



**Electrical Trades Union of Australia**

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## SUBMISSION

### **Joint Select Committee on Government Procurement**

March 2017



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The Electrical Trades Union (ETU) is the Electrical, Energy and Services Division of the Communications, Electrical, Electronic, Energy, Information, Postal, plumbing and Allied Services Union of Australia (CEPU). The ETU represents approximately 65,000 electrical and electronic workers around the country and the CEPU represents approximately 100,000 workers nationally, making us one of the largest trade unions in Australia.

We thank the Committee for the opportunity to make submissions in relation to its current examination of government procurement arrangements.

This submission will focus on the Commonwealth Procurement Rules (CPR), their application within the context of trade agreements and the consistency of their operation with other federal procurement frameworks such as the construction industry's Building Code 2016.

## Trade Agreements

In our view the CPR should be implemented in a way which ensures that governments can use procurement policies to encourage industry development and local employment. Negotiations for the current and future trade agreements should ensure that trade agreement provisions do not prevent procurement policies from meeting these goals.

The ETU 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



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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.

Australia's current international trade commitments do permit interpretations of value for money and preferences for local companies. However, Commonwealth Procurement Rules have until now lacked clarity about how these can be implemented and there appears to be a lack of awareness about them amongst those who implement tendering processes. This puts Australian businesses, especially SMEs looking to grow their capacities, at a disadvantage in competing for government procurement contracts in Australia.

Australian companies are also disadvantaged in competing for overseas procurement contracts by the fact that Australia's free trade agreement partners like the US and South Korea have taken full advantage of interpretations which enable them to preference local SMEs, making it difficult for Australian companies to win contracts.

Australian government policies have not fully exploited the flexibility allowed under current trade agreements, while there is evidence that procurement chapters in trade agreements have not enabled Australian companies to access overseas



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procurement markets. Australian businesses are therefore being harmed by more competition domestically while also being denied the ability to gain more work overseas; effectively being squeezed from two sides.

It is therefore legitimate to question whether Australia's accession to the WTO GPA would lead to increased procurement opportunities for Australian firms. In addition, it must also be asked whether the negotiations and concessions required in the accession process for the GPA would in fact limit current and future policy options for both Commonwealth and State governments, leading again to a squeeze from both sides for Australian business.

Accession to the WTO GPA will involve negotiation with existing GPA members, including the US and other bilateral trade agreement partners. This process could include requests for Australia to give up some of its current procurement exemptions in the AUSFTA and other agreements.

It would be unwise for the Australian government to trade away existing exemptions for government procurement, and options for future flexibility, in the vain hope of additional access to overseas government procurement markets which on past evidence is highly unlikely.

## Current Australian Government commitments and exemptions on Government Procurement in other trade agreements

In addition to the Closer Economic Relations Agreement with New Zealand<sup>1</sup>, Australia has made commitments on government procurement in other bilateral trade agreements with the US, Singapore, Chile, South Korea and Japan. The core of these commitments is national treatment and nondiscrimination for international companies

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<sup>1</sup> In the Closer Economic Relations Agreement with New Zealand, New Zealand is effectively treated as part of Australia for procurement purposes and vice versa. There is no provision for dispute settlement procedures applying to procurement arrangements with New Zealand.



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seeking government procurement contracts, which means that international suppliers must be treated as if they were domestic suppliers.

The Australian Schedules of commitments for entities covered by these agreements list the Commonwealth, State and Territory government agencies and business enterprises. Which are covered by the agreements.

However, all of the agreements include exemptions for certain categories of procurement at Federal, State and Territory level. These include defence procurement and procurement from other government entities. They also include measures necessary to protect intellectual property, public morals, order or safety, human, animal or plant life, health, and for goods and services produced by people with disabilities, prison labour and philanthropic and not-for-profit institutions. There are also exceptions for blood products, financial services, superannuation funds and other investment management services and for services related to the sale and distribution of public debt.

Importantly, there is a general exemption for all governments for small and medium enterprises (SMEs) discussed above. This means that governments can give preference in procurement to local SMEs. There are also exceptions for measures to promote the health, welfare, economic and social advancement of Indigenous people, and for measures to protect national treasures of artistic, historic or archaeological value.

With these exceptions, the Commonwealth has listed most of its entities and government business enterprises.

State lists of commitments vary. In addition to the positive lists of state government agencies, some states have listed exemptions for specific services, which include education services, health services, welfare services, motor vehicles and government advertising.



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These commitments are covered by state-to-state dispute settlement procedures in these agreements.

## The Building Code 2016

We note that the CPR contain requirements around value for money which state that:

*4.4 Achieving value for money is the core rule of the CPRs. Officials responsible for a procurement must be satisfied, after reasonable enquires, that the procurement achieves a value for money outcome. Procurements should (a) encourage competition and be non-discriminatory.*

The Building Code 2016<sup>2</sup> is made pursuant to the *Building and Construction Industry (Improving Productivity) Amendment Bill 2017* and require compliance to its terms for construction industry and related entities and businesses as a condition of eligibility to submit expressions of interest, tender for or be awarded Commonwealth funded building work. Despite only being made law earlier in 2017, the transitional period for existing industrial agreements entered into prior to the issuing of the Building Code 2016 to be compliant is to 1 September 2017. Builders now have to secure code-compliant agreements by the end of August this year if wish to be eligible to tender for contracts that involve commonwealth funding.

We are of the view that the newly issued federal The Building Code 2016 has the potential to breach the non-discriminatory requirements of the CPR. While one view may be that because the Building Code 2016 is applied to all building industry entities who wish to tender for commonwealth work equally, that view ignores the reality that the Code has a retrospective element that will impact some parties more

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<sup>2</sup> <https://www.abcc.gov.au/building-code/building-code-2016>



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than other for procurement arrangements that were in place prior to the existence of the Code.

It is our position that the Building Code 2016 and the legislative framework via *Building and Construction Industry (Improving Productivity) Amendment Bill 2017* that sits above it fundamentally breaches the non-discrimination requirements of the CPR due to the fact that they inherently require discrimination of certain construction industry participants against others, and of the entire construction sector as a whole against other sectors who are not subject to the requirements of the Building Code 2016 and its related legislation.

## Ethical Procurement

We note the CPR requirements around ethical procurement, specifically:

6.7 *Relevant entities* **must** not seek to benefit from supplier practices that may be dishonest, unethical or unsafe. This includes not entering into *contracts* with *tenderers* who have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and who have not satisfied any resulting order. *Officials* should seek declarations from all *tenderers* confirming that they have no such unsettled orders against them.

We welcome this requirement, but we are concerned that in its current form it will not address situations where companies are involved in 'phoenix activity'.

'Phoenix companies' is where a company deliberately goes into liquidation to avoid paying tax, creditors or employees. The business then 'resurrects' through a different entity which enables a company that owes money to creditors and employees to restart without paying its debts.



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We regard phoenix activity as the evasion of tax and other liabilities, such as employee entitlements, through the deliberate, systematic and sometimes cyclic liquidation of related corporate trading entities. In some instances of phoenix activity only one entity within a group of companies will be liquidated, whereas in other cases the corporate group covering the whole business will be stripped of assets and liquidated. Due to the diversity of phoenix activity, it is difficult to precisely define.

The use of phoenix companies occurs across many different industries and is a major concern to the ETU as the major by-product of phoenixing activity usually involves non-payment of group tax (PAYG (withholding), state payroll tax superannuation, long service leave contributions and workers' compensation premiums.

We urge the Committee to ensure that ethical procurement requirements include phoenix activity.

## Subcontractors

The CPR contain requirements regarding the use of subcontractors as part of procurement arrangements.

7.19 *Relevant entities must* make available on request, the names of any subcontractor(s) engaged by a contractor in respect of a *contract*.

- a. *Relevant entities must* require contractors to agree to the public disclosure of the names of any subcontractors engaged to perform services in relation to a *contract*.
- b. Contractors **must** be required to inform relevant subcontractors that the subcontractor's participation in fulfilling a *contract* may be publicly disclosed.





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We are fully supportive of these measures to increase accountability and transparency.

## **Recommendations**

1. Ethical procurement requirements under the CPR be amended to ensure that the scope extends to capture tenderers, be they companies or individuals, that have engaged in phoenix activities and have an outstanding judicial order in relation to employee entitlements.
2. Given the evidence that procurement chapters in current trade agreements have not resulted in demonstrably improved access for Australian companies to external procurement markets, accession to the WTO GPA may not be in Australia's national interest
3. Before any decision to accede to the GPA, the Australian government should follow the example of trading partners like the US and South Korea and ensure that the implementation of Australian procurement policies maximises opportunities for Australian companies to access Australian procurement markets and maximizes domestic economic and employment benefits of procurement decisions. This inquiry report should aim to achieve this.
4. In the event that the Australian government does proceed with accession to the WTO GPA, the government should ensure that Australia's current procurement exemptions in trade agreements are not traded away. Federal and State government should also retain the flexibility to introduce new exemptions if circumstances change.
5. In the event that the Australian Government does proceed with accession to the WTO GPA, the Australian government should ensure that any domestic judicial review process for government procurement decisions is available to Australian companies as well as foreign companies.



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6. In the event that the Australian Government does proceed with accession to the WTO GPA, the text of Australia's commitments in the GPA should be published for public and Parliamentary scrutiny before the decision to sign it is made by Cabinet, and should be subject to an independent evaluation of the economic, social and environmental costs and whether it is in Australia's national interest. Parliament should vote on the whole agreement, not only the implementing legislation.
7. The Australian government should not make additional commitments on government procurement in other trade agreements.



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## Appendix 1 - Terms of Reference

That a joint select committee, to be known as the Joint Select Committee on Government Procurement, be established to inquire and report by 31 May 2017 on the following matters:

- a. the Commonwealth procurement framework;
- b. consideration of the Commonwealth Procurement Rules to come into force on 1 March 2017 (CPR17) and, in particular:
  - c.
    - i. clauses 10.10, 10.18, 10.30, 10.31 and 10.37 (the 'new clauses'),
    - ii. how the new clauses can most effectively be implemented,
    - iii. weighting and other mechanisms that should apply to any Commonwealth procurement decision making, taking into account CPR17, and
    - iv. its interaction with any other Government policies and programs (including grants), instruments, guidelines and documents relating to procurement, including the Department of Finance's Resource Management Guide No. 415;
  - d. the extent to which CPR17 and any related instrument and rules can be affected by trade agreements and other World Trade Organization (WTO) agreements, including:
    - e.
      - i. existing trade agreements Australia has entered into, and
      - ii. trade agreements that the Commonwealth Government is currently negotiating, including the WTO Agreement on Government Procurement; and
    - f. any related matters.