

Collective procurement and the *Competition and Consumer Act 2010*

Background

Victoria's public health services – especially those in regional areas – may choose to undertake procurement activities as part of a group to achieve economies of scale.

An allied approach to procurement is also helpful to health services in standardising products or services across a number of health services, while sharing knowledge and experience reduces administration for individual hospitals.

However, health services may risk breaching the *Competition and Consumer Act 2010* (CCA) if their group procurement activity has 'the purpose or effect of substantially lessening competition in a market'.

This fact sheet looks at how health services can undertake group procurement without inadvertently breaching the CCA.

Under the CCA it is unlawful for a health service(s) to enter into a contract or arrive at an understanding with another party which has the purpose or effect of substantially lessening competition in a market. Health service(s) collective procurement activities may have this unintended effect because the purchasers are able to aggregate their buying power, which *could* have an anti-competitive effect.

The CCA also prohibits health service(s) with a substantial degree of power in a market of substantially lessening competition in that market¹.

Procurement types

There is a distinction between 'collective' procurement and 'collaborative' procurement. Only collective procurement practices (in terms of aggregating buying power) may pose a risk for participating health services of contravening the CCA.

Collaborative procurement

Where a group of health services agree to establish one Invitation to Supply (ITS)/Request for Proposal (RFP) specification to ensure consistency in the products or services being sought the document should clearly state that each of the health services will be entering into their own contractual arrangement with the successful tenderer.

All responses are centrally collated, acknowledging that all participating health services will see each respondent's submission, but are individually evaluated and awarded.

Each participating health service undertakes an independent evaluation and establishes individual contracts with the tenderer that represents the best value for its own health service.

Collective procurement

Where a group of health services agrees to establish one ITS/RFP specification to ensure consistency in the products or services being sought, the ITS/RFP should clearly note the evaluation criteria and weighting along with appropriate probity requirements. Health service(s) should also undertake a detailed market risk assessment regarding compliance with the CCA.

¹ This is a recent amendment to the CCA, based on a recommendation of the Harper Review.

A contract will need to be established for any collective procurement activity and executed by a legal entity so it can be enforced. This is due to the fact that any 'purchase' resulting from the contract will require issuing a tax invoice, requiring ABN and GST registration.

All responses are centrally collated, recognising that the health services collective will undertake a group evaluation and establish a single contract, while noting there may be individual service level agreements (SLAs) sitting under the head contract.

Whether participating health services undertake 'collaborative' or 'collective' procurement, Health Purchasing Victoria (HPV) is able to support health services in developing an ITS/RFP or assist in the end-to-end process via the Customer Engagement team.

HPV-led and branded cluster sourcing

Where a group of health services agree to establish one ITS/RFP specification to ensure consistency in the products or services being sought, they can request in writing to the Director Procurement and Value Delivery to use HPV's cluster sourcing framework. Requests should include the following information:

- Name of the lead health service.
- Name of participating health services.
- The estimated date they wish to go to market.
- The category and specific details of the products or services.
- The value of the current spend.

Participating health services acknowledge to be bound by the outcome of the ITS/RFP. HPV will then agree to lead the cluster sourcing event, which is added to the HPV Confirmed Annual Sourcing Plan (CASP).

All responses are centrally collated via HPV's procurement platform Bravo, with a custom workflow employed to support various scales of market events to manage the ITS/RFP i.e. simple versus complex events.

The cluster of participating health services then undertake a group evaluation and recommends to award a successful supplier(s) to HPV. HPV will establish one contract (noting there may be individual SLAs for each participating health service under the head contract).

The event is administered using HPV procurement resources to deliver the best value outcome for participating health services.

Managing CCA risk

In assessing their risk of contravening the CCA, health services should use their own risk frameworks. They are also encouraged to use HPV's Market Analysis tool for Collective Procurement on the website to better understand whether they are exposed to a breach under the CCA if they undertake a particular collective sourcing activity.

Where health services identify a high level of CCA risk, the following remedial options are available:

- Health services can partner with HPV to undertake a cluster sourcing activity, resulting in HPV contracting on behalf of the participating health services.
- HPV can provide protection to a health service by issuing a Direction – a brief letter from the HPV Chief Executive, provided in response to a health service request seeking Australian Competition and Consumer Commission (ACCC) protection for a market event, which extends the authority HPV enjoys under section 134O of the *Health Service Act* to conduct collective procurement activities.
- Health services can seek an exemption direction directly via the ACCC.

HPV can help

There are two ways HPV can help: Health services can use HPV's cluster sourcing framework to partner with HPV to collectively procure, or they can ask HPV to issue a Direction to extend its protections under the CCA to the health services involved.

Alternatively a health service can seek its own authority directly from the ACCC.

Applying for a HPV Direction to undertake collective procurement

The lead health service writes to the HPV Chief Executive, including the following information in a brief letter:

- The name of the lead health service.
- The name of participating health services.
- The category and specific details of the products or services.
- The value of the current spend.
- Confirmation that the market activity is not on the HPV Confirmed Annual Sourcing plan (CASP).
- Confirmation that participating health services have undertaken a market risk assessment.
- Confirmation to provide HPV with a letter of Probity Compliance (in line with the HPV Probity Compliance Checklist).

HPV will issue a Direction to the lead health service involved in the form of a letter, providing CCA protection (or otherwise explaining why not) for the collective agreement.

Note: HPV encourages health services to use the provided templates for health service use in seeking a HPV Direction or requesting support with a cluster sourcing activity.

Direct health service request to ACCC

Health services may choose to request an authorisation from the ACCC directly.

This provides protection under the CCA where there may be a market risk and health services will be required to pass a test to prove a 'public benefit'. There are two types of requests:

ACCC Notification

- Applies where the annual value of the sourcing event is less than \$3 million.
- Incurs a filing fee of \$1,000 per application.
- Provides immunity for a valid notice, coming into effect after 14 days and lasting for three years.

ACCC Authorisation

- Applies where the annual value of the sourcing event is greater than \$3 million.
- A decision will be issued within six months.
- Incurs a filing fee of \$7,500 per application.
- Once approved, the authorisation is valid for five to 10 years.

More information or assistance

Contact your HPV Customer Relationship Manager or the Health Services Helpdesk on 03 9947 3900 or healthservices@hpv.zendesk.com if you require assistance.

Additional information and templates are available on the HPV website.

Steps

Process

Available collateral

