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**Submission to the Senate Finance and Public Administration Legislation  
Committee Inquiry into the provisions of the Government Procurement (Judicial  
Review) Bill July 2017**

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## Introduction

The Australian Fair Trade and Investment Network (AFTINET) is a national network of 60 organisations and many more individuals supporting fair regulation of trade, consistent with human rights, labour rights and environmental sustainability. AFTINET welcomes this opportunity to make a submission to the Senate Finance and Public Administration Legislation Committee Inquiry into the provisions of the Government Procurement (Judicial Review) Bill 2017.

AFTINET supports the development of trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules. AFTINET supports the principle of multilateral trade negotiations, provided these are conducted within a transparent, accountable framework that safeguards the interests of all countries and is based on principles of human rights, labour rights and environmental sustainability.

AFTINET supports the following principles for trade negotiations

- Trade negotiations should be undertaken through open, democratic and transparent parliamentary processes that allow effective public consultation to take place about whether negotiations should proceed and the content of negotiations.
- There should be regular public consultation during negotiations, including publication of proposals and draft texts.
- Before an agreement is signed, the text should be published for public and parliamentary debate to test if it is in the national interest. Comprehensive studies of the likely economic, social and environmental impacts of the agreement should be undertaken and made public for debate and consultation before signing.
- Parliament should vote on the whole agreement, not only the implementing legislation.
- Trade agreements should not undermine human rights, labour rights and environmental protection, based on United Nations and International Labour Organisation instruments.
- Trade agreements should not undermine the ability of governments to regulate in the public interest, including the ability of governments to have national policies which encourage industry development and local employment, including procurement policies.

AFTINET believes that Australia should emulate its trading partners like the USA, China, South Korea and Japan in using procurement policies to encourage industry development and local employment. Negotiations for current and future trade agreements should ensure that trade agreement provisions do not prevent procurement policies from meeting these goals.

## **The Government Procurement (Judicial Review) Bill 2017 is premature**

The explanatory memorandum for the Bill claims that it will enable Australia to meet international obligations on Procurement in the World Trade Organisation Government Procurement Agreement and the Trans-Pacific Partnership Agreement.

However this claim is premature. Australia's accession to the WTO government procurement agreement is still being negotiated, and has not been signed or approved by Parliament. The current text of the TPP has not been approved by Parliament following the US withdrawal from the agreement. The government is currently engaged with other TPP parties in attempting to renegotiate the text without the US. The outcome of this is uncertain, and will not be known until at least November 2017.

In this context, the government should wait for the outcome of these negotiations to ensure that any proposal for additional judicial review measures, if indeed they are required, are consistent with what may be negotiated.

This would be consistent with the recent report of the Joint Select Committee on Government Procurement entitled *Buying into Our Future* released on June 30, 2017, which made the following recommendation on page 135:

- 9.42 The Committee notes DFAT's assurances that the CPRs comply with Australia's current free trade agreements and that minimal changes will be required to accede to the WTO GPA. It notes the Australian Government's recent introduction of the *Government Procurement (Judicial Review) Bill 2017* into the House of Representatives which has now been referred to the Senate Standing Committee on Finance and Public Administration, due to report on 4 August 2017. The Committee has concerns about this enabling legislation and believes it should not be progressed until WTO GPA negotiations are finalised. (Joint Select Committee on Government Procurement 2017:135)

## **The proposal for use of the Federal Circuit Court may disadvantage local small and medium-size business**

The report of the Joint Select Committee on Government Procurement argued that the implementation of government procurement guidelines should put Australia's long-term national interest ahead of short-term savings for particular government departments. This should mean proper consideration of value-for-money to include the benefits of local employment and industry development. The report also pointed out that these broader considerations of value-for-money are used by our trading partners like the US, the UK and South Korea. In general, the report supports measures to encourage tendering by local suppliers, especially small and medium sized enterprises.

The addition of a formal judicial appeal process may discourage small and medium-sized enterprises from tendering.

The government itself said in 2015 in its response to the Senate Inquiry into Commonwealth Procurement Procedures that the existing framework for suppliers to raise complaints about procurement processes is adequate, and met existing international obligations for the handling of procurement complaints (Australian Government response to the Senate Finance and Public Administration References Committee Report on Government Procurement Procedures, 2015: 8).

The current procedures are that, if the complaint is not resolved through initial consultations with the government department involved, or through the Australian Government Procurement Coordinator, the complaint can be taken to the Commonwealth Ombudsman, which is an independent body that has power to investigate procurement-related complaints (Department of Finance, 2014).

This is a relatively inexpensive process which is accessible to small and medium-sized local businesses.

AFTINET shares the concern expressed in other submissions that the selection of the Federal Circuit Court in the proposed legislation as a body to hear appeals adds an additional level of legal complexity and expense to the procurement process, especially for small and medium-sized business. Such a mechanism is more likely to be used by large global firms, who can more easily meet expensive legal costs. This runs counter to the Joint Select Committee on Government Procurement recommendations to maximise opportunities for local small and medium-size enterprises in government procurement, as is currently done by most of our trading partners.

## Conclusion

The introduction of the Bill is premature because it claims to meet international obligations for which the negotiations have not yet been completed. The government should follow the recommendation of the Joint Select Committee on Government Procurement and should not introduce any legislation until the negotiations of relevant international agreements are completed and the obligations arising from the agreements are clear.

It can also be argued that the use of the Federal Circuit Court as an appeal mechanism is not appropriate. This will add an additional level of complexity and expense to the procurement process, which may disadvantage small and medium-sized enterprises compared with large global firms. Again this runs counter to the recommendations of the Joint Select Committee on Government Procurement to maximise opportunities for local small and medium-size enterprises in government procurement, as is currently done by many of our trading partners.

## References

Commonwealth of Australia (2015) *Australian Government response to the Senate Finance and Public Administration References Committee Report on Government Procurement Procedures*, found on July 10, 2017 at

<https://www.finance.gov.au/sites/default/files/australian-government-response-to-the-senate-inquiry-into-commonwealth-procurement-procedures.pdf>

Department of Finance (2014) *Complaints Handling Charter*, found on July 7, 2017 at <http://www.finance.gov.au/procurement/procurement-coordinator/complaints-handling-charter.html>

Joint Select Committee on Government Procurement (2017) *Buying into our future*, June, found on July 10, 2017 at

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Thurbon, Elizabeth, (2014) "Australia's procurement policy leaves our exporters behind," *The Conversation*, October, found at <http://theconversation.com/australias-procurement-policy-leaves-our-exporters-behind-32569>