# *Government Procurement Following the Australia US Free Trade Agreement — Is Australia Complying with its Obligations to Provide Remedies to Unsuccessful Tenderers?*

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***Abstract***

Chapter 15 of the *Australia United States Free Trade Agreement* ('AUSFTA') refers to the possibility, in a government procurement dispute, of suspension of a 'contract award or the performance of a contract that has already been awarded'. The existence of an international obligation under the AUSFTA to provide such remedies to disappointed tenderers from the US would raise serious questions regarding Australia's compliance with the AUSFTA. This article reviews the government procurement chapter of the treaty and assesses the legal position facing Australia in relation to the provision of such remedies. Given that non-compliance with the AUSFTA can give rise to retaliation by the other treaty party and that retaliation need not be limited to the sector implicated (in this case procurement) in the initial violation, this article addresses an issue of potential importance beyond the field of government procurement.

## *1. Introduction*

In Annex 8 of the Australian Government's National Interest Analysis[1] of the free trade agreement between Australia and the United States of America ('AUSFTA'), one finds a statement that 'minor changes may be required' to two Commonwealth enactments to 'ensure compliance' with the government procurement chapter of the AUSFTA. This assessment (published in March 2004) of the extent of change required of the Commonwealth Government to comply with the government procurement chapter of the AUSFTA was noted and apparently endorsed by the Joint Standing Committee on Treaties in its June 2004 Report on the AUSFTA.[2]

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1 Joint Standing Committee on Treaties, *Australia – United States Free Trade Agreement*: Report 61 (2004) at 30–31 <http://www.aph.gov.au/house/committee/jsct/usafta/report.htm> accessed 6 February 2007.

None of the other parliamentary reports that considered the proposal for a free trade agreement with the US appear to question this assessment.[3] The Parliament's *US Free Trade Agreement Implementation Act* 2004 (Cth) amends the *Commonwealth Authorities and Companies Act* 1997 (Cth) by including just one section (section 47A — 'Compliance with government procurement requirements').

Similarly, there appear to have been no significant changes to procurement rules and policies in States such as New South Wales[4] and Queensland in response to the entry into force of the AUSFTA. The Queensland State Purchasing Policy, the second edition of which was published in 2004,[5] does not appear to have been modified to take into account the entry into force of the treaty. A Queensland Government assessment of the implications for Queensland of the government procurement chapter of the AUSFTA[6] Asserts that '[g]enerally, the requirements [of the AUSFTA] are consistent with the sound procurement practice implemented by Queensland Government agencies'.[7]

However, if one looks more closely at the Commonwealth response to the AUSFTA one can see that the position may not be as straightforward as the above assessments suggest. In addition to the amendments to the two Commonwealth enactments referred to above, there have also been amendments to the regulations made under the *Financial Management and Accountability Act* 1997 (Cth). It is under these regulations that the *Commonwealth Procurement Guidelines* are issued by the Finance Minister. In January 2005 the *Commonwealth Procurement Guidelines* were significantly expanded to include 'Mandatory Procurement Procedures'.[8] These detailed provisions were designed to implement obligations contained in the government procurement chapter of the AUSFTA. The expansion

2 Joint Standing Committee on Treaties, *Australia – United States Free Trade Agreement*: Report 61 (2004) at 30–31 <http://www.aph.gov.au/house/committee/jsct/usafta/report.htm> accessed 6 February 2007.

3 See, for example, the Senate Foreign Affairs, Defence and Trade References Committee Report, *Voting on Trade – The General Agreement on Trade in Services and an Australia/US Free Trade Agreement* (2003) <http://www.aph.gov.au/Senate/committee/fadt_ctte/completed_inquiries/2002–04/gats/index.htm> accessed 6 February 2007; and the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, *Interim Report June 2004* and *Final Report August 2004*, <http://www.aph.gov.au/Senate/committee/freetrade_ctte/> accessed 6 February 2007.

4 For government procurement in NSW, reference should be made to the *Public Sector Employment and Management Act* 2002 (NSW), the *Public Sector Management (Goods and Services) Regulation* 2000 (NSW); the *Public Finance and Audit Act* 1983 (NSW) *and* the Treasurer's directions made under the Act and the *Code of Practice for Procurement* (2005). See also Christine Lithgow, 'Judicial Review of Government Contracting in New South Wales' (1998) 14 *Building and Construction Law* 176.

5 Queensland Government Department of Works, *State Purchasing Policy* (2004) <http://www.qgm.qld.gov.au/00_downloads/spp2000.pdf> accessed 6 February 2007.

6 Queensland Government Chief Procurement Office, *Australia–United States Free Trade Agreement (*AUSFTA*): Implications for Queensland Government Procurement* (2008) <http://www.qgm.qld.gov.au/00_downloads/ausfta.pdf> accessed 6 February 2007.

7 Id at 1.

8 Department of Finance and Administration, *Commonwealth Procurement Guidelines* (2005) <http://www.finance.gov.au/publications/fmg-series/docs/CPGs_–_January_20051.pdf> accessed 6 February 2007.

of the *Commonwealth Procurement Guidelines* in January 2005 coincided with the entry into force of the AUSFTA on 1 January 2005.[9] The length and detail of these new guidelines and associated documents[10] suggest that required changes to comply with the AUSFTA may be more than minor. In one early assessment of the government procurement chapter of the AUSFTA, one commentator observed that:

> Australia's implementation of the government procurement chapter of the Free Trade Agreement … between Australia and the US will involve fundamental changes to all aspects of government procurement. These changes will see a revolution in the interface between business and government and the processes for procurement of goods and services by Australian governments — both Federal and State.[11]

This article will focus on one aspect of the government procurement chapter, namely the opportunities for review that parties to the AUSFTA must provide for entities that wish to challenge procurement decisions. My main focus will be on Article 15.11 of the AUSFTA, which sets out review procedures that parties to the AUSFTA must provide. In particular, Article 15.11 appears to require that parties to the AUSFTA must ensure that there exist review bodies with the power to suspend, in appropriate cases, tender contracts that have been awarded in breach of essential requirements of the tender procedures called for under Chapter 15 of the AUSFTA. Article 15.11 is also the subject of an important agreed understanding recorded in side letters dated 18 May 2004 exchanged between the Australian and US governments.[12] Although these side letters address whether Australian courts and remedies have the potential to satisfy the requirements of Article 15.11, the side letters do not completely exclude the possibility that the US

9 On 18 November 2004, the Minister for Trade issued a media release that indicated that there had been an exchange of diplomatic notes and that the AUSFTA would come into force on 1 January 2005. Certain provisions of the agreement are to be phased in. Thus the prohibition of offsets under the government procurement chapter is to be phased in for a number of Australian States and the Northern Territory over a three-year period. See Section 2 of Annex 15-A.

10 The *Commonwealth Procurement Guidelines* must also be read in conjunction with the Department of Finance and Administration, *Guidance on the Mandatory Procurement Procedures* (2005) <http://www.finance.gov.au/publications/fmg-series/docs/Mandatory_Procurement_Procedures.pdf> accessed 6 February 2007.

11 Tom Brennan, 'Government Procurement under the Free Trade Agreement' (2004) 1(2) *Contract Management in Practice* 22 at 22. This assessment has been questioned by Ted Smithies, 'Will government procurement under the AUS Free Trade Agreement have to change?' (2004) 1(3) *Contract Management in Practice* 29. At 31, Smithies offers the following conclusion regarding the changes required to comply with the government procurement chapter: '…I think it would be hard to argue that these changes will be anything but at the margin, and will not attack the core of the current government practices of Australian jurisdictions'. Relying on work done by Tom Brennan & David Hodges, Linda Weiss, Elizabeth Thurbon & John Mathews in *How to Kill a Country: Australia's Devastating Trade Deal with the United States* (2004) at 84–112 reach similar conclusions on the impact of the AUSFTA on legal challenges to procurement decisions in Australia. For a critique of other aspects of Weiss, Thurbon & Mathews' chapter on procurement, see, for example, Evidence to the Senate Select Committee, *Free Trade Agreement between Australia and the United States of America*, 8 June 2004 at 53–57 (Andrew Stoler).

12 Side letters between the Honourable Robert B Zoellick, the United States Trade Representative and the Honourable Mark Vaile MP, Minister for Trade (2004) <http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/letters/15_procuremen_revt.pdf> accessed 6 February 2007.

might subsequently challenge whether Australia has fully implemented the obligations contained in Article 15.11.

The Queensland Government's assessment of the procurement chapter referred to earlier offers a single paragraph on Article 15.11 of the AUSFTA:

> The [government procurement] chapter sets minimum procedures for dealing with supplier challenges to the process or outcome of a procurement. These procedures, detailed in Article 15.11, confirm a supplier's right to challenge in the event that a procuring entity has failed to comply with measures put in place by a government to implement the chapter. Article 15.11 does not, however, give suppliers rights to challenge the adequacy or compliance of measures put in place by a government. The existing court systems in Australia satisfy the requirements set out in the chapter. This understanding is confirmed in a side letter to the Agreement.[13]

Before considering the requirements of Article 15.11, I will briefly sketch the general operation of the AUSFTA and the government procurement chapter, highlighting other provisions of relevance to the operation of Article 15.11. Following a consideration of the requirements of Article 15.11, I will assess current judicial remedies available in the context of government procurement. My conclusion is that in at least one fundamental respect, namely regarding the power of suspension of already awarded tender contracts, existing avenues of review may not meet the requirements of Article 15.11.

Concerns raised in this article regarding the suspension of tender contracts may have been addressed in relation to Commonwealth Government procurements by Ministerial directions issued under the *Commonwealth Authorities and Companies Act* 1997 (Cth), or by the January 2005 amendments to the *Commonwealth Procurement Guidelines*, or by the instructions issued by Chief Executives of Agencies covered by the *Financial Management and Accountability Act* 1997 (Cth). It is submitted that similar changes to the rules and policies applicable to procurement in Queensland will need to be made in order to ensure compliance with the obligations of the government procurement chapter of the AUSFTA. Provided appropriate directions are issued by the relevant Ministers in NSW and by the State Contracts and Control Board,[14] government procurement in NSW may more readily satisfy the requirements of the AUSFTA.

However, even if Queensland were to follow exactly the Commonwealth's steps in attempting to implement the AUSFTA, this may not be enough to ensure compliance with the AUSFTA. It is submitted that doubt remains as to whether the largely policy-based[15] regulation of Commonwealth (and State) procurement can be squared with the rule-based[16] approach effectively required by Article 15.11. A more rule-based approach did apply to Commonwealth procurement up until 1989.[17] A rule-based approach still applies in relation to government procurement

13 Queensland Government Chief Procurement Office, above n6 at 10.

14 The New South Wales State Contracts Control Board is a statutory board established under s 135 of the *Public Sector Employment and Management Act* 2002 (NSW).

15 The term 'policy' in this article is generally used to designate non-legislative standards.

16 The term 'rule' in this article is generally used to designate standards set out in, or having authority deriving from, statute or subordinate legislation.

by local authorities in States such as Queensland.[18] NSW government procurement covered by rules arising out of the *Public Sector Employment and Management Act* 2002 (NSW) and regulations issued under the Act may satisfy the review obligations contained in the AUSFTA. It is submitted that it is this type of approach that is more likely to satisfy the requirements of Article 15.11.[19]

The article will conclude with brief observations on some of the possible consequences for Australia under the AUSFTA if the concerns expressed herein regarding remedies are shared by US enterprises, the US government and a majority of any future panel established under Chapter 21 of the AUSFTA. The views of a panel established under the AUSFTA will be significant because, whilst the Queensland Government's assessment of Article 15.11 quoted above is correct (regarding the absence of a *supplier's* right to challenge the adequacy of government measures implementing the AUSFTA), there is nonetheless an entitlement under the panel procedure for the US *government* to initiate such a challenge.

Article 15.11 addresses civil remedies that must be provided. Attention will not be directed to criminal penalties, although it should be noted that, under Article 15.10, parties to the AUSFTA are required to impose criminal penalties on those who engage in corrupt procurement practices.

## *2. Brief Overview of the AUSFTA*

This necessarily brief overview of the AUSFTA will focus on the institutional and procedural aspects of the agreement and the chapter on government procurement. It is neither necessary nor possible in the present context to assess the treatment of other substantive areas covered by the agreement or the overall benefits and costs of Australian adherence to the treaty.[20]

The AUSFTA is a bilateral treaty that creates rights and obligations for its parties under international law. The parties are required under international law to carry out their obligations under the treaty in good faith.[21] These obligations include making changes to national laws and practices.[22] The dualism of the Australian constitutional system means that the AUSFTA cannot automatically change

17 See, for example, Nicholas Seddon, *Government Contracts – Federal, State and Local* (3rd ed, 2004) at 260.

18 See, for example, Chapter 6, Part 3 of the *Local Government Act* 1993 (Qld). For additional references, see for example Seddon, above n17 at 261.

19 There is a certain irony in this conclusion given that Chapter 15 of the AUSFTA does not appear to apply to procurements by local government entities.

20 These issues are addressed in the various parliamentary reports referred to in notes 2 and 3 above and in the numerous submissions received by the committees that produced these reports. A general overview of the AUSFTA has been prepared by the Australian Government <http://www.dfat/gov.au/trade/negotiations/us_fta/guide/index.html> accessed 6 February 2007. Nor will this article consider obligations arising for Australia under other treaties, such as the Free Trade Agreement with Singapore, that impact on Australia's trade relations.

21 The relevant international rule is enshrined in Article 26 of the *Vienna Convention on the Law of Treaties*, 1969 ('*Vienna Convention*'), which provides that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.'

22 Under international law, federated States such as Australia and the US are responsible for violations of treaty obligations flowing from legislation and executive action by their federal sub-units. In this regard, see Article 4(1) of the *Articles on State Responsibility* adopted by the International Law Commission in 2001.

Australian law. Legislative implementation has been necessary in order to vary rights and obligations under Australian law to ensure compliance with the AUSFTA.

The substantive obligations of the parties under the various chapters of the AUSFTA correspond in many respects[23] to obligations arising under the *Agreement Establishing the World Trade Organization* (‘*WTO Agreement*’).[24] The *WTO Agreement* is referred to in the preamble and in various articles of the AUSFTA.[25] In a number of articles of the AUSFTA there is express indication that the two treaties are to be construed consistently.[26] It seems clear that, as a general proposition, where the provisions of the AUSFTA are similar to those of the *WTO Agreement*, jurisprudence on the interpretation of the *WTO Agreement* will be an important source in the interpretation of the AUSFTA.[27]

In addition to the various chapters of the AUSFTA addressing different substantive trade issues, there are a number of general chapters. One of these general chapters is Chapter 20 which is entitled ‘Transparency’. Article 20.5 specifically addresses the obligation on parties to provide effective avenues of review and appeal. This article will be considered further below.

Another general chapter of the AUSFTA is Chapter 21 which addresses, *inter alia*, dispute resolution. The dispute resolution provisions of Chapter 21 are in many respects similar to the dispute resolution provisions of the *WTO Agreement*.[28] They operate on the traditional State-based model of international legal adjudication. Thus a US corporation that believes that Australia is not complying with its obligations under the AUSFTA has no entitlement to invoke the dispute settlement provisions of Chapter 21 of the agreement.[29] Rather the US corporation must raise its concerns with the US Government, which may at its discretion invoke the procedures contained in Chapter 21. These procedures, which begin with consultations, include compulsory dispute resolution before *ad*

23 There are, however, important differences in scope. Note, for example, differences in the area of investment. In the area of investment, the AUSFTA also differs from the North American Free Trade Agreement (‘*NAFTA*’). For a discussion of concerns regarding obligations in relation to foreign investment under the AUSFTA, see Joint Standing Committee on Treaties: AUSFTA Report 61, above n2, Chapter 12. Another difference, which is crucial to this article, is the presence of a chapter in the AUSFTA on government procurement. Government procurement is addressed in the ‘plurilateral’ *WTO Agreement on Government Procurement* (see annex 4 of the *WTO Agreement*). Parties to the *WTO Agreement* are not required to adhere to the *Agreement on Government Procurement* (the word ‘plurilateral’ is used to indicate that not all parties to the *WTO Agreement* are parties to the *Agreement on Government Procurement*). Australia is not a party to the *Agreement on Government Procurement*. The US is a party.

24 Australia and the US are amongst more than 140 States that are party to the *WTO Agreement*.

25 See, for example, Article 21.4 of the AUSFTA.

26 See, for example, Article 22.1 of the AUSFTA.

27 In this regard, the *WTO Agreement on Government Procurement* might be seen as part of the context in which the AUSFTA was negotiated – see, for example, Article 31 of the *Vienna Convention*. Nonetheless, care must be taken here as Australia is not a party to the *WTO Agreement on Government Procurement*.

28 With the overlap of substantive provisions of the AUSFTA and the *WTO Agreement*, the dispute resolution provisions of the two treaties have the potential to overlap. In this regard, see Article 21.4 of the AUSFTA.

29 Indeed it has no entitlement to raise violation of the AUSFTA before national courts, see Article 21.15.

*hoc* panels of experts. Such panels are to operate under international law and there is a specific direction in Article 21.9.2 of the AUSFTA to panels to apply the international rules on the interpretation of treaties found in the *Vienna Convention*. The reports of these panels, following the pattern of other trade treaties, are effectively binding on Australia and the US.[30]

## *3. Brief Overview of Chapter 15 of the AUSFTA*

'Government procurement' is defined in Article 1.2.13 of the AUSFTA to mean:

> … the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale or use in the production or supply of goods or services for commercial sale or resale.

'Measures'[31] involving certain types of procurement[32] by specified government entities (Federal, State and Territory)[33] are regulated by Chapter 15 of the AUSFTA. In relation to these forms of procurement various obligations are imposed. These include general obligations of non-discrimination in relation to suppliers of goods and services from the other treaty party.[34] Chapter 15 also requires the creation of specific procedural obligations and entitlements in relation to procurement.[35]

It is these procedural obligations and entitlements that are the main focus of this article. These procedural obligations include obligations to provide general information[36] about covered procurement[37] and specific information on proposed

30 See Article 21.10 of the AUSFTA.

31 See Articles 1.2.15 and 15.15.5 of the AUSFTA.

32 Chapter 15 formally applies to 'covered procurement' (defined in Article 15.1.2 of the AUSFTA), which encompasses a narrower class of procurements than those encompassed by the definition of 'government procurement' in Article 1.2.13. The definition of 'covered procurement' in Article 15.1.2 of the AUSFTA includes certain monetary thresholds, which are set out in Annex 15-A of the AUSFTA. The government procurement chapter applies to State and territory government procurement valued at or above A$666,000.00 (for goods and services) and A$9,396,000.00 (for procurement of constructions services). Articles 15.1.6 to 15.1.8 set out rules regulating the valuation of covered procurements for the purposes of these thresholds. Certain types of procurement are not subject to the requirements set out in Chapter 15. For example, Article 15.1.3(e) excludes 'procurement for the direct purpose of providing foreign assistance', Article 15.1.3(f) excludes 'procurement of research and development services' and Article 15.1.4 excludes certain defence procurements. Annex 15-A also excludes the procurement of motor vehicles by Federal, State and Territory government entities (see Section 1, footnote 2 and Section 2 of Annex 15-A – Tasmania, Western Australia and the Northern Territory do not appear to have excluded motor vehicles) and excludes from the operation of Chapter 15 'any form of preference to benefit small and medium enterprises', 'measures for the health and welfare of indigenous people' and 'measures for the economic and social advancement of indigenous people' (see Section 7 of Annex 15-A). Specific and varying exceptions from the operation of Chapter 15 apply in relation to Australian States. These State exceptions are set out in Section 2 of Annex 15-A. The Queensland and NSW Governments, for example, are entitled to phase out local content requirements for covered procurements over a three-year period (contrast Article 15.2.5 and the definition of 'offsets' in Article 15.15.7).

33 See, for example, the definition of 'procuring entity' in Article 15.15.10 of the AUSFTA.

34 See Article 15.2 of the AUSFTA.

covered procurement.[38] Time limits are to be prescribed allowing potential suppliers adequate time to participate in tender processes.[39]

Tendering procedures that Australia, as a party to the AUSFTA, must require Australian procuring entities to follow are set out in Articles 15.7, 15.8 and 15.9. In addition to open tendering,[40] which appears to be encouraged by the AUSFTA, Chapter 15 permits the use by procuring entities of selective tendering and limited tendering procedures.[41] Selective and limited tendering are, however, to be made subject to additional procedural requirements.[42] The employment of multi-use lists[43] is also permissible under certain conditions.[44]

Where a prospective supplier has applied to be considered for a covered procurement (including via a multi-use list or selective tendering procedure), Chapter 15 requires that the supplier must be entitled to prompt notification of the procurement entity's decision regarding its eligibility to participate in the procurement process.[45] Where such a decision is negative then, if the unsuccessful supplier so requests, there must be an entitlement to a promptly provided written explanation of the reasons for the decision.[46]

Article 15.9 of the AUSFTA addresses the way a procuring entity must treat tenders. The obligations and entitlements set out in paragraphs one to seven of the article, once implemented in relation to Australian procurement, have the potential to influence the scope of judicial remedies available to unsuccessful tenderers in Australia.[47] Full quotation of the paragraphs is therefore warranted:

> ARTICLE 15.9: TREATMENT OF TENDERS AND AWARDING OF CONTRACTS
>
> *Receipt and Opening of Tenders*
>
> 1. A procuring entity shall receive and open all tenders under procedures that guarantee the fairness and impartiality of the procurement process.
> 2. A procuring entity shall treat tenders in confidence. In particular, it shall not provide information to particular suppliers that might prejudice fair competition between suppliers.

35 Article 15.1.5 appears to require Australia to ensure that Australian procuring entities that conduct covered procurements must employ one of the three procurement methods set out in Article 15.2.3 of the AUSFTA (open tendering, selective tendering or limited tendering procedures) and comply with the other procedural requirements set out for tendering in Chapter 15.

36 See Article 15.3.

37 On the scope of the term 'covered procurement', see above n32.

38 See Articles 15.4 and 15.6.

39 See Article 15.5.

40 See the definition of 'open tendering' in Article 15.15.8.

41 See Article 15.2.3.

42 Selective tendering procedures (defined in Article 15.15.11) must also comply with the specific requirements set out in Articles 15.7.6 to 15.7.9. Limited tendering procedures must also comply with the specific requirements set out in Article 15.8 of the AUSFTA.

43 See the definition of 'multi-use list' in Article 15.15.6.

44 See paragraphs 4 and 5 of Article 15.7.

45 See Article 15.7.10 of the AUSFTA.

46 See Article 15.7.11.

47 In this regard see, in for example, the decision of Finn J in *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1 ('*Hughes*'), which is discussed further below.

3. A procuring entity shall not penalize any supplier whose tender is received after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the procuring entity.
4. Where a procuring entity provides suppliers with opportunities to correct unintentional errors of form between the opening of tenders and the awarding of the contract, the procuring entity shall provide the same opportunities to all participating suppliers.

*Awarding of Contracts*

5. A procuring entity may not consider a tender for award unless, at the time of opening, the tender conforms to the essential requirements of all notices issued during the course of a covered procurement or tender documentation.
6. Unless a procuring entity determines that it is not in the public interest to award a contract, it shall award a contract to the supplier that the entity has determined satisfies the conditions for participation and is fully capable of undertaking the contract and whose tender is determined to be the lowest price, the best value, or the most advantageous, in accordance with the essential requirements and evaluation criteria specified in the notices and tender documentation.
7. A procuring entity may not cancel a covered procurement, nor terminate or modify awarded contracts so as to circumvent the requirements of this Chapter.

Article 15.9 goes on to require the prompt provision of information regarding the outcome of the tender process. Unsuccessful suppliers are to be entitled, on request, to written reasons why their tenders were not selected.[48] Article 15.9.9 requires publication of information on the successful tender within 60 days of the award of the contract for the covered procurement. Parties to AUSFTA are entitled to obtain information from each other on the tender and evaluation procedures followed by their respective procuring entities.[49] Procurement records must be maintained for a period of at least three years following the award of a contract.[50]

The central provision for the purposes of this article is Article 15.11 of the AUSFTA. The provision's importance warrants its full quotation:

ARTICLE 15.11: DOMESTIC REVIEW OF SUPPLIER CHALLENGES

1. In the event of a complaint by a supplier of a Party that there has been a breach of the other Party's measures implementing this Chapter in the context of a covered procurement in which the supplier has or had an interest, the Party of the procuring entity shall encourage the supplier to seek resolution of its complaint in consultation with the procuring entity. In such instances the procuring entity shall accord timely and impartial consideration to any such complaint.
2. Each Party shall maintain at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review

48 See Article 15.9.8 of the AUSFTA.
49 See Article 15.9.10.
50 See Article 15.9.11.

challenges that suppliers submit, in accordance with the Party's law, relating to a covered procurement. Each Party shall ensure that any such challenge not prejudice the supplier's participation in ongoing or future procurement activities.

3. Where a body other than an authority referred to in paragraph 2 initially reviews a challenge, the Party shall ensure that the supplier may appeal the initial decision to an impartial administrative or judicial authority that is independent of the procuring entity that is the subject of the challenge.
4. Each Party shall ensure that the authorities referred to in paragraph 2 have the power to take prompt interim measures, pending the resolution of a challenge, to preserve the supplier's opportunity to participate in the procurement and to ensure that the procuring entities of the Party comply with its measures implementing this Chapter. Such interim measures may include, where appropriate, suspending the contract award or the performance of a contract that has already been awarded.
5. Each Party shall ensure that its review procedures are conducted in accordance with the following:
   (a) a supplier shall be allowed sufficient time to prepare and submit a written challenge, which in no case shall be less than ten days from the time when the basis of the complaint became known or reasonably should have become known to the supplier;
   (b) a procuring entity shall respond in writing to a supplier's complaint and provide all relevant documents to the review authority;
   (c) a supplier that initiates a complaint shall be provided an opportunity to reply to the procuring entity's response before the review authority takes a decision on the complaint; and
   (d) the review authority shall provide its decision on a supplier's challenge in a timely fashion, in writing, with an explanation of the basis for the decision.

There are a number of observations that can be made regarding Article 15.11 of the AUSFTA that appear particularly important in the present context. The reference in Article 15.11.2 to an obligation to protect a supplier's entitlement to participate in 'ongoing … procurement activities' appears broad enough to encompass cases where there is a challenge in relation to a procurement contract that has already been awarded. Any doubt regarding this interpretation is removed by Article 15.11.4, which expressly applies to cases where a procurement contract has already been awarded.

Under Article 15.11.4, parties to the AUSFTA appear to be under an obligation to provide for the suspension of performance of an already awarded procurement contract where this is 'appropriate'. The issue of suspension of already awarded contracts is central to the thesis advanced in this article and therefore warrants detailed consideration.

The presence of the word 'may' in the final sentence of Article 15.11.4 will create interpretative difficulties for any international panel established under Chapter 21 of the AUSFTA. Under the *Vienna Convention*, terms used in a treaty

are to be given their ordinary meaning in their context and in light of the object and purpose of the treaty.[51] The use of the word 'may' in the last sentence of paragraph 4 can be contrasted with the use of the word 'shall' earlier in the paragraph. However, in interpreting the word 'may' it appears important that the word 'shall' is used when identifying the general obligation assumed by the State parties under paragraph 4, ie '[e]ach Party *shall* ensure that the [procurement review] authorities …. have the power to take prompt interim measures … to preserve the supplier's opportunity to participate in the procurement and to ensure that the procuring entities of the Party comply with its measures implementing this Chapter' [emphasis added]. The context of the use of the word 'may' is therefore an illustration of what the paragraph requires, in appropriate circumstances, in order to 'to preserve the supplier's opportunity to participate in the procurement and to ensure that the procuring entities of the Party comply with its measures implementing this Chapter'.[52]

The alternative interpretation, namely that the provision of the remedy of suspension of the award or performance of a contract is at the discretion of each State party and is not required by the AUSFTA, is unlikely to be accepted by a panel. Such an interpretation appears inconsistent with the general context of both Article 15.11.4 and Chapter 15 as a whole and would render the words 'where appropriate' otiose, a result generally to be avoided under the rules of treaty interpretation.[53] Although the matter is not entirely free from doubt,[54] the better view therefore appears to be that there is an obligation on the State parties to give to review bodies the power of 'suspending the contract award or the performance of a contract that has already been awarded'.

It is also submitted that the obligation to provide for suspension of award or performance of contracts in appropriate cases extends beyond *interim* measures. Surprisingly, Chapter 15 of the AUSFTA appears silent on the remedies that are to be provided by way of *final* relief. A power of suspension nonetheless appears to

51 See Article 31(1) of the *Vienna Convention*. As noted above, Article 21.9.2 of the AUSFTA requires a panel established under the treaty to apply the rules of treaty interpretation contained in the *Vienna Convention.*

52 See Sue Arrowsmith, *Government Procurement in the WTO* (2003) at 398, for a similar interpretation of Article XX paragraph 7(a) of the *WTO Agreement on Government Procurement*, which provides that '[c]hallenge procedures *shall* provide for … rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities. Such action *may* result in suspension of the procurement process …'. [Emphasis added.] Having herself emphasised the word 'may' in paragraph 7(a), Professor Arrowsmith at 398 submits that '[t]his means … that suspension of the process must be one option available to the review body'. See also Arie Reich, *International Public Procurement Law – The Evolution of International Regimes on Public Purchasing* (1999) at 310–311. Unlike Article XX of the *WTO Agreement on Government Procurement*, Article 15.11 of the AUSFTA specifically refers to suspension of a contract (the *WTO Agreement* refers instead to suspension of the procurement 'process'). On suspension of contracts under the *WTO Agreement on Government Procurement*, see, for example, Arrowsmith, id at 399; and Reich, id.

53 See, for example, Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) at 606–607.

54 It may be, for example, that the process of drafting of the treaty, relevant under Article 32 of the *Vienna Convention* may shed light on the meaning of Article 15.11.4 of the AUSFTA. Details of how each provision was negotiated are not, however, generally available to the public.

be implicit. Reference is made in Article 15.11.4 to the preservation of 'the supplier's opportunity to participate in the procurement'. It is submitted that there would be no purpose in requiring, in appropriate cases, the suspension of contracts by way of *interim* proceedings if this could not be followed by a *final* order effectively terminating the contract.

Article 15.11.4 of the AUSFTA provides indications as to when it might be 'appropriate' to suspend the performance of a contract. Reference in Article 15.11.4 is made to the purpose of ensuring 'that the procuring entities of the Party comply with [the Party's] measures implementing … Chapter [15]'. This appears to link remedies to compliance with procedures required by other provisions of the Chapter such as Article 15.9. Article 15.11.4 refers to '*prompt* interim measures'. [Emphasis added.] Article 15.11.5 also anticipates strict time limits in relation to challenges. It is submitted that permanent suspension may be considered an appropriate remedy in cases where there has been a prompt challenge in relation to a serious failure to comply with the 'essential requirements' of the tender process.[55]

The WTO plurilateral *Agreement on Government Procurement* provides support for the view that the factors relevant to a determination whether to suspend a contract include the time elapsed since the awarding of the contract and the inconvenience that would flow from such suspension.[56] The *WTO Agreement on Government Procurement* expressly addresses such factors in paragraph 7(a) of Article XX, which provides that:

> Challenge procedures shall provide for:
>
> (a) rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. In such circumstances, just cause for not acting shall be provided in writing …

55 Compare the references to 'essential requirements' in Article 15.9 of the AUSFTA, paragraphs 5 and 6. Compare the issues discussed in Seddon, above n17 at 356–366.

56 Article II paragraph 3 of the *WTO Agreement* provides that the *Agreement on Government Procurement* is a 'part of [*the WTO Agreement*] for those Members [of the WTO] that have accepted [it]'. Paragraph 3 goes on to effectively restate a general rule of international law when it provides that the *Agreement on Government Procurement* does 'not create either obligations or rights for members who have not accepted [it]'. Australia is not a party to the *Agreement on Government Procurement*. The *WTO Agreement on Government Procurement* might nonetheless be relevant to the application of the AUSFTA in a way similar to the way in which the Appellate Body in the *Shrimp Turtle case* considered that environmental treaties were relevant to the application of the *WTO Agreement– United States– Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998) adopted by the Dispute Settlement Body (1998) [169]–[172]. On the potential application of the rule contained in Article 31(3)(c) of the *Vienna Convention* see, for example, International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission (2006) finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682 at 237–239.

In this regard it also appears relevant to recall that under Article 15.9.9 of the AUSFTA it will generally be *after* the award of a procurement contract that detailed information regarding the successful tender will be made available to the unsuccessful suppliers. Vital information necessary to mount a challenge will often only become available after the procurement contract has been awarded.

By way of conclusion on this issue, the following propositions are advanced:

1. Australia, as a party to the AUSFTA, appears to be under an obligation to ensure the availability of the remedy of suspension of an already awarded procurement contract in order to preserve the challenging supplier's opportunity effectively to secure the contract. This remedy is to be issued by the relevant review body (Commonwealth, State or Territory) in appropriate cases;
2. Implicit in Article 15.11 of the AUSFTA is the requirement that the review body have the power permanently to suspend a procurement contract in appropriate circumstances as a form of final relief; and
3. In considering whether such a remedy is 'appropriate' the review body must be able to consider factors such as the promptness of the challenge, the importance of the tender requirements not complied with and the extent of non-compliance, and the consequences for other parties and the public interest of suspension of the procurement contract.

## *4. Australian Compliance with Article 15.11*

In light of these propositions, attention should be given to whether existing judicial remedies in Australia satisfy these requirements. Before addressing that question, it is necessary to consider the side letters on government procurement that were exchanged when the AUSFTA was signed in May 2004. These side letters:[57]

> confirm the following understanding reached by the Governments of Australia and the United States regarding Chapter 15 (Government Procurement). … [I]n respect of Article 15.11, in the case of Australia, the Federal Court of Australia and the Supreme Courts of the States and Territories are impartial authorities for the purposes of Article 15.11; and the remedies available in, and the procedures applicable to, such courts, satisfy the requirements of that Article.

The US and Australia agreed that this understanding would 'constitute an integral part of the Agreement'.[58]

These side letters raise difficult questions of treaty interpretation. The letters are plainly not a variation of the terms of Article 15.11 of the AUSFTA. It is, for example, clear that US obligations under Article 15.11 are unaffected by the side letters.

The very existence of the side letters could be seen as betraying a concern on the part of the Australian Government that it is at least arguable that the remedies

57 See above n12. Australia and the US prepared letters in essentially identical terms, which were exchanged.

58 It appears to have been intended that there would be different ways in which side letters to the AUSFTA would operate in relation to the AUSFTA. See Joint Standing Committee on Treaties, AUSFTA Report 61, above n2 at 48.

available in, and the procedures applicable to, the Federal and Supreme Courts, do not satisfy the requirements of Article 15.11. The scope of the relevant remedies and procedures of Australian courts (an arm of government) is plainly information that the Australian Government would be expected to have. It would be reasonable for the US to rely on Australian representations regarding the scope of such remedies and procedures. It is unclear what, if any, representations were made by the Australian Government regarding the operation of existing remedies.

Under international law it appears that States must engage in treaty negotiations in good faith.[59] Estoppel has also been identified as a general principle of international law.[60] If representations were made then it might be argued by the US that Australia is estopped from arguing that the scope of Australian remedies and procedures is narrower than the scope of these remedies and procedures as represented by Australia when the side letters were issued.[61] It is not, however, free from doubt whether a panel established under Chapter 21 of the AUSFTA could adjudicate upon a claim of estoppel.[62]

It can also be argued that the side letters only address the scope of the remedies and procedures *in principle*. On this view, the US has agreed that Australian courts are able to provide the remedies required by Article 15.11 of the AUSFTA. Whether those remedies will *in practice* be issued in appropriate cases will depend on Australian authorities maintaining, and in appropriate cases extending, the availability of those remedies to the extent required by the AUSFTA, and Australian courts applying those remedies in a manner consistent with the AUSFTA. This is arguably not something that the side letters currently address. To cover this practical issue, it is submitted that the side letters should have expressly provided that 'the remedies available in, and the procedures applicable to, such courts, *and the circumstances in which these remedies and procedures are currently made available*, satisfy the requirements of that Article'. This interpretation is further supported by the terms of the side letters in that they appear

59 See, for example, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953) at 106–109; and Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989– Part One' (1989) 60 *British Year Book of International Law* 1 at 25: ('…to negotiate otherwise than in good faith is surely not to negotiate at all'). In the first and apparently only panel decision under the *WTO Agreement on Government Procurement*, *Korea – Measures Affecting Government Procurement*, WT/DS163/1 GPA/D4/1(1999) adopted by the Dispute Settlement Body (2000), the panel observed that Members of the WTO 'have a right to expect full and forthright answers to their questions submitted during negotiations, particularly with respect to Schedules of affirmative commitments such as those appended to the … [*Agreement on Government Procurement*]. However, Members must protect their own interests as well…' [7.119]. For a discussion of this aspect of the panel's decision see, for example, Arrowsmith, above n52 at 363–364. The failure of the US subsequently to protect its interests in that case appears quite different to the situation that existed at the time of the agreement to issue the side letters.

60 Bin Cheng, id at 141–146; and Thirlway, id at 29–49.

61 If, however, the understanding referred to in the side letters was reached without Australia having made any representations to the US and following an independent assessment by the US of Australian courts and remedies, then the US would appear to be estopped from denying the existence of such an understanding.

62 The uncertainty relates to the question of the law that a panel established under the AUSFTA is authorised to apply.

to affirm Australian compliance as at 18 May 2004 (the date of the letters), which predates Australian implementing legislation and the relevant changes to the *Commonwealth Procurement Guidelines*.

Dr Seddon has argued along similar lines in relation to the possibility of the Australian government excluding contractual liability for miscarriages in a tender process by means of an exclusion clause. According to Dr Seddon, '[t]he exclusion of a pre-award contract (a common practice) will be inconsistent with Chapter 15 because it mandates a tender challenge process'.[63] Even if such arguments are rejected, it is still possible that the US might, notwithstanding the side letters, successfully claim under the AUSFTA on the grounds of the inadequacy of remedies provided to unsuccessful tenderers. Before addressing these arguments, it is appropriate to consider the various remedies that might be relied upon by an unsuccessful tenderer in Australia.

### *A. Pre-Award or Tender Process Contracts*

The Federal Court confirmed in 1997 that an unsuccessful tenderer in Australia may be able to establish the existence of a 'process contract' governing the tender process, which is distinct from the procurement contract entered into with the successful tenderer.[64] Implementation of the requirements of Article 15.9 of the AUSFTA should assist efforts by disappointed tenderers to establish the existence and terms of such process contracts.[65] As noted above, attempts by the executive arm of government to exclude or restrict the terms of such a tender process contract may involve a violation of the AUSFTA and the side letters may not affect this conclusion.

Notwithstanding the prospect of obtaining damages for violation of a process contract that might include the costs of preparing a tender or lost profits that would have been earned had the procurement contract been awarded to the plaintiff,[66] there are nonetheless concerns that the process contract approach would not provide the remedies required by Article 15.11. In particular, a process contract would not provide a basis for an unsuccessful tenderer to suspend an already awarded procurement contract and allow for the unsuccessful tenderer to beconsidered for a new contract in lieu of the suspended contact.[67] As argued above, the AUSFTA may require the provision of such a remedy in appropriate cases.

63 Seddon, above n17 at 44.

64 *Hughes* (1997) 146 ALR 1. See generally Seddon, id at 261–309. For a consideration of the English position in relation to tender process contracts see, for example, Sue Arrowsmith, 'Protecting the Interests of Bidders for Public Contracts: The Role of the Common Law' (1994) 53 *Cambridge Law Journal* 104 at 113–116.

65 Compare the discussion of the possible terms of a tender process contract in Seddon, id at 295–305.

66 Id at 290–295.

67 Id at 45. In *Smith Bros & Wilson (BC) Ltd v British Columbia Hydro & Power Authority* (1997) 30 BCLR (3d) 334 [52]–[53], Shaw J in obiter accepted that specific performance of a process contract might in appropriate cases be ordered. There is, however, no suggestion that this might lead to the suspension of another contract. The effect of a decree of specific performance would depend on the terms of any process contract and would clearly not give a right to have the tender contract awarded. I am indebted to Professor Charles Rickett for making this point to me.

### *B. Trade Practices Act and State Fair Trading Legislation*

The *Hughes Aircraft case* also involved a successful invocation of section 52 of the *Trade Practices Act* 1974 (Cth) (‘*Trade Practices Act*’).[68] The Court concluded that representations for the purposes of section 52 generally paralleled the terms of the process contract.[69] In relation to the concern regarding the suspension of contracts it can also be noted that under the *Trade Practices Act* contracts have been set aside. However, it appears ‘inconceivable’ that a court would set aside a contract with a third party who is not party in the *Trade Practices Act* proceedings before the court.[70] It would therefore appear to be necessary to join the successful tenderer in the *Trade Practices Act* proceedings. Even if this were done, however, it appears unlikely that a court would ever set aside the contract unless the successful tenderer was itself implicated in the contravention of section 52.[71] This may nonetheless be sufficient to satisfy the requirements of Article 15.11 of the AUSFTA. Professor Arrowsmith, commenting on a similar provision of the *WTO Agreement on Government Procurement*, has argued that an international requirement of the provision of a power to suspend an already awarded contract might be satisfied by national laws that limit suspension to cases of complicity of a successful tenderer in the breach of the tender rules.[72]

Remedies available under the *Trade Practices Act* may, however, still not satisfy the requirements of the AUSFTA. Notwithstanding the finding of violation of section 52 of the *Trade Practices Act* in the *Hughes Aircraft case*,[73] it is conceivable that the Act will have no application to significant Commonwealth Government procurements. This is due to the requirement that the Crown in the right of the Commonwealth and Commonwealth authorities must carry on a business in order to be caught by the *Trade Practices Act*.[74] Suffice it to say that the Federal Court has given a narrow interpretation to this requirement.[75] The *Fair*

68 *Hughes* (1997) 146 ALR 1 at 119.

69 *Hughes* (1997) 146 ALR 1 at 47.

70 *General Newspapers Pty Ltd v Telstra Corporation* (1993) 117 ALR 629 at 656 (‘*General Newspapers Pty Ltd*’).

71 *General Newspapers Pty Ltd* (1993) 117 ALR 629 at 656 (Davies & Einfeld JJ), compare Gummow J at 659.

72 Arrowsmith, above n52 at 399. The WTO provision considered by Professor Arrowsmith does not include the words ‘where appropriate’. It is arguable that these words in the AUSFTA connote an objective standard, although a panel might be expected to accord a national decision maker a wide margin of discretion. For a general discussion of issues relevant to the question of the degree of deference WTO panels and the Appellate Body will show towards national decisions see, for example, John H Jackson, William J Davey & Alan O Sykes, *Legal Problems of International Economic Relations – Cases, Materials and Text* (4th ed, 2002) at 289–294. It is also arguable that it will be ‘appropriate’ to suspend the performance of contracts not just in cases involving collusion with successful tenderers. Article 15.11 paragraph 4 focuses on compliance *by procuring entities* with measures implementing obligations under the government procurement chapter of the AUSFTA. It is the purpose of ensuring such compliance by procuring entities that colours the words ‘where appropriate’.

73 Seddon, above n17 at 276. Footnote 94 observes that Air Services Australia expressly declined to take the point that it was not bound by the *Trade Practices Act*.

74 See section 2A of the *Trade Practices Act* and Seddon, id at 235–245.

75 Seddon, id at 241–245.

*Trading Act* 1987 (NSW) is subject to a similar limitation.[76] There also appear to be obstacles to reliance upon the *Fair Trading Act* 1989 (Qld) in relation to Queensland Government procurement.[77]

### *C. Tortious Liability*

Negligence provides another basis upon which to seek damages in relation to an abortive tender process. Questions, however, arise regarding the circumstances in which a duty of care might arise[78] and whether a breach of duty can be established.[79] There also appears to be little or no prospect of relying on the negligence of the procuring entity in order to suspend a procurement contract.

### *D. Equitable Estoppel*

Equitable estoppel has been raised in a tender context.[80] However, there are doubts regarding the availability of equitable estoppel against a governmental entity.[81] It is also unclear whether equitable estoppel would provide a basis for invalidating or suspending an awarded procurement contract.[82]

### *E. Restitution*

There is judicial support for a limited claim in restitution in relation to work done, for example, by a successful tenderer when the relevant government decision-maker changes his or her mind and decides to not proceed with a major construction project.[83] A cause of action in restitution, however, would not appear to support the termination or suspension of an awarded procurement contract.[84]

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76 See section 3 of the *Fair Trading Act* 1987 (NSW).

77 Seddon, above n17 at 250–251. The position in other State jurisdictions is summarised in Seddon, id at 232–235.

78 See, for example, *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195 at 1203.

79 Seddon, above n17 at 314–317. For a consideration of the possibility of establishing tortious liability under English law in relation to tendering, see, for example, Arrowsmith, above n64 at 116–118.

80 See, for example, *Metropolitan Transit Authority v Waverley Transit Pty Ltd* [1991] 1 VR 181 ('*MTA*'). Compare Arrowsmith, above n64 at 118–136.

81 See the discussion in Seddon, above n17 at 218–232; *Minister for Immigration and Ethnic Affairs v Kurtovic* (1989) 21 FCR 193 at 207–218; and Joshua Thomson, 'Estoppel by Representation in Administrative Law' (1998) 26 *Federal Law Review* 83.

82 In *MTA* [1991] 1 VR 181, the Victorian Supreme Court left undisturbed (it having not been challenged on appeal) the order of the trial judge that a contract (that was the subject of a tender process) be renewed, it being, in the view of the trial judge, the appropriate remedy given the successful claim of equitable estoppel. The correctness of the Supreme Court's decision on the applicability of equitable estoppel to tendering has been questioned. See above n81. Note also the suggestion by Joshua Thomson, id at 112, that the rules restricting the availability of equitable estoppel vis-à-vis a governmental entity might be avoided by tailoring relief based on the concept of the court giving effect to the 'minimum equity'. It does not appear, however, that the concept of minimum equity would allow a court to fashion a remedy of the kind that may be required by the AUSFTA where a contract has already been entered.

83 Seddon, above n17 at 321 and *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880 ('*Sabemo*'). Compare *POS Media Online Ltd v Queensland Investment Corp* [2001] FCA 809 [189]–[203].

### *F. Administrative Law Review*

Administrative law does provide a basis for terminating *ultra vires* contracts. Difficulties regarding administrative law proceedings and the AUSFTA arise for different reasons. In particular, there are jurisdictional limitations and restrictions on the scope of judicial review. Judicial review traditionally allows review regarding the legality but not the merits of government action. There may also be limits on the applicability of certain of the legality grounds of review in relation to tendering.

The jurisdictional problems relate to the restrictive interpretation of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (*'ADJR Act'*) by the Federal Court in cases such as *General Newspapers Pty Ltd*[85] and *CEA Technologies Pty Ltd v Civil Aviation Authority.*[86] A majority in the High Court in *Griffith University v Tang*[87] appeared to endorse this restrictive interpretation. Section 3(1) of the *ADJR Act* requires that, in order for a decision to be reviewable under the Act, the decision must have been made 'under an enactment'. In interpreting these words, the Federal Court and now the High Court have effectively interpolated additional words into the relevant statutory provision, namely that for a decision to be 'under an enactment' the decision must derive its force or effect from the enactment. If the decision derives its force or effect from laws applying to the community generally, as opposed to an enactment having specific application to government, then the *ADJR Act* will have no application.[88] A decision to contract is said to derive its force and effect from the ordinary laws of contract and not from any statutory provision stating that a government decision-maker has the power to contract.

This approach gives rise to various difficulties. It is not clear, for example, what the words 'force or effect' precisely mean. Where legislation (subordinate or otherwise) requires certain tender procedures to be followed, do these rules give a decision made as part of the tender process its 'force or effect'? Obiter comments in *General Newspapers* suggest that they do,[89] although these obiter comments are not explained. Against this conclusion is an early decision of the Federal Court[90] in which it was ruled that the *ADJR Act* had no application to a Commonwealth Government decision to contract, notwithstanding the existence of regulations setting down procedures for the conduct of a tender process.

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84 In this context, restitution addresses the transfer of wealth that occurs in connection with an awarded contract being semi-performed. It logically comes after the termination of or frustration of a contract and not before. Restitution for services is possible (as in *Sabemo* [1977] 2 NSWLR 880) but that has nothing to do with terminating a contract. Again, I am indebted to Professor Rickett for making this point to me.

85 *General Newspapers Pty Ltd* (1993) 117 ALR 629.

86 *CEA Technologies Pty Ltd v Civil Aviation Authority* (1994) 122 ALR 724.

87 *Griffith University v Tang* (2005) 221 CLR 99 ('Griffith University').

88 See, for example, *General Newspapers Pty Ltd* (1993) 117 ALR 629 at 633–637.

89 Id at 637.

90 *Hawker Pacific Pty Ltd v Freeland* (1983) 52 ALR 185.

The 'under an enactment' requirement is specific to the *ADJR Act*. It is not applicable to administrative law review based, for example, on section 39B of the *Judiciary Act* 1903 (Cth)[91] or to common law review in the States and Territories.

What is not clear in relation to these alternative mechanisms for review (ie alternative to the *ADJR Act*) is whether some legislative (primary or subordinate) tendering requirements are nonetheless required in order for administrative law review to be available. This is of potentially great significance to the issue of whether Australia is in compliance with its procurement obligations under the AUSFTA. Non-compliance with executive *policies* on tendering, as opposed to *legislative* rules (including rules in subordinate legislation), may not be sufficient to give rise to administrative law review.[92]

If this is correct then the curiously titled 'Mandatory Procurement Procedures' contained in the *Commonwealth Procurement Guidelines* may not be sufficient to satisfy the requirements of Article 15.11 of the AUSFTA.[93] It has, for example, been questioned whether there is an obligation arising from the *Financial Management and Accountability Regulations* 1997 (Cth) ('*FMA Regulations'*) to comply with the *Commonwealth Procurement Guidelines*.[94] Elizabeth Carroll has pointed to an apparent conflict between two provisions of these regulations. Regulation 8 of the *FMA Regulations* requires that an official must 'have regard' to the *Commonwealth Procurement Guidelines* but, as Carroll notes, the regulation plainly does not require compliance with the guidelines as it goes on to provide that when an official 'takes action that is not consistent with the Guidelines' the official 'must make a written record of his or her reasons for doing so'. Regulation

91 Although, note the obiter comments of Gummow, Callinan and Heydon JJ on the interpretation of the word 'matter' in Chapter III of the Commonwealth Constitution in *Griffith University* (2005) 221 CLR 99 at 131. Their Honours appeared to restrict 'matter' by requiring an effect on legal rights or obligations. For a consideration of this obiter, see, for example, Christos Mantziaris & Leighton McDonald, 'Federal Judicial Review Jurisdiction after *Griffith University v Tang'* (2006) 17 *Public Law Review* 22 at 30–41. In Queensland, despite its *Judicial Review Act* 1991 being modelled in large part upon the *ADJR Act*, the jurisdictional limitation on the scope of review flowing from the words 'under an enactment' can be avoided. This is possible in two ways. First, under Part 3 of the *Judicial Review Act* 1991, review is also potentially available where there has been no decision made under an enactment but where instead the decision has been made under a non-statutory scheme or program. See s 4(b) of the *Judicial Review Act* 1991. On the interpretation of this section see, in particular, *Mikitis v Director General, Department of Justice and Attorney-General* (1999) 5 QAR 123; *Bituminous Products Pty Ltd v General Manager (Road Systems and Engineering), Department of Main Roads* [2005] 2 Qd R 344. Secondly, an applicant for review may rely on Part 5 of the *Judicial Review Act* 1991, which does not depend on showing that there has been a decision made 'under an enactment'.

92 Compare *Concord Data Solutions Pty Ltd v Director General of Education* [1994] 1 QdR 343; *Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce* (1987) 17 FCR 1; *R v The Lord Chancellor, ex parte Hibbit & Sanders (A Firm)* (Unreported, Queen's Bench Divisional Court, 11 March 1993) noted in Dawn Oliver, 'Comment: Judicial Review and the Shorthandwriters' [1993] *Public Law* 214. See also *Hunter Brothers v Brisbane City Council* [1984] 1 Qd R 328. In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 393 McHugh, Gummow, Kirby and Hayne JJ accepted that even where the consequence of non-compliance with a statutory procedure did not result in contractual invalidity, injunctive relief might nonetheless be available to restrain what is in effect unlawful action.

9(a) of the *FMA Regulations* provides that an 'approver[95] must not approve a proposal to spend public money … unless the approver is satisfied, after making such inquiries as are reasonable, that the proposed expenditure … is in accordance with the policies of the Commonwealth'. Paragraph 8.1 of Division 8 of the *Commonwealth Procurement Guidelines*, which appear to be designed to ensure compliance with Australia's international procurement obligations, provides that 'the Australian Government's mandatory procurement procedures must be followed by agencies when conducting covered procurements'. Regulation 9 therefore appears to make the Mandatory Procurement Procedures binding. Carroll suggests that this apparent conflict between Regulations 8 and 9 should be resolved by giving full effect to Regulation 8 on the grounds that it specifically refers to the *Commonwealth Procurement Guidelines* and should be treated as *lex specialis*. Whilst the *lex posterior* principle might be deployed in support of Regulation 9 it is submitted that Carroll's interpretation is more convincing.

If, as Carroll suggests, there is no legislative obligation to comply with the *Commonwealth Procurement Guidelines* (including the Mandatory Procurement Procedures in Division 8 of the Guidelines), there remains the argument that administrative law review may nonetheless be available in relation to executive action notwithstanding the absence of any relevant legislative (primary or subordinate) provisions.[96] There are a number of obstacles (theoretical and practical) that such an argument must confront. An important theoretical argument was raised by Yeldham J in the context of a dispute regarding the applicability of the rules of natural justice to tendering decisions[97] and was expressed in the following terms:

> In my opinion the plaintiff, in the position of a tenderer, was not entitled to expect or require that the principles of natural justice … should be observed in relation to it. I regard the nature of the power to contract by the acceptance of any one of

93 This raises the issue of the relevance of the side letters. Good faith and estoppel arguments under international law are also relevant.

94 Elizabeth Carroll, 'Review Mechanisms for Commonwealth Procurement Decisions and Article 15.11 of the Australia-United States Free Trade Agreement' (2006) 14 *Australian Journal of Administrative Law* 7 at 12. Note that Carroll argues that procurement under directions issued under the *Commonwealth Authorities and Companies Act* 1997 s 47A(2) may be different. In relation to this interpretation it is simply noted that s 47A(2) of the *Commonwealth Authorities and Companies Act* 1997 (Cth) refers only to directions being given to *directors* of Commonwealth authorities. There is no express reference to the obligations of public servants serving under the directors.

95 'Approver' is defined in Regulation 3 inter alia to include 'a person authorised by or under an Act to exercise a function of approving proposals to spend public money'.

96 Relevant authorities are collected in Seddon, above n17 at 342–369. See also Mark Aronson, Bruce Dyer & Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) at 149–156. An important issue, which will be discussed further below, is whether prerogative relief might be available due to the existence of some form of legitimate expectation. There is a close connection between the jurisdictional requirements for prerogative relief and the requirements governing the applicability of natural justice. See Mark Aronson, Bruce Dyer & Matthew Groves, id at 702–714.

97 *White Industries Ltd v Electricity Commission of New South Wales* (Unreported, NSW Supreme Court, Yeldham J, 20 May 1987) ('*White Industries Ltd*').

> a number of tenders to be inconsistent with an obligation to observe the principles of natural justice. A potential 'right' to gain a beneficial contract is not subject to the rules of natural justice…[98]

Notwithstanding the forthright terms of this statement, Yeldham J subsequently went on to consider whether natural justice obligations might nonetheless have been violated on the facts of the case. The strongest support for Yeldham J's position appears to come from his reliance on obiter from the judgment of Lord Diplock in the *Council of Civil Service Unions case*.[99] It is submitted, however, that Lord Diplock's judgment does not extend as far as Yeldham J implies[100] and it can be doubted whether, even if it did extend this far in England, it reflects the law in Australia.[101]

In England, following the decision in *O'Reilly v Mackman*,[102] the courts have determined the scope of administrative law review on a 'case to case basis'.[103] They have asked whether in particular cases a government decision-maker has 'infringed rights' to which the applicant for review was 'entitled to protection under public law'.[104] This has been interpreted as requiring the applicant to show that the government's decision was taken under some form of 'public duty' or has had some 'public law consequences'.[105] Decisions made as part of tender processes have been held to have had such consequences.[106] It may be possible to argue that such 'public law consequences' include consequences under the AUSFTA. Non-compliance with the AUSFTA, if it leads to US retaliation (discussed below), may result in harm to other sectors of the Australian economy. Eames J specifically considered impacts on Victorian industry when assessing whether administrative law remedies were available in respect of the decisions of the government 'task force' in *Victoria v Master Builders' Association of Victoria*.[107] Questions remain, however, not least because of concerns expressed regarding the correctness of the majority position in *Minister for Immigration and Ethnic Affairs v Teoh*[108] and whether 'public law consequences' might include consequences under public *international* law.

A practical obstacle confronting the view that administrative law remedies are available in relation to tendering decisions regulated by government policies rather than legislative provisions, relates to the grounds of review that might be applicable. It has already been noted that administrative law does not provide a basis for challenging the merits of a particular decision.[109] It appears, however, that the restriction of grounds of review to questions of legality (as opposed to merits or *de novo* review) may not of itself create difficulties under the AUSFTA.[110] What may create difficulties is that the absence of statutory procedures may eviscerate applicable grounds of review as a number of grounds depend on the existence of statutory obligations.[111]

Compliance with the obligations of the AUSFTA might nonetheless be secured by the applicability of natural justice obligations. The applicability of natural

98 *White Industries Ltd* (Unreported, NSW Supreme Court, Yeldham J, 20 May 1987) 31.

99 *Council of Civil Service Unions v Minister for Civil Service* [1985] 1 AC 374 at 408–409 ('*Council of Civil Service Unions*').

justice to government tendering raises the theoretical obstacle considered above. But as also noted above,[112] there has long been a close connection between jurisdiction to grant judicial review and principles of natural justice. Leaving to one side such theoretical arguments, a more practical issue is whether the concept of legitimate expectations might apply to give rise to natural justice obligations in cases where government contracting is regulated only by executive statements and actions.[113] It is submitted that on the existing Australian authorities,[114] where government tendering policies and tender documents include representations regarding the tender process to be followed, then a legitimate expectation may arise.[115] The expectation would not be that a tenderer has a legitimate expectation that a contract will be awarded to it[116] but instead it would involve a legitimate expectation that the government will not depart[117] from that procedure without first giving the tenderers who lodged bids in accordance with the specified tender process an opportunity to be heard.[118] Departure from the process would be permissible provided the tenderers are first heard.[119]

Dr Seddon's views regarding express exclusions of a *Hughes Aircraft* process contract violating the AUSFTA have been referred to above.[120] It is submitted, with respect, that exclusion of a process contract in cases where administrative law remedies are nonetheless available may not involve non-compliance with requirements of Article 15.11 of the AUSFTA. In other words, administrative law alone may provide the form of review required under Article 15.11. It is possible, however, that a clause in a tender document designed to exclude a process contract might also undermine the existence of a legitimate expectation and administrative

100 Yeldham J appears to have referred to Lord Diplock's statement that '[f]or a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the [specified] consequences…'– *Council of Civil Service Unions* [1985] 1 AC 374 at 408–409. The consequences specified by Lord Diplock included an effect on a person 'by depriving him of some benefit or advantage which … he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn'. The Privy Council, for example, had no difficulty finding that public law remedies were applicable to tendering in *CO Williams Constructions v Blackman* [1995] 1 WLR 102, although in that case the Privy Council dealt with a statutorily regulated tender process. See also *R v The London Borough of Enfield ex parte TF Unwin (Roydon) Ltd* (1989) 46 *Building Law Reports* 1 at 18 (Glidewell LJ accepting that a legitimate expectation arose in relation to tender arrangements 'outside' of the relevant legislation); *R v Legal Aid Board, ex parte Donn & Co (a firm)* [1996] 3 All ER 1 (tender decision subject to judicial review although the relevant direction by the Lord Chancellor (regulating tendering) was provided for under legislation); Sue Arrowsmith, 'Judicial Review of Contractual Powers of Public Authorities' (1990) 106 *Law Quarterly Review* 277 at 289–290; but compare *R v The Lord Chancellor, ex parte Hibbit & Sanders (A Firm)*, (Unreported, Queen's Bench Divisional Court, 11 March 1993) discussed by Dawn Oliver, 'Comment: Judicial Review and the Shorthandwriters' [1993] *Public Law* 214; Arrowsmith, above n64 at 105–113. In relation to State enterprises, *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 1 WLR 521 at 529; Michael Taggart, 'Analysis: Corporatisation, Contracting and the Courts' [1994] *Public Law* 351–358. Note also Eames J's views on Yeldham J's judgment in *Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121 at 166 ('*Victoria*').

law review.Conflict with Article 15.11 would in those circumstances again arise as an issue.[121]

State and Territory procurement processes that are regulated by government policy and not by legislative standards would give rise to similar issues. The scope of administrative law review in the States and Territories may in certain circumstances be broader than that provided for review of Federal Government decisions.[122]

To summarise the preceding analysis, in Australian jurisdictions which regulate tendering procedures under statutory provisions, the requirements of Article 15.11 will be satisfied where those statutory procedures correspond to those envisaged by Chapter 15 of the AUSFTA. The *Commonwealth Procurement Guidelines* and certain State procurement procedures may not, however, be regulated by any form of statutory procedure. If the absence of statutory procedures also means the absence of an administrative law cause of action, then compliance with Article 15.11 can be doubted. Developments in Australian administrative law, however, suggest that judicial review might nonetheless be available notwithstanding the absence of statutory procedures particularly through the operation of the rules of natural justice. The opportunity to review a tendering decision on this ground may satisfy the requirements of Article 15.11 of the AUSFTA. It is worthy of note that US tendering appears to be routinely subject to administrative law review.[123]

The powers of Australian ombudsmen, given that there is no power for an ombudsman to invalidate a decision, would not appear to satisfy the requirements of Article 15.11. It is difficult to imagine a US corporation that is familiar with the US mechanisms for review of tendering decisions being satisfied with a non-binding report of an ombudsman.

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101 *Victoria* [1995] 2 VR 121 at 136–137, Tadgell J notes the link between the dichotomy of public law and private law and the procedural reforms in England embodied initially in the rules of court in 1977. See generally, *O'Reilly v Mackman* [1983] 2 AC 237 at 277–278 ('*O'Reilly*'). For an analysis of the path taken in England following the procedural reforms in 1977 see HWR Wade, 'Procedure and Prerogative in Public Law' (1985) 101 *Law Quarterly Review* 180.

102 *O'Reilly* [1983] 2 AC 237.

103 *O'Reilly* [1983] 2 AC 237 at 285.

104 *O'Reilly* [1983] 2 AC 237 at 285. For a consideration of the implications of the decision in *O'Reilly* [1983] 2 AC 237 see, for example, J Beatson, '"Public" and "Private" in English Administrative Law' (1987) 103 *Law Quarterly Review* 34 at 45–61; and Lord Woolf, 'Droit Public – English Style' [1995] *Public Law* 57 at 60–65.

105 See, for example, the authorities cited by Eames J in *Victoria* (1995) 2 VR 121 at 161–162.

106 *R v Legal Aid Board, ex parte Donn & Co (a firm)* [1996] 3 All ER 1 at 11. For a discussion of the position in Canada, see, for example, Sue Arrowsmith, *Government Procurement and Judicial Review* (1988) at 157–161.

107 *Victoria* (1995) 2 VR 121 at 163–164.

108 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 ('*Teoh*'), questioned in *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* (2003) 214 CLR 1 at 21–34 (McHugh and Gummow JJ) and 45–49 (Callinan J) ('*Lam*').

109 In this respect there appears to be an important difference in the manner in which civil liability is established in a process contract case compared to the nature of review available in administrative law proceedings. See Carroll, above n94 at 19.

## *5. Other Relevant International Obligations*

In addition to Article 15.11 and the remedies that this provision requires Australia to establish and maintain, there is also a more general obligation contained in Article 20.5 of the AUSFTA. Article 20.5 provides as follows:

> ARTICLE 20.5: REVIEW AND APPEAL
>
> 1. Each Party shall maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review[124]… and, where warranted, correction of final administrative actions regarding matters covered by this Agreement. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.
> 2. Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceeding are provided with the right to:
>    (a) a reasonable opportunity to support or defend their respective positions; and
>    (b) a decision based on the evidence and submissions of record or, where required by the Party's law, the record compiled by the administrative authority.

If there was any potential for conflict between Articles 15.11 and 20.5 then one would expect a treaty interpreter to attempt to avoid such conflict by application of the *lex specialis* maxim. This maxim applies generally to treaty interpretation.[125] It is, however, unlikely that a conflict between these two

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110 See, for example, the footnote to Article 20.5 of the AUSFTA, which is reproduced below. The position under the *WTO Agreement on Government Procurement*, which has quite different provisions, may be more demanding. See Arrowsmith, above n53 at 395. Note, however, the difficulty created by the words '… to ensure that the procuring entities of the Party comply with its measures implementing [Chapter 15 of the AUSFTA]' in paragraph 4 of Article 15.11. National remedies must have this as one of their purposes. It is submitted, however, that as noted above in n72, national authorities will be accorded a margin of discretion in implementing obligations under the AUSFTA and the availability of administrative law relief will fall within that margin.

111 Thus, for example, the 'relevant considerations' ground of review depends on a legal obligation to take into account a particular consideration. Such a legal obligation would not normally arise in respect of decisions regulated solely by government policy. See, for example, Lithgow, above n4 at 185–187. Compare the observations made by Lord Bridge of Harwich in *Gillick v North Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 at 192–194.

112 See Aronson, Dyer & Groves, above n96.

113 A separate issue is whether the executive act of notification (see Article 23.4) to signify adherence to the AUSFTA could give rise to legitimate expectations. See *Teoh* (1995) 183 CLR 273 and *Lam* (2003) 214 CLR 1 at 21–34 (McHugh and Gummow JJ) and 45–49 (Callinan J). In relation to the possible content of such an expectation see, for example, Article 20.4(b) of the AUSFTA. This provision appears to have been specifically referred to in the context of possible natural justice obligations by the Joint Standing Committee on Treaties: AUSFTA Report 61, above n2 at 50.

114 See the discussion of the authorities in Seddon, above n17 at 352–356; Aronson, Dyer & Groves, above n96 at 464–467. See also Margaret Allars, 'Administrative Law, Government Contracts and the Level Playing Field' (1989) 12 *UNSWLJ* 114 at 141–142; Lithgow, above n4 at 190.

provisions would arise. It is submitted that a treaty interpreter would interpret Article 15.11 in light of the more general terms of Article 20.5.

Reference has already been made to the dispute resolution provisions of the AUSFTA. These provisions are similar in some respects to the WTO Dispute Settlement Understanding ('DSU'). One feature of the *General Agreement on Tariffs and Trade* 1947 ('GATT'),[126] which was carried over in a modified form into the *WTO Agreement*,[127] is the capacity for a party to the *WTO Agreement* to bring a claim under the dispute resolution system without having to allege a violation of the treaty. Trade lawyers refer rather inelegantly to such claims as 'non-violation nullification or impairment' claims. The essence of the claim is that some, normally commercial, benefit which a party reasonably expected to receive when it negotiated the treaty has been nullified or impaired by a measure that is not technically in breach of the treaty.[128] The AUSFTA allows such complaints in Article 21.2(c).

The potential for a non-violation complaint may mean that the side letters in relation to Article 15.11 are of little practical significance. The US might argue that, notwithstanding the side letters, the scope of review provided in Australia was not as it reasonably expected when it negotiated the AUSFTA.[129] If a panel accepted such a submission then the US could eventually withdraw benefits of an equivalent value to those that it expected but did not receive. Whether the US would be prepared to bring such a claim and how it might retaliate[130] if the claim was accepted are beyond the scope of this article.

115 Note also the references to 'fairness' and 'fair competition' in Article 15.9, paragraphs 1 and 2, of the AUSFTA. Whether this is sufficient on its own to give rise to a legitimate expectation depends on whether the decision of the majority in *Teoh* remains good law. On this issue, see above n113.

116 See, for example, *Croft v Minister for Agriculture and Resources* (Unreported, Victorian Supreme Court, Beach J, 7 December 1999), aff'd [2001] VSCA 112. This would often involve an obligation of substantive fairness rejected by McHugh and Gummow JJ in *Lam* (2003) 214 CLR 1 at 21–34.

117 Compare *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 668–671 (Toohey J) and 682–685 (McHugh J) ('*Haoucher*').

118 This relates to the *audi alterum partem* rule of natural justice. There has been much debate regarding the bias rule and its relevance, if any, to obligations of fairness under a process contract. See for example *Hughes* (1997) 146 ALR 1 at 103; *Pratt Contractors Ltd v Transit New Zealand* [2005] 2 NZLR 433 at 446 (Privy Council). It might simply be noted in this context that there is no reason why the bias rule might not in appropriate factual circumstances be modified so that actual bias must be established for a successful administrative law challenge to a tendering decision. See, for example, Adams J in *Cubic Transportation Systems Inc v New South Wales* [2002] NSWSC 656 [162]–[163] ('*Cubic*').

119 As a principle of the rules of natural justice, this conclusion appears to be required by the approach taken for example by Gummow and McHugh JJ in *Lam* (2003) 214 CLR 1 at 21–34. Whether it would comply with Australia's obligations under the AUSFTA is a separate issue. On this point, see above n109 and n110.

120 See discussion at text accompanying n63.

## *6. Conclusions*

Despite assertions that compliance with Chapter 15 of the AUSFTA would only require minor changes to the rules and policies applicable to government procurement in Australia, it appears that compliance does in fact require quite significant changes, particularly in relation to the possibility of suspending and effectively terminating a procurement contract in appropriate circumstances. That significant changes are required is borne out by the changes made to the *Commonwealth Procurement Guidelines*. It is submitted that the States and Territories will need to follow suit if they are to reduce the risk of a complaint by the US regarding non-compliance with the requirements of the AUSFTA.

The side letters in relation to Article 15.11 of the AUSFTA do not mean that a US complaint regarding Article 15.11 will be avoided. The side letters may not preclude a successful complaint regarding, for example, exclusion clauses seeking to avoid or limit tender process contracts, and tortious and equitable claims. The side letters may not be effective in allowing Australia to avoid concerns regarding limits on administrative law remedies. The side letters may not remove the potential for a successful non-violation complaint by the US under Article 21.2(c) of the AUSFTA.

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121 Compare Adams J in *Cubic* [2002] NSWSC 656 [50]–[61] with *Schelde Marinebouw BV v Attorney-General* [2005] NZAR 356 (NZ High Court) [33]. See also Arrowsmith, above n64 at 133–136. Professor Arrowsmith considers that public law expectations might be excluded in a manner similar to the way a process contract might be excluded. Public law expectations may be slightly more resilient, as suggested by the approach in the *Cubic* case, id [135]–[136]. This may relate to the fact that mere reservation of, for example, a right to vary tender arrangements in tender documents, may not itself exclude the right to hearing before the exercise of that right can lawfully occur. The judgments in *Haoucher* (1990) 169 CLR 648 at 668–671 (Toohey J) and 682–685 (McHugh J) appear to support that proposition. The tender documents may have to go a step further to expressly exclude a right to a hearing prior to the exercise of the right.

122 Note, for example, that if the obiter of Gummow, Callinan and Heydon JJ in *Griffith University* (2005) 221 CLR 99 at 131 regarding the meaning of the word 'matter' in Chapter III of the Constitution is accepted it would *not* necessarily affect the scope of judicial review in the States.

123 See, for example, the discussion in Seddon, above n17 at 306–309. On US government procurement see generally Donald P Arnavas, *Government Contract Guidebook* (3rd ed, 2001) especially [7.1]–[7.12]. On US procurement as impacted upon by international procurement agreements see, for example, Christopher F Corr & Kristina Zissis, 'Convergence and Opportunity: The WTO Government Procurement Agreement and US Procurement Reform' (1999) 18 *New York Law School Journal of International and Comparative Law* 303; and Donald P Arnavas & Nick Seddon, 'The US-Australia Free Trade Agreement – Focus on Government Procurement' (2006) 3 *International Government Contractor* 58. On recent simplification of US procurement procedures see, for example, Steven L Schooner, 'Commercial Purchasing: The Chasm Between the United States Government's Evolving Policy and Practice' in Sue Arrowsmith & Martin Trybus (eds), *Public Procurement – The Continuing Revolution* (2003) at 137. Notwithstanding the US simplification, US bid challenge procedures appear to provide more opportunities for legal challenge with a greater array of potential remedies than are available under Australian law.

Although the matter is not free from doubt, the government procurement chapter of the AUSFTA does have the potential to reverse the movement, apparent in Australia since the late 1980s, away from rule based and adjudicative approaches to government tendering. The AUSFTA may herald a movement back towards a more litigious approach to government procurement. The likelihood of such a change of direction depends in part on the interpretation of the AUSFTA and preparedness of the US Government to challenge Australian procurement practices using the panel procedure under the AUSFTA.[131] The more litigious approach to government procurement in the US[132] suggests that the US Government will be under pressure to initiate such challenges from its own suppliers in cases where suppliers consider that they have been treated unfairly when competing for procurement contracts within Australia.

124 For avoidance of doubt, 'review' includes merits (de novo) review only where provided for under the Party's law. [Footnote in original.]

125 See International Law Commission, above n58 at 34–65.

126 See Article XXIII of the GATT.

127 See Article 26 of the DSU.

128 See, for example, Jackson, Davey & Sykes, above n72 at 276–289.

129 This will depend critically on the negotiations that occurred prior to the preparation of the side letters and the circumstances leading up to the entry into the treaty by the US. Regarding an obligation to provide national tender review bodies with the power to suspend already awarded contracts, contrast the refusal of the panel in *Norway – Procurement of Toll Collection Equipment for the City of Trondheim*, adopted by the Committee on Government Procurement (1992) GPR.DS2/R, BISD 40S/319 [4.17] to recommend the annulment of a procurement contract and recommencement of the procurement process in a case where Norway had failed to comply with the *Tokyo Round Agreement on Government Procurement*. I am indebted to one of the anonymous reviewers for emphasising this point. In that case, however, there was no complaint that Norway had failed to establish the necessary laws and policies implementing its obligations under the agreement. If the arguments considered above regarding the existence of a requirement under the AUSFTA to provide for the power of suspension of an already awarded contract in appropriate cases are accepted, then the US may be able to make a much more straightforward *violation* complaint.

130 Public choice theorists have perhaps the most to offer in understanding how a State chooses to retaliate in a trade dispute.

131 The likelihood of such a change also depends on the Australian response to a US challenge. Even if the US successfully invoked the panel procedure under the AUSFTA, the Australian government may be prepared to accept US retaliation. I am indebted to one of the anonymous reviewers of this article for this point.

132 Even though anecdotal evidence apparently suggests that bid challenge litigation in the US is declining see Corr & Zissis, above n123 at 355, it nonetheless appears to be more common in the US than in Australia. For a concise summary of the US bid challenge procedures, which bear an uncanny resemblance to the bid challenge provisions of Chapter 15 of the AUSFTA see, for example, Arnavas, above n123, Chapter 7.