

Chapter 5

Barriers to participation in procurement

5.1 This chapter discusses issues which were identified as barriers to Australian businesses participating in procurement. Those issues were the:

- complexity of tender documentation;
- lack of an effective complaints process;
- application of procurement-connected policies;
- training and technical expertise of procurement officers.

Complexity of tender documentation

5.2 A number of witnesses and submissions commented that the complexity of tender processes and contract documentation was a barrier to businesses participating in procurement processes. For example, Ms Lynne Wilkinson from the Australian Companies Institute Limited (AUSBUY) stated:

We have identified that the process of making [an] application can be quite difficult for businesses. It is overcomplicated when it comes to even making the application. These businesses are oftentimes hands-on businesses. They do not have someone they are paying \$300,000 a year to fill out government procurement legalese paperwork. They do not have a problem with that; what they have a problem with is the simplicity, not saying first up, without going through 80 pages, 'This is what we want; this is when we want it by.'¹

5.3 Ms Wilkinson contended that, at least initially, businesses were only after a limited amount of information:

[Businesses] want to know what you want, when you want it and how many you want. If they can say that simply, it might be one or two pages instead of 80 pages of legalese, then the business can say, 'We can do that and, if we cannot do it by ourselves, we will work with other Australian owned businesses so that we can help and we can supply that.'²

5.4 Ms Suzanne Campbell, Chief Executive Officer of the Australian Information Industry Association, referred to the significant costs that business can incur through participating in government procurement, particularly if the business is involved in a panel arrangement:

The first is in relation to the cost of doing business with no guarantee of a return. The proliferation of panels...is quite extraordinary, with agencies typically setting up their own panels to meet their specific needs. This undermine[s] the objective of the panel, which is to make procurement less

1 *Committee Hansard*, 21 March 2014, p. 2.

2 *Committee Hansard*, 21 March 2014, p. 4.

onerous. It is self-evidently the case that, if you have got a whole lot of panels, that burden is very significant. They also preclude agility and efficiency...While these [panels] are not all refreshed every year, over a three or four-year period around 20 of these might be renewed. Each new panel or requirement to reapply requires the investment of time, effort, energy and a diversion of resources from the conduct of ordinary business. So, for an individual member, this might equate to \$3 million of cost per annum.³

5.5 Ms Campbell also referred to the costs in terms of the time for a business to participate in government procurement:

There is also the cost of time where the nature of government procurement, evaluation and approval processes can run into years. [Our members have] referred to large competitive tenders that might take over two years. So there is the iterative effort. You have been on the panel. You have renewed your processes. Now you have got to bid and you participate in an iterative process for up to two years where bidders are asked to respond not just to queries but also to changes in scope from the purchaser, with multiple requests for engagement. For a larger engagement, it has been estimated that this might cost in excess of \$10 million over two years. So there are very significant costs.⁴

5.6 Both Mr Tony Butler, a senior procurement consultant with many years of experience in public sector procurement, and Ms Campbell referred to the often onerous conditions for participation in procurement faced by business. For example, Ms Campbell explained:

There is a starting point for government in which, in all instances, unlimited liability, high insurance level requirements and [intellectual property] ownership create additional complexity and difficulty, in particular for SMEs, but for all industry participants. This has no regard for the nature of work that is to be done, or the changing nature of business and service environment.⁵

5.7 Mr Butler noted that the issue of preconditions, such as public liability and professional indemnity, being set too high 'has been a long-term problem'.⁶ In his view these preconditions resulted from Commonwealth legal advisers having taken a 'very protective' or 'very cautious' approach to project risk.⁷

5.8 Mr Steve Chapman, Deputy Auditor-General, observed that different processes between departments may create barriers to business participation in procurement:

3 *Committee Hansard*, 21 March 2014, pp 19-20.

4 *Committee Hansard*, 21 March 2014, p. 20.

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

6 *Committee Hansard*, 21 March 2014, p. 9.

7 *Committee Hansard*, 21 March 2014, p. 9.

We hear stories about the different approaches undertaken by different government agencies which might be simple in themselves but create a different hurdle for small businesses who might be looking to, as you say, sell a good product at a good price and get on with business. I think part of the issue going forward is how, without making it bureaucratic, do you standardise simplified processes, particularly for the smaller procurement activities, to allow the Commonwealth to know it is getting a value-for-money outcome without putting inappropriate hurdles in front of those small businesses.⁸

5.9 Dr Seddon stated that there is a reason that some tender processes are burdensome:

I cannot say that there should be some sort of quick and simple process. There obviously can be a quicker and simpler process for low-level purchasing, and maybe the threshold should be lifted from \$80,000—at the moment that is the threshold for goods and services where they must go out to tender. But the reason that government tender processes are so burdensome is that they are spending public money. Most of the rules are there—perhaps overdone a bit—to reflect that basic thing, which is that they are spending public money and they have got to make sure they do it properly.⁹

5.10 The committee was provided with examples and proposals for streamlining procurement processes. For example, Ms Melbourne from the Canberra Business Council described Singapore's 'GeBIZ' system as a best practice model:

All of the tenderers are pre-registered. They have already been through a pre-authentication process for all the legal, contractual and compliance elements of dealing with government. They only ever have to do that once; it is all centralised. Let's say they are tendering for a \$2 million project. The procurement process has given a pricing indication. So it is set: 'We're not going to pay \$10 million; we want to pay something around \$2 million or \$3 million.' There are some fuzzy edges there, but it gives everybody an indication of what they are expecting to spend.

Then, at the point when the tender closes and all the submissions are in, there is a summary note that lists all of the tenderers and their supply partners, the price that they have bid and the value for money breakdown. All of the other tenderers see that at that point in time. It is all automated. So you can see the lowest bid through to the highest bid and you can see which of the prime contractors and their suppliers are fulfilling which elements of the contract. Then industry sorts it out from there. Government does not need to hide or control anything. It is open and industry gets itself organised next time if they are not happy with it.¹⁰

8 *Committee Hansard*, 21 March 2014, p. 13.

9 *Committee Hansard*, 28 April 2014, p. 9.

10 *Committee Hansard*, 28 April 2014, p. 22.

5.11 The Australian Information Industry Association also supported a centralised register for potential suppliers:

Revisiting tender frameworks so that it is easier and less time intensive for firms, large and small, to respond to tenders when they are released. For example a one-stop pre-qualification or certification process, where matters such as insurance certificates, company ownership details and [Australian Business Numbers] (common to all tenders) are collated so that the same information does not need to be repeated every time a tender is submitted.¹¹

5.12 Mr John Callaghan, Executive Director of the Australian Industry Group Defence Council, recommended that incentives be built into procurement processes, rather than relying predominately on penalties:

[F]rom my own other commercial experience I always think it is better to reward good outcomes, preferably financially, so rather than punish, which is the tendency in government procure, for failure to perform, the more incentives you build into the procurement process to reward good outcomes the better. Companies will generally perform better when they know there is a carrot to perform to.¹²

Responses by government

5.13 Mr Michael Green, Acting Head, Industry Division, Department of Industry noted that there is awareness of these issues and that assistance is available:

In a range of cases it is clear from the work that we have done in that particular type of activity that they are not very good at some basic activities—for example, understanding the tender requirements; understanding how to put in competitive documentation that meets the requirement. There are a range of practical activities that the department has engaged in through those and similar initiatives to improve the understanding between both parties of what Australian capability is and what the requirements of the procurer are and how they can best put forward proposals that meet the requirements. For example, we certainly have a number of cases where [the] key reason companies were not getting work through government procurements was that they did not submit compliant documentation. We are working with them to understand what it is they have to do and how they have to frame their proposal to meet the requirements of the tender.¹³

5.14 The Department of Finance (Finance) noted that in 2011, following requests from industry and government agencies, a 'simple standardised contract for low-risk, low-value procurements (under \$80,000)' was developed.¹⁴

11 *Submission 7*, p. 6.

12 *Committee Hansard*, 21 March 2014, p. 33.

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

14 *Submission 12*, p. 9.

5.15 Mr John Sheridan, First Assistant Secretary, Technology and Procurement Division, Business, Procurement and Asset Management Group, Department of Finance, also referred the committee to the Commonwealth's recently released contract suite of standard terms and conditions:

In regard to the Commonwealth contracts suite, [the Department of] Finance has developed a set of standard terms and conditions for low-risk procurements under \$200,000. It was launched by the Minister for Finance and the Minister for Small Business, on [19 March 2014]. The new Commonwealth contracts suite replaces the old basic contract suite and increases the threshold for eligible contracts to \$200,000. In 2012-13, 84 per cent of the contracts reported on AusTender were below \$200,000. The vast bulk of government contracts thus will now be able to go through this new simplified process.

The new contracts suite is much more user friendly, with easy, intuitive online templates that will remove the need for legal advice every time one tenders. It is a maximum of 14 pages long and the standard terms and conditions fit on five pages...

A key feature of the suite is the standard liability, indemnity and insurance clauses, which have been significantly simplified. The contract suite is currently being rolled out across Australia to agencies and businesses and will be operational from 1 July this year.¹⁵

Complexity of the Commonwealth Procurement Rules

5.16 One specific issue raised with the committee was the complexity of the CPRs. In his evidence to the committee, Mr Butler summarised a number of concerns he has with the drafting of the Commonwealth Procurement Rules (CPRs):

It is very clear that [the CPRs] are not written in plain English as the Legislative Instruments Act requires and envisages. I have been reading procurement rules not only in Australia but in various other countries for well over 30 years and I have difficulty navigating the material that is on the Department of Finance website, including the Commonwealth procurement rules. I note that, according to the department, there was no prior consultation with external parties, which might include industry, about the rules before they were issued. I think [there] should have been, given the effects that they have on business and competition. That consultation is clearly envisaged by the Legislative Instruments Act for things of this kind.¹⁶

5.17 Mr Butler also noted he had found 'a variety of strange definitions, inaccuracies and inconsistencies with the free-trade agreement with the US in particular'.¹⁷

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

16 *Committee Hansard*, 21 March 2014, p. 7.

17 *Committee Hansard*, 21 March 2014, p. 7. Mr Butler raised specific concerns about the interpretation of value for money in the CPRs and these concerns are discussed in Chapter 4.

5.18 However, Mr Sheridan from the Department of Finance defended the drafting of the CPRs:

My point would be that the Commonwealth Procurement Rules are only 33 pages or so in length. They are not particularly long. The language is quite clear and was rewritten in 2012 to make it more so. I do not think that they are as difficult as, perhaps, some people suggest.¹⁸

5.19 At the second public hearing, Mr Sheridan again addressed the criticism of the CPRs 'readability':

It is worth noting that the primary audience for the CPRs is government procuring officials. Because of this, the CPRs are transactionally focused and balance the need for clarity of rules whilst maintaining a level of flexibility for agencies to support the CPRs with their own internal procedures. This allows agencies to undertake processes that are commensurate with the scale, scope and risk of the procurements involved.¹⁹

5.20 Mr Sheridan continued:

The most recent review of the CPRs was conducted in 2012. The review was a collaborative process with senior procurement officials, CFO areas from agencies and the Audit Office. The 2012 CPRs update included clarification of mandatory requirements for all procurements to ensure consistency, clarify certain terminology and redefine the procurement methods as recommended by the [Australian National Audit Office (ANAO)] in their 2011 audit on direct source procurement. Through our engagement with senior agency procurement officials, we regularly review the content and readability of procurement related materials and improve them as required.²⁰

5.21 Mr Sheridan referred to the 'wide range of web guidance to assist agencies to implement the procurement framework', as well as a procurement training program for agency staff. Further, Mr Sheridan also noted that advice for potential suppliers is available on the web in *Selling to the Australian government – a guide for business*²¹ which 'provides practical advice for potential suppliers, such as how to find opportunities and submit competitive tenders'.²²

Committee view

5.22 The committee notes the release of the new contracting suite for procurements under \$200,000 by the Department of Finance (Finance) and acknowledges it has been

18 *Committee Hansard*, 21 March 2014, p. 63.

19 *Committee Hansard*, 28 April 2014, p. 38.

20 *Committee Hansard*, 28 April 2014, p. 38.

21 See Department of Finance, *Selling to the Australian Government*, at www.finance.gov.au/procurement/procurement-policy-and-guidance/selling/ (accessed 11 June 2014).

22 *Committee Hansard*, 28 April 2014, p. 38.

subject to a consultation process with stakeholders.²³ The committee notes that the new contracting suite is due to commence from 1 July 2014 and expects that during the early implementation stages, Finance will address the concerns about complexity raised during the inquiry and make any necessary adjustments.

Recommendation 9

5.23 The committee recommends that during the early implementation stages of the new suite of contract documents for procurements under \$200,000, the Department of Finance will address the concerns about complexity of documentation raised during the inquiry and make any necessary adjustments.

5.24 The committee notes that in the Checklist for FMA Act agencies preparing for the introduction of the PGPA Act from 1 July 2014, that there is a note indicating that in relation to the CPRs 'there is a longer term process to review and reform the procurement framework'.²⁴ As part of this longer term process, the committee recommends that the government consider best practice examples from other jurisdictions to further simplify the tender process.

Recommendation 10

5.25 The committee recommends that, as part of its longer term process to review and reform the procurement framework, the government consider best practice examples from other jurisdictions to further simplify the tender process.

Lack of effective complaints process

5.26 During the course of the inquiry the committee received substantial anecdotal evidence where the outcome of procurement processes clearly caused frustration for Australian-owned businesses.

5.27 For example, in its submission, AUSBUY related a case study of product substitution from an Australian owned business which manufactures fabrics:

In recent years the business worked with the Defence Department to develop a special tent fabric for the Defence Forces which would camouflage soldiers especially at night. However when it came to buying product the Government sourced the product off shore.

The imported product mimics the original and does not meet Australian standards, or the security standards inherent original product.²⁵

5.28 To be clear, the committee is not suggesting that there has been any wrongdoing in the conduct of these procurement processes. However, this evidence

23 See Department of Finance website, Have your say: The Commonwealth Contracting Suite – Final Comments Please, www.finance.gov.au/blog/2014/05/13/have-your-say-the-commonwealth-contracting-suite-final-comments-please/ (accessed 15 May 2014).

24 See Public Management Reform Agenda website, available at: pmra.finance.gov.au (accessed 9 July 2014).

25 *Submission 44*, p. 14.

clearly begs the question of the avenues open to tenderers to seek further information or make a complaint about a particular tender process.

Complaints processes available

5.29 In this context, the committee sought advice from officials from Finance on the processes available to business to complain about a procurement process. Mr Sheridan observed that an aggrieved person should raise any issues of concern at the tender debrief to see if they can be 'satisfied by approaching the agency involved'.²⁶ By way of clarification, Ms Jan Mason, Deputy Secretary, Business, Procurement and Asset Management Group, Department of Finance, noted that 'the agency involved' could mean different agencies, depending on the nature of the complaint:

They would complain to the agency undertaking the procurement if they were concerned about whether or not the procurement connected policy had been correctly applied. If they were critical of the [procurement connected] policy itself they should raise that issue with the relevant portfolio that owns that policy.²⁷

5.30 In answers to questions on notice, Finance explained that in handling complaints internally, agencies would employ 'equitable and non-discriminatory complaint-handling procedures'.²⁸ Principles agencies are required to apply when dealing with tenderers' complaints are available on the Finance website.²⁹

5.31 Mr Sheridan explained that a complaint could also be made to him in his role as the Australian Government Procurement Coordinator:

First of all, we would recommend that people with a concern speak to the agency involved, but as the procurement coordinator I am tasked with addressing issues for people who have complaints. Also, if they are not satisfied with that particular avenue, they can pursue other avenues such as the Ombudsman and things like that.³⁰

5.32 In terms of making a complaint to the procurement coordinator, Mr Sheridan confirmed that it is not necessary for a complaint to have first been made to the agency concerned. However, Mr Sheridan did state that if a complaint was made to him, in his role as the procurement coordinator, 'of course I would then go to the agency to see what could be resolved'.³¹

26 *Committee Hansard*, 21 March 2014, p. 67.

27 *Committee Hansard*, 21 March 2014, p. 67.

28 Department of Finance, answers to questions on notice, received 16 May 2014, p. 11.

29 See www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/accountability-and-transparency/complaints-handling/principles.html (accessed 23 June 2014).

30 *Committee Hansard*, 21 March 2014, p. 67.

31 *Committee Hansard*, 21 March 2014, p. 68.

5.33 In answers to questions on notice, Finance provided the following further information in relation to the role of the Australian Government Procurement Coordinator in these circumstances:

The Procurement Coordinator has no authority to compel agencies to reconsider the conduct or outcome of tender processes for which that agency is accountable. Where relevant issues are identified, lessons learned may be used to improve Commonwealth procurement policies and processes. This includes assisting the development of policy guidance, and/or the training and professional development of procurement officers.³²

5.34 Complaints to the procurement coordinator can be made using an online form.³³ At the second public hearing Mr Sheridan noted the infrequency with which complaints are brought to the procurement coordinator:

I note that since August 2011, the Australian government procurement complaints function has only been utilised nine times. In providing assistance to business [in my procurement coordinator and the Australian Government Chief Technology Officer] roles, I meet regularly with vendors, three to four times a week, to discuss general procurement issues as well as [Information and Communications Technology]-specific issues. These vendors range in size from small and medium-sized enterprises right through to large corporations. Vendors rarely use such opportunities to raise concerns about the procurement process.³⁴

5.35 Ms Sue Weston, Deputy Secretary, Department of Industry, informed the committee that the business.gov.au website is also being used as a means of obtaining feedback:

[The business.gov.au website] is also asking the many people who visit that site if they have any ideas on government procurement and it is linking them to the Department of Finance's website to have their say if they have any feedback on how to improve communication or other things they have found out when they have tendered for government business.³⁵

5.36 Mr Sheridan noted that the procurement blog on the Finance website is also used to prompt discussions about how procurement can be improved.³⁶

5.37 By way of comparison, Mr Butler detailed the complaints models in the United States and Canada:

The US has an office [the US Government Accountability Office (GAO)] which investigates complaints at length. If you look at the GAO website you will see that they are continuously investigating complaints of one kind or another. In another model, in Canada—which is not dissimilar to

32 Department of Finance, answers to questions on notice, received 16 May 2014, p. 12.

33 *Committee Hansard*, 21 March 2014, p. 68.

34 *Committee Hansard*, 28 April 2014, p. 39.

35 *Committee Hansard*, 21 March 2014, p. 68.

36 *Committee Hansard*, 21 March 2014, p. 68.

Australia in its practices and also has a free trade agreement with the US and is a member of the WTO procurement agreement—there is a permanent tribunal which deals with these sorts of matters, including procurement.³⁷

Legal remedies for tenderers

5.38 Dr Nick Seddon, a lawyer and academic specialising in government contracts, provided the committee with useful guidance as to the legal recourse available to unsuccessful tenderers:

The basic position is that a disgruntled tenderer could complain that the government has not adhered to the [Commonwealth Procurement Rules (CPRs)]. A breach of the CPRs does not by itself provide a 'private' right of action under which the tenderer could seek damages. The tenderer would have to challenge the tender process under administrative law, arguing that the government failed to adhere to legislation (the CPRs). A successful challenge would result in a court declaring that the government's decision to award a contract to a particular tenderer was invalid. The government would then have to start again. No compensation is awarded in such cases. This means that there is little incentive to pursue a public law remedy to challenge a government tender process, although this has happened in Australia.³⁸

5.39 However, in the context of the current inquiry's focus on Australian-sourced versus overseas-sourced goods and services in procurement, Dr Seddon noted that not all breaches of legislation result in a declaration by a court that what was done was invalid:

It is arguable that a failure to comply with rule 5.3 of the CPRs [the non-discrimination principle] would not necessarily result in invalidity of the award of a contract.³⁹

5.40 Article 15.11 of the AUSFTA requires that each party to the agreement shall: maintain at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review challenges that suppliers submit, in accordance with the Party's law, relating to a covered procurement.⁴⁰

5.41 Dr Seddon stated that the US had 'a good system', including specialised courts, to deal with disputes in relation to tender challenges:

[In] America, certainly at the federal level, they have special courts for that. They have special law firms that do that and they have a thing called a 'rocket docket', which means everything has to be done in a fortnight or some ridiculously short time.⁴¹

37 *Committee Hansard*, 28 April 2014, p. 8.

38 *Submission 1*, p. 5.

39 *Submission 1*, p. 5.

40 Article 15.11(2) of the Australia-United States Free Trade Agreement.

41 *Committee Hansard*, 28 April 2014, p. 5.

5.42 However, Australia does not have a system which complies with this requirement of the AUSFTA. As Dr Seddon explained, the requirement in the AUSFTA needs to be read in conjunction with a side letter from Australia's representative to the negotiations, the then Minister for Trade, Mr Mark Vaile MP and the US representative.⁴² The side letter states:

[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.⁴³

5.43 Dr Seddon speculated that the United States may have been amenable to such an arrangement because of the success of an American company, Hughes Aircraft, in a tender challenge case in the Federal Court.⁴⁴ In answers to questions on notice, Dr Seddon provided an explanation of the legal reasons underlying the decision in the case:

In that case [*Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 (Hughes aircraft case)] Hughes challenged the award of a contract for a new air traffic control system. Hughes' challenge was successful. Finn J held that [Airservices Australia] was in breach of contract and had engaged in misleading or deceptive conduct contrary to s 52 of the *Trade Practices Act* when [Airservices Australia] changed the selection criteria weightings without informing the tenderers or providing an opportunity to re-submit on the basis of the changed criteria. The contract case was based on the proposition that the tender process itself was a contract based on the terms in the Request for Tender...⁴⁵

5.44 Since the decision in the Hughes aircraft case, the two legal bases on which the challenge to the tender was successful have been changed:

First, the Commonwealth responded to the [Hughes aircraft case] decision by specifically excluding the possibility of a 'process' contract governing the conduct of a tender. This is achieved by a standard clause found in all Commonwealth Request for Tender documents. This clause is not prohibited by chapter 15 of the AUSFTA...[and as] a matter of domestic contract law, there is no legal impediment to specifying that the relationship between parties is not contractual.

Secondly, court decisions subsequent to Hughes [aircraft case] have held that the *Trade Practices Act* (now the *Competition and Consumer Act [2010]*) does not apply to government procurement....

42 Dr Nick Seddon, answers to questions on notice, received 2 May 2014, p. 2.

43 Correspondence from Minister for Trade, Mr Mark Vaile MP, to the United States Trade Representative, the Honourable Robert B. Zoellick, dated 18 May 2004, available at: www.dfat.gov.au/fta/ausfta/final-text/ (accessed 22 May 2014).

44 *Committee Hansard*, 28 April 2014, p. 5.

45 Dr Nick Seddon, answers to questions on notice, received 2 May 2014, p. 2.

The *Trade Practices Act* and now the *Competition and Consumer Act* include [section] 2A which appears to get rid of Crown immunity. It provides that the Crown in right of the Commonwealth is bound by the Act but then adds an important qualification 'in so far as it carries on a business'. Case law has held that, when the government engages in procurement, it is not carrying on a business. Thus, the section that appears to deal with the problem of Crown immunity actually substantially maintains it.⁴⁶

5.45 Dr Seddon observed that 'two potentially powerful legal vehicles for tender challenge have been neutralised' and that there is 'not much' else available by way of remedy:

In my view, the most egregious feature of government procurement is the immunity from the operation of the *Competition and Consumer Act*...

The other feature – the routine exclusion in RFTs of a 'process'; contract governing the conduct of government tenders – is, among other things, just a very bad look. Government proclaims through various instruments, including the CPRs, that it will act fairly and ethically. How is this fulfilled by a process that announces detailed terms and conditions in the RFT and, at the same time, states they are not binding?⁴⁷

5.46 Dr Seddon concluded by recommending the definition of 'business' in the *Competition and Consumer Act* be amended by adding the words '...and include government procurement'.⁴⁸

Committee view

5.47 The evidence to the committee suggests that the complaints mechanisms in Commonwealth procurement processes are deficient. The committee acknowledges that much of the evidence in relation to the number and volumes of complaints is anecdotal. However, the committee cannot ignore the pervading sense of dissatisfaction with the avenues for redress following procurement processes.

5.48 The committee appreciates that, as a first step, complaints should be addressed internally by agencies. However, in the event that this avenue does not bring a resolution to the matter, there appears to be a distinct lack of administrative or legal steps that a person can take.

5.49 Finance encourages aggrieved persons to make complaints to the Australian Government Procurement Coordinator and places much weight on the fact that so few complaints have been received via that means. However, given that coordinator has no power to compel agencies to revisit their decisions, it is little wonder that so few complainants have made use of this mechanism to complain.

5.50 The committee notes that in the US the Government Accountability Office operates an investigation and decision-making function to enable challenges to an

46 Dr Nick Seddon, answers to questions on notice, received 2 May 2014, pp 2-3.

47 Dr Nick Seddon, answers to questions on notice, received 2 May 2014, p. 4.

48 Dr Nick Seddon, answers to questions on notice, received 2 May 2014, p. 4.

award (or proposed award) of a procurement contract. While the committee is not recommending that a similar operation be established in Australia, the committee believes that, in the absence of effective legal remedies, there does need to be some mechanism, beyond a complaint to the agency or the procurement coordinator, available to aggrieved parties.

5.51 Therefore, the committee believes there is a need for an independent and effective complaints mechanism to ensure appropriate action is taken in a timely and cost-effective manner.

Recommendation 11

5.52 The committee recommends that, following consultation with stakeholders, the Department of Finance establish an independent and effective complaints mechanism for procurement processes.

5.53 The committee agrees with the view expressed by Dr Seddon that Commonwealth procurement processes should be subject to the operation of the *Competition and Consumer Act 2010*. However, the committee did not receive any evidence as to why Commonwealth procurement should be immune from the operation of this Act. The committee is therefore seeking an explanation from the government as to any reasons why the operation of the *Competition and Consumer Act 2010* should not apply to Commonwealth procurement.

Recommendation 12

5.54 The committee recommends that the government provide an explanation as to whether there are any reasons why the operation of the *Competition and Consumer Act 2010* should not apply to Commonwealth procurement.

Application of procurement-connected policies

5.55 Paragraphs 4.6 and 4.7 of the CPRs deal with procurement-connected policies, that is, policies of the Commonwealth for which procurement has been identified as a means of delivery.⁴⁹ There are currently 24 procurement-connected policies and responsibility for the administration of those policies is spread among 11 Commonwealth departments.⁵⁰

5.56 Mr Butler referred to the 'proliferation of procurement-connected policies and their distributed management and publication by a variety of agencies' as a 'potential source of compliance risk'.⁵¹ Mr Butler continued:

Desirably those should be integrated, presented and maintained with Finance's own material on a centralized portal and in common styles and formats with which procurement personnel can become familiar. They

49 See paragraphs 4.7 and 4.8 of the CPRs, July 2014.

50 A list of the procurement-connected policies is set out at Appendix 4.

51 *Submission 37*, p. 3.

should also be [reviewed regularly] and amended or retired if they are ineffective...or if their objectives are achieved primarily by other means.⁵²

5.57 Ms Yvette Sims, Assistant Secretary, Procurement Policy Branch, Technology and Procurement Division, Business, Procurement and Asset Management Group, Department of Finance, acknowledged the additional layer of complexity that procurement-connected policies introduced into the process:

[T]he 24 procurement connected policies, which are linked to but not included in the Commonwealth Procurement Rules. There are 24 of them. They all relate to different industry groups. They kick in at different thresholds. And I completely understand that it can be very difficult to understand how they fit in and when. Largely the Department of Finance is not responsible for those; they are the responsibility of other agencies.⁵³

5.58 Mr Sheridan advised the committee that a breach of a procurement-connected policy is 'essentially' a breach of the CPRs, and in turn, a breach of the *Financial Management and Accountability Act 1997*, which would need to be reported in the annual Certificate of Compliance report to the Parliament.⁵⁴

Apparent confusion over role of lead agencies

5.59 Ms Mason acknowledged there is no single department which could provide the committee with analysis of the overall compliance with the range of procurement-connected policies:

[Finance] are certainly responsible for the Commonwealth Procurement Rules, but if [the committee] want to then go to the tentacles that are attached to those rules, which are policies prepared by other portfolios, you will unfortunately need to put questions to those portfolios.⁵⁵

5.60 Following this advice, the committee examined the two procurement connected policies most relevant to the procurement of paper which are the National Waste Policy; and the ICT Sustainability Plan 2010-2015 (ICT Plan). Both policies are administered by the Department of the Environment (Environment).⁵⁶ Chapter 6 of this report provides a case study of the procurement of paper.

5.61 Given the concerns as to the application of procurement-connected policies in procurement processes, the committee questioned officers from Finance and the Environment on the monitoring and enforcement of these two policies.

52 *Submission 37*, pp 3-4.

53 *Committee Hansard*, 21 March 2014, p. 63.

54 *Committee Hansard*, 21 March 2014, p. 67

55 *Committee Hansard*, 21 March 2014, p. 67.

56 Department of the Environment, Water, Heritage and the Arts, *National waste policy: Less waste, more resources* (November 2009) at www.environment.gov.au/topics/environment-protection/national-waste-policy (accessed 12 April 2014) and Australian Government, *Australian Government ICT Sustainability Plan 2010-2015* (2010) at www.environment.gov.au/resource/australian-government-ict-sustainability-plan-contents (accessed 11 June 2014).

5.62 Mr Al Blake, Assistant Secretary, Information Technology Branch, Department of the Environment, stated that Environment and Finance 'jointly' were the lead agencies with respect to the ICT Plan.⁵⁷ However, further information from Environment received following the hearing indicated that Environment has responsibility for this policy.⁵⁸

5.63 In relation to the National Waste Policy, Mr Bruce Edwards, Assistant Secretary, Department of the Environment, stated that Environment is the lead agency on that policy. Mr Edwards outlined Environment's role in the implementation and monitoring of the policy:

The National Waste Policy, as the name suggests, is a national policy. Our department is the lead agency at the Australian government level. We do not take a compliance role as such, but we directly implement a range of the strategies under the policy and coordinate others.⁵⁹

5.64 In relation to compliance with standards in the procurement-connected policies, officers from Finance indicated that the relevant standards and certification of standards for environmental sustainability were contained in policies which were the responsibility of Environment.⁶⁰

5.65 In answers to questions on notice, Environment stated that it has 'no mandate for, or resources allocated to, the assessment of overseas standards'.⁶¹

Questioning the application of procurement-connected policies

5.66 It was suggested to the committee that if procurement-connected policies were being appropriately considered and applied then procurement results were likely to be different. For example, Mr Craig Dunn, Senior Marketing Manager Sustainability, Australian Paper, suggested if the requirements in the procurement-connected policies relevant to paper procurement — namely the ICT Plan for recycled content and the aims of the National Waste Policy about waste reduction and management — were taken into account then 'you would possibly expect that the Australian government would be predominately using Australian-made recycled paper because of all these benefits'.⁶² However, Mr Dunn stated that this was not the case:

[Australian Paper] surveyed the top 22 FMA Act agencies and we found that 16 are using only imported recycled copy paper—not local but imported. That is three-quarters of the top 22 agencies. If you take the two largest paper users out of it, which are the Department of Human Services

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

58 Additional information from Department of Environment relating to the public hearing on 28 April 2014, received 8 May 2014.

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

60 See Mr John Sheridan and Ms Jan Mason, Department of Finance, *Committee Hansard*, 21 March 2014, p. 60.

61 Department of the Environment, answers to questions on notice, received 30 May 2014, p. 9.

62 *Committee Hansard*, 21 March 2014, p. 35.

and the Department of Defence, 16 of the next 20 FMA Act agencies are using imported copy paper.

For instance, the Australian Taxation Office are using paper from Indonesia, as are the department of immigration. Germany is where the Australian Federal Police are sourcing their paper. The Department of Health are also sourcing their paper from Germany. The Department of Industry are sourcing their copy paper from Austria...

Australian Customs are buying paper from Australia; the Department of Foreign Affairs, Germany; the Department of Agriculture, Germany; the Department of Veterans' Affairs, Austria; the Department of Education, Germany; the Department of Employment, Germany; the Department of Social Services, Australia; the Department of the Environment, Germany; the Australian Bureau of Statistics, Austria; ASIO, Australia; ASIC, Australia; the Department of Infrastructure, Germany; the Department of Finance, Germany; the Bureau of Meteorology, Austria; and the Department of the Treasury, Germany.⁶³

5.67 Mr Sheridan, representing the Department of Finance, informed the committee that monitoring, reporting and compliance mechanisms for each procurement-connected policy varied:

The details of compliance would vary from policy to policy but, essentially, the policy agency may have put in rules that require reporting, for example, or some other form of compliance management. But there is no hard-and-fast rule that says they must do it in a particular way.⁶⁴

Reporting on procurement connected policies

5.68 Using the paper related policies as an example, witnesses indicated that the lack of reporting on sustainable procurement was a concern. Mr Ross Hampton, CEO of AFPA, noted that Environment had previously commented on the absence of a 'formal whole-of-government mechanism or requirement for entities to report on the uptake of sustainable procurement'.⁶⁵ Mr Hampton stated:

This lack of transparency or formal requirement to report back on sustainable procurement is a significant concern, as there can be an important range of environmental issues in the sourcing of internationally traded goods such as paper.⁶⁶

5.69 Mr Craig Dunn of Australian Paper, raised similar concerns:

63 *Committee Hansard*, 21 March 2014, pp 35-36.

64 *Committee Hansard*, 21 March 2015, p. 66.

65 *Committee Hansard*, 21 March 2014, p. 34, quoting from Department of the Environment, *Sustainable procurement in the Australian government report 2013*, p. 3, available at: www.environment.gov.au/resource/sustainable-procurement-australian-government-report-2013 (accessed 5 June 2013).

66 *Committee Hansard*, 21 March 2014, p. 34.

But the area that is missing here is that it then says that governments will report periodically on the uptake of sustainable procurement, and that is where we believe there is something missing.⁶⁷

Committee view

5.70 The committee notes that the National Commission of Audit recommended the abolition of all procurement-connected policies.⁶⁸ The committee believes that there are a number of procurement-connected policies which provide important policy settings, and does not support the wholesale abolition of procurement-connected policies. However, the committee is very concerned at the lack of cohesion and direction which was clearly evident in the application and monitoring of the relevant procurement-connected policies.

5.71 The committee appreciates that procurement officials are responsible for informing themselves of the specific policies which may be relevant to any particular procurement and, further, there is some limited guidance on Finance's website with respect to the application of procurement-connected policies.

5.72 Given the concern expressed in the course of this inquiry as to the role and application of procurement-connected policies in Commonwealth procurement processes, the committee is of the view that it would be appropriate for the Australian National Audit Office, in the course of its next procurement-related audit, to review the application and implementation of relevant procurement-connected policies.

Recommendation 13

5.73 The committee recommends that the Australian National Audit Office, in the course of its next procurement-related audit, undertake an assessment of the application and implementation of relevant procurement-connected policies.

5.74 The committee notes that lead agencies for policies are responsible for the implementation of all aspects of their procurement-connected policies. However, on the evidence before the committee, for example, in relation to the ICT Plan, administered by Environment, it does not appear that there has been an on-going involvement of that department, beyond the development of the policy.

5.75 The committee notes the requirement that Annual Reports⁶⁹ include an assessment of the department's performance against core purchasing policies and principles as articulated in the Commonwealth Procurement Rules. However, the committee notes that this does not specifically include the application of procurement-connected policies. The committee believes a specific reporting mechanism in relation to procurement-connected policies is required to ensure agencies are held to account.

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

68 The Report of the National Commission of Audit, *Towards Responsible Government – Phase One, Recommendation 59*, p. 230.

69 Department of Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies*, 29 May 2014, p. 11.

Recommendation 14

5.76 The committee recommends that the Department of Finance work with the lead agencies for procurement-connected policies and the Department of Prime Minister and Cabinet to develop a whole of government annual reporting framework for monitoring of and compliance with these policies.

Training and technical expertise of procurement officers

5.77 A number of witnesses also raised concerns about the training and technical expertise of Commonwealth procurement officers.

5.78 Mr Butler indicated that the issue of professionalising the Commonwealth procurement workforce had been raised almost 20 years ago.⁷⁰ Mr Butler referred to the training and expertise which are required for procurement officials in other countries:

In the UK, for example, it is not possible to get a job as a professional procurement officer in the government unless you have recognised professional credentials, which basically, at the starting level, are the MCIPS awarded by the Chartered Institute of Purchasing and Supply. In the United States, where very complicated regulations have to be understood, people who have the authority, the warrant, to exercise purchasing decisions take a long time to train and go through a much higher level of training and education than anyone does in the normal course of events in this part of the world.⁷¹

5.79 Ms Wilkinson, representing AUSBUY, questioned how the Commonwealth obtained the technical advice in relation to particular procurements:

[W]hen it is a highly technical area...where are [the government] getting their technical knowledge? Sometimes it is safer for them to go to someone they know who is a global company and say, 'You tell us what we need, and that is what we will ask for.' So they will tell them what they need in terms of what they can deliver but not what can actually be sourced in Australia.⁷²

5.80 In its submission Professionals Australia commented specifically on the loss of engineering skills in government – at federal, state and territory level – and the impact on the delivery of infrastructure projects:

The Federal Government funds States and Territories and local government through grants for infrastructure – billions of which is now being wasted. The facts are that governments around Australia lack the requisite expertise

70 *Committee Hansard*, 28 April 2014, p. 9. This recommendation Mr Butler refers to is contained in the report: *The Human Element in Procurement, A Consultancy Report on Training Needs and Career Development*, Touche Ross Services in association with John S. Dawson And Associates, J. B. L. Tucker & Associates Pty Ltd and Associate Professor R. B. Molloy, AGPS 1990.

71 *Committee Hansard*, 28 April 2014, p. 9. An MCIPS refers to a person with qualification and training to obtain Full Membership of the Chartered Institute of Purchasing and Supply.

72 *Committee Hansard*, 21 March 2014, p. 2.

to deliver projects on-budget and on-time. The key profession for that expertise are engineers – and there just aren't enough engineers in government to scope, design and manage projects...

What's become apparent through a vast array of research is that government has allowed this situation to arise because they lack in-house expertise to deliver projects.⁷³

5.81 Professionals Australia argued that governments around Australia 'have become uninformed purchasers of infrastructure and lack the necessary internal procurement management expertise'.⁷⁴

5.82 Ms Melbourne of the Canberra Business Council spoke highly of the professionalism of Commonwealth procurement officers:

I think by far and away certainly all of the procurement professionals inside government that we have dealt with have been working very, very hard to do the right thing. They are all very professional and making sure that [everything] is done correctly.⁷⁵

5.83 The Deputy Auditor-General, Mr Steve Chapman, offered this assessment on the expertise of procurement officers:

I am sure there would be instances where perhaps that lack of expertise exists; equally, there would be instances where I think procurement has been undertaken in a very professional way.⁷⁶

5.84 Ms Edel Kairouz, Executive Director, Performance Audit Services Group, (ANAO), expanded on this assessment referring to the findings of ANAO audits:

Agencies generally have central procurement units and they provide expertise in procurement. Our audits have shown that those units have not always been drawn on, and so there is a need, when staff are undertaking procurement, particularly when they are not used to it, for them to draw on both technical experts where they may for the technical aspects of the program and also the procurement expertise that is available in central procurement units.⁷⁷

5.85 When the committee questioned officers from Finance about the concerns raised on this issue, Mr Sheridan responded:

First of all I would want to see what evidence we have that procurement is failing and evidence that suggests that we are somehow unable to buy the things we need or meet the policies of the government with regard to buying those things, and I do not see the evidence that something is wrong in that regard. Notwithstanding the fact that there might be people who

73 *Submission 4*, p. 4.

74 *Submission 4*, p. 2.

75 *Committee Hansard*, 28 April 2014, p. 23.

76 *Committee Hansard*, 21 March 2014, p. 15.

77 *Committee Hansard*, 21 March 2014, p. 15.

think we should have other policies or do other things, as is obviously their right, I do not see that we are failing to procure things in accordance with policy at the moment. That said, we have a range of selection procedures for public servants generally based on merit, we have performance management and assessment for public servants based on their performance, and we have training that we provide specifically for public servants in terms of procurement and help lines and a range of those things in order to do that. I would say we do not have necessarily or as a prerequisite particular tertiary qualifications for particular positions, but one regularly sees the notion that such qualifications or their equivalent might be required for certain positions. I am not saying that we might not or could not have such things, but my view is that I am struggling to see...what the problem is here.⁷⁸

5.86 To address the particular view that governments around Australia 'have become uninformed purchasers of infrastructure and lack the necessary internal procurement management expertise'⁷⁹ the committee wrote to the Department of Infrastructure which rejected this assertion. The Secretary, Mr Mike Mrdak, responded that his department:

[H]as a solid track record of working with state, territory and local governments to deliver significant and complex land transport infrastructure project procurements across Australia, including for example:

the \$1.7 billion Hunter Expressway, a 40km expressway link between Newcastle and the Upper Hunter in New South Wales;

the duplication of the Hume Highway between Sydney to Melbourne which was recently completed;

the duplication of 381 kilometres (58 per cent) of the Pacific highway with full duplication expected by the end of the decade; and

the Victorian Regional Rail Link project that is running ahead of schedule and is expected to be delivered on budget.⁸⁰

Committee view

5.87 Given the proposed infrastructure agenda of the current government, the committee is very concerned by the evidence suggesting that the Commonwealth government is no longer an informed purchaser. The potential for the loss and waste stemming from such a situation is significant.

5.88 The committee supports the engagement and continuing employment of professionals with appropriate skills and training for the design and management of large Commonwealth infrastructure projects. However, the committee also believes

78 *Committee Hansard*, 28 April 2014, p. 46.

79 *Submission 4*, p. 2.

80 Department of Infrastructure and Regional Development, answers to questions on notice, received 2 June 2014, p. 1.

that there is scope for a review of the training and professional skills of procurement officers across the Commonwealth.

Recommendation 15

5.89 The committee recommends that the procurement-related audit by the Australian National Audit Office to assess the application and implementation of procurement-connected polices also include an assessment of the competencies of agencies' procurement officers.

