

# Government senators' minority report

## Introduction

1.1 The committee majority report contains recommendations that government senators will support but others that we cannot support. The position of government senators on each recommendation is outlined below and summarised in the conclusion.

## Commonwealth procurement framework

1.2 Government senators support the Commonwealth procurement framework which forms part of the wider financial framework for agencies that come under the *Financial Management and Accountability Act 1997* (FMA Act) and prescribed bodies under the *Commonwealth Authority and Companies Act 1997* (CAC Act).<sup>1</sup>

## Government procurement commitments from free trade agreements

1.3 The Commonwealth Procurement Rules (CPRs) incorporate the Australian government procurement commitments from our Free Trade Agreements (FTAs), including the Australia United States FTA (AUSFTA). Importantly:

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.<sup>2</sup>

1.4 The Department of Finance (Finance) stressed that Australia's free trade obligations require officials to ensure they do not discriminate on the basis of location, among other things. Clearly, the assessment of value for money cannot include direct consideration or comparison of the multiplier effect of having products made in Australia and benefits such as local employment.<sup>3</sup>

1.5 To do so would be a very subjective exercise, prone to many contestable assumptions and would necessarily need to factor-in retaliatory action that would occur as a consequence. A number of firms are part of trans-national ownership structures and therefore economic benefits that accrue to individual firms are not always domestically contained. 'Second round effects' are seldom accepted more generally in government policy costing processes, because of uncertainty of their magnitude and timing – particularly as there can be strong dispute over the choice of calculation methods or assumptions which ought to apply. If 'multiplier' effects were

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1 Note: the FMA and CAC Acts were replaced by the *Public Governance, Performance and Accountability Act 2013* from 1 July 2014.

2 Department of Finance, *Submission 12*, p. 3.

3 Mr John Sheridan, Department of Finance, *Committee Hansard*, 28 April 2014, pp 49-50. See also Mr John Sheridan, Senate Finance and Public Administration Legislation Committee *Estimates Hansard*, 28 May 2014, p. 76.

used by Australia as a basis to support trade barriers, we would have a weakened position from which to dispute equivalent modelling by our trade competitors – even where the results derive from highly contestable or even spurious methodology.

1.6 The conclusion that there is no latitude to discriminate based on location was supported by Dr Nick Seddon, a lawyer and academic specialising in government contracts, who responded to the question of whether the Australian government is able to develop a policy of buying Australian products:

[T]here is no room to move on that because of the free trade agreements that have been entered into by the Commonwealth government on behalf of Australia, unless an exemption applies.<sup>4</sup>

1.7 Dr Seddon indicated that if the government were to develop 'buy Australian' policies then it would risk the United States invoking the dispute resolution procedures under the AUSFTA.<sup>5</sup> It would also risk other countries that we have FTAs with from threatening to do the same. This would lead to strains on diplomatic relations amongst our FTA community and raise risk to future agreements that could otherwise widen Australian market access. The greatest risk is that such policies could lead to retaliatory action, including the revoking of certain parts of the FTA that represent significant value to important Australian industries.

1.8 Some evidence raised US legislation which contains 'buy American' provisions such as the Buy American Act 1933. Finance responded

We have conclusive evidence that they [buy American provisions] do not apply to countries that are signatories of free trade agreements with Australia, so they do not apply to Australian arrangements.<sup>6</sup>

1.9 In response to a discussion of these issues at recent Budget Estimates hearings, the Minister for Finance, Senator the Hon Mathias Cormann, emphasised the benefits of free trade and competition for Australian businesses and the economy:

Australia's national interest to ensure that our economy can grow as strongly as possible involves, as a trading economy, being an open economy that is able to engage in trade with as many other economies as possible. If we want to make certain judgements in Australia that make it harder for us to trade with other nations around the world, then that is not in our best interests as a nation. That would cost jobs and weaken economic growth over time. Our interest as a government is to build a stronger, more prosperous and more resilient economy where everyone can get ahead and where manufacturing businesses can thrive and be competitive on an international level. The key there is to generally reduce the cost of doing

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4 *Committee Hansard*, 28 April 2014, p. 1.

5 *Submission 1*, p. 5.

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

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business in Australia, not to provide artificial protections from competition.<sup>7</sup>

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The Australian economy is best served in terms of strengthening our economic prospects into the future by being an open economy, by being engaged in international trade and by pursuing opportunities to export goods and services from Australia by being competitive in Australia. In terms of any domestic procurement here in Australia, we want Australian business to be very successful, but you cannot artificially and through protectionist measures give a leg up without breaching relevant international obligations. That would not be justifiable.<sup>8</sup>

1.10 Government senators consider that there is already sufficient means in our procurement rules to safeguard the interests of Australian suppliers and small business, consistent with our international obligations. Additional policies or mechanisms to give greater preference to Australian over foreign suppliers in Commonwealth procurement can risk artificial barriers and protections arising that stifle competition, innovation and value for taxpayers' money. Accordingly, the Government senators on the committee **consider that recommendation 2 is unnecessary**. The Government should continue to improve the available guidance on Australia's agreements with our trading partners, including our trade policy obligations and market access advantages that follow from these agreements.

1.11 Australia's circumstances as a resource-rich nation mean that our standard of living is in large part based on being a free trading nation, committed to global trade liberalisation. This is in our national interest. The recently concluded Japan-Australia Economic Partnership Agreement (JAEPA) strengthens ties with Australia's second-largest trading partner and the world's third-largest economy. It affords Australia major concessions across a range of areas, most notably services and agriculture, an area of traditional sensitivity for the Japanese, as well as allowing access to the lucrative Japanese government procurement market:

The JAEPA guarantees Australian suppliers access to the Japanese government procurement market and contains commitments that will ensure transparency and facilitate participation in procurement processes.

Australian and Japanese procuring entities have committed to not discriminate against the suppliers, goods and services of the other Party [to the JAEPA] for procurements covered by the Government Procurement Chapter [chapter 17 of the JAEPA]<sup>9</sup>

1.12 It is important to adhere to our international trade agreements and WTO. It is however also important to support local industry. As the US example demonstrates

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7 Minister for Finance, Senator the Hon Mathias Cormann, Senate Finance and Public Administration Legislation Committee *Estimates Hansard*, 28 May 2014, p. 78.

8 Minister for Finance, Senator the Hon Mathias Cormann, Senate Finance and Public Administration Legislation Committee *Estimates Hansard*, 28 May 2014, p. 78.

9 See <http://www.dfat.gov.au/fta/kafta/guides/fact-sheet-government-procurement.html>

above, it is possible to have both free trade and processes in place to support Australian businesses.

1.13 Government senators strongly support the existing procurement guidelines which meet Australia's international obligations and consider that the Government should continue to be vigilant in upholding our obligations. The majority report did not present compelling evidence that there were systemic failures in the application of the non-discrimination principle, as evidenced for instance by investor disputes. Therefore Government senators also **consider recommendation 3 as unnecessary**. Government senators would support an orderly review of issues around non-discrimination, if sufficient evidence arises of inadvertent discrimination or misapplication of the principle.

### ***Exemptions***

1.14 The Commonwealth's procurement framework includes a number of exemptions from requirements for higher value contracts. Exemptions from the rules of Division 2 of the CPRs contained in Appendix A enable the government to engage directly with Australian industry, while ensuring the principle of achieving value for money is met. The exemptions include procurements relating to:

- property or accommodation (but not construction services);
- motor vehicles;
- suppliers that primarily exist to provide the services of persons with a disability; and
- suppliers that are SMEs with at least 50% Indigenous ownership.<sup>10</sup>

1.15 Other flexibilities are provided for under the AUSFTA. For example, Finance advised that:

The Government procurement element of our international agreements allows for policies that benefit Small and Medium Enterprises (SMEs). The CPRs include a commitment for FMA Act Agencies sourcing at least 10% of procurement by value from SMEs.<sup>11</sup>

1.16 Government senators note recommendation 5 of the committee majority report that the CPRs be redrafted to provide an explicit exemption for practices that benefit or preference small and medium business. Government senators believe the current exemption for SMEs is sufficiently clear and effective, and **do not support recommendation 5**.

### **Australian suppliers are competitive**

1.17 Finance provided the committee with detailed analysis from AusTender of the number of Australian suppliers in government procurement processes. Finance

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10 *Submission 12*, p. 4.

11 *Submission 12*, p. 4.

indicated that 'Australian suppliers are competitive on their own merits in winning contracts', and this includes our SMEs. In 2012-13:

- 67,854 contracts valued at \$39.3 billion in total, were awarded;
- of the 11,460 suppliers contracted, 10,212 (89.1%) were SMEs;
- SME participation was 31.7% (\$12.5 billion) of the total contracts by value and 60.5% (41,032) of the total number of contracts; and
- 82.4% of goods and services by value purchased by the Commonwealth Government are likely to have been sourced from Australian suppliers, or in the case of services, delivered by Australian suppliers.<sup>12</sup>

1.18 Finance acknowledged the technical difficulty in determining whether goods or content are sourced from 'Australian' suppliers.<sup>13</sup> However, Finance stated that, despite these limitations, Australian suppliers are competitive:

Australian suppliers... win the vast majority of Commonwealth contracts without the need for restrictions or other mechanisms that may impact these same businesses competing overseas. For instance, Australian and New Zealand small to medium enterprises win more than half of government contracts, some 60 per cent of those awarded each year.<sup>14</sup>

1.19 The majority report does not make clear the end to which enhanced information on Australian content would be put. The one apparent benefit intended would be to have better statistical information collected by the Australian Government on the extent to which procured supplies are Australian-made. Unfortunately, such a proposal could easily give rise to unintended adverse consequences, particularly for small business. The proposal would also give rise to new issues of data reliability. Further, the case has not been well made that ABN data gives false information when it is aggregated for statistical purposes.

1.20 Potential costs would include additional red tape imposts for business to provide the necessary data/information and perform any necessary analysis or IT changes to report new data (eg in invoices and in internal record-keeping).

1.21 Australian content calculations would be in many cases difficult to hypothecate and to ensure consistency. This would arise from difficulty in tracing business inputs through complex supply chains – this entails complexity in how far down the production chain Australian content is looked at and how issues of input-costs are weighed against data on ownership and control of a company. Australian content and control can change over time within a firm, or a contract and tracking such changes will therefore have costs.

1.22 The extra hurdles would represent a particular challenge for smaller, less sophisticated, firms. It would also entail higher cost for small transactions, which

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12 *Submission 12*, pp 3-4.

13 Mr John Sheridan, Department of Finance, *Committee Hansard*, 21 March 2014, pp 57-58.

14 Mr John Sheridan, Department of Finance, *Committee Hansard*, 21 March 2014, p. 58.

would be disproportionate to the benefit of greater data collation. This could easily have the unintended consequence of shutting out small and medium Australian suppliers by creating a difficult and costly hurdle for them to comply with (and especially relative to their bigger and better resourced competitors). Reporting regimes that advantage some competitors over others can, with pressure applied over time, ratchet up and become increasingly onerous.

1.23 There would also be issues of data integrity, as some firms may incorrectly perceive advantages from misreporting, even though the data would not be intended for preferencing purposes (and if it were, the incentives to misreport would be even greater). At the Government end, procurer agencies could easily face costs and challenges to verify, interpret, aggregate and evaluate in-bound data.

1.24 Costs for both business and government could be resource-intensive, at a time where resource-constraints mean that better returns on effort lie elsewhere. Such a data-collection exercise would be better justified if it were connected to a different purpose than a statistical one, for instance determining business residency for tax compliance purposes.

1.25 Government senators support the use of the Australian Business Number to determine the quantity and value of contracts awarded to Australian suppliers. As the Department of Finance stated in evidence to the committee, to seek further information from tenderers in order to determine the percentage of local content of goods and services will impose an unreasonable onus on suppliers. Further, the provision of such information is irrelevant to Commonwealth procurement processes, given Australia's commitment to the non-discrimination principle. Government senators therefore **do not support recommendation 1**, because such additional data would have limited statistical value, while adding compliance costs to business and putting small business at a competitive disadvantage.

1.26 Government senators agree that the evidence indicates Australian suppliers, including our SMEs, are able to be competitive in government procurement processes, without a need to introduce preference policies which would harm their prospects in overseas markets.

### **Consideration of non-financial factors**

1.27 Government senators also support value for money as the core principle of the CPRs. However, the CPRs are clear that cost is not the sole determining factor when assessing value for money. A number of non-financial factors to consider are listed:

- fitness for purpose;
- a potential supplier's experience and performance history;
- flexibility (including innovation and adaptability over the lifecycle of the procurement);
- environmental sustainability (such as energy efficiency and environmental impact); and

- whole-of-life costs.<sup>15</sup>

1.28 Finance, which is responsible for the procurement framework, told the committee that in its view the consideration of non-financial factors is supported by the procurement framework:

Contrary to some of the statements made in the submissions, in our view, while achieving value for money is the core principle of the CPRs, the procurement framework supports the consideration of non-financial factors and not just the price of goods and services. For example, procurement officials are expected to consider a range of factors during a tender evaluation. These include fitness for purpose, flexibility, environmental impact and whole-of-life costs, rather than simply the supplier with the lowest bid.<sup>16</sup>

1.29 While the intent for financial and non-financial factors to be assessed in determining a procurement outcome is clearly included in the CPRs, the committee heard from the ANAO of the difficulties faced by officers in making such assessments:

They [non-financial factors] are weighted as part of the procurement process. Each procurement process would be different and would establish criteria before going out to the market to determine what is most important in the value-for-money considerations. But there are broad guidelines in the CPRs about what considerations need to be made.

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I think it would be different in every case [to assess value for money over the whole life of a procurement] but there are broad parameters that should be considered. What attains the greatest weight in the decision process depends on the circumstances and the need.<sup>17</sup>

1.30 Government senators note the National Commission of Audit suggested a more sophisticated approach to determining value for money:

A more strategic approach to procurement is also needed to provide value for money. The interpretation of value for money should reflect a more rigorous and sophisticated approach that looks beyond simple cost per day or cost per unit. A better approach would take into account outcomes, benefit and importantly risk relative to price.<sup>18</sup>

1.31 The committee heard that the CPRs were in the process of being revised to reflect the commencement of the *Public Governance, Performance and Accountability Act 2013* (PGPA ACT) on 1 July 2014. The opportunity is also being taken to address

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15 Commonwealth Procurement Rules, 1 July 2012, paragraph 4.5.

16 Mr John Sheridan, Department of Finance, *Committee Hansard*, 21 March 2014, p. 57.

17 Ms Tracey Martin, Senior Director, Australian National Audit Office, *Committee Hansard*, 21 March 2014, p. 14.

18 The Report of the National Commission of Audit, *Towards Responsible Government – Phase One*, Recommendation 59, p. 228.

concerns raised by the ANAO during its audits in relation to assessing value for money and record keeping. It is proposed that 'the quality of goods and services' be included in the list of financial and non-financial costs and benefits used to assess a procurement. There is also an expansion to the explanation of the concept 'whole of life costs' (inclusive of licensing costs, after-market modules and consumables).<sup>19</sup>

1.32 The recently revised Commonwealth Procurement Guidelines provide extra guidance around assessing whole of life costs (including a list of factors or criteria to consider). It would be appropriate to allow the opportunity for agencies to apply this guidance in practice, before presuming that a more specific and rigid methodology for application in whole-of-govt procurement would be a better approach. Whole of life costs are highly dependent on facts and circumstances that can vary widely between different product types and purchasing contexts. For instance, capital acquisitions versus contracts for labour services have very different accounting treatments and there can be complex legal questions about attribution of costs for tax and accounting purposes.

1.33 Government senators consider that resources would be put to better use by continuing to improve guidance, training staff and sharing insights and experiences that help agencies in their often unique circumstances.

1.34 Government senators agree that 'each procurement process is different'.<sup>20</sup> Agencies need to be able to respond to the different circumstances in place and weight the various value-for-money considerations, depending on the context of the procurement. Therefore, Government senators believe that procurement processes and the assessment of tenders needs to be flexible and adaptable. It would be unwise to constrain the assessment of tenders by adopting, what would appear to be, a one-size-fits all methodology for quantifying the factors to assess whole-of-life costs. Accordingly, Government senators consider that **recommendation 7 is unnecessary**.

1.35 However, Government senators are cognisant that the Australian government has a responsibility to Australian taxpayers to ensure that all procurement delivers the best possible value to taxpayers. Government senators support the revisions to the CPRs to provide further guidance and clarity for the assessment of financial and non-financial factors in procurement decisions. Government senators therefore **support recommendation 8** of the committee majority report for the ANAO to assess the operation of the revised CPRs.

### **Procurement capabilities**

1.36 Questions were raised about the training and technical capabilities of procurement officers.<sup>21</sup> While saying there are very good examples of procurement

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19 See paragraphs 4.5 and 4.6 of the CPRs, July 2014.

20 Ms Tracey Martin, Senior Director, Australian National Audit Office, *Committee Hansard*, 21 March 2014, p. 14.

21 Mr Tony Butler, *Committee Hansard*, 28 April 2014, p. 9; Professionals Australia, *Submission 4*, p. 2.

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occurring in a professional way, the ANAO also conceded there are examples which point to a lack of expertise.<sup>22</sup>

1.37 The Commission of Audit also highlighted the need to improve competencies in this area:

Associated with this reform is a need to build the skills and capabilities of the public sector to enhance competencies around good contracting.<sup>23</sup>

1.38 The inquiry received significant evidence that indicates there are issues with the process of procurement; application of existing CPRs; culture within departments; capacity within some sections of government; and consistency of application across government.

1.39 It was identified by Lynne Wilkinson, CEO, the Australian Companies Institute Limited (AUSBY) that:

...the process of making 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.<sup>24</sup>

1.40 During the hearing concerns were raised that the process of making and application in a procurement exercise is overcomplicated and lengthy;<sup>25</sup> and requires a more simplified and straightforward procurement, 'a low cost of compliance type process and activity where businesses can have an opportunity to put forward their best case in a reasonably low-cost arrangement'.<sup>26</sup> The Government Senators acknowledge that the Government has released a Commonwealth Contracting Suite of simpler and standardised documents for procurement under \$200,000.

1.41 Throughout the inquiry, some departments struggled to explain how their purchasing decisions are judged as valuable beyond a value-for-money assessment. The ANAO has observed that the documentation kept to support decisions can sometimes fail to explain how factors were weighed:

One of the key failings that we have identified is that often, when they write down why something supplies the best value for money, they have not given the range of reasons or the range of considerations. Then it is difficult for the auditors to come along and make an assessment about their judgements and the appropriateness.<sup>27</sup>

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22 Mr Steve Chapman, Deputy Audit-General, *Committee Hansard*, 21 March 2014, p. 15.

23 The Report of the National Commission of Audit, Towards Responsible Government – Phase One, Recommendation 59, p. 228.

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

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

26 *Committee Hansard*, 21 March 2014 p. 14

27 Mr. Stuart Turnbull, Executive Director, Australian National Audit Office, *Committee Hansard*, 21 March 2014, p. 15.

1.42 There is an over-complicated process. Across different procuring agencies, there are different styles and requirements for the application, which makes it frustrating and difficult for those outside the process, applying for assistance:

Each procurement is done on the basis of essentially a statement of requirements against which the potential tenderers produce a response. An evaluation is made of those things and a delegate essentially is presented with an evaluation of one sort or another that says that this is the relative performance of those people tendering and this is the one that presents the best value for money. The criterion for value for money would quite clearly vary between different sorts of procurements, but those things are made each time and tenderers are given feedback as to why they were not successful.<sup>28</sup>

1.43 Government senators therefore **support recommendation 15** in the committee majority report for the ANAO to conduct an assessment of the competencies of agencies' procurement officers to determine whether additional training is required. This however need not necessarily be via an ANAO exercise and could be done by another competent assessor – provided the assessment is independent and a consistent methodology is applied. The related ANAO review proposed at recommendation 13 is one that we consider is potentially premature (see paragraph 1.69).

### **Ensuring standards**

1.44 Government senators acknowledge the concerns raised about ensuring overseas goods meet Australian standards. A relatively simple solution to this was suggested by Dr Nick Seddon who advised the committee that it would be possible to include in tender documents a requirement that tenderers adhere to relevant standards. Dr Seddon indicated that he did not believe this was occurring on a regular basis:

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.<sup>29</sup>

1.45 Dr Seddon discussed with the committee whether overseas tenderers would have a legitimate complaint if such specifications were included in tender documentation:

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

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28 John Sheridan, First Assistant Secretary, Technology and Procurement Division, Business, Procurement and Asset Management, Department of Finance, *Committee Hansard*, 28 April 2014, p. 50.

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

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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.'<sup>30</sup>

1.46 In response to this issue, Finance responded:

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

1.47 Mr John Sheridan, First Assistant Secretary, Technology and Procurement Division, Business, Procurement and Asset Management Group, Department of Finance, confirmed:

[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.<sup>32</sup>

1.48 Government senators support, where relevant, including qualifications or requirements for particular procurements where appropriate and necessary to the needs of the Australian Government as a purchaser. Given the importance of ensuring that standards are appropriately incorporated in procurement, we **support recommendation 6** of the committee majority report. That said, we must remain vigilant against requiring standards that, in a back-door way, have the underlying

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

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

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

objective of erecting unnecessary barriers to potential foreign supply, competition and innovations.

### **Addressing complexity**

1.49 The committee heard that reducing the complexity of procurement documentation is a continuing focus for Finance.

#### ***CPRs***

1.50 Mr Sheridan addressed the issues raised about complexity 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.<sup>33</sup>

1.51 Mr Sheridan informed the committee about the 2012 review of the CPRs which focused on clarification:

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.<sup>34</sup>

1.52 Mr Sheridan emphasised that the intended audience for CPRs are government officials engaged in procurement:

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.<sup>35</sup>

1.53 Mr Sheridan also 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*

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

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

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

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*business*<sup>36</sup> which 'provides practical advice for potential suppliers, such as how to find opportunities and submit competitive tenders'.<sup>37</sup>

1.54 Government senators note that Finance recently issued revised and updated CPRs to reflect the commencement of the PGPA Act from 1 July 2014 which also provided some further guidance and clarity to the rules.

### ***Contract documentation***

1.55 Finance indicated that work has also been undertaken to simplify contract documentation. In 2011, following requests from industry and government agencies, a 'simple standardised contract for low-risk, low-value procurements (under \$80, 000)' was developed by Finance.<sup>38</sup>

1.56 Mr Sheridan 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] as part of the red-tape repeal day announcements. 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.<sup>39</sup>

1.57 Government senators acknowledge the work undertaken by Finance to address complexity by simplifying documentation where possible and ensuring information is targeted to particular audiences. Government senators welcome the new contracting suite for low-risk procurements under \$200,000. This offers a significant red tape saving. Government senators **support recommendation 9** of the committee majority report, for any necessary adjustments which become evident in the early stages of implementation to be made to the contracting suite.

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

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

38 *Submission 9*, pp 9-10.

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

1.58 Government senators also note the government's commitment to reduce the regulatory burden on Australian industry:

The Commonwealth is also seeking to minimise any unnecessary burden on suppliers created by procurement connected policies. A recent example of this is the Government's announcement on 19 March 2014 to repeal the Fair Work Principles.<sup>40</sup>

1.59 Government senators **support recommendation 10 in principle**, in the sense that government should continually strive to use best practice in its processes. However, government senators can only support this recommendation in principle rather than in full, because the recommendation does not specify exactly which jurisdictions the government should use as examples nor does it provide further details of proposals to streamline the tender process.

### Complaints processes

1.60 Finance told the committee about the avenues available to business to complain about a procurement process. The committee heard that in the first instance complaints should be raised by approaching the agency involved in a tender.<sup>41</sup> Principles agencies are required to apply when dealing with tenderers' complaints are available on the Finance website.<sup>42</sup> Complaints can also be made to 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.<sup>43</sup>

1.61 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.<sup>44</sup>

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

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

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

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

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

1.62 The committee was informed that any complaints about procurement-connected policies should be directed to the lead agency.<sup>45</sup>

1.63 Given the number of avenues and opportunities open to people with complaints, and the very low number of complaints received, government senators are perplexed as to what evidence the committee majority is relying on that demonstrates the urgent need for a new complaints mechanism to be developed. Government senators therefore **do not support recommendation 11** in the committee majority report.

1.64 Prior to the last election, the Liberal party pledged a 'root and branch' review of competition policy. Following the election, the government established an independent review, chaired by Professor Ian Harper, which is due to provide its final report to government within 12 months.<sup>46</sup> Government senators believe that until the outcome of that independent review is made public there is little value in debating the operation of the *Competition and Consumer Act 2010*. Therefore, Government senators **are unable to support recommendation 12, pending the outcome of the independent competition policy review.**

### **Evaluation of programs and policies to assist industry**

1.65 The Commission of Audit recommended the abolition of all procurement-connected policies:

There are currently 24 procurement [connected] policies in operation. They range from Coordinated Procurement to Australian Industry Participation Plans and include various environmental policies, such as the National Waste Policy.

While some are directly [connected] to procurement activities, others have no connection with procurement and seek to put into effect other policy objectives (including equal opportunity employment objectives). These policies contribute a significant amount of red tape for both business and government, are often of questionable benefit and can run counter to the principle of value for money.

The Commission considers Procurement Connected Policies should be abolished as procurement practices are already subject to the normal laws of Australia. They also represent unnecessary red tape and can be an inefficient means of meeting broader policy objectives at high cost to business.<sup>47</sup>

1.66 Finally, some on the Committee were concerned for the future of the Australian Industry Participation (AIP) programs and policies – which include AIP Plans in government procurement, Enterprise Solutions Program, Supplier Advocates

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

46 See Competition Policy Review website, available at: [australiancompetitionlaw.org/reports/2014rootbranch.html#issues](http://australiancompetitionlaw.org/reports/2014rootbranch.html#issues) (accessed 10 July 2014).

47 The Report of the National Commission of Audit, *Towards Responsible Government – Phase One*, Recommendation 59, p. 228.

and the Buy Australia at Home and Abroad Initiative. These programs are to be discontinued, with focus shifting to supporting the commercialisation of innovation, job creation and lifting the capability of small business, delivered through a single agency to achieve efficiencies and reduce red tape. The discontinuation of these programs will not act as a brake on Australia's economic growth and diversity.

1.67 The 2014-15 Budget included termination of a number of industry assistance programs to repair the Budget and fund policy priorities. Industry assistance by its nature can create distortions and unfairness between businesses which enjoy assistance and the majority who do not. AIP programs which are under review are being examined to determine the costs, benefits appropriateness and effectiveness of those initiatives. Government senators consider that such an assessment is appropriate, particularly in light of the Commonwealth Budget debt and deficit challenges.

1.68 Reducing regulatory burden for business is the key to increasing competitiveness. Many domestic businesses are subject to not only regulation surrounding federal legislative requirements, but local by-laws and State government regulation as well as environmental standards, labour laws and planning regulations. These laws and regulations all inhibit the capacity of business to compete internationally.

1.69 Government senators note that the government is undertaking an evaluation of the 'costs, benefits, appropriateness and effectiveness of existing [Australian Industry Participation] policies and programs'<sup>48</sup> and believes that it is a sensible course of action to review the current plethora of policies and programs designed to support Australian industry to engage with government. We must ensure programs and policies are well-targeted, efficient and cost effective. Government senators therefore **do not support recommendation 4** of the committee majority report. Until the evaluation of industry participation policies and programs has been completed, government senators **are unable to support recommendations 13 and 14.**

### **Procurement of paper**

1.70 Government senators note that the assertions made by the CFMEU around the procurement of paper have been addressed by Finance in its supplementary submission<sup>49</sup> as well as in submissions from the Department of Human Services,<sup>50</sup> IP Australia,<sup>51</sup> Complete Office Supplies,<sup>52</sup> and Office Max.<sup>53</sup> Government senators note the effectiveness of a whole of government arrangement with the Stationery and Office Supplies (SOS) Panel. Finance advised:

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

49 *Submission 12, supplementary submission 1.*

50 *Submission 40.*

51 *Submission 41.*

52 *Submission 42.*

53 *Submission 46.*

[W]hole-of-government procurement arrangements have been established where efficiencies have been identified to maximise market benefits and deliver savings for the Government. These arrangements have been established by Finance in areas where the supply of goods and services to agencies are substantial and are in common use by all or most agencies with minimal diversity.<sup>54</sup>

1.71 Finance explained the benefits of this arrangement:

The SOS arrangement is providing efficiencies and benefits through a single government approach to market and tender evaluation process, consistent contract processes and determination.<sup>55</sup>

1.72 Finance confirmed what factors were taken into account during its assessment of value for money:

In establishing the SOS arrangement, Finance conducted a value for money assessment, in accordance with the Commonwealth Procurement Guidelines 2008, to determine if Tenderers offered value for money. The assessment took into account factors such as the Tenderers' capabilities, price, ability to comply with government policy and capability to provide the range of goods and services requested.<sup>56</sup>

1.73 Finance also confirmed that agencies can purchase copy paper product from the SOS arrangement knowing it is compliant with all relevant government environmental legislation and policies, such as the ICT Sustainability Plan:

The SOS arrangement has 84 copy paper products that are used by agencies for day-to-day copying, which includes a range of A3 paper and paper used in agency print rooms. Each of these 84 products has recognised environmental chain of custody certification, such as the Forest Stewardship Council (FSC), the Program for the Endorsement of Forest Certification (PEFC) or the Australian Forestry Standard (AFS). Agencies are able to purchase any copy paper product from the SOS arrangement knowing it is compliant with Environmental Standard 4 (ES4) of the ICT Sustainability Plan. Further, Copy paper environmental compliance is audited annually.<sup>57</sup>

## Conclusion

1.74 Our free trade agreements such as the AUSTFA provide Australian companies with access to international markets and opportunities to export Australian goods and services. This access comes with obligations including non-discrimination on the basis of location. Government senators support this mechanism to encourage competitiveness on an international level over putting in place artificial protections.

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54 *Submission 12*, p. 3. There are currently 22 whole-of-government procurement arrangements covering 10 categories of goods and services.

55 *Submission 12, supplementary submission 1*, p. 11.

56 *Submission 12, supplementary submission 1*, p. 3.

57 *Submission 12, supplementary submission 1*, p. 9.

1.75 Government senators consider that the application of the non-discrimination principle is not harmful to Australian interests, but recognise that there may have been failure in some areas to fully capitalise on the exemptions provided for within Australia's free trade agreements. In particular, government senators note our international agreements allow for policies that benefit SMEs and the CPRs contain a commitment for agencies to source at least 10 per cent of procurement by value from SMEs.

1.76 The committee majority report appears to ignore the evidence that Australian suppliers, including our SMEs, are competitive in winning government contracts. Nearly 90 per cent of the suppliers contracted in 2012-13 were SMEs and over 80 per cent of those goods and services procured were (likely to have been) sourced from, or delivered by Australian suppliers. This is not evidence indicating a systemic problem that Australian suppliers are not winning government contracts.

1.77 Government senators support the ANAO assessing whether any further improvements in guidance for agencies is required in relation to ensuring financial and non-financial factors are taken into consideration. However, it is evident that Finance already has in place mechanisms to respond to issues highlighted in ANAO reports. The latest revision of the CPRs to reflect the commencement of the PGPA Act from 1 July 2014 was also used to incorporate revisions suggested by the ANAO. These revisions were the subject of consultation with industry.

1.78 Government senators also support the ANAO or another competent authority assessing the competencies of agencies' procurement officers.

1.79 However, government senators struggle to see how the committee majority report can reach some of the conclusions it does based on the evidence provided to the committee, particularly in relation to procurement complaints. The committee heard of the low level of complaints to the procurement coordinator and, despite this evidence, is recommending a new independent complaints mechanism. Government senators do not believe the evidence presented to the committee on the level of complaints warrants the establishment of a new and costly complaints handling mechanism.

1.80 Government senators note the review of procurement-connected policies underway. This is a sensible approach to ensuring assistance to industry is targeted and efficient as well as cost effective.

#### **Summary of positions on committee majority recommendations:**

<b>Recommendation 1</b>	<b>Do not support, because additional data would have limited statistical value, while adding compliance costs to business and putting small business at a competitive disadvantage</b>
<b>Recommendation 2</b>	<b>Consider the recommendation unnecessary</b>
<b>Recommendation 3</b>	<b>Consider the recommendation unnecessary</b>
<b>Recommendation 4</b>	<b>Do not support</b>

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<b>Recommendation 5</b>	<b>Do not support</b>
<b>Recommendation 6</b>	<b>Support</b>
<b>Recommendation 7</b>	<b>Consider the recommendation unnecessary</b>
<b>Recommendation 8</b>	<b>Support</b>
<b>Recommendation 9</b>	<b>Support</b>
<b>Recommendation 10</b>	<b>Support in principle, given that the recommendation does not specify exactly which jurisdictions the government should use as examples nor does it provide further details of proposals to streamline the tender process</b>
<b>Recommendation 11</b>	<b>Do not support</b>
<b>Recommendation 12</b>	<b>Unable to support, pending the outcome of the independent competition policy review</b>
<b>Recommendation 13</b>	<b>Unable to support, pending outcome of evaluation of industry participation policies and programs</b>
<b>Recommendation 14</b>	<b>Unable to support, pending outcome of evaluation of industry participation policies and programs</b>
<b>Recommendation 15</b>	<b>Support, noting however that this assessment need not necessarily be conducted through the ANAO.</b>

**Senator Cory Bernardi**  
**Deputy Chair**

**Senator Dean Smith**  
**Senator for WA**

**Senator Bridget McKenzie**  
**Senator for Victoria**

