

CHAPTER 2

Issues

2.1 This chapter examines the two main issues raised with the committee in relation to the Bill: the use of Australian materials and Commonwealth procurement requirements.

Manufacturing and materials

2.2 Evidence from organisations involved in the flag industry indicated support for the intent of the Bill but raised concerns about the restrictions that would be imposed in relation to materials used in the manufacture of flags for Commonwealth procurement.

2.3 The first element of the proposed amendment in the Bill, that is, the requirement that all Australian flags flown, used or supplied by the Commonwealth are only manufactured in Australia was generally supported by the flag industry.¹ There was, however, no support for the second element requiring that these flags must be manufactured from Australian materials, which the committee was advised are now not generally available.

2.4 The committee received evidence that there are two types of flag manufacturing processes: sewn and printed. Both production processes use fabric and components which are not made in Australia. It was further explained that it would be unlikely to be commercially viable for the investment in commissioning of plant and machinery to accommodate the manufacturing requirements of 100 per cent Australian content under the proposed amendment, as the demand would be small.²

2.5 Textile wholesaler and supplier, Charles Parsons and Co Pty Ltd summarised this issue in its submission:

Regardless of whether flags for the Australian Government and its various departments are printed or fully sewn, and both applications have their place, a passing of both components of this amendment will see costs treble at a minimum. This will only be prevalent if there is a textile based entity prepared to recommission or reinvest in the machinery to produce the requirement item. As the government contracts would be the only avenue for the produced items, this level of investment seems unlikely.

The actual manufacture of the finished flags being kept in Australia is a great initiative designed to support the limited number of companies and their staff producing flags in Australia, however has the potential to be

1 See for example, Carroll and Richardson Flagworld Pty Ltd, *Submission 1*, p. 2; Charles Parsons and Co Pty Ltd, *Submission 4*, p. 1; Mr Umit Erturk, Manager, Spear of Fame, *References Committee Hansard*, 28 April 2014, pp 27-31.

2 See for example, Carroll and Richardson Flagworld Pty Ltd, *Submission 1*, pp 1-2; Flags of All Nations, *Submission 3*, pp 1-2; Charles Parsons and Co Pty Ltd, *Submission 4*, p. 1; Australian Flag Company, *Submission 5*, pp 1-2; Bainbridge International Pty Ltd, *Submission 6*, p. 1.

undone by the requirement that all the consumables, textiles, threads, tapes etc also be manufactured here.³

2.6 Bainbridge International Pty Ltd reinforced this advice in its submission stating that:

While possible, the recommissioning of plant and machinery to accommodate the amendment would be commercially marginal at best. The market is quite small and the percentage of flags sold into the Commonwealth is much smaller still.

The extra investment needed by the entire supply chain especially in the sewn flags market because of its manufacturing profile would be substantial – manufacturing requires huge production runs of multiple colours.

Small designers and sewing manufacturers would be forced to increase investment to accommodate manufacturers “make to order” practices and minimum production runs.

To shackle the industry with a huge investment to satisfy a small percentage of the market to achieve 100% Australian content would be problematical at best.⁴

2.7 However, Bainbridge International Pty Ltd indicated that the Australian content of finished flags, particularly sewn flags, is still substantial because of the design and labour input in the product.⁵

2.8 This was supported by Carroll and Richardson Flagworld Pty Ltd when it noted that all their flags, either sewn or printed, meet the requirements of the Australian Made Campaign:

...they are substantially transformed here in Australian manufacturing plants using to the maximum extent possible locally sourced materials where these are available.⁶

Procurement issues

2.9 The committee heard evidence that there is no government policy requiring that Australian made national flags fly over the Parliament, government buildings, or defence establishments; or are used on ceremonial occasions. Mr Peter Rush, Assistant Secretary, Honours, Symbols and Territories Branch, Department of the Prime Minister and Cabinet, confirmed in evidence before the references committee that the origin of the Australian flags purchased by the Commonwealth is subject to the Commonwealth procurement policies.⁷

3 *Submission 4*, p. 1.

4 *Submission 6*, p. 1.

5 *Submission 6*, p. 1.

6 *Submission 1*, p. 1.

7 *References Committee Hansard*, 28 April 2014, p. 48.

2.10 The Department of Finance explained in its submission that the Bill needed to be considered in the context of the CPRs and Australia's international free trade obligations.⁸ As noted in Chapter 1, Commonwealth procurement is undertaken with an aim to achieve value for money as a core element. This involves encouraging competition and does not allow for discrimination on the basis of location:

The CPRs incorporates Australia's government procurement commitments from international agreements...These agreements place obligation on the Commonwealth Government to provide access for the suppliers, goods and services of the other countries to our procurement market.⁹

2.11 As the Bill seeks to discriminate between suppliers on the basis of their location and origin of their goods, the Department of Finance confirmed that it did not consider that the Commonwealth procurement framework could accommodate the requirements of the Bill as currently drafted.¹⁰

Current engagement of Australian suppliers and SMEs under the CPRs

2.12 The Department of Finance (Finance) submission to the references committee inquiry argued that under the CPRs, SMEs and Australian suppliers are well represented in Commonwealth procurement. Using data available on the AusTender database, Finance presented details of SME engagement for 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;
- 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.¹¹

2.13 Finance noted the limitations on extracting data from AusTender on the engagement of Australian suppliers:

AusTender data includes only two identifiers that can be used to determine whether goods or services are sourced from Australian suppliers, the ABN of each supplier (if available) and their business address.

...

Importantly...in-depth analysis of 'Australian made or delivered' content is technically very difficult. In order to increase the accuracy of Australian

8 *Submission 2*, pp 1-2.

9 Department of Finance, *Submission 2*, pp 1-2.

10 References committee inquiry, answers to questions on notice from the hearing on 28 April 2014, provided by Department of Finance on 16 May 2014, p. 3.

11 References committee inquiry, Department of Finance, *Submission 12*, pp 4-5.

supplied statistics we would need to impose additional onerous reporting requirements on suppliers in relation to the content of the goods and services being supplied under each contract. This would introduce a significant amount of red tape for suppliers. Further, a consensus definition of what is 'Australian' is also difficult to achieve as, for example, goods may be made up of components from various sources.¹²

2.14 Nonetheless, Finance also presented data more broadly on the likely level of engagement with Australian suppliers in 2012–13:

- 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;
- 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.¹³

2.15 Noting the limits outlined above in regard to the information available on AusTender, Finance also provided more specific data on flag procurement by the Australian government:

Within the Australian Government, the procurement of flags is undertaken by individual agencies to meet their operational requirements. Agencies publish contract notices for procurements of flags valued at or above \$10,000 on AusTender (www.tenders.gov.au). Agencies reported 104 contracts on AusTender with the keyword 'flag' from 1 July 2008 to 24 April 2014. These contracts are not specific to the Australian flag and may relate to the procurement of other flags and related items.

The flag related contracts total approximately \$2.5 million. Around 60 of these contracts were reported on AusTender as being awarded following a Limited Tender, which involves the agency making a direct approach to one or a number of suppliers. The Department of Defence and Defence Material Organisation also reported 40 contracts as being awarded following an Open Tender.¹⁴

US government procurement favouring local suppliers

2.16 In considering the non-discriminatory procurement policies imposed on Australian agencies by international agreements, the committee questioned the Department of Finance about the ability of parties to favour local suppliers for certain procurement items. In particular, the committee sought clarification about selected pieces of US legislation which appear to allow, or require, US government agencies to discriminate in favour of US suppliers and sought advice on how this legislation operates without breaching the requirements of the AUSFTA.

12 References committee inquiry, answers to questions on notice from the hearing on 28 April 2014, provided by the Department of Finance on 16 May 2014, p. 4.

13 References committee inquiry, Department of Finance, *Submission 12*, p. 5.

14 References committee inquiry, answers to questions on notice from the hearing on 28 April 2014, provided by the Department of Finance on 16 May 2014, pp 3-4.

2.17 In relation to the *Buy American Act* of 1933, which is the principal domestic preference statute governing most procurement by the US federal government,¹⁵ the Department of Finance confirmed that:

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

Similarly, Australia cannot apply legislation or policies which preference local suppliers to procurements cover by AUSFTA (and other international agreements).¹⁶

2.18 The committee also raised the recent US legislative reform which requires that national flags purchased to fly over US military establishments be manufactured in the US from 100 per cent American content. The committee sought advice on why this approach was not in breach of the AUSFTA.¹⁷ This procurement reform is possible under what is known as the 'Berry Amendment', which governs US Department of Defense procurement only and requires defence procurement to source certain items domestically:

In order to protect the U.S. industrial base during periods of adversity and war, Congress passed domestic source restrictions as part of the 1941 Fifth Supplemental Department of Defense (DOD) Appropriations Act. These provisions later became known as the Berry Amendment. The Berry Amendment (Title 10 United States Code [U.S.C.] §2533a, Requirement to Buy Certain Articles from American Sources; Exceptions) contains a number of domestic source restrictions that prohibit DOD from acquiring food, clothing (including military uniforms), fabrics (including ballistic fibers), stainless steel, and hand or measuring tools that are not grown or produced in the United States. The Berry Amendment applies to DOD purchases only.¹⁸

2.19 In evidence to the references committee, the Department of Finance explained how US government procurement restrictions, such as those applying to the Department of Defense, in accordance with the Berry Amendment provisions, were consistent with the AUSFTA. The Department of Finance advised that the Government Procurement Chapter of the AUSFTA (including the non-discrimination requirement) is limited in application by exceptions or 'carve-outs' which are set out

15 *The Berry Amendment: Requiring Defense procurement to come from domestic services*, Congressional Research Service, 24 February 2014, p. 13.

16 References committee inquiry, answer to question on notice from hearing of 21 March 2014, received from the Department of Finance on 1 April 2014.

17 It was further noted in evidence to the committee from the Department of Finance that the flag requirement for the other US government agencies, under longer standing legislation, is the requirement for 50 per cent US content, *References committee Hansard*, 28 April 2014, p. 42.

18 *The Berry Amendment: Requiring Defense procurement to come from domestic services*, Congressional Research Service, 24 February 2014, Preface summary.

by jurisdiction. The Defense exclusions include Federal Supply Classification 83 which comprises:

Textiles, Leather, Furs, Apparel, Shoes, Tents, and Flags (all elements other than pins, needles, sewing kits, flagstaffs, flagpoles and flagstaff trucks).¹⁹

Consideration of 'national pride' in government procurement

2.20 The committee also received evidence which called for the treatment of the procurement of the Australian flag by the Commonwealth to be distinct from other items under the CPRs based on its significance as a symbol of the nation. The Carroll and Richardson Flagworld Pty Ltd submission elaborated on this point:

My prime concern at the current Commonwealth Procurement Procedures is that all purchases appear to be treated in the same way regardless of category, whether the purchase be for paper products or flags. I think that in the national interest the Government should follow the example set by just about every other Government around the world and source its Australian flags from local companies who make them in Australia (not local companies who import).²⁰

2.21 This approach, which seeks to distinguish procurement items by a category relating to 'national pride', was also endorsed by the Australian Made Campaign Limited submission to the references committee inquiry:

The procurement guidelines should also recognise the need to treat certain purchases as being in a special category of 'national pride'. This would include defence materiel as well as items used at official venues or ceremonial occasions where the context needs to reflect all things 'Australian'. Examples are:

- Australian flags, particularly those being used in an official or ceremonial context;
- equipment used at official venues, such as the furniture and crockery for Parliament House or the PM's residence;
- official gifts; and
- uniforms worn by our defence personnel.²¹

2.22 The Department of Finance informed the committee that this category of exemption is not possible under Australia's international trade obligations:

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 obligation.

19 References committee inquiry, answer to question on notice from hearing on 28 April 2014, provided by the Department of Finance on 16 May 2014.

20 Carroll and Richardson Flagworld, *Submission 1*, p. 2.

21 References Committee Inquiry, Australian Made Campaign Limited, *Submission 27*, p. 3.

Australia's free trade commitments prevent either party from discriminating against another party in favour of goods and services supplied by their own country or based on the origin of the good or service.²²

Committee view

2.23 While the committee recognises the importance of the Australian flag as a national symbol, it does not support the proposed amendments in the Bill to require that all Australia flags flown, used or supplied by the Commonwealth are only manufactured in Australia from Australian materials.

2.24 The committee notes the concerns raised about the Bill in regard to the requirement that flags must be manufactured with Australian made materials, which is currently not possible, and appears not to be a commercially viable proposition.

2.25 Importantly, the committee also notes the evidence that the Commonwealth procurement framework cannot accommodate the requirements of the Bill. The Bill imposes an obligation to favour goods on the basis of the location and origin, which is inconsistent with the CPRs and Australia's obligations in the AUSFTA.

2.26 The committee recognises that, while the CPRs do impose a requirement for non-discrimination in procurement processes, there is also a commitment in the CPRs for FMA Act agencies to source at least 10 per cent of procurement by value from SMEs.

2.27 The committee received persuasive evidence that SMEs and Australian suppliers are competitive in winning contracts under the current CPRs. The Department of Finance drew on the data available in AusTender to present the level of SMEs, and the likely level of Australian supplier engagement in the 2012-13 financial year. The data presented indicated that Australian suppliers are well represented in Commonwealth procurement.

2.28 The committee heard evidence that in relation to the engagement of an SME as a supplier under the CPRs, a government agency may be permitted to discriminate in favour of an SME. The committee would expect that most flag manufacturers in Australia would fall within the definition of an SME for the purpose of the CPRs, and therefore would be able to benefit from this interpretation of the SME provisions in the CPRs.

2.29 The committee notes the importance of the CPRs in not only incorporating relevant international obligations under FTAs, but also in providing a framework for agencies to achieve best practice processes when procuring goods and services using public money.

2.30 The committee also notes that the current arrangements have not prevented the procurement of Australian made national flags by the Department of Parliamentary Services for the current rotation of flags in use to fly above Parliament House.

22 References committee inquiry, Answers to questions on notice from the hearing on 21 March 2014, received from the Department of Finance on 1 April 2014.

Recommendation 1

2.31 The committee recommends that the Flags Amendment Bill 2014 not be passed.

Senator Cory Bernardi

Chair