

# Procurement Complaints Handling

Across Entities

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Canberra ACT

6 April 2023

Dear Mr Speaker  
Dear President

In accordance with the authority contained in the *Auditor-General Act 1997*, I have undertaken an independent performance audit across entities. The report is titled *Procurement Complaints Handling*. Pursuant to Senate Standing Order 166 relating to the presentation of documents when the Senate is not sitting, I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website — <http://www.anao.gov.au>.

Yours sincerely



Grant Hehir  
Auditor-General

The Honourable the President of the Senate  
The Honourable the Speaker of the House of Representatives  
Parliament House  
Canberra ACT

## **AUDITING FOR AUSTRALIA**

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# Audit snapshot

## Auditor-General Report No.19 2022–23

### Procurement Complaints Handling



#### Why did we do this audit?

- ▶ This audit was conducted to provide assurance to Parliament on the effectiveness of procurement complaints handling, including that the complaint mechanisms are accessible to suppliers and that processes are in place to receive and investigate complaints.



#### Key facts

- ▶ The Commonwealth Procurement Rules (CPRs) require entities to apply timely, equitable and non-discriminatory complaint-handling procedures. Suppliers dissatisfied with the outcome of their complaint can refer it to the Procurement Coordinator in the Department of Finance for review.
- ▶ The *Government Procurement (Judicial Review) Act 2018* (GPJR Act) was established to provide suppliers an independent complaint mechanism for contraventions of the 'relevant' CPRs so far as those rules relate to 'covered' procurement. The GPJR Act defines these terms by reference to the CPRs, which in turn have allowed for only limited coverage.



#### What did we find?

- ▶ While procurement complaints handling by the four audited entities was largely effective, the procurement framework limits the ability of suppliers to make complaints and seek remedies under the GPJR Act.
- ▶ The framework does not encourage complaints. The extent to which each of the four entities supported supplier access to the complaint mechanisms varied.
- ▶ The entities that had received complaints handled them in a largely appropriate manner. This was not the case for complaints to the Procurement Coordinator within the Department of Finance.



#### What did we recommend?

- ▶ There were four recommendations to the Department of Finance aimed at making the GPJR Act and the Procurement Coordinator complaint mechanisms more accessible to suppliers.
- ▶ The Department of Finance agreed to all four recommendations.

89%

of 193,871 contracts were not covered by the GPJR Act, meaning suppliers did not have access to this complaint mechanism for most procurement

32%

of 28 open tenders by the four audited entities advised suppliers where to make a complaint, what to put in their complaint and how it would be handled, including under the GPJR Act

5%

of 43 open tenders by 41 other entities advised suppliers where to make a complaint, what to put in their complaint and how it would be handled, including under the GPJR Act

# Summary and recommendations

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## Background

1. Timely and accessible processes for suppliers to complain where they consider there have been deficiencies in the conduct of a procurement have long been recognised as an important element of an appropriate procurement framework.<sup>1</sup> In addition to providing suppliers with an avenue to have their concerns addressed, procurement complaints processes can assist entities implement approaches that comply with the Australian Government's procurement framework, including key principles such as open and effective competition, achieving value for money and behaving ethically. Accordingly, if an entity subject to the Commonwealth Procurement Rules receives a complaint about procurement, then it must apply timely, equitable and non-discriminatory complaint-handling procedures.<sup>2</sup>
2. If it was a complaint made under section 18 of the *Government Procurement (Judicial Review) Act 2018* (GPJR Act), then the accountable authority must also investigate the complaint, prepare a report of the investigation and, if no public interest certificate is in force, suspend the procurement.<sup>3</sup> A public interest certificate is a written statement issued by the accountable authority under section 22 of the GPJR Act stating that it is not in the public interest for a specified procurement by the entity to be suspended while applications for injunctions under Part 2 are being considered or complaints under section 18 are being investigated.
3. Suppliers dissatisfied with how an entity has addressed their complaint may seek resolution through other mechanisms, such as by lodging a complaint for the Procurement Coordinator to consider or by taking legal action. The Procurement Coordinator function within the Department of Finance 'assists the business community in matters relating to procurement activities conducted by the Australian Government, including the handling of certain complaints'.<sup>4</sup> The GPJR Act allows suppliers to make an application to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2), which may grant an injunction and/or order the payment of compensation in relation to a contravention of the relevant Commonwealth Procurement Rules (so far as those rules relate to a covered procurement). A high-level flow chart of the process established by the GPJR Act is at Appendix 5 of this report.

## Rationale for undertaking the audit

4. Procurement is an important and substantial activity for the Australian Government. There were 824,178 contracts valued at \$564.5 billion reported to start between 1 July 2012 and

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1 For example, in a 2014 report on Commonwealth procurement, the Senate Finance and Public Administration References Committee recommended that an independent and effective complaints mechanism be established for procurement processes so as to ensure appropriate action is taken in a timely and cost-effective manner where suppliers are dissatisfied with the conduct of a procurement.

2 Department of Finance, *Commonwealth Procurement Rules*, July 2022, paragraph 6.8.

3 Sections 18–20, *Government Procurement (Judicial Review) Act 2018* (Cth).

4 Department of Finance, *Procurement complaints* [Internet], available from <https://www.finance.gov.au/government/procurement/buying-australian-government/handling-procurement-complaints> [accessed January 2023].

30 June 2022 on AusTender.<sup>5</sup> The ‘lack of an effective complaints process’ was one of the barriers to businesses participating in Australian Government procurement identified by a 2014 Senate inquiry.<sup>6</sup> To implement a recommendation from the Senate inquiry, and to enable Australia to meet international obligations, the GPJR Act established an independent complaint mechanism for government procurement from 19 April 2019.

5. This performance audit was conducted to provide assurance to Parliament on the effectiveness of procurement complaints handling, including that the complaint mechanisms are accessible to suppliers and that processes are in place to receive and investigate complaints.

### **Audit objective and criteria**

6. The objective of this audit was to assess the effectiveness of procurement complaints handling by the Australian Communications and Media Authority (ACMA), the Department of Finance (Finance), the Department of Industry, Science and Resources (DISR) and the Reserve Bank of Australia (RBA).

7. To form a conclusion against the objective, the ANAO adopted the following high-level criteria.

- Were procurement complaint mechanisms and processes made clear and accessible to suppliers?
- Were procurement complaints from suppliers handled appropriately?

### **Conclusion**

8. The Australian Government procurement framework limits the ability of suppliers to make complaints and seek remedies. Operating within this framework, procurement complaint procedures and handling across the four entities subject to audit was largely effective.

9. The procurement framework does not adequately encourage complaints from suppliers. While the GPJR Act was introduced to establish an independent and effective complaints mechanism for procurement, the ANAO estimated that it did not apply to at least 89 per cent of contracts reported over the three years to 30 June 2022 (representing 62 per cent of contracts reported by value).

10. The approaches to making procurement complaint mechanisms and processes accessible to suppliers varied across the four entities subject to audit. DISR’s approach was comparatively better practice in terms of the information published on entity websites, as was the RBA’s in terms of the information provided in open tender documentation. The information ACMA provided was limited to advising suppliers where to lodge a complaint, being an approach based on the Commonwealth Contracting Suite and observed across many other Australian Government entities. Finance published insufficient information on its website, including in respect of public interest certificates under the GPJR Act.

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5 The ANAO has undertaken work to provide transparency of, and insights on, Commonwealth entities’ self-reporting of procurement contracts on AusTender in Auditor-General Report No. 11 2022–23, *Australian Government Procurement Contract Reporting – 2022 Update* (see paragraph 3.2).

6 Finance and Public Administration References Committee, *Commonwealth Procurement Procedures*, July 2014, pp. 41 and 47–53.



11. ACMA and DISR handled procurement complaints from suppliers appropriately. Finance's handling of complaints about its own activities was largely appropriate, yet its handling of complaints to the Procurement Coordinator about the procurement processes of other Australian Government entities was poor. While the RBA had not received a complaint that fell within the scope of this audit, it had a suitable system in place to handle complaints.

## Supporting findings

### Accessibility for suppliers

12. DISR published clear and sufficient information on its website about where to lodge a procurement complaint, what to include in the complaint and how it would be handled by the entity. More broadly, Finance's approach to encouraging Australian Government entities to publish procurement complaints handling information has not been fully successful. At the time of audit:

- the information published by ACMA and RBA was limited to advising where to lodge a procurement complaint;
- Finance's own website was further limited to providing an email address that suppliers could use if they were unsure of where to lodge a procurement complaint;
- over half of a comparator sample of 41 other entity websites contained insufficient information; and
- where Finance raised shortcomings directly with entities, most did not improve their websites in response. (See paragraphs 2.4 to 2.23)

13. Testing of open approaches to market across 45 entities indicated that most provide little to no complaints handling information beyond the contact details for lodging a complaint. This result was in part due to the wording of the complaints clause in an approach to market template from the Commonwealth Contracting Suite, which entities are either required or encouraged to use for procurements valued up to \$1 million. The RBA was the most consistent of the four auditees in also providing some information in its open approaches about what to put in a complaint and how it would be handled, including whether the procurement may be suspended under the GPJR Act if a complaint were received. Across the four auditees, complaints information was rarely included in limited approaches to market and was not included in the letter of outcome to unsuccessful tenderers. (See paragraphs 2.24 to 2.42)

14. ACMA and DISR had each issued two public interest certificates (PICs), documented their decision-making and appropriately informed suppliers that the PICs were in force. Finance's documentation was poor. Of the five PICs that Finance had reported on its website as having issued: one written certificate was not published; suppliers were notified that two were in force in advance of the written certificates being issued during the course of this audit; and the other two written certificates have not been issued. The RBA had not decided to issue any PICs as at 30 June 2022. (See paragraphs 2.43 to 2.70)

15. While amendments to the Commonwealth Procurement Rules (CPRs) supported the implementation of the GPJR Act in April 2019, the approach taken was to limit the GPJR Act's coverage. Suppliers cannot access the GPJR Act mechanism to complain about contraventions of several mandatory CPR provisions that reflect Australian Government procurement policy.

Further, the ANAO estimated that at least 89 per cent of contracts reported on AusTender over a three-year period (62 per cent by value) were not covered by the GPJR Act. Given its limitations, entities could better inform suppliers about whether an approach to market is covered by the GPJR Act and support supplier access to the mechanism. Although Finance developed a supplier guide to the GPJR Act, it decided not to finalise and publish the guide. (See paragraphs 2.71 to 2.115 and Appendix 4)

16. Australian Government entities could also better inform suppliers of avenues for raising concerns about matters that have not been covered by the GPJR Act, such as allegations an entity has contravened CPR 6.6 by failing to deal with a conflict of interest. Entities could also raise awareness of the role of the Procurement Coordinator and Commonwealth Ombudsman in reviewing complaint matters. Uptake of the available mechanisms could be encouraged by making it clear to suppliers that they will not be penalised for complaining. (See paragraphs 2.118 to 2.134)

## Handling complaints from suppliers

17. ACMA, DISR and RBA had suitable systems in place for handling procurement complaints, with DISR's being the most comprehensive. Finance's systems were partially suitable and improvements were in train at the time of this audit. (See paragraphs 3.4 to 3.17)

18. Suppliers had made complaints to three of the entities. Of the 15 complaints examined:

- ACMA handled its one complaint in accordance with the GPJR Act, undertaking a thorough yet lengthy investigation;
- DISR handled its seven complaints appropriately, including one under the GPJR Act, with its approach characterised by timeliness and independence; and
- Finance's handling of its seven complaints was timely and largely appropriate, falling short in its handling of a potential GPJR Act complaint and two requests for independent review. (See paragraphs 3.18 to 3.41)

19. Finance's investigations were thorough for complaints it had accepted as 'official complaints' to the Procurement Coordinator. Its responsiveness to, and handling of, supplier complaints was otherwise below the standard expected. Accessibility was poor, customer service was poor and the handling process took too long. (See paragraphs 3.42 to 3.63)

## Recommendations

### Recommendation no. 1 Paragraph 2.88

The Department of Finance revisit whether the Commonwealth Procurement Rules provide sufficient coverage of the complaint mechanisms established by the *Government Procurement (Judicial Review) Act 2018* to meet Australia's international trade obligations and to implement recommendation 11 of the July 2014 Senate Finance and Public Administration References Committee's report into Commonwealth procurement procedures.

**Department of Finance response:** *Agreed.*

**Recommendation no. 2  
Paragraph 2.108** The Department of Finance amend the Commonwealth Contracting Suite approach to market templates to better support access to the *Government Procurement (Judicial Review) Act 2018*, including by stating whether the procurement is or is not a ‘covered procurement’.

**Department of Finance response:** *Agreed.*

**Recommendation no. 3  
Paragraph 2.116** The Department of Finance publish a guide for suppliers about the *Government Procurement (Judicial Review) Act 2018*, and then notify relevant Australian Government entities and suggest they include a hyperlink to the guide on their websites and in their Approach to Market templates for covered procurements.

**Department of Finance response:** *Agreed.*

**Recommendation no. 4  
Paragraph 3.64** The Department of Finance review how the Procurement Coordinator complaint mechanism is promoted and operated, and implement arrangements that improve:

- (a) its accessibility to suppliers with concerns regarding Australian Government procurement policy and its implementation by entities; and
- (b) customer service and the timeliness of complaints handling.

**Department of Finance response:** *Agreed.*

## Summaries of entity responses

20. The proposed audit report was provided to the: Australian Communications and Media Authority; Department of Finance; Department of Industry, Science and Resources; Reserve Bank of Australia; and Office of the Commonwealth Ombudsman. Extracts of the proposed audit report were provided to the: Attorney-General’s Department; Australian Digital Health Agency; Australian Nuclear Science and Technology Organisation; Department of Defence; Department of Foreign Affairs and Trade; Department of Infrastructure, Transport, Regional Development, Communications and the Arts; Federal Court of Australia; Great Barrier Reef Marine Park Authority; and Maddocks.

21. Two audited entities provided a summary response, and they are below. The full responses from the auditees or other Australian Government entities are at Appendix 1. The improvements observed by the ANAO during the course of this audit are at Appendix 2.

### Department of Finance

Finance has undertaken a number of process improvement initiatives through the course of this audit and will continue to refine both departmental and Whole-of-Australian-Government guidance and processes relating to complaints handling to promote best practice, and to ensure supplier awareness of complaints mechanisms available to them. Whilst investigations conducted by the Procurement Coordinator on official complaints are comprehensive, Finance has commenced further improvements to the handling of these complaints to improve timeliness.

As recognised in the Audit, Finance provides comprehensive guidance to entities on the handling of complaints under the *Government Procurement (Judicial Review) Act 2018*. This guidance is complemented by Finance's engagement with entities on accessibility and coverage of complaints information on entities websites.

Finance is an active steward in supporting and enhancing procurement and contract management capability across the Australian Public Service. This includes engaging with officials on templates (including the Commonwealth Contracting Suite); conducting outreach activities to provide tailored support to entities; and implementing a continuous capability improvement and modernised training delivery program.

## Australian Communications and Media Authority

The Australian Communications and Media Authority (ACMA) welcomes the review and external scrutiny of its process and procedures in regards the proposed s19 report into Procurement Complaints Handling and supports the findings of the audit.

While no findings were directly attributable to the ACMA, ongoing improvements will be made. This will include the ability for potential suppliers to locate complaint information more easily on ACMA's website, and clearer information being provided about how to lodge a complaint in future procurement documentation.

We would also like to acknowledge the business improvement opportunity identified in the audit concerning the reporting of procurement contracts raised by the Office of the eSafety Commissioner (eSafety) on AusTender. Work has been completed to validate eSafety's procurement data. Following the publication of these contracts, in the future relevant eSafety contracts will be reported on AusTender.

The ACMA thanks the ANAO for its proposed audit report and acknowledges the collaborative approach in undertaking this audit. The ACMA commits to continuing the positive working relationship with the ANAO.

## Key messages from this audit for all Australian Government entities

22. Below is a summary of key messages, including instances of good practice, which have been identified in this audit and may be relevant for the operations of other Australian Government entities.

### Procurement

- Complaints provide valuable insight into the conduct of Australian Government procurement by officials and entities, and they should be encouraged. Affirm the right of suppliers to complain and that they will not be punished for it in future procurements. Suppliers concerned about a procurement team's reaction may not use the word 'complaint'. An expression of dissatisfaction by a supplier, where a response is sought or expected, may be an implied complaint.
- Make sure it is easy for suppliers to find the procurement complaints page on your website. The website, and request documentation issued during approaches to market, should tell suppliers: where to lodge a general procurement complaint; where to lodge a complaint under the *Government Procurement (Judicial Review) Act 2018*; what information to include in their complaint; and how it will be handled by the entity.

- State clearly in approach to market documentation that the specific procurement is, or is not, a covered procurement for the purposes of the *Government Procurement (Judicial Review) Act 2018*.
- Keep the supplier informed of progress when investigating their complaint and make it a priority to resolve complaints promptly. Explain the reasons for your final decision and the internal and/or external review options available to the supplier if they are not fully satisfied with that decision.

**Governance**

- By demonstrating better practice in their own processes, policy owners are able to set an example to other entities.



## **Audit findings**

# 1. Background

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## Introduction

1.1 The Office of the Commonwealth Ombudsman has developed the *Better Practice Complaint Handling Guide* to help government agencies ensure they have an effective and user-centred complaint handling system. In the Foreword to the February 2021 edition, the Commonwealth Ombudsman outlined that:

While complaints are important to the people who make them, they are also valuable to agencies and policy makers.

A user friendly and efficient complaint handling system doesn't just resolve problems for individuals. A well-handled complaint can help restore complainant satisfaction and confidence in public administration. Complaints also provide a wealth of data that can be interrogated to identify program weakness, systemic administration issues and opportunities to improve business practices. Complaint data may also indicate a difficulty with policy settings that should be considered by policy makers.<sup>7</sup>

1.2 If an entity receives a complaint about a procurement, then it is required by the Commonwealth Procurement Rules (CPRs) to apply timely, equitable and non-discriminatory complaint-handling procedures. Accountable authorities of relevant entities also have complaint handling obligations under the *Government Procurement (Judicial Review) Act 2018* (GPJR Act). 'Relevant entities' for the purpose of the GPJR Act are non-corporate Commonwealth entities and corporate Commonwealth entities prescribed in section 30 of the *Public Governance, Performance and Accountability Rule 2014* as having to comply with the CPRs. There were 122 relevant entities when this audit commenced in February 2022, which had increased to 125 relevant entities as of 15 November 2022.<sup>8</sup>

### **Government Procurement (Judicial Review) Act 2018**

1.3 According to the July 2014 report of a Senate inquiry into procurement procedures, evidence to the committee suggested that 'the complaints mechanisms in Commonwealth procurement processes are deficient'. Recommendation 11 in the report stated, 'The committee recommends that, following consultation with stakeholders, the Department of Finance establish an independent and effective complaints mechanism for procurement processes'.<sup>9</sup> The Australian Government response of April 2015 to Recommendation 11 was: 'Not supported'.<sup>10</sup>

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7 Office of the Commonwealth Ombudsman, *Better Practice Complaint Handling Guide*, February 2021. The February 2021 version was current at the time of audit. An updated version of the Guide was published in February 2023 and is available from <https://www.ombudsman.gov.au/publications-resources-and-faqs>. In the context of this audit there were no significant changes between the versions.

8 In addition to these entities, the CPRs apply to the Commonwealth Superannuation Corporation (CSC) in relation to CSC's function of providing administrative services relating to superannuation schemes administered by CSC. This is as per section 29AA of the *Public Governance, Performance and Accountability Rule 2014*. The CSC is not one of the corporate Commonwealth entities prescribed in section 30 of those rules.

9 Finance and Public Administration References Committee, *Commonwealth Procurement Procedures*, July 2014, pp. 47–53.

10 Australian Government, 'Australian Government response to the Finance and Public Administration References Committee Report: Commonwealth procurement procedures' [Internet], April 2015, p. 8.



1.4 The Australian Government subsequently changed its position on establishing an independent complaint mechanism, in the context of compliance with Australia's international obligations. The Explanatory Memorandum to the Government Procurement (Judicial Review) Bill 2017 outlined that:

The Bill is consistent with recommendation 11 of the July 2014 Senate Finance and Public Administration References Committee's report into the Commonwealth procurement procedures, for the Department of Finance to establish an independent and effective complaints mechanism for procurement processes.

The Bill will enable Australia to meet international obligations on government procurement that require the Commonwealth to establish or designate an impartial and independent body where suppliers can raise complaints about government procurement processes and be awarded remedies/compensation.<sup>11</sup>

1.5 Effective from 19 April 2019, the *Government Procurement (Judicial Review) Act 2018* (GPJR Act) applies to contraventions, or proposed contraventions, of the relevant CPRs relating to covered procurements by relevant entities. In this context:

- 'relevant CPRs' means the provisions of Division 2 of the CPRs and the following paragraphs of Division 1: 4.18, 5.4, 7.2, 7.10, 7.13–7.18, 7.20, and 9.3–9.6; and
- 'covered procurements' means the rules in Divisions 1 and 2 of the CPRs apply to the procurement, and it is not included in a class of procurements that has been determined by the Minister for Finance not to be covered procurements.

1.6 The GPJR Act allows suppliers to make an application to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) which may grant an injunction and/or order the payment of compensation by the relevant entity to the supplier.<sup>12</sup> Where a supplier decides to seek an injunction from the court, it must have first made a complaint to the accountable authority under section 18 of the GPJR Act and made a reasonable attempt to resolve the complaint.

1.7 The accountable authority must investigate complaints made under section 18 and prepare a report of the investigation. The accountable authority must suspend the procurement while the complaint is being resolved unless a public interest certificate is in force. The GPJR Act allows the accountable authority to issue a public interest certificate stating that it is not in the public interest for the procurement to be suspended while complaints under section 18 are being investigated or applications for injunctions are being considered.

1.8 Amendments to the CPRs introduced on 20 April 2019 — the day after the GPJR Act commenced — included narrowing the definition of 'procurement' to those aspects covered by Australia's international obligations. The activities that follow the award and reporting of a contract in the procurement lifecycle were moved out of the definition to avoid them being captured by the GPJR Act. Specifically, the 'delivery of and payment for the goods and services', the 'ongoing management of the contract' and the 'consideration of disposal of goods' are no longer included in

11 See also: The Hon. Michael McCormack MP, (Minister for Small Business), Second Reading Speech: Government Procurement (Judicial Review) Bill 2017, *House of Representatives Hansard*, 25 May 2017.

12 RMG 422 advises that 'the amount of compensation that is able to be awarded is limited to the reasonable cost incurred by the supplier in: preparing its tender; and making and attempting to resolve the complaint' and that 'the court cannot overturn awarded contracts'.

the definition. These activities are recognised elsewhere in the CPRs as important in achieving the objectives of the procurement.

## Procurement Coordinator

1.9 Suppliers may also lodge complaints with the Procurement Coordinator in the Department of Finance. The Minister for Finance announced the creation of the Procurement Coordinator role in July 2009 as part of a package of reforms to government purchasing. The Procurement Coordinator was to: provide external parties with an understanding of the Commonwealth framework; review and advise on procurement practices across government on an ongoing basis; handle complaints as ‘one clear point of contact’ from suppliers and interested external parties; review complaints regarding contract administration; and aggregate information about Commonwealth procurement across all procurement categories.<sup>13</sup>

1.10 The complaint mechanism as outlined on the Department of Finance’s website is narrower in scope than the 2009 announcement, advising suppliers that:

Complaints, in the first instance, should be referred to the entity managing the procurement process.

If your issue is not resolved, and you consider it relates to the specifications of a particular tender that were such that you were prevented from preparing a competitive tender response you can refer a complaint 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 the matter being referred to the relevant entity; and
- there is sufficient time to adequately deal with the complaint before the tender closes.

For completed tenders, where relevant issues are identified, lessons learned may be used to improve Commonwealth procurement policies and processes. This includes assisting the development of policy guidance, and/or the training and professional development of procurement officers.

You should note that the Procurement Coordinator has no authority to compel an entity to reconsider the conduct or outcome of tender processes for which that entity is accountable.<sup>14</sup>

## Rationale for undertaking the audit

1.11 Procurement is an important and substantial activity for the Australian Government. There were 824,178 contracts valued at \$564.5 billion reported to start between 1 July 2012 and 30 June 2022 on AusTender.<sup>15</sup> The ‘lack of an effective complaints process’ was one of the barriers to businesses participating in Australian Government procurement identified by a 2014 Senate

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13 The Hon Lindsay Tanner MP, (Minister for Finance and Deregulation), ‘Australian Government Procurement Statement Released’, media release, 28 July 2009.

14 Department of Finance, ‘Complaints Handling Charter’ [Internet], available from <https://www.finance.gov.au/business/procurement/complaints-handling-charter> [accessed December 2022].

15 The ANAO has undertaken work to provide transparency of, and insights on, Commonwealth entities’ self-reporting of procurement contracts on AusTender in Auditor-General Report No. 11 2022–23, *Australian Government Procurement Contract Reporting – 2022 Update* (see paragraph 3.2).

inquiry.<sup>16</sup> To implement a recommendation from the Senate inquiry, and to enable Australia to meet international obligations, the GPJR Act established an independent complaint mechanism for government procurement from 19 April 2019.

1.12 This performance audit was conducted to provide assurance to Parliament on the effectiveness of procurement complaints handling, including that the complaint mechanisms are accessible to suppliers and that processes are in place to receive and investigate complaints.

## Audit approach

### Audit objective, criteria and scope

1.13 The objective of this audit was to assess the effectiveness of procurement complaints handling by the Australian Communications and Media Authority (ACMA), the Department of Finance (Finance), the Department of Industry, Science and Resources (DISR) and the Reserve Bank of Australia (RBA).

1.14 To form a conclusion against the objective, the ANAO examined the following audit criteria.

- Were procurement complaint mechanisms and processes made clear and accessible to suppliers?
- Were procurement complaints from suppliers handled appropriately?

1.15 The audit focussed on the effectiveness of the selected entities in encouraging and handling complaints from suppliers about procurement activities after 19 April 2019. Examination of Finance's complaints handling included complaints submitted to the Procurement Coordinator in addition to Finance's handling of supplier complaints about its own procurement activities. Consistent with the definition of 'procurement' introduced in the 20 April 2019 version of the CPRs (see paragraph 1.8), the handling of complaints about contractual matters was outside the scope of this audit.

### Audit methodology

1.16 The audit methodology included engagement with relevant officials of the four audited entities and the examination of entity records, websites and a sample of approaches to market. The audit methodology also included testing the complaints information that 41 other Australian Government entities provided on their websites and in a sample of their open approach to market documentation. The audit methodology is further outlined in Appendix 3.

1.17 The audit was conducted in accordance with ANAO Auditing Standards at a cost to the ANAO of approximately \$231,000.

1.18 The team members for this audit were Tracey Bremner, Amy Willmott and Brian Boyd.

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16 Finance and Public Administration References Committee, *Commonwealth Procurement Procedures*, July 2014, pp. 41 and 47–53.

## 2. Accessibility for suppliers

### Areas examined

The ANAO examined whether entities made procurement complaint mechanisms and processes clear and accessible to suppliers.

### Conclusion

The procurement framework does not adequately encourage complaints from suppliers. While the *Government Procurement (Judicial Review) Act 2018* (GPJR Act) was introduced to establish an independent and effective complaints mechanism for procurement, the ANAO estimated that it did not apply to at least 89 per cent of contracts reported over the three years to 30 June 2022 (representing 62 per cent of contracts reported by value).

The approaches to making procurement complaint mechanisms and processes accessible to suppliers varied across the four entities subject to audit. DISR's approach was comparatively better practice in terms of the information published on entity websites, as was the RBA's in terms of the information provided in open tender documentation. The information ACMA provided was limited to advising suppliers where to lodge a complaint, being an approach based on the Commonwealth Contracting Suite and observed across many other Australian Government entities. Finance published insufficient information on its website, including in respect of public interest certificates under the GPJR Act.

### Areas for improvement

The ANAO made three recommendations to Finance in its capacity as policy owner, which relate to making the independent complaint mechanism under the GPJR Act more accessible to suppliers. The ANAO also identified three opportunities for improvement for Australian Government entities to better inform suppliers so as to make complaint mechanisms more accessible.

2.1 According to the Office of the Commonwealth Ombudsman's *Better Practice Complaint Handling Guide*, a complaint handling system 'should be user-centred, simple to access and easy to use'. The Guide advises organisations to 'publish clear information about how to submit complaints and your complaints process in multiple formats'.<sup>17</sup> Finance's *Handling Procurement Complaints* guidance says that 'entities should publish their complaints handling procedures on their website and refer to them in approach to market documentation'.<sup>18</sup>

2.2 In relation to informing suppliers about the GPJR Act complaints mechanism, Finance's Resource Management Guide No. 422 (RMG 422) states that 'entities should publicise information on their websites on how to lodge a complaint under the Act'. RMG 422 also states that, where an accountable authority issues a public interest certificate, the 'entity is required to publish the public

17 Office of the Commonwealth Ombudsman, *Better Practice Complaint Handling Guide*, February 2021, pp. 10–12.

18 Department of Finance, *Buying for the Australian Government—Handling Procurement Complaints* [Internet], available from <https://www.finance.gov.au/government/procurement/buying-australian-government> [accessed November 2022]

interest certificate on its website promptly and should notify affected suppliers in writing that a public interest certificate is in force'.<sup>19</sup>

2.3 The ANAO examined whether ACMA, DISR, Finance and RBA (the auditees):

- provided clear and sufficient information about their complaints handling processes on their websites and in their approach to market documentation;
- helped make the various complaint mechanisms accessible to suppliers; and
- appropriately informed suppliers about any public interest certificates issued.<sup>20</sup>

## Was the information published on entity websites clear and sufficient?

DISR published clear and sufficient information on its website about where to lodge a procurement complaint, what to include in the complaint and how it would be handled by the entity. More broadly, Finance's approach to ensuring Australian Government entities publish procurement complaints handling information has not been fully successful. At the time of audit:

- the information published by ACMA and RBA was limited to advising where to lodge a procurement complaint;
- Finance's own website was further limited to providing an email address that suppliers could use if they were unsure of where to lodge a procurement complaint;
- over half of a comparator sample of 41 other entity websites contained insufficient information; and
- where Finance raised shortcomings directly with entities, most did not improve their websites in response.

## Ease of finding the information

2.4 Each auditee had published some information on its website for suppliers wanting to complain about a procurement managed by the entity.<sup>21</sup>

2.5 It was easy to find the procurement complaints information on the DISR and RBA websites. The information was one-to-two clicks from the homepage.<sup>22</sup> The information was also accessible via other relevant pages on the site and could be found using the site's search function.<sup>23</sup>

19 Department of Finance, Resource Management Guide No. 422: *Handling complaints under the Government Procurement (Judicial Review) Act 2018*, August 2019, paragraph 29 and Appendix 1.

20 Outside the scope of this audit was consideration of the 'accessibility' of website content in terms of the *Disability Discrimination Act 1992* and the Web Content Accessibility Guidelines.

21 The analysis in this section excludes the information on the Finance website about making complaints to the Procurement Coordinator. The analysis also excludes the eSafety Commissioner website, however the ANAO noted there was no procurement complaints information on the eSafety Commissioner website nor a link to the information on ACMA's website. ACMA undertakes the eSafety procurement, as outlined at paragraph 2 in Appendix 3.

22 The *Better Practice Complaint Handling Guide* states, 'Make your complaint pages readily accessible from your home page so that people can reach it in one or two clicks' (p. 12).

23 In December 2022, RBA reformatted its webpage to make its procurement complaints information more prominent.

2.6 It was fairly easy to find the correct page on the Finance website, being three clicks from the homepage and accessible via the search function. It was not easy to identify the sentence on that page relevant to suppliers wishing to lodge a complaint (quoted in paragraph 2.9 below) which was preceded by information for departmental staff.

2.7 It was not easy to find the procurement complaints information on the ACMA website. The information was located on its procurement page, which was five clicks from the homepage along a trail that was not intuitive, being: Home > Menu > About the ACMA > Planning, reporting and policies > Planning and priorities > Government procurement. The complaints information on the procurement page was not accessible via other relevant pages or the search function.

### **Information on where to lodge a complaint**

2.8 Complaints under section 18 of the GPJR Act are to be made in writing 'to the accountable authority of the entity'. The accountable authority can delegate the powers and functions conferred under the GPJR Act, including the ability to receive complaints. RMG 422 states that entities should publicise on their websites 'the details of officials that are able to receive such complaints (i.e. officials who have the appropriate delegation)'.

2.9 On the four auditee websites, the following details on where to lodge a procurement complaint were given.

- ACMA's provided contact details for GPJR Act complaints and advised suppliers to use the contact details in the request for tender documentation for other complaints.
- DISR's provided contact details for lodging both GPJR Act and general procurement complaints.
- Finance's advised 'Finance employees and the public' that:  
If you would like to provide a complaint to Finance on a procurement matter but unsure where to direct it then please contact us [here](#) [mailto:link] and it will be assigned to the appropriate area.<sup>24</sup>
- RBA's provided contact details for general procurement complaints only.

2.10 To provide comparison data, the ANAO checked the websites of another 41 relevant entities (the sampling method is at paragraph 7 in Appendix 3). Of the 41 comparator websites:

- 44 per cent provided contact details for lodging both GPJR Act and general procurement complaints;
- two per cent provided contact details for GPJR Act complaints only;
- 12 per cent provided contact details for general procurement complaints only;
- five per cent referred suppliers to the request for tender documentation only, which is unhelpful to any suppliers unable to access the documentation, such as those not invited to participate in a limited approach to market; and
- 37 per cent did not provide any procurement complaints information.

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24 In January 2023 Finance published an updated webpage about making complaints in relation to procurement conducted by Finance. The updated webpage provided information on where to lodge a general procurement complaint, where to lodge a complaint under the GPJR Act, what to include in a complaint and how it would be handled by Finance.

2.11 Only ACMA's website and one of the comparator websites advised suppliers that they needed to lodge GPJR Act complaints with the accountable authority. None of the websites tested stated that a particular official had the appropriate delegation. (See further at paragraphs 2.98 to 2.100)

### **Information on what to include in a complaint**

2.12 One of the auditee websites (DISR's), and 49 per cent of the comparator websites, provided information on what suppliers should include in their procurement complaint. Four of the comparator websites did so by providing an online or downloadable complaint form for suppliers to complete.

2.13 Finance had produced two online forms for lodging complaints about its procurements, yet neither was accessible via the entity's website at the time of audit.<sup>25</sup> It had:

- a form for making general procurement complaints, which was published on its intranet and so was not accessible to suppliers; and
- a form for making GPJR Act complaints, which was only accessible via a hyperlink within Finance's request for tender documentation for some open tenders and so was not readily available to all potential complainants (such as to suppliers not invited to participate in limited tenders, see paragraph 2.40).<sup>26</sup>

2.14 It is important that entities identify on receipt whether a complaint is intended to be a GPJR Act complaint, as legislated handling requirements apply. If the complaint complies with the requirements of section 18 of the GPJR Act, then the accountable authority or authorised delegate:

- must investigate the complaint and prepare a report of the investigation (section 19); and
- must suspend the procurement while the complaint is being resolved unless a public interest certificate is in force (section 20).

2.15 None of the auditee websites advised suppliers to make it clear if their complaint is intended to be a GPJR Act complaint. Twenty per cent of the comparator websites did advise suppliers to make this clear.

### **Information on how a complaint would be handled**

2.16 One of the auditee websites (DISR's), and 49 per cent of the comparator websites, provided information on how the procurement complaint would be handled by the entity. The complaints handling information was rarely detailed. The information on DISR's website, and on:

- 37 per cent of comparator websites, included that the entity would acknowledge receipt of the complaint<sup>27</sup>;

25 Finance's website contained a form for lodging complaints to the Procurement Coordinator about procurements managed by Australian Government entities, yet it was not fit for the purpose intended (see paragraphs 3.46 to 3.49).

26 Finance included hyperlinks providing external access to both its general procurement complaint form and its GPJR Act complaint form on the updated webpage it published in January 2023.

27 Paragraph 6.8 of the Commonwealth Procurement Rules requires that entities provide 'acknowledgement soon after the complaint has been received'.

- 12 per cent of comparator websites, included an indicative timeframe for resolving the complaint (ranging from 10 to 20 days); and
- 27 per cent of comparator websites, included information specific to the handling of GPJR Act complaints.

2.17 Overall 25 per cent of the auditee entity websites, and 37 per cent of the comparator entity websites, provided some information on where to make a procurement complaint, what to put in the complaint and how it would be handled.

#### Opportunity for improvement

2.18 There is an opportunity for improvement for many Australian Government entities to publish clear and sufficient information on their websites about their procurement complaints processes. It may be helpful to look at the approaches taken by other entities, such as by the:

- Department of Industry, Science and Resources;
- Department of Infrastructure, Transport, Regional Development, Communications and the Arts;
- Australian Digital Health Agency;
- Great Barrier Reef Marine Park Authority;
- ANSTO (Australia's Nuclear Science and Technology Organisation); and
- Department of Defence.<sup>a</sup>

Note a: See webpages:

- <https://www.industry.gov.au/contact-us/feedback-and-complaints/procurement-complaints>;
- <https://www.infrastructure.gov.au/department/tenders/procurement-complaints>;
- <https://www.digitalhealth.gov.au/about-us/policies-privacy-and-reporting/procurement-tenders-and-contracts>;
- <https://www2.gbrmpa.gov.au/about-us/corporate-information/procurement-and-tenders>;
- <https://www.ansto.gov.au/procurement-policy>; and
- <https://www.defence.gov.au/business-industry/procurement/defence-procurement-complaints-scheme> [all accessed 20 March 2023].

#### Information provided by Finance to Australian Government entities

2.19 Finance has informed entities of the GPJR Act and the need to publish complaints information, as part of its stewardship over procurement systems and policies. In addition to its production of RMG 422, Finance's activities have included:

- delivering presentations on the GPJR Act at three meetings of the Senior Procurement Officials Reference Group<sup>28</sup>;

28 GPJR Act related presentations were given at the November 2018, March 2019 and November 2019 meetings. Finance's engagement on strategic procurement matters and related policies takes place through the Senior Procurement Officials Reference Group, encompassing senior procurement officials from non-corporate Commonwealth entities and prescribed corporate Commonwealth entities required to apply the CPRs.



- publishing articles about the GPJR Act in three editions of the 'Procurement Bulletin'<sup>29</sup> including on the need for entities to publish information on their websites on how to lodge a complaint;
- responding to queries from procurement officials to its Procurement Agency Advice inbox, with Finance categorising 33 of the queries it addressed from 2018–19 to 2021–22 as being GPJR Act specific; and
- providing individualised feedback to entities about the accessibility and coverage of the procurement complaints information on their websites, as a standing agenda item in the 'outreach sessions' it holds with senior procurement officials of Australian Government entities, including with officials within its own department.

2.20 The ANAO sought to examine the feedback Finance provided at the outreach sessions held with the auditees.

- ACMA in December 2021 — the recorded feedback included 'there appears to be readily available information on how to lodge a complaint in relation to government procurement'.
- DISR in December 2020 — records of the feedback were not on Finance's file.
- Finance's own procurement officials:
  - in December 2020 — records of the feedback were not on Finance's file; and
  - in May 2022 — the recorded feedback included 'there does not appear to be information readily available for potential suppliers on how to lodge a government procurement complaint about a Finance managed procurement'.
- RBA — an outreach session was not held with RBA during the period examined.

2.21 The ANAO examined the records of a sample of 25 outreach sessions held with other entities, randomly selected from those Finance ran between October 2020 and October 2021. The records indicated that Finance provided feedback to all 25 entities about their websites. The feedback (as summarised by the ANAO) was that the complaints information published was:

- sufficient on four websites (16 per cent);
- partially sufficient on six websites (24 per cent); and
- insufficient on the other 15 websites (60 per cent) as 'there does not appear to be information readily available'.

2.22 The records also indicated that Finance offered to assist each of the 21 entities that had insufficient or partially sufficient information on their websites. The ANAO checked these websites in October 2022 — being one to two years after the feedback was provided — and found that 17 of the entities (81 per cent) had made no improvement.

2.23 Finance's approach to driving improvement in the publication of complaints handling information by other entities has had limited effect and Finance did not demonstrate better practice on its own website. In performance audits of other entities that similarly have a stewardship role as

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29 GPJR Act related articles appeared in the May 2019, September 2019 and May 2021 editions. The monthly Procurement Bulletin is a resource provided by Finance that includes topical procurement matters, future procurement events and Australian Government procurement employment opportunities. As at October 2022, the mailing list included 2,220 officials representing 150 Australian Government entities.

policy owners, the ANAO has also found shortcomings with monitoring and supporting agency compliance with their policies.<sup>30</sup>

## Was the information provided during approaches to market clear and sufficient?

Testing of open approaches to market across 45 entities indicated that most provide little to no complaints information beyond the contact details for lodging a complaint. This result was in part due to the wording of the complaints clause in an approach to market template from the Commonwealth Contracting Suite, which entities are either required or encouraged to use for procurements valued up to \$1 million. The RBA was the most consistent of the four auditees in also providing some information in its open approaches about what to put in a complaint and how it would be handled, including whether the procurement may be suspended under the GPJR Act if a complaint were received. Across the four auditees, complaints information was rarely included in limited approaches to market and was not included in the letter of outcome to unsuccessful tenderers.

2.24 An approach to market (ATM) is an invitation to potential suppliers to participate in a procurement. The Commonwealth Procurement Rules (CPRs) advise that the following information be provided during ATMs:

- 'request documentation that includes all information necessary to permit the potential supplier to prepare and lodge submissions'; and
- 'following the rejection of a submission or the award of a contract, officials must promptly inform affected tenderers of the decision' and 'debriefings must be made available, on request'.<sup>31</sup>

2.25 The ANAO examined whether the information provided by the four auditees contained clear and sufficient information on their procurement complaints processes. The ANAO focussed on ATMs that were 'covered procurements' for the purposes of the GPJR Act (see definition in paragraphs 1.5 and 2.82).

### Request documentation for open approaches to market

2.26 Open ATMs involve publishing a notice on AusTender inviting all potential suppliers to participate. The four auditees had published a total of 143 open ATMs on AusTender between 19 April 2019 (when the GPJR Act took effect) and 30 June 2022. The number published per auditee was: 23 by ACMA; 62 by DISR; 23 by Finance; and 35 by RBA.

2.27 Each of the auditees had developed entity-specific templates for use in their open ATMs (see paragraph 2.34). To examine the extent of the complaint information provided in practice, the ANAO tested a sample of 28 open ATMs (seven per auditee, as per the sampling method at paragraph 6 in Appendix 3). To provide comparison data, the ANAO also tested the request

30 See for example: Auditor-General Report No. 27 2021–22, *Administration of the Revised Protective Security Policy Framework*, paragraph 10; Auditor-General Report No. 48 2019–20, *Management of the Australian Government's Lobbying Code of Conduct — Follow-up Audit*, paragraphs 13–14; and Auditor-General Report No. 11 2019–20, *Implementation of the Digital Continuity 2020 Policy*, paragraph 8.

31 Department of Finance, *Commonwealth Procurement Rules*, July 2022, paragraphs 7.16–7.17.

documentation for a sample of 43 open ATMs published by 41 other relevant entities (three by Defence and one by each of the other entities, as per the sampling method at paragraph 7 in Appendix 3). The key results of the testing are outlined in Table 2.1 and then discussed below.

**Table 2.1: Information in the request documentation for open approaches to market**

| The request documentation contained some information that advised...  | ACMA<br>% of 7 | DISR<br>% of 7 | Finance<br>% of 7 | RBA<br>% of 7 | Other<br>% of 43 |
|---|----------------|----------------|-------------------|---------------|------------------|
| where to lodge a general procurement complaint  | 86%            | 71%            | 100%              | 100%          | 91%              |
| where to lodge a GPJR Act complaint <sup>a</sup>  | 86%            | 57%            | 86%               | 100%          | 60%              |
| what to include in a complaint  | 0%             | 43%            | 71% <sup>b</sup>  | 100%          | 33%              |
| how a complaint would be handled by the entity  | 0%             | 43%            | 29%               | 100%          | 26%              |
| that the particular procurement may be suspended if a GPJR Act complaint is received, unless a public interest certificate was in force | 0%             | 29%            | 29%               | 100%          | 14%              |

Note: Shading highlights test results that exceed 50 per cent.

Note a: Of those ATMs which advised where to lodge a complaint, the lodgement details were the same for GPJR Act complaints as for general procurement complaints in 71 per cent of cases.

Note b: This includes three ATMs where Finance advised what to include in a GPJR Act complaint by means of inserting a hyperlink to the entity's GPJR Act complaints form. It did not also advise what to include in a general procurement complaint.

Source: ANAO analysis of a sample of request documentation accessed from the records of audited entities and from AusTender.

### *Information about the entity's complaints handling process*

2.28 Most of the 71 ATMs tested in total (90 per cent) provided contact details for lodging a GPJR Act and/or general procurement complaint, which was an improvement on the website test results at paragraphs 2.9 to 2.10. Only 27 per cent of the 71 ATMs contained some information advising suppliers what to include in a procurement complaint and how it would be handled by the entity. That advice was rarely detailed.

2.29 The RBA was the only auditee that consistently addressed each of the elements listed in Table 2.1 in its open ATMs. The RBA provided little detail, however, in its advice on what to include in a complaint and how it would be handled. DISR provided greater detail in two of its seven ATMs by inserting a hyperlink to the complaints handling page of its website, thereby expanding the amount of information provided.

2.30 Overall, 12 of the 71 ATMs tested (17 per cent) referred suppliers to entity websites for more information about their complaints processes.<sup>32</sup> This approach was effective only half of the time. It was not fully effective in six comparator ATMs because the entity websites did not contain sufficient information and/or because of conflicting information. In one of the comparator ATMs, for example:

- the request documentation referred suppliers to the entity's website for information on where to submit a formal complaint; and then
- the entity website referred suppliers back to the request documentation.

<sup>32</sup> To illustrate, a simple complaints clause from a comparator ATM that refers suppliers to the entity's website is included as 'example 3' in Appendix 6.

## Opportunity for improvement

2.31 There is an opportunity for improvement for many Australian Government entities to provide sufficient information in their approach to market documentation about what to include in a complaint and how a complaint would be handled. A way of expanding the information provided is to insert a hyperlink to the procurement complaints page of the entity's website. Entities should first ensure:

- there is no conflict between the instructions in the approach to market documentation and those on their webpage; and
- that their webpage contains clear and sufficient information.

### *Information about the suspension provisions of the GPJR Act*

2.32 As indicated in Table 2.1, all seven of RBA's ATMs explained the application of the suspension provisions of the GPJR Act. This was uncommon. Only 19 per cent of the ATMs tested across the other auditees, and 14 per cent of the comparator ATMs, advised that the particular procurement may be suspended if a complaint was received unless a public interest certificate was in force.<sup>33</sup> A related 'opportunity for improvement' for Australian Government entities is at paragraph 2.94.

2.33 Overall 32 per cent of the auditee sample of open tenders, and five per cent of the comparator entity sample, provided some information on where to make a procurement complaint, what to put in the complaint, how it would be handled, and that the particular procurement may be suspended if a GPJR Act complaint is received (unless a public interest certificate was in force).

### **Approach to market templates**

2.34 The ANAO examined the entity-specific ATM templates that each auditee maintained. The complaints clause in:

- DISR's template appeared in one of the sampled ATMs<sup>34</sup>;
- Finance's template appeared in one of the sampled ATMs, and was limited to providing contact details for general complaints and a hyperlink to its form for GPJR Act complaints;
- RBA's template, along with a related 'Government Procurement Act' clause, were used as the basis for each ATM in the sample (with occasional customisation<sup>35</sup>); and
- ACMA's template was from the Commonwealth Contracting Suite.

### *Commonwealth Contracting Suite template*

2.35 The Commonwealth Contracting Suite (CCS) approach to market template is maintained by Finance and is:

33 To illustrate the approaches taken to providing information about the suspension provisions, a simple approach by DISR is in 'example 2' and a detailed approach by Finance is in 'example 4' of Appendix 6.

34 The complaints clause from DISR's template is 'example 2' in Appendix 6.

35 For example, the complaints clause had been customised in one of RBA's ATMs to include the probity advisor wording quoted as 'example 5' in Appendix 6.

- mandatory for use by non-corporate Commonwealth entities (such as ACMA, DISR and Finance) for procurements valued under \$200,000, except in certain circumstances such as when procuring specialist scientific equipment;
- encouraged for use by non-corporate Commonwealth entities for procurements valued between \$200,000 and \$1 million; and
- encouraged for use by corporate Commonwealth entities (such as RBA) for procurements valued up to \$1 million.<sup>36</sup>

2.36 The wording of the complaints clause in the CCS template, which is presented in Figure 2.1, therefore influences the information that is provided to suppliers in some covered procurements. In the request documentation tested, the complaints clause appeared in 25 per cent of the open ATMs in the auditee sample and 21 per cent of the open ATMs in the comparator sample.

**Figure 2.1: Complaints handling clause in the Commonwealth Contracting Suite approach to market template**

|  |                                     |
|--|-------------------------------------|
| <b>A.A.2(i) Complaints Handling</b>  |                                     |
| In the first instance, complaints relating to this ATM should be directed to the Customer's Contact Officer or:  |                                     |
| Name/Position:   | << insert name and position here >> |
| Email Address:   | << insert email address here >>     |
| Telephone:   | << insert telephone number here >>  |
| <p>Please direct all complaints about this procurement, including those raised under <a href="#">Government Procurement (Judicial Review) Act 2018</a> (GPJR Act) to the Customer's ATM Contact Officer or the Complaints contact specified above. Potential Suppliers are reminded that the GPJR Act places time limits on making applications under that Act.</p> <p>For more information on the GPJR Act refer to the Government Procurement (Judicial Review) Act 2018 available at <a href="https://www.legislation.gov.au/Details/C2018A00129">https://www.legislation.gov.au/Details/C2018A00129</a>.</p> |                                     |

Source: Commonwealth Contracting Suite approach to market template applicable to a covered procurement valued up to \$1 million for which a public interest certificate had not been issued. The template was accessed via the CCS document creation tool, which is for use by government officials only.

Suppliers can view sample templates and the CCS terms at <https://www.finance.gov.au/government/procurement/commonwealth-contracting-suite-ccs>.

## Request documentation for limited approaches to market

2.37 A limited ATM involves the entity directly approaching one or more potential suppliers and inviting them to quote or to tender for the work. To check whether the extent of complaint information provided differed from the open ATMs, the ANAO tested a sample of 12 covered procurements undertaken by limited ATMs (three per auditee, as per the sampling method at paragraph 6 of Appendix 3).<sup>37</sup>

<sup>36</sup> Department of Finance, Resource Management Guide No. 420: *Mandatory use of the Commonwealth Contracting Suite for procurement under \$200,000*, July 2017.

<sup>37</sup> The ANAO did not produce comparator data for its testing of limited ATMs because the request documentation is not openly available from AusTender.

2.38 It was uncommon for complaints information to be provided during limited ATMs. Three out of the 12 limited ATMs (25 per cent) advised where to lodge a procurement complaint — being one by each of ACMA, DISR and Finance. DISR's also advised what to put in a complaint and how it would be handled by the entity (by way of a hyperlink to DISR's website).

2.39 Procurement record-keeping was poor in the sample of limited ATMs. Properly documenting procurement decisions and keeping clear records will assist entities to address any complaints and to demonstrate compliance with the CPRs.

2.40 Suppliers that are not invited to participate in a limited ATM for a covered procurement may submit a GPJR Act complaint if they have reason to believe there was a contravention of the relevant CPRs that affected their interests. The relevant CPRs include that an entity must only conduct a covered procurement through limited tender in the circumstances listed at paragraph 10.3 of the CPRs, which are known as the 'limited tender conditions'. Entities must report the relevant limited tender condition on AusTender. The ANAO observed that half of the procurements in the limited ATM sample did not demonstrably satisfy the limited tender condition that the entity reported on AusTender.

### **Information provided to unsuccessful tenderers**

2.41 When advising unsuccessful tenderers of the outcome of an ATM, all four auditees:

- did offer tenderers the opportunity to request a debriefing, as required by the CPRs; and
- did not provide any information on complaints processes or mechanisms.

2.42 The information provided to unsuccessful tenderers was consistent with the CCS 'unsuccessful letter' template.

### **Were suppliers appropriately informed of any public interest certificates that had been issued?**

ACMA and DISR had each issued two public interest certificates (PICs), documented their decision-making and appropriately informed suppliers that the PICs were in force. Finance's documentation was poor. Of the five PICs that Finance had reported on its website as having issued: one written certificate was not published; suppliers were notified that two were in force in advance of the written certificates being issued during the course of this audit; and the other two written certificates have not been issued. The RBA had not issued any PICs as at 30 June 2022.

### **Public interest certificates**

2.43 The suspension provisions of the GPJR Act preserve the supplier's right to participate in the covered procurement if the outcome of the complaint is in their favour. Where a valid complaint under the GPJR Act is received:

- the covered procurement is to be suspended until the complaint is resolved or withdrawn or a public interest certificate is issued; or
- if a public interest certificate has already been issued, the covered procurement will not be suspended as a public interest certificate is in force.

2.44 In reference to public interest certificates, the explanatory memorandum to the Government Procurement (Judicial Review) Bill 2017 outlined that:

The intended effect of the certificate is simply that the procurement would not be suspended while the application or complaint was being considered ... The public interest certificate is a necessary feature of the procurement complaint mechanism to prevent real adverse consequences to the public interest if a particular procurement was suspended ... Where a procuring entity issues a public interest certificate, the procuring entity will be required to promptly publish the certificate on its website.

2.45 Each of the four auditees had dedicated sections on their websites for the reporting of public interest certificates (PICs). ACMA's and RBA's sections also explained the purpose of PICs to suppliers. By 30 June 2022, ACMA had reported two PICs, DISR had reported two PICs, Finance had reported five PICs and RBA had reported no PICs.

2.46 The ANAO also checked the websites of the 118 relevant Australian Government entities that were not subject to this audit at 30 June 2022. Twenty-two of their websites (19 per cent) contained dedicated sections for the reporting of PICs and 18 of these reported that the entity had issued PICs under the GPJR Act. The PICs covered a total of 64 procurements.

### **Decisions taken to issue public interest certificates**

2.47 The ANAO examined the departmental records of the nine decisions taken by ACMA, DISR and Finance to issue PICs. The ANAO did not identify indications that additional decisions had been taken by these auditees, or that the RBA had decided to issue a PIC, as at 30 June 2022.

#### *The decision-makers*

2.48 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 the GPJR Act. The accountable authorities of ACMA, DISR and Finance had delegated their powers to issue PICs. In practice, for:

- ACMA, both decisions to issue PICs were taken by the accountable authority;
- DISR, one decision was taken by the accountable authority and the other decision by an authorised delegate; and
- Finance, four of the five decisions were taken by authorised delegates. The other one decision was taken by a departmental official who was not identifiable from the records, which did not support external assurance that the official was properly authorised (see paragraph 2.53).

2.49 To produce comparator information, the ANAO checked the 64 PICs reported by other Australian Government entities as at 30 June 2022. The issuing official was identifiable in 63 of the PICs, of which ten (16 per cent) were accountable authorities.

#### *Documenting the decisions*

2.50 A PIC may be issued at any stage during the procurement process, including after a complaint has been made. RMG 422 advises that the entity should document the decision to issue a PIC, 'including the reasons that a suspension would have an adverse impact on the public interest that outweighs the private interest of the aggrieved supplier to have the covered procurement suspended.'

2.51 The decisions taken by ACMA and DISR were well documented in comprehensive briefings, each comprised of a covering minute and three to eight attachments. These included an attachment that outlined the reasons a suspension of that procurement would have an adverse impact on the public interest that outweighed the private interest of an aggrieved supplier to have it suspended. In ACMA's briefings this attachment was five to six pages long, and in DISR's it was one to two pages long.

2.52 On average, the recommendations to issue PICs were approved by decision-makers two days following the request. Of their four decisions to issue PICs:

- ACMA and DISR had each taken one decision during the procurement planning stage; and
- ACMA and DISR had also each taken one decision after a procurement had been suspended for a month due to receipt of a GPJR Act complaint. The issuing of the PIC lifted the suspension, allowing the procurement to continue.
  - At the time ACMA issued its PIC, the GPJR Act complaint was still being investigated, whereas DISR issued its PIC after finalising the report on the investigation.

2.53 Finance's decision-making for its five PICs was poorly documented across various combinations of email exchanges and of records in a workflow management system ('the system'). The system records did not identify the decision-maker (on four occasions the ANAO could identify the decision-maker from email exchanges). The system records also did not include a text field for commentary by the decision-maker. On three of the occasions where the basis for the decision was documented in an email exchange, the decision-maker stated they were satisfied that the public interest 'would outweigh the rights of an individual supplier in being able to make a complaint'. This wording does not reflect the circumstances in which a PIC can be issued, or its effect, as PICs do not impact a supplier's right to complain.

2.54 Finance advised the ANAO in December 2022 that observations made by the ANAO in the course of this audit 'led to the Department recently decommissioning the electronic workflow system' and that 'the Department is currently updating its processes'.

2.55 On average, the recommendations to issue PICs were approved by Finance's decision-makers 26 days following the request. The recorded basis in all five decisions taken by Finance related to the procurement being to establish either a coordinated or a cooperative panel arrangement for use across Australian Government entities (in addition to issuing PICs covering the establishment of these particular panels, as discussed at paragraphs 2.85 to 2.87, no procurements from standing offers under panel arrangements are covered procurements for the purposes of the GPJR Act). None of the decisions related to receipt of a GPJR Act complaint.

2.56 To obtain an indication of the reasons the other Australian Government entities decided to issue their 64 PICs, the ANAO compared the date the PIC was issued with the dates the ATM had opened and closed for submission. Decisions taken prior to the ATM being published on AusTender are unlikely to have followed receipt of a GPJR Act complaint. The applicable dates could be identified by the ANAO for 62 of the PICs and, of these:

- 53 per cent were issued on the day of, or prior to, the ATM being published on AusTender as open for submissions;



- 15 per cent were issued after the ATM was published but before the closing date for submissions; and
- 32 per cent were issued after submissions had closed (ranging from three to 399 days after and averaging 166 days).

### Issuing the certificates

2.57 The issuing of a PIC involves the issuing of a written certificate containing the statement specified in subsection 22(1) of the GPJR Act; that is:

- (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.

2.58 In respect of the two decisions taken by ACMA, both briefings recommending that PICs be issued included a draft written certificate. The accountable authority issued the PICs as part of the approval process by signing the draft certificates.

2.59 In respect of the two decisions taken by DISR:

- the briefing provided to an authorised delegate included a draft written certificate, which was signed by that official at the time of their approval; and
- the briefing provided to the accountable authority advised that, following their approval to issue a PIC, an authorised delegate would sign the written certificate. Accordingly, an authorised delegate signed the certificate on the day the accountable authority gave approval.

2.60 For only one of the five decisions taken by Finance had a written certificate been signed at the time of approval. In that case the authorised delegate had recorded their approval in an email of 8 December 2020 and had also signed a written certificate on 8 December 2020.

2.61 Of the other four decisions taken by Finance, at the time this audit commenced in February 2022:

- approval to issue two of the PICs had been recorded via email (on 22 October 2021 and 2 December 2021) and no written certificate had been signed — both procurements were still active; and
- approval to issue the other two PICs had been recorded in the workflow management system by the decision-maker setting the record's status to 'Send to Legal - Issue Certificate' (on 13 January 2020 and 26 May 2021) and Finance was unable to provide evidence that a written certificate had been generated by the system — both procurements had been completed.

2.62 Following ANAO inquiries, Finance revisited the four decisions in March 2022. An authorised delegate signed written certificates on 31 March 2022 for the two procurements that were then still active. Written certificates have not been signed for the other two decisions taken. Finance advised the ANAO in December 2022 that:

The delegate did not consider it in the public interest to issue written certificates for the two procurements completed before the issue was identified (FIN/007/20RFTPhase2, and RFT FIN 003/19) as the delegate could not be satisfied the requirements in section 22 of the GPJR Act could be met. The intended effect of the certificate is to certify that it would not be in the public interest for the procurement to be suspended. This could not be established (and was not relevant) in the case of the completed procurements.

### *Information provided on the written certificates*

2.63 Seven PICs in the form of written certificates had been issued by the auditees as at 30 June 2022, being two by ACMA, two by DISR and three by Finance. All seven PICs contained the statement specified in subsection 22(1) of the GPJR Act and were factually correct.

2.64 To measure the appropriateness of the information more broadly, the ANAO assessed the seven PICs against the non-mandatory template PIC provided in RMG 422. All seven were consistent with the template PIC. To provide comparator data, the ANAO also assessed 63 of the PICs issued by other entities<sup>38</sup> and these were largely consistent with the template. The assessment results are outlined in Table 2.2.

**Table 2.2: Assessment of the content of Public Interest Certificates (PICs)**

| Content in the PIC template                        | ACMA<br>% of 2 | DISR<br>% of 2 | Finance<br>% of 3 | Other<br>% of 63 |
|--|----------------|----------------|-------------------|------------------|
| Statement as per subsection 22(1) of the GPJR Act. | 100%           | 100%           | 100%              | 100%             |
| AusTender ID (where applicable)                    | 100%           | 100%           | 100%              | 100%             |
| Tender close date and time (where applicable)      | 100%           | 100%           | 100%              | 39%              |
| Procuring entity name                              | 100%           | 100%           | 100%              | 100%             |
| Contact officer:                                   |                |                |                   |                  |
| • Name (or position title)                         | 100%           | 50%            | 67%               | 89%              |
| • Contact number                                   | 0%             | 0%             | 0%                | 44%              |
| • Email address                                    | 100%           | 100%           | 100%              | 98%              |
| Category (UNSPSC code) <sup>a</sup>                | 100%           | 100%           | 100%              | 33%              |
| Description  | 100%           | 100%           | 100%              | 100%             |
| Accountable authority/delegate's name and title    | 100%           | 100%           | 100%              | 100%             |
| Date   | 100%           | 100%           | 100%              | 100%             |

Note a: When reporting in AusTender, including when publishing ATMs, entities are required to select the United Nations Standard Products and Services Code (UNSPSC) category that relates to the majority of the goods or services being sought.

Source: ANAO analysis of the PICs published by entities as at 30 June 2022, against the template at Appendix 5 of *Resource Management Guide No. 422*, August 2019.

### **Publishing the certificates and notifying affected suppliers**

2.65 Consistent with the explanatory memorandum (as quoted in paragraph 2.44) RMG 422 states that the entity 'is required to publish the public interest certificate on its website promptly'.

<sup>38</sup> While the ANAO identified 64 PICs reported by other entities as at 30 June 2022, the report for one of those PICs did not include a copy of the written certificate and so it could not be assessed against the template.

RMG 422 also advises that entities 'should notify affected suppliers in writing that a public interest certificate is in force'. Where a PIC is issued before submissions to an ATM have closed, then the notification may be done within the request documentation or by issuing an addendum.

2.66 ACMA published copies of its two PICs on its website promptly, within one day of them being issued. ACMA also notified affected suppliers in writing that the PICs were in force:

- for the PIC issued during the planning stage, ACMA included a copy of the certificate in the request documentation; and
- for the PIC it issued after submissions had closed, ACMA notified affected suppliers via email the day after the certificate was signed.

2.67 In respect of DISR's two PICs:

- for the PIC issued during the planning stage, DISR published a copy on its website the day it was signed and then notified suppliers in the request documentation that a PIC was in force; and
- for the PIC issued after submissions had closed, DISR notified affected suppliers via email three days after the certificate was signed and then published a copy on its website three days later.

2.68 Finance had issued three PICs in the form of written certificates. Finance published copies of two of the written certificates on its website, both six days after they were signed.

2.69 Finance had made five decisions to issue PICs and notified suppliers that all five PICs were in force by reporting them on its website. The report included the name of the procurement, the AusTender reference number and the date the PIC was issued. On four occasions Finance also notified suppliers during the ATM (either within the request documentation or by issuing an addendum) that the PIC was in force. As indicated by the dates outlined in Table 2.3, Finance had notified suppliers that:

- one PIC was in force on the day the written certificate was signed;
- two PICs were in force four-to-five months in advance of the written certificates being signed during the course of this audit; and
- two PICs were in force without a written certificate being signed (see paragraph 2.62).

**Table 2.3: Timing of Finance's notification and reporting activities**

| Decision # | Approval to issue a PIC | Issued a written certificate | Published a copy on its website | Notified suppliers that a PIC was in force |                |
|------------|-------------------------|------------------------------|---------------------------------|--|----------------|
|            |                         |                              |                                 | on its website                             | during the ATM |
| 1          | 13 Jan 2020             | –                            | –                               | 4 Mar 2020                                 | –              |
| 2          | 8 Dec 2020              | 8 Dec 2020                   | –                               | 8 Dec 2020                                 | 10 Dec 2020    |
| 3          | 26 May 2021             | –                            | –                               | 30 June 2021                               | 27 May 2021    |
| 4          | 22 Oct 2021             | 31 Mar 2022                  | 6 April 2022                    | 28 Oct 2021                                | 28 Oct 2021    |
| 5          | 2 Dec 2021              | 31 Mar 2022                  | 6 April 2022                    | 10 Feb 2022                                | 6 Dec 2021     |

Note: The procurements relating to the first, second and third decisions had been completed at the time this audit commenced in February 2022.

Source: ANAO analysis of Department of Finance records and website.

2.70 For each of the affected procurements, Finance advised the ANAO in August 2022 that ‘no formal complaints under the GP(JR) Act were received in relation to this procurement and no prejudice to tenderers or prospective tenderers arose’. In relation to needing to improve its processes for recording decisions taken to issue PICs, and for ensuring a written certificate is published promptly, Finance advised in December 2022 that it ‘is implementing new processes that will address the concerns that the ANAO has raised’. Finance provided departmental documentation on two PICs that it had issued and published on its website in November 2022 (outside the scope of this audit), which supported Finance’s claims.

## Were the complaint mechanisms made accessible to suppliers?

While amendments to the Commonwealth Procurement Rules (CPRs) supported the implementation of the GPJR Act in April 2019, the approach taken was to limit the GPJR Act’s coverage. Suppliers cannot access the GPJR Act mechanism to complain about contraventions of several mandatory CPR provisions that reflect Australian Government procurement policy. Further, the ANAO estimated that at least 89 per cent of contracts reported on AusTender over a three-year period (62 per cent by value) were not covered by the GPJR Act. Given its limitations, entities could better inform suppliers about whether an approach to market is covered by the GPJR Act and support supplier access to the mechanism. Although Finance developed a supplier guide to the GPJR Act, it decided not to finalise and publish the guide.

Australian Government entities could also better inform suppliers of avenues for raising concerns about matters that have not been covered by the GPJR Act, such as allegations an entity has contravened CPR 6.6 by failing to deal with a conflict of interest. Entities could also raise awareness of the role of the Procurement Coordinator and Commonwealth Ombudsman in reviewing complaint matters. Uptake of the available mechanisms could be encouraged by making it clear to suppliers that they will not be penalised for complaining.

## Extent suppliers have accessed the complaint mechanisms

2.71 There is no central register of the number or nature of procurement complaints made by suppliers to Australian Government entities nor are procuring entities required to report such complaints.<sup>39</sup>

2.72 Where a supplier has made a complaint to a procuring entity and is dissatisfied with the outcome, then alternative complaint mechanisms include the Procurement Coordinator within Finance and the Office of the Commonwealth Ombudsman. Finance advised its Secretary in July 2022 that, since the Procurement Coordinator ‘function commenced in 2011, there have been 40 complaints received’. The Office of the Commonwealth Ombudsman advised the ANAO in

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39 The NSW government has taken a different approach to reporting. NSW has similar provisions to the GPJR Act within its *Public Works and Procurement Act 1912* for alleged breaches of the Enforceable Procurement Provisions Direction relating to international procurement agreements. The NSW Procurement Board is to maintain a record of complaints regarding alleged breaches, to allow the Board to understand trends in relation to the statutory complaint regime and to inform any future updates to the Direction. Agencies must provide information to the Board on complaints that are the subject of proceedings in the Supreme Court, and are encouraged to provide information on complaints that are resolved directly between the agency and the supplier.

December 2021 that, 'The numbers of complaints we receive about a tender or procurement process are low, at approximately 15 complaints each year'. The ANAO was further advised that:

We do not usually take action on these complaints and have not commenced any formal investigations in the past two years into procurement complaints. This is usually for 2 reasons:

- If the person has not made a complaint to the department or agency before contacting the Office, then we encourage them to do so. The relevant department or agency is best placed to efficiently resolve their complaint or provide an explanation that addresses their grievance.
- There are other bodies more suitable to handle these complaints. If the complaint relates to the Defence portfolio, we refer the person to the Defence Procurement Complaints Scheme. Otherwise, we refer the person to complain to Procurement Coordinator in the Department of Finance.

2.73 The independent complaint mechanism established under the GPJR Act allows suppliers to make an application to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) ('the court'). The Federal Court of Australia (FCA) advised the ANAO in July 2022 that neither court maintained specific statistics regarding applications filed under the GPJR Act, however:

from our searches we identified one FCA matter ... While this application was accepted by the Court for filing, it was subsequently discontinued by the applicant ...

We have also conducted searches for judgments that consider the GPJR Act. No judgments were able to be found.

2.74 By way of update, the FCA confirmed to the ANAO in March 2023 that there had been no applications to the Court under the GPJR Act since the July 2022 advice quoted above.

2.75 The *Better Practice Complaint Handling Guide* cautions that 'low complaint volumes do not necessarily imply high customer satisfaction (for example, it may be because a system is not sufficiently accessible)' and advises that 'an accessible system will actively seek to reduce access barriers'.

## **Extent of coverage by the GPJR Act mechanism**

2.76 In summary, under the GPJR Act that commenced 19 April 2019:

- the court may order the payment of compensation and/or grant an injunction in relation to a contravention of the relevant CPRs (so far as those rules relate to a covered procurement); and
- a supplier may complain to the accountable authority of a relevant Commonwealth entity about a contravention of the relevant CPRs (so far as those rules relate to a covered procurement).

2.77 Suppliers can only access the GPJR Act complaint mechanism if the CPRs have provided for coverage of both the procurement and their topic of concern. Audit findings relating to the extent to which coverage was provided, and whether that was consistent with the scope of the recommendation from the Senate Finance and Public Administration Committee, and with meeting the international obligations, are summarised below. Further detail is provided in Appendix 4.

## *Relevant CPRs*

2.78 The CPRs incorporate the requirements of Australia's international trade obligations and government policy in procurement into a set of rules, which apply to procurement conducted by relevant Commonwealth entities. The 'relevant CPRs' are defined in section 4 of the GPJR Act as:

- (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.

2.79 Changes introduced by the Australian Government in the CPRs issued 20 April 2019 included adding paragraph 6.9 to declare the relevant provisions of Division 1 for the purposes of the GPJR Act definition above. Finance advised the Minister in March 2019 that the provisions selected from Division 1 were 'limited to those that reflect our international obligations'. The provisions selected were CPRs: 4.18, 5.4, 7.2, 7.10, 7.13–7.18, 7.20 and 9.3–9.6.

2.80 Finance also advised the Minister in March 2019 that if certain other changes were not made then 'the scope of potential supplier complaints would be broader than what is required by Australia's international obligations'. The proposed changes were included in the 20 April 2019 CPRs and involved narrowing the definition of 'procurement' so as to 'reduce the risk of a complaint on matters that are not required by our international obligations' (see further at paragraph 1.8); and moving three paragraphs that reflected Australian Government procurement policy out of Division 2 and into Division 1 so they would not be covered by the GPJR Act.

2.81 The provisions that entities 'must' comply with<sup>40</sup> that were not declared relevant CPRs include, among others:

- 4.5 — officials must be satisfied, after reasonable enquiries, that the procurement achieves a value for money outcome; and
- 6.6 — officials must act ethically throughout the procurement (see further at paragraphs 2.119 to 2.120).

## *Covered procurement*

2.82 Section 5 of the GPJR Act provides that a procurement is a 'covered procurement' if the rules in Divisions 1 and 2 of the CPRs apply and it is not included in a class of procurements specified in a determination made by the Finance Minister by legislative instrument.<sup>41</sup>

2.83 Entity reporting of contracts valued at or above the reporting threshold on AusTender does not identify whether the award was by covered procurement.<sup>42</sup> To get an indication of the extent

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40 Rules that must be complied with in undertaking procurement are denoted in the CPRs by the term 'must'. The term 'should' indicates good practice.

41 In reference to the determination power, the Addendum to the Explanatory Memorandum to the Government Procurement (Judicial Review) Bill 2017 outlined that:

The intention is to allow the Government of the day flexibility to exempt additional procurements, if needed, and to do so in a manner that reflects the Government's particular circumstances and requirements. The determination power would be used in a manner that is consistent with Australia's free trade agreements. It is not envisaged that determinations would be issued regularly.

42 The reporting thresholds (including GST) are:

- \$10,000 for non-corporate Commonwealth entities; and
- for prescribed corporate Commonwealth entities, \$400,000 for procurements other than procurement of construction services, or \$7.5 million for procurement of construction services.

of coverage, the ANAO estimated the proportion of reported contracts that were not covered by the GPJR Act (the AusTender data better supports the identification of procurement excluded from coverage than included). In summary:

- 193,871 parent contracts valued at \$120.3 billion were reported to start between 1 July 2019 and 30 June 2022 on AusTender<sup>43</sup>; and
- of these, at least 89 per cent were not covered procurement for the purposes of the GPJR Act (being 173,295 contracts valued at \$75.1 billion).

2.84 The above figure of 89 per cent will be an underestimation because it cannot be determined with confidence from the AusTender data which of the remaining 11 per cent are or are not covered by the GPJR Act. Nevertheless, it can be concluded that suppliers have not been provided access to the GPJR Act mechanism in respect of most Australian Government procurement.

### *Panel procurement is not covered*

2.85 Changes introduced in the 1 January 2019 CPRs included specifying in paragraph 9.12 that 'procurements from an existing standing offer are not subject to the rules in Division 2'. RMG 422 then advised that procurements from standing offers under panel arrangements are not covered procurements for the purposes of the GPJR Act 'as paragraph 9.12 of the CPRs indicates that these procurements are not subject to Division 2 of the CPRs'.

2.86 The exclusion of panel procurement substantially limits supplier access to the GPJR Act. The proportion of the number of reported contracts associated with a 'standing offer notice' on AusTender increased from 28 per cent in 2012–13 to 50 per cent in 2021–22. The largest of these panels contained 3,273 suppliers. ANAO analysis has identified that for seven out of the top 10 panels by total value, at least 80 per cent of the panel's total value was awarded to 20 per cent or less of the suppliers represented on the panel.<sup>44</sup>

2.87 Excluding panel supplier access to the GPJR Act does not sit comfortably with implementation of recommendation 11 of the Senate inquiry report. The report outlined a need for 'some mechanism, beyond a complaint to the agency or the procurement coordinator, available to aggrieved parties' and recommended that 'Finance establish an independent and effective complaints mechanism for procurement processes'. Given most procurement by relevant entities is not 'covered procurement', and several mandatory provisions reflective of Australian Government policy are not 'relevant CPRs', the coverage of the GPJR Act is not sufficient to fully implement recommendation 11.

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43 The ANAO has excluded from the analysis consideration of the 74,914 amendments to existing contracts valued at \$77.7 billion reported by entities. If those amendments were included in the population and contract amendment were not covered by the GPJR Act, then the result would be that at least 92 per cent of contracts were not covered by the GPJR Act.

44 Auditor-General Report No. 11 2022–23, Information Report, *Australian Government Procurement Contract Reporting – 2022 Update*, paragraphs 6.6, 6.9 and 6.14.

## Recommendation no. 1

2.88 The Department of Finance revisit whether the Commonwealth Procurement Rules provide sufficient coverage of the complaint mechanisms established by the *Government Procurement (Judicial Review) Act 2018* to meet Australia's international trade obligations and to implement recommendation 11 of the July 2014 Senate Finance and Public Administration References Committee's report into Commonwealth procurement procedures.

**Department of Finance response:** *Agreed.*

2.89 *Finance will review the complaint mechanisms established by the Government Procurement (Judicial Review) Act 2018. Finance notes that any changes to the Act would require Government and parliamentary consideration.*

### Informing suppliers whether the GPJR Act applies

2.90 Given its limited scope of coverage, a potential barrier to suppliers accessing the independent complaint mechanism is not knowing if the GPJR Act applies to both the procurement and their topic of concern.

2.91 Out of the four auditee websites, DISR's briefly explained to suppliers what a covered procurement was by reference to the procurement thresholds, while Finance's provides a detailed explanation within guidance targeted to procuring entities. Of the comparator websites, 10 per cent explained to suppliers what a 'covered procurement' was.

2.92 The ANAO identified that the following ATM documents advised suppliers whether it was a covered procurement for the purposes of the GPJR Act:

- 11 per cent of open ATMs in the auditee sample, being two ATMs by Finance and one by DISR (see 'example 2' in Appendix 6); and
- 21 per cent of open ATMs in the comparator sample.

2.93 Most of the ATMs tested, therefore, did not advise whether the GPJR Act applied. Some of these had taken the Commonwealth Contracting Suite approach of only including GPJR Act related information in request documents for covered procurements, but this approach may not be apparent to suppliers. Some other entities prefaced their GPJR Act information with generic statements such as 'If this RFT Process is a covered procurement...' or 'this Condition [...] only applies if the Procurement Process is a Covered Procurement' [*emphasis added*].

### Opportunity for improvement

2.94 There is an opportunity for improvement for many Australian Government entities to state clearly in approach to market documentation that it is, or is not, a covered procurement for the purposes of the *Government Procurement (Judicial Review) Act 2018*.

2.95 In relation to entities explaining to suppliers which are the relevant CPRs for the purposes of the GPJR Act:

- Finance's website provided an explanation within guidance targeted to procuring entities but none of the auditee websites explained them for suppliers;



- seven per cent of the comparator websites provided detailed explanations for suppliers; and
- none of the ATMs in the auditee or comparator samples explained them.

## Assisting supplier access to the GPJR Act mechanism

### *Making a complaint before applying for an injunction*

2.96 There are two types of injunctions that can be granted by the court under the GPJR Act.<sup>45</sup> As summarised in RMG 422:

- A **restraining injunction** can be granted where the court finds that the relevant Commonwealth entity or official has or is proposing to engage in conduct that contravenes the relevant CPRs. The injunction ‘restrains’ them from engaging in that conduct.
- A **performance injunction** can be granted where the court finds that the relevant Commonwealth entity or official has refused, is refusing, or is proposing to refuse to do something and this refusal contravenes the relevant CPRs.

2.97 The court may not grant an injunction unless the court is satisfied that the supplier ‘has made a complaint under section 18 to the accountable authority of the relevant Commonwealth entity about the contravention or proposed contravention’ and ‘has made a reasonable attempt to resolve the complaint’.<sup>46</sup> Subsection 18(1) provides, 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.

2.98 The ANAO checked whether the four auditees and 41 comparator entities had provided information on where to lodge a complaint under section 18 on their websites (see paragraphs 2.8 to 2.11) and in their request documentation for open ATMs (see Table 2.1). Where this information was provided, it rarely advised suppliers to lodge their complaint with the entity’s accountable authority. This advice only appeared: on the website of one auditee (ACMA) and one comparator entity; and in the request documentation issued by one auditee (RBA) and no comparator entities. Where suppliers were instead advised to email complaints to another official or to a group email account, then it could not be objectively determined if the receiving official had the appropriate delegation. This situation may make it difficult for suppliers and/or entities to demonstrate compliance with the GPJR Act.

2.99 The ANAO considered that the wording of the ATM template in the Commonwealth Contracting Suite increased the risk of complaints being directed to officials who were not

45 See Part 2—Injunctions, *Government Procurement (Judicial Review) Act 2018* (Cth).

46 See subsection 11(1), *Government Procurement (Judicial Review) Act 2018* (Cth).

authorised to receive them. The template instructs suppliers to direct complaints raised under the GPJR Act 'to the Customer's ATM Contact Officer or the Complaints contact' (as per Figure 2.1). The contact officer in particular may not have the appropriate delegation, given these procurements are generally valued below \$200,000.

2.100 The ANAO sought Finance's advice on the implications of entities instructing suppliers to lodge complaints under the GPJR Act to an individual official who does not have the appropriate delegation and/or to a group email account. Finance advised the ANAO in August 2022:

The accountable authority of the relevant Commonwealth entity should ensure it has clear processes in place to receive written complaints made under section 18 of the GPJR Act (refer paragraph 28 of RMG 422). Should an official, who does not have the appropriate delegation, receive a written complaint under section 18 of the GPJR Act then internal procedures should be in place for the written complaint to be forwarded on to the relevant official who has the appropriate delegation to formally receive and assess the complaint. If it is unclear whether the complaint is intended to be a complaint under section 18 of the GPJR Act, the delegate should seek clarification from the supplier (refer paragraph 31 of RMG 422).

2.101 RMG 422 advises that entities 'should ensure that the formal written complaint submitted by a supplier clearly references the relevant paragraph/s of the CPRs it considers have been contravened'. The website of one of the auditees (DISR), and 29 per cent of the comparator entities, suggests suppliers identify the CPRs they believe have been breached to assist in the timely resolution of their complaint. A further 10 per cent of comparator entity websites stated that identifying the relevant CPRs was a mandatory requirement. It is not evident that this is a requirement of the GPJR Act given, as RMG 422 states, 'there are no formal requirements for making a supplier complaint other than it be made in writing to the accountable authority'.

2.102 Giving suppliers a list of the CPRs paragraphs applicable to the GPJR Act and/or a hyperlink to the CPRs, would not necessarily mean they are positioned to assess which paragraph their concern relates to. A supplier that had complained to one of the comparator entities expressed that it had been asked 'to nominate those CPRs we believe were breached without the technical expertise to do so accurately ... we do not believe that our business is appropriately qualified to nominate ... those CPRs potentially breached for the purposes of an investigation'.

### *Meeting the time limit for applications for injunction*

2.103 The court can grant an injunction only where it is satisfied that the application was made within 10 days of when the supplier became aware, or ought reasonably to have become aware, of the alleged contravention of the relevant CPRs affecting its interests.<sup>47</sup> That is, within 10 days of becoming aware of the matter of concern, the supplier is to have: lodged a complaint under section 18 to the accountable authority; attempted to resolve the complaint; and then made an application for an injunction.

2.104 The court may allow a longer period if it is satisfied that the supplier's failure to make the application within the 10-day period is attributable to the applicant's reasonable attempt to resolve the complaint or there are special circumstances that warrant allowing a longer period.<sup>48</sup> Barriers to supplier access therefore include suppliers not meeting the time limit due to lack of awareness.

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47 See subsections 11(2), (3) and (4), *Government Procurement (Judicial Review) Act 2018* (Cth).

48 See subsection 11(5), *Government Procurement (Judicial Review) Act 2018* (Cth).

2.105 All references to the time limit in the open ATMs tested used the wording from the Commonwealth Contracting Suite ATM template, being 'Potential Suppliers are reminded that the GPJR Act places time limits on making applications under that Act'. This wording appeared in 39 per cent of the auditee sample and 23 per cent of the comparator sample.

- Of the four auditee websites, none explained the time limit while one website (ACMA's) expressed a sense of urgency by advising that 'complaints must be made in writing to the accountable authority immediately after becoming aware of the alleged breach of the relevant CPRs'.
- Of the 41 comparator websites, five per cent explained the 10-day time limit, two per cent advised 'there are time limits for taking certain action' and a further 12 per cent expressed a sense of urgency.

2.106 The report of a Senate inquiry into the provisions of the Government Procurement (Judicial Review) Bill 2017 noted that 'several submissions expressed concern over the adequacy of the 10 day time limit in which a supplier must lodge an application for an injunction'. The report quoted Finance's advice to the inquiry that:

The default timeframe of 10 days was chosen to encourage timely efforts, by both suppliers and the procuring entity, to resolve any concerns about the process. The choice of a 10 day default strikes an appropriate balance between the interests of both sides and minimises disruption to other parties involved in the same process.<sup>49</sup>

2.107 There is no requirement for the entity to resolve the matter within 10 days of the accountable authority receiving the complaint.

## Recommendation no. 2

2.108 The Department of Finance amend the Commonwealth Contracting Suite approach to market templates to better support access to the *Government Procurement (Judicial Review) Act 2018*, including by stating whether the procurement is or is not a 'covered procurement'.

**Department of Finance response:** *Agreed.*

2.109 *The Department of Finance will amend the Commonwealth Contracting Suite (CCS) approach to market templates to address the matters raised by the audit.*

## Guidance for suppliers about the GPJR Act

2.110 The domestic review provisions of the Trans-Pacific Partnership Agreement (TPP) included that 'The procedural rules for all complaints shall be in writing and made generally available' and 'Each Party shall make information on its complaint mechanisms generally available.'<sup>50</sup> RMG 422 is generally available on Finance's website as guidance 'relevant to accountable authorities and officials undertaking procurements'. The guidance does not therefore outline some of the procedural rules applicable to suppliers. For example, RMG 422 does not explain that:

49 Finance and Public Administration Legislation Committee, 'Government Procurement (Judicial Review) Bill 2017 [Provisions]', August 2017, pp. 5–8.

50 Trans-Pacific Partnership Agreement, Article 15.19: Domestic Review, p. 15-24.

- the supplier is not required to make a complaint to the accountable authority before making an application to the court for compensation; and
- the 10-day time limit does not apply to an application for compensation, which may be made independent of an application for an injunction.

2.111 There is no Australian Government guide on the GPJR Act tailored to suppliers. As evident from the quote below, Finance's response to a question taken on notice during the Senate inquiry into the provisions of the Government Procurement (Judicial Review) Bill 2017 indicated that there would be guidance for suppliers. The question was asked in the context of submissions to the inquiry expressing concerns about the ability of small and medium sized business enterprises to utilise the courts as a complaint mechanism.<sup>51</sup>

#### **Question 8**

What is the expected impact on Small and Medium Enterprises (SMEs)?

a) Will there be any support to assist SMEs in challenging outcomes?

#### **Response**

The impact on SMEs is expected to be positive as they will have access to a more timely, effective and lower cost complaints mechanism for government procurement. Guidance and information on the new complaints mechanism will be available for suppliers to assist them with understanding how it will operate.<sup>52</sup>

2.112 Finance developed, but did not finalise and publish, a supplier guide to the GPJR Act. The ANAO notes that the:

- January 2019 draft RMG 422, which was circulated to the Senior Procurement Officials Reference Group for comment, contained guidance for suppliers. This included an appendix titled 'Reference guide for potential suppliers: Raising a complaint'. Finance removed the supplier guidance from subsequent versions of RMG 422;
- March 2019 briefing advised the Finance Minister that, 'In addition to the updates to the CPRs, Finance is developing guidance and other relevant supplier information, which will be made publicly available prior to the commencement of the Judicial Review Act';
- April 2019 publication of RMG 422 stated at paragraph 79 that 'Information to assist suppliers with the processes and information required when raising a complaint under the Act is included in the *Supplier Guide to the Government Procurement (Judicial Review) Act 2018*, which is available on the Finance website';
- May 2019 issue of Finance's Procurement Bulletin advised that the 'Supplier Guide ... is currently being cleared, and entities will be notified once it has been published on the Finance website'; and
- August 2019 publication of RMG 422 amended paragraph 79 to remove the reference to the Supplier Guide as follows, 'Information to assist suppliers with the processes and information required when raising a complaint is available on the Finance website'. This is

51 Finance and Public Administration Legislation Committee, 'Government Procurement (Judicial Review) Bill 2017 [Provisions]', August 2017, including pp. 9–11.

52 Answers to questions taken on notice on 22 June 2017 from the Department of Finance, received 13 July 2017 by the Finance and Public Administration Legislation Committee, 'Government Procurement (Judicial Review) Bill 2017 [Provisions]' inquiry.

the only paragraph that has been amended since the April 2019 release, as at December 2022.

2.113 Finance advised the ANAO in August 2022, in response to a request for ‘any records of a decision not to proceed with the proposed Supplier Guide’, that:

The ‘Supplier Guide to the *Government Procurement (Judicial Review) Act 2018*’ was being developed by the Department of Finance. A decision was made through the clearance process not to proceed with the development and release of the guidance, with information instead being included in RMG 422 and the Selling to Government webpage. Documentation regarding that decision is not available. Information was instead published on the ‘Selling to Government’ website advising on some of the complaint mechanisms available to suppliers (<https://sellingtogov.finance.gov.au/guide/if-you-dont-win-a-contract>).

2.114 The information published on Finance’s ‘Selling to Government’ website does not constitute supplier guidance on the GPJR Act. As at December 2022, the relevant section states, in full:

Additionally, for specific complaints that are subject to the requirements of the *Government Procurement (Judicial Review) Act 2018* [hyperlink], there may be recourse through the Federal Circuit Court or the Federal Court of Australia.

2.115 Of the 45 entity websites examined by the ANAO in total, four per cent (being RBA’s and ACMA’s) referred suppliers to the ‘Selling to Government’ website and 33 per cent referred suppliers to RMG 422.

### Recommendation no. 3

2.116 The Department of Finance publish a guide for suppliers about the *Government Procurement (Judicial Review) Act 2018*, and then notify relevant Australian Government entities and suggest they include a hyperlink to the guide on their websites and in their Approach to Market templates for covered procurements.

**Department of Finance response:** *Agreed.*

2.117 *The Department of Finance will develop and publish guidance for suppliers on the GPJR Act. The Department will also suggest that relevant Australian Government entities include a link to the guidance on their websites and in their Approach to Market templates for covered procurements. Once published, a link will also be included in the CCS approach to market documentation for covered procurements.*

### Access to complaint mechanisms for alleging breaches of probity

2.118 Probity is the evidence of ethical behaviour in procurement. It provides a level of assurance to suppliers that a procurement was conducted in a manner that is fair, equitable and defensible.<sup>53</sup> Further, procurement is vulnerable to corruption. Control measures suggested by various state anti-corruption bodies include ‘a complaints management process to deal with allegations about

53 See: Department of Finance, *Ethics and Probity in Procurement* [Internet], available from <https://www.finance.gov.au/government/procurement/buying-australian-government/ethics-and-probity-procurement> [accessed October 2022].

wrongdoing concerning procurement activities’ and ‘clear and easy to follow information about how to make a complaint if ... suppliers suspect wrongdoing’.<sup>54</sup>

2.119 The CPRs on ethical behaviour that relevant entities must comply with are CPRs 6.6, 6.7 and 6.8. The Australian Government has not declared these to be ‘relevant CPRs’. The GPJR Act mechanism is therefore not accessible to suppliers alleging a contravention of CPR 6.6, for example, which states that:

In particular, officials undertaking procurement **must** act ethically throughout the procurement. Ethical behaviour includes:

- a. recognising and dealing with actual, potential and perceived conflicts of interest;
- b. dealing with potential suppliers, tenderers and suppliers equitably, including by
  - i. seeking appropriate internal or external advice when probity issues arise, and
  - ii. not accepting inappropriate gifts or hospitality; ...

2.120 Finance’s records of the identification of the relevant CPRs for the purpose of the GPJR Act include the following with respect to CPR 6.6:

While “Ethical behaviour” is covered in Australia’s FTAs [free trade agreements], CPRs paragraph 6.6 pre-dates Australia’s FTAs with its inclusion in the Commonwealth Procurement Guidelines (CPGs) in 1998 and 2014. Refer to Part 3 of the 1998 CPGs and CPGs paragraph 5.21 of the 2004 CPGs.

Further, “Ethical behaviour” is addressed as part of the legislative environment: *Public Service Act 1999*, *Public Governance, Performance and Accountability Act 2013* and the *Crimes Act 1914*.

2.121 Suppliers will therefore be largely reliant on entity complaint mechanisms in the first instance, if they have probity concerns.<sup>55</sup> An entity complaint mechanism that does not offer suppliers the option of complaining to an official who is independent of the procurement, is not well suited to allegations of probity breaches.

2.122 All 71 open ATMs across the auditee and comparator entity samples provided the email address of a ‘contact officer’ for the specific procurement. The ANAO checked whether suppliers also had access to a different email address they could use when making complaints. If not, then the ANAO checked whether the contact officer address was for a central procurement policy team, as this may increase supplier trust compared with raising allegations directly with an official undertaking the procurement.

2.123 The results of the ANAO’s analysis differed by auditee. Of the 28 ATMs in the auditee sample:

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54 For example:

- the NSW ICAC’s corruption prevention advice on ‘Procurement’, available from <https://www.icac.nsw.gov.au/>
- the Queensland CCC’s information sheet, *Probity as a means of managing corruption risks in procurement*, available from <https://www.ccc.qld.gov.au/>; and
- the Victorian IBAC’s, *Corruption in procurement - risks and warning signs*, available from <https://www.ibac.vic.gov.au>.

55 Suppliers are expected to have complained to the procuring entity before accessing the Procurement Coordinator or the Commonwealth Ombudsman complaint mechanisms.

- RBA's seven ATMs provided a different email address suppliers could use when making complaints;
- DISR provided a different email address in five of its ATMs, and directed suppliers to the contact officer for the procurement in the other two ATMs;
- ACMA's seven ATMs did not provide a different email address, however that address was for the entity's central procurement policy team; and
- Finance's seven ATMs directed suppliers to the contact officer for the procurement.

2.124 Of the 43 ATMs in the comparator sample, 70 per cent offered suppliers a different email address that they could use when making complaints. For a further 12 per cent, the contact officer email address was that of the entity's central procurement policy team.

2.125 The ANAO also identified that one of the 28 ATMs in the auditee sample had provided contact details specifically for the raising of probity concerns. (The ATM was by the RBA and the relevant text is included as 'example 5' in Appendix 6). In addition, three of the 43 ATMs in the comparator sample contained contact details for raising probity concerns, and another one identified the contact listed for GPJR Act complaints as being the entity's probity adviser. The procurement complaints handling pages on the auditee and comparator entity websites examined did not provide advice specific to raising matters of probity.<sup>56</sup>

### **Fear of retribution as a barrier to complaining**

2.126 A survey of suppliers to a state government by an anti-corruption body revealed that the main barrier to their reporting corruption in procurement 'was a fear that reporting would negatively impact their organisation'.<sup>57</sup> The Commonwealth Ombudsman has identified the 'fear of retribution' as a barrier to complaint more broadly.<sup>58</sup> Similarly, supplier input to this audit received through the ANAO's citizen contribution facility included:

In my view as a supplier to government, the single largest issue with a procurement complaints mechanism is that there is a strong perception that any complaint will tarnish the supplier's image in the eyes of its client and make winning any future work very difficult. Every supplier (especially those with knowledge of probity auditing and procurement rules) has a collection of stories that could be told where procurement guidelines weren't appropriately followed, which would be exponentially more than the number of complaints actually received.

2.127 The *Better Practice Complaint Handling Guide* advises that 'your publications and your staff should actively encourage complaints by making it clear that ... there is no penalty for complaining'.<sup>59</sup> None of the four auditee websites explicitly made this clear. One of the 41 comparator websites examined contained an explicit statement, being 'The initiation of a complaint won't prejudice a supplier's participation in future procurement processes'. Less directly,

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56 The ANAO's focus was on complaint mechanisms for suppliers to raise probity concerns during ATMs and did not extend to information that may be elsewhere on entity websites about the reporting of fraud and corruption. The ANAO noted, however, when examining the auditee websites that the 'more information' section of DISR's procurement complaint handling page included a hyperlink for suppliers to 'Learn about how to report fraud or corruption.'

57 Victorian IBAC, *Perceptions of Corruption*, June 2016, pp. 2 and 7.

58 Office of the Commonwealth Ombudsman, *Better Practice Complaint Handling Guide*, February 2021, p. 12; and the Commonwealth Ombudsman, *Complaint Management by Government Agencies*, October 2014, p. 18.

59 Office of the Commonwealth Ombudsman, *Better Practice Complaint Handling Guide*, February 2021, p.12.

ACMA's website and 13 comparator websites used the term 'non-discriminatory', 'without discrimination' or 'without disadvantage' when describing its approach to complaints handling. This usage reflects the CPRs requirement that entities apply 'non-discriminatory complaint-handling procedures'.

2.128 None of the 28 ATMs in the auditee sample explicitly addressed the fear of retribution, while the complaints clause in one of DISR's ATMs used the term 'non-discriminatory'. Four of the ATMs in the comparator sample had addressed the fear of retribution by using wording reflective of the TPP and WTO GPA agreements, which state 'the procuring entity shall accord impartial and timely consideration to the complaint in a manner that is not prejudicial to the supplier's participation in ongoing or future procurement'.<sup>60</sup>

### **Access to the Procurement Coordinator and Commonwealth Ombudsman complaint mechanisms**

2.129 The Procurement Coordinator 'Complaints Handling Charter' on Finance's website advises suppliers that if their issue has not been resolved by the procuring entity 'and you consider it relates to the specifications of a particular tender that were such that you were prevented from preparing a competitive tender response you can refer a complaint to the Procurement Coordinator.' This wording may discourage suppliers from accessing the complaint mechanism. The limitation is inconsistent with the Australian Government's expectations that the Procurement Coordinator would 'respond to concerns regarding procurement policy and its implementation'.<sup>61</sup>

2.130 The Office of the Commonwealth Ombudsman advised the ANAO in December 2021 that:

Under the *Ombudsman Act 1976*, the Office of the Commonwealth Ombudsman (the Office) handles complaints about matters of administration, which can include the way a department or agency dealt with a tender or procurement matter ... The nature of the complaints about procurement matters received by the Office usually relate to one of the following:

- Parties who were unsuccessful in being awarded a tender.
- Parties who had previously been successful through a tender process, but were not invited to tender for a new process.
- Parties who held a current contract and submitted a tender for a new contract, but were not awarded the contract.

...

We do not usually take action on these complaints and have not commenced any formal investigations in the past 2 years into procurement complaints. This is usually for 2 reasons:

- If the person has not made a complaint to the department or agency before contacting the Office, then we encourage them to do so. The relevant department or agency is best placed to efficiently resolve their complaint or provide an explanation that addresses their grievance.

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60 Trans-Pacific Partnership Agreement p. 15-24 and the World Trade Organization Agreement on Government Procurement p. 42.

61 Australian Government, Mid-Year Economic and Fiscal Outlook 2009–10, Appendix A: Policy decisions taken since the 2009–10 Budget, Commonwealth of Australia, Canberra, 2009, p.210.



- There are other bodies more suitable to handle these complaints. If the complaint relates to the Defence portfolio, we refer the person to the Defence Procurement Complaints Scheme.<sup>62</sup> Otherwise, we refer the person to complain to Procurement Coordinator in the Department of Finance.

2.131 The ANAO examined the extent to which the auditee and comparator entities were aiding supplier access to these complaint mechanisms through awareness raising. The ANAO also considered whether entities helped distinguish between the two, to avoid what the *Better Practice Complaint Handling Guide* calls the 'referral roundabout'.<sup>63</sup>

2.132 None of the 71 open ATMs tested across the 45 entities referred to the Office of the Commonwealth Ombudsman in the context of procurement complaints handling. Eleven per cent of ATMs in the auditee sample (all by DISR), and 12 per cent of the comparator sample, referred to the Procurement Coordinator. For only one of the 71 ATMs tested (a comparator entity ATM) was the reference to the Procurement Coordinator accompanied by an explanation of their role.

2.133 In addition to Finance's website, which hosts the Procurement Coordinator information, the following was referenced on websites.

- One auditee (DISR) referred to both mechanisms on its complaints handling webpage, as follows:  
If you are not happy with the outcome, you can raise it with the Australian Government procurement coordinator [hyperlink] or Commonwealth Ombudsman [hyperlink].
- 32 per cent of comparator websites also referred to both, with one of these websites explaining the mechanisms and the rest taking a similar approach to DISR.
- Two per cent of comparator websites referred to the Office of the Commonwealth Ombudsman mechanism only.

2.134 Complaints handling by the Procurement Coordinator is examined within Chapter 3, with an ANAO recommendation for Finance to improve accessibility at paragraph 3.64. The management of complaints by the Office of the Commonwealth Ombudsman was the subject of Auditor-General Report No. 41 2021–22.<sup>64</sup>

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62 The Defence Procurement Complaints Scheme manages the administration and investigation of procurement complaints, including those submitted by potential suppliers to Defence under the GPJR Act. Information on the Scheme is available from the Defence website (see: <https://www.defence.gov.au/business-industry/procurement/defence-procurement-complaints-scheme>).

63 Office of the Commonwealth Ombudsman, *Better Practice Complaint Handling Guide*, February 2021, p. 39.

64 Auditor-General Report No. 41 of 2021–22, *Management of Complaints by the Office of the Commonwealth Ombudsman*.

### 3. Handling complaints from suppliers

#### Areas examined

The ANAO examined whether entities handled procurement complaints from suppliers appropriately.

#### Conclusion

ACMA and DISR handled procurement complaints from suppliers appropriately. Finance's handling of complaints about its own activities was largely appropriate, yet its handling of complaints to the Procurement Coordinator about the procurement processes of other Australian Government entities was poor. While the RBA had not received a complaint that fell within the scope of this audit, it had a suitable system in place to handle complaints.

#### Areas for improvement

The ANAO made one recommendation to Finance to review the Procurement Coordinator function with a view to improving the accessibility, customer service and timeliness.

3.1 A well-handled complaint can help generate supplier satisfaction and confidence in Australian Government procurement and administration. Having a suitable system in place will enhance the entity's ability to manage procurement complaints in a consistent and responsive manner and to comply with legislative requirements.

3.2 The ANAO examined whether each of the four auditees had suitable systems in place for handling procurement complaints, including those made under the *Government Procurement (Judicial Review) Act 2018* (GPJR Act) and, in respect of Finance, complaints made to the Procurement Coordinator. The system design principles outlined in the *Better Practice Complaints Handling Guide* include that 'complaint handling should be supported by clear process guidance' and 'complaints should be recorded in an electronic system capable of producing complaint insights'. The guide also advises entities that 'Regular reviews of your complaint handling system are an opportunity to ensure the system is up to date and able to meet new challenges and evolving better practice'.<sup>65</sup>

3.3 The ANAO also examined whether the auditees had appropriately handled complaints that had been made by suppliers after 19 April 2019, which is when the GPJR Act commenced. The ANAO used the broad definitions of 'complaint' and 'supplier' that are outlined in paragraph 4 of Appendix 3.

#### Were suitable systems in place for handling procurement complaints?

ACMA, DISR and RBA had suitable systems in place for handling procurement complaints, with DISR's being the most comprehensive. Finance's systems were partially suitable and improvements were in train at the time of this audit.

<sup>65</sup> Office of the Commonwealth Ombudsman, *Better Practice Complaint Handling Guide*, February 2021, pp. 16–17 and 34.

## Entity-specific guidance

3.4 The ANAO examined the procedural guidance that auditees had in place for staff handling general procurement complaints. In summary:

- ACMA and RBA had basic guidance, sufficient to support consistency in the context of having few complaints and centralised complaint handling;
- DISR had comprehensive guidance; and
- Finance did not have entity-specific internal guidance in place (an example of where such guidance would have been beneficial is at paragraph 3.31).

3.5 The ANAO also examined the procedural guidance in place to assist staff to handle complaints and issue Public Interest Certificates (PICs) under the GPJR Act.

- When ACMA received a complaint under the GPJR Act, it did not yet have guidance in place but noted in a briefing to its accountable authority that ‘the processes to be followed contained in RMG 422 are clear and have been taken into account in preparing this advice to you’. ACMA had comprehensive guidance in place from 2021 (see paragraph 3.17).
- DISR had training materials and basic guidance in place from 2019, with comprehensive guidance being in place by early 2022.
- Finance had basic guidance in place from 2019 comprising a flow chart for handling GPJR Act complaints, a flow chart for issuing PICs and a related PIC checklist. As the policy owner, Finance also had internal expertise on the GPJR Act and had produced the comprehensive, cross-entity guidance in RMG 422.
- RBA had comprehensive guidance in place from 2019.

3.6 Finance advised the ANAO in December 2022 that its ‘internal guidance is under re-development to provide more information and clarity to Finance staff on the process and roles in handling a procurement complaint’.

### *Procurement Coordinator*

3.7 The Procurement Coordinator function resides in Finance with the First Assistant Secretary, Procurement and Insurance Division. The Procurement Coordinator Secretariat sits within a team of that Division. Finance had a public Complaints Handling Charter in place for the Procurement Coordinator function<sup>66</sup>, which was supported by basic internal guidance and by a series of templates. At the time of this audit, Finance was in the process of updating its guidance materials and advised the ANAO that it was awaiting the learnings from the audit.

3.8 The guidance was insufficient for ensuring timely complaints-handling. While the publicly available Complaints Handling Charter included a three-day timeframe for acknowledging the receipt of complaints, the internal guidance did not set out any expectations in terms of timeliness. The *Better Practice Complaint Handling Guide* advises: ‘Timeliness benchmarks mitigate the risk of unnecessary delay in complaint handling ... Complaints should be reviewed at established deadlines

66 Department of Finance, *Complaints Handling Charter* [Internet], available from <https://www.finance.gov.au/business/procurement/complaints-handling-charter>.

to see if they need extended timeframes and/or escalation’.<sup>67</sup> Shortcomings with timeliness are examined at paragraphs 3.58 to 3.63 and addressed by ANAO recommendation no. 4.

3.9 There is potential for the Procurement Coordinator to receive a complaint that gives rise to a conflict of interest, such as a complaint about a procurement undertaken by their Division. In July 2022, Finance’s accountable authority approved a process for managing such conflicts of interest. This initiative was not driven by a complaint but was a proactive measure.

## Complaints register

3.10 DISR and RBA each maintained a register of procurement-related complaints in the form of a spreadsheet, which was supported by user guidance. Each entity directed supplier complaints to centralised email accounts and the ANAO verified the registers were complete.

3.11 ACMA did not maintain a register and advised the ANAO in July 2022 that there had been one procurement complaint. ACMA directs supplier complaints to a centralised email account and the ANAO verified it contained one complaint. Establishing a register for future complaint activity may help provide assurance to the entity’s governance.

3.12 Finance did not maintain a register of complaints made to it as a procurer of goods and services. The ANAO obtained verification that no complaints had been lodged via Finance’s GPJR Act webform. Finance did not have a system for providing assurance as to the number of procurement complaints lodged via other means.<sup>68</sup> The ANAO was therefore reliant on Finance’s assertions in this regard. Finance advised the ANAO in January 2023 that ‘to support and track complaints/submissions received through the general complaints form, the department has also established a Procurement Complaint Register’ and it provided a copy of the spreadsheet it will use for this purpose.

3.13 Finance did maintain a register of complaints made to the Procurement Coordinator, which was in the form of a spreadsheet. The ANAO verified the register was complete in respect to complaints accepted for consideration by the Procurement Coordinator (see paragraph 3.45). It was largely complete in respect to complaints that the Procurement Coordinator Secretariat had responded to directly, such as by suggesting the supplier seek a debriefing from the procuring entity in the first instance (see paragraph 3.43).

## Implementing recommendations from reviews

3.14 Two of the auditees (Finance and ACMA) had undertaken reviews since April 2019 that made recommendations relevant to their procurement complaints handling systems.

3.15 Finance had established a taskforce in June 2020 to ‘examine the Department’s approach to procurement governance and assurance and how organisational values and behaviours are embedded into the work of individual teams’.<sup>69</sup> The recommendations in the resulting Assurance Taskforce Final Report of October 2020 included that Finance ‘Implement centralised procurement

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67 Office of the Commonwealth Ombudsman, *Better Practice Complaint Handling Guide*, February 2021, p. 21.

68 The ANAO is not expressing a preference for either a centralised or a devolved approach to complaints handling. The system should address the risks associated with whichever approach is adopted.

69 In 2019–20, Finance reported one instance of significant non-compliance with the finance law to the Minister for Finance under paragraph 19(1)(e) of the *Public Governance, Performance and Accountability Act 2013*. The Assurance Taskforce was established by Finance in response to the instance of non-compliance.

complaints handling to ensure a consistent approach to how procurement complaints are received and managed'. An Assurance Implementation Taskforce then commenced in December 2020 to lead implementation of the recommendations. An Assurance Implementation Steering Committee had oversight of the implementation, including endorsing closure of recommendations. Internal reporting stated that the recommendation to establish centralised procurement complaints handling was implemented in December 2020.

3.16 The procurement complaints to be handled centrally in Finance were to include 'those of a general nature'. The ANAO found in 2022 that the handling of general procurement complaints had not been centralised.

3.17 ACMA undertook an internal audit of its 2021 procurement to establish the National Self Exclusion Register. At \$14.4 million, this was the highest value tender that ACMA had conducted since its establishment of the Do Not Call Register in 2007. A recommendation in the internal audit's Final Report of December 2021 was for ACMA to update its Procurement and Contract Management Guide to include, among other things, processes for managing complaints lodged under the GPJR Act. ACMA already had this work in train. A Procurement Complaints Handling Procedure had been in draft form since February 2021. It was approved in December 2021 along with an updated Procurement and Contract Management Guide.

## Were supplier complaints to the procuring entities handled appropriately?

Suppliers had made complaints to three of the entities. Of the 15 complaints examined:

- ACMA handled its one complaint in accordance with the GPJR Act, undertaking a thorough yet lengthy investigation;
- DISR handled its seven complaints appropriately, including one under the GPJR Act, with its approach characterised by timeliness and independence; and
- Finance's handling of its seven complaints was timely and largely appropriate, falling short in its handling of a potential GPJR Act complaint and two requests for independent review.

3.18 The ANAO examined in detail the handling of 15 complaints from suppliers about procurements undertaken by the auditees. These comprised one complaint received by ACMA, seven by DISR and seven by Finance. All except two related to 'covered procurements' for the purposes of the GPJR Act (these two complaints were received by DISR). The RBA had not received a complaint that fell within the scope of this audit.

## Receiving complaints

3.19 The CPRs require entities to provide acknowledgement 'soon after' a complaint is received. As the term 'soon after' is not defined, the ANAO adopted a timeframe of three business days for audit analysis purposes.<sup>70</sup>

<sup>70</sup> This was based on other guidance and benchmarks, including the Complaints Handling Charter discussed at paragraph 3.8, which adopted a three-day timeframe.

3.20 All except one of the 15 complaints was acknowledged soon after receipt. That one had been submitted to Finance and, while it was not acknowledged within three business days, it was finalised within five business days of receipt.

### *Assessing if it is a GPJR Act complaint*

3.21 When an accountable authority or official receives a procurement complaint, they should first assess if it meets the requirements of the GPJR Act and if it is intended to be a complaint made under the Act. Should this be unclear then, as RMG 422 states, 'it is the responsibility of the accountable authority to seek immediate clarification from the supplier in order to assess what course of action is required and, in particular, whether the procurement must be suspended under section 20 of the Act'. The ANAO considers three of the 15 complaints warranted such clarification.

3.22 A complaint was made to the ACMA contact for an open request for tender (RFT) and then the supplier directed their complaint to the accountable authority. The complaint did not reference the GPJR Act or a contravention of the CPRs but, as it was a procurement-related complaint received by an accountable authority, ACMA sought clarification from the supplier. It was a GPJR Act complaint and the procurement was suspended (see also paragraph 2.52). The duration from receipt of the initial complaint to suspension of the procurement was five business days.

3.23 A complaint was made to the DISR contact for an open RFT. The supplier did not reference the GPJR Act but did allege a contravention of a relevant CPR. DISR sought clarification from the supplier, who confirmed it was a GPJR Act complaint, and the procurement was suspended (see also paragraph 2.52). The duration from receipt of the complaint to suspension of the procurement was one business day.

3.24 A complaint was made to the Finance contact for an open RFT. Two business days later, the supplier emailed their complaint to the accountable authority and referred to 'the terms of the judicial review legislation'. Finance did not clarify the supplier's intent and handled it as a general procurement complaint. Finance advised the ANAO in July 2022 that it 'was not a complaint to the Accountable Authority made under the GPJR Act, as paragraph 7.4.6 of the RFT states that *Any complaint relating to the RFT which is made under the Government Procurement (Judicial Review) Act 2018 (Cth) is to be lodged using the following link [to Finance's GPJR Act complaints form]*' and the supplier 'did not submit a complaint through this mechanism'. Finance's position is inconsistent with its statement in RMG 422 that there are no formal requirements for making a GPJR Act complaint 'other than it be made in writing to the accountable authority'.

### **Considering complaints**

3.25 Two complaints were handled as GPJR Act complaints, being one by each of ACMA and DISR. Such complaints must be investigated. Subsection 19(1) the GPJR Act provides:

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.

3.26 ACMA's investigation process displayed independence, thoroughness and procedural fairness. ACMA engaged a law firm that had no prior involvement in the procurement to investigate the complaint and prepare the report. Both ACMA and the supplier provided input to

the investigation and comments on the draft report. Both had maintained detailed records, including of their videoconference and telephone conversations, which aided the investigation.<sup>71</sup> The content of the 27-page final report was consistent with the guidance provided in RMG 422.<sup>72</sup>

3.27 The GPJR Act complaint received by DISR was investigated by a departmental procurement officer who 'had not had substantive involvement in the procurement' subject to complaint. The supplier's complaint had included a matter not covered by the GPJR Act, which was dealt with through the same investigation for efficiency. Internal legal advice was obtained on the draft report of the investigation, which resulted in the six-page final report being consistent with the guidance provided in RMG 422.

3.28 Some general procurement complaints can be resolved early, with minimal further assessment being made, while others will require a formal investigation into the alleged matter. DISR and Finance applied a similar mix of these approaches. DISR's complaint handling displayed more characteristics of independence than Finance's.

3.29 All six of DISR's general procurement complaints were handled by its central procurement team, which was independent of the matters subject to complaint.

- Two complaints were resolved early by the procurement officers explaining the applicable Commonwealth procurement rule.
- One complaint was resolved early, following internal legal advice, by DISR's Chief Finance Officer offering the supplier a debriefing.<sup>73</sup>
- Two complaints were investigated by the procurement officers, assisted by internal legal advice and by the probity advisor engaged for the tender process.
- One complaint was investigated by the procurement officers and then, as the supplier was not satisfied, a second investigation took place involving both internal and external legal advice.

3.30 Finance's seven complaints related to three tenders, with the team managing the tender processes being involved to varying degrees in the handling of complaints. A firm was engaged as probity advisor to the three tenders.

- Two complaints were resolved early by the tender team providing detailed responses, with the draft responses having been reviewed by the probity advisor.

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71 RMG 422 advises: 'Properly documenting decisions and keeping clear records will assist relevant Commonwealth entities to address complaints ... entities are also reminded to maintain records of minutes from meetings and telephone conversations, as well as email correspondence with suppliers.'

72 Paragraph 45 of RMG 422 recommends that the investigation report should include: details of the complaint, including the alleged conduct that is the subject of the complaint and the relevant CPR that was allegedly contravened; information on the conduct of the investigation, including any interviews with officials involved in the covered procurement, procurement documentation that has been reviewed, and any additional information sought from the supplier; details of any steps taken to resolve the complaint with the supplier; a summary of the findings of the investigation; and, where the investigation determines contraventions have or may have occurred, details of the proposed remedial action.

73 This complaint had characteristics of unreasonable conduct by a complainant, reflective of an individual experiencing distress, frustration or anger. The NSW Ombudsman has produced useful guidance for entities managing such complaints, as a joint project of the Australasian Parliamentary Ombudsman. A manual and a model policy is available from: <https://www.ombo.nsw.gov.au/guidance-for-agencies/managing-unreasonable-conduct-by-a-complainant> [accessed November 2022].

- The tender team sought to resolve another complaint but the supplier was not satisfied with the outcome. The supplier was advised they could 'request an independent review by Finance' and they requested the review (see paragraph 3.31).
- Two complaints were investigated by the probity advisor. The tender team sent one of the suppliers an accurate summary of the investigation findings and sent the other supplier a copy of the probity advisor's report.
- Two complaints were investigated by the Chair of the tender evaluation team, with the draft letters of outcome reviewed by the probity advisor. One of the suppliers then requested an independent review by Finance (see paragraph 3.32).

3.31 Finance conducted a review in response to the first of the two requests for independent review. According to Finance's records, the reviewer had 'not been involved with the tender evaluation' and their 'assessment remained independent of direction from anyone who was involved in the process'. The Chair had sought guidance from the probity advisor and from the Procurement Agency Advice team within Finance, expressing to both that the independent review process requirements were unclear. The response from the probity advisor was that the reviewer met the criteria for an independent internal review.<sup>74</sup> Despite this, the reviewer's supervisor was also the Chair of that tender's evaluation team and was managing the complaint review process. This situation raises issues with the independence of the approach and highlights the potential benefits of Finance establishing entity-specific procedures for its staff (see paragraph 3.4).

3.32 The other supplier that requested an independent review by Finance had tendered to be a provider of two service subcategories on a coordinated procurement panel<sup>75</sup>, and their complaint related to being unsuccessful against one of these. The tender team's emailed response to the request discouraged such a review by stating:

Finance is of the view that adequate information has already been provided ... If Finance, in its absolute discretion, determines that the independent review has identified a significant flaw in the evaluation process with respect to [the supplier's] tender, and that the circumstances warrant the merits of the decision being reviewed, please be aware that there is no guarantee whatsoever that the outcome will change, or that any new decision will be in [the supplier's] favour.

...

Please be aware, in particular, that the independent review could be adverse and, if Finance determines that the merits of the decision should also be reviewed as a result, this could result in [the supplier] being unsuccessful in both Service Subcategories. ...

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74 The Chair's questions to the probity advisor included whether the reviewer ('a senior experienced procurement specialist in my team') provided adequate independence to meet the requirements of the *Handling Procurement Complaints* process on Finance's website, which is part of its 'Buying for the Australian Government' guidance for entities. The probity advisor replied that the review met the criteria set out on the website.

75 'Coordinated procurement' refers to whole of Australian Government arrangements for procuring goods and services. As per CPR 4.12, non-corporate Commonwealth entities must use coordinated procurements. Exemptions from coordinated procurements can only be granted jointly by the requesting non-corporate Commonwealth entity's Portfolio Minister and the Finance Minister when a non-corporate Commonwealth entity can demonstrate a special need for an alternative arrangement. Prescribed corporate Commonwealth entities may opt-in to coordinated procurements.



If you confirm that you would like to proceed with the independent review, to enable Finance to progress the matter, please ... Acknowledge that you understand that, if Finance determines, in its absolute discretion, that the merits of the decision should be reviewed, there is a possibility that:

- a) there will be no change to the outcome, or
- b) any change to the outcome will be less favourable to [the supplier's] tender and, for example, could result in [the supplier] being unsuccessful in both Service Subcategories.

3.33 Finance did not undertake a review in response to the second of the two requests. Finance advised the ANAO in September 2022 that the supplier had not replied to the above quoted email. Finance also advised in respect of the one service subcategory the supplier was successful against, that:

if an independent review was to be undertaken it was likely that the review would find that [the supplier] did not satisfy the evaluation criteria for this subcategory. In this case, there were inconsistencies with the way that the evaluation criteria was applied across the service subcategories, however, it was to [the supplier's] advantage. [The probity advisor] was consulted and assisted with the drafting of the response to [the supplier] that inferred that it may not be in their best interests to request an independent review of their tender.

3.34 The *Better Practice Complaints Handling Guide* advises and that 'the best complaint handlers ... proactively invite people to access review and escalation options if they seem dissatisfied'.<sup>76</sup> Finance's approach of discouraging a supplier from accessing the offered review option undermines procedural fairness. It is also questionable whether Finance, when considering the interests of the supplier, gave due consideration to the interests of the Australian Government entities required to use the resulting coordinated procurement panel.

## Finalising complaints

3.35 The *Better Practice Complaints Handling Guide* advises that, 'when communicating outcomes, you should include: a short summary of what the complaint was about; what actions were taken to assess and/or investigate each element of the complaint; what information and evidence you considered; reasons for any decisions, findings or conclusions; [and where applicable] any remedial action'.<sup>77</sup> ACMA's, DISR's and Finance's communications with suppliers on the outcomes of the 15 complaints were consistent with this guidance.

3.36 One out of the 15 suppliers received a favourable outcome from their complaint, with the entity setting out remedial actions.

3.37 The CPRs require entities to apply 'timely' complaint-handling procedures. According to the *Better Practice Complaint Handling Guide*, the 'timely actioning of complaints means that the time taken to complete the assessment, and if applicable the investigation, of a complaint is proportionate to the particular issue and the shortest timeframe possible while ensuring a proper outcome is delivered'.<sup>78</sup>

76 Office of the Commonwealth Ombudsman, *Better Practice Complaint Handling Guide*, February 2021, p. 31. Further, p. 39 notes that 'In a procedurally fair system ... there is a process for complainants to seek review of how their complaint was handled'.

77 Office of the Commonwealth Ombudsman, *Better Practice Complaint Handling Guide*, February 2021, p. 31.

78 Office of the Commonwealth Ombudsman, *Better Practice Complaint Handling Guide*, February 2021, p. 40.

3.38 ACMA's handling of the GPJR Act complaint took 78 business days from receipt of the complaint to the outcome being sent to the supplier. The complaint was a complex matter and the procurement value was significant to ACMA's overall funding levels. ACMA's accountable authority wrote to the supplier advising that the investigation was complete and providing a copy of the final report. The report concluded that ACMA had not contravened the relevant CPRs.

3.39 DISR took 11 business days from receipt of its GPJR Act complaint to advising the supplier of the outcome. An authorised delegate had approved the advice. At the request of the supplier, a copy of the final report was subsequently provided and it concluded there was no contravention of the CPRs.

3.40 DISR and Finance were timely in their handling of the general procurement complaints. DISR took from two to nine business days, averaging six business days. DISR therefore achieved its published timeframe of seeking to resolve issues within 10 days. Finance took from two to 15 business days, averaging seven business days. Finance had not set an indicative timeframe for handling complaints.

3.41 The 15 complaints examined included one complaint to DISR about its procurement of delivery partners for the Entrepreneurs' Programme. The scope of the ANAO's examination did not extend to DISR's complaint handling activities following the June 2022 publication of Auditor-General Report No. 42 of 2021–22 about the procurement of the delivery partners. During that audit the ANAO identified seven complaints from five tenderers, either made to DISR or to the ANAO through the citizens contribution facility on the ANAO website. The audit concluded, among other things, that the 'design and conduct of the procurement did not comply with the Commonwealth Procurement Rules'.<sup>79</sup> In an overview of how it was addressing the audit findings, DISR advised the Joint Committee of Public Accounts and Audit in November 2022 that:

The department has written to all unsuccessful tenderers in the 2019 procurement in relation to the non-compliance issues identified in the ANAO audit report. Tenderers were also invited to a briefing with Senior Executives where the department outlined its response to the audit, listened to their concerns and answered questions.

The department is committed to act as a model litigant and has provided details to the tenderers on how to claim for compensation under the *Government Procurement (Judicial Review) Act 2018 (Cth)*. The department is seeking to settle legitimate claims quickly and treat claimants fairly and consistently.<sup>80</sup>

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79 Auditor-General Report No. 42 of 2021–22, *Procurement of Delivery Partners for the Entrepreneurs' Programme*, June 2022. The audit conclusion is at paragraphs 8–10. The audit findings relating to complaints are at paragraphs 2.112–2.113, Table 2.4 and Appendix 6.

80 Department of Industry, Science and Resources, Submission 5, Joint Committee of Public Accounts and Audit, Inquiry into Commonwealth Procurement: Auditor-General Reports 6, 15, 30, 42 (2021–22) and 5 (2022–23), November 2022, p. 3.

## Were supplier complaints to the Procurement Coordinator handled appropriately?

Finance's investigations were thorough for complaints it had accepted as 'official complaints' to the Procurement Coordinator. Its responsiveness to, and handling of, supplier complaints was otherwise below the standard expected. Accessibility was poor, customer service was poor and the handling process took too long.

3.42 If a supplier is not satisfied that their complaint was sufficiently addressed by the procuring entity, then they may seek review through other mechanisms. These include the Procurement Coordinator within Finance (background on the role is provided in paragraphs 1.9 to 1.10).

### Receiving complaints

3.43 Where a supplier raises concerns with the Procurement Coordinator without evidencing they were first raised with the procuring entity, then Finance's standard response includes:

We suggest you seek a debrief from the agency responsible for the procurement (if you have not already done so). The complaint handling charter (found at [\[hyperlink\]](#)) notes that complaints, in the first instance, should be referred to the agency managing the procurement process. This is due to the Commonwealth Procurement Framework being devolved by nature, meaning each agency and area is responsible for its own procurement processes and decisions in order to meet its business needs.

Following a debriefing, if you still have concerns, a complaint may be lodged with the Procurement Coordinator, using the Online Complaints Form referenced in the Complaints Handling Charter, requesting a review [of] the process.

3.44 Given few approaches are made to the Procurement Coordinator each year, there is opportunity for Finance to customise its responses to better assist suppliers. The *Better Practice Complaint Handling Guide* notes that 'it can be hard for people to know where they should direct their complaint' and agencies should 'help people find the right complaint pathway and avoid people getting stuck, frustrated or lost on a referral roundabout'. The following sequence of events from late 2020 provide an example of a supplier who may have benefited from greater engagement by the Procurement Coordinator Secretariat.

- 9 September: The supplier emailed the Procurement Coordinator with concerns. The email included an extract of the reasons given by the procuring entity for the supplier's tender being unsuccessful and a copy of the request for tender, which did not explain where to send complaints.
- 10 September: Finance replied, directing the supplier to seek a debrief from the procuring entity as per the standard wording quoted above in paragraph 3.43.
- 29 October: The supplier emailed its procurement concerns to the Office of the Commonwealth Ombudsman. The email did not mention these had been raised previously with the Procurement Coordinator.
- 17 November:
  - The Office replied, suggesting the supplier raise the issue with the Procurement Coordinator and providing a link to Finance's Procurement Coordinator webpage; then

- the supplier forwarded the email chain to the Procurement Coordinator mailbox.
- 27 November: Finance replied to the supplier, again directing them back to the procuring entity using the standard wording quoted above in paragraph 3.43.

Greater assistance was warranted in that instance and, while 80 days had passed since the supplier's first email, Finance had received only one new matter in the mailbox during that time.

3.45 When a supplier's complaint is accepted for consideration it is recorded in the Procurement Coordinator register as being an 'official complaint'. There were seven 'official complaints' recorded in the register as having been both lodged and completed since 19 April 2019. Four out of the seven complaints related to 'covered procurements' for the purposes of the GPJR Act.

#### *Official complaints*

3.46 Finance requires that official complaints be lodged using an online complaint form. The Complaints Handling Charter on Finance's website advises suppliers that the details they need to provide via that form include: 'copies of any documents relating to your complaint; and a copy of the entity response to your complaint'.

3.47 The online complaint form is not fit for this purpose because the form does not let suppliers upload documents. The form contains fields for suppliers to enter their contact details and the tender details, and then a free-text field for outlining the issues they wish to raise.

3.48 When an online complaint form is lodged, the system sends the supplier a confirmation of receipt. The system is also to send a copy of the form to the Procurement Coordinator mailbox. The Complaints Handling Charter advises suppliers that they will receive acknowledgement from the Procurement Coordinator Secretariat within three business days of lodgement.

3.49 On 2 November 2021, a supplier phoned and then emailed Finance to advise they had not received acknowledgement of a recently submitted complaint. The Procurement Coordinator Secretariat was unaware of the complaint and investigated why. On 3 November 2021, Finance identified that submitted forms were no longer being sent to a mailbox. There were five complaint forms awaiting attention.

3.50 The oldest of the five complaint forms had been lodged 17 months prior, on 11 June 2020. A further three weeks after identifying this complaint, Finance spoke to the supplier on 24 November 2021 to apologise for the delay in responding. The supplier advised they had concurrently raised their concerns with the procuring entity and its Minister, and the matter was resolved. The conversation was followed up with an emailed apology from the Procurement Coordinator. This complaint did not require further consideration by Finance.

3.51 The second oldest of the five complaint forms had been lodged more than 10 months prior. The supplier had emailed the Procurement Coordinator mailbox on 15 December 2020 to ask how to upload the required documents with the complaint form. After not having received a response for five days, the supplier lodged a complaint form and emailed its documentation to the Procurement Coordinator mailbox on 20 December 2020. Finance had accepted and registered it as an 'official complaint' on the basis of email exchanges.

3.52 The other three complaint forms had been awaiting attention for three, 13 and 46 business days respectively. Finance emailed the three suppliers on 3 November 2021 to apologise for the

delay in confirming receipt and it registered their complaints as 'official complaints' for further consideration.

3.53 To help ensure that complaint forms lodged in the future were sent to the Procurement Coordinator mailbox, Finance updated its draft procedural guidance to include regular testing of the online form. Finance also amended the form itself, and the Complaints Handling Charter, to advise suppliers that: 'If receipt of your complaint has not been acknowledged after three business days, please email [ProcurementCoordinator@finance.gov.au](mailto:ProcurementCoordinator@finance.gov.au)'.

3.54 Two complaint forms were lodged by suppliers after the system issue had been addressed (one in December 2021 and one in February 2022). The system sent these to the Procurement Coordinator mailbox as intended and the Secretariat registered them as 'official complaints'.

### Considering and finalising complaints

3.55 The ANAO examined the handling of the six 'official complaints' that required further consideration by Finance. Finance's considerations included liaison with relevant Australian Government entities. Cooperating with Finance on procurement complaint and compliance matters is in keeping with the obligation on accountable authorities of non-corporate Commonwealth entities to govern their entities in a way that is not inconsistent with the policies of the Australian Government.<sup>81</sup> The CPRs incorporate government policy in procurement and the Procurement Coordinator role was established by government policy (see paragraph 1.9).

3.56 As a result of Finance's liaison activities, three out of the six complaints were not progressed for investigation by the Procurement Coordinator. This was because:

- in one case, the complaint did not relate to a procurement undertaken by an Australian Government entity and so fell outside the scope of the Procurement Coordinator (see case study 1 in Appendix 7); and
- in two cases, the procuring entities had not completed their own investigations. Both suppliers were informed that they could re-submit their complaint to the Procurement Coordinator following a response from the procuring entity, if they wished.

3.57 Finance undertook a comprehensive investigation of the other three complaints. This involved reviewing the process for the procurement referenced in the complaint, focusing on the requirements under the Commonwealth Procurement Rules and, where applicable, the shadow economy procurement connected policy.<sup>82</sup> Finance provided each supplier a detailed letter of outcome. The letters ranged from four to six pages and outlined: the role of the Procurement Coordinator; the details of the complaint; Finance's engagement with other entities; a timeline of the relevant facts of the procurement process; Australian Government policy considerations; and

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81 Section 21 of the *Public Governance, Performance and Accountability Act 2013* states: 'The accountable authority of a non-corporate Commonwealth entity must govern the entity in accordance with paragraph 15(1)(a) in a way that is not inconsistent with the policies of the Australian Government'. It goes on to note: 'Paragraph 15(1)(a) is about promoting the proper use and management of public resources for which the accountable authority is responsible'.

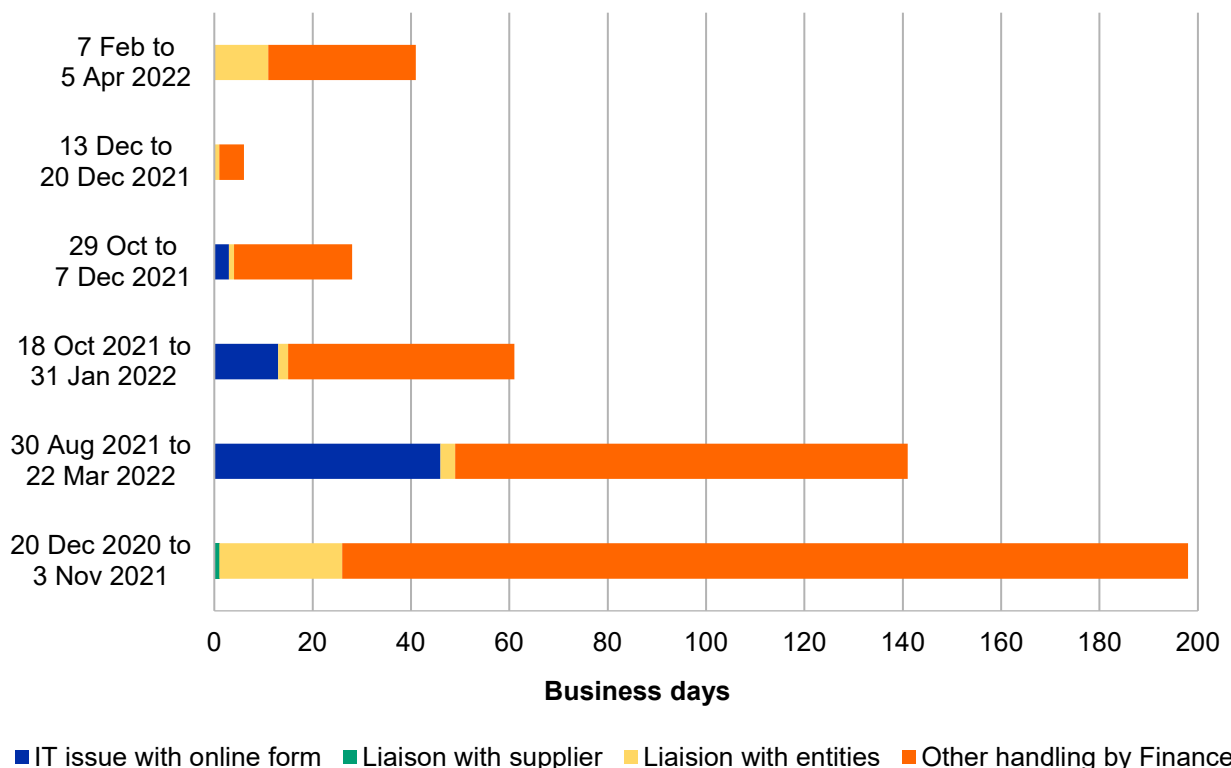
82 Seven of the 33 supplier complaints referred to throughout this Chapter 3 related to the shadow economy procurement connected policy, with this being the most common topic of complaint identified in the entity records examined. The Treasury has primary responsibility for the policy. An ANAO performance audit on the effectiveness of the implementation of the government response to the Black Economy Taskforce report more broadly is in progress.

the Procurement Coordinator’s response to the complaint. For all three the Procurement Coordinator was of the view that the requirements of the Commonwealth Procurement Rules, as they relate specifically to the complaint, had been met. Finance also advised the procuring entities of the outcome of the complaints.

3.58 For each of the six official complaints, the ANAO calculated the number of business days between the date the supplier lodged their complaint and the date Finance informed them of the outcome. ‘Business days’ can better represent work effort and potential for time-efficiency savings. The time taken to consider each of the three complaints that the Procurement Coordinator did not accept for investigation was: six, 28 and 141 business days. While the time taken for each of the three complaints formally investigated was: 41, 61 and 198 business days.

3.59 The ANAO analysis indicates the elapsed time taken to handle the six complaints (475 business days) was attributable to the following factors: 13 per cent to the IT system issue with the online complaint form; 0.2 per cent to liaison with the supplier; nine per cent to liaison with other entities; and 78 per cent to other handling activities by Finance. The results of the ANAO’s analysis per complaint are outlined in Figure 3.1. Case studies of Finance’s handling of two of the complaints are provided in Appendix 7.

**Figure 3.1: Time taken to consider six complaints to the Procurement Coordinator**



Source: ANAO analysis of Finance records.

3.60 As was noted at paragraph 3.8, Finance did not set target or indicative timeframes for resolving complaints that could be used to measure timeliness. The timeframes for most complaints, however, appeared excessive and inconsistent with the *Better Practice Complaint Handling Guide*’s definition of the ‘timely actioning of complaints’ (see paragraph 3.37).

3.61 Finance did not keep suppliers adequately informed of progress. The updates on progress that were given tended to be in response to supplier requests rather than proactive. According to the records examined, there was no contact made with the supplier that waited 41 business days for an outcome, other than the initial acknowledgement of receipt. In respect of the complaint that took 197 business days to finalise, there was no contact with the supplier recorded throughout the last 153 business days (see case study 2 in Appendix 7).

3.62 Finance advised the ANAO in September 2022 that:

Finance intends to refresh our internal guidance as to how complaints will be dealt with in future, including how suppliers lodging a complaint are kept informed of the progress of their complaint. In addition, we will give consideration to placing performance indicators around response timeframes to the initial complaints. We have started to look into the appropriateness of a Customer Relationship Management system to manage and monitor complaints being submitted for the consideration of the Procurement Coordinator. We will use the preliminary audit findings, when they are available, to help continue to address the shortcomings identified in the management to date.

3.63 It is questionable if the complaints handling function, as currently promoted and operated by Finance, is delivering on the policy decision taken over 13 years ago to 'establish a Procurement Coordinator to advise on the procurement framework and respond to concerns regarding procurement policy and its implementation'.<sup>83</sup> In its roles as Procurement Coordinator and as steward over Australian Government procurement systems and policies, Finance should demonstrate better practice in procurement complaints handling.

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83 Australian Government, Mid-Year Economic and Fiscal Outlook 2009–10, Appendix A: Policy decisions taken since the 2009–10 Budget, Commonwealth of Australia, Canberra, 2009, p.210.

## Recommendation no. 4

3.64 The Department of Finance review how the Procurement Coordinator complaint mechanism is promoted and operated, and implement arrangements that improve:

- (a) its accessibility to suppliers with concerns regarding Australian Government procurement policy and its implementation by entities; and
- (b) customer service and the timeliness of complaints handling.

**Department of Finance response:** *Agreed.*

3.65 *The Department of Finance (Finance) view the audit findings as an opportunity to continue to build on process improvement initiatives undertaken through the course of this audit to further enhance processes and guidance in relation to the complaints handling process for the Procurement Coordinator complaints mechanism.*

3.66 *Finance will improve supplier awareness of the Procurement Coordinator complaints mechanism by improving its visibility on the Selling to the Australian Government website. Finance will also continue to work with entities to ensure appropriate accessibility and coverage of complaints information on entities websites.*

3.67 *Finance have commenced updating its procedural documentation for the handling of complaints made to the Procurement Coordinator with a focus on improving response timeframes and keeping suppliers better informed of the progress of their complaint.*

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Grant Hehir  
Auditor-General

Canberra ACT  
6 April 2023



## **Appendices**

## Appendix 1 Entity responses



### Australian Government Department of Finance

Jenny Wilkinson PSM  
Secretary

Our Ref: EC23-000149

Mr Grant Hehir  
Auditor General  
Australian National Audit Office  
GPO Box 707  
CANBERRA ACT 2601

Dear Mr Hehir

I refer to your correspondence dated 21 February 2023 providing the proposed Audit Report on *Procurement Complaints Handling* (the Report) pursuant to section 19 of the *Auditor General- Act 1997* and seeking a response from the Department of Finance (Finance).

Thank you for the opportunity to respond to the matters raised in the proposed Report. Finance agrees with all four recommendations. Please find attached Finance's Summary Response and response to the recommendations.

Finance places significant importance on its stewardship role assisting Commonwealth entities to undertake best practice procurement and is continuously reviewing and enhancing the Commonwealth Procurement Framework to ensure it meets Government policies and expectations as well as our international obligations.

Finance views the Report findings as an opportunity to continue to develop and refine procurement complaints processes and guidance, building on the process improvement initiatives undertaken during the course of this audit.

Yours sincerely

  
Jenny Wilkinson  
Secretary

21 March 2023



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Communications  
and Media Authority**

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**Chair and Agency Head**

Mr Grant Hehir  
Auditor-General for Australia  
Australian National Audit Office  
GPO Box 707  
Canberra ACT 2601

ACMA file reference: ACMA2021/527-11

Dear Auditor-General

**Audit report on Procurement Complaints Handling**

I refer to the Australian National Audit Office's (ANAO's) correspondence dated 21 February 2023 providing the proposed audit report on Procurement Complaints Handling and seeking a response from the Australian Communications and Media Authority (ACMA).

I note and welcome the conclusion of the ANAO that the ACMA appropriately handled complaints from suppliers under the *Government Procurement (Judicial Review) Act 2018*.

The ACMA welcomes and acknowledges the audit recommendations and findings. Although no recommendations have been directed towards the ACMA, we are committed to implementing actions to address those areas identified for improvement. This includes improving the availability of information regarding procurement complaints on the ACMA website and in procurement documentation.

I would like to express my thanks to the ANAO audit team, who were professional and collaborative during their engagement with my staff.

A summary of the ACMA's response has been provided separately for inclusion in your audit report.

Thank you for the opportunity to respond to the proposed audit report.

Yours sincerely

Nerida O'Loughlin PSM  
8 March 2023



Australian Government  
Department of Industry,  
Science and Resources

OFFICE OF THE SECRETARY

Meghan Quinn PSM

Mr Grant Hehir  
Auditor-General for Australia  
Australian National Audit Office  
38 Sydney Avenue  
Forrest ACT 2603

Dear Mr ~~Hehir~~ Grant

Thank you for your correspondence dated 21 February 2023 which sought comment from the Department of Industry, Science and Resources (the department) on the proposed report for the performance audit of Procurement Complaints Handling.

The department notes the audit's recommendations, opportunities for improvements, and the key messages for all Australian Government entities in respect of better informing suppliers about making procurement complaints including making complaint mechanisms more accessible.

The department acknowledges the findings and recommendations in the report and will consider all recommendations to identify opportunities for improvement to our policies, processes and guidance on procurement and complaints handling.

I thank the Australian National Audit Office for its report and for the important work it is doing to provide assurance to the Parliament and Australian people about the proper use of public resources.

Yours sincerely

17 March 2023



RESERVE BANK OF AUSTRALIA

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[lowep@rba.gov.au](mailto:lowep@rba.gov.au)

Philip Lowe  
GOVERNOR

24 February 2023

Mr Brian Boyd  
Executive Director  
Australian National Audit Office

By Email – [Brian.Boyd@anao.gov.au](mailto:Brian.Boyd@anao.gov.au)

Dear Mr Boyd

Thank you for the opportunity to comment on the audit report on Procurement Complaints Handlings. The RBA does not have any matters it wants to raise in regards to this report.

Yours sincerely

A handwritten signature in blue ink that reads 'Philip Lowe'.

cc: Carla Jago ([Carla.Jago@anao.gov.au](mailto:Carla.Jago@anao.gov.au))  
Tracey Bremner ([Tracey.Bremner@anao.gov.au](mailto:Tracey.Bremner@anao.gov.au))

A2319064

17 March 2023

Mr Grant Hehir  
Auditor-General for Australia  
Australian National Audit Office

By email to: [OfficeoftheAuditorGeneralPerformanceAudit@anao.gov.au](mailto:OfficeoftheAuditorGeneralPerformanceAudit@anao.gov.au)

Dear Mr Hehir 

**Proposed Report under s 19 of the Auditor-General Act 1997 – Procurement Complaints Handling**

Thank you for the opportunity to reply to your proposed Report regarding Procurement Complaints Handling.

As outlined in your Report, the Office of the Commonwealth Ombudsman (the Office) is responsible for handling complaints about the administrative actions and decisions of Australian government agencies. In some instances, the Office receives complaints related to government procurement. While, for the reasons outlined at paragraph 2.129 in your proposed report, my Office does not usually act on these complaints, it is important to note that we can and do consider, and may investigate, such complaints when satisfied it is warranted. All complaints are important and provide my Office with valuable insights into public administration, whether or not they are investigated.

I note the 4 recommendations to the Department of Finance and the key messages for all Australian Government entities in your proposed report. I appreciate and support your key messages about complaint handling, noting they reiterate sound principles, and acknowledge the valuable insights complaints can provide to inform improvement.

Finally, I note the references throughout the Report to my Office's *Better Practice Complaint Handling Guide*. I was pleased to publish an updated version of the Guide in February 2023 and hope that its inclusion in your report will support increased awareness among readers of the core principles of good complaint handling systems.

Yours sincerely



Iain Anderson  
Commonwealth Ombudsman  
*Influencing systemic improvement in public administration*



Australian Government

Defence

PO Box 7900 CANBERRA BC ACT 2610

EC23-000688

**Mr Grant Hehir**  
Auditor-General  
PO BOX 707  
CANBERRA ACT 2601

Dear Mr Hehir

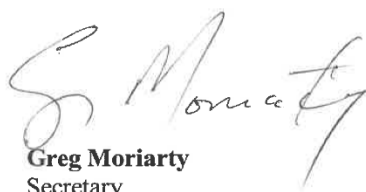
**Australian National Audit Office (ANAO) Extract from Section 19 Proposed Report – Procurement Complaints Handling.**

Thank you for the opportunity to comment on the extract from the Proposed Report for the ANAO performance audit *Procurement Complaints Handling*.

Defence remains committed to providing an effective user-centred procurement complaints handling process compliant with the Commonwealth Procurement Rules (CPRs). Defence is also committed to providing accurate up-to-date information about its complaints handling process on its website for Australian community access.


Our point of contact is the ANAO Liaison Officer who can be contacted via email at: [anao.lo@defence.gov.au](mailto:anao.lo@defence.gov.au).

Yours sincerely



**Greg Moriarty**  
Secretary

12 March 2023



**Angus J Campbell, AO, DSC**  
General  
Chief of the Defence Force

13 March 2023

**From:** [Amanda Cattermole](#)  
**To:** [Office of the Auditor-General - Performance Audit](#)  
**Cc:** [Brian Boyd](#); [Tracey Bremner](#)  
**Subject:** Re: Extract from Auditor-General Proposed Audit Report on Procurement Complaints Handling\_ADHA  
[SEC=OFFICIAL:Sensitive]  
**Date:** Friday, 24 March 2023 1:04:23 PM  
**Attachments:** [image002.jpg](#)  
[image003.jpg](#)

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Dear Mr Hehir and team

Thank you so much for your letter below.

I have read the extract provided and am very comfortable with the inclusion of the reference to the Australian Digital Health Agency as it appears in that extract.

I do not need this reply included in the report as an appendix but please treat it as formal confirmation of the Agency position in relation to this matter.

Yours sincerely

Amanda Cattermole  
CEO  
Australian Digital Health Agency

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## Appendix 2 Improvements observed by the ANAO

1. The existence of independent external audit, and the accompanying potential for scrutiny, improves performance. Improvements in administrative and management practices usually occur: in anticipation of ANAO audit activity; during an audit engagement; as interim findings are made; and/or after the audit has been completed and formal findings are communicated.
2. The Joint Committee of Public Accounts and Audit (JCPAA) has encouraged the ANAO to consider ways in which the ANAO could capture and describe some of these impacts. The ANAO's 2021–22 Corporate Plan states that the ANAO's annual performance statements will provide a narrative that will consider, amongst other matters, analysis of key improvements made by entities during a performance audit process based on information included in tabled performance audit reports.
3. Performance audits involve close engagement between the ANAO and the audited entity as well as other stakeholders involved in the program or activity being audited. Throughout the audit engagement, the ANAO outlines to the entity the preliminary audit findings, conclusions and potential audit recommendations. This ensures that final recommendations are appropriately targeted and encourages entities to take early remedial action on any identified matters during the course of an audit. Remedial actions entities may take during the audit include:
  - strengthening governance arrangements;
  - introducing or revising policies, strategies, guidelines or administrative processes; and
  - initiating reviews or investigations.
4. In this context, the below actions were observed by the ANAO during the course of the audit. It is not clear whether these actions and/or the timing of these actions were planned in response to proposed or actual audit activity. The ANAO has not sought to obtain assurance over the source of these actions or whether they have been appropriately implemented.

### Australian Communications and Media Authority (ACMA)

5. ACMA advised the ANAO in November 2022 that it was working with the Department of Finance to enable the AusTender reporting of contracts entered for the purposes of the eSafety Commissioner since 23 January 2022, when the *Online Safety Act 2021* commenced (see paragraph 2 of Appendix 3). ACMA had been relying on advice (obtained in 2015 when eSafety started operations and confirmed in March 2022) that the AusTender reporting arrangements at paragraph 7.18 of the Commonwealth Procurement Rules (CPRs) did not apply to the eSafety procurements. As CPR 7.18 is a relevant CPR for the purposes of the *Government Procurement (Judicial Review) Act 2018*, this advice was questioned during the conduct of the audit. ACMA updated the ANAO in December 2022, advising that it had signed a Memorandum of Agreement with the Department of Finance to have eSafety created as a reporting entity in AusTender and was in the process of quality assuring the bulk upload of contracts. (See also updated information in ACMA's summary response to the proposed audit report at paragraph 20.)

### Department of Finance (Finance)

6. Finance had put in place a process for dealing with potential complaints to the Procurement Coordinator that give rise to a conflict of interest (see paragraph 3.9) and had

commenced updating its procedural documentation for the handling of Procurement Coordinator complaints (see paragraph 3.7). Finance advised the ANAO in September 2022 that it was giving consideration to response timeframes and how suppliers lodging a complaint to the Procurement Coordinator are kept informed of progress (see paragraph 3.62).

7. Finance advised the ANAO in July 2022 that it was:

- in the planning stage of a review of Resource Management Guide 422 (RMG 422)—*Handling complaints under the Government Procurement (Judicial Review) Act 2018*:

The review will consider how the guidance has been used in practice, and given entities experience in receiving/dealing with complaints, how the guidance could be strengthened in light of that experience.

...

In conducting the review Finance will consult and seek feedback from Commonwealth entities subject to the Act, as well as Industry, on their experience with the Act and RMG 422, including managing complaints under the Act and issuing of Public Interest Certificates. Finance will also consider previous queries for clarification and feedback that has been received from entities in the review. The update of RMG 422 will not include changes to legislation or Australia's international obligations.

Following the consultation period, Finance will review the feedback received and identify relevant changes that could be made to improve RMG 422. Further consultation may be undertaken with entities based on the responses received and any changes that are proposed.

- establishing a Procurement Complaints Reference Group that will:
  - provide a forum for members to engage openly and collaboratively on the procurement complaints management processes implemented by their respective entities. The Reference Group will focus on:
    - entity processes for managing, tracking and responding to procurement complaints
    - best practice procurement and lessons learnt to reduce future procurement complaints
    - guidance available or required to support entities to successfully manage procurement complaints
    - challenges entities may encounter with regards to procurement complaints

Membership is proposed to be made up of procuring officials from approximately twelve entity central procurement teams. Terms of reference are being finalised and invitations to entities are expected to be sent out in the next fortnight.

8. Finance updated the ANAO in December 2022 on its progress with reviewing the complaints handling guidance on the Finance website, as well as its internal processes and guidance for handling Finance procurement complaints:

the Procurement Quality Review Team (PQRT) and Legal teams have collaborated to develop a range of initiatives to assist suppliers and Finance staff in handling procurement complaints:

1. The GPJR complaints online form has been amended to workflow to both PQRT and Legal team's inboxes to ensure prompt receipt and processing of complaints. This was completed in October 2022 and Finance has since received and processed GPJR complaints from suppliers;

2. Working with Procurement and Insurance Division to delineate between advice on the Finance website regarding Whole-of-Australian-Government (WoAG) advice on procurement complaints and procurement complaints directed to Finance as an entity. The WoAG advice has been published (links below), and the Finance specific content is under review and pending approval for publication;

- a. <https://www.finance.gov.au/business/procurement/procurement-complaints-business>
- b. <https://www.finance.gov.au/government/procurement/buying-australian-government/handling-procurement-complaints>
- c. <https://www.finance.gov.au/business/procurement/procurement-coordinator-complaints-handling-charter>

3. Subject to outward-facing content being approved and published, internal guidance is under re-development to provide more information and clarity to Finance staff on the process and roles in handling a procurement complaint; and

4. A central procurement complaints register is under development, pending upgrade of Finance software infrastructure. (See also updated information at paragraph 3.12.)

## Appendix 3 ANAO audit methodology

1. The audit methodology included engagement with officials of the entities subject to audit, being the Department of Finance, the Department of Industry, Science and Resources, the Australian Communications and Media Authority (ACMA) and the Reserve Bank of Australia. The methodology also included the examination of entity records and websites.
2. Procurement is one of the corporate support services that ACMA provides to eSafety, which is an independent statutory office. The eSafety Commissioner is an official of ACMA for the purposes of the finance law within the meaning of the *Public Governance, Performance and Accountability Act 2013*, as per section 170 of the *Online Safety Act 2021*. ACMA's policies and procedures apply to the ACMA and eSafety procurements equally and therefore the ANAO's audit methodology does not distinguish between them.
3. The authoritative publications and legislation the ANAO referred to in the conduct of this audit included:
  - Australian Standard AS 10002:2022, Guidelines for complaint management in organizations, March 2022;
  - Office of the Commonwealth Ombudsman, *Better Practice Complaint Handling Guide*, February 2021<sup>84</sup>;
  - *Government Procurement (Judicial Review) Act 2018* and related explanatory memorandum for the Government Procurement (Judicial Review) Bill 2017;
  - Department of Finance, Resource Management Guide No. 422: Handling complaints under the Government Procurement (Judicial Review) Act 2018; and the
  - Department of Finance, Commonwealth Procurement Rules, with all paragraph references in this audit report pertaining to the 1 July 2022 version unless otherwise specified.
4. The ANAO adopted the *Better Practice Complaint Handling Guide* definition of 'complaint', which is 'an implied or express statement of dissatisfaction where a response is sought, reasonable to expect or legally required'.<sup>85</sup> The inclusion of 'implied' complaints is consistent with Australian Public Service Commission advice that, 'It is good practice to be alert to communications that might constitute a complaint, even when the word "complaint" is not used'.<sup>86</sup> The ANAO also adopted the GPJR Act definition of 'supplier', being a person, partnership or other group 'that supplies, or could supply, goods or services'. This encompasses the CPR definitions of 'potential supplier', 'supplier' and 'tenderer'.
5. The ANAO did not engage with the complainants, and they have not been identified in the audit findings. Suppliers and other members of the public were welcomed to contribute via the 'Contribute to this audit' facility on the ANAO website.

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84 The February 2021 version was current at the time of audit. An updated version of the Guide was published in February 2023 and is available from <https://www.ombudsman.gov.au/publications-resources-and-faqs>. In the context of this audit there were no significant changes between the versions.

85 Office of the Commonwealth Ombudsman, *Better Practice Complaint Handling Guide*, February 2021, p. 5.

86 Australian Public Service Commission, *Values and Code of Conduct in Practice* [Internet], available from <https://www.apsc.gov.au/publication/aps-values-and-code-conduct-practice> [accessed December 2022].

## Sampling method

6. The audit methodology included examining the procurement complaints information provided on entity websites and in a sample of approaches to market (such as in request for tender documentation). For each of the four entities subject to audit, the sampling method involved randomly selecting five covered procurements conducted by open tender, and three by limited tender, between 19 April 2019 and 16 February 2022. To ensure currency, two procurements that were open for tender during July to November 2022 were included in the sample for each entity.

7. The ANAO also produced comparator data by testing the complaints information that a sample of other Australian Government entities provided on their websites and in their request for tender documentation. The sampling method involved selecting every entity that had a tender open on 9 November 2021, 24 March 2022 and/or 4 August 2022.<sup>87</sup> This resulted in a sample size of 41 entities. The ANAO randomly selected three of the Department of Defence's open tenders for testing (one from each of three Groups within Defence) and one open tender from each of the other 40 entities. As the ANAO downloaded the request for tender documentation from AusTender and did not engage with the 41 entities, they are not identified in the audit findings.

8. The 45 entities tested (being the four auditees and the 41 comparators) accounted for 84 per cent of contracts reported on AusTender in 2021–22 by number or 95 per cent by value.

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87 One date was arbitrarily selected at audit planning stage, one at the end of evidence gathering stage, and one at the mid-point of these. The ANAO excluded itself from the sample of relevant entities, to avoid a conflict of interest that could not be managed. The ANAO included itself when counting the number of public interest certificates reported across all relevant entities (no public interest certificate had been issued or reported by the ANAO).

## Appendix 4      Extent of coverage of the GPJR Act provided through the Commonwealth Procurement Rules

1. The ANAO examined the extent of coverage by the *Government Procurement (Judicial Review) Act 2018* (GPJR Act) that has been provided through the Commonwealth Procurement Rules (CPRs), including whether it was consistent with the scope of recommendation 11 of the July 2014 Senate Report and with meeting international obligations on government procurement. This Appendix 4 provides further detail on the audit findings summarised in paragraphs 2.76 to 2.87. A related ANAO recommendation is at paragraph 2.88.

### Relevant CPRs

2. The CPRs incorporate the requirements of Australia's international trade obligations and government policy in procurement into a set of rules, which apply to procurement conducted by relevant Commonwealth entities (see paragraph 1.2). The 'relevant CPRs' are defined in section 4 of the GPJR Act as:

- (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.

3. The CPRs are non-disallowable legislative instruments issued by the Minister for Finance under section 105B(1) of the *Public Governance, Performance and Accountability Act 2013*. Changes introduced in the CPRs issued 20 April 2019 included adding paragraph 6.9 to declare the relevant provisions of Division 1 for the purposes of the GPJR Act definition above. As per Finance advice of March 2019 to the Minister, the provisions selected from Division 1 were 'limited to those that reflect our international obligations'. The March 2019 advice also informed the Minister that:

The Office of Trade Negotiations and the Trade and Investment Law Branch in DFAT, and the Office of International Law in AGD were consulted and have provided legal advice to ensure the revised language in the CPRs is consistent with Australia's international obligations. AGS provided advice on the operation of the CPRs and the Judicial Review Act.

4. The resulting relevant CPRs are outlined in Table A.1 below.

**Table A.1:      Relevant CPRs for the purposes of the GPJR Act**

| Section  | CPR Paragraph(s) |
|--|------------------|
| Division 1                                     |                  |
| 4. Value for money: Third-party procurement    | 4.18             |
| 5. Encouraging competition: Non-discrimination | 5.4              |
| 7. Accountability and transparency:            |                  |
| • Records                                      | 7.2              |
| • Notifications to the market                  | 7.10, 7.13–7.15  |
| • Providing information                        | 7.16–7.17        |
| • Reporting arrangements                       | 7.18, 7.20       |

| Section   | CPR Paragraph(s) |
|---|------------------|
| 9. Procurement method: Requirement to estimate value of procurement | 9.3–9.6          |
| Division 2  |                  |
| 10. Additional rules: all subsections                               | All paragraphs   |

Source: ANAO analysis of section 4 ‘Definitions’, *Government Procurement (Judicial Review) Act 2018*, and of paragraph 6.9 of the Commonwealth Procurement Rules.

5. Finance also advised the Minister in March 2019 that if certain other changes were not made then ‘the scope of potential supplier complaints would be broader than what is required by Australia’s international obligations’. The proposed changes were included in the 20 April 2019 CPRs and involved narrowing the definition of ‘procurement’ so as to ‘reduce the risk of a complaint on matters that are not required by our international obligations’ (see further at paragraph 1.8) and moving three paragraphs that reflected Australian Government policy out of Division 2 and into Division 1. Specifically, paragraphs 10.32, 10.33 and 10.39 from Division 2 of the 1 January 2019 CPRs were moved to paragraphs 4.7, 4.8 and 7.26 in Division 1 of the 20 April 2019 CPRs:

- ‘to ensure broader benefits to the Australian economy is not caught by the GPJR Act’; and
  - ‘to ensure contract management and standard verification is not caught by the GPJR Act’.
6. Other provisions that relevant entities ‘must’ comply with<sup>88</sup> that were not declared relevant CPRs for the purposes of coverage by the GPJR Act include paragraphs:
- 4.4 and 4.5 — officials must consider the relevant financial and non-financial costs and benefits of each submission and must be satisfied that the procurement achieves a value for money outcome;
  - 4.9 — entities must comply with applicable procurement-connected policies;
  - 4.12 — non-corporate Commonwealth entities must use coordinated procurements;
  - 4.14 and 4.15 — entities joining an existing contract must ensure, among other things, that the goods and services being procured are the same as provided for within the contract and that the terms and conditions are not being materially altered;
  - 6.6 — officials must act ethically throughout the procurement (see further at paragraphs 2.119 to 2.120);
  - 6.7 — entities must not seek to benefit from supplier practices that may be dishonest, unethical or unsafe; and
  - 6.8 — entities must apply timely, equitable and non-discriminatory complaint-handling procedures.

## Covered procurement

7. Section 5 of the GPJR Act provides that a procurement is a ‘covered procurement’ if the rules in Divisions 1 and 2 of the CPRs apply and it is not included in a class of procurements

<sup>88</sup> Rules that must be complied with in undertaking procurement are denoted in the CPRs by the term ‘must’. The term ‘should’ indicates good practice.

specified in a determination made by the Finance Minister by legislative instrument.<sup>89</sup> There were no determinations made for this purpose on the Federal Register of Legislation as at 31 December 2022.

8. Division 1 of the CPRs applies to all procurement by non-corporate Commonwealth entities regardless of value, and to procurement by prescribed corporate Commonwealth entities when the expected value is at or above the relevant procurement threshold.<sup>90</sup> Division 2 applies if the expected value of the procurement is at, or above, the relevant procurement threshold.<sup>91</sup> Exemptions are set out in paragraph 2.6 and Appendix A of the CPRs, which were amended by the Australian Government in the context of the GPJR Act commencing, as outlined below.

9. Paragraph 2.6 provides for the application of measures determined to be necessary in specified situations, such as for the 'restoration of international peace and security' or 'to protect human health'. For the 20 April 2019 CPRs:

- the beginning of paragraph 2.6 was changed from 'Nothing in any part of these CPRs prevents an official from applying measures...' to 'These CPRs do not apply to the extent that an official applies measures ...' and
- a footnote was added stating, 'Where such measures are applied, because Divisions 1 and 2 do not apply in full to the procurement, this has the effect that the procurement is not a covered procurement ...'

10. Appendix A, and related paragraphs 3.5, 3.6 and 3.9, were amended for the 20 April 2019 CPRs so that procurement of the kinds of goods and services listed in Appendix A<sup>92</sup> would be exempt from the rules of Division 2 (and therefore would not be covered procurement) regardless of whether the entity chose to utilise the exemption. For example, paragraph 3.9 in the:

- 1 January 2019 CPRs commenced, 'When an Appendix A exemption applies, and the relevant entity chooses to utilise the exemption, the procurement is exempt from the additional rules for procurements at or above the relevant procurement threshold (Division 2) ...'
- 20 April 2019 CPRs commenced, 'When an Appendix A exemption applies, the additional rules of Division 2 for procurements at or above the relevant procurement threshold do not apply to the procurement ...'

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89 In reference to the determination power, the 'Addendum to the Explanatory Memorandum' to the Government Procurement (Judicial Review) Bill 2017 outlined that:

The intention is to allow the Government of the day flexibility to exempt additional procurements, if needed, and to do so in a manner that reflects the Government's particular circumstances and requirements. The determination power would be used in a manner that is consistent with Australia's free trade agreements. It is not envisaged that determinations would be issued regularly.

90 Noting that the rules moved from Division 2 and into paragraphs 4.7–4.8 and 7.26 of Division 1 of the 20 April 2019 CPRs apply higher thresholds.

91 The procurement thresholds (including GST) are:

- \$80,000 for non-corporate Commonwealth entities, other than for procurements of construction services;
- \$400,000 for prescribed corporate Commonwealth entities, other than for procurements of construction services; and
- \$7.5 million for procurements of construction services by relevant entities.

92 The kinds of goods and services listed in Appendix A include, for example, contracts for labour hire and the procurement of land, research and development services, and government advertising services.



11. Relevant entities must report contracts on AusTender valued at or above the reporting threshold.<sup>93</sup> AusTender does not record whether a contract award was by covered procurement. To get an indication of the extent of coverage, the ANAO estimated the proportion of reported contracts that were not covered by the GPJR Act during the three financial-years following its establishment (the AusTender data better supports the identification of procurement excluded from coverage than included).

- There were 193,871 parent contracts valued at \$120.3 billion reported to start between 1 July 2019 and 30 June 2022 on AusTender.<sup>94</sup>
- The ANAO removed all contracts that entities reported as having one or more characteristics that excluded them from coverage by the GPJR Act.<sup>95</sup> This left 20,576 contracts valued at \$45.2 billion remaining.
- Therefore, suppliers were not provided access to the GPJR Act complaint mechanism for at least 89 per cent of contracts (173,295 contracts valued at \$75.1 billion).

12. The above figure of 89 per cent will be an underestimation because it cannot be determined with confidence which of the remaining 11 per cent are or are not covered. For example, AusTender does not have an identifier for 'construction services' and so the remaining 11 per cent will include some construction services contracts valued below the \$7.5 million threshold that are not covered by the GPJR Act.

### Panel procurement is not covered

13. Panels are a tool for the procurement of goods or services regularly acquired by entities. The process to establish a panel will generally be subject to Divisions 1 and 2 and therefore be a covered procurement under the GPJR Act. Finance guidance to entities on procuring from panels includes:

Once a panel has been established, an entity may then purchase directly from the panel by approaching one or more suppliers. Each purchase from a panel represents a separate procurement process ... A contract (often referred to as a Work Order or an Official Order) is

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93 The reporting thresholds (including GST) are:

- \$10,000 for non-corporate Commonwealth entities; and
- for prescribed corporate Commonwealth entities, \$400,000 for procurements other than procurement of construction services, or \$7.5 million for procurement of construction services.

94 The ANAO has excluded from the analysis consideration of the 74,914 amendments to existing contracts valued at \$77.7 billion reported by entities. If those amendments were included in the population and contract amendment were not covered by the GPJR Act, then the result would be that at least 92 per cent of contracts were not covered by the GPJR Act.

95 The factors applied for the purpose of the ANAO analysis were:

- a purchase from an existing standing offer according to the 'SON ID' field, which includes purchases from panel arrangements;
- valued below the relevant procurement threshold according to the reported contract value or 'limited tender condition reason';
- paragraph 2.6 of the CPRs was applied in some part, or an exemption listed in Appendix A of the CPRs was applied, according to the reported 'limited tender exemption reason'; and/or
- reported by the Commonwealth Superannuation Corporation, which is not a prescribed corporate Commonwealth entity.

formed under a Panel each time an entity purchases goods or services under the panel arrangement.

14. Changes introduced in the 1 January 2019 CPRs included specifying in paragraph 9.12 that ‘procurements from an existing standing offer are not subject to the rules in Division 2’. RMG 422 advises that procurements from standing offers under panel arrangements are not covered procurements for the purposes of the GPJR Act ‘as paragraph 9.12 of the CPRs indicates that these procurements are not subject to Division 2 of the CPRs’.

15. The exclusion of panel procurement substantially limits supplier access to the GPJR Act. The proportion of the number of reported contracts associated with a ‘standing offer notice’ on AusTender increased from 28 per cent in 2012–13 to 50 per cent in 2021–22. The largest of these panels contained 3,273 suppliers.<sup>96</sup> Panels established since 2021–22 include two new coordinated procurement panels, which are mandatory for use by non-corporate Commonwealth entities. As at 31 January 2023, 413 suppliers had been appointed to the new Management Advisory Services panel (to procure services commonly known as consultancies) and 84 suppliers appointed in the first of three phases of the new People Panel.

16. Finance’s records indicated that, to comply with Australia’s international obligations, suppliers with a complaint about an entity’s compliance with CPRs 5.4, 7.2 and 7.16–18 in relation to a procurement from a panel arrangement should be able to access the GPJR Act mechanism. CPR 5.4 requires that all potential suppliers to government be treated equitably. ANAO analysis has identified that for seven out of the top 10 panels by total value, at least 80 per cent of the panel’s total value was awarded to 20 per cent or less of the suppliers represented on the panel.<sup>97</sup> To achieve a value for money outcome, procurement should encourage competition and be non-discriminatory.

17. Excluding panel supplier access to the GPJR Act mechanisms does not sit comfortably with implementation of recommendation 11 of the Senate inquiry report. The report outlined a need for ‘some mechanism, beyond a complaint to the agency or the procurement coordinator, available to aggrieved parties’ and recommended that ‘Finance establish an independent and effective complaints mechanism for procurement processes’. Given most procurement by relevant entities is not ‘covered procurement’, and several mandatory provisions reflective of Australian Government policy are not ‘relevant CPRs’, the coverage of the GPJR Act is not sufficient to fully implement recommendation 11.

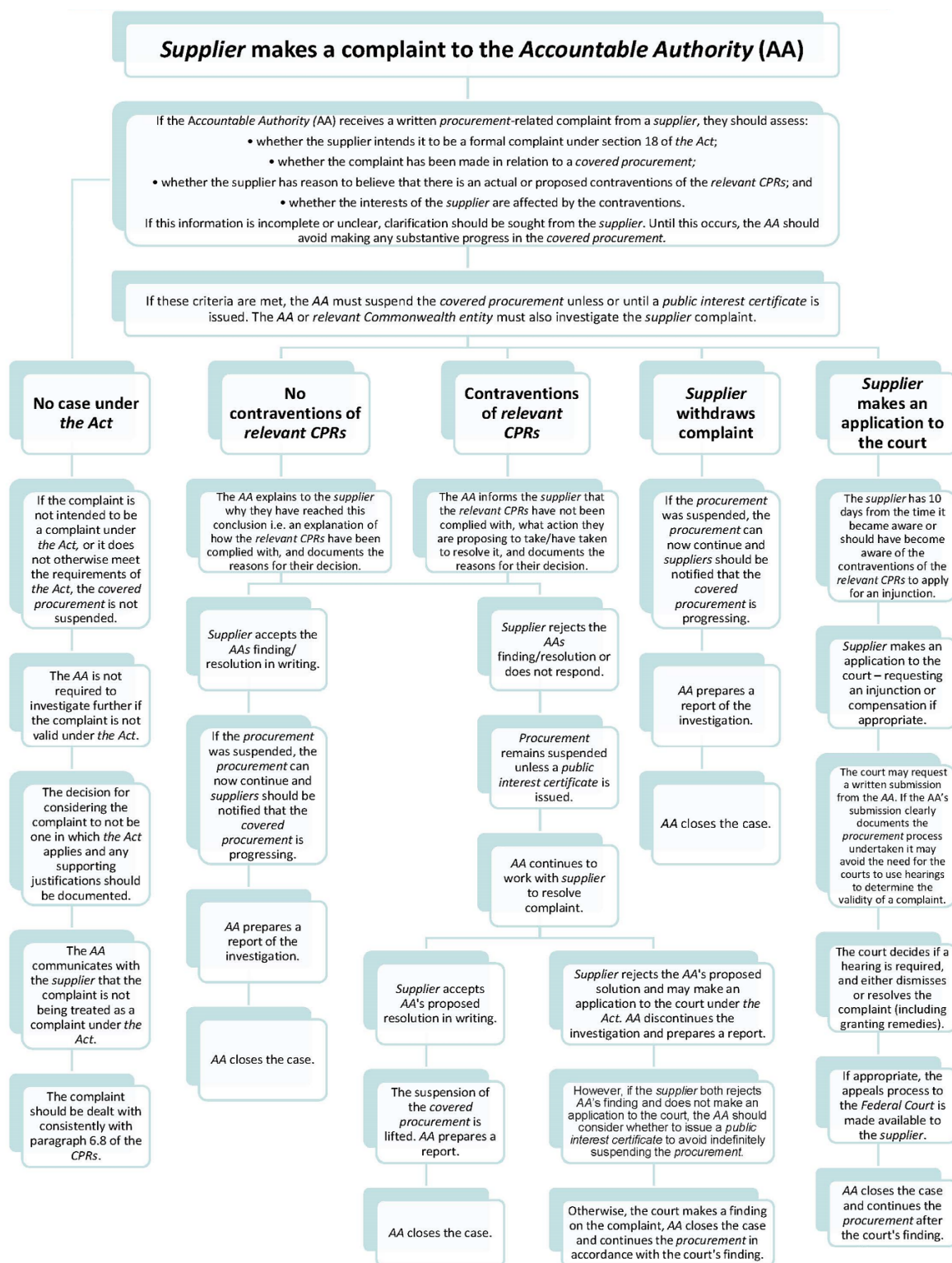
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96 Auditor-General Report No. 11 2022–23, Information Report, *Australian Government Procurement Contract Reporting – 2022 Update*, paragraphs 6.6 and 6.9.

97 Auditor-General Report No. 11 2022–23, Information Report, *Australian Government Procurement Contract Reporting – 2022 Update*, paragraph 6.14.

## Appendix 5 Flow chart of the process established by the GPJR Act

1. The following is a high-level flow chart of the process established by the *Government Procurement (Judicial Review) Act 2018* from Finance's Resource Management Guide No. 422.<sup>98</sup>



98 Available from: <https://www.finance.gov.au/publications/resource-management-guides>.

## Appendix 6 Examples of complaint-related clauses in approach to market documentation

1. This appendix contains examples of some of the complaint-related clauses observed during this audit from sampled approach to market documentation covering 45 relevant entities. The intent is to present a range of examples that may be of interest to entities when reviewing their own documentation and is not to endorse the use of these clauses. Paragraph numbering has been simplified and so may not reflect the original.

### Example 1: A complaints clause from a request for tender (RFT)

|   |
|---|
| <b>1. Complaints</b>  |
| <b>1.1</b> If you wish to lodge a dispute or complaint about the RFT process, you should do so by advising the [entity] Procurement Manager in writing at [mailto:link]. You should provide details of the basis upon which the dispute or complaint is being lodged, whether under the <i>Government Procurement (Judicial Review) Act 2018</i> (Cth) or otherwise, including: |
| a. clear statement regarding what the complainant considers was defective in the tendering/funding process, including any alleged or proposed conduct in contravention of the relevant CPRs;  |
| b. copies of, or references to, information to support the complaint;   |
| c. details of how the interests of the Tenderer or a supplier are affected by the alleged or proposed conduct; and  |
| d. a statement as to what the complainant wishes to achieve from the complaint process.   |
| <b>1.2</b> The [entity] Procurement Manager, jointly with the Chairperson of the Tender Evaluation Committee will attempt to resolve the matter with you through communication and conciliation.  |
| <b>1.3</b> If the [entity] receives a complaint lodged by a Tenderer, the [entity] reserves the right to suspend this procurement process as required under the <i>Government Procurement (Judicial Review) Act 2018</i> (Cth).   |
| <b>1.4</b> Complaints will not prejudice a Tenderer's participation in this or any future [entity] procurement processes.   |
| <b>1.5</b> Tenderers are asked to cooperate with the [entity] in resolution of any complaint regarding this procurement.  |
| <b>1.6</b> If you are not satisfied with the [entity's] response then you may seek an independent internal agency review of the complaint.  |

### Example 2: A complaints clause from a request for tender template

|   |
|---|
| <b>1.1 Complaints</b>   |
| (a) The Department will apply timely, equitable and non-discriminatory complaint handling procedures. |

- (b) Any complaints arising out of this RFT process should be lodged in writing by sending the complaint to [mailto: link].
- (c) A complaint lodged by a Tenderer should set out:
  - (i) that it is a complaint made under this clause 1.1;
  - (ii) a clear description of the Tenderer's complaint;
  - (iii) copies of, or references to, any evidence or information to support the Tenderer's complaint; and
  - (iv) a statement as to what the Tenderer wishes to achieve from the complaint process.
- (d) The Department will acknowledge receipt of the complaint and will seek to address the complaint with the relevant Tenderer as soon as practicable.
- (e) Where requested by the Department, a Tenderer must do all things reasonably necessary to cooperate with the Department (including providing information or answering questions) in the investigation and attempted resolution of any complaint in respect of this RFT process.  
 [Note to user: you should seek advice from your legal or procurement adviser as to whether this RFT process relates to a covered procurement. If the RFT process is not for a covered procurement, delete both options A and B below.]
- (f) This RFT process [is/is not] a covered procurement for the purposes of the *Government Procurement (Judicial Review) Act 2018* (the GP(JR) Act).  
 [Option A - Note to user: select this option where a Public Interest Certificate is issued prior to RFT release or with the RFT]
- (g) A Public Interest Certificate (PIC) has been issued under the GP(JR) Act in relation to this RFT process.
- (h) A copy of the PIC is available at [insert link or attach a copy to the RFT and refer to the relevant schedule/attachment]
- [Option B - Note to user: select this option where a Public Interest Certificate has not been issued prior to RFT release or with the RFT]
- (g) Information on any public interest certificate that may be issued under the GP(JR) Act in relation to this RFT process will be available at: [hyperlink to webpage]
- (h) If a supplier makes a complaint under that Act and at the time of the complaint no public interest certificate is in force in relation to this RFT process, the Department may suspend this RFT process by notice to all registered Tenderers.

### Example 3: Simple clauses that refer suppliers to the entity's website

1. **Government Procurement (Judicial Review) Act 2018 (Cth)**
  - 1.1 This RFT process is a covered procurement for the purposes of the *Commonwealth Procurement Rules* and the *Government Procurement (Judicial Review) Act 2018 (Cth)*.
  - 1.2 Information on any public interest certificate that may be issued under the *Government Procurement (Judicial Review) Act 2018 (Cth)* in relation to this RFT process will be available at [webpage] on the [Department's] Website.

## **2. Complaints procedures**

- 2.1 Complaints in relation to this RFT process should be made in writing and directed to the Complaints Officer at [mailto:link]. The Complaints Officer is able to receive complaints under the *Government Procurement (Judicial Review) Act 2018 (Cth)*.
- 2.2 Complaints will be handled by the Department in accordance with the Department's Procurement Complaints Procedures which are available at [webpage] on the [Department's] Website.

### **Example 4: A detailed GPJR Act complaints clause**

## **1. COMPLAINTS**

### **1.1 ...**

### **1.2 Complaints under the *Government Procurement (Judicial Review) Act 2018***

- (a) Clause 1.2 only applies if this tender process is a Covered Procurement for the purposes of the Judicial Review Act.
- (b) The Judicial Review Act establishes a statutory framework for suppliers to make complaints about non-compliance with specific provisions of the Commonwealth Procurement Rules in respect of Covered Procurements.
- (c) If this clause 1.2 applies and the Tenderer has reason to believe that:
  - (i) the Commonwealth or an official of the Commonwealth has engaged, is engaging or is proposing to engage in any conduct in contravention of the Relevant Commonwealth Procurement Rules in relation to this tender process; and
  - (ii) the interests of the Tenderer are affected by the conduct,the Tenderer may submit a complaint about the conduct in writing at the website set out in the Tender Particulars.
- (d) Where requested by the Commonwealth, the Tenderer must do all things reasonably necessary to cooperate with the Commonwealth (including providing information or answering questions) in the investigation and attempted resolution of any complaint in respect of this tender process under this clause 1.2.
- (e) A public interest certificate under the Judicial Review Act in relation to the tender process:
  - (i) is in force if stated in the Tender Particulars as being in force; or
  - (ii) may otherwise be issued by the Commonwealth at any time during the tender process (including after any complaint has been made by a Tenderer under this clause 1.2), in which case the Contact Officer will notify all Tenderers of the issue of the public interest certificate by notice:
    - A. published on AusTender; or
    - B. by email or post.

- (f) Without limiting the operation of the Judicial Review Act, if a Tenderer makes a complaint under this clause 1.2 and at the time of the complaint no public interest certificate is in force in relation to this tender process, the Commonwealth may suspend this tender process in accordance with section 20 of the Judicial Review Act by notice to all Tenderers:
- A. published on AusTender; or
  - B. by email or post.

### Example 5: A contract for probity issues in a Request for Proposal (RFP)

#### Part 1 — Introduction

...

3. **Probity issues** The Probity Advisor for this project is: [name], [company], [mobile number], [email address]

...

#### Part 2 — Process Conditions

...

- 6.5.2 The [entity] has appointed a Probity Advisor for this RFP. The Probity Advisor's role is to ensure that the procedures adopted in procurement process uphold the principles of integrity, honesty, fairness and appropriate process.

If any Respondents have any concerns about the conduct or probity of the evaluation process, the Respondent should promptly bring its concerns to the Probity Advisor's attention. The Probity Advisor will investigate the matter and make an appropriate recommendation to the [entity]. Any action taken as a result of such process will be at the [entity's] discretion.

The Probity Advisor for this project is: [name], [company], [mobile number].

## Appendix 7 Case studies of the handling of complaints to the Procurement Coordinator

1. This appendix contains case studies of the Department of Finance's (Finance's) handling of two complaints made to the Procurement Coordinator. These complaints took longer to resolve than was warranted in the circumstances and suppliers were rarely given a proactive update on progress. The handling of supplier complaints to the Procurement Coordinator is examined in Chapter 3, paragraphs 3.42 to 3.63.

### Case study 1

2. The supplier lodged a complaint on 30 August 2021 and was advised of the outcome on 22 March 2022. The complaint was not accepted for investigation because it was not about an Australian Government procurement.

| Business day | Summary of activity   |
|--------------|---|
| 1            | Supplier lodges complaint via the online form. Details provided indicate that the complaint was about a procurement undertaken by a firm that provides services to a particular Australian Government entity, and not by the entity itself.   |
| 47           | Finance identifies the online form and emails the supplier an acknowledgement of receipt.   |
| 61           | Finance meets with the Australian Government entity. Finance's record of the meeting includes: 'Finance to send a response back to [the supplier] confirming this is not within scope for the Procurement Coordinator as the procurement was not undertaken by the Commonwealth and therefore not covered by the [Commonwealth Procurement Rules]'. The Australian Government entity emails Finance supporting documentation. |
| 75           | Supplier seeks an update on their complaint.  |
| 80           | Finance consults the Australian Government entity.  |
| 83           | Finance responds to the supplier: 'We want to assure you that your complaint is still under consideration...'   |
| 121          | Supplier seeks an update on their complaint.  |
| 123          | Finance consults the Australian Government entity, which confirms that it was not a third-party procurement. That is, the firm was not undertaking a procurement on behalf of the entity.   |
| 126          | Finance responds to the supplier: 'This matter is the key priority of the secretariat at the moment...'   |
| 141          | Finance emails the supplier, advising: 'the procurement process you are referring to was not undertaken by a Commonwealth entity, was not subject to the Commonwealth Procurement Rules and therefore falls outside of scope for consideration by the Procurement Coordinator...'   |

Source: ANAO analysis of Finance records.

### Case study 2

3. The supplier lodged a complaint on 20 December 2020 about an active tender process and was advised of the outcome of the Procurement Coordinator's investigation on 3 November 2021.



| Business day | Summary of activity   |
|--------------|---|
| 1            | Supplier lodges complaint via the online complaint form and emails its supporting documents to the Procurement Coordinator mailbox.   |
| 3            | Finance replies to the supplier's email.<br>Supplier advises Finance that it did not understand the reply, noting that 'This language is very difficult for normal people who do not work in the govt departments to understand'.   |
| 4            | Finance sends a reworded reply to the supplier: 'The Procurement Coordinator cannot start investigating your complaint because there is no evidence of you contacting [the procuring entity] about your concerns ...'<br>Finance notifies the procuring entity of the complaint.  |
| 5            | Supplier emails evidence to Finance.  |
| 11           | Procuring entity emails documentation to Finance.   |
| 16           | Finance emails supplier: 'We will endeavour to investigate and respond to your complaint as soon as possible ...'<br>Finance emails procuring entity, advising that the entity and the supplier 'have provided information which we believe is sufficient to consider the complaint'.   |
| 18           | Finance requests information from the procuring entity.   |
| 19           | Procuring entity provides the requested information to Finance.   |
| 45           | Finance emails the supplier: 'Just to provide a quick update on the progress of this enquiry, we are considering all available information with a view to replying to your email as soon as possible.'  |
| 46           | Finance requests information from the procuring entity.   |
| 54           | Procuring entity provides the requested information to Finance.   |
| 71           | Finance requests advice from the Australian Government entity responsible for a procurement connected policy.   |
| 77           | Finance follows up on its request as the Australian Government entity had not replied.  |
| 82           | Finance follows up on its request as the Australian Government entity had not replied.  |
| 87           | Finance follows up on its request as the Australian Government entity had not replied.<br>Australian Government entity provides the requested advice to Finance.  |
| 198          | Finance advises the supplier of the outcome of their complaint, which is a detailed letter that includes: 'the requirements of the Commonwealth Procurement Rules, as they relate specifically to this complaint have been met ...'<br>Finance advises the procuring entity of the outcome of the supplier's complaint and of lessons that can be learned by the entity from the procurement complaint. |
| 217          | Finance identifies the online complaint form that the supplier had submitted on day '1'.  |

Source: ANAO analysis of Finance records.