

The Senate

Finance and Public Administration
References Committee

Commonwealth procurement procedures

July 2014

© Commonwealth of Australia 2014

ISBN 978-1-76010-041-4

Senate Finance and Public Administration Committee Secretariat:

Ms Lyn Beverley (Secretary)

Ms Ann Palmer (Principal Research Officer)

Ms Margaret Cahill (Research Officer)

Ms Marina Katic (Administrative Officer)

Ms Lauren Carnevale (Administrative Officer)

The Senate

PO Box 6100

Parliament House

Canberra ACT 2600

Ph: 02 6277 3530

Fax: 02 6277 5809

E-mail: fpa.sen@aph.gov.au

Internet: www.aph.gov.au/senate_fpa

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia License.



The details of this licence are available on the Creative Commons website:
<http://creativecommons.org/licenses/by-nc-nd/3.0/au/>.

Printed by the Senate Printing Unit, Parliament House, Canberra.

Membership of the Committee

Members

| | |
|--|----------|
| Senator the Hon Kate Lundy (Chair) | ALP, ACT |
| Senator Cory Bernardi (Deputy Chair) | LP, SA |
| Senator Alex Gallacher (until 7 July 2014) | ALP, SA |
| Senator Lee Rhiannon (until 7 July 2014) | AG, NSW |
| Senator Dean Smith | LP, WA |
| Senator Mehmet Tillem (until 30 June 2014) | ALP, VIC |
| Senator the Hon John Faulkner (from 1 July 2014) | ALP, NSW |
| Senator the Hon Joseph Ludwig (from 1 July 2014) | ALP, QLD |
| Senator Janet Rice (from 7 July 2014) | AG, VIC |

Participating Members

| | |
|--------------------------|----------|
| Senator Catryna Bilyk | ALP, TAS |
| Senator John Madigan | DLP, VIC |
| Senator Bridget McKenzie | NAT, VIC |
| Senator Nick Xenophon | IND, SA |

Table of Contents

| | |
|--|------------|
| Membership of the Committee | iii |
| Chair's Preface | vii |
| List of Recommendations | ix |
| Chapter 1..... | 1 |
| Introduction | 1 |
| Referral | 1 |
| Conduct of the inquiry | 2 |
| Acknowledgement | 2 |
| Chapter 2..... | 3 |
| The Commonwealth Procurement Framework..... | 3 |
| Commonwealth Procurement Rules | 3 |
| Australian supplier engagement in government procurement..... | 10 |
| Procurement-connected policies | 12 |
| Chapter 3..... | 15 |
| Commonwealth procurement and the non-discrimination principle | 15 |
| Application of the non-discrimination principle | 15 |
| Chapter 4..... | 31 |
| Achieving value for money in Commonwealth procurement..... | 31 |
| Assessing value for money | 31 |
| Chapter 5..... | 41 |
| Barriers to participation in procurement | 41 |
| Complexity of tender documentation | 41 |
| Lack of effective complaints process | 47 |
| Application of procurement-connected policies..... | 53 |
| Training and technical expertise of procurement officers..... | 58 |
| Chapter 6..... | 63 |
| Case study: Commonwealth government procurement of paper | 63 |
| The Stationery and Office Supplies Panel..... | 63 |

| | |
|--|------------|
| How much copy paper does the Commonwealth use?..... | 64 |
| Value for money | 64 |
| Conclusion..... | 71 |
| Government senators' minority report..... | 73 |
| Introduction | 73 |
| Commonwealth procurement framework..... | 73 |
| Government procurement commitments from free trade agreements..... | 73 |
| Australian suppliers are competitive | 76 |
| Consideration of non-financial factors | 78 |
| Procurement capabilities | 80 |
| Ensuring standards..... | 82 |
| Addressing complexity | 84 |
| Complaints processes | 86 |
| Evaluation of programs and policies to assist industry | 87 |
| Procurement of paper | 88 |
| Conclusion | 89 |
| Aditional comments by Senators John Madigan and Nick Xenophon | 93 |
| Appendix 1 | 101 |
| Submissions and Additional Information received by the Committee..... | 101 |
| Appendix 2 | 105 |
| Public Hearings..... | 105 |
| Appendix 3 | 109 |
| Defence Exempt Procurements | 109 |
| Appendix 4 | 111 |
| Procurement-Connected Policies | 111 |

Chair's Preface

This important inquiry has explored the operation and effectiveness of the Commonwealth Procurement Rules (CPRs), set out the rules for government procurement as well as procurement related policies, as they relate to the participation of Australian companies and businesses. The inquiry has also explored the impact of Australia's international obligations arising from bilateral free trade agreements on procurement policies.

The committee has formed the view that government procurement policies, as part of the value-for-money assessment, should take into account the impact of the government's procurement decisions on communities and on the broader economy.

Throughout this inquiry, witnesses made clear to the committee that the value-for-money proposition is not only a matter of comparing prices, it is a matter of assessing the broader benefit, as well as the costs, of the available options. Hence the urgent need for a stronger methodology to assess whole-of-life costs within the value-for-money assessment part of the procurement decision-making process.

The committee has also formed the view that with the consideration of the broad economic benefits of procurement as part of a comprehensive value-for-money assessment, the effective application of the range of procurement-related policies, combined with scrutiny and accountability measures, procurement outcomes for Australian companies would be considerably improved without impacting on our international obligations.

For example, it may be that increased employment, enhancing the skills base of the economy and boosting tax revenue will vastly outweigh what might have been gained from an initial procurement decision based on price alone.

Further, the application of the non-discrimination principle was cited throughout the inquiry as having the potential for inadvertently discriminating against Australian manufacturers. The committee is strongly of the view that effective procurement policy must ensure that Australian firms have at least an equal opportunity to compete, tender and win contracts.

The committee is also gravely 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 and the Buy Australia at Home and Abroad Initiative. These programs were cut in the 2014 Federal Budget. The committee calls for these programs to be continued.

These programs were introduced by the previous Labor Government to support Australian Industry and provide innovative solutions for government. The \$82.3 million cut from these programs in the present government's budget will act as a brake on Australia's economic growth and diversity.

The principles guiding that policy enshrined in the *Australian Jobs Act 2013* should continue to be followed, and government procurement decisions should be subject to

regular review, heightened scrutiny and transparency by the Australian National Audit Office.

The committee supports the intent of bilateral free trade agreements, yet notes that evidence suggested that the Australian Government could do more to ensure local industries and locally manufactured content is enabled to participate fully, is not discriminated against (inadvertently or otherwise) by fully capitalising on exemptions provided for in those agreements – as it was heard is the case in other countries.

Government procurement decisions may well be a significant determinant of the social and economic health of many Australian communities and regions. As a result, great care needs to be taken in the policy, practice and operation of the Commonwealth Government procurement rules if they are to operate in the interests of the Australian people.

Senator Kate Lundy
Chair

List of Recommendations

Recommendation 1

2.34 The committee recommends that the Department of Finance (Australian Government Procurement Coordinator) consult with Australian industry, and in particular Australian manufacturers, to develop an alternate test which can provide more meaningful information on the quantity of Australian content in goods and services procured by the Commonwealth government, and how to build this information into data collected in AusTender.

Recommendation 2

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

Recommendation 3

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

Recommendation 4

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

Recommendation 5

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

Recommendation 6

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

Recommendation 7

4.36 The committee recommends that the government develop a methodology to quantify the factors used to assess whole-of-life costs.

Recommendation 8

4.39 The committee recommends that during its next procurement-related audit, the Australian National Audit Office review the operation of the revised Commonwealth Procurement Rules, particularly the revisions relating to the assessment of financial and non-financial costs and benefits, and provide an evaluation.

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.

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.

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.

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.

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.

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.

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.

Chapter 1

Introduction

Referral

1.1 On 14 November 2013, the following matter was referred to the Finance and Public Administration References Committee for inquiry and report by the first sitting day in March 2014:

The current ratio of Australian goods and services versus imported goods and services utilised by the Commonwealth through procurement procedures, with particular reference to:

- a. the current policies and procedures for procurement in Commonwealth departments and agencies, including:
 - (i) the current effectiveness of procurement policies and procedures,
 - (ii) the effectiveness of any policies or procedures designed to preference Australian goods and services, and
 - (iii) the operation of procurement divisions of departments and agencies, including oversight and scrutiny, cost, and requirements relating to transparency and information-sharing;
- b. the current policies and procedures for procurement for major Commonwealth-funded capital projects currently underway or foreshadowed in the budget, including:
 - (i) the current effectiveness of procurement policies and procedures for these projects,
 - (ii) the effectiveness of any policies designed to preference Australian goods and services, and
 - (iii) the transparency and accountability of project management;
- c. the economic, social and environmental benefits of utilising Australian goods and services; and
- d. any related matters.¹

1.2 On 12 February 2014, the Senate granted an extension of time for reporting until 30 June 2014.² On 26 June 2014 the Senate subsequently agreed to extend the

1 *Journals of the Senate*, No. 3, 14 November 2013, p. 128.

2 *Journals of the Senate*, No. 13, 12 February 2014, p. 450.

reporting date to 10 July 2014.³ On 9 July the Senate agreed to a further extension of time for reporting to 17 July 2014.⁴

Conduct of the inquiry

1.3 Details of the inquiry were placed on the committee's website. The committee also directly contacted a number of relevant organisations and individuals to notify them of the inquiry and invite submissions by 31 December 2013. Submissions received by the committee are listed at Appendix 1.

1.4 The committee held public hearings in Canberra on 21 March and 28 April 2014. A list of witnesses who gave evidence to the committee is provided at Appendix 2.

1.5 The Hansard transcripts of evidence may be accessed through the committee's website at: www.aph.gov.au/senate_fpa.

Acknowledgement

1.6 The committee thanks all those who made submissions and appeared at hearings.

3 *Journals of the Senate*, No. 37, 26 June 2014, p. 1021.

4 *Journals of the Senate*, No. 40, 9 July 2014, p. 1108.

Chapter 2

The Commonwealth Procurement Framework

2.1 This chapter sets out the central elements of the Commonwealth procurement framework which are relevant to this inquiry, namely:

- the Commonwealth Procurement Rules; and
- policies to preference Australian goods and services.

2.2 The chapter also includes some analysis of the engagement of Australian suppliers in Commonwealth procurement and the volumes of Australian goods and services procured by the Commonwealth government.

Commonwealth Procurement Rules

2.3 The Commonwealth Procurement Rules (CPRs) form the core of the Commonwealth procurement framework, setting out the rules for government procurement and articulating the requirements for officials performing duties in relation to procurement.¹ Prior to 1 July 2014 the CPRs were issued under Regulation 7 of the Financial Management and Accountability Regulations 1997 and applied to all agencies that came under the *Financial Management and Accountability Act 1997* (FMA Act), as well as prescribed bodies under the *Commonwealth Authority and Companies Act 1997* (CAC Act).² From 1 July 2014, with the introduction of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) the CPRs will form part of the PGPA Act rules and are issued by the Minister for Finance under section 105B(1) of the PGPA Act.³

2.4 The evidence to this inquiry related to the CPRs and the Commonwealth Financial Framework as it existed prior to 1 July 2014. For this reason, the references in this report are to the CPRs which were issued on 1 July 2012. While the CPRs issued in July 2014 largely replicate the previous CPRs, any significant differences are noted in the committee's report.

2.5 In addition to the CPRs, the Commonwealth procurement framework also includes:

- web based guidance, developed by the Department of Finance to assist agencies to implement the procurement framework;

1 Paragraphs 2.2 and 2.4 of the Commonwealth Procurement Rules (CPRs), 1 July 2012.

2 Paragraph 2.1 of the CPRs, 1 July 2012 and Department of Finance, *Submission 12*, p. 2. The CPRs issued pursuant to the Financial Management and Accountability Regulations 1997 were a legislative instrument under section 64(3) of the *Financial Management and Accountability Act 1997* (FMA Act). See Dr Nick Seddon, *Submission 1*, p. 2.

3 See Forward to the Commonwealth Procurement Rules, July 2014, p. 3; Department of Finance, *Submission 12*, p. 2.

- Finance Circulars which advise of key changes and developments in the procurement framework; and
- Chief Executive Instructions, which a Chief Executive may use to set out agency specific operational rules to ensure compliance with the rules of the procurement framework.⁴

2.6 The procurement framework has been devolved which means the responsibility for spending public money rests with agencies, Chief Executives and their delegates. Any non-compliance with the CPRs is required to be reported in the annual Certificate of Compliance process.⁵

Structure of the CPRs

2.7 The CPRs are divided into two parts. Division 1 of the CPRs sets out the rules that are applicable to all procurements, regardless of their value or whether an exemption from Division 2 applies to them, and are grouped according to the following areas:

- value for money;
- encouraging competition;
- efficient, effective, economical and ethical procurement;
- accountability and transparency;
- risk management; and
- procurement method.

2.8 Division 2 of the CPRs provides additional rules for procurements at or above the relevant procurement threshold, which was \$80,000 for FMA Act agencies, other than for procurements of construction services; and \$400,000 for relevant CAC Act

4 Paragraph 2.4 of the CPRs, 1 July 2012; Department of Finance, *Submission 12*, pp 2-3. Paragraph 2.4 of the CPRs, July 2014, also states that the CPRs are the core of the procurement framework, which also includes web-based guidance, developed by the Department of Finance to assist agencies to implement the procurement framework; and 'Resource Management Guides' which advise of key changes and developments in the procurement framework (these appear to replace the Finance Circulars referred to in the earlier CPRs). The CPRs issued in July 2014 do not refer to Chief Executive Instructions, but rather 'Accountable Authority Instructions' which can be used to set out entity-specific operational rules to ensure compliance with the rules of the procurement framework (paragraph 2.5 of the CPRs, July 2014).

5 Department of Finance *Submission 12*, p. 5. The Certificate of Compliance Report informs the Parliament of the outcomes of the annual Certificate of Compliance process for agencies under the *Financial Management and Accountability Act 1997*. See www.finance.gov.au/publications/certificate-of-compliance-report/ (accessed 4 April 2014). The committee did not receive evidence on the compliance reporting arrangements which will exist under the PGPA Act. However the committee understands that there is a draft guidance issued, dated 17 June 2014, which outlines proposed requirements for compliance reporting for the 2014-15 year. This is applicable to non-corporate Commonwealth entities, available at: <http://www.pmra.finance.gov.au/#ref1> (accessed 7 July 2014).

bodies, other than for procurements of construction services.⁶ Appendix A of the CPRs provides a list of procurements which are exempt from Division 2 rules but are still required to be undertaken in accordance with value for money and the rules contained in Division 1 of the CPRs.

Value for money

2.9 The CPRs provide that the core principle applied to all procurements is that there must be value for money:

- Value for money in procurement requires:
- a. encouraging competitive and non-discriminatory processes;
 - b. using Commonwealth resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth;
 - c. making decisions in an accountable and transparent manner;
 - d. considering the risks; and
 - e. conducting a process commensurate with the scale and scope of the procurement.⁷

2.10 At the first public hearing Mr John Sheridan, First Assistant Secretary, Technology and Procurement Division, Business, Procurement and Asset Management Group, Department of Finance, reiterated the importance of value for money in the procurement process:

The key principle of the Commonwealth's procurement framework is to achieve value for money through competitive, open, transparent, efficient and publicly accountable processes.⁸

2.11 The CPRs explicitly provide that, in assessing value for money, the price of goods and services is not the sole determining factor:

A comparative analysis of the relevant financial and non-financial costs and benefits of alternative solutions throughout the procurement will inform a value for money assessment. Factors to consider include, but are not limited to:

- a. fitness for purpose;
- b. a potential supplier's experience and performance history;
- c. flexibility (including innovation and adaptability over the lifecycle of the procurement);

6 Paragraph 3.3 of the CPRs, 1 July 2012. Paragraph 9.7 of the CPRs, July 2014, provide that for non-corporate Commonwealth entities the procurement threshold, other than for procurements of construction services, is \$80,000; for prescribed corporate Commonwealth entities the procurement threshold, other than for procurements of construction services, is \$400,000.

7 Paragraph 4.4 of the CPRs, 1 July 2012.

8 *Committee Hansard*, 21 March 2014, p. 57.

- d. environmental sustainability (such as energy efficiency and environmental impact); and
- e. whole-of-life costs.⁹

Encouraging competition and non-discriminatory processes

2.12 Paragraph 5 of the CPRs focus on the encouraging competition and non-discriminatory processes aspect of the principle of value for money in procurements:

Competition is a key element of the Australian Government's procurement framework. Effective competition requires non-discrimination and the use of competitive procurement processes.¹⁰

...

The Australian Government's procurement framework is non-discriminatory. All potential suppliers to government must, subject to these CPRs, be treated equitably based on their commercial, legal, technical and financial abilities and not be discriminated against due to their size, degree of foreign affiliation or ownership, location, or the origin of their goods and services.¹¹

Commonwealth procurement and bilateral trade agreements

2.13 Australia is a party to a number of bilateral free trade agreements which, to some extent, cover government procurement. These agreements have no effect unless implemented in domestic legislation.¹² The CPRs incorporate relevant international obligations arising from bilateral free trade agreements, including the Australia-United States Free Trade Agreement (AUSFTA), therefore an official undertaking a procurement are not required to refer directly to international agreements.¹³

Exemptions and preferencing local suppliers

2.14 In its submission the Department of Finance (Finance) notes that, pursuant to commitments in Australia's free trade agreements, the Commonwealth government is obligated to 'open up access to our procurement market' and '[t]hese commitments limit the extent to which the Commonwealth Government can preference local suppliers'.¹⁴

9 Paragraph 4.5 of the CPRs, 1 July 2012. Paragraph 4.5 of the CPRs, July 2014, include an additional factor in this list – the quality of goods and services. This additional factor is discussed further in Chapter 4 of the report.

10 Paragraph 5.1 of the CPRs, 1 July 2012.

11 Paragraph 5.3 of the CPRs, 1 July 2012.

12 See Dr Nick Seddon, *Submission 1*, pp 1-2.

13 See Paragraph 2.15 of the CPRs, 1 July 2012. This provision is set out at Paragraph 2.14 of the CPRs, July 2014. Chapter 15 of the Australia-United States Free Trade Agreement (AUSFTA) deals with Government Procurement. In his submission Dr Seddon notes that the CPRs are 'a close copy of Chapter 15 [of the AUSFTA]', *Submission 1*, pp 1-2.

14 *Submission 12*, p. 3.

2.15 For example, the AUSFTA provides:

Each Party and its procuring entities shall accord unconditionally to the goods and services of the other Party and to the suppliers of the other Party offering the goods or services of that Party, treatment no less favourable than the most favourable treatment the Party or the procuring entity accords to domestic goods, services and suppliers.¹⁵

A procuring entity of a Party may not:

- (a) treat a locally established supplier less favourably than other locally established suppliers on the basis of degree of foreign affiliation or ownership; nor
 - (b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of the other Party.¹⁶
- ...

A procuring entity may not seek, take account of, impose, or enforce offsets in the qualification and selection of suppliers, goods, or services, in the evaluation of tenders or in the award of contracts, before or in the course of a covered procurement.¹⁷

...

offsets means any conditions or undertakings that require use of domestic content, domestic suppliers, the licensing of technology, technology transfer, investment, counter-trade, or similar actions to encourage local development or to improve a Party's balance-of-payments accounts.¹⁸

2.16 This prohibition on preference for local content is reflected in the CPRs in the non-discrimination principle (paragraph 5.3 of the CPRs).

2.17 However, Finance did refer to some exemptions in the CPRs that allow the government to engage directly with Australian industry, while ensuring the principle of achieving value for money is met. Those 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

15 Articles 15.2(1) of the AUSFTA.

16 Article 15.2(2) of the AUSFTA.

17 Article 15.2(5) of the AUSFTA.

18 Article 15.15 of the AUSFTA (Definitions).

- suppliers that are SMEs with at least 50 per cent Indigenous ownership.¹⁹

2.18 Under chapter 15 of the AUSFTA, certain military purchases are also exempt from the requirements not to preference local business. This list is not reproduced in the CPRs, but can be found in the Defence Procurement Policy Manual.²⁰

Small and Medium Enterprises

2.19 Finance noted that Australia's international trade agreements do allow for policies that benefit Small and Medium Enterprises (SMEs).²¹ The AUSFTA provides that the provisions in the agreement in relation to government procurement do not apply to 'any form of preference to benefit small and medium enterprises'.²²

2.20 In relation to SMEs, paragraph 5.4 of the CPRs states:

To ensure that Small and Medium Enterprises (SMEs) can engage in fair competition for Australian Government business, officials should apply procurement practices that do not unfairly discriminate against SMEs and provide appropriate opportunities for SMEs to compete. Officials should consider, in the context of value for money:

- a. the benefits of doing business with competitive SMEs when specifying requirements and evaluating value for money;
- b. barriers to entry, such as costly preparation of submissions, that may prevent SMEs from competing;
- c. SMEs' capabilities and their commitment to local or regional markets; and
- d. the potential benefits of having a larger, more competitive supplier base.²³

2.21 Dr Nick Seddon, a lawyer and academic specialising in government contracts, indicated that, in his view, the provision regarding SMEs in the CPRs is 'not very well drafted'. Specifically:

[T]hey say that government agencies, when making purchasing decisions, must not discriminate against SMEs. That does not answer the question: can they discriminate in favour of SMEs—that is, give them a bit of a boost?

19 *Submission 12*, p. 4. These exemptions are contained in Appendix A of the CPRs and reflect exemptions provided for under the AUSFTA.

20 Dr Nick Seddon, *Submission 1*, p. 4. Dr Seddon notes the list in the Defence Procurement Policy Manual (DPPM) copies the list in chapter 15 of the AUSFTA but is presented in the DPPM as determined by the Secretary of Defence and CEO Defence Materiel Organisation as exempt under a general rule in the CPRs, namely paragraph 2.6 of the CPRs. This list is reproduced at Appendix 3.

21 *Submission 12*, p. 4. The CPRs define SMEs as 'an Australian or New Zealand firm with fewer than 200 full-time equivalent employees', see Appendix C (Definitions) of the CPRs, 1 July 2012. The Definitions are in Appendix B of the CPRs, July 2014.

22 Section 7 of Chapter 15 of the AUSTFA, General Notes, Schedule of Australia.

23 Paragraph 5.4 of the CPRs, 1 July 2012.

The crunch would be in a case where you have submissions in a tender process and an SME is in the running and is a bit more expensive or maybe is not quite as good value for money but is an SME. A question then arises: can a decision be made to give the contract to that SME and, in that sense, discriminate in favour of an SME? The CPRs are not clear on that...²⁴

2.22 Dr Seddon argued if the CPRs are read in the context of the provisions of the AUSFTA 'it is pretty clear that deciding whether to grant a contract to an SME is exempt from the basic principle that you should not give local preference'.²⁵ However, Dr Seddon did acknowledge that the AUSFTA should not be used as an aid to assist in the interpretation of the CPRs.²⁶

2.23 The CPRs include a commitment for FMA Act Agencies sourcing at least 10 per cent of procurement by value from SMEs.²⁷ By way of example, the Department of Industry provided the committee with its SME participation statistics:²⁸

| Supplier Group | by Value (\$) | % by Value | by Number | % by Number |
|----------------|---------------|------------|-----------|-------------|
| SME | \$146,537,320 | 65 | 949 | 63 |
| Other | \$78,853,962 | 35 | 568 | 37 |
| Total | \$225,391,282 | 100 | 1517 | 100 |

2.24 The Department of Industry noted that the overall SME participation rate across whole of government in 2012-13 was 31.7 per cent.²⁹

Policies to assist industry participation

2.25 Finance stated that the Commonwealth Government 'has a range of policies and initiatives in place to support Australian industry participation in government procurement'.³⁰

2.26 A number of these policies come within the Australian Industry Participation (AIP) policies and programs, which are administered by the Department of Industry. These programs and policies:

[E]ncourage full, fair and reasonable opportunity for Australian industry to compete for work in major public and private sector projects. AIP

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

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

26 *Committee Hansard*, 28 April 2014, p. 2.

27 Department of Finance, *Submission 12*, p. 4. See Paragraph 5.5 of the CPRs, July 2014, which provides that the government is committed to non-corporate Commonwealth entities sourcing at least 10 per cent of procurement by value from SMEs.

28 *Submission 36*, p. 2.

29 *Submission 36*, p. 3. See also Department of Finance, *Submission 12*, p. 5.

30 *Submission 12*, p. 8.

programmes also support the matching of capable and competitive Australian companies with supply opportunities in major projects.³¹

2.27 The AIP policies and programs include:

- AIP Plans in Commonwealth Government Procurement – tenderers for large Commonwealth procurements (over \$20 million) are required to prepare and implement AIP Plans which outline actions a tenderer will take to provide Australian suppliers, especially SMEs, with access to supply opportunities in the project.³²
- Supplier Advocates – which provide leadership and coordination to improve the competitiveness of SMEs in targeted industry sectors and help them connect with new business opportunities.³³
- The Buy Australian at Home and Abroad initiative – which assists Australian firms to enhance their competitiveness and link with new business opportunities, particularly on major projects both in the public and private sector.³⁴

Australian supplier engagement in government procurement

2.28 In its submission, Finance provided detailed analysis from AusTender of the number of Australian suppliers in government procurement processes. This data 'indicates that Australian suppliers are competitive on their own merits in winning contracts'.³⁵ Finance provided the following statistics on value and participation of SME involvement in Commonwealth procurement for 2012-13:

- from the 67,854 contracts awarded, there were 11,460 suppliers contracted, 10,212 (89.1%) of which were SMEs; and

31 Department of Industry website, available at:
www.industry.gov.au/industry/AustralianIndustryParticipation/Pages/default.aspx (accessed 23 June 2014).

32 Department of Industry, *Submission 36*, p. 6.

33 The targeted industry sectors are: rail; steel; information technology; clean technologies; water; textiles, clothing footwear; food and beverage; and medical and scientific technologies, see Department of Industry website at:
www.industry.gov.au/industry/AustralianIndustryParticipation/SupplierAdvocates/Pages/default.aspx (accessed 23 June 2014).

34 Department of Industry website, available at:
www.industry.gov.au/industry/BuyAustralianatHomeandAbroad/Pages/AbouttheInitiative.aspx (accessed 23 June 2014). Note: Funding for these measures will be discontinued from 31 December 2014. See Senate Economics Committee, *Estimates Hansard*, 3 June 2014, p. 80.

35 *Submission 12*, p. 4. AusTender is the Australian Government's procurement information system, see www.tenders.gov.au/ (accessed 22 May 2014).

- the value of the 67,854 contracts awarded was \$39.3 billion in total, of which 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.³⁶

2.29 Finance also provided information on the provision of goods and services by Australian suppliers:

- 82.4% of goods and services, by value purchased by the Commonwealth Government are likely to have been sourced from Australia suppliers, or in the case of services, delivered by Australian suppliers;
- 92.0% of services are likely to have been sourced from Australian suppliers; and
- 70.1% of goods are likely to have been sourced from Australian suppliers.³⁷

2.30 However, at the first public hearing, Mr Sheridan, representing the Department of Finance, explained the technical difficulty in determining whether goods or content are sourced from 'Australian' suppliers:

This is because AusTender data includes the [Australian Business Number (ABN)], where that is available, of each supplier and their business addresses. These two identifiers are the only information that can be used to determine whether goods or services are sourced from Australian suppliers. In order to increase the accuracy of Australian-supplied statistics, we would need to impose additional onerous reporting requirements on suppliers in relation to the content of goods and services being supplied under each contract. This would introduce a significant amount of red tape for suppliers.

A consensus definition of what is Australian is also difficult to achieve, because, for example, goods may be made up of components from various sources.³⁸

2.31 Mr Sheridan 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.³⁹

36 *Submission 12*, p. 4. This data is based on reporting of procurement contracts, valued at \$10 000 or greater, on AusTender in 2012-13.

37 *Submission 12*, p 5. In terms of the breakdown of goods and services in the total contracts – goods accounted for 43.8% by value (\$17.2 billion); services accounted for 56.2% by value (\$22.1 billion); and of the total number of contracts reported, 69.8% were valued below \$80,000 equating to 3.7% of the total value of all contracts awarded.

38 *Committee Hansard*, 21 March 2014, pp 57-58.

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

Committee view

2.32 The committee has serious concerns that an ABN is not a good indication of whether goods are manufactured in Australia. Further, having an ABN does not enable a distinction to be drawn between a supplier and a manufacturer, whether goods are wholly imported or the quantity of Australian content.

2.33 The committee is also not convinced that seeking information, in addition to an ABN, from Australian businesses as to whether goods are manufactured in Australia will in fact increase the regulatory burden on these businesses. The committee therefore recommends that this assertion, that increasing the accuracy of data would impose onerous reporting requirements on suppliers, be tested with Australian industry, and specifically, with Australian manufacturers.

Recommendation 1

2.34 The committee recommends that the Department of Finance (Australian Government Procurement Coordinator) consult with Australian industry, and in particular Australian manufacturers, to develop an alternate test which can provide more meaningful information on the quantity of Australian content in goods and services procured by the Commonwealth government, and how to build this information into data collected in AusTender.

Procurement-connected policies

2.35 The CPRs refer to 'procurement-connected' policies as 'policies of the Commonwealth for which procurement has been identified as a means of delivery'.⁴⁰ While Finance maintains a list of procurement-connected policies, the CPRs state:

Many of these procurement-connected policies are the responsibility of agencies other than Finance. The policy agency is responsible for administering, reviewing and providing information on the policy as required.⁴¹

2.36 There are currently 24 procurement-connected policies, relating to different industry groups.⁴² Examples of procurement-connected policies include:

- Australian Industry Participation Plans for Government Procurement, administered by the Department of Industry;
- Procurement On-Time Payment Policy for Small Business, administered by the Department of Finance;
- Legal Services Directions, administered by the Attorney-General's Department;

40 Paragraph 4.6 of the CPRs, 1 July 2012.

41 Paragraphs 4.6 and 4.7 of the CPRs, 1 July 2012.

42 Ms Yvette Sims, Department of Finance, *Committee Hansard*, 21 March 2014, p. 63. A full list of procurement-connected policies, the department responsible for the policies, the year the policy was initiated, the suppliers affected and the threshold applicable to the policy are set out in Appendix 4.

- Commonwealth Disability Strategy, administered by the Department of Social Services;
- Energy Efficiency in Government Operations, administered by the Department of Industry;
- ICT Sustainability Plan 2010-2015, administered by the Department of the Environment; and
- The National Waste Policy, administered by the Department of the Environment.

Chapter 3

Commonwealth procurement and the non-discrimination principle

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

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

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

Application of the non-discrimination principle

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

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

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

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

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

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

1 *Submission 12*, p. 3.

2 *Submission 40*, p. 1.

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

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

All our tenders, regardless of what they are for, comply with Commonwealth tender processes and legislation, which under free trade means that we can specify quality, we can specify design, we can specify value for money and other criteria; we cannot specify place of origin.

...

We have a philosophy that wherever possible we should strive to have Australian products, but we cannot breach Commonwealth guidelines in doing our procurement.⁴

Support for policies promoting local preference

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

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

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

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

3 Submission 2, p. 2.

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

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

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

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

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

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

I would suggest we need to look towards other countries as to how they go about looking after, firstly, people within their own bounds...

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

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

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

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

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

9 Submission 22, p. 7.

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

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

The *Buy America[n] Act of 1933* relates to the procurement of goods by the US federal government. The US has waived the Buy America[n] Act for procurements covered by AUSFTA (and its other international agreements).

Similarly, Australia cannot apply legislation or policies which preference local suppliers to procurements covered by AUSFTA (and our other international agreements).¹²

3.14 This point was reiterated at the second public hearing:

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

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

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

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

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

11 *Submission 39*, p. 11.

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

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

14 *Submission 37*, pp 1-2.

15 *Submission 1*, p. 5.

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

Committee view

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

Recommendation 2

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

Need for a level playing field

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

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

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

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

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

16 *Submission 1*, p. 5.

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

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

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

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

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

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

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

Australia has in place a range of regulations, codes and laws necessary to provide protection to employees, consumers and the general public. The [Furniture Cabinets Joinery] industry supports the need for these regulations and codes however it is incongruous to have such a domestic regulatory framework if the Government, in its own purchasing decisions, does not require competing imported product entering Australia to abide by similar principles.

Commercial furniture, cabinet and joinery manufacturers cannot compete with countries which have virtually no environment and safety regulation and policies and thus companies operating in them need not invest in capital and processes to prevent this occurring. Similarly, less stringent labour laws and employee protections – such as annual leave, superannuation etc. – place Australian producers at a competitive disadvantage to these countries.²¹

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

18 *Submission 10*, p. 9.

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

20 *Submission 45*, p. 3.

21 *Submission 26*, p. 2.

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

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

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

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

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

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

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

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

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

23 *Submission 44*, pp 13-15.

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

25 *Submission 19*, p. 4.

26 *Submission 14*, p. 3.

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

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

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

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

There would be a remote possibility that a foreign company could then say, 'You are now erecting a form of barrier to trade.' This has happened in the past with lots of imported products. They claim that it is not a fair competition because Australia erects a barrier based on health...It is a possibility that if Commonwealth agencies insisted on certain standards somebody could complain. They would have to complain in the international forum...

But my view about that is that if the Australian government wants to set a high standard then it is perfectly free to do so. The chance of a challenge occurring under the processes of the free trade agreement is extremely low, I would think. Secondly, I think Australia could stand up and say, 'This is legitimate standard setting. It is not discriminating against foreign companies. All they have to do is meet the standard.'³⁰

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

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

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

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

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

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

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

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

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

Current assistance programs

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

AIP Plans

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

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

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

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

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

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

34 *Submission 36*, p. 6.

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

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

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

Demonstrate how full, fair and reasonable opportunity will be provided to Australian SMEs to supply goods and services to a project;

Endeavour to maximise opportunities for Australian SMEs to participate in all aspects of a project[;] and

Make large procuring entities aware of capable Australian suppliers and assist them to be competitive both nationally and overseas.³⁷

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

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

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

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

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

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

37 *Submission 36*, p. 6.

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

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

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

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

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

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

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

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

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

3.47 The Portfolio Budget Statements 2014-15 for the Industry Portfolio referred to an evaluation of 'the costs, benefits, appropriateness and effectiveness of existing [Australian Industry Participation] policies and programmes' to be completed in 2014.⁴⁴ The 'Opening up opportunities through Australian Industry Participation' program does not appear to have been allocated any funding for the forward estimates and is listed as a 'closed/closing programme' in the Portfolio Budget Statements 2014-15.⁴⁵ At the June 2014 estimates hearings, the Department of Industry confirmed

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

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

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

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

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

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

that the 'Opening up opportunities through Australian Industry Participation' measure is only funded until 31 December 2014.⁴⁶

Enterprise Solutions Program

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

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

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

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

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

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

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

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

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

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

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

Committee view

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

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

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

Recommendation 3

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

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

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

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

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

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

Policies supporting SMEs

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

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

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

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

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

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

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

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

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

Recommendation 4

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

SMEs and the CPRs

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

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

Recommendation 5

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

Australian standards

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

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

Recommendation 6

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

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

Chapter 4

Achieving value for money in Commonwealth procurement

4.1 This chapter discusses the concerns raised during the inquiry about the interpretation of the value for money criteria in the Commonwealth Procurement Rules (CPRs).

Assessing value for money

4.2 The CPRs indicate that '[a]chieving value for money is the core rule of the CPRs'.¹ However, the CPRs state that '[t]he price of the goods and services is not the sole determining factor in assessing value for money' and the assessment requires consideration of relevant non-financial as well as financial costs and benefits.²

4.3 The CPRs do not provide a definition of value for money. Instead, officials responsible for a procurement 'must be satisfied, after reasonable enquiries, that the procurement achieves a value for money outcome'.³ Broad requirements are listed:

- encouraging competitive and non-discriminatory processes;
- using public resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth;
- making decisions in an accountable and transparent manner;
- considering the risks; and
- conducting a process commensurate with the scale and scope of the procurement.⁴

4.4 In addition, the CPRs provide a non-exhaustive list of factors to consider when assessing value for money:

- fitness for purpose;
- a potential supplier's experience and performance history;
- flexibility (including innovation and adaptability over the lifecycle of the procurement);

1 Paragraph 3.2 of the CPRs, 1 July 2012. As noted in Chapter 2, references in this report are to the CPRs as they were prior to July 2014. Where significant differences exist between those CPRs and the CPRs introduced in July 2014, these will be noted in the committee's report.

2 Paragraph 4.5 of the CPRs, 1 July 2012. The CPRs of July 2014 do not contain the statement that the price of goods and services are not the sole determining factor in assessing value for money. However, paragraphs 3.2 and 4.5 of the CPRs, July 2014, state that financial and non-financial costs and benefits must be considered.

3 Paragraph 4.4 of the CPRs, 1 July 2012.

4 Paragraph 4.4 of the CPRs, 1 July 2012.

- environmental sustainability (such as energy efficiency and environmental impacts); and
- whole-of-life costs.⁵

4.5 The Australian National Audit Office (ANAO) explained how an assessment of value for money should occur:

At a basic level, obtaining value for money for each procurement action requires a comparative analysis of all the relevant costs and benefits of each supplier's proposal throughout the procurement cycle, and is not determined by price alone. It should also consider the whole-of-life costs of the procurement and include consideration of quality and overall fitness for purpose.⁶

4.6 The Department of Finance (Finance) commented that it believes the consideration of non-financial factors is supported by the procurement framework:

[I]n 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.⁷

Consideration of non-financial factors

4.7 However, this view from Finance that the consideration of non-financial factors is supported by the procurement framework was not shared by many witnesses who provided submissions or appeared before the inquiry. Witnesses expressed concern that agencies are using a very narrow interpretation of value for money to assess tenders and equating it with cost minimisation. For example, AUSBUY argued:

Australia's policy of value for money appears in practice to be interpreted rather as the cheapest price. This approach costs Australia in the disregard of such issues as intellectual property and failure to meet Australian standards.⁸

4.8 Australian Paper highlighted that the CPRs stated other factors should be considered alongside price:

...the concept of value for money is being applied too narrowly within [FMA Act] Government agencies. As the CPRs state, value for money should encompass a range of considerations including environmental

5 Paragraph 4.5 of the CPRs, 1 July 2012. Paragraph 4.5 of the CPRs, July 2014, includes an additional factor, 'the quality of the goods and services', and a new explanation of 'whole-of-life costs' at paragraph 4.6. These revisions are further discussed later in Chapter 4.

6 *Submission 31*, p. 4.

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

8 *Submission 44*, p. 3.

sustainability, supplier experience and performance, innovation and adaptability and whole-of-life costs.⁹

4.9 SPC Ardmona noted the difficulty of assessing non-financial factors and called on the government to improve consideration and measurement processes:

'Value for Money' calls on government departments and agencies to view both financial and non-financial factors when procuring goods and services. In evaluating the procurement of Australian processed fruit and vegetables, non-financial factors such as food safety, occupational health and safety, fair wages, environment and product quality can be difficult to assess. Lowest price therefore has become the key selection parameter, with less weighting given to the above important non-financial factors. The inability to measure these important factors severely restricts the competitiveness of an Australian manufacturer, as these standards add cost and can lead to the appearance of our products being uncompetitive on price. This is despite the requirement on Australian growers and food manufacturers to adhere to some of the most stringent standards in the world.¹⁰

4.10 Mr Tony Butler observed a level of inconsistency with the assessment of value for money and indicated that value for money 'is used in some cases to represent an objective and in others (more appropriately) as a basis for comparing alternative outcomes'.¹¹

4.11 In terms of how non-financial considerations should be taken into account, the ANAO stated:

They 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.

...

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.¹²

Whole-of-life costs

4.12 Submitters particularly drew attention to the need to determine whole-of-life costs, not just upfront costs, in an assessment of value for money.

9 Submission 17, p. 4.

10 Submission 45, p. 2.

11 Submission 37, p. 7.

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

4.13 For example, the CFMEU emphasised that the cheapest price does not equal value for money and that considerations such as whole-of-life costs should be included in any analysis.¹³ The CFMEU highlighted examples such as building products:

[W]hole-of-life costs and the fact that the imported products have shorter warranties or less secure warranties does not appear to be adequately taken into account in value-for-money decisions currently.¹⁴

4.14 The Australian Industry Group reported that there is an undue emphasis on upfront over whole-of-life costs:

The emphasis should be on 'value for money' over the whole life of a product or service and should take into account factors such as risk, reliability and future maintenance costs.¹⁵

4.15 The importance of whole-of-life costs was acknowledged by the ANAO as were the practical difficulties in conducting that analysis:

The notion of whole of life is very much an important element of the value-for-money equation. Obviously it is creating some practical difficulties for agencies when you are looking at large multi-year procurements as distinct from a small arrangement.¹⁶

A broader approach

4.16 Dr Skladzien, representing the Australian Manufacturing Workers' Union, while agreeing with the need to achieve value for money, argued that a more holistic approach is required which includes consideration of the flow-on or multiplier effects of awarding a contract:

It [the narrow interpretation of value for money] totally subtracts from the notion that once you spend the money, the money goes on and does things. It can go to the pockets or shareholders, it can pay labour, it can pay capital or it can do a whole bunch of things. Our view is that with those flow-ons what happens to the money is crucially important to government procurement decisions—or should be crucially important. In order to have a true assessment of the costs and benefits of a procurement decision, we need to know the full costs and benefits of procurement decisions. So if we are faced with a decision between A and B and the contract price is slightly different but A has a huge benefit for the development of technology in

13 Mr Travis Wacey, National Policy Research Officer, CFMEU, *Committee Hansard*, 28 April 2014, p. 14.

14 Mr Travis Wacey, National Policy Research Officer, CFMEU, *Committee Hansard*, 28 April 2014, p. 14.

15 *Submission 10*, p. 3

16 Mr Steve Chapman, Deputy Auditor-General, Australian National Audit Office, *Committee Hansard*, 21 March 2014, p. 13.

Australia and B does not then those benefits should be taken into account in that decision.¹⁷

4.17 This view was supported by Mr William Churchill, Communications and Public Affairs Manager, AUSVEG who suggested consideration be given to a local benefits test which would recognise the direct benefits for the community including: employment, tax revenue raised and compliance with Australian workplace laws. Mr Churchill argued that such a test would:

...allow for the assessors to consider the environment we have here in Australia and to measurably apply that to the Australian environment, saying that the preference may be not to discriminate but if we were to source this product from Australia we would be able to see these direct benefits flow through to the community. Certainly that would need to be done in a proper way with proper measurables, but it would be a chance to look at supplying from Australia, which is given no consideration in the current framework. Often, as we are seeing, it is all about price under section 4 [of the CPRs]—it is all about value for money and what is 'value for money'?¹⁸

4.18 The CFMEU suggested a 'true-value' process to be considered in tender evaluations where:

the onus [is] on the Australian supplier to quantify the return to the community in tax receipts and welfare expenditure saved from continued economic activity associated with local manufacturing and also any benefit to small and medium enterprises associated with continuing local manufacturing.¹⁹

Constraints

4.19 Dr Seddon explained that a selection committee reviewing tenders is not able to consider the multiplier effect of a particular tender unless directed to do so by a government policy and such a policy would be 'vulnerable to an accusation that it is a form of local preference'.²⁰

4.20 Finance confirmed that additional benefits for the economy such as tax revenue, local employment and concepts such as 'national pride' are not taken into consideration by the CPRs:

[The CPRs] do not take that [tax revenue] into account. The requirements for what can be procured are driven by our free trade agreements, which require us not to take those matters into account.²¹

17 *Committee Hansard*, 21 March 2014, p. 44.

18 *Committee Hansard*, 21 March 2014, p. 52.

19 Mr Travis Wacey, National Policy Research Officer, CFMEU, *Committee Hansard*, 28 April 2014, pp 13-14.

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

21 Mr John Sheridan, Department of Finance, *Committee Hansard*, 21 March 2014, pp 60-61.

...

Australia does not have a 'national pride' exemption in any of our free trade agreements and if such a provision was implemented for Commonwealth government procurement it would contravene Australia's obligations.²²

4.21 Finance stressed Australia's free trade obligations require officials to ensure they do not discriminate on the basis of location, among other things. This means 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. Mr Sheridan, representing the Department of Finance, added:

...and my point would be: at what stage would you stop making such assumptions? Would you stop in a local area? Would you go further? Would you look at international trade agreements? How could you make those value-for-money decisions in that broader sense rather than looking at the particular procurement involved? That is the challenge we face.²³

Areas for improvement

4.22 The committee put to Finance the level of frustration expressed by witnesses regarding the apparent inconsistency with how the concept of value for money is applied and the lack of transparency regarding the weightings for financial and non-financial factors in each case. Mr Sheridan responded:

I can certainly understand that frustration, but 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.²⁴

4.23 The ANAO reported that as a result of its audits, key areas for agencies to improve procurement practices and outcomes include 'better demonstrating and considering value for money when making procurement decisions'.²⁵ Mr Steve Chapman, Deputy Auditor-General also reported that audits have 'identified that there may be benefit in providing clear and practical guidance to agency staff on specific matters such as value for money and documentation of procurement decisions'.²⁶

22 Department of Finance, answers to questions on notice, received 1 April 2014, p. 26.

23 *Committee Hansard*, 28 April 2014, p. 50.

24 *Committee Hansard*, 28 April 2014, p. 50.

25 Mr Steve Chapman, Australian National Audit Office, *Committee Hansard*, 21 March 2014, p. 12.

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

4.24 Ms Michelle Melbourne, Chair, Canberra Business Council, also spoke about the lack of transparency around procurement processes. While acknowledging the hard work of the procurement professionals, she felt the system is overly bureaucratic to the detriment of Australian industry. To address this she suggested further work on value for money and transparency:

I think the key for us in what we see here in Canberra and on behalf of Australia is that we are at the forefront of a global market and we want the overseas players to be here. We do not want to lock them out, so we need to be smart about driving Australian industry. We can do that really simply with things like a better definition of value for money and being transparent.²⁷

4.25 To provide greater clarity to officers undertaking procurement, Mr Butler also suggested further work be undertaken in relation to the treatment of value for money and to this end, highlighted work in this area by the European Union (EU):

The issues involved have been extensively debated in the EU where there is provision for contracts to be awarded either on price or to "the most economically advantageous offer", from the viewpoint of the contracting entity. The EU's procurement rules are quite different from Australia's, reflecting in part the greater emphasis on competition policy. But there is much to be learned from European experience and the wealth of related literature.²⁸

4.26 Mr Butler further explained:

The aim of the European communities was to ensure at least a single market in procurement, so they worked very hard to prevent any country giving preference to its own suppliers as opposed to others. That is still the case. But they do recognise that there are certain social, environmental and other concerns that can be taken into account in procurement, as long as they are applied equally to all tenderers.²⁹

4.27 A lack of transparency (for procurement officers and industry) around the assessment of value for money, especially non-financial factors, was a recurring theme throughout the inquiry. The committee therefore notes with interest the following guidance from the European Procurement Regulations:

To ensure compliance with the principle of equal treatment in the award of contracts, contracting authorities should be obliged to create the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied in the contract award decision. Contracting authorities should therefore be obliged to indicate the contract award criteria and the relative weighting given to each of those criteria. Contracting authorities should, however, be permitted to derogate from that

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

28 *Submission 37*, p. 3. See also *Committee Hansard*, 21 March 2014, pp 7-8; and www.ojec.com/Directives.aspx (accessed 19 May 2014).

29 *Committee Hansard*, 21 March 2014, p. 10.

obligation to indicate the weighting of the criteria in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular because of the complexity of the contract. In such cases, they should indicate the criteria in decreasing order of importance.³⁰

4.28 Finance informed the committee that the CPRs were last reviewed in 2012.³¹ Finance also noted that it is responding to areas for improvement identified in ANAO reports including 'a better definition of value for money [and] a better way of recording procurement decisions...'.³² Finance advised that this updated guidance will be included in the review of the CPRs currently underway to meet the requirements of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) which comes into effect in July 2014.³³

4.29 On 19 May 2014 a draft of the revised CPRs was made available on the Australian Government Procurement Coordinator's blog for comment by 1 June 2014. It was noted that '[f]urther minor amendments to the CPRs may be made prior to finalisation and tabling in Parliament'.³⁴

4.30 In the new CPRs which commenced in July 2014, a very minor change has been made regarding record keeping requirements. A new factor, 'the quality of goods and services' has been included in the list of financial and non-financial costs and benefits used to assess the value for money of a procurement. There is also an expansion to the explanation of the concept of 'whole-of-life costs':

Whole-of-life costs could include:

- a. the initial purchase price of the goods and services;
- b. licensing costs (where applicable);
- c. the cost of additional features procured after the initial procurement; and
- d. consumable costs.³⁵

Committee view

4.31 The committee understands the frustration expressed by some witnesses in relation to the opacity of the processes used by agencies to assess value for money. It can appear that the concept of value for money is applied inconsistently due to the

30 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, paragraph 90.

31 Mr John Sheridan, Department of Finance, *Committee Hansard*, 28 April 2014, p. 38.

32 Mr John Sheridan, Department of Finance, *Committee Hansard*, 28 April 2014, p. 47.

33 Mr John Sheridan, Department of Finance, *Committee Hansard*, 21 March 2014, p. 63.

34 See Procurement Coordinator Blog, *Updating the Commonwealth Procurement Rules*, 19 May 2014, available at: www.finance.gov.au/blog/2014/05/19/updating-the-commonwealth-procurement-rules/ (accessed 21 May 2014).

35 Paragraphs 4.5 and 4.6 of the CPRs, July 2014.

lack of transparency around the consideration and weightings given to financial and non-financial factors. In relation to the consideration of non-financial factors, the committee notes the evidence that the flow-on effects of procurement decisions, such as tax revenues and other social and economic consequences are not taken into account.

4.32 The committee notes that better demonstration and consideration of value for money and improved documentation has also been identified by the ANAO as areas for improvement.

4.33 The committee agrees that clearer guidance on the consideration and assessment of value for money is required and that there should be a clear analysis and documentation of relevant factors leading to procurement decisions.

4.34 The committee understands that the Department of Finance is addressing these issues as part of the review of the CPRs taking place in connection with the introduction of the PGPA Act. It notes the revised CPRs released in July 2014, but has reservations that the changes included in that revision do not adequately address the issues raised with the committee. In particular the revisions do not appear to address the ANAO suggestion to provide 'clear and practical guidance to agency staff on specific matters such as value for money and documentation of procurement decisions'.³⁶

4.35 In relation to assessing whole-of-life costs, the committee notes the expanded explanation in the revised CPRs containing the list of factors which could be taken into account. However, the committee believes that there should be a methodology developed to facilitate quantification of these and other whole-of-life factors to better inform procurement decisions.

Recommendation 7

4.36 The committee recommends that the government develop a methodology to quantify the factors used to assess whole-of-life costs.

4.37 The committee welcomes initial revisions to the CPRs and is pleased to note the consultation process being undertaken by Finance, asking for comments on the revised CPRs but notes the short timeframe. The committee is also not aware whether any further steps, beyond a blog posting, have been undertaken to engage industry.

4.38 The inquiry timeframe did not allow the committee to review and seek feedback from stakeholders on the operation of the revisions to the CPRs or discuss with Finance whether any supplementary material is envisaged. Therefore, the committee believes that during its next procurement-related audit, the ANAO should review the use of the revised CPRs, particularly the assessment of financial and non-financial costs and benefits, and provide an evaluation.

36 Committee Hansard, 21 March 2014, p. 12.

Recommendation 8

4.39 The committee recommends that during its next procurement-related audit, the Australian National Audit Office review the operation of the revised Commonwealth Procurement Rules, particularly the revisions relating to the assessment of financial and non-financial costs and benefits, and provide an evaluation.

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,³² and/or the training and professional development of procurement officers.³³

5.34 Complaints to the procurement coordinator can be made using an online form.³⁴ 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.³⁵

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.³⁶

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.³⁷

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 verses 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 polices 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.

Chapter 6

Case study: Commonwealth government procurement of paper

6.1 Using the procurement of paper as an example, this chapter examines concerns around the assessment of value for money as outlined in the Commonwealth Procurement Rules (CPRs). In particular, the discussion focuses on the application and operation of the procurement-connected policies relevant to the procurement of paper in determining value for money.

The Stationery and Office Supplies Panel

6.2 The procurement of stationery and office supplies by the Commonwealth government is undertaken pursuant to a whole-of-government arrangement, the Stationery and Office Supplies (SOS) panel. The SOS panel commenced on 7 March 2012, with the execution of a Heads of Agreement between the Department of Finance (Finance) and three panellists: Complete Office Supplies; Staples Australia; and OfficeMax Australia. The SOS panel arrangement is for an initial period of three years.¹

6.3 In its submission, Finance noted that a number of whole-of-government procurement arrangements have been established. The submission stated:

[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.²

6.4 In the case of the SOS panel, Finance stated the whole-of-government arrangement:

[I]s providing efficiencies and benefits through a single government approach to market and tender evaluation process, consistent contract processes and determination.³

6.5 Government agencies subject to the *Financial Management and Accountability Act 1997* (FMA Act) must procure stationery through the SOS panel.

1 There are two options of one year each to extend the SOS Panel, which may be exercised at the discretion of the Department of Finance. See Department of Finance website, *Stationery and Office Supplies Panel Arrangement*, at www.finance.gov.au/procurement/StationeryandOfficeSupplies.html (accessed 5 May 2014).

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

3 Department of Finance, *Submission 12, supplementary submission 1*, p. 11.

Agencies under the *Commonwealth Authorities and Companies Act 1997* (CAC Act) are encouraged to use the SOS Panel, although this is not compulsory.⁴

How much copy paper does the Commonwealth use?

6.6 Finance estimates the government will spend \$8.5m on copy paper in 2013-14, which is around nine reams per employee.⁵ This represents a substantial reduction on an aggregate use of over 6,500 tonnes of office paper per year, with an average of 18.6 reams of paper per person per year, as determined in 2008-09 by the Australian National Audit Office (ANAO).⁶

6.7 A number of submissions referred to the 2008-09 ANAO figures as indicative of current Commonwealth use of copy paper.⁷ However, Finance indicated to the committee that these figures are out-of-date, so any calculations based on them are inaccurate.⁸

Value for money

6.8 Submissions and witnesses expressed concern that the 'value for money' criteria was being interpreted too narrowly by agencies when procuring paper, with the result that procurement decisions are based on lowest price alone.⁹

6.9 The Australian Forest Products Association (AFPA) submitted they were aware of contracts being awarded to overseas companies on the basis of slightly more competitive price margins, sometimes as small as 1 per cent and argued:

Such narrow margins highlight the many challenges faced by domestic manufacturers and the issue as to whether the full suite of relevant non-financial and environmental sustainability factors have been adequately considered in assessing 'value for money'.¹⁰

6.10 One specific example referred to by several witnesses and submitters was the procurement of envelopes in 2013 by the Department of Human Services (DHS),

4 *Stationery and office supplies panel arrangement*, at www.finance.gov.au/procurement/StationeryandOfficeSupplies.html (accessed 5 May 2014). Use of the SOS panel is mandatory for all non-corporate Commonwealth entities subject to the *Public Governance, Performance and Accountability Act 2013* and corporate Commonwealth entities can opt in at any time.

5 Department of Finance, *Submission 12, supplementary submission 1*, p. 5.

6 ANAO, *Audit Report No 25 2008-09, Green Office Procurement and Sustainable Office Management* (2009), p. 58.

7 Australian Forest Products Association, *Submission 13*, p. 3; Australian Paper, *Submission 17*, p. 4; Construction, Forestry, Mining and Energy Union (CFMEU), *Submission 39*, p. 14.

8 Department of Finance, *Submission 12, supplementary submission 1*, p. 5.

9 Australian Forest Products Association, *Submission 13*, p. 8; Australian Paper, *Submission 17*, p. 4; CFMEU, *Submission 39*, p. 13.

10 *Submission 13*, p. 8.

where the contract was awarded to an overseas supplier.¹¹ The Australian Made Campaign outlined the details:

Australian manufacturer Australian Paper lost a contract for the supply of envelopes to Centrelink during 2013 by \$8,256, a margin less than 1% of the winning tender (\$843,744).¹²

6.11 The Australian Made Campaign argued this small upfront saving would cost the government far more in lost revenue over the longer term:

Australian Paper estimates the Government lost tax and excise revenue of [approximately] \$173,760 on the production of the 240 tonnes of paper that would have gone into the envelopes had the Australian product been selected.¹³

6.12 Mr Stuart Turnbull, Executive Director, Defence, Performance Audit Services Group, ANAO, told the committee of the difficulty of auditing value for money decisions made by agencies in procurement processes. Mr Turnbull stated it can be difficult to evaluate how agencies assessed value for money in their procurement deliberations, due to insufficient record keeping:

One of the key failings that we have identified is that often, when [agencies] 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.¹⁴

6.13 However, DHS provided the committee with the following information in relation to the assessment of value for money used for the procurement of envelopes:

DHS sources envelopes in accordance with established policy, both in the context of value for money and also the use of recycled and/or Australian sourced paper wherever it is appropriate to do so...

The tender process [for envelopes] involved the consideration of a broad range of factors when establishing whether each supplier's proposal represented value for money. In addition to pricing, the assessment included risk (including risk to surety of supply), quality, flexibility to adapt rapidly to changing requirements, fitness-for-purpose, and environmental impacts.

DHS also applies a value for money assessment every six months when sourcing the individual batches of envelopes.¹⁵

11 Australian Made Campaign, *Submission 27*, p. 3; CFMEU, *Submission 39*, p. 20; Mr Travis Wacey, CFMEU, *Committee Hansard*, 28 April 2014, p. 13; Ms Michelle Melbourne, Canberra Business Council, *Committee Hansard*, 28 April 2014, p. 24.

12 *Submission 27*, p. 3.

13 *Submission 27*, p. 3.

14 *Committee Hansard*, 21 March 2015, p. 15.

15 *Submission 40*, p. 2.

Economic and social benefits

6.14 The committee received evidence suggesting the procurement of locally produced stationery had definite economic benefits for government, including greater government tax revenues from individuals and companies, and the benefit of supporting Australian jobs and skills.

6.15 Mr Travis Wacey, National Policy Research Officer, Construction, Forestry, Mining and Energy Union (CFMEU), provided the committee with the following estimate of job losses in the paper and forestry industries as a result of Australian Paper not being awarded the envelopes contract in 2013 by DHS:

We are not just talking about one or two jobs; we think that 15 to 20 direct production jobs were triggered by the loss of this contract, and it is a situation representing literally hundreds of thousands of dollars, if not millions of dollars in lost taxpayer revenue in the short, medium and longer term just for the \$8,000 benefit.¹⁶

6.16 Mr Wacey added that this action reduced government tax revenue and potentially increased government spending on welfare.¹⁷ On this point, Australian Paper provided an indication of the amount their business contributes in taxes:

Australian Paper also provides significant revenue to all levels of government, equivalent to \$1.81 for each and every actual ream of copy paper that we make and totalling \$432 million in 2012, a value that we feel can't but is being ignored by the government's procurement decisions.¹⁸

6.17 Mr Craig Dunn, Senior Marketing Manager Sustainability, Australian Paper, told the committee how the economic benefits of purchasing Australian products also brings social benefits, particularly to regional communities:

Certainly from a social perspective it is interesting how social benefits often link into economic benefits. We are all aware of the social amenities created by high-quality manufacturing jobs in this country, then when we have a situation where a manufacturing plant closes down because the importers have won the day [and] the economic impacts of the loss of that social amenity are often quite great for regional communities in particular.¹⁹

6.18 Furthermore, the CFMEU pointed out that there are potential national security implications in sourcing certain types of paper from overseas. The CFMEU referred to the Shoalhaven Paper Mill which is the only Australian paper manufacturer with the capacity to make the secure paper used for Australian passports and birth certificates.²⁰ The CFMEU argued that if local capacity to manufacture secure paper is lost, this paper will be sourced from overseas:

16 *Committee Hansard*, 28 April 2014, p. 13.

17 *Committee Hansard*, 28 April 2014, p. 13.

18 *Submission 17*, p. 3.

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

20 CFMEU, *Submission 39*, pp 21-23.

Not having a capacity to produce fine writing, newsprint and especially security papers and documents [that are] as important to national security as Australian passports is incompatible with Australia's essential security interests.²¹

Procurement-connected policies

6.19 Concerns were raised with the committee that government agencies do not take sufficient account of environmental sustainability in paper procurement. Specifically, submissions and witnesses contended that procurement-connected policies relevant to environmental sustainability were not being taken into account in the assessment of value for money by government agencies.

6.20 As discussed in Chapter 5, there are 24 procurement-connected policies. Finance's procurement guide, *Buying for the Australian Government*, states 'officials are responsible for informing themselves of the policies that apply to a specific procurement'.²²

6.21 The two most relevant to the procurement of paper 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).²³

6.22 The National Waste Policy sets out a policy aimed at producing less waste for disposal, and managing waste as a resource to deliver economic, environmental and social benefits.²⁴ In particular, the policy contains a strategy to promote and embed sustainable procurement principles in government procurement practice.

6.23 The ICT Plan requires agencies to adopt mandatory environmental standards for information and communication technology (ICT) acquisitions. Regarding paper, it stipulates government agencies must reduce average annual paper use to nine reams per employee by July 2015,²⁵ which, according to Finance, is on track to be fulfilled in the 2013-14 financial year.²⁶

21 CFMEU, *Submission 39*, p. 22; see also Mr James Evans, CFMEU, *Committee Hansard*, 28 April 2014, pp 16-17.

22 See Department of Finance, *Buying for the Australian Government*, at www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/policy-framework/procurement-policies/principles.html (accessed 11 June 2014).

23 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).

24 *National waste policy: Less waste, more resources* (November 2009), p. 6.

25 *Australian Government ICT Sustainability Plan 2010-2015*, p. 4.

26 Department of Finance, *Submission 12, supplementary submission 1*, p. 5.

6.24 Moreover, the ICT Plan states this paper must:

...have a minimum post-consumer recycled content of 50 per cent by July 2011, with progression to 100 per cent post-consumer recycled content by July 2015.²⁷

6.25 Additional requirements stipulate that non-recycled paper content should come from wood that complies with Forest Stewardship Council (FSC) certified sources, Program for the Endorsement of Forest Certification (PEFC) schemes or from sustainably managed forests.²⁸

Application of procurement-connected policies

6.26 In its submission, the AFPA referred to the volume of imported copy paper being used by Commonwealth agencies:

Overall, Australian Government agencies in 2011-12 entered into contracts for procurement of goods valued at \$9.8 billion with Australian suppliers and \$8.8 billion with overseas suppliers (Department of Finance and Deregulation, 2013), producing a ratio of 0.9 imported goods to every domestically supplied good.

This implies that for copy paper, Australian Government agencies are procuring 25 per cent more imported goods for every domestic good than for the average of total goods sourced.²⁹

6.27 AFPA argued:

[S]uch an outcome reflects a failure of Australian Government agencies to fully implement the stated goal and aims of the Commonwealth Procurement Rules, particularly with respect to assessing 'value for money'³⁰ and environmental sustainability for paper products.

6.28 Mr Julian Mathers, General Manager External Affairs, Australian Paper, argued that in interpreting the environmental sustainability of goods and services to determine value for money in the CPRs, the application of the relevant procurement-connected policies should be considered:

We look for guidelines under the Commonwealth Procurement Rules regarding the types of things that should be taken into account in environment, and we find that in other policies—sustainable procurement policies, ICT guidelines and the rest of it. So yes, we say that there is a direct connection, as we see it, between the Commonwealth Procurement Rules and those other policies that guide how the procurement rules are to be implemented.³¹

27 *Australian Government ICT Sustainability Plan 2010-2015*, p. 15.

28 *Australian Government ICT Sustainability Plan 2010-2015*, p. 15.

29 *Submission 13*, p. 7.

30 *Submission 13*, p. 7.

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

6.29 At the first public hearing, Mr Michael Stephens, Manager Strategic Policy; Pulp and Paper, AFPA, told the committee that Commonwealth agencies generally considered sustainable procurement too narrowly. He suggested that most procurement officials thought they had fulfilled their obligations just by using the SOS panel arrangements to buy paper meeting ICT Plan recycled content requirements.³²

6.30 Mr Dunn agreed, saying that some agencies felt meeting the ICT guidelines was sufficient:

...the strong impression I get [from meetings with departments] is that they feel that their task, from a sustainability perspective, begins and ends with the ICT guidelines, which specify recycled paper, 50 per cent post-consumer. Any additional issues about, say, sustainability within that context are really not looked into any further.³³

6.31 Mr Mathers told the committee this kind of limited assessment did not consider the environmental benefits of using paper produced in Australia. He stated:

There is just a simple proposition here, I think, which is: you recycle product in Australia, you remove that product from landfill here and you get all the benefits of that here—the carbon emissions and other benefits of recycling. You bring it in from overseas and you do not get any of those benefits.³⁴

6.32 The environmental benefits were also emphasised by Mr Dunn:

Local recycled products reduce Australian landfill, but landfill increases every time a ream of recycled paper is imported from overseas.³⁵

6.33 Mr Dunn suggested that consideration should be given in cases where the government has provided funding to assist business to comply with relevant procurement-connected policies. For example Australian Paper's Maryvale paper mill was being redeveloped to comply with the ICT Plan recycling stipulations, with a \$9.5m co-investment by the government. Given government co-investment, and the environmental and economic benefits of the mill, Mr Dunn asked why the government was not more supportive of recycled paper produced in Australia.³⁶

6.34 Mr Dunn concluded:

It is vital that the government fully applies its own sustainability considerations as part of value-for-money procurement for copy paper across all agencies so that the benefits of initiatives like the Maryvale plant—which is a closed loop recycling solution, where we are taking full

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

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

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

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

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

responsibility for local wastepaper—can be more accurately assessed and valued.³⁷

Compliance with standards in procurement-connected policies

6.35 The committee heard assertions the sustainability of some imported paper sold under the SOS panel arrangements could not be guaranteed, as regulatory frameworks in Australia were more stringent than in other countries.³⁸ At the first public hearing, Mr Hampton of AFPA informed the committee that his organisation found 'time and time again that standards that are applied rigorously in Australia are pretty much \$10 stamps that you can buy in a market in other countries'.³⁹ Australian Paper gave the example that a basic term like 'recycled content' was not defined consistently internationally, and imported products could contain far less recycled content than Australian equivalents.⁴⁰

6.36 The Department of Finance in its supplementary submission advised that the SOS panel included all pertinent government environmental legislation and policies, such as the ICT Plan. Therefore:

Agencies are able to purchase any copy paper product from the SOS arrangement knowing it is compliant with...the ICT Sustainability Plan.⁴¹

Lack of tools to consider sustainability issues

6.37 The National Waste Policy provides that:

Guidance on sustainable procurement such as standard specifications and model contract clauses are available to procurement officials within four years.⁴²

6.38 That guidance is the Sustainable Procurement Guide, which was released in 2013.⁴³ Mr Michael Stephens, of AFPA, described the Sustainable Procurement Guide as 'very generic, not very specific and not very practical in terms of interpretation'.⁴⁴

6.39 Mr Ross Hampton, Chief Executive Officer of AFPA, stated there was a lack of tools available for procurement areas to consider sustainability issues, which also affected private sector businesses that wanted to understand government procurement decisions:

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

38 Australian Paper, *Submission 17*, p. 4.

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

40 Mr Craig Dunn, Australian Paper, *Committee Hansard*, 21 March 2014, p. 43.

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

42 *National waste policy: Less waste, more resources* (November 2009), p. 9.

43 See Department of the Environment, *Sustainable procurement guide*, 2013, available at: www.environment.gov.au/resource/sustainable-procurement-guide (accessed 5 June 2014).

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

AFPA believes there is a lack of robust risk assessment tools and due diligence for the adequate consideration of sustainability issues. This can have a direct impact on the way in which tenders are specified and considered, which can also have a detrimental impact on domestic suppliers.⁴⁵

6.40 Mr Edwards, of the Department of the Environment, provided the following information on the Sustainable Procurement Guide:

The sustainable procurement guideline is simply a guide for procurement officers. It is designed to help them understand the concept of sustainable procurement. It does not require sustainable procurement, but it helps them understand the value-for-money proposition in procurement. So the role of that document is guidance; it is not designed to provide detailed risk, to the level suggested, around sustainable procurement.⁴⁶

[It] it is fair to say [the Sustainable Procurement Guide is] not prescriptive. Sustainable procurement is very much in its infant days, and the first step in that process was just helping to understand the concept. That guideline goes a little bit further, which is to help them understand how you might consider sustainable procurement principles as part of a general procurement process. So it is very much a document to aid them to understand that and start navigating those concepts.⁴⁷

Conclusion

6.41 As detailed in both Chapters 5 and 6 of this report, this case study on paper procurement has drawn out the lack of clarity about the application of procurement-connected policies. It shows the responsible departments do not appear to have a clear understanding of their role in monitoring the application of procurement-connected policies and there is a lack of and whole-of-government reporting on the application of these policies.

6.42 The committee has made a number of recommendations throughout this report which, it believes, will address the issues detailed in this chapter. In relation to determining value of money, the committee has recommended that the ANAO look specifically at the application of the explanation for assessing non-financial factors in the revised CPRs. This will determine whether the revised guidance in the CPRs is clear and sufficient. The committee also recommended that the ANAO look at the application of procurement-connected policies. This will provide a clear baseline for the performance of agencies and determine whether any further specific training and guidance is required. The inclusion of reporting on procurement-connected policies in agencies' annual reports will ensure lead agencies do more than just develop and publish policies but also take an active role in monitoring and compliance. The recommended audit of the procurement competencies of agencies will also ensure appropriate targeting of education and information. To address the concerns regarding

45 *Committee Hansard*, 21 March 2015, p. 34.

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

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

the failure of imported goods to meet Australian standards, the committee has recommended Finance provide training for agencies so they are aware that tender documents can include a requirement that tenderers adhere to relevant standards. Finally, the recommendation for an independent complaints mechanism will ensure continuous improvement in procurement processes.

Senator Kate Lundy

Chair

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).¹

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.²

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.³

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

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.⁴

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.⁵ 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.⁶

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

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.

business in Australia, not to provide artificial protections from competition.⁷

...

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.⁸

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]⁹

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

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.¹⁰

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.¹¹

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

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.¹²

1.18 Finance acknowledged the technical difficulty in determining whether goods or content are sourced from 'Australian' suppliers.¹³ 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.¹⁴

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

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.¹⁵

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.¹⁶

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.

...

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.¹⁷

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.¹⁸

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

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).¹⁹

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'.²⁰ 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.²¹ While saying there are very good examples of procurement

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.

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

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.²³

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.²⁴

1.40 During the hearing concerns were raised that the process of making and application in a procurement exercise is overcomplicated and lengthy;²⁵ 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'.²⁶ 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.²⁷

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.²⁸

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.²⁹

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

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.

somebody could complain. They would have to complain in the international forum...

But my view about that is that if the Australian government wants to set a high standard then it is perfectly free to do so. The chance of a challenge occurring under the processes of the free trade agreement is extremely low, I would think. Secondly, I think Australia could stand up and say, 'This is legitimate standard setting. It is not discriminating against foreign companies. All they have to do is meet the standard.'³⁰

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.³¹

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.³²

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

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.³³

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.³⁴

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.³⁵

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*

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

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

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

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

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.³⁸

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.³⁹

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.

36 See Department of Finance, *Selling to the Australian Government*, at 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.⁴⁰

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.⁴¹ Principles agencies are required to apply when dealing with tenderers' complaints are available on the Finance website.⁴² 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.⁴³

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.⁴⁴

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 (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.⁴⁵

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.⁴⁶ 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.⁴⁷

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

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

46 See Competition Policy Review website, available at: 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'⁴⁸ 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 submission⁴⁹ as well as in submissions from the Department of Human Services,⁵⁰ IP Australia,⁵¹ Complete Office Supplies,⁵² and Office Max.⁵³ Government senators note the effectiveness of a whole of government arrangement with the Stationery and Office Supplies (SOS) Panel. Finance advised:

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.⁵⁴

- 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.⁵⁵

- 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.⁵⁶

- 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.⁵⁷

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.

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:

| | |
|-------------------------|---|
| Recommendation 1 | 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 |
| Recommendation 2 | Consider the recommendation unnecessary |
| Recommendation 3 | Consider the recommendation unnecessary |
| Recommendation 4 | Do not support |

| | |
|--------------------------|---|
| Recommendation 5 | Do not support |
| Recommendation 6 | Support |
| Recommendation 7 | Consider the recommendation unnecessary |
| Recommendation 8 | Support |
| Recommendation 9 | Support |
| Recommendation 10 | 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 |
| Recommendation 11 | Do not support |
| Recommendation 12 | Unable to support, pending the outcome of the independent competition policy review |
| Recommendation 13 | Unable to support, pending outcome of evaluation of industry participation policies and programs |
| Recommendation 14 | Unable to support, pending outcome of evaluation of industry participation policies and programs |
| Recommendation 15 | Support, noting however that this assessment need not necessarily be conducted through the ANAO. |

Senator Cory Bernardi
Deputy Chair

Senator Dean Smith
Senator for WA

Senator Bridget McKenzie
Senator for Victoria

ADDITIONAL COMMENTS

BY SENATORS JOHN MADIGAN AND NICK XENOPHON

1.1 We welcome the Senate Finance and Public Administration References Committee Chair's report into Commonwealth procurement procedures.

1.2 We moved to have this inquiry because of the widespread disquiet from around Australia at how \$41 billion worth of Commonwealth procurement is conducted, with the many negative outcomes for Australian manufacturers that the procurement system produces.

1.3 The current state of play in respect of Commonwealth procurement is unacceptable and cannot be allowed to continue. There has been a lack of political will to-date to tackle this issue.

1.4 A key reform in Commonwealth procurement would be to consider the social and economic benefits, including the multiplier effects, of locally sourced procurement.

1.5 Just in this past week it has come to public attention that the Defence Materiel Organisation (DMO) rejected a tender for up to 100,000 pairs of work boots over five years from Rossi Boots of Adelaide. In the de-brief process the DMO were up front enough to tell Rossi executives that the decision was made on the basis of cost and awarded to an importer.

1.6 The Rossi case is emblematic of much of what is wrong with Commonwealth procurement and encapsulates much of the evidence heard by the Committee.

1.7 As Rossi Boots Chief Executive Neville Hayward told the media, all he wanted was a fair go, and it appears that the procurement system is almost designed to make Australian businesses and manufacturers disadvantaged in comparison to overseas suppliers.

1.8 Rossi's price was understood to be marginally higher than the winning tenderer, but not overly so.¹ But Rossi offered additional 'whole-of-life' benefits to the Commonwealth and to Australia due a range of factors, including durability, whole-of-life support, employment of Australians supporting Australian families and the economy, tax payments by the company and employees, compliance benefits of the company meeting Australian standards for employment conditions, the environment, OH&S and industrial relations.

1.9 We draw attention to Request for Tender DPS 13016 seeking manufacture and supply of Australian flags to be flown above Parliament House. We specifically draw attention to the long list of requirements Australian tenderers had to meet

1 Defence Minister Johnston, 14 July 2014, *Senate Hansard*: "I am concerned that the amount of money involved is such that this...might well have gone to an Australian manufacturer."

covering adherence to such matters as the Racial Discrimination Act 1975, the Sex Discrimination Act 1984, the Disability Discrimination Act 1992, Part 4 of the Charter of the United Nations Act 1945 and list of other Acts. No such requirement is placed on tenderers applying from offshore.

1.10 This is frankly both absurd and unfair. The benefits to Australia of compliance with these requirements must be quantified within the procurement process so that Australian suppliers are not disadvantaged by simply following the law.

1.11 Any decision not to engage an Australian supplier should also take into consideration the opportunity costs by way of reduced employment in Australia, the resulting social welfare payments and burden on the community that unemployment causes.

1.12 While these costs and benefits are known and understood by many, both inside and outside government, they are not taken into active consideration by the Government in the procurement process.

1.13 It was clear from the evidence before the Committee that there is currently no practice of taking into account wider cost and benefit advantages of engaging Australian suppliers in procurement decisions.

1.14 Although whole-of-life costs were acknowledged by the Australian National Audit Office (ANAO) as an active consideration under the Commonwealth Procurement Rules (CPRs), the Committee asked if there was any “standardised way to assess value for money over the whole life of a procurement”. The ANAO representative could not provide one, saying:

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.²

1.15 The CPRs address “non-financial costs and benefits” through the concept of “value for money” under CPR 4.5, and say that they may include, but not be limited to:

- (a) Fitness for purpose
- (b) A potential supplier’s experience and performance history
- (c) Flexibility (including innovation and adaptability over the lifecycle of the procurement)
- (d) Environmental sustainability (such as energy efficiency and environmental impact)
- (e) Whole-of-life costs

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

1.16 Whole-of-life costs are currently ill-defined and should include the social and economic benefits of locally sourced procurement.

1.17 The Royal United Services Institute of the UK found in a 2012 report³ found that over a third of defence procurement funds spent locally found its way back to the government in taxes. There should be an independent analysis of the extent to which government procurement funds spent locally are returned to the Commonwealth and states.

1.18 Among others witnesses, Australian Paper highlighted that, while the CPRs stated these wider factors should be considered alongside price, they were not being applied:

...the concept of value for money is being applied too narrowly within [FMA Act] Government agencies. As the CPRs state, value for money should encompass a range of considerations including environmental.⁴

1.19 The CPRs don't go anywhere near far enough in this area. As a result the Government pays 'lip service' to considering wider costs and benefits. That the CPRs merely provide an open ended list of possible factors that may, or may not, be taken into account, is unacceptable.

1.20 It is unsurprising that government agencies and departments do not take whole-of-life factors seriously, as they are not adequately spelt out nor a methodology set out as to how to quantify them. As a result, there appears to be no serious assessment of "through life" factors in procurement decisions.

1.21 We strongly support Recommendation 7 in the Committee's majority report:

The committee recommends that the government develop a methodology to quantify the factors used to assess whole-of-life costs.

1.22 However, that methodology should include the social and economic benefits of locally sourced procurement.

RECOMMENDATION 1: That the Government urgently redraw the CPRs specifying a range of 'whole-of-life' factors that must be addressed in a procurement, including the social and economic benefits of locally sourced procurement.

RECOMMENDATION 2: That the Government, as an appendix to the CPRs, specify a methodology as to how a procurer must quantify or 'score' these 'whole-of-life' factors in procurement decisions and how they are to be assessed in comparison to quality and cost measures as part of the overall procurement decision.

RECOMMENDATION 3: That the Government consider the adoption or integration into the methodology from recommendation 2 a 'holistic, whole of

3 Trevor Taylor and John Louth, Royal United Services Institute, 20 January 2012:
<https://www.rusi.org/news/ref:N4F194BF09B370/#.U7Sy6PnEJSh>

4 Australian Paper, *Submission 17*, p. 4.

life, cost benefit analysis'. This form of analysis is used commonly in the mining, resources, energy and infrastructure sectors.

1.23 We disagree strongly with the claim by the Department of Finance that 82.4 per cent of goods 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” because they had Australian Business Numbers (ABNs). In no way is this indicative of the country of origin of either products or services. An Australian ABN number is not indicative of country of manufacture.

RECOMMENDATION 4: That the Department of Finance introduce a simple check with suppliers to track the true number and percentage of Australian suppliers to government.

1.24 The Committee heard evidence from the Department of Finance, in response to claims that overseas suppliers are not held to the same standards as Australian suppliers:

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.⁵

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

[A] procuring agency can apply the qualifications or the requirements that they might have for a particular procurement of any reasonable amount. So they might say not that you have to have an Australian certification because that may well discriminate against an overseas supplier, but it would be quite legitimate to say you should have an Australian certification or the equivalent or prove the equivalent. That would be reasonable in those circumstances and meet our Commonwealth procurement requirements and of course free trade agreement requirements.⁶

1.26 The comments by Finance officials make it clear that, as many witnesses to the inquiry said, Australian product standards are not, as a rule, applied to products considered for procurement from overseas.

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

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

1.27 The comments also make clear that there appears to be either a knowledge gap with government procurement officials who may not be aware they have the power to apply Australian product standards to overseas suppliers, or simply a disregard of that power.

1.28 We support Recommendation 3 from the Committee's majority report:

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

RECOMMENDATION 5: That the Government make it a rule that overseas suppliers must comply with Australian product standards without exception.

1.29 The committee heard problems in relation to the Government accepting on face value the claims of quality, workplace safety, human rights and environmental standards, made by potential overseas suppliers.

1.30 For example, an Australia's Forest Products Association representative told the inquiry:

(The overseas supplier) are masquerading as 50 per cent recycled and presenting something else. It is just that 50 per cent recycled does not mean the same thing all over the world.... (but) hat is as far as our departments are asked to look. That is the point. They have a list and they click on a box that says that it is 50 per cent recycled, they tick it and they move on and then they are into lowest price.⁷

RECOMMENDATION 6: That potential overseas suppliers are required to bear a reverse onus of proof, making them responsible to prove to Australian procurement officials that the claims made about their product are correct.

RECOMMENDATION 7: That the Government apply a comprehensive and transparent system of efficacy testing and quality assurance to verify the claims made by overseas suppliers about their products' quality, environmental sustainability and fitness for purpose.

1.31 We support recommendation 11 from the Committee's majority report:

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

1.32 We support recommendation 12 from the Committee's majority report:

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.

7 Committee Hansard, 21 March 2014, p. 43.

1.33 University of Adelaide Associate Professor John Spoehr, also the Executive Director of the Australian Workplace Innovation and Social Research Centre (WISeR) is an expert in integrated economic, industry and urban research and practice.

1.34 Professor Spoehr believes Australia is among the worst performing developed countries in recognising and harnessing the benefits of government procurement for the local economy and wider community.

1.35 If Australia is to approach world's best practice Professor Spoehr believes, and we agree with him, that a longer term inquiry must be launched at the federal level by an appropriately qualified person to examine the challenges and opportunities at stake in this area.

1.36 The "Smart Procurement" agenda offers much for governments which, as this inquiry showed, have much room for improvement towards maximising Australian industry involvement.

1.37 Smart Procurement is a methodology which brings customer and supplier together in a longer term relationship which develops the solution to the procurement need over time, leading to a better informed customer (the government) and arriving at a much improved and cost effective outcome.

1.38 Smart Procurement also enables smaller firms to work together to provide procurement solutions on a scale that they would not otherwise be able to.

1.39 Together with the Committee's majority report, I am deeply concerned at the discontinuation of the Enterprise Solutions Program (ESP), which improved access to government procurement by Australian small and medium sized enterprises (SMEs) and encourage government departments to actively consider Australian content for procurement.

1.40 A program similar to ESP, called Small Business Innovation Research (SBIR), is active in the United States and provides crucial early stage capital for local innovation – a market that is undeveloped in Australia – and the process results in government procurers becoming educated buyers.

1.41 Programs like ESP fit with the Smart Procurement agenda and are where Australian procurement needs to go. Unfortunately the Government has seen fit to end the program.

1.42 We support the Committee's majority recommendation to ESP be recommenced.

RECOMMENDATION 8: That the Government appoint an Australian Industry Participation Advocate, and an office to support him or her, to work with Australian businesses to better position them for bidding for procurement work and with governments to constantly revise procurement rules so as to maximise Australian involvement.

NICK XENOPHON
Independent Senator for South Australia

Senator John Madigan
Democratic Labor Party
Senator for Victoria

Appendix 1

Submissions and Additional Information received by the Committee

Submissions

- 1 Dr Nick Seddon, College of Law, Australian National University
- 2 Dr Rosemary Laing, Department of the Senate
- 3 Department of Veterans' Affairs
- 4 Professionals Australia
- 5 Australian Federation of Disability Organisations
- 6 Australian Communications Consumer Action Network
- 7 Australian Information Industry Association
- 8 Dr Herbert Hermens
- 9 National Disability Services
- 10 Australian Industry Group
- 11 Department of Agriculture
- 12 Department of Finance
- 13 Australian Forest Products Association
- 14 Australian Council of Trade Unions
- 15 Name Withheld
- 16 Council of Textile and Fashion Industries of Australia LTD
- 17 Australian Paper
- 18 Australian Manufacturing Workers' Union
- 19 Australian Services Union and Finance Sector Union
- 20 Earth Worker
- 21 Mr Tim Conway
- 22 AUSVEG
- 23 Australian Furniture Association Ltd
- 24 Good Environmental Choice Australia
- 25 Mr Kent Grogan
- 26 Furniture Cabinets Joinery Alliance Ltd
- 27 Australian Made Campaign Limited

- 28 Ethical Clothing Australia
- 29 Emantra
- 30 Transport Workers' Union of Australia
- 31 Australian National Audit Office
- 32 Committee for Gippsland Inc
- 33 Mr Darby Johns, Albox Australia Pty Ltd
- 34 South East Melbourne Manufacturers Alliance
- 35 City of Greater Dandenong
- 36 Department of Industry
- 37 Mr Tony Butler
- 38 Innovation Australia
- 39 Constructing, Forestry, Mining and Energy Union
- 40 Department of Human Services
- 41 IP Australia
- 42 Complete Office Supplies
- 43 Department of Defence
- 44 The Australian Companies Institute Limited (AUSBUY)
- 45 SPC Ardmona
- 46 OfficeMax

Tabled Documents

- 1 Australian Industry Group, Opening statement, tabled at public hearing, 21 March 2014
- 2 Department of Finance, Opening statement, tabled at public hearing, 28 April 2014

Answers to Questions on Notice

- 1 Answer to Question on Notice, Australian Information Industry Association, 21 March 2014, received 25 March 2014
- 2 Answer to Question on Notice, Department of Industry, 21 March 2014, received 1 April 2014
- 3 Answer to Question on Notice, The Australian Companies Institute Limited (AUSBUY), 21 March 2014, received 1 April 2014
- 4 Answer to Question on Notice, Department of Finance, 21 March 2014, received 1 April 2014

-
- 5 Answer to Question on Notice, Australian Information Industry Association, 21 March 2014, received 2 April 2014
 - 6 Answer to Question on Notice, Mr Tony Butler, 21 March 2014, received 8 April 2014
 - 7 Answer to Question on Notice, Australian Forest Products Association, 21 March 2014, received 10 April 2014
 - 8 Answer to Question on Notice, Australian Paper, 21 March 2014, received 10 April 2014
 - 9 Answer to Question on Notice, Australian National Audit Office, 21 March 2014, received 16 April 2014
 - 10 Answer to Question on Notice, Dr Nick Seddon, 28 April 2014, received 2 May 2014
 - 11 Answer to Question on Notice, Mr Tony Butler, 28 April 2014, received 5 May 2014
 - 12 Answer to Question on Notice, Mr Tony Butler, 28 April 2014, received 7 May 2014
 - 13 Answer to Question on Notice, AUSVEG, 21 March 2014, received 14 May 2014
 - 14 Answer to Question on Notice, Department of Finance, 28 April 2014, received 16 May 2014
 - 15 Answer to Question on Notice, Construction, Forestry, Mining and Energy Union, 28 April 2014, received 16 May 2014
 - 16 Answer to Question on Notice, Department of Infrastructure and Regional Development, 21 March 2014, received 2 June 2014
 - 17 Answer to Question on Notice, Department of Environment, 28 April 2014, received 30 May 2014

Additional Information

- 1 Australian Forest Products Association, Additional information, received 21 March 2014
- 2 Department of Finance, Additional information, received 21 March 2014
- 3 Australian Paper, Additional information, received 10 April 2014
- 4 Department of Environment, Additional information relating to the public hearing on 28 April 2014, received 8 May 2014

Appendix 2

Public Hearings

Friday, 21 March 2014

Senate Committee Room 2S1

Parliament House, Canberra

Witnesses

The Australian Companies Institute Limited (AUSBUY)

Ms Lynne Wilkinson, Chief Executive Officer

Mr Tony Butler

Australian National Audit Office

Mr Steve Chapman, Deputy Auditor-General

Ms Edel Kairouz, Executive Director

Ms Tracey Martin, Senior Director

Australian Information Industry Association

Ms Suzanne Campbell, Chief Executive Officer

Ms Suzanne Roche, General Manager Policy and Government Relations

Australian Industry Group

Mr John O'Callaghan, Executive Director, Australian Industry Group
Defence Council

Australian Forest Products Association

Mr Ross Hampton, Chief Executive Officer

Mr Michael Stephens, Manager, Pulp and Paper

Australian Paper

Mr Julian Mathers, General Manager, Packaging, Procurement & External Relations

Mr Craig Dunn, Marketing Manager, Office Paper

Australian Manufacturing Workers' Union

Mr Tom Skladzien, National Economic and Industry Adviser

AUSVEG

Mr John Brent, Member, AUSVEG Board of Directors

Mr William Churchill, Communications and Public Affairs Manager

Department of Finance

Ms Jan Mason, Deputy Secretary, Business, Procurement and Asset Management

Mr John Sheridan, First Assistant Secretary, Technology and Procurement Division, Business, Procurement and Asset Management

Ms Yvette Sims, Assistant Secretary, Procurement Policy Branch

Department of Industry

Ms Sue Weston, Deputy Secretary

Mr Michael Green, General Manager, Industry Executive

Mr Ken Pettifer, Division Head, Innovation Division

Monday, 28 April 2014

Senate Committee Room 2S3

Parliament House, Canberra

Witnesses

Dr Nick Seddon, Adjunct Professor

Mr Tony Butler

Construction, Forestry, Mining and Energy Union

Mr Jack Evans, Secretary, Nowra Sub-Branche, Pulp and Paper Workers District, CFMEU, Forestry and Furnishing Products Division

Mr Travis Wacey, Policy Research Officer

Canberra Business Council

Ms Michelle Melbourne, Chair

Spear of Fame

Mr Umit Erturk, Manager

Carroll and Richardson

Mr Wayne Gregory, Managing Director

Department of Environment

Mr Bruce Edwards, Assistant Secretary, Waste Policy Branch, Environment Quality Division

Mr Al Blake, Assistant Secretary, Information Technology

Department of Finance

Ms Jan Mason, Deputy Secretary, Business, Procurement and Asset Management

Mr John Sheridan, First Assistant Secretary, Technology and Procurement Division, Business, Procurement and Asset Management

Ms Yvette Sims, Assistant Secretary, Procurement Policy Branch

Department of Industry

Mr Michael Green, General Manager, Industry Executive

Mr Ken Pettifer, Division Head, Innovation Division

Department of the Prime Minister and Cabinet

Mr Peter Rush, Assistant Secretary, Honours, Symbols and Territories
Branch, Government Division

Appendix 3

Defence Exempt Procurements¹

Paragraph 2.6 of the CPRs permits the Chief Executive of an agency to determine that a measure is necessary for, among other things, the protection of ‘essential security’ interests. The Secretary and CEO DMO have determined the procurement of the following goods or services to be categorised as Defence Exempt Procurements under the measure:

Goods

The procurement of goods that fall within the following US Federal Supply Codes (FSC):

- FSC 10 Weapons;
- FSC 12 Fire Control Equipment;
- FSC 13 Ammunition and Explosives;
- FSC 14 Guided Missiles;
- FSC 15 Aircraft and Airframe Structural Components;
- FSC 16 Aircraft Components and Accessories;
- FSC 17 Aircraft Launching, Landing, and Ground Handling Equipment;
- FSC 18 Space Vehicles;
- FSC 19 Ships, Small Craft, Pontoons and Floating Docks;
- FSC 20 Ships and Marine Equipment;
- FSC 23 Ground Effect Vehicles, Motor Vehicles, Trailers and Cycles;
- FSC 28 Engines, Turbines, and Components;
- FSC 29 Engine Accessories;
- FSC 31 Bearings;
- FSC 46 Water Purification and Sewage Treatment Equipment;
- FSC 48 Valves;
- FSC 49 Maintenance and Repair Shop Equipment;
- FSC 54 Prefabricated Structures and Scaffolding;
- FSC 58 Communication, Detection, and Coherent Radiation Equipment;
- FSC 59 Electrical and Electronic Equipment Components;
- FSC 60 Fibre Optics Materials, Components, Assemblies, and Accessories;

1 Defence Procurement Policy Manual (DPPM) February 2014 Edition, pp 1.2-1-1.2-2.

- FSC 61 Electric Wire, and Power and Distribution Equipment;
- FSC 63 Alarm, Signal and Security Detection Systems;
- FSC 66 Instruments and Laboratory Equipment; and
- Specialty Metals.

Services

The procurement of the following kinds of services:

- design, development, integration, test, evaluation, maintenance, repair, modification, rebuilding and installation of military systems and equipment;
- operation of Government-owned Facilities;
- Space services; and
- services in support of military forces overseas.

Appendix 4

Procurement-Connected Policies¹

| Procurement-Connected Policy | Policy Agency responsible | Year initiated | Suppliers affected by the policy | | | Threshold PCP Applies From \$million |
|--|-----------------------------------|----------------|----------------------------------|------------|--------------|--------------------------------------|
| | | | Small (<20) | SME (<200) | Large (>200) | |
| Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort | Dept of Finance | 2003 | X | X | X | |
| Australian Government Foreign Exchange Risk Management Guidelines and Finance Circular | Dept of Finance | 2006 | X | X | X | |
| Procurement On-Time Payment Policy for Small Business | Dept of Finance | 2012 | X | | | Contracts up to \$1 |
| Limited Liability in Information and Communications Technology Contracts | Dept of Finance | 2006 | X | X | X | |
| Coordinated Procurement | Dept of Finance | 2008 | X | X | X | |
| Competitive Neutrality Guidelines for Managers | Dept of the Treasury | 2004 | X | X | X | |
| Commonwealth Fraud Control Guidelines | Attorney General's Dept | 2011 | X | X | X | |
| Legal Services Directions | Attorney General's Dept | 2005 | X | X | X | |
| Intellectual Property Principles for Australian Government Agencies | Attorney General's Dept | 2008 | X | X | X | |
| Protective Security Policy Framework | Attorney General's Dept | 2013 | X | X | X | |
| Trade Sanctions | Dept of Foreign Affairs and Trade | 2014 | X | X | X | |

1 Department of Finance, Answers to questions on notice, received 1 April 2014, pp 11-12.

| Australia Government Information, Communications and Information Systems Security Manual | Aust Signals Directorate Dept of Defence | 2005 | X | X | X | |
|--|---|----------------|----------------------------------|---|---|--------------------------------------|
| Procurement-Connected Policy | Policy Agency | Year initiated | Suppliers affected by the policy | | | Threshold PCP Applies From \$million |
| Commonwealth Disability Strategy | Dept of Social Services | 2010 | X | X | X | |
| Fair Work Principles* | Dept of Employment | 2010 | X | X | X | |
| Workplace Gender Equality Procurement Principles and UserGuide | Dept of Employment | 2013 | | X | X | |
| The National Code of Practice for Construction Industry Implementation Guidelines | Dept of Employment | 2013 | X | X | X | \$5 |
| National Packaging Covenant | Dept of the Environment | 2010 | X | X | X | |
| National Waste Policy | Dept of the Environment | 2009 | X | X | X | |
| Australian Government ICT Sustainability Plan | Dept of the Environment | 2010 | X | X | X | |
| Australian Industry Participation Plans for Government Procurement | Dept of Industry | 2010 | X | X | X | \$20 |
| Energy Efficiency in Government Operations | Dept of Industry | 2007 | X | X | X | |
| ICT SME Participation Procurement Policy | Dept of Industry | 2010 | X | X | X | \$20 |
| National Public Private Partnership Policy Framework and Guidelines | Dept of Infrastructure and Regional Australia | 2008 | X | X | X | \$50 |
| Indigenous Opportunities Policy | Dept of the Prime Minister and Cabinet | 2011 | X | X | X | \$5 |

*Note: On Repeal Day, 19 March 2014, Minister Abetz announced the revocation of the Fair Work Principles with effect from 1 July 2014.

