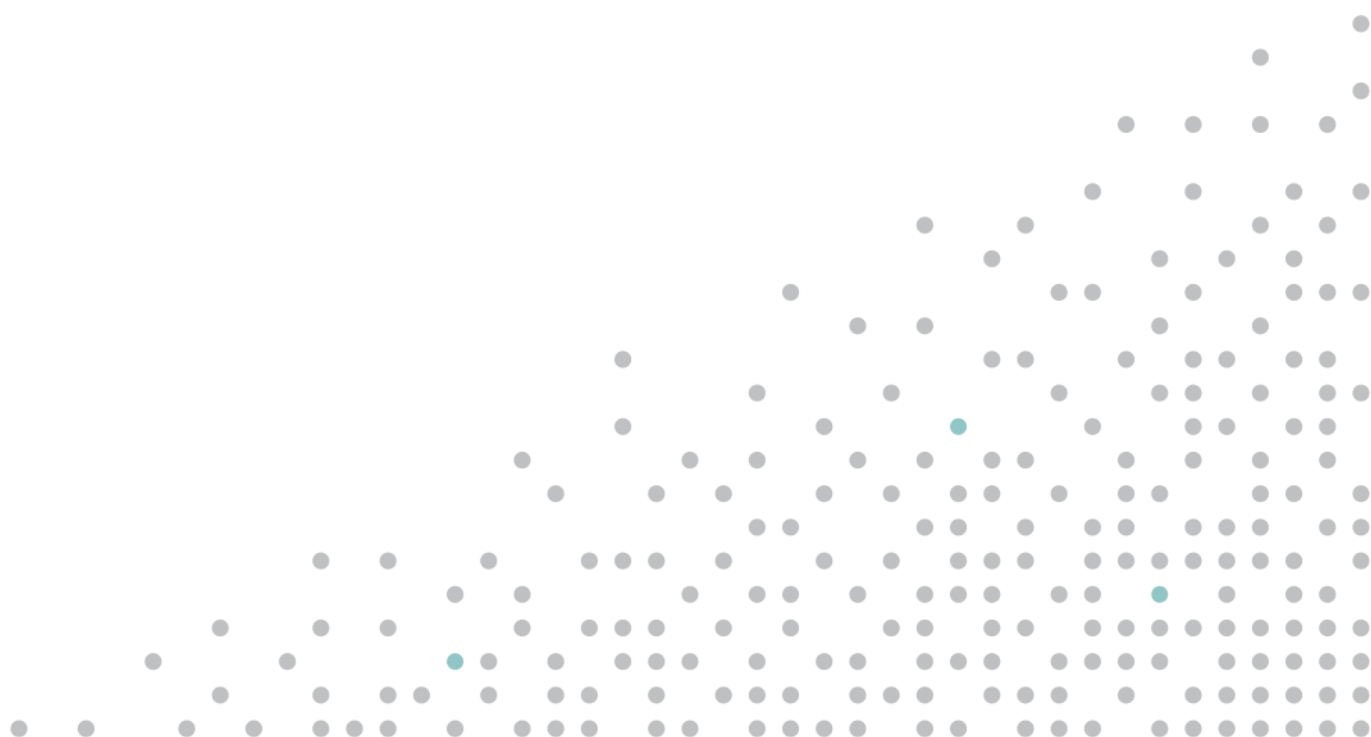




Australian Government
Department of Finance



Handling complaints under the *Government Procurement (Judicial Review) Act 2018*

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The words '**must**', '**required**', '**requires**' and '**requiring**' denote mandatory compliance by accountable authorities/officials. The use of the words 'could', 'should', 'may', 'encouraged' or 'consider' convey non-mandatory guidance, which may or may not be applied by accountable authorities/officials in their approach to resource management, depending on the operating circumstances of the entity and its appetite for risk.

Terms in *italics* are defined in Appendix 6.

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Audience

This guide is relevant to *accountable authorities* and *officials* undertaking *procurements* in:

- *non-corporate Commonwealth entities (NCEs)*; and
- *corporate Commonwealth entities (CCEs)* prescribed in section 30 of the *Public Governance, Performance and Accountability Rule 2014* as having to comply with the *Commonwealth Procurement Rules (CPRs)*.

These entities are referred to as *relevant Commonwealth entities* in this guide.

This guide contains general information only. It does not replace legal advice that may be required in relation to the rights and obligations of Commonwealth entities in the context of a particular complaint or *procurement* process.

Key points

This guide:

- Provides guidance on the Commonwealth *procurement* complaint mechanism established under the [*Government Procurement \(Judicial Review\) Act 2018*](#).
- Assists *relevant Commonwealth entities* to implement and comply with this mechanism when a *supplier* has raised a complaint with an *accountable authority* or submitted an application to the *Federal Circuit Court of Australia (FCC)* or *Federal Court of Australia (Federal Court)* alleging a *relevant Commonwealth entity's* contravention of *relevant CPRs* when conducting a *covered procurement*.
- Outlines the roles and responsibilities of key stakeholders.

Resources

This guide is available on the Department of Finance website at www.finance.gov.au.

Other relevant publications, tools and websites include:

- [*AusTender*](#).
- [*BuyRight*](#).
- [*Commonwealth Procurement Rules*](#).
- [*Commonwealth Contracting Suite \(CCS\), including the CCS Deed of Standing Offer Suite*](#).
- [*Legal Services Directions 2017*](#).
- [*Procurement Coordinator Complaints Handling Charter*](#).
- [*Public Governance, Performance and Accountability Act 2013*](#).
- [*Selling to Government*](#).

Introduction

1. The *Government Procurement (Judicial Review) Act 2018 (the Act)* establishes an independent complaint mechanism for government *procurement* processes.
2. *The Act* applies to contraventions of the *relevant CPRs* relating to *covered procurements* by *relevant Commonwealth entities*. *The Act* applies to contraventions, or proposed contraventions, which occurred after the commencement of *the Act*.
3. Under *the Act*, *suppliers* can make a written complaint to the *accountable authority* of the *relevant Commonwealth entity* about contraventions that affect the *supplier's* interests.
4. *The Act* includes obligations for *accountable authorities* of *relevant Commonwealth entities* to investigate such complaints and to prepare a report of the investigation.
5. *The Act* also allows *suppliers* to make an application to the *FCC* or the *Federal Court* which may grant an injunction and/or order the payment of compensation by the *relevant Commonwealth entity* to the *supplier*.
6. Other avenues to raise complaints, which are separate to the complaint mechanism established by *the Act*, will continue to be available to *suppliers*, including the [*Australian Government Procurement Coordinator*](#) and the [*Commonwealth Ombudsman*](#).

Part 1 – Roles and definitions

Relevant Commonwealth entity

7. *The Act* relates to *covered procurements* conducted by *relevant Commonwealth entities*.
8. *Procurements* undertaken by Commonwealth entities that are not subject to the *CPRs* are not covered by *the Act*.

Covered Procurement

9. A *covered procurement* under *the Act* is a *procurement* where both Division 1 and 2 of the *CPRs* apply.
10. The following *procurements* are not *covered procurements* for the purposes of *the Act*:
 - *Procurements* undertaken by Commonwealth entities¹ that are not subject to the *CPRs*.
 - *Procurements* valued below the relevant *procurement* thresholds specified in paragraph 9.7 (Division 1) of the *CPRs* (i.e. *procurements* that are not subject to Division 2).

¹ Paragraph 2.2 of the *CPRs* defines the *NCEs* and prescribed *CCEs* that **must** comply with the *CPRs*.

- *Procurements* from standing offers under panel arrangements, as paragraph 9.12 of the *CPRs* indicates that these *procurements* are not subject to Division 2 of the *CPRs*. However, the process to establish a panel arrangement will generally be subject to Divisions 1 and 2 of the *CPRs*, and therefore would be captured by *the Act*.
- *Procurements* that are exempt from Division 2 in accordance with Appendix A of the *CPRs*, including such *procurements* in which the *relevant Commonwealth entity* voluntarily elects to conduct them in accordance with some or all of the rules of Division 2 for better practice.
- *Procurements* where, under paragraph 2.6 of the *CPRs*, an *official* applies measures determined by their *accountable authority* to be necessary for the maintenance or restoration of international peace and security, to protect human health, for the protection of essential security interests, or to protect national treasures of artistic, historic or archaeological value. Where such measures are applied, Division 1 and 2 do not apply in full to the *procurement*.
- *Procurements* which are part of a class of *procurements* that has been determined by the Finance Minister to not be *covered procurements* for the purposes of *the Act*.

Accountable Authority

11. Where referenced in this guide, the terms *accountable authority* and *official* have the same meaning as in the [Public Governance, Performance and Accountability Act 2013 \(PGPA Act\)](#).
12. The delegation provisions in section 110 of the *PGPA Act* apply to the functions and powers conferred on the *accountable authority* of *NCEs* under *the Act*. Accordingly, the powers and functions an *accountable authority* is capable of delegating to an *official* or *officials* within the *relevant Commonwealth entity* include the ability to receive, investigate, communicate, and prepare reports on the investigation of complaints, and to suspend *covered procurements* on receipt of a complaint. The *accountable authority* can also delegate the power to issue *public interest certificates*.
13. References to the *accountable authority* in this guide include reference to an *official* who has been delegated the power to perform that function.
14. The discretionary powers, functions, roles, duties, and responsibilities that *the Act* directly confers onto the *accountable authority*, can be delegated to an *official* or *officials* at any point that the *accountable authority* chooses or deems it necessary, including upon and after the commencement of *the Act*. Given the specific delegation powers in *the Act*, it is expected that the formal delegation power (section 110 of the *PGPA Act*) will be used to allocate any of these various tasks to an *official* or *officials* within the *relevant Commonwealth entity* if they are not to be signed off on or otherwise exercised directly by the *accountable authority*. The investigating officer should be independent of the *covered procurement* process.
15. For clarification, the delegation powers in section 110 of the *PGPA Act* do not apply to *CCEs*. Rather, *accountable authorities* of *CCEs* typically use common law authorisations to direct *officials* to undertake certain functions.

The Finance Minister

16. *The Act* provides the *Finance Minister* with the authority to issue a determination which specifies that a class of *procurement* is not a *covered procurement*.
17. The intention of this provision is to provide the Government with flexibility to exempt additional *procurements* to reflect the Government's policies and requirements in a manner that is consistent with Australia's international obligations.

Suppliers

18. Under *the Act*, a *supplier* means:
 - (a) a person who supplies, or could supply, *goods* or services; or
 - (b) a partnership (or other group) of two or more persons that supplies, or could supply, *goods* or services.
19. The definition of *supplier* (under *the Act*) encompasses the definitions of a potential supplier, a supplier and a tenderer in the *CPRs*.
20. In the *CPRs*:
 - Potential supplier is defined as an entity or person who may respond to an approach to market (ATM).
 - Supplier is defined as an entity or person who has entered into a contract with the Commonwealth.
 - Tenderer is an entity or person who has responded with a submission to an ATM.
21. In order to make a complaint or an application to the court under *the Act*, the *supplier* must be able to show that its 'interests' are 'affected' by the conduct that it considers to contravene the *relevant CPRs*. The intention of these terms is to establish whether a *supplier* has sufficient interest to have standing to bring forward a complaint.
22. A *supplier* does not need to be a tenderer in the relevant *covered procurement* in order to make a complaint or an application to the court. However, a *supplier* is still required to demonstrate that its interests were affected by the alleged contraventions of the *relevant CPRs*.

Courts

23. *The Act* provides concurrent or joint jurisdiction to the *FCC* and the *Federal Court* to consider applications, grant injunctions and/or order the payment of reasonable compensation for the costs incurred in preparing the tender and/or bringing forward and attempting to resolve the complaint. Where a complaint is unresolved at the *relevant Commonwealth entity* level and proceeds to court, it is expected that most matters would be heard in the *FCC*.
24. The court can only consider applications in relation to alleged contraventions of the *relevant CPRs* that occurred during a *covered procurement*.

Relevant paragraphs of the CPRs

25. *The Act* applies to alleged contraventions of the *relevant CPRs*. The *relevant CPRs* include all paragraphs in Division 2 of the *CPRs*, as well as those paragraphs in Division 1 of the *CPRs* that are declared to be relevant by paragraph 6.9 of the *CPRs* ([Appendix 3](#)).
26. For clarity, *the Act* does not apply to compliance with other *procurement* related policies, guidelines and procedures, including, but not limited to, the following:
- a *relevant Commonwealth entity's* accountable authority instructions or any other internal *procurement* procedures or policies;
 - procurement-connected policies;
 - [Supplier Pay On-Time or Pay Interest Policy \(Resource Management Guide 417\)](#); or
 - contract management issues.

Part 2 – Responsibilities

Relevant Commonwealth entity

Reducing the chance of receiving a complaint

27. *Relevant Commonwealth entities* should reduce the likelihood of receiving a complaint under section 18 of *the Act* by:
- conducting *procurement* processes in a manner that complies with the *relevant CPRs*;
 - ensuring that *procurement* processes outlined in accountable authority instructions and internal operational guidelines are consistent with the *CPRs*;
 - ensuring that *procurement* processes are well planned and the processes are followed;
 - ensuring that *procurement* documentation clearly outlines the process for dealing with complaints and issues, and that when complaints or issues are initially raised by suppliers in accordance with the procurement documentation, that entities engage positively, openly and collaboratively to resolve these issues to avoid them becoming formal complaints under section 18;
 - offering to provide *suppliers* with a comprehensive debrief; and
 - properly documenting all *procurement* processes and keeping accurate records, including documenting all substantive decisions in relation to the *procurement*.

Initial handling of a complaint under the Act

28. *Accountable authorities* should ensure that their *relevant Commonwealth entities* have clear processes to receive and investigate complaints made under section 18 of *the Act*.

29. *Relevant Commonwealth entities* should publicise information on their websites on how to lodge a complaint under *the Act*, including the details of *officials* that are able to receive such complaints (i.e. *officials* who have the appropriate delegation).
30. If the *accountable authority* receives a written *procurement*-related complaint from a *supplier*, they should first assess whether the complaint meets the requirements of *the Act*, and in particular, whether:
- the complaint is intended to be a complaint under *the Act*;
 - the complaint involves a *covered procurement*;
 - the *supplier* has reason to believe that there has or will be a contravention or contraventions of the *relevant CPRs*; and
 - the interests of the *supplier* are affected by the contraventions.
31. Should any of the above be unclear from the material presented by the *supplier*, 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*.
32. As there are no formal requirements for making a *supplier* complaint other than it be made in writing to the *accountable authority*, *relevant Commonwealth entities* should establish processes to quickly determine whether any written document by a *supplier* which is addressed to the *accountable authority* and is critical of conduct by the *relevant Commonwealth entity* with respect to an identifiable *covered procurement* is a formal complaint under section 18 of *the Act*.
33. If a complaint does not meet the requirements of section 18 of *the Act*, there is no legal requirement to suspend the *covered procurement*. If the *accountable authority* determines that this is the case prior to undertaking any investigation, they should:
- a. inform the *supplier* that the complaint is not covered by *the Act* and the reasons for this decision; and
 - b. document the reasons for their decision.
34. Although the *accountable authority* need not suspend the *procurement* if the complaint does not meet the requirements of *the Act*, the *accountable authority* should exercise judgment and deal with the complaint in accordance with paragraph 6.8 of *the CPRs*.

Responding to the complaint

35. Once it is determined that a complaint has been made in a manner that complies with the requirements of section 18(1) of *the Act*, the *accountable authority* should promptly notify the *supplier* that the complaint has been received and is under investigation. The notice should also confirm that:
- the *covered procurement* will be suspended until the complaint is resolved or withdrawn or a *public interest certificate* is issued (refer to paragraphs 57-58 on *public interest certificates*); 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.

36. Timely notification will help to avoid a situation where the *supplier* proceeds to make an application to the court (having not heard back from the *accountable authority* about its complaint) before the *accountable authority* has had time to conduct their investigation and/or had an opportunity to resolve the complaint with the *supplier*.

Investigating the complaint

37. Once a complaint has been received that complies with the requirements of section 18(1) of *the Act*, the *accountable authority* **must** suspend the *covered procurement* while the complaint is being resolved unless a *public interest certificate* is in force.

38. *The Act* requires the *accountable authority* to undertake an investigation, but it does not establish specific requirements regarding how the investigation should be conducted. As a general rule, *accountable authorities* should follow their internal review processes, and investigations should be progressed in a timely manner.

39. It is also important that the *accountable authority* takes steps to ensure that the *supplier* is provided with the opportunity to resolve the complaint. This can have an impact on the remedies that are available to the *supplier* should the *supplier* make an application to the court (see paragraphs 65-68 below).

40. While there is no legal requirement to resolve the matter within 10 days of the *accountable authority* receiving the complaint, the *accountable authority* should try to resolve the matter promptly, or otherwise communicate with the *supplier* an expected timeframe for resolution. This practice will give the *relevant Commonwealth entity* and the *supplier* greater certainty in being able to resolve the complaint without court proceedings.

41. It is recommended that the *official* conducting the investigation has not had previous substantive involvement in the relevant *covered procurement*.

42. There are several potential outcomes to an investigation, including:

- finding that the conduct complained about does not contravene the *relevant CPRs*;
- finding that there have been contraventions of *relevant CPRs*;
- the *supplier* informing the *accountable authority* that they consider the complaint to be resolved;
- the *supplier* otherwise agreeing to withdraw the complaint;
- the *supplier* making an application to the *FCC* or *Federal Court* under *the Act* regarding the conduct that is the subject of the complaint; and
- despite the initial assessment concluding that the matter is a legitimate complaint under *the Act* (see paragraph 30), finding that the complaint is not one to which *the Act* applies after further analysis of the matter, for example because the complaint is not from a *supplier* whose interests are affected, or because the complaint is in relation to an aspect of the *CPRs* that is not a *relevant CPR*.

43. If the *accountable authority* determines that the complaint does not fall within the scope of *the Act*, they do not need to continue to investigate the conduct or prepare a report. However, *accountable authorities* should keep proper records of their decision-making and the basis for this determination and advise the *supplier* of their determination.
44. Where a *supplier* chooses to seek a remedy from the court, the *accountable authority* should consider if the continuation of the investigation would result in prejudice to the proper administration of justice, and if so, the *accountable authority* **must** discontinue the investigation.
45. Section 19(1)(b) of *the Act* **requires** the *accountable authority* to prepare a report of the investigation. There are no specific format or minimum content requirements set out in *the Act*. However, it is recommended that the 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.
 - Where the investigation determines contraventions have or may have occurred, details of the proposed remedial action.
46. Where a report of an investigation has been prepared, the *accountable authority* should generally continue to treat the investigation under *the Act* as open until the time that:
- the *supplier* informs the *accountable authority* in writing that it considers the complaint to be resolved;
 - the *supplier* withdraws the complaint in writing; or
 - the *supplier* institutes proceedings in court.
47. In the event that the *supplier* has not done any of the above, and the *accountable authority* is satisfied that all relevant issues have been considered, the *accountable authority* should consider whether it is appropriate to issue a *public interest certificate*.
48. The report should be retained with the other relevant *procurement* documentation.
49. If the complaint is withdrawn prior to the completion of the investigation, the *accountable authority* should seek to have this confirmed in writing by the *supplier*.
50. If the investigation concludes that contraventions have occurred, the *supplier* should be informed of any proposed remedial action or other action the *accountable authority* proposes to take. For example, where the investigation concludes that minimum time limits have not been adhered to, remedial action may include amending the time limit for *suppliers* to lodge a submission to be consistent with *the CPRs* (refer paragraph 10.22 of the *CPRs*).

51. The *accountable authority* should seek written confirmation from the *supplier* that it considers the complaint to be resolved. If the *supplier* confirms that it considers the complaint to be resolved, the suspension of the *covered procurement* can be lifted, and the *procurement* process can continue (refer to [Appendix 2](#) regarding notifying *suppliers* where a *covered procurement* is continuing after a suspension).
52. If the *supplier* and the *accountable authority* are unable to resolve the complaint, the *supplier* may choose to seek a remedy from the court. In this case, if the *covered procurement* is suspended it **must** remain suspended until the court makes a finding on whether the *relevant CPRs* have been contravened (unless a *public interest certificate* is issued).
53. Further information on managing a *supplier* complaint is located at [Appendix 2](#).

Treatment and communication with other suppliers

54. When a complaint is received and the *accountable authority* suspends the *covered procurement*, they should communicate with other *suppliers* who may be affected by the suspension.
55. Whether information detailing the suspension of the *covered procurement* needs to be provided to other *suppliers* depends on a number of issues, including:
- the likely time it will take to investigate and resolve the complaint;
 - the impact of any suspension on the progress to the *covered procurement*; and
 - the stage of the *covered procurement* at the time it is suspended.
56. Probity advice should be considered before sharing information regarding the suspension with other *suppliers*. A key consideration will be to ensure that any communication with and treatment of other *suppliers* is fair and equitable.

Public Interest Certificate

57. In some circumstances, suspending a *covered procurement* will not be in the public interest. *The Act* allows the *accountable authority* of a *relevant Commonwealth entity* to issue a *public interest certificate* stating that it is not in the public interest for the *covered procurement* to be suspended while complaints under section 18 of *the Act* are being investigated or applications for injunctions are being considered.
58. A *public interest certificate* may be issued at any stage during the *covered procurement* process, including after a complaint is made, and it will allow the *covered procurement* to continue as scheduled. In some circumstances, given the scale or significance of a *procurement*, it may be appropriate for the *accountable authority* to issue a public interest certificate before the approach to the market.
59. Further detail on issuing a *public interest certificate* is located at [Appendix 1](#).

Application to the court

60. *The Act* provides for a *supplier*, where its interests are affected by contraventions or proposed contraventions of the *relevant CPRs*, to make an application to the *FCC* or the *Federal Court*. *The Act* places a time limit of 10 days on the making of applications for

injunctions. The court is able to allow longer periods at its discretion, for example where the delay in making the application is attributable to the *supplier* attempting to resolve the complaint, or where the court considers that special circumstances apply.

61. The court will assess the *relevant Commonwealth entity's* compliance with the *relevant CPRs* in relation to which the *supplier* alleges contraventions or proposed contraventions. The court may request a written submission from the *relevant Commonwealth entity*.
62. The *relevant Commonwealth entity* **must** indicate if a *public interest certificate* has been issued and provide a copy to the court if one has been issued.
63. *Officials* should also refer to the [Legal Services Directions](#) and the [FCC](#) and [Federal Court](#) websites for more information on the rules that apply to the conduct of applications.
64. The court can dispose of an application if there are no reasonable prospects of the application being successful, the application is frivolous or vexatious, or the court considers the application is an abuse of court process.

Available remedies

65. *The Act* provides for the *supplier* to seek an injunction and/or compensation. There are two types of injunctions that can be granted:
 - 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*.
66. The court cannot grant an injunction unless the *supplier* has first made a complaint to the *accountable authority* and, if the court considers it reasonable for them to have done so, has made a 'reasonable attempt' to resolve the complaint.
67. The court may also decide not to grant an injunction if:
 - the *supplier* has also made an application of compensation; and
 - a *public interest certificate* is in force in relation to the *covered procurement*; and
 - a contract has not yet been entered into; and
 - the court considers that an injunction would significantly delay the *covered procurement* and that compensation would be a more appropriate remedy.
68. 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.
69. The court cannot overturn awarded contracts.

70. The Commonwealth operates a devolved *procurement* framework where *relevant Commonwealth entities* are responsible for undertaking their own *procurement* processes in order to meet their business needs. Noting this, *relevant Commonwealth entities* are responsible for paying any compensation ordered by the court.

Handling complaints outside of the scope of the Act

71. Complaints outside the scope of *the Act*, including complaints that are not related to *covered procurements* and complaints related to *covered procurements* that are not complaints under section 18 of *the Act*, **must** be handled in an appropriate manner in accordance with paragraph 6.8 of the *CPRs* and the *relevant Commonwealth entity's* internal review processes.

Suggestions for officials

72. To assist the *accountable authority* to effectively investigate and respond to complaints, *officials must* ensure they appropriately document the *procurement* processes undertaken (refer paragraphs 7.2 and 7.3 of the *CPRs*). This includes documenting:
- key decisions and the reasons for making those decisions;
 - evaluation processes;
 - delegate approvals;
 - communication with *suppliers*; and
 - any other information that demonstrates that the *relevant Commonwealth entity's* actions were robust and consistent with the *PGPA Act*, the *CPRs*, the entity's accountable authority instructions and all plans and documents related to the *procurement*.

Part 3 – Additional information

Determination issued by the Finance Minister

73. In some circumstances, a *procurement* or class of *procurements* may be determined by the *Finance Minister* to not be *covered procurements* for the purposes of *the Act*. A determination can only be issued if it is consistent with Australia's international obligations.
74. Any proposal for a determination **must** be agreed by the Department of Finance (Finance), who will then submit the proposal to the *Finance Minister* for consideration. To make a proposal for a determination, please contact procurementagencyadvice@finance.gov.au.

Other avenues available to suppliers

75. Other avenues to raise complaints continue to be available to *suppliers*, including the [*Australian Government Procurement Coordinator*](#) and the [*Commonwealth Ombudsman*](#).

Other resources

76. A guide on handling a complaint is available at Appendix 2 to assist *relevant Commonwealth entities* to follow the requirements of *the Act*.
77. A table outlining the *relevant CPRs* for the purposes of *the Act* is available at Appendix 3.
78. A high-level flow chart of the process established by *the Act* is included at Appendix 4.
79. Information to assist *suppliers* with the processes and information required when raising a complaint is available on the Finance website.
80. A template for a *public interest certificate* is included at Appendix 5.

Case studies

Case Study 1:

A *relevant Commonwealth entity* is undertaking a *procurement* with an estimated value of \$1,200,000. The *procurement* is a *covered procurement* (i.e. not exempt from any parts of Division 1 or Division 2 of the *CPRs*). The *relevant Commonwealth entity* releases the request for tender documentation. Before the closing time for tenders, an aggrieved *supplier* raises a complaint under section 18 of *the Act* that the request for tender documentation is incomplete, as it does not clearly specify the estimated quantity of *goods* to be procured (an alleged contravention of paragraph 10.6(a) of the *CPRs*).

The *relevant Commonwealth entity* considers whether the complaint meets the conditions under section 18(1) of *the Act* and determines it to be a valid complaint under *the Act*. The *relevant Commonwealth entity* informs the aggrieved *supplier* that the complaint has been received and is under investigation.

As a *public interest certificate* is not in force, the *procurement* is immediately suspended. The *relevant Commonwealth entity* issues an addendum stating that the *procurement* has been suspended and that a revised closing time and date will be notified in due course. The addendum confirms that receipt and processing of clarification questions and the scheduled industry briefing will be deferred until further notice.

During the investigation, the *accountable authority* confirms that the request documentation does not clearly specify the estimated quantity of *goods* to be procured. The *accountable authority* prepares a report that recommends that the *relevant Commonwealth entity* issue an addendum to the request documentation that includes the estimated quantity of *goods* to be procured in accordance with paragraph 10.14 of the *CPRs*. The *accountable authority* confirms with the aggrieved *supplier* that this information was not provided and will be released accordingly to all participating suppliers, consistent with the requirement to treat *suppliers* equitably under paragraph 6.6 of the *CPRs*. The aggrieved *supplier* confirms that their complaint has been resolved in writing. The *relevant Commonwealth entity* issues the addendum, which confirms that the *procurement* has recommenced, specifies the estimated quantity of *goods* to be procured, advises the new date for the industry briefing, and extends the closing time.

Case Study 2:

A *relevant Commonwealth entity* has undertaken a *procurement* and awarded a contract to a *supplier* to the value of \$1,200,000. The *procurement* is a *covered procurement* (i.e. not exempt from Division 1 or Division 2 of the *CPRs*). After the contract has been awarded to the successful *supplier*, an unsuccessful *supplier* complains under section 18 of *the Act* that it was discriminated against due to the size of its company, and that there has been a contravention of paragraph 5.4 of the *CPRs*.

The *relevant Commonwealth entity* considers whether the complaint meets the conditions under section 18(1) of *the Act* and determines it to be a valid complaint under *the Act*. The *relevant Commonwealth entity* acknowledges the complaint has been received, and then commences its investigation. As the contract has already commenced, the *procurement* cannot be suspended.

The *accountable authority* investigates the complaint by reviewing the *procurement* documentation, including the request documentation, the evaluation plan, minutes of the evaluation committee, the evaluation report and the recommendation to the delegate, and prepares a report that finds that the entity acted in accordance with paragraph 5.4 of the *CPRs*.

The *relevant Commonwealth entity* explains to the aggrieved *supplier* that the *procurement* was conducted in accordance with the *CPRs*. The *relevant Commonwealth entity* explains that the contract was awarded to another *supplier* on the basis of an independent and arm's length assessment of the best value for money. Further, the *relevant Commonwealth entity* explains that the size, degree of foreign affiliation or ownership, location or the origin of its *goods* or services were not considered during the evaluation. The *relevant Commonwealth entity* has evaluation documents to support this.

The aggrieved *supplier* does not agree with the *relevant Commonwealth entity's* finding and advises the *accountable authority* that it will make an application to the *Federal Circuit Court (FCC)*.

The *FCC* accepts the application. As the contract has already been awarded, the only form of remedy available is compensation.

It is agreed that the case may be heard based on a written submission. At the *FCC's* request, the *relevant Commonwealth entity* provides a written submission stating why it considers its actions were compliant with paragraph 5.4 of the *CPRs*. The *relevant Commonwealth entity* also provides supporting evidence (e.g. tender evaluation report) as per the *FCC's* rules and procedures.

The *FCC* considers the facts and finds that the *relevant Commonwealth entity* acted in compliance with paragraph 5.4 of the *CPRs*. No compensation is ordered.

Case Study 3:

A *relevant Commonwealth entity* has undertaken a *procurement* and awarded a contract to a *supplier* with a value of \$1,200,000. The *procurement* is not a *covered procurement* as an Appendix A exemption applied to the *procurement*, which meant Division 2 of the *CPRs* does not apply.

An aggrieved *supplier* raises a complaint under section 18 of *the Act* that the *relevant Commonwealth entity* contravened paragraph 10.35 of the *CPRs* – the *supplier* contracted was not fully capable of undertaking the contract.

The *relevant Commonwealth entity* considers whether the complaint meets the conditions under section 18(1) of *the Act*, and determines that the complaint does not fall under *the Act*. The *relevant Commonwealth entity* informs the aggrieved *supplier* soon after the complaint has been received that the complaint does not fall under *the Act*. The *accountable authority* manages the complaint, communication, and conciliation with the *supplier*, in accordance with its internal review processes and paragraph 6.8 (Division 1) of the *CPRs*.

The *relevant Commonwealth entity* advises the aggrieved *supplier*, who does not accept the decision. The aggrieved *supplier* considers if the *FCC* has jurisdiction to receive an application to resolve the complaint. As the *procurement* is not a *covered procurement*, the *FCC* does not have jurisdiction to accept the application so the complaint does not proceed in the *FCC*.

Appendix 1 – Issuing *public interest certificates*

What is a *public interest certificate*?

1. A *public interest certificate* is a document issued by the *accountable authority* of a *relevant Commonwealth entity*. A *public interest certificate* may only be issued where the *accountable authority* concludes that it is not in the public interest for a particular *covered procurement* process to be suspended while applications for injunctions are being considered or complaints are being investigated (see section 22 of *the Act*).
2. A template of the *public interest certificate* is at [Appendix 5](#).

In what circumstances can a *public interest certificate* be issued?

3. A *public interest certificate* should only be issued where suspending the *covered procurement* would have an adverse impact on the public interest that exceeds the right of the aggrieved *supplier* to have the *covered procurement* suspended. It will be a matter of judgement for the responsible *accountable authority* to weigh the relative merits of these competing interests, which will depend on a range of factors, including, but not limited to:
 - a) the purpose of the *goods* and services being procured;
 - b) the scope, scale and risk of the *covered procurement*;
 - c) the criticality of timing for the *covered procurement*;
 - d) linkages and interdependencies with other processes, potentially including other non-*procurement* processes; and
 - e) the scale and scope of any alleged contravention of the *relevant CPRs* and the potential materiality of that alleged contravention on the interests of the aggrieved *supplier*.
4. If the *accountable authority* determines that it is appropriate to issue a *public interest certificate*, the *relevant Commonwealth entity* should document the decision, 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.
5. A *public interest certificate* may be issued at any stage during the *covered procurement* process, including after a complaint is made, and it will allow the *covered procurement* to continue as scheduled.
6. In some circumstances where the *supplier* has not responded to a *relevant Commonwealth entity's* findings in relation to the complaint, the *accountable authority* should consider whether there are grounds for issuing a *public interest certificate*.
7. A *public interest certificate* may be issued for programs of work, provided that the *public interest certificate* clearly outlines which specified *covered procurements* are encompassed by the *public interest certificate*.

Who can issue a *public interest certificate*?

8. For *NCEs*, a *public interest certificate* can only be issued by the *accountable authority* or an authorised delegate of the *accountable authority*.
9. For *CCEs*, the delegation powers in section 110 of the *PGPA Act* do not apply. However, their *accountable authorities* typically use common law authorisations to authorise *officials* to undertake certain functions on behalf of the entity.

When can a *public interest certificate* be issued?

10. The *public interest certificate* may be issued at any stage during the *covered procurement* process. It is considered good practice to determine if a *public interest certificate* will be required as soon as possible in the *covered procurement* process.

Where should the *public interest certificate* be published?

11. Where an *accountable authority* issues a *public interest certificate*, the *relevant Commonwealth entity* is **required** to publish the *public interest certificate* on its website promptly and should notify affected *suppliers* in writing that a *public interest certificate* is in force as set out below.

AusTender

12. Where there is a *public interest certificate* in force **prior to publishing the ATM**, the *relevant Commonwealth entity* should provide a copy of the *public interest certificate* with the ATM documentation.
13. Where the ATM has:
 - **Already been published** and the *accountable authority* subsequently issues a *public interest certificate*, the *relevant Commonwealth entity* is **required** to publish a copy of the *public interest certificate* on the *relevant Commonwealth entity's* website promptly and should notify affected *suppliers* in writing. This may be done through an ATM addendum.
 - **Closed** and the *accountable authority* subsequently issues a *public interest certificate*, the *relevant Commonwealth entity* is **required** to publish a copy of the *public interest certificate* on the *relevant Commonwealth entity's* website promptly and should notify affected *suppliers* in writing.

Not using AusTender, including Limited Tender

14. Where an ATM is not required to be published on AusTender, for example, when undertaking a Limited Tender, the *relevant Commonwealth entity* is required to take action to 'issue' the *public interest certificate* by promptly publishing the *public interest certificate* on the *relevant Commonwealth entity's* website and should notify the *supplier/s* in writing that a *public interest certificate* is in force.

Table 1: <i>Public Interest Certificate</i> publication and notification			
Stage of the <i>procurement</i> process	Publish <i>PIC</i> promptly on entity website	How to inform <i>suppliers</i> of the <i>Public Interest Certificate (PIC)</i>	
		PIC issued on AusTender e.g. addenda	In writing e.g. email communication
Prior to publishing the ATM	✓	✓	
ATM has been published	✓	✓	
ATM has closed	✓		✓
Not using AusTender	✓		✓

Notification upon receiving a complaint

15. Notwithstanding the above requirements, where a *supplier* raises a complaint regarding a *covered procurement*, it should be informed in writing if a *public interest certificate* is in force and provided with a copy of the *public interest certificate*.
16. A copy of the *public interest certificate* **must** be provided when requested by a *supplier* or the court.

Appendix 2 – Guide for relevant Commonwealth entities: Handling complaints

1. The Department of Finance publishes information (including the *Selling to Government* Guidance) that advises *suppliers* that complaints under *the Act* can only be made in relation to non-compliance with Division 2 and relevant paragraphs of Division 1 for *covered procurements*.
2. Below is a guide for *relevant Commonwealth entities* to ensure compliance with managing and investigating complaints under *the Act*.
3. Note that references in this guide to the *accountable authority* should be read as referring to the *accountable authority* or authorised delegate under *the Act*.

Have you determined whether this is a complaint under section 18 of the Act?

4. If the *accountable authority* receives a written *procurement*-related complaint from a *supplier*, they should first assess whether:
 - the complaint is intended to be a complaint under section 18 of *the Act*;
 - the complaint involves a *covered procurement*;
 - the *supplier* has reason to believe that an actual or proposed contraventions of the *relevant CPRs* has occurred or will occur; and
 - the interests of the *supplier* are affected by the alleged contraventions.
5. A *relevant Commonwealth entity* 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. If *the CPR* provisions have not been made clear, the *accountable authority* should confirm this with the *supplier*.

Have you informed the *supplier* that its complaint has been received and is being investigated?

6. When a complaint is received from a *supplier*, the *accountable authority* should promptly inform the *supplier* that the complaint has been received and is under investigation. For transparency, the *supplier* **must** be advised if a *public interest certificate* is in force, or comes into force, as the *public interest certificate* allows the *covered procurement* to continue while the complaint is under investigation. A copy of the *public interest certificate* **must** be provided when requested by the *supplier* (or the court).
7. The *accountable authority* should provide the *supplier* with a timeframe for when it can expect an outcome to its complaint.
8. The *accountable authority* should only investigate the alleged contraventions of the *CPRs* outlined in the *supplier's* complaint and not the entire *covered procurement* process. The investigating officer should be independent of the *covered procurement* process.

Does the *covered procurement* need to be suspended?

9. If a *public interest certificate* is not in force and the complaint is determined by the *relevant Commonwealth entity* to be a valid complaint under section 18 of *the Act*, the *covered procurement* **must** be immediately suspended from the time the formal complaint is received.
10. When suspending a *covered procurement*, *relevant Commonwealth entities* may wish to receive probity advice on sharing information in relation to the complaint (and/or suspension of the *procurement*) with the affected *suppliers*.

How do I suspend a *covered procurement*?

AusTender – Before the approach to market closes

11. Where the *covered procurement* is suspended prior to the closing date, the *relevant Commonwealth entity* **must** issue an addendum to the ATM, which **must** state that:
 - the *covered procurement* has been suspended as of [date] (as a complaint under *the Act* has been received and a *public interest certificate* is not in force);
 - a revised closing date will be notified once the issue is resolved; and
 - no responses, including clarification questions, will be considered until further notice.
12. The revised closing date **must** not be any earlier than the date originally advertised. While there is no requirement for a one-to-one relationship between the length of the suspension and the revised closing time, it is considered best practice to provide reasonable time from the end of the suspension to the revised closing.

AusTender – After the closing date

13. If the closing date for the *covered procurement* has passed, the *relevant Commonwealth entity* **must** notify all *suppliers* that have submitted a response to the ATM, in writing, that the *covered procurement* has been suspended. Once the complaint has been resolved, the *relevant Commonwealth entity* **must** notify *suppliers* that submitted or are submitting a response to the ATM that the *covered procurement* is continuing.

Not using AusTender, including Limited Tender

14. If the *covered procurement* was not undertaken using AusTender (for example, where the procurement was conducted by Limited Tender), all *suppliers* that been invited to tender or have submitted a response to the ATM **must** be notified in writing that the *covered procurement* has been suspended. Once the complaint has been resolved, *suppliers* **must** be notified that the *covered procurement* is continuing and what the revised closing time is.

Suppliers that raise concerns about the covered procurement being suspended

15. If other *suppliers* raise concerns about a *covered procurement* being suspended, the *relevant Commonwealth entity* may inform those *suppliers* that the *covered procurement* **must** be suspended where a *public interest certificate* is not in force.

Other *suppliers* may be referred to the appropriate addendum or other written communication.

Preserving a supplier's right to participate in a covered procurement

16. When suspending a *covered procurement*, the *accountable authority* should ensure that *suppliers'* rights to participate in the *covered procurement* are preserved. For example, this includes not progressing the *covered procurement* to the next stage. No directive steps should be taken.

Have you investigated compliance with the *relevant CPRs* that are the subject of the complaint?

17. In investigating the complaint, the *accountable authority* **must** investigate if the *covered procurement* was conducted in a manner consistent with the *relevant paragraph/s of the CPRs* which the *supplier* considers have been or will be contravened.
18. This could include reviewing *procurement* documentation to determine the relevant decisions and the basis of those decisions.

Have you notified the *supplier* of the outcome of its complaint?

19. Where the *accountable authority* has found that the *covered procurement* was compliant with the *relevant paragraph/s of the CPRs*, the *relevant Commonwealth entity* should notify the outcome to the *supplier*, including a clear explanation of why the *covered procurement* is considered compliant with those paragraphs.
20. If relevant, the *relevant Commonwealth entity* should also notify the *supplier* of how the contraventions were resolved in writing.

Have you offered a solution (if applicable)?

21. Where the *accountable authority* has found that the *covered procurement* was not compliant, the *relevant Commonwealth entity* should notify the *supplier* and work with them to resolve the complaint. For any remedy offered, including where the contract has not been awarded, the *accountable authority* **must** offer a remedy that is not prejudicial to the *supplier* (or other *suppliers*) participating in the current or future *procurements*. For example, if a complaint is that the minimum time limits have not been adhered to, the *relevant Commonwealth entity* may rectify the contravention by complying with minimum time limits – preserving the *supplier's* opportunity to participate in the *covered procurement*.
22. Where the complaint remains unresolved, the *supplier* may make an application to the court.

Does the resolution involve extension of timeframes?

23. Where a *supplier* has already submitted a response to a suspended *covered procurement*, it can resubmit a response before the revised closing time in accordance with a common deadline (refer to paragraph 10.20 of the *CPRs*).

Have you confirmed with the *supplier* if it considers the complaint to be resolved?

24. Regardless of whether the *accountable authority*'s conclusion is that the *relevant CPRs* have or have not been contravened, the *relevant Commonwealth entity* should confirm with the *supplier* whether it considers the complaint to be resolved.
25. If the *supplier* does not consider the complaint to be resolved and intends to make an application to the court, the *accountable authority* **must** continue to suspend the *covered procurement* until either a court makes a finding on whether there has been contraventions of the *relevant CPRs* or a *public interest certificate* is issued. The *relevant Commonwealth entity* may finalise the report on the investigation and refer to the [Legal Services Directions](#) regarding legal representation in the court. The *relevant accountable authority* may also consider the need to issue a *public interest certificate* to lift the suspension on the *covered procurement*.
26. If the *supplier* informs the *accountable authority* that it considers the complaint to be resolved, or withdraws its complaint, the suspension is lifted and the *relevant Commonwealth entity* may continue with the *covered procurement*. Where the *relevant Commonwealth entity* had previously issued a notice to *suppliers* regarding the suspension of the *covered procurement*, the *relevant Commonwealth entity* **must** issue an addendum, or written notification to notify *suppliers* that the complaint has been resolved and the *covered procurement* is continuing (and confirming any revised closing date).

Have you maintained records of the *covered procurement* and complaint?

27. Under *the Act*, the *accountable authority* is **required** to prepare a report of the investigation. This report should be retained with the other relevant *procurement* documentation.
28. *Relevant Commonwealth entities* can reduce the chance of receiving a complaint by complying with the *CPRs*, ensuring that *covered procurement* processes are well planned, and that the process that has been outlined in the approach to the market is consistent with the *relevant CPRs* and is followed closely. Properly documenting decisions and keeping clear records will assist *relevant Commonwealth entities* to address complaints. Paragraph 7.3 of the *CPRs* outlines the minimum records that should be maintained.
29. *Relevant Commonwealth entities* are also reminded to maintain records of minutes from meetings and telephone conversations, as well as email correspondence with *suppliers*.

Have you referred to the Legal Services Directions on using in-house or external lawyers?

30. If the *supplier* makes an application to the court, the *relevant Commonwealth entity* **must** follow the directions and orders of the court. *Relevant Commonwealth entities* should refer to the [Legal Services Directions](#) for guidance on representation by in-house or external lawyers in court.

Appendix 3 – Compliance with CPRs

In addition to Division 2 of the *CPRs* which apply for *covered procurements* at or above the relevant *procurement* threshold, the following Division 1 paragraphs are also declared relevant for the purposes of *the Act*.

Section	CPRs Paragraph(s)
Division 1	
4. Value for money	
Third-party procurement	4.18
5. Encouraging competition	
Non-discrimination	5.4
7. Accountability and transparency in procurement	
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
9. Procurement method	
Requirement to estimate value of procurement	9.3 - 9.6

Appendix 4 – Flow-chart

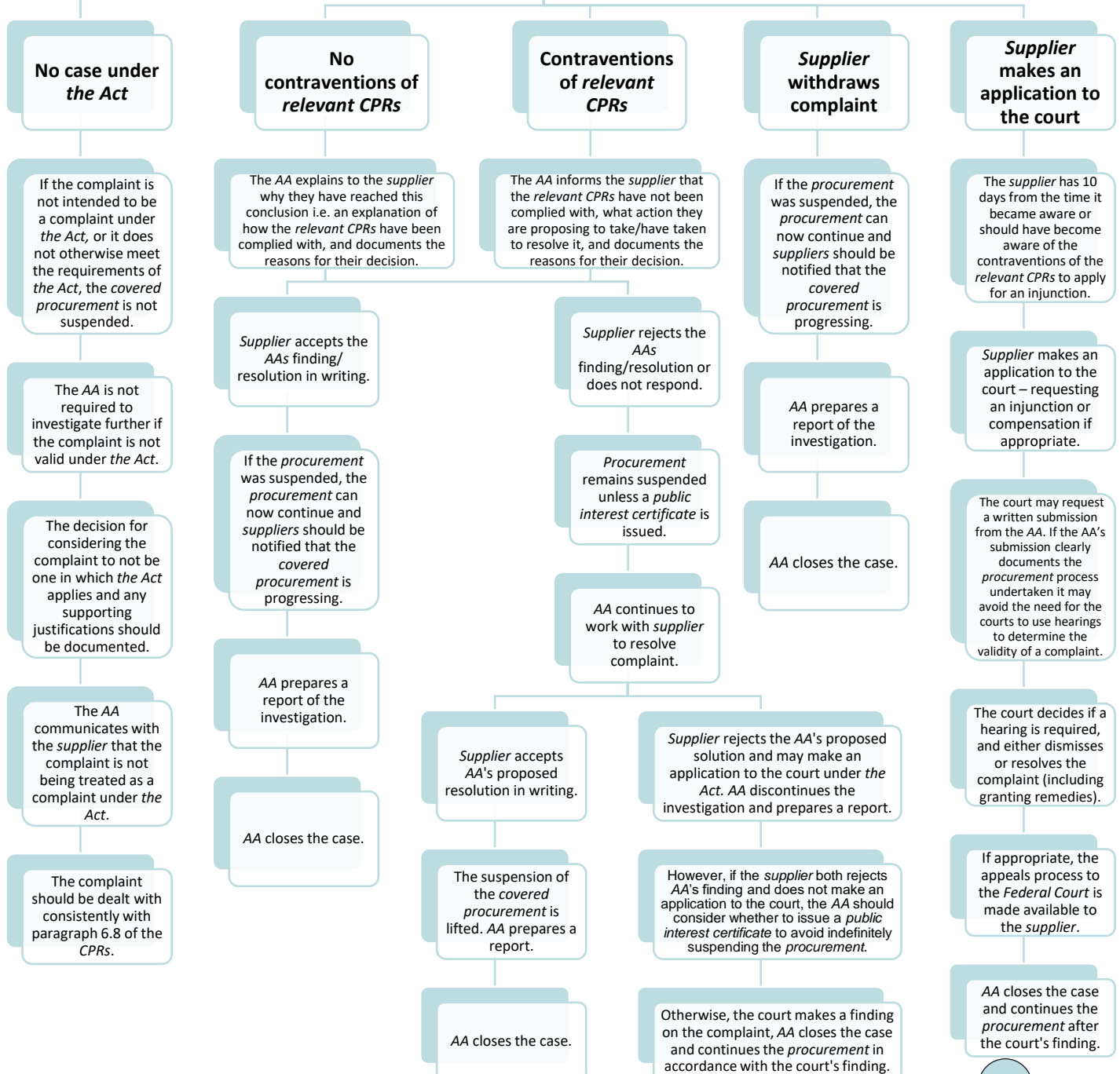
Supplier makes a complaint to the Accountable Authority (AA)

If the Accountable Authority (AA) receives a written *procurement*-related complaint from a *supplier*, they should assess:

- whether the supplier intends it to be a formal complaint under section 18 of the *Act*;
- whether the complaint has been made in relation to a *covered procurement*;
- whether the supplier has reason to believe that there is an actual or proposed contraventions of the *relevant CPRs*; and
- whether the interests of the *supplier* are affected by the contraventions.

If this information is incomplete or unclear, clarification should be sought from the *supplier*. Until this occurs, the AA should avoid making any substantive progress in the *covered procurement*.

If these criteria are met, the AA must suspend the *covered procurement* unless or until a *public interest certificate* is issued. The AA or *relevant Commonwealth entity* must also investigate the *supplier* complaint.



Appendix 5 – Public Interest Certificate template

This *public interest certificate* is issued under section 22(1) of the *Government Procurement (Judicial Review) Act 2018*.

I hereby state that it is not in the public interest for the following *procurement(s)* by [..procuring entity name..] to be suspended while complaints under section 18 of *the Act* are being investigated or while applications for injunctions under Part 2 of *the Act* are being considered.

AusTender ID(s)	[Relevant AusTender ID(s): ATM ID/CN ID/SON ID]
Tender(s) Close Date and Time	[DD-MM-YYYY XX:XX AM/PM]
Procuring Entity	[Procuring entity name - <i>NCEs</i> and prescribed <i>CCEs</i> listed in section 30 of the <i>Public Governance, Performance and Accountability Rule 2014</i>]
Contact Officer	[Name] [Contact number] [Email address]
Category (UNSPSC)	[UNSPSC code]
Description	[Describe what is being procured]

Signature of *accountable authority*/delegate:

<Name>

<Title>

<Month><Year>

Appendix 6 – Definitions

Accountable authority has the same meaning as in the *PGPA Act*.

Act means the *Government Procurement (Judicial Review) Act 2018*.

Commonwealth Procurement Rules (CPRs) means the *Commonwealth Procurement Rules* under subsection 105B(1) of the *PGPA Act*.

Corporate Commonwealth entity (CCE) has the same meaning as in the *PGPA Act*.

Covered procurement means:

- (a) the rules in Division 1 and 2 of the *CPRs* apply to the *procurement*, and
- (b) the *procurement* is not included in a class of *procurements* specified in a determination by the Finance Minister under section 5(2) of *the Act*.

Note: The rules in Division 1 and 2 of the *CPRs* do not to apply to a *procurement* for a purpose set out in paragraph 2.6 of the *CPRs*.

Federal Circuit Court (FCC) means the *Federal Circuit Court of Australia*.

Federal Court means the *Federal Court of Australia*.

Finance Minister means the Minister responsible for issuing the *CPRs* under section 105B of the *PGPA Act*.

Goods has the same meaning as in the *CPRs*.

Non-corporate Commonwealth entity (NCE) has the same meaning as in the *PGPA Act*.

Official has the same meaning as in the *PGPA Act*.

PGPA Act means the *Public Governance, Performance and Accountability Act 2013*.

Procurement has the same meaning as in the *CPRs*.

Public Interest Certificate means a written certificate issued by the *accountable authority* of a *relevant Commonwealth entity* 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* of *the Act* are being considered; or
- (b) complaints under *section 18* of *the Act* are being investigated.

Relevant Commonwealth entity means

- (a) a *non-corporate Commonwealth entity*; or
- (b) a *corporate Commonwealth entity* prescribed by rules made for the purposes of paragraph 105B(1)(b) of the *PGPA Act*.

Relevant Commonwealth Procurement Rules means

- (a) a provision of Division 1 of the *CPRs* that is declared by those rules to be a relevant provision for the purposes of this paragraph; or

(b) Division 2 of the CPRs.

Supplier (under *the Act*) means

- (a) a person who supplies, or could supply, *goods* or services; or
- (b) a partnership (or other group) of two or more persons that supplies, or could supply, *goods* or services.