

The Senate

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Finance and Public Administration  
Legislation Committee

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Flags Amendment Bill 2014

June 2014

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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)

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](mailto:fpa.sen@aph.gov.au)

Internet: [www.aph.gov.au/senate\\_fpa](http://www.aph.gov.au/senate_fpa)

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# **List of Recommendations**

## **Recommendation 1**

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





# CHAPTER 1

## Introduction

1.1 On 6 March 2014, Senator Nick Xenophon, also on behalf of Senator John Madigan, introduced into the Senate the Flags Amendment Bill 2014 (Bill).<sup>1</sup>

1.2 On 20 March 2014, on the recommendation of the Senate Selection of Bills Committee, the Senate referred the Bill to the Senate Finance and Public Administration Legislation Committee (committee) for inquiry and report by 16 June 2014.<sup>2</sup>

1.3 The Bill amends the *Flags Act 1953* to require that all Australian flags flown, used or supplied by the Commonwealth are only manufactured in Australia from Australian materials.

### Conduct of inquiry

1.4 Details of the committee's inquiry, including links to the Bill and associated documents, were placed on the committee's website at [www.aph.gov.au/senate\\_fpa](http://www.aph.gov.au/senate_fpa).

1.5 The committee directly contacted a number of relevant organisations to notify them of the inquiry and invite submissions by 17 April 2014. Six submissions were received by the committee and are listed at Appendix 1.

1.6 While the committee decided to prepare its report on the basis of submissions received and other available information, it was able to draw on relevant published information received by the Senate Finance and Public Administration References Committee (references committee) for its current inquiry into Commonwealth procurement procedures. In particular, the references committee, at its hearing on 28 April 2014, took evidence from two witnesses representing flag manufacturing organisations and also examined other witnesses with specific reference to this Bill.<sup>3</sup>

1.7 It is suggested that readers refer to the references committee report, to be tabled on 30 June 2014, for a broader examination of the issues around the Commonwealth procurement framework.

1.8 The committee thanks those who assisted by providing submissions to the inquiry and provided evidence to the references committee in its inquiry into Commonwealth procurement procedures.

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1 *Journals of the Senate*, No. 18, 6 March 2014, p. 583.

2 *Journals of the Senate*, No. 22, 20 March 2014, pp 663-664.

3 See

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Finance\\_and\\_Public\\_Administration/Commonwealth\\_procurement\\_procedures/Public\\_Hearings](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Commonwealth_procurement_procedures/Public_Hearings)

## Overview of Bill

### *Provisions of the Bill*

1.9 Item 3 of Schedule 1 of the Bill amends section 7 of the *Flags Act 1953* to insert new subsection 7(2) to require that the Commonwealth must only fly, use or supply a designated flag if the flag was manufactured in Australia from materials manufactured in Australia. This item also inserts new subsection 7(3) to define a 'designated flag' as referring to a flag or ensign referred to or appointed in the *Flags Act 1953*.

### *Statement of compatibility with human rights*

1.10 The Statement of Compatibility with Human Rights contained in the Explanatory Memorandum to the Bill states that the Bill does not engage any of the applicable rights or freedoms and is therefore compatible with human rights as it does not raise any human rights issues.<sup>4</sup>

### *Background*

1.11 In his second reading speech, Senator Xenophon referred to evidence provided to the committee during the Additional Estimates 2013-14 hearings by the Department of Parliamentary Services (DPS) concerning the manufacture of the flags which fly in rotation above Parliament House. The Secretary of DPS confirmed that there is no requirement for any tender process undertaken by DPS to specify country of origin, including the flag above Parliament House:

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.<sup>5</sup>

1.12 Although it was confirmed in evidence to the committee that the current rotation of Australian flags which fly above Parliament House are Australian made,<sup>6</sup> Senator Xenophon noted in the Senate that under the current Commonwealth procurement regime these flags are not required to be Australian made.<sup>7</sup>

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4 *Explanatory Memorandum*, p. 3.

5 Ms Carol Mills, Secretary, Department of Parliamentary Service, *Estimates Hansard*, 24 February 2014, p. 40.

6 Answer to Question on Notice no. 138, Additional Estimates 2013-14, Department of Parliamentary Services.

7 Senator Nick Xenophon, *Senate Hansard*, 6 March 2014, p. 1018.

1.13 In addition to raising the possibility of foreign made flags flying above Parliament House (or other Commonwealth buildings), concern for Australia's manufacturing sector was also put forward as a reason for introducing the Bill:

We need to do more to ensure the Parliament and the Commonwealth can support the Australian economy and our manufacturing sector, despite free trade agreements. Most Australians would agree that the flags flying from our Commonwealth buildings are an excellent place to start.<sup>8</sup>

### ***Commonwealth Procurement Rules***

1.14 The Commonwealth Procurement Rules (CPRs), issued under Regulation 7 of the *Financial Management and Accountability Regulations 1997*, are at the core of the Commonwealth's procurement framework.<sup>9</sup> The CPRs set out the policies and procedures which agencies must comply with when undertaking procurement processes.

1.15 The committee notes that the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) which will replace the *Financial Management and Accountability Act 1997* (FMA Act) and the *Commonwealth Authorities and Companies Act 1997* (CAC Act), comes into effect on 1 July 2014. It will be supported by rules setting out financial management requirements. The CPRs will form part of the PGPA rules and are being revised to include references to the PGPA Act.<sup>10</sup>

1.16 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.

1.17 Division 2 of the CPRs provides additional rules for procurements at or above the relevant procurement threshold, which is currently \$80,000 for FMA Act agencies, other than for procurements of construction services; and \$400,000 for relevant CAC Act bodies, other than for procurements of construction services.<sup>11</sup> Appendix A

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8 Senator Nick Xenophon, *Senate Hansard*, 6 March 2014, p. 1018.

9 The Commonwealth procurement framework is also supported by web based guidance issued by the Department of Finance, Finance Circulars and Chief Executive Instructions. See CPRs, 1 July 2012, paragraph 2.4.

10 References committee inquiry, Department of Finance, *Submission 12*, p. 2.

11 Section 3.3, CPRs, dated 1 July 2012, p. 12.

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.

### *Non-discrimination*

1.18 Value for money is a key element of the CPRs and involves encouraging competition and the requirement for non-discrimination in procurement processes. Paragraph 5.3 of the CPRs states:

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.<sup>12</sup>

### *Procurement of Australian goods and services under the CPRs*

1.19 The ability for agencies to preference Australian goods and services in procurement processes is constrained under the CPRs on the basis that it incorporates Australian government commitments agreed to under free trade agreements (FTAs). Parties entering into the FTAs have entered into commitments to liberalise access to each other's market for goods and services, including government procurement. According to the Department of Finance:

These commitments provide access for Australian suppliers to the government procurement markets of other countries, whilst also placing obligations on the Commonwealth Government to open up access to our procurement market. These commitments limit the extent to which the Commonwealth Government can preference local suppliers.<sup>13</sup>

1.20 Dr Nick Seddon in his evidence to the references committee inquiry into Commonwealth procurement procedures emphasised that 'one of the main reasons for entering into free trade agreements is to eliminate local preference and allow competition to operate.'<sup>14</sup>

### *Small and Medium Enterprises*

1.21 Despite the emphasis on value for money and non-discrimination in the CPRs, the Department of Finance notes in its submission that the government procurement elements of Australia's international agreements allow for policies that benefit Small and Medium Enterprises (SMEs).<sup>15</sup> The CPRs state that the Australian Government is committed to FMA Act agencies sourcing at least 10 per cent of procurement by value

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12 Paragraph 5.3, CPRs, 1 July 2012, p.17.

13 References committee inquiry, Department of Finance, *Submission 12*, p. 3.

14 *References committee Hansard*, 28 April 2014, p. 1.

15 An SME is defined in the CPRs as an Australian or New Zealand firm with fewer than 200 full-time equivalent employees, see CPRs, 1 July 2012, Appendix C: Definitions, p. 42.

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from SMEs.<sup>16</sup> To ensure that SMEs can engage in fair competition for Australian Government business, paragraph 5.4 of the CPRs provides that:

...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.

1.22 Dr Nick Seddon, in his evidence to the references committee, suggested paragraph 5.4 of the CPRs as currently drafted lacks clarity in how it is to be applied. He suggested that while it is clear that government agencies must not discriminate against SMEs when making purchasing decisions, it does not provide guidance on whether agencies can discriminate in favour of SMEs.<sup>17</sup>

1.23 To support his analysis, Dr Seddon posed the scenario of a procurement process, where the tenderers included an SME that was slightly more expensive or did not provide as good value for money, and asked whether the contract could still be awarded to that tenderer on the basis that it is an SME. In this case, he proposed using the Australia-United States Free Trade Agreement (AUSFTA) as an aid to interpret the intention of the CPRs:

The CPRs are not clear on that, but, if you go back to the Australia-United States Free Trade Agreement, 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.

...

I made the point that the Australia-United States Free Trade Agreement is not law in Australia. It is international law, but it is not domestic law and, strictly, one should just look at the CPRs. But on this question—can a government agency discriminate in favour of an SME?—I think the answer is probably yes because of the background, namely the free trade agreement on which the CPRs were based and chapter 15 of the Australia-United States Free Trade Agreement in particular.<sup>18</sup>

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16 Paragraph 5.5, CPRs, 1 July 2012.

17 *References Committee Hansard*, 28 April 2014, p. 1.

18 *References Committee Hansard*, 28 April 2014, pp 1-2.



## 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.<sup>1</sup> 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.<sup>2</sup>

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

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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.<sup>3</sup>

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.<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup>

### ***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.<sup>7</sup>

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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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup>

#### *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.<sup>11</sup>

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

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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.<sup>12</sup>

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.<sup>13</sup>

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](http://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.<sup>14</sup>

### *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.

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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,<sup>15</sup> 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).<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup>

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

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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).<sup>19</sup>

*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).<sup>20</sup>

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.<sup>21</sup>

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.

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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.

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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.<sup>22</sup>

### **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.

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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**

# Dissenting Report by Independent Senator Nick Xenophon & DLP Senator John Madigan

## ‘Time to fly the flag for Aussie jobs’

1.1 The Australian Government’s current procurement rules are stacked against local manufacturers and suppliers. While the flag currently flying above Parliament House is currently Australian made, the fact that this is not a requirement for all flags used by the Commonwealth to be made in Australia is a national embarrassment.

1.2 The committee has squandered an important opportunity to support Australian flag makers at a time when Australian manufacturing is at a crisis point. Since the Global Financial Crisis in 2008 over 82,000 manufacturing jobs have been lost in Australia.<sup>1</sup> Successive governments have taken a literalist approach to free trade and this is damaging Australia’s manufacturing industry. Rigid and inflexible international free trade agreements are taking precedence over providing support for Australian jobs. The decline in Australia’s manufacturing industry has also been exacerbated by weak anti-dumping laws.

1.3 The purpose of the Flags Amendment Bill 2014 is to ‘ensure that Australian flags flown, used or supplied by the Commonwealth are only manufactured in Australia from Australian materials’.<sup>2</sup> Similar legislation already exists elsewhere. For example in the United States all national flags flown over military establishments must be manufactured from 100 per cent US content. It is disappointing that despite the widespread support for the intention of this bill there remains little desire on the part of the Commonwealth to take similar steps to strengthen our local manufacturing industry.

1.4 The United States’ approach to free trade agreements contrasts sharply with Australia’s. The US supports local manufacturers and this was discussed at the committee’s public hearing on 28 April 2014:

**Senator XENOPHON:** ...My first question to you goes to the fact that the United States has the Buy American legislation. There are two pieces of legislation in the US. There is the Buy American Act, that has been in place since President Hoover in 1933; there is also more recent legislation that requires flags on US government buildings and defence establishments to

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1 Bernard Salt, ‘Before and After: GFC triggers the great divide’, *The Australian*, 3 April 2014, available at <http://www.theaustralian.com.au/business/opinion/before-and-after-gfc-triggers-the-great-divide/story-e6frg9jx-1226872733742#>, accessed 12 June 2014.

2 Flags Amendment Bill 2014, Explanatory Memorandum, p. 2.

be made in the United States. How do you say that those key pieces of legislation in the US sit with the US's interpretation of the free trade agreement that we have with them?

**Dr Seddon:** I have always been puzzled by that. I have never understood how America can enter into these agreements and have legislation like that at home. It baffles me.<sup>3</sup>

1.5 What is really baffling is that Australian does not have similar legislation in place here. It seems the Americans are prepared to do what is in the national interest first and foremost – but Australia does not. There is a wide spread perception amongst many manufacturers and workers that successive Australian governments have tripped over themselves to get ‘brownie points’ in world trade forums to the nation’s detriment.

1.6 The Australian Companies Institute Ltd also expressed concern about Australia’s approach to local procurement versus that of other countries:

Australia has few requirements for Australian companies’ participation. The issue of international obligation does not appear to deter other countries from closing their doors to support their own, although it is an excuse here to open our markets to competition.<sup>4</sup>

### **The Commonwealth Procurement Rules**

1.7 As set out in the committee’s majority report, the Commonwealth Procurement Rules set out the policies and procedures under which agencies must comply when making purchasing decisions. All procurements must comply with six sub rules of value for money, encouraging competition, efficient, effective, economical and ethical procurement, accountability and transparency, risk management and procurement methods.

1.8 At the heart of the issue is the principle that procurement processes must be non-discriminatory. The CPRs state “all potential suppliers to government must... not be discriminated against due to their... degree of foreign affiliation or ownership, location, or the origin of their goods and services”.<sup>5</sup>

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3 Dr Seddon, *References Committee Hansard*, 28 April 2014, p. 3.

4 References Committee Inquiry, The Australian Companies Institute Limited, *Submission 44*, p. 3.

5 Paragraph 5.3, CPRs, 1 July 2012, p. 17.



1.9 While provisions exist within the CPRs to encourage the government to consider small to medium enterprises ('SMEs') for procurement contracts, these provisions lack clarity and are often counterproductive to Australian manufacturing.

1.10 As noted by Dr Seddon at the committee's hearing on 28 April 2014:

If you look very closely at the CPRs, they are not very well drafted on this particular thing because they 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?<sup>6</sup>

1.11 Given local industry concern that foreign made flags continue to be purchased by the Australian government, it appears that desirable discrimination in favour of SMEs does not take place here. As Mr Wayne Gregory of Carroll & Richardson Flagworld told the committee:

...while 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.<sup>7</sup>

1.12 In its majority report the committee outlined statistics provided by the Department of Finance in relation to the likely level of engagement with Australian suppliers in terms of procurement. We question the veracity of these figures, particularly given the only factors used by the Department to identify Australian suppliers are ABNs and business addresses.<sup>8</sup> The Department was brought to task on this issue during Senate Estimates in May 2014 in an exchange with Senator Madigan:

**Senator MADIGAN:**... Having an ABN does not mean the product is made in this country. It means you are a registered business, but that does not mean that a product is manufactured on our shores.

**Ms Mason:** That is correct. It is an indicator.

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6 Dr Seddon, *References Committee Hansard*, 28 April 2014, p. 1.

7 Mr Gregory, *Committee Hansard*, 28 April 2014, pp. 27-28.

8 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.

**Senator MADIGAN:** So saying 'ABN' is a misleading comment to infer that the product is Australian made.

**Ms Mason:** It is an indicator, and it is the information that we hold.

**Senator MADIGAN:** It is not an indicator, Ms Mason. It does not mean that a product is Australian made. Just because a company has an ABN does not mean it is made with Australian hands or Australian labour.<sup>9</sup>

1.13 The Department of Finance must improve their gathering and recording of information pertaining to the origin of goods procured by the Government. Relying on ABNs and registered business addresses is a lame, flimsy and lazy approach to record management which must be improved.

### **The impact of the CPRs on local suppliers**

1.14 Carroll & Richardson Flagworld Pty Ltd told the committee of the difficulties they face as a local supplier competing with overseas companies:

In recent times we have seen a shift in purchasing emphasis by the Australian Government that places at risk the ability of companies such as ours the opportunity to compete fairly with overseas sourced flags. Local importers can easily bring in container loads of flags and swamp our market with cheap and inferior products. The manufacturing plants they source these imported products do not have the meet the stringent conditions placed on local companies to meet a host of legislative and regulatory requirements.<sup>10</sup>

1.15 Carroll & Richardson Flagworld continued:

We have seen the most difficult customer to convince of the need to support and buy Australian Made Flags is the Commonwealth Government itself through its departments. The reason offered by public servants is that their hands are tied because of the requirement they have under the present Commonwealth Procurement Procedures and our WTO obligations. I cannot think of any other country in the world that would allow its National Flags to be made in another country and then imported to the detriment of local companies who are willing and capable of making the flag.<sup>11</sup>

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9 Senate Finance and Public Administration Legislation Committee, *Senate Estimates Hansard*, 28 May 2014, p. 79.

10 Carroll & Richardson Flagworld Pty Ltd, *Submission 1*, p. 1.

11 *Ibid*, p. 2.

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## The case for a ‘national pride’ category

1.16 The Australian Made Campaign argued the case for a national pride category within the procurement rules:

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...<sup>12</sup>

1.17 This proposition has strong support from flag producers in Australia:

We particularly endorse the position that the Australian Made Campaign put in their submission to your inquiry that suggests that the CPR needs to treat certain purchases as being in a special category of national pride or national interest. It is not something that you usually see in a tender document, where they ask things such as, 'Is there a national interest issue here? Is there something of national pride that needs to be recognised in the procurement?' Certainly that would be the case, for example, for the flag that flies over this house.<sup>13</sup>

## Public perception and expectations regarding Australian flags

1.18 The committee heard from Mr Umit Erturk, Manager of Spear of Fame regarding the public attitude towards Australian flags flown at government buildings:

**Senator MADIGAN:** ...Mr Erturk, do you believe there is a perception within the Australian community that Australian flags should be manufactured in Australia—that Australians assume that the flags that are on our government buildings and used by our defence forces should be Australian made and are Australian made?

**Mr Erturk:** Yes. I believe that that is quite clear from the general public. But when I was invited to address this Senate committee, I gathered my staff... I said to them: 'Have a look. This is the situation. I am going to address a committee regarding what we are doing here. What do you think about the Australian flag, not any other flag but the Australian national

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

13 Mr Gregory, *Committee Hansard*, 28 April 2014, p. 27.

flag? Should it be made in Australia?' You would not believe the reaction I got, saying: 'Of course it should be. That's our national pride.'<sup>14</sup>

### **Remedying the criticism of the bill**

1.19 Australian flag makers quite rightly pointed out that requiring Australian flags to be made from materials manufactured in Australia would be very difficult to achieve. As Bainbridge International Pty Ltd pointed out:

There is no textile manufacturing capacity in Australia at the moment available or prepared to invest in the manufacture of flag base fabric to supply a small % (Commonwealth demand) of a relatively modest total national demand.<sup>15</sup>

1.20 The Australian Flag Company advised the committee that the “lack of competitive local input materials” is a further challenge faced by flag makers, particularly when trying to keep the cost of the product down.<sup>16</sup>

1.21 The Government and Opposition appear to be scrounging for lame excuses not to support a common sense initiative already adopted by some of our free trade partners. The bill should be amended to remove reference to the requirement that flags be manufactured from Australian materials. We believe this will make the bill easier to implement from the point of view of Australian flag producers while simultaneously allowing the government to support local jobs and the Australian manufacturing industry.

1.22 The fact the committee did not even consider supporting the bill in an amended form is greatly disappointing. It is indicative that successive Australian governments have lost their way with both free trade agreements and local procurement rules.

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14 Mr Umit Erturk, *Committee Hansard*, 28 April 2014, p. 29.

15 Bainbridge International Pty Ltd, *Submission 6*, p. 1.

16 Australian Flag Company Pty Ltd, *Submission 5*, p. 1.

**Recommendation 1**

**The bill is passed with appropriate amendments as set out in this report.**

**NICK XENOPHON**

**JOHN MADIGAN**



# **APPENDIX 1**

## **Submissions received by the Committee**

- 1 Carroll and Richardson Flagworld
- 2 Department of Finance
- 3 Flags of All Nations
- 4 Charles Parsons Pty Ltd
- 5 Australian Flag Company
- 6 Bainbridge International Pty Ltd