Chapter 3

Commonwealth procurement and the non-discrimination principle

3.1 During the inquiry witnesses and submitters raised concerns about the content and application of the Commonwealth Procurement Rules (CPRs). These issues can broadly be categorised as issues about:

- the application of the non-discrimination principle; and
- the interpretation of the value for money criteria.

3.2 The application of the non-discrimination principle is discussed in this chapter and the interpretation of the value for money criteria is covered in Chapter 4.

Application of the non-discrimination principle

3.3 The Department of Finance (Finance) explained that the CPRs incorporate Australia's commitments pursuant to free trade agreements, including the Australia-United States Free Trade Agreement (AUSFTA):

> These commitments provide access for Australian suppliers to the government procurement markets of other countries, whilst also placing obligations on the Commonwealth Government to open up access to our procurement market. These commitments limit the extent to which the Commonwealth Government can preference local suppliers.[1]

3.4 The application of the non-discrimination principle in Commonwealth procurement processes was reflected in evidence to the committee. For example, the Department of Human Services (DHS), in discussing the arrangements for the procurement of paper, stated:

> DHS conducted these procurements in accordance with the requirements of the [CPRs] and other relevant Commonwealth policies. These requirements, based on Australia's obligations under international free trade agreements, necessitate all government procurement to be non-discriminatory and for all suppliers to be treated equitably based on their commercial, legal, technical and financial abilities and not discriminated against due to size, foreign affiliation or ownership, location, or the origin of goods or services.[2]

3.5 Similarly, the Clerk of the Senate, Dr Rosemary Laing, also referring to the procurement of paper by the Department of the Senate, noted:

> Because of the department's focus on the best value for money, it does not discriminate for or against Australian made products. This is in line with the approach espoused in the CPRs that the products or services must be

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1 *Submission 12*, p. 3.

2 *Submission 40*, p. 1.

> assessed on the basis of their suitability for the intended purpose, rather than solely on the country of origin.[3]

3.6 Ms Carol Mills, Secretary of the Department of Parliamentary Services, also referred to this issue in evidence at the Additional Estimates 2013-14 hearings, when questioned as to whether there was a requirement that the flag to fly above Parliament House is made in Australia:

> All our tenders, regardless of what they are for, comply with Commonwealth tender processes and legislation, which under free trade means that we can specify quality, we can specify design, we can specify value for money and other criteria; we cannot specify place of origin.
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> …
>
> We have a philosophy that wherever possible we should strive to have Australian products, but we cannot breach Commonwealth guidelines in doing our procurement.[4]

Support for policies promoting local preference

3.7 Witnesses expressed concern that Australia's commitment to the non-discrimination principle was idealistic and that other countries were taking steps to protect their domestic industries. For example, Ms Lynne Wilkinson, CEO of The Australian Companies Institute Limited (AUSBUY) argued:

> Every other country looks after itself first, but we seem to be the ones, at our expense, who look after the international obligations. We are purists and idealists. In terms of the government procurement process, there is very often laziness, lack of integrity, naivety and lack of accountability in that process. So they are the things that we would like to see changed, and it really needs to come from the top. The Commonwealth government needs to say, 'We're going to support local businesses.' We have never signed any free trade agreements under which we have not failed and suffered. We signed a free trade agreement with [America] in 2005; we still have tariffs for another 11 years with that. So we cannot say that we are very smart. We are very smart at giving away what we have, but we are not very smart at building what our people have built for the last 226 years.[5]

3.8 Ms Michelle Melbourne, Chair of the Canberra Business Council, outlined the experience she has had with her own IT company, Intelledox, in US procurement processes. She contended that while Australia follows the rules of the AUSFTA, the United States (US) proactively advocates for its local industry:

> [I]n my experience, and we certainly have a lot of experience in the US and in the face of the free trade agreement in that context, it is…not an even playing field for our company over there; it just isn't. So [Australia] mind[s]

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3 *Submission 2*, p. 2.

4 Senate Finance and Public Administration Legislation Committee, *Additional Estimates Hansard*, 24 February 2014, p. 40.

5 *Committee Hansard*, 21 March 2014, p. 5.

> our p's and q's and follow[s] the rules with the free trade agreement, but the US do not do that. They are fiercely parochial. Each state and procurement body that you deal with over there asks you: 'Who is your local partner? What are you going to leave behind? What are the skills that you're bringing? What are the innovations? Are you working with a veteran-owned company? Are you working with a company that is owned by African American directors? Are you working with a company that is owned by a director with a disability?' They are asking all of these questions, which is about driving behaviour. They are policy settings that are either state based or nationally based that drive me, as an overseas supplier, to engage with local industry.[6]

3.9 Some evidence focussed on US legislation which contains 'buy American' provisions. For example the *Buy American Act 1933*, which provides preference for domestic components in US federal government procurement:

> The Buy American Act applies to direct purchases by the [US] federal government of more than $3,000, providing their purchase is consistent with the public interest, the items are reasonable in cost, and they are for use in the United States. The act requires that "substantially all" of the acquisition be attributable to American-made components. Regulations have interpreted this requirement to mean that at least 50% of the cost must be attributable to American content.[7]

3.10 At the public hearing, Mr John Brent, a Board Member of AUSVEG, referred to the operation of the Buy American Act and argued:

> I would suggest we need to look towards other countries as to how they go about looking after, firstly, people within their own bounds…
>
> …I believe our focus should be on what is best for Australia. What can we do in the best interests of our 22 million-odd people? What can I do, representing 38,000 people in my community? In my community we have implemented a 'buy local' week and it has gone from strength to strength over a period. It is about trying to engage with our community to ensure that we give them better knowledge and a better understanding of what we can do locally. Just as we are doing at a local government level to try to create interest in product, I believe we need to try at both state and federal levels to do our best to encourage people to buy our own product.[8]

3.11 The AUSVEG submission noted the Buy American Act 'provided adequate room for Free Trade Agreements that are mutually beneficial to continue to operate with Presidential sign off'.[9]

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6 *Committee Hansard*, 28 April 2014, p. 25.

7 John R. Luckey, Legislative Attorney, *Domestic Content Legislation: The Buy American Act and Complementary Little Buy American Provisions*, 25 April 2012, Congressional Research Service, Summary, p. ii.

8 *Committee Hansard*, 21 March 2014, p. 53.

9 *Submission 22*, p. 7.

3.12 The Construction, Forestry, Mining and Energy Union (CFMEU) referred to the *American Reinvestment and Recovery Act of 2009* which was introduced in response to the Global Financial Crisis and was designed to stimulate economic activity. The Reinvestment and Recovery Act specifically provided that none of the funds appropriated under the Act may be used for a project unless all of the iron, steel and manufactured goods used in the project are produced in the United States. The 'buy American' provision is to be applied in a manner consistent with US obligations under international agreements.[10] The CFMEU argued these 'buy American' requirements are an 'indicative of a way forward for the Australian Government'.[11]

3.13 In answers to questions on notice, Finance emphasised that the US legislation made specific exemptions for its obligations under free trade agreements:

> The *Buy America[n] Act of 1933* relates to the procurement of goods by the US federal government. The US has waived the Buy America[n] Act for procurements covered by AUSFTA (and its other international agreements).
>
> Similarly, Australia cannot apply legislation or policies which preference local suppliers to procurements covered by AUSFTA (and our other international agreements).[12]

3.14 This point was reiterated at the second public hearing:

> [The Department of Finance has] conclusive evidence that [the 'Buy American' legislation does] not apply to countries that are signatories of free trade agreements with Australia, so they do not apply to Australian arrangements.[13]

3.15 Australia has previously implemented policies which protected local industries. Mr Tony Butler noted that Australia's last preferencing scheme was the 'Commonwealth Purchasing Preference Margin' – an arrangement which provided a margin of preference against imports for locally made goods. This scheme was abolished in 1989 after it was found to be ineffective, affecting 'the outcome of only 107 contracts with a value of about 0.1% of total Commonwealth purchasing expenditure'.[14]

3.16 Dr Nick Seddon, a lawyer and academic specialising in government contracts, observed that policies promoting local preference conflict with the purpose of free trade agreements:

> It is a fundamental principle of free trade agreements that trade should be subject to unfettered competition so far as possible. Local preference is therefore inimical to this principle and is the specific target of prohibition.[15]

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10 Section 1605 of the *American Recovery and Reinvestment Act of 2009.*

11 *Submission 39*, p. 11.

12 Department of Finance, answers to questions on notice, received 1 April 2014, p. 2.

13 Mr John Sheridan, Department of Finance, *Committee Hansard*, 28 April 2014, p. 41.

14 *Submission 37*, pp 1-2.

15 *Submission 1*, p. 5.

3.17 Dr Seddon stated that in his opinion, aside from the specific exemptions to the AUSFTA, the Commonwealth government is not free to develop 'buy Australian' policies. If the government were to develop such policies, it would risk the United States invoking the dispute resolution procedures under the AUSFTA.[16]

Committee view

3.18 The committee notes the evidence from Finance that 'Buy American' provisions in US legislation do not apply to Australia because of the operation of the AUSFTA. However, the Department of Finance has failed to address the other question which was asked of it in this context, which was whether Australia could put in place preferencing schemes, which take into account Australia's free trade obligations, along the lines of the Buy America provisions. The committee is therefore seeking a detailed explanation of the barriers to putting such a scheme in place.

Recommendation 2

3.19 The committee recommends that the Department of Finance provide a detailed explanation of the barriers to developing a preferencing scheme, which takes into account Australia's free trade obligations.

Need for a level playing field

3.20 One of the reoccurring arguments advanced during the inquiry was that the application of the non-discrimination principle disadvantaged Australian manufacturers and producers. Witnesses and submissions contended that Commonwealth procurement is not a 'level playing field' because Australian businesses are subject to more rigorous regulation than their overseas competitors.

3.21 Mr Wayne Gregory, Managing Director of Carroll & Richardson Flagworld, explained:

> [W]hile the Commonwealth procurement rules seek to be non-discriminatory, in reality they offer a free kick to many importers. We do not compete with overseas suppliers who want to sell here; they sell through local importers. Obviously, the manufacturer overseas does not have to comply, so it is not a level playing field with regard to legislative requirements, regulations, standards, fair work, income tax, payroll tax, superannuation, and occupational health and safety. Clearly the local importer has to, but the local importer may well be two people and a little factory out the back.[17]

3.22 Similarly, the Australian Industry Group's submission argued:

> Local producers are required to produce to stringent Australian and International Standards and nonconformity or false claims of conformity

16 *Submission 1*, p. 5.

17 *Committee Hansard*, 28 April 2014, pp 27-28. See also Mr Umit Erturk, Manager, Spear of Fame, *Committee Hansard*, 28 April 2014, p. 28; Dr Herbert Hermens, *Submission 8*, p. 2.

> are much more rigorously enforced than is the case with many imported alternatives. This puts local businesses at a disadvantage.[18]

3.23 Mr John Brent, a Board Director of AUSVEG, used biosecurity as a specific example of how Australian food producers are disadvantaged:

> [T]here is discrimination at the wharf, at the port, where biosecurity does not apply the same level of scrutiny to the imported product as it does to the Australian product. We know the integrity of the Australian food product and I think it measures up quite well, and yet we have imported product that does not go through the same regime.[19]

3.24 In its submission, SPC Ardmona outlined the testing that Australian food producers undertake:

> Australian food products are produced to the highest quality standards ensuring product safety. Farmers test their soil, water and fruit for such things as pesticides and heavy metals. These same strict standards may be an implied requirement for products imported into Australia, but evidence of non-compliance of imported products to the Australia and New Zealand Food Standard Code suggest that testing procedures are not widely being used…Testing procedures add cost to Australian manufactured products, but ensure the safety of consumers.[20]

3.25 The Furniture Cabinets Joinery Alliance outlined the types of regulations that it viewed as creating a disadvantage to its industry:

> Australia has in place a range of regulations, codes and laws necessary to provide protection to employees, consumers and the general public. The [Furniture Cabinets Joinery] industry supports the need for these regulations and codes however it is incongruous to have such a domestic regulatory framework if the Government, in its own purchasing decisions, does not require competing imported product entering Australia to abide by similar principles.
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> Commercial furniture, cabinet and joinery manufacturers cannot compete with countries which have virtually no environment and safety regulation and policies and thus companies operating in them need not invest in capital and processes to prevent this occurring. Similarly, less stringent labour laws and employee protections – such as annual leave, superannuation etc. – place Australian producers at a competitive disadvantage to these countries.[21]

3.26 Mr Julian Mathers, General Manager External Affairs, Australian Paper, drew out the effects of more stringent standards Australian businesses complied with, which increased costs and reduced competitiveness:

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18 *Submission 10*, p. 9.

19 *Committee Hansard*, 21 March 2014, p. 53.

20 *Submission 45*, p. 3.

21 *Submission 26*, p. 2.

> On the cost side of our business, we have some things that we do that we are proud to do as an Australian company in regard to workplace laws and occupational health and safety as well as compliance with environmental laws and other things that are different from the rest of the world—it is good and part of Australia and part of the high standards that we have here, but they are different from the rest of the world.[22]

3.27 In its submission, the Australian Companies Institute Limited (AUSBUY) set out a number of case studies of 'brand substitution' in procurement processes, that is, where locally manufactured goods which conformed with Australian standards, had been replaced by overseas sourced goods which did not meet Australian standards.[23] Ms Lynne Wilkinson, the CEO of AUSBUY contended:

> The management of the process needs to be much more closely scrutinised and there needs to be much more accountability within the management of that process—spot checks to see whether it meets the standards. If it doesn't, the people who have allowed that through will be the ones accountable.[24]

3.28 The Australian Services Union and the Finance Sector Union proposed that Commonwealth procurement policy should include a requirement that overseas suppliers or sub-contractors comply with the same standards as domestic suppliers.[25]

3.29 The Australia Council of Trade Unions supported a model where overseas tenderers demonstrate compliance with international standards:

> In the event of contracts being awarded offshore, successful tenderers should be required to demonstrate compliance with the relevant employment standards contained within the [United Nations] human rights instruments, the [International Labour Organisation] Conventions and, where applicable, the [Organisation for Economic Co-operation and Development] Principles for Multi-National Enterprises. Opportunities should be afforded to stakeholders to verify such compliance via appropriate compliance mechanisms.[26]

3.30 A number of witnesses emphasised that they were not seeking a 'protectionist' policy in relation to procurement.[27] Mr Travis Wacey, National Policy Research Officer with the CFMEU, stated:

> We do not want special treatment necessarily, but we feel that if we do have a level playing field we can compete with the best.[28]

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22 *Committee Hansard*, 21 March 2014, p. 40.

23 *Submission 44*, pp 13-15.

24 *Committee Hansard*, 21 March 2014, pp 4-5.

25 *Submission 19*, p. 4.

26 *Submission 14*, p. 3.

27 See for example Ms Michelle Melbourne, Chair, Canberra Business Council, *Committee Hansard*, 28 April 2014, p. 26; Mr Umit Erturk, Manager, Spear of Fame, *Committee Hansard*, 28 April 2014, p. 30. See also Australian Information Industry Association, *Submission 7*, p. 2.

3.31 Dr Seddon advised the committee that it would be possible to include in tender documents a requirement that tenderers adhere to relevant standards, for example that wood products must be sourced from sustainable forests. However, Dr Seddon indicated that he is unsure of the extent to which that type of specification is happening:

> I know that it is done sometimes, but I do not think it is systematic. It is a bit sporadic. It depends on the type of purchase, obviously. But it would be possible to, in a sense, raise the standard so that you as a tenderer must conform to these standards. Australian companies then would not be disadvantaged.[29]

3.32 In terms of whether overseas tenderers would have a legitimate complaint if such specifications were included in tender documentation, Dr Seddon stated:

> There would be a remote possibility that a foreign company could then say, 'You are now erecting a form of barrier to trade.' This has happened in the past with lots of imported products. They claim that it is not a fair competition because Australia erects a barrier based on health...It is a possibility that if Commonwealth agencies insisted on certain standards somebody could complain. They would have to complain in the international forum…
>
> But my view about that is that if the Australian government wants to set a high standard then it is perfectly free to do so. The chance of a challenge occurring under the processes of the free trade agreement is extremely low, I would think. Secondly, I think Australia could stand up and say, 'This is legitimate standard setting. It is not discriminating against foreign companies. All they have to do is meet the standard.'[30]

3.33 In answers to questions on notice, Finance responded to the argument that overseas suppliers were at an unfair advantage because they are not required to meet the same policies, regulations and standards as Australian manufacturers:

> It is inaccurate to say that overseas suppliers are not required to meet the same policies, regulations and standards as Australian manufacturers. Procurement contracts can only be awarded to suppliers who satisfy any relevant Commonwealth policies, including regulations. In prescribing standards, Commonwealth agencies must do this in a non-discriminatory manner and may use Australian standards. These requirements are captured in the *Commonwealth Procurement Rules* and reflect the *Financial Management and Accountability Regulations 1997* that the spending of public money cannot be approved where it is inconsistent with Commonwealth policy. Hence, if an overseas supplier is not compliant with

28 *Committee Hansard*, 28 April 2014, p. 18. See also Name Withheld, *Submission 15*, p. 1.

29 *Committee Hansard*, 28 April 2014, pp 2-3.

30 *Committee Hansard*, 28 April 2014, p. 3.

> a particular standard as specified in tender documents, the agency is not required to award a contract.[31]

3.34 At the second public hearing, Mr John Sheridan, First Assistant Secretary, Technology and Procurement Division, Business, Procurement and Asset Management Group, Department of Finance, explained:

> [A] procuring agency can apply the qualifications or the requirements that they might have for a particular procurement of any reasonable amount. So they might say not that you have to have an Australian certification because that may well discriminate against an overseas supplier, but it would be quite legitimate to say you should have an Australian certification or the equivalent or prove the equivalent. That would be reasonable in those circumstances and meet our Commonwealth procurement requirements and of course free trade agreement requirements.[32]

3.35 In terms of agencies' abilities to test whether overseas suppliers did, in fact, meet Australian regulations and standards, Mr Sheridan stated it is open to agencies to do their own testing as to whether goods meet Australian standards or to get independent testing done, however '[t]hat would be a matter for the procuring agency'.[33]

Current assistance programs

3.36 While witnesses and submissions considered that other countries did a better job in providing for local preference in government procurement, there was also consternation that the current government programs which provide support for Australian small to medium enterprises (SMEs) might be under threat.

AIP Plans

3.37 In its submission the Department of Industry explained the Australian Industry Participation (AIP) Plans:

> Since 1 January 2010, tenderers for large Commonwealth procurements (over $20 million) have been required to prepare and implement AIP Plans. These plans outline actions a tenderer will take to provide Australian suppliers, especially SMEs, with access to supply opportunities in the project.[34]

3.38 Since 2012 the requirements for AIP Plans have applied to Commonwealth grants as well as to Commonwealth procurements over $20 million.[35]

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31 Department of Finance, answers to questions on notice, received 1 April 2014, p. 24.

32 *Committee Hansard*, 28 April 2014, p. 48.

33 *Committee Hansard*, 28 April 2014, p. 48.

34 *Submission 36*, p. 6.

35 Mr Michael Green, Acting Head, Industry Division, Department of Industry, *Committee Hansard*, 21 March 2014, p. 58.

3.39 The AIP Plan policy applies to all *Financial Management and Accountability Act 1997* agencies, and has also been adopted by some of the *Commonwealth Authorities and Companies Act 1997* bodies. However, it does not apply to the Department of Defence, which supplies its own policies to provide for Australian industry participation in defence procurement projects.[36]

3.40 The Department of Industry outlined the objectives of an AIP Plan:

> Demonstrate how full, fair and reasonable opportunity will be provided to Australian SMEs to supply goods and services to a project;
>
> Endeavour to maximise opportunities for Australian SMEs to participate in all aspects of a project[;] and
>
> Make large procuring entities aware of capable Australian suppliers and assist them to be competitive both nationally and overseas.[37]

3.41 Mr Michael Green, Acting Head of the Industry Division, Department of Industry informed the committee that as at 28 February 2014, there had been six AIP Plans approved for government grants over $20 million.[38]

3.42 Dr Tom Skladzien, National Economic Adviser for the Australian Manufacturing Workers' Union (AMWU), explained the benefits of AIP Plans:

> [T]he recent AIP plans are really good…because they allow competitive firms to win work in a situation where they otherwise would not because they just do not have the information. The large investment programs are run by global procurement companies who have established supply chains and unless you force them to open up their procurement decisions then they just do not, even if it [is in] their commercial interests. They do this for the same reason that I go to the same barber every week…It is not because he is the best barber in the city but because I have a relationship with the barber. The same thing determines a lot of the procurement work on large investment projects: they have relationships with suppliers and they just go back to the same supplier even if there is a more competitive, better quality, domestic supplier available. AIP plans essentially open up that decision and force the firm to make a decision, where it would otherwise be a decision by default.[39]

3.43 Ms Melbourne, of the Canberra Business Council, also supported policies which encouraged industry collaboration:

> [E]ssentially it is about that industry participation, where the large and the small coexisting and collaborating and partnering is what is the accepted culture. We do not want to exclude anybody from the supply chain. The policy settings must drive behaviour of the big guys to be pulling along and

36 Mr Michael Green, Acting Head, Industry Division, Department of Industry, *Committee Hansard*, 21 March 2014, p. 58.

37 *Submission 36*, p. 6.

38 *Committee Hansard*, 21 March 2014, p. 58.

39 *Committee Hansard*, 21 March 2014, p. 49.

> including the smaller guys, and vice versa—that is, that the smaller guys, who are the subject matter experts largely, are not locked out of influencing or participating with the big guys.[40]

3.44 Specifically in relation to AIP Plans, Ms Melbourne observed:

> I know there are some fabulous federal programs. There is the Australian Industry Participation Plan, which we have had a lot to do with, but it has no teeth. Unfortunately, it needs more life. We need to make sure that it does not lose its funding…[41]

3.45 Ms Suzanne Campbell, Chief Executive Officer of the Australian Information Industry Association, referred to the example of small companies in the ACT working collaboratively with multinational companies:

> The global multinationals say, 'We can rely on our own [research and development] facilities to present us with innovation, and we know that will come, but it is a matter of time. So it is better for us to turn to the local environment and incorporate smaller, more agile, innovative companies in our solution, and they represent to government a package of solution[s] and are successful'. Those individual companies by themselves would not have been successful.[42]

3.46 Mr Green, representing the Department of Industry, informed the committee that AIP Plans were being continued. However, it appears that this continuation is subject to an ongoing review:

> We are continuing to look at a range of obligations that are imposed on business as part of the government's agenda to look at regulatory costs on business, so it is one of a number of things that are being looked at in terms of obligations and costs on business.[43]

3.47 The Portfolio Budget Statements 2014-15 for the Industry Portfolio referred to an evaluation of 'the costs, benefits, appropriateness and effectiveness of existing [Australian Industry Participation] policies and programmes' to be completed in 2014.[44] The 'Opening up opportunities through Australian Industry Participation' program does not appear to have been allocated any funding for the forward estimates and is listed as a 'closed/closing programme' in the Portfolio Budget Statements 2014-15.[45] At the June 2014 estimates hearings, the Department of Industry confirmed

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40 *Committee Hansard*, 28 April 2014, p. 25.

41 *Committee Hansard*, 28 April 2014, p. 25.

42 *Committee Hansard*, 21 March 2014, p. 23.

43 Mr Michael Green, Department of Industry, *Committee Hansard*, 21 March 2014, p. 59.

44 Portfolio Budget Statements 2014-15 for the Industry Portfolio, p. 69.

45 Portfolio Budget Statements 2014-15 for the Industry Portfolio, pp 54 and 58. The 'Opening up opportunities through Australian Industry Participation' program includes Buy Australian at Home and Abroad and the Australian Industry Participation Authority, see Portfolio Budget Statements 2014-15 for the Industry Portfolio, p. 57.

that the 'Opening up opportunities through Australian Industry Participation' measure is only funded until 31 December 2014.[46]

Enterprise Solutions Program

3.48 In early 2013, the former government announced the establishment of the Enterprise Solutions Program. The program is intended to:

> [H]elp small to medium companies develop innovative solutions to problems identified by government agencies…The Enterprise Solutions Program will assist companies overcome key barriers to providing solutions for government agencies, including: limited access to finance; limited access to skills and expertise; the cost of early product development; and uncertainty in market demand.[47]

3.49 The Enterprise Solutions Program was allocated $24.6 million over five years. The program was anticipated to involve three stages:

- a call for proposals from government agencies for unmet technological needs and the establishment of 'Technological Requirement Specifications' (TRS) which Australian companies will be consulted for solutions;
- a call for feasibility studies on potential solutions to unmet government technological needs will be made to Australian industry with competitive grants of up to $100,000 for feasibility studies of up to three months to meet a specific TRS; and
- assessment of feasibility studies for specific TRSs will be assessed for a proof of concept grant. If successful, proof of concept grants of up to $1 million will be provided to companies to undertake further design, prototyping and testing a proposed solution for a period of up to 18 months.[48]

3.50 At the public hearing in March, Mr Ken Pettifer, Head, Business Competitiveness and Trade Division, Department of Industry, noted that the Enterprise Solutions Program had been designed but never rolled out and was, at that stage, under review by the government.[49]

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46 Mr Grant Wilson, Acting Australian Industry Participation Authority Australian Industry Participation Branch, Department of Infrastructure, Senate Economics Legislation Committee, *Estimates Hansard*, 3 June 2014, p. 80.

47 Department of Industry, Innovation, Science, Research and Tertiary Education, *Innovation Policy Report*, March 2013, p. 4.

48 See AusIndustry, Enterprise Solutions Program website, www.ausindustry.gov.au/programs/innovation-rd/EnterpriseSolutionsProgram/Pages/default.aspx (accessed 14 May 2014).

49 *Committee Hansard*, 21 March 2014, p. 59.

3.51 Both the Australian Council of Trade Unions and the Australian Manufacturing Workers' Union supported continuation of the Enterprise Solutions Program.[50]

3.52 Following the announcement of the 2014-15 Federal Budget, the Enterprise Solutions Program will no longer continue.[51] Along with the closure of the 'Opening up opportunities through Australian Industry Participation' program, the discontinuation of the Enterprise Solutions Program is yet another measure designed to assist Australian industry to work with government which has been cut by the current government.

Committee view

3.53 The committee supports the intent of bilateral free trade agreements, where such agreements provide both parties with unimpeded access to the other's markets.

3.54 However, the committee is deeply concerned that the non-discrimination principle is being interpreted too narrowly and may inadvertently discriminate against Australian manufacturers. For example, the committee notes that at the 2014-15 Budget Estimates hearings, the Finance and Public Administration Legislation Committee investigated the requirements in the request for tender for the flag to fly above Parliament House.[52] Those tender documents set out 17 conditions with yes/no tick boxes, regarding a tenderers' compliance with Australian legislation, such as occupational health and safety provisions, discrimination and environmental legislation. The documents then appear to suggest that Australian suppliers are required to certify their compliance, whereas overseas suppliers are not.

3.55 The committee therefore believes that the government should review the application of the non-discrimination principle to ensure that it does not inadvertently discriminate against Australian manufacturers.

Recommendation 3

3.56 The committee recommends that the government review the application of the non-discrimination principle to ensure that it does not inadvertently discriminate against Australian manufacturers.

3.57 Further, the committee is also sympathetic to the view of witnesses and submitters that Australia is idealistic in its application of the non-discrimination principle. In the committee's view, part of the problem lies with the application of the non-discrimination principle, but also the failure by the Australian government and

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50 Australian Council of Trade Unions, *Submission 14*, p. 2; Australian Manufacturing Workers' Union, *Submission 18*, p. 3; Dr Tom Skladizen, National Economic Adviser, Australian Manufacturing Workers' Union, *Committee Hansard*, 21 March 2014, p. 49.

51 See AusIndustry, Enterprise Solutions Program website, www.ausindustry.gov.au/programs/innovation-rd/EnterpriseSolutionsProgram/Pages/default.aspx (accessed 14 May 2014).

52 Senate Finance and Public Administration Legislation Committee, *Estimates Hansard*, 26 May 2014, pp 45-47.

industry to fully capitalise on the exemptions provided for within Australia's free trade agreements.

Policies supporting SMEs

3.58 Specifically, the committee believes that more can be done to assist SMEs while still upholding the non-discrimination principle in the CPRs. The evidence to the committee is that one of the best ways in which SMEs can become involved in procurement processes is through 'the big guys to be pulling along and including the smaller guys'.[53]

3.59 While the committee notes that the 2014-15 Budget provides $2.8 million over four years 'to assist small business to access the Commonwealth procurement market',[54] the committee believes that this comes at the expense of existing policies to assist SMEs. In this context, the committee is concerned and disappointed at the closure of the Enterprise Solutions Program. The Enterprise Solutions Program offered SMEs the opportunity to develop innovative solutions for government. In the committee's view, the cancellation of the Enterprise Solutions Program before it had a chance to properly commence, means that the program has never been given the opportunity to reach its full potential. The committee recommends that the Enterprise Solutions Program should be recommenced.

3.60 Further, the committee notes the review of AIP policies and programs and the apparent discontinuation of funding for these programs. The committee supports the evaluation and monitoring of government programs but the committee places on the record its concern that this review is a precursor to a removal of funding for AIP policies and programs which include: Buy Australian at Home and Abroad;[55] Supplier Advocates;[56] Supplier Access to Major Projects;[57] and the Industry Capability Network.[58]

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53 Ms Michelle Melbourne, Canberra Business Council, *Committee Hansard*, 28 April 2014, p. 25.

54 Budget 2014-15, Budget Paper No. 2, p. 113.

55 See http://industry.gov.au/Industry/BuyAustralianatHomeandAbroad/Pages/default.aspx (accessed 27 June 2014)

56 See http://industry.gov.au/Industry/AustralianIndustryParticipation/SupplierAdvocates/Pages/default.aspx (accessed 27 June 2014)

57 See http://industry.gov.au/industry/AustralianIndustryParticipation/Pages/SupplierAccessToMajorProjects.aspx (accessed 27 June 2014)

58 See http://industry.gov.au/industry/AustralianIndustryParticipation/Pages/IndustryCapabilityNetworkLimited.aspx (accessed 27 June 2014)

Recommendation 4

3.61 The committee recommends that the government continue to fund the Australian Industry Participation policies and programs and reinstitute funding for the Enterprise Solutions Program.

SMEs and the CPRs

3.62 The committee notes Dr Seddon's comments regarding the drafting of the SME provision in the CPRs. The committee agrees that the current framing of this provision does not reflect the exemption as it is framed in the AUSFTA. Where the AUSFTA provides that the government procurement provisions do not apply to 'any form of preference to benefit small and medium enterprises', the CPRs provide that 'officials should apply procurement practices that do not unfairly discriminate against SMEs and provide appropriate opportunities for SMEs to compete'.

3.63 The committee supports a clear statement being included in the CPRs to the effect that the CPRs do not apply to any practice designed to preference SMEs. In the view of the committee such a statement is consistent with Australia's obligations under the AUSFTA. The committee therefore recommends that paragraph 5.4 of the CPRs be redrafted to provide an explicit exemption from the CPRs for practices to benefit or preference SMEs.

Recommendation 5

3.64 The committee recommends that the Commonwealth Procurement Rules be redrafted to provide an explicit exemption for practices to benefit or preference small and medium businesses.

Australian standards

3.65 The committee recognises that there is significant concern regarding the failure of imported goods to meet Australian standards. The committee notes the advice from Finance that an agency may apply qualifications or requirements to a particular procurement and, further, that it would be 'quite legitimate' for an agency to require a successful tenderer to 'have an Australian certification or the equivalent or prove the equivalent'.[59]

3.66 The committee believes that this is a matter where the Department of Finance can provide agencies and procurement officers with improved guidance and education.

Recommendation 6

3.67 The committee recommends the Department of Finance provide education and training to agencies and their staff regarding the inclusion of Australian standards, or the equivalent, in tender documentation.

59 Mr John Sheridan, Department of Finance, *Committee Hansard*, 28 April 2014, p. 48.