

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Buying into our Future

Review of amendments to the Commonwealth Procurement Rules

Joint Select Committee on Government Procurement

June 2017
CANBERRA

© Commonwealth of Australia

ISBN 978-1-74366-659-3 (Printed Version)

ISBN 978-1-74366-660-9 (HTML Version)

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/>.

List of Recommendations

Recommendation 1

- 9.10 The Committee recommends that the Department of Finance revise clause 10.9(c) of the Commonwealth Procurement Rules to require all goods purchased by the Australian Government to comply with Australian standards unless none are applicable.

Recommendation 2

- 9.16 The Committee recommends that the Attorney-General's Department oversee the introduction and application of a procurement connected policy requiring Commonwealth agencies to evaluate suppliers' compliance with human rights regulation.

Recommendation 3

- 9.20 The Committee recommends that the Department of Environment oversee the introduction and application of a procurement connected policy requiring Commonwealth agencies to evaluate the whole-of-life environmental sustainability of goods and services to be procured.

Recommendation 4

- 9.23 The Committee recommends that the Department of Industry, Innovation and Science enhance the procurement connected policy for Australian Industry Participation Plans, requiring that good procurement practices are implemented down through the supply chain so that both prime and subcontractors:

- implement best practice terms and conditions; and

- are contractually obligated to report on those terms and conditions.

Recommendation 5

- 9.34 The Committee recommends that all Commonwealth contracts contain a similar clause to Commonwealth Contracting Suite clause 10, ensuring that the obligations of prime contractors apply to all sub-contractors.

Recommendation 6

- 9.38 The Committee recommends that rural and regional small and medium businesses be added to the list of exemptions under Appendix A: Exemptions from Division 2 of the Commonwealth Procurement Rules.

Recommendation 7

- 9.40 The Committee recommends that the Department of Finance and the Department of Industry, Innovation and Science jointly develop and implement a framework to collect relevant data on the degree of Commonwealth procurement that is supplied by Australia-owned businesses, contains Australian-manufactured goods, or uses Australian-based services.

Recommendation 8

- 9.45 The Committee recommends that, in negotiating future trade or World Trade Organisation agreements, Australia not enter into any commitments that undermine the Australian government's ability to support Australian businesses.

Recommendation 9

- 9.50 The Committee recommends that the Department of Finance, or the proposed Australian Industry Advocate, publish comprehensive implementation guidelines for the new Commonwealth Procurement Rules as a matter of priority. The guidelines should:
- explicitly define what constitutes economic benefit;
 - prescribe a minimum 15 per cent weighting across a tender in accordance with the economic benefit criteria;

- procuring agency or Minister to retain discretion to increase weighting to leverage economic benefit;
- encourage maximisation of economic opportunities and benefits when assessing a tender for the degree of local content and participation;
- outline how rubrics or weighted criteria may be used to compare the unique economic benefits offered by different suppliers and in assessing economic benefit as part of the overall tender evaluation;
- describe techniques for assessing the veracity of suppliers' claims of economic benefit and for ensuring these benefits are delivered; and
- encourage the consideration of innovative solutions during the scoping and design stage of procurement projects.

Recommendation 10

9.52 The Committee recommends that, in order to limit discretionary decision-making, promote consistency and safeguard transparency, the guidelines prohibit the use of qualitative assessments across whole tenders.

Recommendation 11

9.54 The Committee recommends that the guidelines specifically require that, for all procurements over \$4 million, a record is created including:

- the reason for the tender approach chosen;
- the reason for the selection of the preferred tenderer; and
- details of the economic benefit score.

Recommendation 12

9.56 The Committee recommends that the Department of Finance design and deliver a public service wide training program to support the effective implementation of the new Commonwealth Procurement Rules in line with new guidance material.

Recommendation 13

- 9.57 The Committee recommends that the Australian government ensures that all departments and agencies must ensure that an individual has successfully undergone procurement training before that individual can be delegated a procurement authority.

Recommendation 14

- 9.64 The Committee recommends that the Australian Government legislate as a statutory authority under the responsibility of the Minister for Industry, Innovation and Science an Australian Industry Advocate to:
- aid Commonwealth agencies to design procurement processes which maximise benefits to the Australian economy and increase opportunities for SME participation;
 - support Australian businesses to access Commonwealth procurement by promoting opportunities and assisting businesses to promote the economic benefits they can offer;
 - provide independent, transparent and consistent evaluation of the unique economic benefits offered by different suppliers;
 - guide Commonwealth agencies' application of weighted criteria and assessment rubrics to overall procurement evaluations; and
 - monitor suppliers' delivery of contracted economic benefits.

Recommendation 15

- 9.67 The Committee recommends that the Department of Finance incorporate supplier feedback, including on the rewording of clauses identified in this report, into its 12 month review of the new Commonwealth Procurement Rules. It also recommends that the findings of the review are made public.

Recommendation 16

- 9.71 The Committee recommends that a Parliamentary inquiry is established by March 2018 to evaluate:
- supplier feedback, including on the rewording of clauses identified in this report;

- interaction with the Anti-dumping framework and the tax system; and;
- recent changes to the Australian Industry Participation Plan policy.

The inquiry should report by the end of 2018.

Terms of Reference

That a joint select committee, to be known as the Joint Select Committee on Government Procurement, be established to inquire and report by 31 May 2017¹ on the following matters:

- a the Commonwealth procurement framework;
- b consideration of the Commonwealth Procurement Rules to come into force on 1 March 2017 (CPR17) and, in particular:
 - i clauses 10.10, 10.18, 10.30, 10.31 and 10.37 (the ‘new clauses’),
 - ii how the new clauses can most effectively be implemented,
 - iii weighting and other mechanisms that should apply to any Commonwealth procurement decision making, taking into account CPR17, and
 - iv its interaction with any other Government policies and programs (including grants), instruments, guidelines and documents relating to procurement, including the Department of Finance’s Resource Management Guide No. 415;
- c the extent to which CPR17 and any related instrument and rules can be affected by trade agreements and other World Trade Organization (WTO) agreements, including:
 - i existing trade agreements Australia has entered into, and

¹ On 10 May 2017 in the Senate and 11 May 2017 in the House of Representatives a resolution was passed to extend the reporting date to 30 June 2017.

- ii trade agreements that the Commonwealth Government is currently negotiating, including the WTO Agreement on Government Procurement; and
- d any related matters.

Members

Chair

Senator Nick Xenophon

Deputy Chair

Senator Kimberley Kitching

Members

Senator the Hon. Eric Abetz

Senator David Bushby

Senator the Hon. Kim Carr

Mr Ian Goodenough MP

The Hon. Sussan Ley MP

Ms Rebekha Sharkie MP

Ms Meryl Swanson MP

Mr Tony Zappia MP

Participating Members

Senator Chris Back

Senator Catryna Bilyk

Senator Carol Brown

Senator the Hon. Doug Cameron

Senator Anthony Chisholm

Senator the Hon. Jacinta Collins

Senator Sam Dastyari

Senator Patrick Dodson

Senator Jonathon Duniam

Senator the Hon. Don Farrell

Senator David Fawcett

Senator Alex Gallacher

Senator Katy Gallagher

Senator Jane Hume

Senator Chris Ketter

Senator David Leyonhjelm

Senator Sue Lines

Senator the Hon. Ian Macdonald

Senator Gavin Marshall

Senator Jenny McAllister

Senator Malarndirri McCarthy

Senator Bridget McKenzie

Senator Claire Moore

Senator Deborah O'Neill

Senator Barry O'Sullivan

Senator James Paterson

Senator Helen Polley

Senator Louise Pratt

Senator Linda Reynolds CSC

Senator the Hon. Lisa Singh

Senator Dean Smith

Senator Glenn Sterle

Senator Anne Urquhart

Senator Murray Watt

Senator John Williams

Senator the Hon. Penny Wong

Committee Secretariat

Ms Lynley Ducker, Committee Secretary

Dr Narelle McGlusky, Inquiry Secretary

Ms Samantha Leahy, Senior Researcher

Ms Stephanie Limm, Researcher

Ms Cathy Rouland, Office Manager

Abbreviations

ABS	Australian Bureau of Statistics
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AFPA	Australian Forest Products Association
AFTINET	Australia Fair Trade and Investment Network
AiG	Australian Industry Group
AIP Plan	Australian Industry Participation Plan
AINDT	Australian Institute of Non-destructive Testing
AIT	Canadian Agreement on Internal Trade
AMWU	Australian Manufacturing Workers' Union
ANAO	Australian National Audit Office
APCC	Australasian Procurement and Construction Council
ASBFEO	Australian Small Business and Family Enterprise Ombudsman
ASI	Australian Steel Institute
AWU	Australian Workers' Union
BIM	Building Information Modelling

BPIC	Building Products Innovation Council
BusVic	Bus Association Victoria
CCS	Commonwealth Contracting Suite
CFMEU	Construction Forestry Mining and Energy Union
CPR 17	Commonwealth Procurement Rules effective 1 March 2017
CPR 14	Commonwealth Procurement Rules effective July 2014
CPRs	Commonwealth Procurement Rules
CSC	CSC Australia Pty. Limited
Defence	Department of Defence
DFAT	Department of Foreign Affairs and Trade
DMO	Defence Materiel Organisation
DPSP	Department of Public Services and Procurement (Canada)
ECA	Ethical Clothing Australia
ECT	Employment Contribution Test
EU	European Union
EUC	End-User Computing
EWPA	Engineered Wood Products Association of Australasia
FAR	Federal Acquisitions Regulation (USA)
Finance	Department of Finance
FTE	Full-time Equivalent
GBCA	Green Building Council of Australia
GDP	Gross Domestic Product
GPA	Government Procurement Agreement

ICN	Industry Capability Network
IPP	Industry Participation Plan
IPP Plan	South Australian Industry Participation Policy Plan
LIDP	Local Industry Development Plan
NCPs	non-conforming products
OH&S	occupational, health and safety
OIA	Office of the Industry Advocate (SA)
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013</i>
PIAA	Printing Industries Association of Australia
PMC	Department of Prime Minister and Cabinet
PPP	public-private partnership
RPDE	Defence Rapid Prototyping, Development and Evaluation Program
SA	South Australia
SBIR	Small Business Innovation Research Program
SCLC	South Coast Labour Council
SMBA	Small and Medium Business Administration (Korea)
SMEs	small and medium enterprises
TCFUA	Textile Clothing and Footwear Union of Australia
UK	United Kingdom
UNGPs	<i>United Nations Guiding Principles on Business and Human Rights</i>
UNICEF	United Nations International Children's Emergency Fund
USA	United States of America
VCCC	Victorian Comprehensive Cancer Centre

VGPB	Victorian Government Purchasing Board
VIPP	Victorian Industry Participation Policy
WGEA	Workplace Gender Equality Agency
WGE Act	<i>Workplace Gender Equality Act 2012</i>
WTIA	Welding Technology Institute of Australia
WTO	World Trade Organization
WTO GPA	World Trade Organisation Government Procurement Agreement

Contents

List of Recommendationsiii

Terms of Referenceix

Members.....xi

Abbreviationsxv

Executive Summary.....xxv

The Report

1 Introduction.....1

Referral and conduct of the Inquiry.....1

Scope of the Inquiry.....2

Structure of the Report.....2

2 Commonwealth Procurement Framework5

Introduction.....5

Value of government procurement5

Procurement of Australian made or supplied goods.....9

Impact of Commonwealth procurement.....11

Commonwealth Procurement Framework13

Commonwealth Procurement Rules14

Department of Finance procurement guidance materials.....16

Procurement connected policies17

Indigenous Procurement Policy.....18

Workplace Gender Equality Procurement Principles and User Guide20

The Australian Industry Participation Plans for Government
Procurement21

Code for Tendering and Performance of Building Work 201622

3 The amendments25

Introduction25

Background.....25

The new clauses25

Clause 10.10 and 10.37: Australian standards26

Clause 10.18: Labour regulations, OH&S and environmental considerations27

Clause 10.30: Economic benefit29

Clause 10.31: International agreements31

4 Implementation concerns35

Introduction35

Concerns.....35

Procurement ‘culture’36

Value for money versus lowest cost.....36

Inconsistent interpretation and implementation.....37

Utilisation of existing provisions38

Accountability and transparency40

Risk assessment and allocation41

Government as uninformed purchaser42

Application of Australian standards42

Exemptions.....44

Risks.....46

Loss of skilled workforce46

Australian standards: safety, economic and environmental risks47

Waste49

Barriers to domestic business participation.....49

	Case study: Rossi Boots	51
5	Implementation: guidelines and training	55
	Introduction	55
	Refining or expanding new clauses	55
	Guidelines	60
	Criticism of existing guidelines	61
	Comprehensive guidelines	64
	Human rights	68
	Procurement connected policies	69
	Training for procurement officers	71
6	Implementation: other issues	73
	Introduction	73
	Cultural change	73
	Weighting	75
	Applying Australian standards	78
	Transparency	82
	Design and innovation	84
	Contract management	86
	Accession to WTO GPA	88
7	International procurement models	93
	Introduction	93
	United Kingdom	93
	Public Contracts Regulations 2015	94
	Public Services (Social Value) Act 2012	97
	UK Commissioning Academy	99
	Government Construction Strategy	100
	United States of America	101
	Federal Acquisitions Regulation	101
	Buy American Act	102

	Berry Amendment	103
	Buy American and Hire American Presidential Executive Order	104
	Small Business Act	104
	Canada	105
	Canadian Content Policy	106
8	Australian procurement models	109
	Introduction	109
	Victoria	109
	Victorian Government Purchasing Board	110
	Industry Capability Network Victoria	111
	Victorian infrastructure procurement agencies and initiatives	115
	South Australia	117
	State Procurement Board	117
	Office of the Industry Advocate	118
9	Conclusion	127
	Introduction	127
	Support for new Commonwealth Procurement Rules	127
	Implementation issues	127
	New clauses	128
	Clauses 10.10 and 10.37: Australian standards	128
	Clause 10.18: Relevant regulations	129
	Clause 10.30: Economic benefit	131
	Clause 10.31: Australia's international agreements	135
	Other implementation issues	136
	Addressing implementation issues	137
	Comprehensive implementation guidelines and training	137
	Guidelines	137
	Training	139
	Industry Participation Advocate	139

Review of the new Commonwealth Procurement Rules.....141

Appendices

A. List of Submissions.....145

B. List of Witnesses151

Executive Summary

This report presents the findings of the Joint Select Committee on Government Procurement which was established on 1 December 2016 to inquire into the Commonwealth Procurement Framework, particularly the amended Commonwealth Procurement Rules.

Amendments to the Commonwealth Procurement Rules came into effect on 1 March 2017. The amendments aim to ensure that the full benefit of Commonwealth procurement will flow to the Australian economy. The amendments will also ensure that Australian regulations and standards are upheld. The amendments are designed to mitigate the disadvantages faced by Australian suppliers accessing government procurement opportunities.

The evidence received by the Committee showed overall support for the amendments to the Commonwealth Procurement Rules. However this support was tempered by concerns about effective implementation. Many of the new clauses lack clarity or leave too much to the discretion of officials. The Committee has made suggestions to tighten up the clauses by refining or expanding the terms.

The Committee heard about several problems with the implementation of the previous Commonwealth Procurement Rules. These include a procurement culture that focuses on lowest cost rather than value-for-money, a lack of accountability and transparency, and unacceptable risk shifting. There is also a perception that—due to a lack of technical skill and expertise—the government has become an uninformed purchaser. The absence of a requirement to comply with Australian standards is also considered a deficiency.

There are several flow-on risks that may have a detriment on Australia more broadly. These include the loss of a skilled workforce, safety, economic and environmental risks and potential wastage. The procurement system may also

create barriers to domestic businesses to even attempt to take advantage of procurement opportunities.

Comprehensive guidelines are essential to address the current deficiencies and ensure that the implementation of the new clauses is successful. New guidelines are required to remove the discretionary nature of decision making and replace it with specific standards that must be met, as well as mandate the evidence required from tenderers. Economic benefit, in particular, requires explicit definition and weighting to properly assess suppliers claims. There must also be specific, detailed guidance on negotiating the complex area of human rights.

Additional procurement connected policies are needed to provide guidance for environmental sustainability and human rights. These guidelines and policies should be supplemented with a public service wide training program. Improved record keeping is essential to address the lack of transparency and accountability in the current system.

Contract management can be better utilised to control implementation and maximise procurement and contract outcomes. Good contract management ensures that tenderers meet their obligations and responsibilities.

If the amended Commonwealth Procurement Rules are to encourage Australian suppliers, the Australian Government must not enter into international trade agreements which diminish the benefits that underpin these amendments. Additionally, procurement officers must be better informed of the exemptions currently available in the international agreements to preference domestic businesses.

A range of best practice models are available for Australia to draw on to improve the procurement system.

The Committee believes that a three pronged approach is necessary to address the implementation issues identified in this report and ensure the new rules are applied consistently, transparently and to maximum effect. It would like to see:

- the publication of comprehensive implementation guidelines coupled with public service wide training to support officials to apply the rules in the manner in which they are intended;
- the introduction of procurement connected policies to safeguard the Australian Government's role as a model procurer; and

- the formation of an independent Industry Participation Advocate modelled on the South Australian system to facilitate consideration of Australian economic benefit required by clause 10.30.

The Committee has made sixteen recommendations to that effect.

1. Introduction

Referral and conduct of the Inquiry

- 1.1 The Joint Select Committee on Government Procurement was established by a resolution of appointment passed by the Senate and the House of Representatives on 1 December 2016. The Committee was established to inquire and report on the Commonwealth Procurement Framework, particularly the new Commonwealth Procurement Rules. The Committee was asked to report by 31 May 2017. The Senate on 10 May 2017 and the House of Representatives on 11 May 2017 passed a resolution to extend the reporting date to 30 June 2017.
- 1.2 Details of the Inquiry were made available on 21 February 2017 on the Parliament of Australia's website, including a call for written submissions. The Inquiry was also promoted through a mail out to interested parties; including peak bodies, organisations and relevant government departments. The Chair and Deputy Chair created a short video encouraging participation in the Inquiry process.
- 1.3 Over the course of the Inquiry, the Committee received 53 submissions. A list of submissions is at Appendix A.
- 1.4 In addition, the Committee undertook three public hearings, in Canberra on 29 March 2017 and 8 May 2017 and in Melbourne on 19 April 2017. Details of the public hearings, including a list of witnesses can be found in Appendix B.

Scope of the Inquiry

- 1.5 The terms of reference require the Committee to inquire and report on matters relating to the Commonwealth Procurement Framework, including:
- consideration of the revised Commonwealth Procurement Rules, which came into effect on 1 March 2017; and
 - the extent to which the revised Commonwealth Procurement Rules and related procurement instruments can be affected by trade agreements including the World Trade Organization (WTO) Government Procurement Agreement (GPA).
- 1.6 The Committee focused on the interpretation and implementation of the revised Commonwealth Procurement Rules.

Structure of the Report

- 1.7 Chapter 2 provides background information on Australia's Commonwealth Procurement Framework, including statistics on government procurement, the role of procurement and an overview of policies and guidelines which shape procurement decisions.
- 1.8 Chapter 3 examines the new clauses in the revised Commonwealth Procurement Rules, setting out the text of the clauses and providing a brief analysis of the changes and their benefits.
- 1.9 Chapter 4 examines concerns raised over the implementation process for the procurement system prior to the introduction of the amended Commonwealth Procurement Rules. The Chapter also explores the risks which may result from the concerns identified and concludes with a case study that demonstrates the issues discussed in the Chapter.
- 1.10 Chapter 5 discusses suggested revisions to the new clauses before focussing on the guidelines and training required to address some of the implementation issues raised in Chapter 4. It also examines suggestions to reinstate a number of procurement connected policies.
- 1.11 Chapter 6 looks at a range of further issues to be considered to ensure efficient implementation of the new clauses including: cultural change, weighting, applying Australian standards, transparency, design and innovation, contract management and accession to the WTO GPA.

- 1.12 Chapter 7 considers international best practice in procurement with a particular focus on practices which may be applicable to the Australian context.
- 1.13 Chapter 8 considers the examples of procurement practice from Victoria and South Australia which could be useful in refining the Commonwealth system.
- 1.14 Chapter 9 provides the Committee's conclusions and recommendations.

2. Commonwealth Procurement Framework

Introduction

2.1 This chapter considers:

- the value of procurement undertaken both directly by the Australian Government, and by state and territory governments on its behalf;
- Australian Government procurement of locally made or supplied goods, and the potential impact on the Australian economy; and
- the operation of the Commonwealth Procurement Framework, including the application of the Commonwealth Procurement Rules (CPRs), procurement connected policies and Department of Finance guidance material.

Value of government procurement

2.2 The Australian Government's annual expenditure on goods and services is substantial. In the 2015-16 financial year Commonwealth agencies reported entering into 70 338 contracts valued at \$56.9 billion. Altogether 10 793 suppliers (9 595 of which were small to medium sized enterprises) delivered goods to the value of \$24.5 billion and services totalling \$32.5 billion.¹ According to the Department of Finance, the top five categories of goods and services procured directly by the Australian Government are:

¹ Department of Finance, *Submission 30*, p. 13.

- commercial, military and private vehicles, plus accessories and components;
- healthcare services;
- management, business and administrative services;
- building, construction and maintenance services; and
- engineering, research and technology based services.²

2.3 In addition to this direct expenditure, the Australian Government also funds state and territory governments to procure goods and services on its behalf.

2.4 The exact value of state and territory government procurement funded by the Australian Government is unclear as Commonwealth funding is not always provided explicitly for the purposes of a specific procurement. State and territories use a mixture of federal funding and independently generated revenue to finance different purchases. However, a sense of the scale is given by considering total Australian Government funding to the states in conjunction with states' expenditure on infrastructure. Witnesses provided evidence that infrastructure is one of the largest Commonwealth expenses that is primarily delivered by state and territory governments. Mr Christopher Walton, Chief Executive Officer of Professionals Australia, explained:

...one of [the Australian] Government's largest procurement spends is infrastructure, which it is then relying on states to deliver. The Commonwealth, in its own right, procures a lot but it procures huge amounts of infrastructure and relies on state governments for delivery.³

2.5 The Australian Government's 2017–18 budget papers show that the Commonwealth expects to provide state and territory governments with a total of \$119 billion in funding consisting of:

² Department of Finance, 'Statistics on Australian Government Procurement Contracts', <<https://www.finance.gov.au/procurement/statistics-on-commonwealth-purchasing-contracts/>> viewed 4 May 2017.

³ Mr Christopher Walton, Chief Executive Officer, Professionals Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 22.

... payments of \$55.9 billion for specific purposes like schools and hospitals and general revenue assistance of \$63.1 billion.⁴

2.6 Payments to individual state and territory governments in the 2017–18 budget papers are:

- \$35 148 million to New South Wales;
- \$27 262 million to Victoria;
- \$26 787 million to Queensland;
- \$8 334 million to Western Australia;
- \$10 576 million to South Australia;
- \$3 625 million to Tasmania;
- \$2 136 million to Australian Capital Territory; and
- \$4 193 million to the Northern Territory.⁵

2.7 It is unclear how much of this Commonwealth funding is used by states to procure goods and services. However, infrastructure is one of the largest Commonwealth expenses delivered by state and territory governments, and state budget papers show the following expenditure on infrastructure across the forward estimates:

- \$73.3 billion in New South Wales from financial year 2016–17 to 2019–20;⁶
- \$38.4 billion in Victoria from financial year 2017–2018 to 2020–21;⁷

⁴ Australian Government, *Budget 2017–18: Federal Financial Relations Budget Paper No. 3*, 'Australia's Federal Relations', p. 2, <<http://budget.gov.au/2017-18/content/bp3/html/>> viewed 10 May 2017.

⁵ Australian Government, *Budget 2017–18: Federal Financial Relations Budget Paper No. 3*, 'Australia's Federal Relations', p. 5, <<http://budget.gov.au/2017-18/content/bp3/html/>> viewed 10 May 2017.

⁶ New South Wales Government, *NSW Budget 2016–17: Budget Overview*, June 2016, p. 2, <http://www.budget.nsw.gov.au/__data/assets/pdf_file/0007/128545/NSW_2016-17_Budget_Overview.pdf> viewed 10 May 2017.

⁷ Victorian Government, *Victorian Budget 2017/18 Overview: Getting on with the Job*, May 2017, p. 6, <<https://s3-ap-southeast-2.amazonaws.com/budgetfiles201718.budget.vic.gov.au/Overview.pdf>> viewed 10 May 2017.

- \$1.8 billion in Tasmania from financial year 2016–17 to 2019–20;⁸
- \$1.75 billion in the Northern Territory in financial year 2017–18;⁹
- \$12.1 billion in South Australia from financial year 2016–17 to 2019–20;¹⁰
- \$22.9 billion in Western Australia from financial year 2017–17 to 2019–20;¹¹ and
- \$40 billion in Queensland from financial year 2016–17 to 2019–20.¹²

2.8 Mr Ian Nightingale, Industry Advocate of South Australia, provided similar evidence, but pointed out that state and territory government spending on infrastructure varies from year to year:

In total [South Australian Government procurement] is approximately \$6 billion. Per annum it is around \$4 billion in goods and services and about \$1.8 billion in building and infrastructure. But I do need to clarify that it fluctuates. If you build a massive hospital in one year then you will have a much higher building and construction figure.¹³

2.9 The Department of Finance suggested that goods and services purchased by the states on the Australian Government's behalf shouldn't be considered procurement:

⁸ Tasmanian Government, *The Budget; Budget Paper No. 1*, May 2016, pp. 101–103, <<http://www.treasury.tas.gov.au/Documents/2016-17-Budget-Paper-No-1.pdf>> viewed 10 May 2017.

⁹ Northern Territory Government, *Budget Strategy and Outlook 2017–18: Budget Paper No. 2*, May 2017, p. 5, <https://budget.nt.gov.au/__data/assets/pdf_file/0007/277603/BP2-2017-18-book.pdf> viewed 10 May 2017.

¹⁰ South Australian Government, *2016–17 State Budget: Budget Paper 1 Budget Overview*, July 2016, p. 5, <http://servicesa.cdn.on.net/budget201617/pdfs/budget/2016-17_budget_overview.pdf> viewed 10 May 2017.

¹¹ Western Australian Government, *2016–17 Budget Paper No. 3: Economic and Fiscal Outlook*, May 2016, p. 29 <<http://static.ourstatebudget.wa.gov.au/16-17/2016-17-wa-state-budget-bp3.pdf?>> viewed 10 May 2017.

¹² Queensland Government, *Queensland Budget 2016–17: Budget Paper No. 1 Budget Speech*, May 2016, p. 8, <<https://s3-ap-southeast-2.amazonaws.com/s3-media-budget/pdfs/budget+papers/bp1/bp1-2016-17.pdf>> viewed 10 May 2017.

¹³ Mr Ian Nightingale, Industry Advocate, Department of State Development, South Australia, *Committee Hansard*, Canberra, 29 March 2017, p. 4.

Payments to the states and territories are subject to intergovernmental agreements. Intergovernmental agreements are not procurements ...¹⁴

- 2.10 It is unclear what conditions the Commonwealth imposes on the state and territory spending funded through ‘intergovernmental agreements’. The Department of Finance noted that state and territory governments conduct procurement according to their own procurement frameworks:

Similar to the Commonwealth Procurement Rules, each state and territory procurement framework reflects international trade obligations applicable to state and territory jurisdictions which arise from international agreements negotiated by the Commonwealth, such as the *Australia United States Free Trade Agreement* and the *Japan Australia Economic Partnership Agreement*. State and territory obligations are similar to those of the Commonwealth, though they differ with respect to the applicable thresholds, exemptions, and covered entities.¹⁵

- 2.11 Further, the Department of Finance suggested that it would be difficult, if not impossible, for the Australian Government to require states to apply the CPRs to procurement funded by the Commonwealth:

The Commonwealth Procurement Rules are designed only to apply to federal government entities. They are not designed to be imposed on states and territories for their procurements, or for state and territory expenditures using funding from the Commonwealth. Imposition of Commonwealth Procurement Rules on state and territory procurements, or state and territory expenditures, would require careful consideration and legal advice on a case by case basis to address:

- constitutional issues,
- consequential procurement outcomes,
- contractual issues, and
- trade obligations.¹⁶

Procurement of Australian made or supplied goods

- 2.12 It is difficult to determine the proportion of government procurement that is supplied by Australian businesses, or whether the goods and services being

¹⁴ Department of Finance, *Supplementary submission 30.2*, p. 1.

¹⁵ Department of Finance, *Supplementary submission 30.2*, p. 2.

¹⁶ Department of Finance, *Supplementary submission 30.2*, p. 2.

delivered are Australian made. The Department of Finance collects data on procurement undertaken directly by Commonwealth agencies; however it is limited to information about suppliers' Australian Business Numbers (where available) and business addresses. When a business address in Australia is taken as an indicator of Australian supply this data indicates that:

- 84.8 per cent of goods and services, by value, were likely to have been sourced from Australian suppliers, or in the case of services, delivered by Australian suppliers;
- 97 per cent of services were likely to have been sourced from Australian suppliers; and
- 69 per cent of goods were likely to have been sourced from Australian suppliers.¹⁷

2.13 However, a business address in Australia is not a reliable indicator of Australian supply. Witnesses pointed out that international companies may have Australian offices, and Australian businesses may manufacture their products—or components of their products—overseas.

Mr Myron Mann, Managing Director of South Australian footwear manufacturer Rossi Boots, provided one such example. He noted that Rossi Boots lost a Defence Materiel Organisation (DMO) tender for 100 000 pairs of non-combat boots to a Western Australian based company offering footwear manufactured in Indonesia.¹⁸

2.14 Similarly, the Department of Finance highlighted the difficulties in determining the proportion of Australian-made goods in a time of integrated global supply chains :

A consensus definition of what is 'Australian' is also difficult to achieve as, for example, goods may be made of components from various sources.¹⁹

2.15 Mr Arthur Rorris, Secretary of the South Coast Labour Council (SCLC) used steel manufacturing to illustrate this point:

There seems to be a lot of confusion and inconsistency in what is Australian-made steel, and I am sure that you can use that for other products and goods.

¹⁷ Department of Finance, *Submission 30*, p. 6.

¹⁸ Mr Myron Mann, Managing Director, Rossiters Pty Ltd, *Committee Hansard*, Melbourne, 19 April 2017, p. 35.

¹⁹ Department of Finance, *Submission 30*, p. 6.

Is it the steel itself that comes out of those furnaces? Could it be imported steel that is fabricated in Australia? Is it a combination of the two?²⁰

- 2.16 Some state and territory governments collect data on locally procured content. The South Australian Industry Advocate reported that the average value of state government contracts awarded to suppliers with a predominately South Australian based workforce was 65 per cent.²¹ The Victorian Government reported that \$5.43 billion worth of procurement commenced in the 2015–16 financial year and ‘will support approximately 5 556 local jobs and 510 local apprentices and trainees.’²² However, there is little transparency around the amount of local content procured by state and territory governments using Commonwealth funds.

Impact of Commonwealth procurement

- 2.17 The total value of government procurement undertaken in Australia is significant. Witnesses highlighted the positive impact this expenditure has on the economy when governments purchase Australian made goods or services, or engage Australian businesses.

- 2.18 Professionals Australia asserted that local procurement can support Australian businesses to grow and generate employment:

Every time the government spends tax payer dollars, it provides the chance for a company to provide its services. These companies then employ people to carry out their work. In doing so, government procurement directly contributes to the health of the Australian economy.²³

- 2.19 This point was corroborated by Mr Robert Schweitzer, former Managing Director of RMS Distribution Services, who described the impact of a Department of Defence contract his company held:

The account in terms of our business represented about three per cent of the company's turnover and 2.5 per cent of the profit, yet there were seven per

²⁰ Mr Arthur Rorris, Secretary, South Coast Labour Council (SCLC), *Committee Hansard*, Melbourne, 19 April 2017, p. 9.

²¹ Industry Advocate South Australia, *Submission 4*, p. 2.

²² Victorian Government, *Local Jobs First: Victorian Industry Participation Policy Annual Report 2015–16*, October 2016, p. 6.

²³ Professionals Australia, *Submission 16*, p. 5.

cent of our staff—in other words, it was a very high labour component compared to the rest of our business.²⁴

- 2.20 Mr Walton, Chief Executive Officer of Professionals Australia, suggested that strategic procurement can boost workforce development. He drew attention to the Victorian Government's procurement framework which requires contracted businesses to provide training opportunities:

... [the Victorian Government] brought in the Major Projects Skills Guarantee where projects over a relatively low limit required at least 10 per cent of the jobs on it to be for engineering cadets, graduates or apprentices.²⁵

- 2.21 Mr David Giles-Kaye, Chief Executive Officer of the Council of Textile and Fashion Industries of Australia, said procurement can also be used to foster industry innovation:

In the vastly larger fashion market [designer innovation] is driven by consumers, very many of who recognise the broader value of a better product. There is the opportunity in government to use procurement as a tool for encouraging investment in innovation ...

The only example of this I know of in our industry is the current combat uniform for the Australian Defence Force, which is required to be made in Australia ... This is a good thing, and it does maintain important capability in country and supports very many jobs.²⁶

- 2.22 Mr Andrew Dettmer, National President of the Australian Manufacturing Workers' Union (AMWU) went further, suggesting that procurement could be strategically deployed to create whole new industries:

We also know that industries can be created around particular sets of procurement decisions. We know that if there is a will to do so and a legislative basis to support it, that those industries can be created which are going to be nation-building.²⁷

²⁴ Mr Robert Schweitzer, private capacity, *Committee Hansard*, Melbourne, 19 April 2017, p. 17.

²⁵ Mr Walton, Professionals Australia, *Committee Hansard*, Melbourne, 19 April 2017, pp. 24–25.

²⁶ Mr David Giles-Kaye, Chief Executive Officer, Council of Textile & Fashion Industries of Australia, *Committee Hansard*, Melbourne, 19 April 2017, pp. 52–53.

²⁷ Mr Andrew Dettmer, National President, Australian Manufacturing Workers' Union (AMWU), *Committee Hansard*, Melbourne, 19 April 2017, p. 48.

- 2.23 This idea is supported by the Construction Forestry Mining and Energy Union of Australia (CFMEU) and the Textile Clothing and Footwear Union of Australia (TCFUA). In a joint submission to the inquiry, the unions noted that domestic procurement supports private investment in Australian industries:

Spending locally not only directly creates jobs in Australian industries, it also has a multiplier effect in that it increases economic activity in downstream industries and communities and can stimulate private investment in Australian industries.²⁸

- 2.24 However, Mr Stephen Gargano, National Research Officer with Professionals Australia, pointed out that the impact procurement has on the Australian economy is largely determined by the policies informing how officials procure goods and services, and the obligations imposed on contracted suppliers:

Obviously, [the impact] is going to differ depending on the item being procured, the type of procurement and the government agency, but at a very minimum we would be looking at items like job creation, economic growth, skill development, workforce development, local content, the capacity for a procurement to stimulate the economy or stimulate specific industries, and capacity to contribute to the development or growth of industry such as submarine or boat building.²⁹

Commonwealth Procurement Framework

- 2.25 The Australian Government's Commonwealth Procurement Framework outlines the principles and rules guiding officials' use of public funds to procure the goods and services required to support its policies and programs.³⁰ It is a subset of the Resource Management Framework which applies to Commonwealth agencies and governs the effective and ethical management of public resources. The Resource Management Framework consists of the *Public Governance, Performance and Accountability Act 2013*, the Public Performance and Accountability Rule 2014 and the Financial

²⁸ Construction Forestry Mining and Energy Union of Australia (CFMEU) and the Textile Clothing and Footwear Union of Australia (TCFUA), *Submission 35*, p. 19.

²⁹ Mr Stephen Gargano, National Research Officer, Professionals Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 24.

³⁰ Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, paragraphs 2.10–2.13; Department of Finance, *Submission 30*, p. 3.

Reporting Rule. The Commonwealth Procurement Framework is enabled by these rules and legislation and considered a subset of them.

2.26 The three main elements of the Commonwealth Procurement Framework are:

- the *Commonwealth Procurement Rules (CPRs)*;
- Department of Finance procurement guidelines and resources; and
- procurement connected policies.³¹

Commonwealth Procurement Rules

2.27 The CPRs direct the way non-corporate Commonwealth agencies purchase goods and services, and articulate the requirements for Commonwealth officials performing duties in relation to procurement.³² They reflect Australia's international trade obligations and provide for a variety of procurement arrangements including whole of government agreements, panel arrangements and multi-use lists.³³

2.28 The CPRs are issued by the Minister for Finance under section 105B(1) of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). They are divided into two parts supplemented by appendices.³⁴

2.29 Division One of the CPRs sets out the rules which apply to all procurement, no matter the value of goods or services to be purchased. Division One rules aim to ensure procurement:

³¹ Department of Finance, '*Commonwealth Procurement Rules*', <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/commonwealth-procurement-rules/>> viewed 1 May 2017; Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, pp. 3–10.

³² Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, paragraphs 2.2, 2.3 and 3.1.

³³ Department of Finance, '*What is Whole-of-Government*', <<http://www.finance.gov.au/procurement/wog-procurement/wog.html>> viewed 1 May 2017; Department of Finance, '*Panel Arrangements and Multi-use lists*', <<https://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/procurement-practice/panel-and-mul/principles.html>> viewed 1 May 2017; Department of Finance, *Submission 30*, p. 3.

³⁴ Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, paragraphs 2.1, 3.5 and 3.6.

- achieves value-for-money;
- encourages competition;
- is conducted in an efficient, effective, economical and ethical manner;
- is accountable and transparent;
- engages sensibly with risk; and
- is undertaken using appropriate procurement methods.³⁵

2.30 Division One rules require that procurement be conducted using one of three methods: open tender, prequalified tender or limited tender.

2.31 Open tender involves ‘publishing an open approach to market and inviting submissions’.

2.32 Prequalified tender involves inviting submissions from:

- a shortlist of potential suppliers that responded to an initial open approach to market on Austender;
- a list of potential suppliers selected from a multi-use list established through an open approach to market; or
- a list of all potential suppliers that have been granted a specific licence or comply with a legal requirement, when the licence or compliance with the legal requirement is essential to the conduct of the procurement.³⁶

2.33 Limited tender involves approaching one or more suppliers to make submissions. This method may only be used in low value procurement or procurement subject to specific conditions listed in Division Two of the CPRs. For example, ‘for reasons of extreme urgency brought about by events unforeseen’, or ‘in the case of a contract awarded to the winner of a design contest’.³⁷

2.34 Division Two lists rules which apply in addition to Division One rules when the expected value of procurement is at or above one of the following thresholds:

- \$80 000 for general procurement by a non-corporate Commonwealth agency;

³⁵ Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, pp. 12–25.

³⁶ Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, p. 25.

³⁷ Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, pp. 27–28.

- \$400 000 for the procurement of construction services by a prescribed corporate Commonwealth agency; or
- \$7.5 million for the procurement of construction services by a non-corporate Commonwealth agency.³⁸

2.35 Division Two rules govern how procurement valued above these thresholds should be conducted. They specify principles including:

- the conditions in which a limited tender may be undertaken;
- minimum time frames for procurement; and
- consideration of the broader benefits to the Australia economy for procurement expected to value above \$4 million.

2.36 Appendix A details the types of procurement exempt from Division Two despite being above one of the relevant thresholds, for example the procurement of blood plasma or goods or services for the Defence Intelligence Organisation. Appendix B provides a list of definitions.³⁹

Department of Finance procurement guidance materials

2.37 The Department of Finance is the Commonwealth agency with responsibility for maintaining the Commonwealth Procurement Framework. It provides a range of resources to support other Commonwealth agencies to undertake procurement that is compliant with the Framework.⁴⁰

2.38 The Department's website has information on procurement tailored to Commonwealth agencies and officials, as well as industries and businesses interested in selling goods and services to the Australian Government. Online resources offered by the Department include: ⁴¹

- the CPRs, information about recent amendments and how the rules should be applied;⁴²

³⁸ Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, paragraph 9.7.

³⁹ Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, pp. 34–37.

⁴⁰ Department of Finance, *Submission 30*, p. 3.

⁴¹ Department of Finance, 'Procurement', <<https://www.finance.gov.au/procurement/>> viewed 2 May 2017.

⁴² Department of Finance, 'Procurement', <<https://www.finance.gov.au/procurement/>> viewed 2 May 2017; Department of Finance, 'Buying for the Australian Government',

- the *Procurement Bulletin*, a monthly e-magazine discussing new developments in procurement and advertising future procurement activities;⁴³
- the Commonwealth Contracting Suite, a collection of ‘smart’ forms to assist officials to prepare documentation for procurement valued under \$1 million;⁴⁴
- ICT procurement strategies and national frameworks, policies, information on panel arrangements, and procurement guidelines;⁴⁵
- links to a separate website which explains Commonwealth procurement processes to businesses including a Guide to Selling, FAQs and case studies;⁴⁶
- links to the AusTender website and information for industry about Commonwealth agencies’ annual procurement plans and multi-use lists;
- a description of the Procurement Coordinator’s role and access to their blog promoting changes to the Commonwealth Procurement Framework;⁴⁷ and
- Resource Management Guides, such as *Commonwealth Grants and Procurement Connected Policies: Resource Management Guide No. 415* which outlines the process for establishing procurement connected policies.⁴⁸

Procurement connected policies

<<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/>> viewed 2 May 2017.

⁴³ Department of Finance, ‘*Training and Professional Development Opportunities*’, <<https://www.finance.gov.au/procurement/Training.html>> viewed 4 May 2017.

⁴⁴ Department of Finance, ‘*Commonwealth Contracting Suite – Frequently Asked Questions*’, <<https://ccs.finance.gov.au/FAQs/index.html>> viewed 2 May 2017.

⁴⁵ Department of Finance, ‘*Policy Guides and Procurement*’, <<https://www.finance.gov.au/policy-guides-procurement/>> viewed 2 May 2017.

⁴⁶ Department of Finance, ‘*Make Selling to the Australian Government Your Business*’ <<http://sellingtogov.finance.gov.au/>> viewed 2 May 2017.

⁴⁷ Department of Finance, ‘*Procurement*’, <<https://www.finance.gov.au/procurement/>> viewed 2 May 2017.

⁴⁸ Department of Finance, ‘*List of Resource Management Guides*’, <<http://www.finance.gov.au/resource-management/index/rmg/>> viewed 2 May 2017.

- 2.39 In addition to the CPRs, Commonwealth agencies must also comply with procurement connected policies. The Australian Government wields considerable economic influence through procurement.⁴⁹ Procurement connected policies seek to utilise this influence to drive policy outcomes by placing additional requirements on Commonwealth agencies' procurement activities.⁵⁰
- 2.40 Procurement connected policies are approved by Cabinet and managed by the Commonwealth agency which proposed their introduction. It is Commonwealth officials' responsibility to ensure they inform themselves of the policies that apply to procurement they are conducting.⁵¹ Until 2014, there were 24 procurement connected policies⁵² administered across 11 government departments; however, in recent years many of these policies have been abolished and there are now only four:
- the *Indigenous Procurement Policy*;
 - the *Workplace Gender Equality Procurement Principles and User Guide*;
 - the *Australian Industry Participation Plans for Government Procurement*; and
 - the *Code for Tendering and Performance of Building Work 2016*.

Indigenous Procurement Policy

- 2.41 The Department of the Prime Minister and Cabinet's (PMC) *Indigenous Procurement Policy* took effect from 1 July 2015. It aims to 'stimulate Indigenous entrepreneurship and business development [by] providing Indigenous Australians with more opportunities to participate in the economy'. The procurement connected policy has three components:

⁴⁹ Professor John Howe, Director, Centre for Employment and Labour Relations Law, Melbourne Law School, University of Melbourne, *Committee Hansard*, Melbourne, 19 April 2017, p. 1.

⁵⁰ Department of Finance, '*Procurement Connected Policies*', <<https://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/policy-framework/procurement-policies/principles/>> viewed 1 May 2017.

⁵¹ Department of Finance, *Commonwealth Grants and Procurement Connected Policies: Resource Management Guide No. 415*, November 2016, pp. 5–9.

⁵² National Commission of Audit, *Report of the National Commission of Audit – Volume 2, Towards Responsible Government*, '10.21 Outsourcing, Competitive Tendering and Procurement', <<http://www.ncoa.gov.au/report/appendix-vol-2/10-21-outsourcing-competitive-tendering-and-procurement.html>> viewed 5 May 2017.

- it sets increasing, yearly targets for Commonwealth purchasing from Indigenous enterprises;
- it requires some Commonwealth contracts to be set-aside for Indigenous enterprises; and
- it establishes minimum Indigenous participation requirements for certain Commonwealth contracts.⁵³

2.42 The *Indigenous Procurement Policy* is able to set mandatory requirements for Indigenous participation in procurement without contravening the CPRs due to exemption 17 in Appendix A of the rules. This exemption enables:

... Commonwealth entities to procure goods and services directly from [small to mediums sized enterprises] that are at least 50 per cent Indigenous owned regardless of the value of the procurement. This exemption only applies to the additional rules set out in Division 2 of the Commonwealth Procurement Rules, and refers predominantly to the requirement to approach the open market for goods and services valued above the relevant threshold ... The rules in Division 1 still apply to the procurement, including the requirement to achieve value for money.⁵⁴

2.43 PMC reported that in the 2015–16 financial year the procurement connected policy's targets for Commonwealth purchasing from Indigenous enterprises were exceeded with 1 509 contracts, totalling \$284.2 million, awarded to 493 Indigenous businesses. This represents almost 46 times the value of Commonwealth procurement from Indigenous businesses in previous years.⁵⁵ Indigenous ICT Organisation, Gulanga reported that Commonwealth agencies are embracing the *Indigenous Procurement Policy*:

Most agencies we have spoken with are solidly behind the intent of the IPP. The hurdle is often shifting that intent into action ... The government's vision and passion to open procurement that provides more valuable business opportunities for Indigenous entrepreneurs is commendable.⁵⁶

⁵³ Department of the Prime Minister and Cabinet, *Commonwealth Indigenous Procurement Policy*, 1 July 2015, p. 6.

⁵⁴ Department of the Prime Minister and Cabinet, *Commonwealth Indigenous Procurement Policy*, 1 July 2015, pp. 6–7.

⁵⁵ Department of the Prime Minister and Cabinet, 'Commonwealth Milestones: 12 Months IPP Outcomes', <<https://www.dpmc.gov.au/indigenous-affairs/economic-development/indigenous-procurement-policy-ipp>> viewed 2 May 2017.

⁵⁶ Gulanga, *Submission 26*, p. 1.

- 2.44 However, Gulanga noted that continuing implementation will be key to the policy's long term success:

Given the success of the IPP to date and the demographic value of expanding and enhancing the Indigenous business community, accelerating intent into action is paramount for the enduring legacy the IPP initiative can deliver.⁵⁷

Workplace Gender Equality Procurement Principles and User Guide

- 2.45 The Department of Employment's *Workplace Gender Equality Procurement Principles* and the supporting *User Guide* link the *Workplace Gender Equality Act 2012* (WGE Act) to procurement outcomes. The procurement connected policy requires Commonwealth agencies to only procure goods and services (valued above the relevant thresholds) from organisations compliant with the WGE Act.⁵⁸ The *Workplace Gender Equality Procurement Principles* have been in effect since 1 August 2013 and 'focus on promoting and improving gender equality and outcomes for both women and men in the workplace'. Organisations with 100 or more employees must demonstrate their compliance with the WGE Act by reporting to the Workplace Gender Equality Agency on gender equality indicators and seeking a letter of compliance.⁵⁹
- 2.46 In 2015-16, the Workplace Gender Equality Agency noted in its regular publication, *Australia's Gender Equality Scorecard* that organisations reporting in relation to the WGE Act were more aware of the gender equality issues in their workplace:

Employers tell us that reporting to the Agency has prompted them to take a close look at their data and face up to their own gender equality 'hot spots' — whether it is rates of return to work after parental leave, representation of

⁵⁷ Gulanga, *Submission 26*, p. 1.

⁵⁸ Department of Families, Housing, Community Services and Indigenous Affairs (now administered by the Department of Employment), *Workplace Gender Equality Procurement Principles and User Guide*, 1 August 2013, p. 1.

⁵⁹ Workplace Gender Equality Agency, '*Complying with the Act*', <<https://www.wgea.gov.au/about-legislation/complying-act>> viewed 2 May 2015; Workplace Gender Equality Agency, '*Workplace Gender Equality Procurement Principles*' <<https://www.wgea.gov.au/about-legislation/workplace-gender-equality-procurement-principles>> viewed 4 May 2017.

women in leadership or technical roles, or access to flexible work arrangements.⁶⁰

- 2.47 The Agency also reported modest progress in closing the gender pay gap and increases in women's participation in leadership roles.⁶¹

The Australian Industry Participation Plans for Government Procurement

- 2.48 The Department of Industry, Innovation and Science's *Australian Industry Participation Plans for Government Procurement* was introduced on 1 January 2010 to support small to medium sized Australian businesses to participate in major investment projects. The procurement connected policy requires organisations which bid for non-corporate Commonwealth procurement valued at or above \$20 million, to prepare and implement an Australian industry participation plan (AIP plan).⁶² AIP plans must:

- demonstrate how the organisation will provide full, fair and reasonable opportunity to Australian industry to supply goods and services to the project; and
- endeavour to maximise opportunities for Australian industry to participate in all aspects of the project.⁶³

- 2.49 The Department of Industry, Innovation and Science's *Annual Report 2015–16* noted that 304 AIP plans with a combined value of \$13.9 billion were approved between 1 January 2010 and 30 June 2016.⁶⁴

- 2.50 The Committee notes the recent change in the *Australian Industry Participation Plans for Government Procurement* and further notes that this seems to have led to a dramatic decrease in the number of AIP plans

⁶⁰ Workplace Gender Equality Agency, *Australia's Gender Equality Scorecard: Key Findings from the Workplace Gender Equality Agency's 2015–16 Reporting Data*, November 2016, p. 1.

⁶¹ Workplace Gender Equality Agency, *Australia's Gender Equality Scorecard: Key Findings from the Workplace Gender Equality Agency's 2015–16 Reporting Data*, November 2016, p. 1.

⁶² Department of Industry, Innovation and Science, *Australian Industry Participation Plans User Guide for developing an AIP Plan*, Version 2.4, June 2016, pp. 4–6.

⁶³ Department of Industry, Innovation and Science, *Australian Industry Participation Plans User Guide for developing an AIP Plan*, Version 2.4, June 2016, p. 6.

⁶⁴ Department of Industry, Innovation and Science, *Annual Report 2015–16*, 14 September 2016, p. 126.

implemented each year. This suggests the policy change may negatively impact the level of Australian industry engagement.⁶⁵

Code for Tendering and Performance of Building Work 2016

2.51 The Department of Employment's *Code for the Tendering and Performance of Building Work 2016* was introduced on 2 December 2016, replacing the *Building Code 2013*. The new procurement connected policy aims to ensure building contractors who tender for Commonwealth funded building work comply with:

- right of entry laws for union officials;
- freedom of association provisions for workers;
- work health and safety regulation; and
- security of payment laws.⁶⁶

2.52 The Building Code 2016 came into effect pursuant to the *Building and Construction Industry (Improving Productivity) Amendment Bill 2017* and existing industrial agreements entered into prior to the issuing of the Building Code 2016 must be compliant by 1 September 2017. Building contractors become subject to the code from the first time they submit an expression of interest for a Commonwealth funded building work. Contractors who fail to comply with the code risk being excluded from Commonwealth funded building work.⁶⁷

2.53 The Electrical Trades Union and Australian Council of Trade Unions raised concerns that the retrospective application of the Building Code 2016 may breach the non-discriminatory requirements in clause 4.4 of the CPRs:

⁶⁵ Mr Trevor Power, Head of Division, Industry Growth Policy, Department of Industry, Innovation and Science, *Committee Hansard*, 2016-2017 Additional Estimates, Economic Legislation Committee, Canberra, 2 March 2017, pp.147-148; Department of Industry, Innovation and Science, *Answer to Question on Notice No. AI-157: 2016-17 Additional Estimates 2 March 2017*, pp.1-8.

⁶⁶ Senator the Hon Michaelia Cash, Minister for Employment, 'New Building Code to Improve Conduct and Boost Productivity on Building Sites', <<https://ministers.employment.gov.au/cash/new-building-code-improve-conduct-and-boost-productivity-building-sites>> viewed 2 May 2017.

⁶⁷ Department of Employment, 'Explanatory Statement: Code for the Tendering and Performance of Building Work 2016', <<https://www.legislation.gov.au/Details/F2016L01859/Explanatory%20Statement/Text>> viewed 2 May 2017.

We are of the view that the newly issued federal The Building Code 2016 has the potential to breach the non-discriminatory requirements of the CPR. While one view may be that because the Building Code 2016 is applied to all building industry entities who wish to tender for commonwealth work equally, that view ignores the reality that the Code has a retrospective element that will impact some parties more than other for procurement arrangements that were in place prior to the existence of the Code.⁶⁸

- 2.54 Stakeholders also alerted the Committee to a possible contradiction between the requirements of the new Code and the amended CPRs. The Building Code specifies the use of Australian standards whereas the CPRs include an option to use international standards:

As an example, if I am builder A building a bridge in state B that has government procurement rules and also goes to the Building Code of Australia, I am legally bound by the Building Code of Australia to build that bridge to Australian standards, but the government procurement rules tell me I have to use international standards. So there is a contradiction between the two agreements.⁶⁹

⁶⁸ Australian Council of Trade Unions (ACTU), *Submission 34*, p. 17; Electrical Trades Union (ETU), *Submission 11*, pp. [6–7]

⁶⁹ Mr Ian Cairns, National Manager, Industry Development and Government Relations, Australian Steel Institute (ASI), *Committee Hansard*, Canberra, 8 May 2017, p. 27.

3. The amendments

Introduction

- 3.1 This Chapter provides an overview of the new clauses implemented under the amended Commonwealth Procurement Rules (CPRs) that came into effect on 1 March 2017. It sets out the text of the new clauses and a brief analysis of the changes and their benefits.

Background

- 3.2 There have been calls for reform of the Commonwealth Procurement Framework to address concerns that it does not support Australian suppliers. In 2014, the Senate Finance and Public Administration References Committee made fifteen recommendations to the government regarding the practical implementation of government procurement practices.¹
- 3.3 During negotiations for the passage of the *Building and Construction Industry (Improving Productivity) Bill* in November 2016, the Government agreed to amendments to the CPRs. The amendments were tabled on 30 November 2016 and the Joint Select Committee on Government Procurement was established to inquire into their implementation.

The new clauses

¹ Senate Finance and Public Administration References Committee, *Commonwealth procurement procedures*, July 2014, pp. ix–x; Australian Government response to the Senate Finance and Public Administration Reference Committee Report: *Commonwealth procurement procedures*, April 2015, p. 3; see paragraphs 3.23–3.31 below.

- 3.4 The amendments aim to ensure that the full benefit of Commonwealth procurement will flow to the Australian economy and that Australian regulation and standards are upheld. The amendments are designed to mitigate the disadvantages faced by Australian suppliers accessing government procurement opportunities.
- 3.5 The evidence suggests that effective implementation of the new clauses will be critical in achieving these aims and addressing some of the weaknesses in the new framework.

Clause 10.10 and 10.37: Australian standards

10.10 Where an Australian standard is applicable for *goods* or services being procured, tender responses **must** demonstrate the capability to meet the Australia standard, and *contracts* **must** contain evidence of the applicable *standard*.²

10.37 Where applying a *standard* (Australian, or in its absence, international) for *goods* or services, *relevant entities* **must** make reasonable enquiries to determine compliance with that *standard*:

- a. this includes gathering evidence of relevant certifications; and
- b. periodic auditing of compliance by an independent assessor.³

- 3.6 The specification of Australian Standards in the CPRs was welcomed by Australian industry. Contributors to the inquiry highlighted the safety, economic and environmental risks of not complying with relevant Australian standards.
- 3.7 Ian Nightingale, the South Australian Industry Advocate illustrated that implementing Australian Standards ensured product quality:

If any public entity is going to provide genuine value for money to our nation and to our state then you must be considering quality—if you are genuinely

² Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, paragraph 10.10. Clause 10.10 and 10.37 are discussed in more detail in paragraphs 5.3–5.5, 5.15–5.21, 6.19–6.21, 6.43 and 9.7–9.10.

³ Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, paragraph 10.37. Clause 10.10 and 10.37 are discussed in more detail in paragraphs 5.3–5.5, 5.15–5.21, 6.19–6.21, 6.43 and 9.7–9.10.

getting a value-for-money outcome; if you are only going for a least-cost outcome then quality and standards go out the door.⁴

- 3.8 Dr Burn from the Australian Industry Group (AiG) argued that requiring compliance with Australian standards will help ameliorate the disadvantage faced by Australian suppliers and provide a level playing field for all tenderers:

... the domestic suppliers of competing products who do conform with standards— at a cost of course—are conforming with Australian or international standards at the level that we require here, but they are bearing costs that are not being borne by suppliers who do not put the same effort into the quality of their stuff. So, to the extent that the domestic market has been eroded somewhat by lower quality stuff and domestic suppliers feel that they cannot compete ... then there will be ... some benefit to domestic suppliers who do conform to higher quality, just as, for that matter, there would be some benefit to imported suppliers who conform and bear the costs of conforming to those standards.⁵

- 3.9 Specification of Australian Standards was not required in the previous version of the CPRs (CPR 14). Rather, under CPR 14, specifications for goods and services were to be based on international standards, unless they were significantly more onerous than the Australian version in which case the Australian standard could be used instead.

Clause 10.18: Labour regulations, OH&S and environmental considerations

10.18 *Officials must* make reasonable enquiries that the *procurement* is carried out considering relevant regulations and / or regulatory frameworks, including but not limited to *tenderer*' practices regarding:

- a. labour regulations, including ethical employment practices;
- b. occupational, health and safety; and

⁴ Mr Ian Nightingale, Industry Advocate, Department of State Development, South Australia, *Committee Hansard*, Canberra, 29 March 2017, p. 5.

⁵ Dr Peter Burn, Head of Influence and Policy, Australian Industry Group (AiG), *Committee Hansard*, Canberra, 29 March 2017, p. 10.

c. environmental impacts.⁶

- 3.10 The inclusion of labour and occupational, health and safety regulations is seen as an important step in levelling the playing field for Australian suppliers. Rossi Boots, a family owned Australian company, emphasised that, while necessary to maintain the conditions expected in Australia, these regulations impose costs on domestic businesses not faced by many of their international competitors:

When government contemplate global sourcing, they should allow for cost factors that they impose on local suppliers that are not imposed on the global competitor. In addition to high minimum wages, these also include weekend penalty rates, payroll taxes, superannuation guarantee levies, accumulation of annual leave, workers compensation, occupational health and safety costs, sick leave and personal leave.⁷

- 3.11 There is a cost disadvantage for Australian suppliers of complying with environmental regulations that will also be eased with the implementation of clause 10.18:

Australian industry is making huge in-roads on environmental savings and sustainable development which should be a factor taken into account in government procurement decisions.⁸

- 3.12 Human Rights organisations praised the inclusion of ethical employment and environmental practices within the CPRs. Professor Howe, from Melbourne Law School, spoke on behalf of the Joint Academic and Civil Society Group stating:

We commend the inclusion of rule 10.18 in the Procurement Rules.⁹

- 3.13 Professor Jennifer Burn, Director of Anti-Slavery Australia also supported the amendment, although called for its expansion:

⁶ Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, paragraph 10.18. Clause 10.18 is discussed in more detail in paragraphs 5.6–5.11, 5.21, 5.33–5.36, 7.12, 7.37 and 9.11–9.15.

⁷ Rossiter's Pty Ltd, *Submission 53*, p. 1.

⁸ Rossiter's Pty Ltd, *Submission 53*, p. 3.

⁹ Professor John Howe, Director, Centre for Employment and Labour Relations Law, Melbourne Law School, University of Melbourne, *Committee Hansard*, Melbourne, 19 April 2017, p. 1.

I was delighted when I saw the amendment with 10.18. I have read the rules and the guidelines. It may seem that such practices should be included, but where the practices are so serious we would recommend that there is an additional example included within that framework that specifically mentions human trafficking, slavery and slavery like practices.¹⁰

- 3.14 Compliance with labour regulations, occupational health and safety rules or environmental considerations was not included in CPR 14.

Clause 10.30: Economic benefit

- 3.15 **10.30** In addition to the considerations at paragraph 4.4, for *procurements* above \$4 million, Commonwealth *officials* are required to consider the economic benefit of the *procurement* to the Australian economy.¹¹

- 3.16 The focus on economic benefit to the Australian economy was praised by contributors to the Inquiry. Mr Giles-Kaye, Chief Executive Officer of the Council of Textile & Fashion Industry Australia, declared:

This is a fantastic inclusion, in my opinion.¹²

- 3.17 Professionals Australia expressed similar support:

Professionals Australia strongly supports this clause, and we believe it represents an opportunity to leverage the procurement function to deliver maximum possible community benefit.¹³

- 3.18 The Australian Steel Institute (ASI) summarised an Industry Capability Network report: *Impacts of New and Retained Business in the Australian Manufacturing Sector* to demonstrate the possibilities for economic benefit in the Australian Manufacturing sector:

The most valuable point the document makes is the observation that:

¹⁰ Professor Jennifer Burn, Director, Anti-Slavery Australia, University of Technology Sydney, *Committee Hansard*, Canberra, 8 May 2017, p. 35.

¹¹ Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, paragraph 10.30. Clause 10.30 is discussed in more detail in paragraphs 5.12–5.14, 5.20–5.40, 6.13, 7.21–7.23, 8.58 and 9.23–9.31.

¹² Mr David Giles-Kaye, Chief Executive Officer, Council of Textile & Fashion Industries Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 53.

¹³ Professionals Australia, *Submission 16*, p. [4].

Table 3.1 shows the Type I multiplier analysis for the manufacturing industry, indicating for every \$1.0 million of new or retained output in the manufacturing industry, approximately:

- \$713,400 worth of gross value added is induced in the economy. Value-added includes wages, salaries, taxes paid and profits
- Six full-time equivalent (FTE) jobs are supported
- \$64,900 worth of welfare payments are saved. Welfare refers to payments made by Social Security in order to assist and sustain unemployed persons
- \$225,300 worth of tax revenue is raised.¹⁴

3.19 Guidance circulated by the Department of Finance listed a number of factors that could be taken into account when considering economic benefit. These include:

- competitive pricing;
- building, leasing or procuring infrastructure that supports Australian communities;
- providing skills and training that benefit Australian communities;
- employing workers in Australia;
- paying taxes in Australia;
- the environmental benefit of the proposed solution to Australia, for example, low environmental impact through energy efficient inputs;
- contributing to positive social outcomes in Australian communities;
- using indigenous businesses;
- using small and medium enterprises (SMEs) in delivering goods and services, such as a subcontractor or supplier;
- sharing knowledge, skills and technology with SMEs; and
- using goods and services from a business that provides services of persons with a disability.¹⁵

3.20 The Committee received suggestions from submitters and witnesses on what should be considered in determining economic benefit. The substance of

¹⁴ Australian Steel Institute (ASI), *Submission 27.1*, p. 7.

¹⁵ Department of Finance, *Consideration of broader economic benefits in procurement*, p. 3.

these suggestions was all contained in the Department of Finance's existing guidance.

Clause 10.31: International agreements

10.31 The policy operates within the context of relevant national and international agreements and *procurement* policies to which Australia is a signatory, including trade agreements and the Australia and New Zealand Government Procurement Agreement.¹⁶

3.21 Previous similar attempts to amend the CPRs have been blocked due to concerns over breaching Australia's international obligations. However, the Department of Foreign Affairs and Trade (DFAT) offered assurances that the wording of the new clauses and careful implementation will mitigate those concerns.

3.22 For example, with regard to clause 10.10 and 10.37, DFAT stressed that all tenderers, both domestic and foreign, must be treated equally:

The changes relating to compliance with standards and regulatory frameworks build on existing provisions in the CPRs and provide clarity to procurement officers. These changes are consistent with our FTA obligations if all tendering firms—domestic and foreign—are required to demonstrate their capacity to meet standards and comply with regulatory frameworks and if procurement officers treat all tenders—domestic and foreign—equally in making their assessments.¹⁷

3.23 Similarly, with regard to clause 10.10, all tenderers must receive equal treatment when assessing economic benefit:

Treating domestic and foreign firms equally is also necessary when assessing the economic benefit to Australia for Procurements over \$4 million. Australia's FTAs allow a contract to be awarded to the firms that represent the best value or most advantageous tender and give procurement officers the flexibility to request and consider all relevant financial and non-financial in making that assessment ... However, this has a clear boundary in that all tendering firms—

¹⁶ Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, paragraph 10.31. Clause 10.31 is discussed in more detail in paragraphs 5.12–5.14 and 9.32–9.39.

¹⁷ Department of Foreign Affairs and Trade (DFAT), *Submission 25*, pp. 4–5.

Australian and Foreign—must be given an equal opportunity to demonstrate the economic benefit to Australia.¹⁸

3.24 The same principal applies to Australia's possible accession to the World Trade Organization's Government Procurement Agreement (WTO GPA):

Australia's accession to the GPA will not have any impact on the CPR17 changes beyond our existing [Free Trade Agreement] FTA obligations, because the relevant obligations in the GPA are not materially different to those in our FTA's. This means that, as long as our implementation of the changes in CPR17 is in line with our existing FTA commitments, there will be no impact on CPR17 once we become a member of GPA.¹⁹

3.25 Despite DFAT's assurances, some concerns were raised that the amendments will breach Australia's international obligations. Both the European Union Delegation to Australia and the New Zealand High Commission argue that the CPRs are not compatible with Australia's current free trade agreements and possible accession to the WTO GPA.

3.26 The New Zealand High Commission and the Delegation of the European Union to Australia both stated that clause 10.30 (economic benefit) may not be in accordance with Australia's international agreements.

3.27 The New Zealand High Commission consider there are implications for the Australia New Zealand Government Procurement Agreement (ANZGPA):

New Zealand is concerned that the practical application of the new 'economic benefit' criteria in the revised CPRs (paragraph 10.30) has the potential to be inconsistent with the key tenets of ANZGPA. The criteria may deny New Zealand suppliers legitimate access to the single market for government procurement.²⁰

3.28 DFAT conceded that, although the amended CPRs were designed to ensure compliance with Australia's international trade agreements, there are concerns about the ANZGPA:

The New Zealand ANZGPA has very similar provisions in that they require that we do not discriminate against—and in fact that is what we do in our

¹⁸ DFAT, *Submission 25*, p. 5.

¹⁹ Mr Hamish McCormick, First Assistant Secretary, Office of Trade Negotiations, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 8 May 2017, p. 63.

²⁰ New Zealand High Commission, *Submission 13*, p. 2.

FTAs and the GPA principle of non-discrimination. But the ANZGPA does go a little bit further than that. It is an agreement between the two finance ministers and talks about not being biased against or having the effect of denying equal access or opportunity to any ANZ supplier.²¹

- 3.29 The EU Delegation advised the Committee that clauses 10.30 and 10.10 were not compatible with the WTO GPA, and the EU–Australia trade and investment relationship:

It appears that the requirement for ‘economic benefit to the Australian economy’ is in breach with the GPA, in particular with Article IV(1) of the GPA which contains a general requirement for non-discrimination.²²

- 3.30 The EU Delegation did not consider that clause 10.10 (the application of Australian standards) would be compliant with the WTO GPA:

It is not clear how the requirement for compliance with an Australian standard is compatible with Article X:2(b) of the GPA which provides that: ‘In prescribing the technical specifications for the goods or services being procured, a procuring entity shall, where appropriate: base the technical specification on international standards, where such exist; otherwise, on national technical regulations, recognized national standards or building codes.’ It appears that under CPRs only in the absence of an Australian standard, an international standard would apply.²³

- 3.31 However, DFAT are confident that, if all tenderers are treated equally the new clauses will not contravene Australia’s international obligations:

The main consideration is that all suppliers, whether they are from Australia or overseas, need to be treated equally in government procurement decision-making processes other than the specific situations where exceptions and limitations in the treaties apply.²⁴

²¹ Mr David Holly, Assistant Secretary, Office of Trade Negotiations, DFAT, *Committee Hansard*, Canberra, 8 May 2017, p. 66.

²² European Union Delegation to Australia, *Submission 3*, p. [2].

²³ European Union Delegation to Australia, *Submission 3*, p. [2].

²⁴ Mr McCormick, DFAT, *Committee Hansard*, Canberra, 8 May 2017, p. 62.

4. Implementation concerns

Introduction

- 4.1 The amended Commonwealth Procurement Rules (CPRs) came into effect on 1 March 2017. This chapter examines concerns raised over the implementation process for the procurement system prior to the introduction of the amended CPRs. The chapter also explores some of the risks which may result from the concerns identified and concludes with a case study that demonstrates some of the issues discussed in the chapter.

Concerns

- 4.2 The Commonwealth Procurement Rules (July 2014) (CPR14) have attracted considerable criticism, particularly with regard to the evaluation of Australian domestic bids against international bids. Even where the CPR14 are seen to be adequate, the implementation process has been perceived as flawed. Concerns raised with the Committee include:
- procurement culture;
 - value-for-money versus lowest cost;
 - inconsistent interpretation; and
 - utilisation of existing provisions;
 - accountability and transparency;
 - risk allocation;
 - government as uninformed purchaser;
 - application of Australian standards; and

- exemptions.

Procurement 'culture'

Value for money versus lowest cost

- 4.3 Although the core principle of both the CPR14 and current CPRs is value for money, there appears to be ongoing tension between the concept of value for money and lowest cost.¹ The lack of a clear definition of value for money within the CPRs is seen as contributing to the problem.² The Australian National Audit Office (ANAO) makes it clear that lowest cost does not equate to value for money:

This is not always a simple matter of lowest cost, but requires the thoughtful consideration of the financial and non-financial cost and benefits associated with a specific procurement.³

- 4.4 Professionals Australia indicated that a risk adverse public sector tends to select the lowest cost tender.⁴ The Australian Manufacturing Workers' Union (AMWU) pointed out that the simplest option is often to make a decision on the basis of cost:

We say that there is a short-term and limited focus on cost, which is often the determinant, rather than looking at broader aspects of procurement decisions and the nation-building potential behind them.⁵

- 4.5 The prevailing perception is of a procurement 'culture' that focuses on lowest cost rather than considering value-for-money and the implication of broader social or economic benefits. The Council of Textile & Fashion Industries summarised the general opinion of many witnesses:

¹ Department of Finance, *Commonwealth Procurement Rules*, July 2014, paragraphs 4.4 and 4.5.

² Bus Association Victoria (BusVic), *Submission 1*, p. 7.

³ Australian National Audit Office (ANAO), *Submission 22*, p. [1].

⁴ Mr Christopher Walton, Chief Executive Officer, Professionals Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 24.

⁵ Mr Andrew Dettmer, National President, Australian Manufacturing Workers' Union (AMWU), *Committee Hansard*, Melbourne, 19 April 2017, p. 43.

I have heard it said a number of times by junior and senior procurement officials that, so long as specification is met in a tender, the lowest cost bid will win.⁶

- 4.6 Whole-of-life factors must be considered in value-for-money decisions.⁷ Such factors would include not just the provision of the procurement but ongoing maintenance through to final disposal:

Assessment of value-for-money should thus include the cost of tendering, the initial cost of purchase, service, support, warranty, operating costs, anticipated maintenance and repair and disposal or removal of the product at the end of its useful life.⁸

- 4.7 However, the difficulties of assessing and measuring these types of factors appear to discourage their consideration:

The requirements under section 4.5 and 4.6 of the Framework that require purchasing officers to consider whole of life costs are another area where the culture lags behind community expectations. Many of the concepts in this section are hard to quantify and implement without proper support for purchasing officials. This has led to a culture where the easiest decision to justify (usually selecting the goods or services with the lowest cost) is the one selected.⁹

Inconsistent interpretation and implementation

- 4.8 Inconsistent interpretation and implementation across Commonwealth departments and agencies is also seen as a significant problem. Consult Australia identified the connection between procurement culture and inconsistent implementation:

The issue that we have with the procurement rules is not necessarily the rules themselves but the interpretation and implementation of those rules and the cultures and behaviours that drive those implementations and interpretations. What we find is that there is inconsistent application of the procurement rules

⁶ Mr David Giles-Kaye, Chief Executive Officer, Council of Textiles & Fashion Industries of Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 52.

⁷ Department of Finance, *Commonwealth Procurement Rules*, July 2014, paragraph 4.6; Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, paragraph 4.6.

⁸ Consult Australia, *Submission 9*, p. 6.

⁹ Australian Manufacturing Workers' Union (AMWU), *Submission 18*, p. [1].

as they flow through to effect and influence procurement across not just the Commonwealth government but in the states and territories ...¹⁰

- 4.9 Similarly, the South Coast Labour Council (SCLC) agreed on the importance of the value for money provisions but emphasised the ‘patchy and certainly inconsistent’ application of the provisions.¹¹

- 4.10 Consult Australia maintained that the problem cannot be dismissed as the result of preferences being exercised by an individual procurement officer:

It often goes to the culture of particular agencies, or the culture of particular departments within particular agencies. So there is a large degree of inconsistency. It can also go to the specifics of the project in particular.¹²

- 4.11 This perception was reinforced by complaints received by the Australian Small Business and Family Enterprise Ombudsman (ASBFEO):

They tend to focus on, anecdotally, around three or four major departments that have a large procurement spend and they do tend to notice the differences. Although they are not necessarily complaining about those differences, they are complaining more so about a unique process that has gone through ... there is recognition of differences between departments. But we do not have a broad view across all departments. Our complaints tend to be very focused on particular large-spend departments.¹³

Utilisation of existing provisions

- 4.12 The previous and current CPRs contain a general exemption for small and medium enterprises (SMEs) and a range of exemptions under Australia’s various trade agreements, including the national interest, health and safety, and environmental considerations. Dr Thurbon, among others, emphasised the discretion that the Australian government has to implement exemptions, particularly for SMEs:

¹⁰ Ms Megan Motto, Chief Executive Officer, Consult Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 39.

¹¹ Mr Arthur Rorris, Secretary, South Coast Labour Council, *Committee Hansard*, Melbourne, 19 April 2017, p. 13.

¹² Ms Motto, Consult Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 41.

¹³ Mr James Strachan, Director Advocacy, Australian Small Business and Family Enterprise Ombudsman (ASBFEO), *Committee Hansard*, Canberra, 8 May 2017, p. 15.

Under its international obligations, the Australian Government retains a significant degree of scope to discriminate in favour of locally produced goods and services—so long as those goods and services are provided by local SMEs.¹⁴

4.13 According to Dr Thurbon, the following policy objectives are permitted under Australia's trade agreements:

- compulsory local industry participation plans for large projects;
- reserving some government contracts for local SMEs;
- mandating local content requirements in contracts reserved for SMEs;
- small business innovation research-style pre-commercial technology procurement;
- import substitution focused procurement plans;
- requiring government agencies to purchase specific goods made by SMEs;
- government issued 'performance insurance' for purchase of specific goods by local SMEs; and
- mandating local content in government-led foreign aid projects.¹⁵

4.14 The Australian Fair Trade and Investment Network (AFTINET), argues that not enough is being done to take full advantage of these existing provisions to preference domestic suppliers, particularly with regard to Australia's trade agreements:

... Australia's current international trade commitments do permit interpretations of value for money and preferences for local companies. However, Commonwealth Procurement Rules have until now lacked clarity about how these can be implemented and there appears to be a lack of awareness about them amongst those who implement tendering processes.¹⁶

4.15 Although the CPRs state that procurement practices are not to 'unfairly discriminate against SMEs'¹⁷, there have been ongoing claims that government departments are not aware of, or effectively implementing, the

¹⁴ Dr Elizabeth Thurbon, *Submission 46: Attachment A*, p. 582.

¹⁵ Dr Thurbon, *Submission 46: Attachment A*, 591.

¹⁶ Australian Fair Trade and Investment Network (AFTINET), *Submission 10*, p. 4.

¹⁷ Department of Finance, *Commonwealth Procurement Rules*, July 2014, paragraph 5.4; Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, paragraph 5.4.

broad exemptions that apply to SMEs.¹⁸ The AMWU argues that ‘our international obligations are poorly understood’ by procurement officers:

... they are generally considered by purchasing officers to be much more restrictive on our ability to preference locally made goods and locally delivered services than is actually the case.¹⁹

- 4.16 The Australian Forest Products Association (AFPA) reiterated concerns ‘regarding the lack of awareness and implementation amongst Government procurement officials of the environmental sustainability guidelines and broader socio-economic benefits when purchasing’.²⁰ AFPA go so far as to contend that ‘there has been a deliberate attempt through processes to ignore those things’.²¹

Accountability and transparency

- 4.17 The lack of accountability and transparency surrounding procurement decisions, particularly the assessment of value for money, was repeatedly raised. The ANAO found that this was a significant issue, noting that recent audits have highlighted:

- shortcomings in the planning and conduct of procurements, including in relation to keeping records of reasons for decisions and the assessment of value for money; and
- shortcomings in record keeping systems, which complicate external scrutiny and review processes and can affect entities’ ability to protect the Commonwealth’s interests.²²

- 4.18 The AFPA expressed frustration concerning the difficulty of determining what factors had been taken into consideration in evaluating value-for-money by procurement officials because of the ‘continued lack of transparency and consistent, measureable approaches across the agencies’.²³

¹⁸ AFTINET, *Submission 10*, p. 3; Australian Chamber of Commerce and Industry (ACCI), *Submission 5*, p. 2.

¹⁹ AMWU, *Submission 18.1*, p. [5].

²⁰ Australian Forest Products Association (AFPA), *Submission 20*, p. [1].

²¹ Mr Ross Hampton, Chief Executive Officer, Australian Forest Products Association (AFPA), *Committee Hansard*, Canberra, 8 May 2017, p. 22.

²² ANAO, *Submission 22*, p. [2].

²³ Mr Hampton, AFPA, *Committee Hansard*, Canberra, 8 May 2017, p. 19.

- 4.19 Professionals Australia consider that the lack of formal guidance with regard to accountability in the CPRs nullifies any advantages:

Procurement officers must consider value for money and must consider broader economic benefits, but at present they do not need to provide any firm evidence or reporting to demonstrate that they have satisfied the requirements of the CPRs. Regulation and rules without accountability, transparency and enforceability serve no purpose, and will not result in any tangible improvements to the procurement process.²⁴

Risk assessment and allocation

- 4.20 ANAO audit reports have highlighted ‘insufficient attention to the identification and ongoing management of risks’ as an area of concern.²⁵
- 4.21 Consult Australia identified the ‘inappropriate transfer of risk’ as the most significant issue with regard to current Australian government procurement. Although proportionate liability legislation was introduced in the early 2000s to ensure that liability is apportioned equitably between parties, Consult Australia claims that it ‘is inconsistently applied between the states and territories’ and this has a range of detrimental effects:

So that creates uncertainty in terms of viability for our members, and that is fed into competitive pressures. It is fed directly into pricing, it is fed into decisions to not bid for work where that contract condition, for example, might be in the play. It can lead to firms taking on potentially uninsurable risk and a whole range of consequential behaviours that fall out of that.²⁶

- 4.22 The ASBFEO identified a ‘certain degree of rigidity’ and inflexibility faced by SMEs in negotiating with government departments, particularly ‘around transfer of risk’.²⁷ Similarly, the Department of Defence indicated that they have received complaints from SMEs that prime contractors are ‘passing too many contractual burdens and too much risk down to subcontractors’.²⁸

²⁴ Professionals Australia, *Submission 16*, p. [5].

²⁵ ANAO, *Submission 22*, p. [2].

²⁶ Ms Motto, Consult Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 40.

²⁷ Mr Strachan, ASBFEO, *Committee Hansard*, Canberra, 8 May 2017, p. 14.

²⁸ Mr Kim Gillis, Deputy Secretary, Capability Acquisition and Sustainment Group, Department of Defence, *Committee Hansard*, Canberra, 8 May 2017, pp. 51–52.

- 4.23 Professionals Australia warn that the unacceptable shifting of risk to the private sector can be detrimental in the long term:

If something goes wrong, the government ends up having the risk anyway, and the private sector then tries to either have a big enough balance sheet to wear the risk or tries to ensure against the risk. And who pays for the insurance? We do—the taxpayer.²⁹

Government as uninformed purchaser

- 4.24 Professionals Australia maintains that governments have become uninformed purchasers and no longer possess the technical expertise to make informed procurement decisions, particularly with regard to infrastructure. It blames the steady increase of outsourcing over several decades for the loss of expertise and identifies a range of problems caused throughout the infrastructure delivery cycle by poor decision-making:³⁰

Governments have consistently confused value for money with low cost, and budgets for engineering workforces have consistently been stripped. As a result, governments are no longer informed as to what they are buying, and have no objective ability to reasonably decide whether specific cases of procurement represent value for money.³¹

- 4.25 Consult Australia echoed these concerns and emphasised the damage the lack of expertise creates during the tendering process:

The procurement skills in government, and particularly the skills required to make a good client—that is, in-house design skills and in-house engineering skills—have been lost largely due to the 30 years of outsourcing that we have experienced in the Australian market. This has led to clients often not really knowing what they want and therefore putting incomplete information in briefs or just putting substandard briefs together for the private sector to base their tenders on.³²

Application of Australian standards

²⁹ Mr Walton, Professionals Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 22.

³⁰ Professionals Australia, *Submission 16*, p. [2].

³¹ Professionals Australia, *Submission 16*, p. [3].

³² Ms Motto, Consult Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 41.

- 4.26 The lack of any requirement to comply with Australian standards in the CPR14 was frequently identified as a deficiency. Imports have grown to meet increasing demand in Australia raising concerns over quality:

With a declining manufacturing sector, Australia has seen a significant increase in the use of imported materials, components and structures to meet industrial demand. In all too many cases the quality of the supplied products is not in line with Australian Standard requirements.³³

- 4.27 A number of witnesses drew the Committee's attention to a report by BIS Shrapnel commissioned by the Australian Workers' Union (AWU), which estimated that 'domestic production now supplies less than half of the steel used in public sector construction' indicating that the remainder is sourced from overseas.³⁴ The Australian Steel Institute (ASI) told the Committee that in the case of fabricated steel product, over the last decade 'we have gone from 20 per cent imported product in the marketplace to closer to 60 per cent imported product in the marketplace'.³⁵ With raw steel, the figure is approximately 60 per cent Australian to 40 per cent imported, due to a tightening of antidumping laws.³⁶ The reliance on imported products is contributing to a sense that Australian standards are being eroded by lower quality products:

The evolution of the global economy in the last little while—say, 10 or 15 years—has meant that the globe has become awash with supply of a wide variety of products that previously were not on the market from sources that previously were not supplying, and some of those do not conform with the standards that we require for community safety, worker health et cetera.³⁷

- 4.28 AFPA said that a recent report found that 92 per cent of responding companies reported non-conforming products (NCPs) in their supply chains in the building industry. AFPA is concerned that the 'NCP volume and the number of organisations responsible for placing it onto the market, are both

³³ Australian Institute of Non-destructive Testing (AINDT), *Submission 8*, p. 2.

³⁴ BIS Shrapnel, *The Benefits of a Local Procurement Policy for Local Steel in Government Construction*, September 2015, p. i.

³⁵ Mr Ian Cairns, National Manager, Industry Development and Government Relations, Australian Steel Institute (ASI), *Committee Hansard*, Canberra, 8 May 2017, p. 31.

³⁶ Mr Cairns, ASI, *Committee Hansard*, Canberra, 8 May 2017, p. 31.

³⁷ Dr Peter Burn, Head of Influence and Policy, Australian Industry Group (AiGroup), *Committee Hansard*, Canberra, 29 March 2017, p. 10.

growing'. AFPA quotes a recent report from the Engineered Wood Products Association of Australasia (EWPAA) that said '28 per cent of imported panel products were found to not meet Australian Standards'.³⁸

- 4.29 The cost of complying with Australian standards is seen as disadvantaging Australian businesses. For example, the SCLC argues that the cost of certification for Australian steel manufacturers should be taken into consideration:

Our steelmakers meet certain standards. They are required to have certification, and we can have some confidence in that certification. Why is it that someone who imports steel should not be subject to certification here in Australia at their cost in the same way that the local producers are? We say that that would be one way to level the playing field ...³⁹

- 4.30 It was also suggested that the risk of sub-standard products is increased because of inadequate monitoring and inspection. The SCLC commented that a 'standard is only as good as its ability to be enforced'.⁴⁰

- 4.31 The South Australian Industry Advocate explained that his office discovered the extent of the problem when it was looking at the impacts on the steel industry:

When we looked into it more, it was not just that steel products were coming into the country that were considerably low quality and substandard; there was little being done to police the requirement of Australian Standards or equivalent.⁴¹

Exemptions

- 4.32 In addition to the exemptions regarding Australia's international obligations and SMEs, limited exemptions from the application of the CPRs are in clauses 2.6, 10.3 and Appendix A: Exemptions from Division 2. Defence, the largest Australian Government procurer, takes advantage of the range of exemptions as required. It has a framework in place to ensure that the exemptions are not abused:

³⁸ AFPA, *Submission 20*, p. 13.

³⁹ Mr Morris, South Coast Labour Council, *Committee Hansard*, Melbourne, 19 April 2017, p. 9.

⁴⁰ Mr Morris, South Coast Labour Council, *Committee Hansard*, Melbourne, 19 April 2017, p. 9.

⁴¹ Mr Ian Nightingale, Industry Advocate, Department of State Development, South Australia, *Committee Hansard*, Canberra, 29 March 2017, p. 5.

Ultimately, it is the financial delegate who makes the decision. They are responsible for ensuring that the method of procurement is consistent with the Commonwealth Procurement Rules and meets value for money. We have quite a robust framework that underpins all of our decisions regarding the method of procurement. It gives effect to the CPRs, in terms of procurement processes not being one size fits all. We spend a lot of time and effort ensuring that the procurement methodology that is exercised is commensurate with the value, the scope, the risk and the nature of the procurement. It really is about how you outline what will be the best procurement methodology that is consistent with the principles in the CPRs, noting that there are certain elements, particularly regarding division 2, that are mandatory unless you exercise an exemption.⁴²

- 4.33 Concerns were raised that some of the exemptions from the CPRs were being overused and impeding access for Australian suppliers. The use of limited tenders, in particular, appears to be excessive. The ANAO warned against utilising limited tender provisions to circumvent best practice:

The CPRs also make provision for limited tender in defined circumstances such as extreme urgency, to benefit from exceptionally advantageous conditions, and where there is no reasonable alternative or substitute. In utilising this flexibility, a key factor for entities is to ensure that procurement approaches continue to deliver best value for taxpayers' money and that corners are not cut simply for the convenience of the public sector.⁴³

- 4.34 The ANAO referred the Committee to the findings of its *Report 48 2014–2015: Limited Tender Procurement* where it found extensive use of limited tendering and stressed the uncompetitive nature of the practice:

By its nature, limited tender is less competitive than open and prequalified tender as it does not provide the opportunity for all potential suppliers to compete for the provision of goods and services. In 2013–14 limited tender was the most widely used of the available procurement methods representing

⁴² Ms Victoria Bergmann, Acting First Assistant Secretary, Procurement and Contracting, Capability Acquisition and Sustainment Group, Department of Defence, *Committee Hansard*, Canberra, 8 May 2017, pp. 52–53.

⁴³ ANAO, *Submission 22*, pp. [1–2]; Dr Tom Ioannou, Acting Deputy Auditor-General, Australian National Audit Office (ANAO), *Committee Hansard*, Canberra, 8 May 2017, p. 41.

56 per cent by number of procurements and accounted for the greatest percentage of expenditure at 48 per cent by value, \$23.8 billion.⁴⁴

Risks

4.35 The link between the concerns identified above and the detriment caused is not easily quantifiable. However, given the significant economic role of government procurement and the support it provides for Australian businesses and industry, witnesses identified areas where there may be detriment, including:

- loss of a skilled workforce;
- lack of compliance with Australian standards, leading to safety, economic and environmental risks;
- waste; and
- barriers to domestic business participation in government procurement.

Loss of skilled workforce

4.36 A range of industries linked the loss of workforce skills and capability with the difficulties accessing government procurement opportunities. Discussing the value of a ‘whole of life’ approach to procurement, the ASI emphasised the connection between maintaining the ‘existing high skills base’ and ongoing work.⁴⁵ The AWU reiterated the risks of the ‘trend to imported modular construction for key components of resource projects’ including the loss of essential fabrication and heavy engineering skills:

These are important skills that will be required for ongoing maintenance and extensions to existing and new plant. This is not only in resources, but essential services areas like power, water and basic infrastructure—thereby being in the nation’s interest that this skill base is kept viable.⁴⁶

4.37 The Council of Textile & Fashion Industries of Australia provided the example of the possible cumulative effect for the Australian textile industry of failing to secure procurements such as the dress uniforms for the Australian Defence Force. The industry still possesses the skills to produce

⁴⁴ Australian National Audit Office (ANAO), *Report 48. 48 2014–2015: Limited Tender Procurement*, 10 June 2015, p. 14.

⁴⁵ Australian Steel Institute (ASI), *Submission 27*, p. 13.

⁴⁶ Australian Workers’ Union (AWU), *Submission 36*, p. 20.

structured apparel but the concern is that the capability will be lost altogether:

Tailoring, which is a big part of that uniform, is a pretty unique [skill]. There is not a lot of tailoring that is done at scale anymore in Australia.

...

Tailoring is one of the things that has suffered the most in our industry with going offshore.⁴⁷

Australian standards: safety, economic and environmental risks

4.38 The lack of adherence to Australian standards is considered to pose safety, economic and environmental risks.

4.39 AFPA stresses the safety and economic risks of the increase in NCPs in the building industry:

The risks of NCPs in building products (e.g. plywood, steel, plastics, electrical, glass and aluminium) is a significant issue in terms of workplace health and public safety as well as the direct economic costs of product failure.⁴⁸

4.40 AWU also notes not only the safety risks involved in using sub-standard product, but the false economy for government procurement:

Industry reports have shown that roughly half of all imported steel does not comply with Australian standards. This is alarming from both a safety and a quality standpoint. From the perspective of governments, sub-standard steel is known to have a shorter life span and is likely to need replacement, significant repairs or retrofitting earlier. These costs are hidden from government budgets in the first instance, but emerge in capital works costs far earlier than otherwise would be the case if high quality steel had been used in the first instance.⁴⁹

4.41 ASI provides an example demonstrating the direct economic cost that can result from ignoring Australian standards in infrastructure and construction, and the flow on effect to government and the community:

⁴⁷ Mr Giles-Kaye, Council of Textile & Fashion Industries of Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 54.

⁴⁸ AFPA, *Submission 20*, p. 13.

⁴⁹ AWU, *Submission 36*, p. 6.

There was a recent case in Western Australia where a bridge was built to the new Crown stadium. It was imported from China and was totally nonconforming. It was cracking, completely unsafe and had to be pulled down and put back up again to the value of \$3.5 million, I think. As to who picked up the tab, I am not too sure, but it is an unproductive practice. If the contractor is picking up the tab, he is clipping somebody else along the way.⁵⁰

- 4.42 However, ASI also quotes the warning from the Australasian Procurement and Construction Council (APCC) that the dangers of sub-standard products extend beyond economic concerns:

This has the potential to create significant constraints and risks to a construction project. In Australia there have been numerous instances where non-compliant construction products have caused the collapse of buildings, motorway signs, glass panels and more. The risk of loss of life and severe injury should not be underestimated.⁵¹

- 4.43 The Welding Technology Institute of Australia (WTIA) is alarmed by the increasing safety risk of non-adherence to Australian standards:

Over the past three years the number of reports of unsafe steel structures received by the WTIA from its Certified Welding Inspectors has increased exponentially. This appears to be supported by reports of increased events from State Safety Regulators for the same period. The primary cause of safety concerns has been welding which is not fit for purpose and does not comply with recognised Australian or International Standards resulting in failure.⁵²

- 4.44 AFPA drew attention to the sound environmental record of the Australian wood and paper industry and stressed that the production of imported product may not meet sustainable practice requirements. Environmental risks associated with unsustainable practices include:

- land use conversion for fibre supply (i.e. deforestation or conversion of natural forests to plantations);
- environmental and social impacts of poor forestry practices (i.e. issues such as product yield, forest health, biodiversity and lack of community consultation);

⁵⁰ Mr Cairns, ASI, *Committee Hansard*, Canberra, 8 May 2017, p. 29.

⁵¹ Australasian Procurement and Construction Council (APCC), *Procurement of Construction Products: A Guide to Achieving Compliance*, p. 5 quoted in AIS, *Submission 27*, p. 13.

⁵² Welding Technology Institute of Australia (WTIA), *Submission 2*, p. 1.

- manufacturing practices (e.g. use of chemical, water and energy inputs);
- illegal logging and trade in wood and paper products;
- the carbon emissions footprint of products, including transport impacts; and
- the waste implications of additional landfill from using non-domestic recycled content paper sources.⁵³

Waste

- 4.45 Professionals Australia suggests that there is broad consensus across government agencies and stakeholder groups that ‘weak procurement systems are costing the Australian economy billions’.⁵⁴ With regard to infrastructure projects, Professionals Australia told the Committee:

There are multiple reports conservatively quoting waste and significant delays. The minimum waste is 6.5 per cent. When it is over a billion dollars, the evidence shows 12.7 per cent is the waste. And, if you do a surfeit of projects at once, as happened in 2009, it gets up to 21.2. On the figures from this committee, a \$59 billion procurement spend would be \$3.8 to \$7.5 billion waste a year. If you go to a surfeit, it gets up to over \$12 billion.⁵⁵

- 4.46 Consult Australia identified unverified information in briefs as one area that caused cost overruns and waste:

For example, a building needs to be built. A geotechnical report is undertaken by the client and forms part of the tender documentation so that the designer can design the buildings - that is, the geotechnical information says what is in the subsoil or the clay or what is under the ground. The tender information will often not verify that geotechnical report, which means that each of, say, eight or 10 or 12 or 15 tenderers will have to spend the money doing their own geotechnical report so that they can rely on the information in those reports to complete their tender and subsequently any design work that might happen as a result of winning the project. That is clearly waste, and we are able to put a figure on that through our report: somewhere in the vicinity of \$45 000 per bid is wasted on unverified information.⁵⁶

Barriers to domestic business participation

⁵³ AFPA, *Submission 20*, p. 7.

⁵⁴ Professionals Australia, *Submission 16*, p. [4].

⁵⁵ Mr Walton, Professionals Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 23.

⁵⁶ Ms Motto, Consult Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 41.

- 4.47 The inefficient implementation of the procurement system presents an initial threshold barrier for domestic businesses attempting to participate in the process. For example, with regard to the transfer of risk, Consult Australia indicated that businesses may decide not to bid for a project rather than attempt to manage the risk.⁵⁷
- 4.48 The failure of many SMEs to take advantage of the opportunities presented by government procurement was highlighted throughout the inquiry. The Australian Chamber of Commerce and Industry (ACCI) warned that government must be careful to ensure that SMEs are not discouraged through onerous requirements or processes:

The Government needs to remain vigilant to ensure that departments are simplifying the procurement process, that the rules are not unreasonably burdensome and that they are fit for purpose. SMEs often do not have the time or the expertise to read and understand complicated rules and write lengthy submissions. There may also be a case to reduce liability cover on small value contracts.⁵⁸

- 4.49 ASBFEO has received feedback from SMEs suggesting that the practice of bundling smaller contracts into one large contract and employing a larger firm to ‘manage and deliver parcels of government work’ is making it difficult for SMEs to access government procurement contracts.⁵⁹
- 4.50 ASBFEO confirmed that it has received complaints from discouraged SMEs regarding the difficulties they face attempting to apply for government contracts under the current system:

In terms of the size of the contracts being offered—frequently, we have had information passed to use by unsuccessful tenderers that were unable to satisfy the requirements because they have been set much broader, requiring a range of skill sets that sort of locks out participants that have previously been providing those services as they get recontracted, and they roll in a whole range of other requirements. That then tends to require the small business to partner with a larger firm or multiple firms to satisfy them.

⁵⁷ Consult Australia, *Submission 9*, p. 3.

⁵⁸ ACCI, *Submission 5*, p. 2.

⁵⁹ Australian Small Business and Family Enterprise Ombudsman (ASBFEO), *Submission 19*, pp. [3–4].

We have also had information passed to us that there is a certain degree of rigidity in negotiation with government departments and an unwillingness to enter into conversations about flexibility and contracting to be able to either accommodate innovative or novel proposals or even have discussions around transfer of risk ...⁶⁰

Case study: Rossi Boots

- 4.51 The experience of Rossi Boots, a family-owned company established in South Australia in 1910, demonstrates many of the issues discussed above. The Company produces around 250 000 pairs of boots each year, has annual revenue of \$12 million and employs approximately 80 people at its small factory in Adelaide.
- 4.52 In 2014 Rossi Boots missed out on a \$15 million contract to supply 100 000 pairs of non-combat boots to the Australian Defence force. The Company was told that their tender was compliant but did not measure up on 'value-for-money'. Rossi Boots' tender was 'somewhere around 15 per cent more expensive than the imported product out of Indonesia'.⁶¹
- 4.53 Rossi Boots' difficulties with the government procurement process centred on the definition of value for money. The Company included information in their tender regarding the broader economic benefits that would accrue from choosing an Australian supplier:

We certainly put forward in the tender the benefits that we believed would be forthcoming to both the economic situation in South Australia and in Australia in general, because we would be buying supplies from other places. We certainly talked about the desire from our own research and development of the Australian troops wanting to wear Australian made product.⁶²

- 4.54 The Company also identified the anomalies that are not always taken into consideration when an Australian bid is assessed against an overseas bid. For example, government imposed costs such as the superannuation guarantee levy, payroll tax, annual leave loading or long service leave, penalty rates and workers compensation all have to be factored into any

⁶⁰ Mr Strachan, ASBFEO, *Committee Hansard*, Canberra, 8 May 2017, p. 14.

⁶¹ Mr Myron Mann, Managing Director, Rossiter's Pty Ltd, *Committee Hansard*, Melbourne, 19 April 2017, p. 31.

⁶² Mr Mann, Rossiter's Pty Ltd, *Committee Hansard*, Melbourne, 19 April 2017, p. 31.

tender bid for an Australian business but are not necessarily part of the costs for an international tenderer:

The point is that these are rarely seen when we start to look at the pricing overseas. They make up about 25 per cent additional cost on top of whatever your manufacturing costs are.⁶³

- 4.55 Rossi Boots emphasised that they were not implying that these costs should be removed. On the contrary they acknowledge the important part such factors play in maintaining Australian conditions and standards. The Company stressed the positive effect meeting the extra costs has on its performance:

So the first thing we have to do in order to be competitive is to overcome that by being more productive in many ways, and you will find that a lot of Australian companies, including Rossi Boots, are very advanced in their manufacturing. We use advanced ways of cutting the leather. We use computerised stitching machines. We do all sorts of things to overcome those additional costs of labour.⁶⁴

- 4.56 As well, Rossi Boots pointed out the ongoing economic impact that the award of the tender would have provided. The Company expected to increase its workforce by 15 to 20 people:

We have about 75 to 80 people, so it is a fairly significant increase in the number of people we would have had to hire. We buy a lot of raw material from local manufacturers, so that spinoff would have occurred without any doubt, and we would probably have invested in some new advanced computerised stitching.⁶⁵

- 4.57 However, the Company is of the opinion that such details would not attract any weight in securing the tender and that, before the rules were changed, 'there was no allowance for considering any secondary economic benefit'.⁶⁶

- 4.58 Another point of contention for Rossi Boots was the regulatory requirements imposed on domestic companies. Again, the Company's argument was not

⁶³ Mr Mann, Rossiter's Pty Ltd, *Committee Hansard*, Melbourne, 19 April 2017, p. 30.

⁶⁴ Mr Mann, Rossiter's Pty Ltd, *Committee Hansard*, Melbourne, 19 April 2017, p. 30.

⁶⁵ Mr Mann, Rossiter's Pty Ltd, *Committee Hansard*, Melbourne, 19 April 2017, p. 33.

⁶⁶ Mr Mann, Rossiter's Pty Ltd, *Committee Hansard*, Melbourne, 19 April 2017, p. 35.

with the regulations, but the uneven playing field it created for Australian companies:

In addition to high labour costs there are regulatory burdens on domestic manufacturing activity such as:

- Trade Waste Costs;
- EPA Licences, restrictions and autocracy; and
- Fire Levies.

As these costs are imposed by Government, they should be compared with the global supplier's costs with regard to these items and an appropriate credit should be allowed in 'value for money' considerations.⁶⁷

4.59 Seeking feedback on the procurement process, Rossi Boots raised these issues with the office of the Minister for Finance and were told that, under Australia's international obligations, 'they could not consider secondary economic benefit'.⁶⁸ The Company find it difficult to understand the inconsistency between Australia's approach and that of many of its trading partners:

I think a lot of other countries have found ways to deal with this. Whether they mandate a certain content or whether they have a formula that says, 'We'll get so much back on the dollar if we spend it locally,' they have found ways to do this, pricewise.⁶⁹

4.60 Overall, Rossi Boots suggests, as other witnesses have, that the government tends to take the easier option of selecting a tender on the basis of lowest cost, shifting responsibility and accountability to the supplier:

I felt that there was no genuine desire to look at Australian manufacturing whatsoever. In my view it is because of the fact that, if they buy from overseas, they do not have to come to our factory and audit; they do not have to check whether I am complying with all the legal obligations that I should. They simply send the contract offshore. They buy the goods. They do not go and check. They do nothing. The goods arrive here with no quality assurance.⁷⁰

⁶⁷ Rossiter's Pty Ltd, *Submission 53*, p. 2.

⁶⁸ Mr Mann, Rossiter's Pty Ltd, *Committee Hansard*, Melbourne, 19 April 2017, p. 36.

⁶⁹ Mr Mann, Rossiter's Pty Ltd, *Committee Hansard*, Melbourne, 19 April 2017, p. 38.

⁷⁰ Mr Mann, Rossiter's Pty Ltd, *Committee Hansard*, Melbourne, 19 April 2017, p. 34.

- 4.61 The experience encapsulates the difficulties faced by many smaller companies when attempting to take advantage of government procurement opportunities. Rossi Boots estimates that the bid cost it \$25 000:

There is a lot of sampling, a lot of prototyping and all those sorts of things that have to be done. There are specialist people who write these tenders. We used one because we knew from past experience - it would be highly unlikely, if you and I sat down and tried to write one of these tenders, that we would ever win one because we would not use the right language, the right 'government speak' and all that. There are specialist people who cost a lot of money to help you write these tenders.⁷¹

- 4.62 In conclusion, Rossi Boots told the Committee the Company would be unlikely to pursue such a tender again:

I think [Defence] have left me with a view that it is highly unlikely I would ever win a contract or a tender with Defence, and the cost of actually participating is too high to spend that money up-front and then realise that you have no chance.⁷²

⁷¹ Mr Mann, Rossiter's Pty Ltd, *Committee Hansard*, Melbourne, 19 April 2017, p. 34.

⁷² Mr Mann, Rossiter's Pty Ltd, *Committee Hansard*, Melbourne, 19 April 2017, p. 34.

5. Implementation: guidelines and training

Introduction

- 5.1 The Committee received a range of suggestions on how to efficiently implement the Commonwealth Procurement Rules (CPRs). This chapter discusses suggested revisions to the new clauses before focusing on the guidelines and training required to address some of the issues raised in the previous chapter. Finally it examines suggestions to reinstate a number of procurement connected policies.

Refining or expanding new clauses

- 5.2 A number of witnesses expressed concerns with the wording of some of the new clauses, suggesting clarification, refining or expansion of the terms. The Textile Clothing and Footwear Union of Australia (TCFUA) maintained that the new rules are ‘not tight enough’, ‘not specific enough’ and ‘not prescriptive’.¹ Overall, the Australian Manufacturing Workers’ Union (AMWU) concurs and suggests that the CPRs should provide greater detail of requirements:

The AMWU believes that the CPRs would be improved by setting out specifically what purchasing officials must do in order to deliver an outcome

¹ Ms Michele O’Neil, National Secretary, Textile Clothing and Footwear Union of Australia (TCFUA), *Committee Hansard*, Canberra, 19 April 2017, p. 60.

which provides best value to the Australian government, economy and community.²

Clause 10.10

- 5.3 With regard to the use of Australian standards, there is concern that clause 10.10 is not rigorous enough and that, to avoid a ‘tick and flick’ attitude, the clause should specifically state that a third-party audit is required. The Welding Technology Institute of Australia (WTIA) recommends the following wording to address this issue:

Where an Australian standard is applicable for goods or services being procured, tender response **must** demonstrate, **through third party certification** to the **relevant** Australian standard, and contracts **must bind tenderers to compliance** with the applicable standards.³

- 5.4 Considerable concern was also expressed over perceived conflict between the new clause 10.10 and existing clause 10.9(c) which requires technical specifications to be based on international standards:⁴

In prescribing *specifications* for goods and services, a *relevant entity must*:

- base technical *specifications* on international standards, when they exist and apply to the relevant *procurement*, except when the use of international standards would fail to meet the *relevant entity's* requirements or would impose greater burdens than the use of recognised Australian standards.⁵

- 5.5 The Australian Steel Institute (ASI) recommends that clause 10.9(c) be ‘rephrased to require that goods to be procured must meet all relevant and applicable Australian standards, as is the case with procurements covered by the Building Code’.⁶ The Building Products Innovation Council suggest that the following qualification be added to clause 10.9(c) to clarify the relationship with clause 10.10:

- c. base technical *specifications* on **Australian or** international standards, when they exist and apply to the relevant procurement, except when the use of international standards would:

² Australian Manufacturing Workers’ Union (AMWU), *Submission 18.1*, p. [5].

³ Welding Technology Institute of Australia (WTIA), *Submission 2*, p. 2

⁴ Council of Textile & Fashion, *Submission 47*, p. [4].

⁵ Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, paragraph 10.9(c).

⁶ Australian Steel Institute (ASI), *Submission 27*, pp. 3, 16 and 17.

- fail to meet the relevant entity’s requirements; or
- impose greater burdens than the use of recognised Australian standards; or
- **not deliver equivalent performance to that required by the Australian standards.**⁷

Clause 10.18

5.6 Clause 10.18 is also considered to be unclear and open to interpretation. It provides that:

Officials must make reasonable enquiries that the *procurement* is carried out considering relevant regulations and/or regulatory frameworks, including but not limited to *tenderers’* practices regarding:

- labour regulations, including ethical employment practices;
- occupational, health and safety; and
- environmental impacts.⁸

5.7 There is concern that the wording of the clause is ambiguous. ASI claims that the phrase ‘relevant regulations and/or regulatory frameworks’ could be read as referring to the ‘law in force in the jurisdiction in which the tenderer operates’, defeating the purpose of the new clause.⁹ The Printing Industries Association of Australia (PIAA) considers that the same phrase could be too broadly interpreted, leading procurement officers to ‘feel compelled to delve into consideration of regulations and regulatory frameworks which are irrelevant to the procurement at hand’.¹⁰

5.8 To clarify the intention of clause 10.18, the PIAA suggests that it be amended to provide an exhaustive list of the ‘nature of regulations and/regulatory frameworks to be considered by an official’ assessing a tender.¹¹ ASI advocates that the clause be rephrased to provide a list of the environmental, social and labour law provisions that must be satisfied by a tender along the lines of sub-regulation 56(2) of the *Public Contract Regulations 2015* (UK). That sub-regulation reads:

⁷ Building Products Innovation Council (BPIC), *Submission 6*, pp. 2–3.

⁸ Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, paragraph 10.18.

⁹ ASI, *Submission 27*, p. 18.

¹⁰ Printing Industries Association of Australia (PIAA), *Submission 44*, p. 9.

¹¹ PIAA, *Submission 44*, pp. 6 and 9.

(2) Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with applicable obligations in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to the Public Contracts Directive as amended from time to time.¹²

- 5.9 A number of submitters also promoted changes to clause 10.18 to reflect Australia's international obligations regarding human rights, particularly with regard to human trafficking and slavery.¹³ The Human Rights Commission considers that the 'scope of the clause is inadequate in terms of the human rights protected'.¹⁴ There was widespread agreement that the CPRs should be aligned with and mirror the *United Nations Guiding Principles on Business and Human Rights* (UNGPs).¹⁵
- 5.10 Anti-Slavery Australia pointed out that Australia has incorporated its international obligations regarding human rights into the *Criminal Code Act 1995* and that clause 10.18 should be amended to specifically reference 'human rights abuses, including trafficking, slavery and slavery-like practices in the supply chain', a position echoed by other submitters.¹⁶
- 5.11 The Green Building Council of Australia (GBCA) proposed that, in line with the requirements of clause 4.5 (e) of the CPRs, clause 10.18 (c) be expanded to include both 'environmental impacts' and 'environmental sustainability'.¹⁷

Clause 10.30 and 10.31

¹² As quoted in ASI, *Submission 27*, p. 18.

¹³ International Learning Lab on Public Procurement and Human Rights, *Submission 14*; United Nations International Children's Emergency Fund (UNICEF) Australia, *Submission 24*; Joint Academic and Civil Society Group, *Submission 29*; Anti-Slavery Australia, *Submission 32*; Australian Human Rights Commission, *Submission 33*.

¹⁴ Australian Human Rights Commission, *Submission 33*, p. 2.

¹⁵ International Learning Lab on Public Procurement and Human Rights, *Submission 14*, p. 4; UNICEF Australia, *Submission 24*, pp. 5–6.

¹⁶ Anti-Slavery Australia, *Submission 32*, pp. 9–10.

¹⁷ Green Building Council of Australia (GBCA), *Submission 23*, p. 2.

- 5.12 Clause 10.30 was singled out for particular criticism. Expressing the concerns of many, the AMWU calls the clause ‘too vague’.¹⁸ While procurement officers are ‘*required to consider the economic benefit of the procurement to the Australian economy*’, the clause contains no definition of ‘economic benefit’. The Council of Textile & Fashion called for the clause to be more prescriptive¹⁹ and ASI suggested that the clause be amended so that ‘economic benefit’ is given an internal definition to mean:
- the broad social impacts that has on the economy (including impact on skill formation, investment (including R&D)), employment levels and the community generally; and
 - the way in which the procurement decision will impact on an Australian industry capable of providing competitive pressure on the price and quality of imported goods.²⁰
- 5.13 Additionally, the PIAA recommends that the clause should ‘refer to the benefits of a procurement to a state and/or regional economy, as well as the Australian economy’.²¹ Professionals Australia suggests that the clause should provide ‘some additional accountability’ and ‘reporting requirements’ as well.²²
- 5.14 Clause 10.31 has also been questioned. The AMWU claim that it undermines clause 10.30 and go so far as to state that it should be deleted.²³ However while the ASI finds the clause ‘vague’ and ‘somewhat broad’ it recommends that the ‘terms of international agreements to which procurement officers are to have regard should be expressly identified’ in the clause, eliminating uncertainty and confusion.²⁴

Clause 10.37

¹⁸ AMWU, *Submission 18.1*, p. [5].

¹⁹ Council of Textile & Fashion, *Submission 47*.

²⁰ ASI, *Submission 27*, p. 4

²¹ PIAA, *Submission 44*, pp. 6, 16–17.

²² Professionals Australia, *Submission 16*, p. [4].

²³ AMWU, *Submission 18.1*, p. [5].

²⁴ ASI, *Submission 27*, pp. 4 and 20.

- 5.15 WTIA suggests that, while this clause is ‘reasonably clear’, it should be strengthened. They would like to see the phrase ‘make reasonable enquiries to determine’ replaced with ‘ensure’:

Where applying a standard (Australian, or in its absence, international) for goods or services, relevant entities must **ensure** compliance with that standard:

- this includes gathering evidence of relevant certifications; and
- periodic auditing of compliance by an independent assessor.²⁵

Extra clause

- 5.16 To further improve the CPRs, there were calls for an extra clause specifically addressing anti-dumping.
- 5.17 Despite having an anti-dumping and anti-countervailing (anti-subsidy) system in place, the Australian government continues to have difficulty controlling the import of dumped goods to fulfil procurement demands.²⁶ To strengthen the existing regime and ensure that the risk of importing dumped goods is minimised, Australian Paper recommends that a specific clause be inserted into the CPRs:

The Commonwealth Procurement Rules should contain a requirement that the risk of both potential damage to Australian industry and the reputation of the Australian Government from purchasing goods that are suspected to be dumped should be fully factored into procurement tenders and contracts.²⁷

Guidelines

- 5.18 Submitters emphasised the need for adequate guidance to departments to ensure that the implementation of the new clauses is effective. There was some criticism of the guidelines provided by the Department of Finance (Finance) prior to the implementation of the amended CPRs.²⁸ There was

²⁵ WTIA, *Submission 2*, p. 2.

²⁶ Construction Forestry Mining and Energy Union (CFMEU) and the Textile Clothing and Footwear Union of Australia (TCFUA), *Submission 35*, pp. 39–42; Australian Forest Products Association (AFPA), *Submission 20*, p. 17.

²⁷ Australian Paper, *Submission 38*, p. 7.

²⁸ The Department of Finance has provided three sets of guidelines: Application and verification of standards; Consideration of relevant regulations and/or frameworks; and Consideration of broader economic benefits in procurement. The guidelines are available from the Departments

wide agreement on the need for comprehensive, detailed guidelines to address specific issues including assessing the matter of human rights within the supply chain. The role of procurement connected policies to provide guidance was also raised.

Criticism of existing guidelines

5.19 In February 2017, Finance provided three sets of guidelines to departments:

- Application and verification of standards;
- Consideration of relevant regulations and/or frameworks; and
- Consideration of broader economic benefits in procurement.

5.20 The criticism of the guidelines provided by Finance highlights two areas of concern: the discretion provided to procurement officials during implementation and comprehensive definitions of economic benefit. The fear is that without more prescriptive and detailed guidelines the intent of the new clauses will not be achieved:

What we would like to see is if we are going to provide these procurement rules that they provide additional guidelines as to how this might actually achieve anything. There would be plenty of scope for an item like clause 10.30 to exist and achieve nothing if there are no specifics as to what procurement officers might actually have to look at.²⁹

5.21 In their joint submission, the Construction Forestry Mining and Energy Union (CFMEU) and the Textile Clothing and Footwear Union of Australia (TCFUA) point out that the guidelines issued by Finance leave significant choices to the procurement officer with regard to clauses 10.30, 10.37 and 10.18.³⁰ The optional nature of many of the decisions and the lack of concrete guidance is seen as weakening the aim of the new clauses.³¹

website: <<https://www.finance.gov.au/procurement/procurement-policy-and-guidance/commonwealth-procurement-rules/>>.

²⁹ Mr Stephen Gargano, National Research Officer, Professionals Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 24.

³⁰ CFMEU and TCFUA, *Submission 35*, pp. 17–21.

³¹ Mr Travis Wacey, Policy Research Officer, Forestry & Furnishing Products Division, Construction Forestry Mining and Energy Union (CFMEU), *Committee Hansard*, Melbourne, 19 April 2017, p. 64; CFMEU and TCFUA, *Submission 35*, pp. 17–21.

- 5.22 The limited definition of ‘economic benefit’ provided in the Finance guidelines for the implementation of clause 10.30 is considered inadequate. The guidelines state:

In general terms, benefits to the Australian economy result when the procured supply:

- makes better use of Australian resources that would be otherwise under-utilised (e.g. employing persons who would be otherwise under- or unemployed, spare industrial capacity, or freeing government funds for other spending); or
- otherwise increases productivity (e.g. adopting new know-how or innovation, or more people acquiring in-demand skills, or allowing resources to be allocated to sectors in which Australia has a comparative advantage).³²

- 5.23 As well, the guidelines identify an ‘increase in productivity-enhancing technology development and adoption’ as relevant to economic benefit.³³ However, the guidelines specifically rule out consideration of any ‘second round effects’.³⁴

- 5.24 Witnesses maintain that the narrow guidelines do not encourage consideration of broader social and economic impacts. For example, the CFMEU and TCFUA acknowledge the emphasis on ‘employing unemployed and under employed people’ but question why the guidelines did not include the benefits of ‘retaining existing jobs which might otherwise be foregone if a contract goes overseas’.³⁵

- 5.25 There is particular concern over the exclusion of consideration of possible beneficial flow-on effects from an individual procurement. Ethical Clothing Australia (ECA), among others, list a wide range of positive outcomes if procurement tenders are won by domestic businesses:

There is the money that actually stays in the country through the payment of tax. There is the economy of scale. Companies can reinvest in technology, making them go forward and more able to compete. It is a question of

³² Department of Finance, *Consideration of broader economic benefits in procurement*, 16 February 2017, p. 1.

³³ Department of Finance, *Consideration of broader economic benefits in procurement*, p. 2.

³⁴ Department of Finance, *Consideration of broader economic benefits in procurement*, p. 2.

³⁵ CFMEU and TCFUA, *Submission 35*, p. 18.

upskilling. There is any number of reasons you can look at as to why awarding contracts to local manufacturers is value-for-money, and those elements should be taken into consideration.³⁶

5.26 The AMWU stressed the overall gains to the government and the economy of domestic versus off-shore procurement:

The economic benefits that flow directly to government through higher taxes and lower welfare spending, and indirectly through higher skills, improved labour and capital productivity and the spill over effects for the wider economy, should form part of any government decision on which proposal provides 'best value'.³⁷

5.27 Disquiet over the definition of 'economic benefit' reflects the ongoing concerns over a clear definition of value-for-money in the CPRs. Witnesses consider that, without detailed direction, the inclination to revert to the practice of making decisions based on the lowest-cost will continue:

What we generally find is that where there are not really specific guidelines in place, procurement officers tend to default to price.³⁸

5.28 The Council of Textiles & Fashion Industries of Australia reiterated the need for clarity:

The rules around the broader economic benefit need to be clarified more. The point I made a few times in my preamble was that, from our experience and from the people I talk to, the tender committees do fall back to the lowest price bid.³⁹

5.29 Professionals Australia stress the need for quantifiable standards to counteract the focus on cost:

³⁶ Mr Roque Grillo, Accreditation Advisor, Ethical Clothing Australia (ECA), *Committee Hansard*, Canberra, 8 May 2017, p. 10.

³⁷ AMWU, *Submission 18.1*, p. [4].

³⁸ Mr Craig Dunn, General Manager, Communications and Sustainability, Australian Paper, *Committee Hansard*, Canberra, 8 May 2017, p. 22.

³⁹ Mr David Giles-Kaye, Chief Executive Officer, Council of Textiles & Fashion Industries of Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 54.

... but unless we create alternative criteria that can be measured and are able to be assessed by the public servants, it will carry on down the current path.⁴⁰

Comprehensive guidelines

- 5.30 Comprehensive guidance is considered essential if the new clauses are to be implemented successfully. There is recognition that procurement decisions can be complex and assessing economic benefit presents a challenge. Supporting its argument for clear guidelines, the Australian Chamber of Commerce and Industry (ACCI) provided the following example of the type of decisions facing procurement officers:

... there are two competitors shortlisted to build a community centre. Both offer the same price and the same project outcome but for the purposes of the project one offers to hire and train workers in the local community including offering apprenticeships. At first glance, the business that will hire and upskill local workers would add more benefit to the economy. On the other hand, the other business may actually be a well-known provider of apprenticeships and opportunities but may not be putting forward that this is project-specific. This business is already contributing an economic benefit and is expected to do in the future because of its reputation. In the end, what decision does the government procurement officer make based on economic benefit? It is not clear what they will do.⁴¹

- 5.31 Noting the extent of factors that would need to be considered, Professionals Australia pointed out that decision makers cannot be expected to have the expertise to ascertain broad economic benefit and therefore require guidance:

Where one item is being assessed for wider economic benefits we are obviously forgoing economic benefits on potential competing items of procurement. So we would like to see at least some guidelines given to procurement officers. I do not think we can just assume that every person responsible for procurement is going to immediately know what items they should be looking at.⁴²

- 5.32 In general the CFMEU and the TCFUA recommend that the existing guidelines need to be tightened, removing the discretionary nature of

⁴⁰ Mr Christopher Walton, Chief Executive Officer, Professionals Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 24.

⁴¹ Australian Chamber of Commerce and Industry (ACCI), *Submission 5*, p. 2.

⁴² Mr Gargano, Professionals Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 24.

decision making and replacing it with specific standards that must be met and mandating evidence required from tenderers.⁴³

Clause 10.18

- 5.33 ECA explained the difficulty of determining if manufacturers in the textile clothing and footwear industry are complying with the requirements of clause 10.18. Companies accredited by the ECA are put through a rigorous ongoing process and procurement officers can have confidence that such companies have met those requirements. Therefore procurement officers can rely on that accreditation:

Government officials considering tenders for TCF related procurement contracts prioritise ECA-accredited products as a reliable and efficient way of meeting their obligations under clause 10.18.⁴⁴

- 5.34 To ensure that overseas suppliers are complying with clause 10.18, CFMEU and TCFUA suggest that procurement officers should be advised to place the onus on the suppliers to provide evidence that they are complying with all relevant standards and ethical obligations:

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. Domestic tenderers with an overseas supply chain bear this same onus of proof to Australian procurement officials.⁴⁵

- 5.35 The PIAA also suggests clarification of the guidelines for clause 10.18, particularly with regard to paragraph 7 and the tools and options available to procurement officers:

- that, for the purposes of 7 (b), ‘an audit report from an appropriate industry organisation will qualify as an “independent audit report”’;
- that, for the purposes of 7 (c), limits be specified on the extent of the investigation of breaches of regulations and/or regulatory frameworks;

⁴³ CFMEU and TCFUA, *Supplementary submission 35.1*, p. 2.

⁴⁴ Ethical Clothing Australia (ECA), *Submission 21*, pp. 3–4.

⁴⁵ CFMEU and TCFUA, *Supplementary submission 35.1*, p. 16.

- that, for the purposes of 7 (d), the meaning of ‘sustainability credentials’ be defined.⁴⁶

5.36 GBCA, following on from its recommendation to expand clause 10.18 (c) to include ‘environmental sustainability’, suggests that additional guidance be provided to assist in evaluating the environmental and sustainability benefits to be derived from a particular procurement:

Environmental sustainability of the proposed goods and services (such as energy efficiency and environmental impact), may be demonstrated through:

- evidence that, wherever possible, providers of both goods and services are increasing their energy efficiency in a manner consistent with the Government’s emissions reduction and energy productivity targets;
- providers evidencing support for the delivery of environmental sustainability through their own supply chains; and
- the use of rating tools like Green Star and NABERS for a provider’s own office accommodation and other facilities (warehousing, data centres etc.).⁴⁷

Clause 10.30

5.37 Overall, witnesses strongly suggest that more detailed guidelines are required on how to determine economic benefit:

[The Australian Small Business and Family Enterprise Ombudsman] recommends that additional and more specific guidance on the consideration and measurement of economic benefits (particularly social benefits) be developed and promulgated. This would assist procurement officers to achieve the best value for money with a clearer understanding of what clause 10.30 is expecting them to consider. In addition having to document how value for money is achieved through economic, social and environmental criteria would sharpen the implementation approach used.⁴⁸

5.38 CFMEU and TCFUA suggest that the guidance on determining economic benefit should include:

Economic benefit to the Australian economy is demonstrated through an outline of:

⁴⁶ PIAA, *Submission 44*, pp. 11–14.

⁴⁷ GBCA, *Submission 23*, p. 2.

⁴⁸ Australian Small Business and Family Enterprise Ombudsman (ASBFEO), *Supplementary submission 19.1*, p. [5].

- Employment for citizens of Australia
- Investment and capital expenditure that builds capacity in the Australian economy and
- Use of businesses and supply chains that employ Australian citizens and invest in Australia

Economic development can also take the form of new investment, increased industry capability and expansion of economic sectors in the State which are likely to generate innovation and growth. These are often high value-add industries. It can also take the form of economic development for disadvantaged and socially and economically excluded groups and regions.⁴⁹

- 5.39 Another factor that could be included in the consideration of economic benefits is gender equality. While potential contractors are currently required to provide evidence that they are compliant with the reporting process for the *Workplace Gender Equality Procurement Principles* under the *Workplace Gender Equality Act 2012*, they are not required to provide details on the extent of their compliance. The Workplace Gender Equality Agency (WGEA) which was created under the Act, identifies Employers of Choice for Gender Equality and the Equality Rights Alliance suggests that procurement officers should seek this information to assist in their decision making:

We suggest that tenderers for Commonwealth contracts who have been named as WGEA Employers of Choice should be invited to include this information in their tender documents and decision makers should be directed to include this information in their overall analysis of benefit to the Australian economy. Utilizing the existing WGEA Employer of Choice program will ensure that the requirement to consider gender does not introduce excessive red tape or cost for tenderers, as the necessary assessment and certification will have been provided by WGEA in the course of their normal reporting cycle.⁵⁰

- 5.40 To maximise the advantage of economies of scale, guidance should be provided clarifying that the \$4 million threshold in clause 10.30 can apply to an aggregated total procurement across government:

The Department of Finance should provide guidance to Departments by identifying product and service categories (eg internal use copy paper) that are

⁴⁹ CFMEU and TCFUA, *Supplementary submission 35.1*, pp. 9–10.

⁵⁰ Equality Rights Alliance, *Submission 43*, pp. 4–5.

procured under a Whole of Government panel arrangement, meet or exceed the \$4 million threshold across Whole of Government and therefore should be considered under clause 10.30.⁵¹

Human rights

5.41 Procurement officers will need assistance to negotiate the complex area of human rights. The Human Rights Commission recommends that guidance be developed to ensure that the requirements established in the UNGPs are adhered to during the implementation of the CPRs.⁵²

5.42 Anti-Slavery Australia stresses the need to inform procurement officers of Australia's human rights obligations and the relationship between these obligations and the CPRs:

Anti-Slavery Australia recommends that the Australian government create guidelines to assist procurement officers in the identification, prevention and mitigation of potential human rights abuses, including human trafficking and slavery, in government supply chains. These guidelines should be integrated into the existing materials that relate to 'Whole-of Government procurement' contracts, arrangements and initiatives. These guidelines should have a clear link to the Commonwealth Procurement Rules.⁵³

5.43 The Joint Academic and Civil Society Group proposes 'detailed and practical guidance' that sets out 'human rights risks in specific sectors and/or in relation to specific rights'.⁵⁴ The International Learning Lab on Public Procurement and Human Rights suggests a range of useful devices that could support this area:

Knowledge and capacity development of public sector procurement professionals on human rights risks and measures to address them should be supported, e.g. through the development of online tools to identify higher risk product categories and countries of origin; e-learning courses; and/or an

⁵¹ Australian Paper, *Supplementary submission 38.1*, p. [2].

⁵² Australian Human Rights Commission, *Submission 33*, p. 2.

⁵³ Anti-Slavery Australia, *Submission 32*, p. 10.

⁵⁴ Joint Academic and Civil Society Group, *Submission 29*, p. 6; UNICEF Australia, *Submission 24*, p. 6.

online hub or portal for Australian public buyers to share good practices and experiences on human rights.⁵⁵

Procurement connected policies

5.44 As well as strengthening the guidelines provided for the CPRs, there were repeated calls for the reinstatement of procurement connected policies that are seen as providing valuable guidance for procurement officers.⁵⁶ As discussed in Chapter two, until 2014 there were 24 procurement policies administered across 11 government departments. The majority of these policies were abolished in recent years and now there are currently only four:

- *Indigenous Procurement Policy;*
- *Workplace Gender Equality Procurement Principles;*
- *Australian Industry Participation Plans for Government Procurement;* and
- *The Code for the Tendering and Performance of Building Work 2016.*

5.45 As noted in Chapter two, there are some concerns over the implementation of two of these existing procurement policies. Recent changes to the policy on Australian Industry Participation (AIP) plans may have had a negative impact on the aim of the policy. To enhance the positive affect of the AIP plans, the AMWU suggests that the threshold for major projects for should be reduced from \$500 million to \$50 million to encourage more businesses to consider engaging local suppliers:

This will ensure that a greater number of proponents will need to demonstrate how Australian businesses have been given a full, fair and reasonable opportunity to supply goods and services on their project.⁵⁷

5.46 There are concerns that implementation of the Building Code 2016 may breach non-discrimination requirements in the CPRs. There also appears to be some contradiction between the requirement for Australian standards in

⁵⁵ International Learning Lab on Public Procurement and Human Rights, *Submission 14*, p. 13.

⁵⁶ Australian Paper, *Submission 38*, p. 5.

⁵⁷ AMWU, *Supplementary submission 18.1*, p. [6-7].

the Building Code 2016 and the option to use international standards in the amended CPRs.⁵⁸

- 5.47 The previous procurement policies identified as being most useful for departments making procurement decisions were:
- *National Waste Policy*;
 - *ICT Sustainability Plan*; and
 - *Fair Work Principles*.
- 5.48 The *National Waste Policy* came into effect in 2009 and is designed to provide a 'coherent, efficient and environmentally responsible approach to waste management in Australia'.⁵⁹ Although the Policy provided guidance on sustainable procurement, Finance indicated that it 'did not provide any compliance factors' and therefore, when the policies were streamlined, it was not deemed to be a procurement connected policy.⁶⁰
- 5.49 Australian Paper maintain the withdrawal of the *National Waste Policy* has left procurement officers without any guidance in considering environmental sustainability with regard to the CPRs.⁶¹
- 5.50 The *ICT Sustainability Plan 2010–2015* set mandatory environmental standards in ICT procurement across the Commonwealth Government and provided guidelines for the implementation of sustainable procurement principles and practices.⁶² The Plan lapsed in 2015 and has not been renewed by the Department of Environment and Energy.
- 5.51 The *Fair Work Principles* applied to all procurements over \$80 000 and required tenderers to comply with the *Fair Work Act 2009*. The Principles created specific obligations for tenderers from the cleaning services industry and from textile, clothing and footwear manufacturing. Textile, clothing and

⁵⁸ See Chapter two, paragraphs 2.53–2.54.

⁵⁹ Department of Environment and Energy, 'About the National Waste Policy', <<http://www.environment.gov.au/protection/national-waste-policy/about>> viewed 17 May 2017.

⁶⁰ Mr John Sheridan, First Assistant Secretary, Technology and Procurement, Department of Finance, *Committee Hansard*, 8 May 2017, p. 60.

⁶¹ Mr Dunn, Australian Paper, *Committee Hansard*, Canberra, 8 May 2017, p. 20.

⁶² Department of Environment and Energy, 'Australian Government ICT Sustainability Plan', <<http://www.environment.gov.au/topics/sustainable-communities/government-sustainability/ict-sustainability-plan>> viewed 17 May 2017.

footwear suppliers had to have accreditation under the *Homeworkers Code of Practice* which was administered by Ethical Clothing Australia. The *Fair Work Principles* were revoked on 1 July 2014.⁶³

- 5.52 Also recommended as a useful example of a procurement connected policy that provides guidance in a difficult area, was the Welsh Government's *Code of practice: Ethical employment in supply chains*.⁶⁴ The Code commits 'public, private and third sector organisations to a set of actions that tackle illegal and unfair employment practices'. All organisations that 'receive funding from Welsh Government, either directly or via grants or contracts' are expected to sign the code.⁶⁵

Training for procurement officers

- 5.53 The provision of comprehensive guidance was closely linked to a call for an improved program of training for procurement officers. The Australian National Audit Office (ANAO) have found 'significant skill and capability gaps amongst personnel (at all levels) undertaking procurement activities'.⁶⁶ Finance currently provides a range of guidelines, advice on best practice and training as required. However there is no mandatory requirement to access the support provided. It is at the discretion of individual departments.⁶⁷
- 5.54 Both the growing volume and complexity of government procurement were evident. Consult Australia was one of the many witnesses who highlighted the need for government to 'invest in the skills of its procurement officials' to meet the increased expertise and knowledge required by procurement decision-makers.⁶⁸ Consult Australia recommends the establishment of an

⁶³ Department of Employment, 'Revocation of the Fair Work Principles and the Commonwealth Cleaning Services Guidelines', <<https://www.employment.gov.au/news/revocation-fair-work-principles-and-commonwealth-cleaning-services-guidelines>> viewed 17 May 2017.

⁶⁴ Professor Jennifer Burn, Director, Anti-Slavery Australia, University of Technology Sydney, *Committee Hansard*, Canberra, 8 May 2017, p. 35.

⁶⁵ Welsh Government, 'Code of Practice: Ethical Employment in Supply Chains', <<http://gov.wales/topics/improving-services/better/vfm/code-of-practice/?lang=en>> viewed 17 May 2017.

⁶⁶ Australian National Audit Office (ANAO), *Submission 22*, p. [2].

⁶⁷ Mr Sheridan, Department of Finance, *Committee Hansard*, 8 May 2017, pp. 58–59.

⁶⁸ Consult Australia, *Submission 9*, p. 4.

independent Procurement Centre of Excellence building on the work of the existing Australasian Procurement and Construction Council (APCC):

The Centre would be tasked with building a stronger relationship between government and business and supporting best practice procurement in Australia at all levels of government. The Centre should:

- be established as independent of government;
- build stronger linkages between government and with industry sectors;
- provide transparent expert advice to all levels of government; and
- develop guidelines, build capability and improve standards.⁶⁹

5.55 There was collective agreement among human rights advocates that specific training is required to ensure that procurement officers can effectively interpret and implement clause 10.18. The Australian Human Rights Commission recommends that such training be mandatory.⁷⁰ The Joint Academic and Civil Society Group advises that it be developed in ‘consultation with stakeholders and other experts such as the Australian Human Rights Commission’.⁷¹

5.56 The training should cover the broad spectrum of relevant issues including ‘human trafficking and slavery, identification of risk in supply chains and the appropriate measures to be taken’ if these issues are recognized.⁷² For example, with regard to modern slavery the Australian Catholic Bishops Conference pointed out:

... procurement officers will need specialised training. It would be difficult for procurement officers to make the ‘reasonable enquiries’ required in clause 10.18 unless they are trained to identify modern slavery. Australian are often not aware slavery still exists, even in a wealthy country like Australia, making it much harder for people to understand what a reasonable enquiry might be. Modern slavery cannot be exposed and eradicated until people understand what it is and the key risk factors that indicate further investigation or risk mitigation is necessary.⁷³

⁶⁹ Consult Australia, *Submission 9*, pp. 4–5.

⁷⁰ Australian Human Rights Commission, *Submission 33*, p. 2.

⁷¹ Joint Academic and Civil Society Group, *Submission 29*, p. 6.

⁷² Anti-Slavery Australia, *Submission 32*, p. 11.

⁷³ Australian Catholic Bishops Conference, *Submission 50*, p. 3.

6. Implementation: other issues

Introduction

6.1 This chapter looks at further issues to be considered to ensure efficient implementation of the new clauses including:

- cultural change;
- weighting;
- applying Australian standards;
- transparency;
- design and innovation;
- contract management; and
- accession to the World Trade Organization (WTO) Government Procurement Agreement (GPA).

Cultural change

6.2 The Australian National Audit Office (ANAO) told the Committee that the guidelines for the Commonwealth procurement framework are ‘very robust’ and praised the support provided by the Department of Finance (Finance). However, the ANAO noted that ‘some departments do not seek the support’ provided.¹

¹ Ms Rona Mellor, Acting Auditor-General, Australian National Audit Office (ANAO), *Committee Hansard*, Canberra, 8 May 2017, p. 39.

- 6.3 The ANAO identified a need for departments to recognise that procurement is ‘core business for public servants’:

Within agencies themselves, recognition that procurement is important business that needs to be well-managed needs to continue to be a message, and that accountable authority instructions have to be followed and so what are the business assurance frameworks around that.²

- 6.4 The ANAO stresses the importance of departmental responsibility for successfully implementing the Commonwealth Procurement Rules (CPRs) and sees building capability as central to initiating cultural change:

It is the thoughtful selection of people, their training, the constant focus on the proper application of whatever rule set there is. Yes, it is a reasonably complex rule set, but it is a very well established one now. None of this should really be coming as a surprise to people involved in procurement across the Commonwealth ... it is a core capability and a core part of doing business in the Commonwealth these days. There is a real obligation and duty—there is actually a duty for the accountable authority to promote the proper application of these principles.³

- 6.5 The ANAO also suggested that departments would benefit from sharing knowledge and experience to improve their internal processes:

... there is good learning to be had from others who might have faced similar risk problems. They can share staff across these things. They can establish evaluation processes that involve more experienced people. We would implore them to look wider than just within themselves if they need the help.⁴

- 6.6 Ultimately the ANAO are confident that, if departments fully utilise all of the guidance, assistance and support provided by the framework, the CPRs will be implemented effectively:

The real challenge as we see it is that people are not necessarily thinking through which part of the framework they are operating in or documenting why they are landing in a particular part of the framework—the exemptions, for example, or the competitive space or the limited tender space—and then

² Ms Mellor, ANAO, *Committee Hansard*, Canberra, 8 May 2017, p. 42.

³ Dr Tom Ioannou, Acting Deputy Auditor-General, ANAO, *Committee Hansard*, Canberra, 8 May 2017, p. 43.

⁴ Ms Mellor, ANAO, *Committee Hansard*, Canberra, 8 May 2017, p. 43.

following through and applying all the elements of the framework that apply to the part of the framework that they are occupying.⁵

Weighting

- 6.7 The use of a weighting system in implementing the new clauses was a contentious issue, particularly with regard to economic benefit. Both the ANAO and Finance advised that the weighting given to various factors varied from procurement to procurement:

The weighting that you would put on various matters depends on the procurement, and that is essentially the choice of the procurement officials. They would weigh up which factors have more weight in particular circumstances.⁶

- 6.8 The Department of Defence (Defence) explained that it prefers a qualitative process; as a mandated weighting system does not provide the flexibility required to assess complex procurement projects:

We find that the qualitative assessment allows us to have more balance across all of the evaluation criteria. In some cases, if we were to take a purely quantitative approach, we feel that some of the benefits and also the risks may get lost in terms of the approach and may lead to a less than ideal outcome. So, if you were taking a purely mechanical or mathematical approach, our experience has been that these can often reduce your ability to truly understand and discriminate between the differences in the tenders. We often find that the quantitative numerical approach is just a bit too simplistic in relation to some of our truly complex procurement activities. We find that, on balance, the broader approach allows for greater flexibility to take into consideration a range of strategic factors.⁷

- 6.9 Defence provided the example of assessing economic benefit with regard to procurement in regional or remote areas:

⁵ Dr Ioannou, ANAO, *Committee Hansard*, Canberra, 8 May 2017, p. 43.

⁶ Mr John Sheridan, First Assistant Secretary, Technology and Procurement, Department of Finance, *Committee Hansard*, Canberra, 8 May 2017, p. 61; Ms Mellor, ANAO, *Committee Hansard*, Canberra, 8 May 2017, p. 44.

⁷ Ms Victoria Bergmann, Acting First Assistant Secretary, Procurement and Contracting, Capability Acquisition and Sustainment Group, Department of Defence, *Committee Hansard*, Canberra, 8 May 2017, pp. 47–48.

Predominantly, a lot of the Indigenous procurements are made in the estate area because they are in regional Australia and they are working on bases in remote areas where those Indigenous communities are the predominant communities. We are making sure that when you do economic benefit it might be that you are employing local people in a local community to do a job as opposed to flying somebody in and out of Darwin or Townsville or somewhere to do that, which is historically what we have done. The social benefit for us doing that is significant, and that is why it is really hard to have a finite methodology that says this is exactly how you are going to do something, because it stops you actually making a good decision sometimes.⁸

- 6.10 In response, the Australian Steel Institute (ASI) referred to the example provided by regulation 67 of the British *Public Contracts Regulations 2015* which requires weightings to be considered but provides the flexibility for them to vary from procurement to procurement:

Weighting:

- The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.
- Those weightings may be expressed by providing for a range with an appropriate maximum spread.
- Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.⁹

- 6.11 Proponents of a weighting system argue that the new clauses have to be considered in the context of Rules 4.1–4.15 (value-for-money) in Division 1 of the CPRs and, as those rules lack a weighting mechanism, the impact of the amendments risks being nullified. South Coast Labour Council (SCLC) contends that a ‘quantitative value and weighting’ system will strengthen the implementation of the new clauses:

We have to have a number in the equation because ... there are the value for money principles ... Division 2 is subordinate to division 1. Division 1 deals with the value for money. If the economic benefit is to be taken into account then there needs to be some tweaking ... of division 1 as well to give it some

⁸ Mr Kim Gillis, Deputy Secretary, Capability Acquisition and Sustainment Group, Department of Defence, *Committee Hansard*, Canberra, 8 May 2017, p. 53.

⁹ *Public Contracts Regulations 2015* (UK), Regulation 67 (9), (10), (11), <http://www.legislation.gov.uk/uksi/2015/102/pdfs/ukxi_20150102_en.pdf> viewed 23 May 2017.

real effect. Specifically we note this key inconsistency and contradiction ... defining what value for money is is something that is not very easy to identify in the current CPRs.¹⁰

- 6.12 The Australian Manufacturing Workers' Union (AMWU) maintains that there is sufficient leeway in Australia's trade agreements to accommodate a weighting system that takes into account the economic benefits of purchasing locally produced goods and services to determine 'best value'. It uses the purchase of office paper as an example:

... a contract for the provision of office paper to the Australian government could include a weighting of 15% on material costs for any bidder who will provide paper made in Australia and 10% for service costs, where the staff providing those services were located in Australia.

In this scenario, all bidders will be treated equally. Australian firms are welcome to bid with imported paper and off-shore service support, and any American firm is welcome to bid with domestically-sourced paper and to open an Australian service support centre. All bidders know the evaluation criteria in advance and all parties understand what the Australian government believes will deliver best value when it does its calculations and the reasons for those decisions.¹¹

- 6.13 However, it was considered that a weighting system would be inappropriate for human rights issues. The variety and scope of factors that require assessment to establish human rights risks are too complex to be captured in a weighting process:

For this reason, and because we are cognisant of the need to ensure that any system adopted is realistic in its expectations of the volume and type of information (both company specific and more broadly in terms of nature and scope of human rights risks) individual departments and agencies making procurement decisions can access and process, we do not recommend that labour and human rights considerations be taken into account via weighting during tender assessment. Rather, we recommend that human rights be integrated into the procurement system at all stages.¹²

¹⁰ Mr Arthur Rorris, Secretary, South Coast Labour Council (SCLC), *Committee Hansard*, Melbourne, 19 April 2017, p. 7; South Coast Labour Council (SCLC), *Submission 37*, p. [1].

¹¹ Australian Manufacturing Workers' Union (AMWU), *Supplementary submission 18.1*, p. [4].

¹² Joint Academic and Civil Society Group, *Supplementary submission 29.1*, pp. 4–5.

- 6.14 The Committee heard that the Victorian and South Australian governments have both implemented weighting systems to measure economic benefit in their procurement processes. These examples are discussed in Chapter eight.

Applying Australian standards

- 6.15 Overall, there is strong support for the application of Australian standards. As well as ensuring safety, requiring such standards makes Australian businesses more competitive:

This creates a level playing field for tenderers then to submit their competitive tender responses without compromising on the technical performance of their goods or services.¹³

- 6.16 There are, however, two widespread concerns: lack of expertise among procurement officers to identify appropriate standards and reliance on self-assessment to determine compliance.

- 6.17 According to the guidelines provided by Finance, the responsible procurement officer determines the standards that apply to a particular procurement.¹⁴ Standards are defined as:

... a document, approved by a recognised body such as Standards Australia, the International Organization for Standardization, the International Electrotechnical Commission or the International Telecommunication Union, that provides, for common and repeated use, rules, guidelines or characteristics for goods or services, or related processes and production methods, with which compliance is not mandatory, unless the goods or services are subject to regulation by government.¹⁵

- 6.18 Given the reliance on the expertise of individual procurement officers, Professionals Australia's claim that the Australian Government has become an uninformed purchaser has implications for the implementation of clause 10.10 and, in consequence, clause 10.37. ANAO's findings on the lack of skill and capability amongst all levels of procurement officials support this

¹³ Australasian Certification Authority for Reinforcing and Structural Steels (ACRS), *Submission 12*, p. 2; Australian Steel Institute (ASI), *Submission 27*, p. 14.

¹⁴ Department of Finance, *Application and verification of standards*, 16 February 2017, p. 1.

¹⁵ Department of Finance, *Application and verification of standards*, p. 1.

claim.¹⁶ There is concern that the lack of expertise may manifest itself with regard to identifying applicable Australian standards for individual procurements and consequently nullify the intention of the new clauses:

It is not reasonable for the government to place a complex requirement in the hands of procurement officials without the necessary support. Especially in the context of the guidelines allowing clause 10.10 to be applied at the discretion of the procurement official, this is unlikely to make any impact on existing procurement practices.¹⁷

- 6.19 The Welding Technology Institute of Australia (WTIA), among others, identified the dangers inherent in depending on tenderers to prove their own competency without reference to a third-party auditor:

As third-party auditors for industry our experience is that there is a significant gap between organisations 'demonstrating the capability to meet the Australian standard' and actually meeting it. Every compliance audit results in a series of compromises in relation to complete or partial non-conformance with certain aspects of the standard. Such compromises create financial risks for the Commonwealth and safety risks for the public.¹⁸

- 6.20 To address these concerns, the use of suitably endorsed accreditation bodies to oversee compliance with the standards required was strongly encouraged for both clauses 10.10 and 10.37. Tenderers should be expected to provide evidence of third-party certification and third-party audit reports should form part of the 'reasonable enquiries' undertaken when determining compliance. For example, the Australian Institute for Non-destructive Testing (AINDT) recommended that relevant materials should be independently inspected at both points:

Where applicable, and in accordance with Australian Standards, engineering products subject to Non-Destructive Testing, whether in Australia or Overseas, must be independently inspected by an accredited laboratory to

¹⁶ Australian National Audit Office (ANAO), *Submission 22*, p. [2].

¹⁷ Australian Manufacturing Workers' Union (AMWU), *Submission 18.1*, p. [7]; Construction Forestry Mining and Energy Union (CFMEU) and the Textile Clothing and Footwear Union of Australia (TCFUA), *Submission 35.1*, p. 3.

¹⁸ Welding Technology Institute of Australia (WTIA), *Submission 2*, p. 2.

ISO17025 (NATA) and personnel performing testing certified to AS ISO9712 (AINDT).¹⁹

6.21 The Building Products Innovation Council (BPIC), suggested that manufacturers/suppliers have an Australian recognised ‘independently audited Quality Assurance system’ in place that meets the following minimum requirements:

- testing or inspection of samples from the open market every 2–3 years (having passed completely through the supply chain and been subjected to all handling, transport and assembly stresses);
- product labels/receipts to identify manufacturing date and specific manufacturing facility from where product is produced;
- testing or inspection of samples from the factory/production facility;
- regular and documented quality system audits; and
- independent assessment of the production process or service.²⁰

6.22 However, Consult Australia sounded a note of caution, warning of the possibility of an additional regulatory burden placed on its members involved in complex projects that may include multiple standards:

There are a whole range of standards that engineers and architects rely on in their day-to-day work. So when you refer to the appropriate standards being adhered to, one of the things we would be concerned about is not only the regulatory burden being placed on firms having to note through the tender process and through the procurement process all of those standards which they will be taking into account when they are completing the engineering or architecture task—and ... there might be multiples of hundreds on a complex job—but also the regulatory burden of needing to identify through the supply chain of subconsultants all of the other standards that they would then have to comply with to satisfy their own individual contracts and parts of the job. That would be a very onerous condition for a design firm and I believe it creates unnecessary cost and compliance burden for firms.²¹

6.23 Two additional areas were highlighted by witnesses with regard to the application of standards: the definition of Australian and international standard and the lack of standards applying to some sectors.

¹⁹ Australian Institute for Non-destructive Testing Federal Council (AINDT), *Submission 8*, p. 3.

²⁰ Building Products Innovation Council (BPIC), *Submission 6*, p. 3.

²¹ Ms Motto, Consult Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 40; Consult Australia, *Submission 9.1*, p. [2].

- 6.24 Due to some apparent confusion during evidence supplied to the Committee, Finance pointed out that internationally recognised standards rarely differ from Australian standards and clarified the definition of international standards:

When it says international standards, the interpretation that we have clearly applied in the Commonwealth Procurement Rules is ‘international standards produced by organisations like the International Standards Organisation’, and there is a small number of equivalent international agencies. It does not mean ‘the standards of other countries’. So, if you like, it is an International standard with a capital I, rather than a foreign standard arrangement. Our consultation with Standards Australia indicates that there are very few examples of there being Australian standards differing from—capital I—International standards.²²

- 6.25 With regard to standards, Finance explained that the clauses apply to binding standards and that there is a difference between these types of standards and those formulated to only provide guidance:

The reason that not all standards would apply is that not all standards are, essentially, the equivalent of legislative, or required; there are educative standards as well: there are standards—published by Standards Australia and indeed internationally—that talk about advice to firms, how you might do something; rather than, if you think of the standard for electrical plugs, how detailed that might be.²³

- 6.26 Ethical Clothing Australia (ECA) drew attention to the circumstances in the textile clothing and footwear industry where ECA is responsible for providing a voluntary standard that demonstrates that a company’s practices are both ‘ethical and legally compliant’.²⁴ As discussed previously, Commonwealth procurement policy no longer requires tenderers to be accredited by ECA and therefore demonstrate that they are compliant with these standards. Therefore the standard does not fall under clauses 10.10 and 10.37.

- 6.27 The Committee asked the ECA to investigate if Australian Standards had any plans to develop a similar standard. ECA found that there is currently

²² Mr Sheridan, Department of Finance, *Committee Hansard*, Canberra, 8 May 2017, p. 60; Department of Finance, *Submission 30*, p. 8.

²³ Mr Sheridan, Department of Finance, *Committee Hansard*, Canberra, 8 May 2017, p. 60.

²⁴ Ethical Clothing Australia (ECA), *Submission 21*, p. 3.

‘no projects underway regarding an Australian Standard for ethically produced clothing’.²⁵ Such a project would need to be initiated by the industry and would still require a compliance body to oversee its implementation:

In order to further explore the possibility of developing an Australian Standard in this area would require either a member of industry or the public to submit a project proposal which would then be considered by an industry expert. It is also worth noting here that Standards Australia is not a compliance organisation, so even if a Standard was developed, they do not have the responsibility to enforce it.²⁶

- 6.28 ECA recommended that alternative standards be considered for sectors where an Australian standard does not currently exist.²⁷

Transparency

- 6.29 As noted in Chapter four, the ANAO has identified lack of transparency in the current procurement system as a major concern.²⁸ Stakeholders confirmed ongoing problems with ascertaining what factors have been considered in a procurement decision.²⁹

- 6.30 The ANAO stressed that good record keeping is the key to addressing these concerns with the implementation of the new clauses:

What we are going to look for, as we always do, is: what is the evidence that that requirement has been done? The requirement is to consider those things. We will be looking for evidence of that consideration—what they have found, what they have weighed up and what decisions have been made in the course of that—to see if it meets the requirement.³⁰

- 6.31 The Australian Chamber of Commerce and Industry (ACCI) stressed the importance of ‘transparency in decision-making’, suggesting that, with due

²⁵ ECA, *Supplementary submission 21.1*, p. [2].

²⁶ ECA, *Supplementary submission 21.1*, p. [2].

²⁷ ECA, *Submission 21*, p. 3.

²⁸ ANAO, *Submission 22*, p. [2].

²⁹ Mr Ross Hampton, Chief Executive Officer, Australian Forest Products Association (AFPA), *Committee Hansard*, Canberra, 8 May 2017, p. 19; Professionals Australia, *Submission 16*.

³⁰ Ms Mellor, ANAO, *Committee Hansard*, Canberra, 8 May 2017, p. 42.

regard to commercial-in-confidence issues, the Government should make their cost-benefit analysis available.³¹ The Construction Forestry Mining and Energy Union (CFMEU) advocated for clearer reporting of the reasons for a decision to procure off-shore, to help validate the choice:

If there is a competitive Australian supplier in the mix as a tenderer and the procurement officer, the funding entity or whoever is spending that government money decides to use an imported product instead of the Australian-made product, they should justify the decision. They should justify why that is better value for money for the taxpayer and take into account everything that is in the Commonwealth Procurement Rules and also the new rules, in terms of economic benefit and regulation. That means that, if an imported product is chosen over an Australian product, it is transparent as to why that has occurred.³²

- 6.32 Communication and accessibility were identified as important to encourage Australian business participation and develop confidence in the transparency of the procurement process. Engagement with industry is crucial:

As I spoke with various companies in preparation for today, the common theme that came through was that of transparency—more transparency in the process, in the outcomes and in related communications around both. Transparency will encourage investment in product development. One of the practices that is well liked in the industry is the industry briefings before a tender where the entity and the industry get together for a presentation of the requirement, for questions and answers and for inquiry input. It is also good for all parties if an agency is open to engaging with the industry well prior to a tender being released.³³

- 6.33 A lack of transparency is seen as contributing to concerns over human rights abuses in supply chains. Without transparency, third parties cannot identify or remedy breaches. Improving transparency in contracting arrangements could help:

³¹ Australian Chamber of Commerce and Industry (ACCI), *Submission 5*, pp. 1 and 3.

³² Mr Travis Wacey, Policy Research Officer, Forestry & Furnishing Products Division, Construction Forestry Mining and Energy Union (CFMEU), *Committee Hansard*, Melbourne, 19 April 2017, p. 63.

³³ Mr David Giles-Kaye, Chief Executive Officer, Council of Textile & Fashion Industries of Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 52.

There are two levels at which transparency would need to be enhanced in order to allow monitoring and identification of breaches by third parties. First, government would be required to reveal certain information in relation to existing contracts. Second, contractors would be required to identify (at a minimum) first and second tier contractors and locations where work is occurring.³⁴

Design and innovation

- 6.34 Witnesses pointed out the connection between the scoping and design stage of a project and the procurement process, emphasising that procurement should be considered early in the project life.³⁵ Professionals Australia explained that decisions regarding supply are influenced by where the design work is done:

We have got to pick the right project but then we have to manage it, scope it and get the design stage right. Where you do the design affects how much downstream work you get. If you are designing a house to be built in Melbourne and it is being designed in Brisbane, it almost automatically happens that you start to design for the suppliers that you know rather than the ones here. It is small things like specifications or knowledge of the supply chain processes.³⁶

- 6.35 Professionals Australia emphasised that projects designed overseas are likely to advantage overseas suppliers:

That work was being done by Bechtel and these other major companies out of Houston, Yokohama and London. They were designing that, knowing that the work would go to the supply chains out of Australia. So where you design has a massive effect on the amount of downstream work you get.³⁷

- 6.36 The ASI reiterated the point with regard to Australian steel:

We have seen some major Australian projects designed overseas or designed to Japanese standards and other international standards. This prohibits Australian steel from competing in that particular project, because we make to

³⁴ Joint Academic and Civil Society Group, *Supplementary submission 29.1*, pp. 3–4.

³⁵ Ms Motto, Consult Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 41.

³⁶ Mr Christopher Walton, Chief Executive Officer, Professionals Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 26.

³⁷ Mr Walton, Professionals Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 26.

Australian standards, not Japanese standards. They are slightly different. That is certainly an obstacle that we have seen in the Australian major projects scene. In the past we have also seen a similar scenario in government shipbuilding, where we have taken up a French or Spanish design and we have then had that composition of steel to a Spanish or French specification, thereby outlining the fact that Australia just cannot compete or deliver on those specifications.³⁸

- 6.37 To circumvent the problem, Professionals Australia suggests that the procurement system should require that the design phase is undertaken in Australia. However this would not preclude overseas suppliers from government procurement opportunities:

If the overseas company wins it, fine, but they have got to set up here. They have got to have a base here. Inevitably, they will start using more local engineers, and the engineers will learn et cetera. If you do not do that, it is very hard to win downstream work.³⁹

- 6.38 A lack of upfront consideration of procurement issues during the scoping and design phase is also seen as hindering innovation. PT Blink, a leading innovator in the use of technology in the design and construction of large steel structures, told the Committee that innovative solutions should be considered at the beginning of the design process, not once the project is underway.⁴⁰

- 6.39 The Defence Rapid Prototyping, Development and Evaluation Program (RPDE) was brought to the Committee's attention as a model that could be used to integrate procurement and project planning. RPDE is a joint Defence-Industry initiative which brings together Defence, industry and academia to 'address complex Defence capability development and modernisation issues' before a project goes to tender.⁴¹ Defence stresses the collaborative nature of the program and maintains that it fosters innovation:

It works by responding to requests from Defence capability managers to help them solve complex problems, which might be a technology challenge, a need

³⁸ Mr Ian Cairns, National Manager, Industry Development and Government Relations, Australian Steel Institute (ASI), *Committee Hansard*, Canberra, 8 May 2017, pp. 27–28.

³⁹ Mr Walton, Professionals Australia, *Committee Hansard*, Melbourne, 19 April 2017, pp. 26–27.

⁴⁰ PT Blink, *Submission 45*, p. [6].

⁴¹ Rapid Prototyping, Development and Evaluation Program, <<http://rpde.org.au/>> viewed 6 June 2017.

and a requirement definition or industry capability questions. It really provides an opportunity to share information about Defence needs and receive feedback from members. It is an important program. It is really part of that whole new innovation strategy ...⁴²

Contract management

- 6.40 Effective contract management is considered essential to counter a number of implementation concerns. The ANAO stated the importance of efficient contract management, finding that ‘managing the contract is where the value for money actually comes from’.⁴³ The current practice of including terms established during the tender process in the contract is expected to assist with successfully implementing the new clauses:

It is common practice for procurement officials to translate claims made by tenderers into contract clauses to ensure the Australian Government maximises procurement and contract outcomes. Finance expects that any claims made by tenderers in relation to new clauses will be similarly treated.⁴⁴

- 6.41 Consult Australia advocate the benefits of streamlined, standard contracts to encourage better definition of the scope of the work and lessen concerns over risk shifting from the beginning of a project:

Unfortunately the situation in Australia is that we spend far too much time on the second part of the contract—that is, transferring risk between the parties, often without properly managing that risk but merely transferring it—and not enough time on the scope of the work, so that we make sure that we are actually getting the definition of the project or the problem right in the first place.⁴⁵

- 6.42 The effective implementation of clause 10.10 and 10.37, in particular, would benefit from including the Australian standards specified in the tender documents, in the subsequent contract.⁴⁶

⁴² Ms Kate Louise, First Assistant Secretary, Defence Industry Policy, Department of Defence, *Committee Hansard*, Canberra, 8 May 2017, p. 54.

⁴³ Ms Mellor, ANAO, *Committee Hansard*, Canberra, 8 May 2017, p. 39.

⁴⁴ Department of Finance, *Submission 30*, p. 7.

⁴⁵ Ms Megan Motto, Chief Executive Officer, Consult Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 42; Consult Australia, *Submission 9*, p. 8.

⁴⁶ ACRS, *Submission 12*, pp. 2–3.

- 6.43 Contracts could be effectively used to provide government with better understanding and control of supply chains. The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) consider that government should establish a direct contractual relationship with subcontractors to mitigate some of the risks associated with larger projects, by providing greater transparency:

It is about looking at the responsibility of government extending down through the supply chain ... So if you look at security issues or occupational health and safety, they have sufficient priority to make sure that subcontractors in a procurement arrangement—those things are covered off. What we are flagging is government being an exemplar of what good procurement practice should be down through a supply chain. There are certain things that need to be stipulated all the way through that supply chain. That would include things like payment practices, making sure that payment terms are appropriate and having the ability for subcontractors to have a means by which of complaining without being then punished for it ...⁴⁷

- 6.44 However, Defence is cautious about establishing direct contractual relationships with subcontractors:

It is very difficult for us in that relationship to actually mandate or control those subcontractor relationships at that level. We deal with this all the time. We do not have a capacity to actually control down into that subcontractor level other than if we hear about that performance.⁴⁸

- 6.45 Defence maintain that any difficulties being experienced by subcontractors would be reflected in the progress of the project and that Defence would hold the prime contractor to account, forcing the problem to be rectified.⁴⁹
- 6.46 Contract management is also seen as a significant factor in ensuring that supply chains do not breach human rights obligations. Current guidance suggests that officials may require suppliers to certify their compliance with regulations and/or regulatory frameworks and that officers may undertake

⁴⁷ Ms Anne Scott, Principal Adviser, Australian Small Business and Family Enterprise Ombudsman (ASBFEO), *Committee Hansard*, Canberra, 8 May 2017, p. 15.

⁴⁸ Mr Gillis, Department of Defence, *Committee Hansard*, Canberra, 8 May 2017, p. 51.

⁴⁹ Mr Gillis, Department of Defence, *Committee Hansard*, Canberra, 8 May 2017, p. 51.

their own investigations to confirm compliance.⁵⁰ Witnesses suggest that this provides a foundation for making such certification mandatory for suppliers in 'high risk' contracts above a certain value. Further, this requirement should be supplemented with an annual reporting requirement for the term of the contract.⁵¹

- 6.47 By contrast, the South Australian Industry Advocate illustrated how contract management could ensure that obligations are met. Terms and commitments agreed in the tendering process via the Industry Participation Plan (IPP) are included in the contract guaranteeing that compliance:

Once the successful tenderer has been identified then my office goes back and fine-tunes that industry participation plan with all of the commitments that were made in it so it is completely accurate. Once that fine-tuning or that finalisation has been done, the industry participation plan becomes an addendum to the contract and it is a commitment in the contract.⁵²

Accession to WTO GPA

- 6.48 As discussed in Chapter four, there already exists a range of broad exemptions that can be exercised without breaching Australia's international obligations. However, there are concerns that Australia's possible accession to the World Trade Organization (WTO) Government Procurement Agreement (GPA) may jeopardise some of these provisions.
- 6.49 According to the Department of Foreign Affairs and Trade (DFAT) website, Australia presented the WTO with a revised accession offer on 30 September 2016, which was discussed during the Government Procurement Agreement Committee meetings held in October 2016 and February 2017.⁵³ On 25 May 2017 the Government introduced the Government Procurement (Judicial

⁵⁰ Department of Finance, 'Consideration of relevant regulations and/or frameworks', 16 February 2017, paragraph 7, <<https://www.finance.gov.au/procurement/procurement-policy-and-guidance/commonwealth-procurement-rules/>> viewed 22 May 2017.

⁵¹ Anti-Slavery Australia, *Submission 32*, pp. 12–14; Joint Academic and Civil Society Group, *Submission 29*, pp. 15–16.

⁵² Mr Ian Nightingale, Industry Advocate, Department of State Development, South Australia, *Committee Hansard*, Canberra, 29 March 2017, p. 4.

⁵³ Department of Foreign Affairs and Trade (DFAT), 'WTO Agreement on Government Procurement (GPA)' <<http://dfat.gov.au/international-relations/international-organisations/wto/Pages/wto-agreement-on-government-procurement.aspx>> viewed 24 May 2017.

Review) Bill 2017 into the Parliament. It will meet Australia's obligations should we accede to the WTO GPA:

The Bill will enable Australia to meet international obligations on government procurement that require the Commonwealth to establish or designate an impartial and independent body where suppliers can raise complaints about government procurement processes and be awarded remedies/compensation.⁵⁴

6.50 The Bill has been referred to the Senate Standing Committee on Finance and Public Administration which is due to report on 4 August 2017.

6.51 DFAT maintains that accession to WTO GPA will not have any impact on the implementation of the amended CPRs:

In terms of its effect on the recent changes to the CPRs in CPR17, Australia's membership of the GPA is unlikely to have an impact beyond that of Australia's existing FTAs. The rules and obligations in the GPA are not materially different to Australia's existing FTAs.⁵⁵

6.52 Despite the reassurance from DFAT, Dr Thurbon warned that restrictions on public procurement are usually imposed on signatories to the WTO-GPA:

World Trade Organization (WTO) membership requires governments to curtail the use of local content requirements, direct export subsidies and preferential government procurement policies (which involve using government purchasing to support local firms).⁵⁶

6.53 This concern was corroborated by the Australian Fair Trade Investment Network (AFTINET) who argues that there is little evidence to suggest that acceding to the WTO GPA will improve opportunities for Australian businesses. Further, AFTINET claimed that Australia could put at risk its current flexibility to exempt small and medium enterprises (SMEs) and support local suppliers:

... the negotiations and concessions required in the accession process for the GPA could limit current and future policy options for both Commonwealth and state governments, leading again to a squeeze from both sides for Australian business.

⁵⁴ Explanatory Memorandum, Government Procurement (Judicial Review) Bill 2017, p. 1.

⁵⁵ Department of Foreign Affairs and Trade (DFAT), *Submission 25*, p. 7.

⁵⁶ Dr Elizabeth Thurbon, *Submission 46: Attachment B*, p. 636.

...

It would be unwise for the Australian Government to trade away existing exemptions for government procurement, and options for future flexibility, in the vain hope of additional access to overseas government procurement markets, which based on past evidence is highly unlikely.⁵⁷

- 6.54 However, Dr Thurbon pointed out that during the accession process, countries can be exempt from certain restrictions usually imposed on WTO GPA signatories:

The WTOGPA does not typically permit preferences for SMEs, but both Korea and the [United States] secured exemptions for their SME set asides program. Similarly, the [Korea-United States Free Trade Agreement] exempts both countries' small medium size business set-asides programs from the principle of non-discrimination.

- 6.55 Dr Thurbon provided two specific case studies of how other countries have promoted their small and medium enterprises to make them competitive.

United States – Small Business Innovation Research (SBIR) Program

- 6.56 The Small Business Innovation Research (SBIR) Program started in 1982 and requires some US federal government agencies to spend a percentage of their research and development budget on pre-commercial technology development assistance to local firms. According to Dr Thurbon:

The aim is to use the purchasing power of the government to fund the creation, commercialisation and early uptake of new, technology-based products by 'small' US companies. Each year, the agencies in question advertise their problem-sets and call for innovative proposals from local firms to address them. The agencies then fund successful bidders to develop and commercialise the proposed solution—from proof of concept to product delivery.⁵⁸

- 6.57 According to Dr Thurbon, this is allowed within international obligations because it uses the SME exception.

South Korea—Procurement Conditioned SME Research & Development Program

⁵⁷ Australian Fair Trade and Investment Network (AFTINET), *Submission 10*, pp. 3-4.

⁵⁸ Dr Thurbon, *Submission 64: Attachment B*, p. 638.

- 6.58 South Korea's Procurement Conditioned SME Research & Development Program was implemented in 2002. It identifies products that the Korean government and large companies such as Samsung, regularly procure from overseas:

Korea's Small and Medium Business Administration (SMBA) is primarily responsible for identifying products or localisation through regular survey of customs and government procurement data. Once a product is identified, the government looks for a local firm that is likely to be capable of developing a substitute product with a two year timeframe ... If the substitute product is successfully produced, the government agency or private conglomerate must then submit a procurement plan and commit to purchasing the product from the local firm for a certain period of time.⁵⁹

- 6.59 There are pre-designated joint contributions for the program. If the project is for a government agency, the government contribution is 75 per cent of the development cost, with the local firm taking up 25 per cent. If the buyer is a private firm, the governments contribution is 50 per cent, with the local and private firm each evenly contributing the final 50 per cent.⁶⁰

⁵⁹ Dr Thurbon, *Submission 46: Attachment B*, p. 639.

⁶⁰ Dr Thurbon, *Submission 46: Attachment B*, p. 639.

7. International procurement models

Introduction

- 7.1 This chapter considers international best practice in procurement with a particular focus on policies and practices which may be applicable to the Australian context.
- 7.2 Throughout the inquiry, witnesses highlighted the federal procurement frameworks of the United Kingdom (UK), the United States of America (USA) and Canada as examples of best practice. They explained how these countries use procurement to support local industries, drive social outcomes and safeguard the working conditions of sub-contractors.
- 7.3 Witnesses noted that the UK, USA and Canadian social and economic benefit policies operate successfully despite the existence of international trade agreements. They suggested that the Australian Government could introduce similar measures without contravening its international trade obligations.
- 7.4 The following paragraphs describe the procurement frameworks of the UK, USA and Canada in more detail and record witness comments on their merits.

United Kingdom

- 7.5 The UK Government's federal procurement framework is based on its obligations to the European Union (EU). The EU aims to maintain an open public procurement market across member states and ensure the free movement of goods and services across Europe. It does so through:

- EU Treaty obligations of non-discrimination, free movement of goods, freedom to provide services and freedom of establishment;
- European Court of Justice case law which provides for equality of treatment, transparency, mutual recognition and proportionality; and
- EU procurement directives.¹

7.6 As a member state, the UK has enacted domestic legislation to give effect to EU obligations, including:

- the *Public Contracts Regulations 2015*; and
- the *Public Services (Social Value) Act 2012*.

7.7 This legislation is complemented by policies and initiatives targeted at specific areas of procurement, such as:

- the Commissioning Academy which trains officials to achieve excellence in procurement; and
- the *Government Construction Strategy* which requires use of building information modelling (BIM) in large building and construction procurements.

Public Contracts Regulations 2015

7.8 Much like the Australian Government's Commonwealth Procurement Rules (CPRs), the UK's *Public Contracts Regulations 2015* establishes the procedures government agencies must follow when conducting procurement above specified financial thresholds.

7.9 The core principle of the regulation is value-for-money, defined as 'the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought'. The regulations also provide for:

- transparent contracting;
- equal treatment of domestic and international suppliers;
- electronic procurement techniques;
- consideration of social and environmental factors;

¹ Crown Commercial Service (UK), *A Brief Guide to the 2014 EU Public Procurement Directives*, October 2016, p. 3.

- measures to enhance small and medium enterprise (SME) access to government procurement, such as splitting larger contracts into a series of smaller contracts;
- whole-of-life costing; and
- preliminary market consultation.²

7.10 Witnesses to the inquiry commented on the operation of the *Public Contract Regulations 2015*, highlighting functions which could be adopted by the Australian Government.

7.11 The Australian Steel Institute (ASI) noted that the regulations unambiguously require suppliers to comply with applicable UK, EU and international law to be considered for a government contract. It pointed out that sub regulation 56(2) refers to an annex which explicitly lists applicable regulation:

Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with applicable obligations in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to the Public Contracts Directive as amended from time to time.³

7.12 The ASI suggested that this approach is preferable to the CPRs' ambiguous requirement to 'make reasonable inquiries that the procurement is carried out considering relevant regulations' contained in clause 10.18. It argued that the clarity of the prescriptive UK regulations avoids confusion over whether international suppliers need to comply with the regulation of their country of origin, international regulation, or the regulation of the nation offering the contract. The ASI said this approach also removes the requirement for officials to determine what regulation within the applicable jurisdiction of law should be considered 'relevant' to the procurement:

² United Kingdom (UK) Government, *Explanatory Memorandum to the Public Contracts Regulations 2015*, pp. 6–9; Crown Commercial Service (UK), *A Brief Guide to the 2014 EU Public Procurement Directives*, October 2016, p. 3.

³ Australian Steel Institute (ASI), *Submission 27*, p. 18.

This regulatory model unambiguously identifies the relevant standards a supplier must satisfy.⁴

7.13 The ASI also highlighted the operation of regulation 67 of the *Public Contracts Regulations 2015*. This regulation outlines a diverse range of evaluation criteria, including social factors, which can inform procurement decisions and provides for the use of weighted criteria. The ASI suggests that the inclusion of a similar clause in the CPRs would authorise officials to apply weighted evaluation criteria to procurement while maintaining the flexibility to fine tune weightings to affect different outcomes.⁵

7.14 The *Public Contracts Regulations 2015* also provide for improved SME access to government procurement by:

- requiring procurement opportunities to be advertised through the UK Contracts Finder Portal;
- preventing officials from setting company turnover requirements at more than twice the value of the contract; and
- encouraging officials to split projects into smaller contracts.⁶

7.15 According to the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) the Australian Government could save money if it adopted some of these provisions:

In some cases, breaking a job into smaller parts could actually save the Government money. ASBFEO have been made aware of instances where prime suppliers are paid a large sum of money to manage contracts with a few key subcontractors who are paid much, much less for their work.⁷

7.16 ASBFEO suggested that the Australian Government target for small business participation is ‘unambitious’ at 10 per cent and should be ‘increased to match the UK [target] by 2020, with an option to review the target once reached’:

The UK has a target of one third (33 per cent) of the value of Government procurement spending going to small and medium-sized businesses

⁴ ASI, *Submission 27*, p. 18.

⁵ ASI, *Submission 27*, pp. 21–23.

⁶ UK Government, *Explanatory Memorandum to the Public Contracts Regulations 2015*, pp. 7, 8.

⁷ Australian Small Business and Family Enterprise Ombudsman (ASBFEO), *Submission 19.1*, p. [7].

(businesses employing 250 employees or less) by 2020. The previous target was for 25 per cent by 2015.⁸

- 7.17 Additionally, the UK Government can require prime contractors to source sub-contractors from government panel arrangements where rates, terms and conditions have already been set, and to apply specific payment terms to their supply chains.⁹ It also surveys its supply chains to accurately assess the level of SME participation in government procurement and requires primary contract terms and conditions to be applied equally to sub-contractors up to three levels removed. ASBFEO supported the introduction of these measures into the Australian context:

All efforts to ensure a level playing field for businesses of all sizes should be taken.¹⁰

Public Services (Social Value) Act 2012

- 7.18 The *Public Services (Social Value) Act 2012* requires UK officials to consider the economic, environmental and social benefits that can be secured through procurement before a procurement processes commences. It compels officials to consider consulting relevant communities and suppliers to design procurement processes that secure goods or services while maximising benefit to the community.
- 7.19 The Act only applies to the preparatory processes undertaken in the lead up to procurement expected to value more than relevant thresholds. It does not apply to any formal stages of the procurement process. Nor does it dictate how consideration of social impacts should shape procurement processes.
- 7.20 The Act specifies that resulting procurement processes must not discriminate against suppliers from EU member states or from countries party to the World Trade Organisation's Government Procurement

⁸ ASBFEO, *Submission 19*, p. [2] and *Submission 19.1*, p. [1].

⁹ ASBFEO, *Submission 19.1*, p. [7].

¹⁰ ASBFEO, *Submission 19.1*, p. [1]; Mr James Strachan, Director Advocacy, Australian Small Business and Family Enterprise Ombudsman (ASBFEO), *Committee Hansard*, Melbourne, 8 May 2017, pp. 12 and 15.

Agreement (WTO GPA), in line with the UK's international trade obligations.¹¹

- 7.21 ASBFEO noted that the *Public Services (Social Value) Act 2012* is similar to clause 10.30 of the new CPRs in that it, 'is intended to focus government procurement decision makers on external benefits as part of the value for money consideration'. As such, ASBFEO believed the implementation of clause 10.30 may be affected by issues similar to those which accompanied the introduction of the Act. For example, officials applying the clause may struggle to rank the unique economic benefits offered by different suppliers:

Like the UK, Australian Government departments are likely to encounter problems assessing value for money due to measurement confusion for economic benefits. We recognise the Department of Finance guidelines have considered measurement of economic benefit by restricting the quantification of it to direct effects (or first round impacts). However, there is not any guidance for businesses bidding on contracts about how they can demonstrate and quantify the social and environmental outcomes. This will make it difficult for procurement officers to determine if, e.g. 20 additional staff employed is a more valuable economic benefit than a 2-hour interactive class to transfer knowledge to local businesses.¹²

- 7.22 ASBFEO believed the impact of CPR clause 10.30 could also be inhibited by its narrow focus on economic benefit:

Assessing a value for money outcome through the current narrow lense of "economic benefit" will likely lead to the proposal that provides the lowest "cost to outcome" ratio to win[ning], over a proposal that provides social benefits but at a higher "cost to outcome" ratio.¹³

- 7.23 However, it suggested that adding a requirement to consider the social impact of procurement to clause 10.30 may address some of these issues by explicitly enabling a broader consideration of non-economic factors:

For social value to be considered as part of procurement processes and value for money assessments in Australian Government procurement, it needs to be

¹¹ ASBFEO, *Submission 19.1*, pp. [2–3]; UK Government, 'Procurement Policy Note—The Public Services (Social Value) Act 2012—advice for commissioners and procurers', *Information Note 10/12*, 20 December 2012, pp. 2, 4, 6, 7.

¹² ASBFEO, *Submission 19.1*, p. [2].

¹³ ASBFEO, *Submission 19.1*, p. [2].

given explicit consideration, alongside economic and environmental outcomes and explicit wording in the CPRs as part of a value for money assessment.¹⁴

7.24 If the Australian Government does go down this path, ASBFEO suggested that it could assess compliance with the clause and handle complaints from SMEs in a similar manner to the UK Government's Mystery Shopper Scheme.¹⁵ The Mystery Shopper Scheme allows for anonymous investigation and dispute resolution by:

- carrying out spot checks on procurement processes;
- receiving supplier complaints about procurement practice; and
- discussing findings with contracting agencies so practices can be refined.¹⁶

7.25 ASBFEO also noted that the UK Government issues Social Value Awards to 'recognise and celebrate good practice in commissioning and providing social value' under the Act.¹⁷

UK Commissioning Academy

7.26 The UK Government's Commissioning Academy aims to develop public sector leaders capable of designing services, influencing external parties, and shaping and managing markets to achieve the best outcomes for the community. Consult Australia suggested that such an institute is needed in the Australian context to promote excellence in procurement:

With large amounts of public funds being spent on infrastructure, it is incumbent on governments to ensure they get maximum value for money through the procurement process. To buy wisely you need wise buyers...¹⁸

¹⁴ ASBFEO, *Submission 19.1*, p. [2].

¹⁵ ASBFEO, *Submission 19.1*, p. [3].

¹⁶ UK Government, *Mystery Shopper: Scope and Remit*, <<https://www.gov.uk/government/publications/mystery-shopper-scope-and-remit>> viewed 24 May 2017; ASBFEO, *Submission 19.1*, p. [2].

¹⁷ UK Government, 'Social Value Awards', <<https://www.gov.uk/government/publications/social-value-act-information-and-resources/social-value-act-information-and-resources>> viewed 23 May 2017.

¹⁸ Consult Australia, *Submission 9*, p. 4; United Kingdom, *Commissioning Academy: 2016 Brochure*, <<https://www.gov.uk/government/publications/the-commissioning-academy-brochure/commissioning-academy-brochure-2016>> viewed 23 May 2017.

Government Construction Strategy

- 7.27 The UK Government's 2011 *Government Construction Strategy* outlines measures to improve the efficiency of public sector construction projects, including the use of BIM in procurement.
- 7.28 BIM is the accumulation of data from all parties involved in a building or infrastructure project so that a 3D model can be created to inform the design, construction and ongoing management of the resulting infrastructure.¹⁹ When procurement is informed by BIM:
- the implications of different designs can be easily evaluated;
 - products manufactured separately can be tested for fit;
 - design data can be programmed directly into construction tools, eliminating intermediaries; and
 - asset management post construction is better informed.
- 7.29 The *Government Construction Strategy* is driving closer collaboration between the UK Government and the construction industry by facilitating the move towards standardised data provision and broader use of BIM.²⁰
- 7.30 BuildingSMART Australasia considered the UK Government a global leader in the use of BIM and suggested the practice may result in a 20 per cent reduction in construction costs for government buildings there.²¹ It called on the Australian Government to adopt BIM as part of its building and construction procurement; suggesting that it could 'minimise red tape and additional costs to suppliers'.
- 7.31 Ms Motto also spoke positively of the UK Government's approach to construction procurement and suggested that the Australian Government could 'draw from' this experience.²²

¹⁹ Northern Ireland, Department of Finance, *Building Information Modelling*, <<https://www.finance-ni.gov.uk/articles/building-information-modelling-bim#toc-1>> viewed 24 May 2017.

²⁰ UK Government, *Building and Construction Strategy*, 2011, p.13, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61152/Government-Construction-Strategy_0.pdf> viewed 24 May 2017.

²¹ BuildingSMART Australasia, *Submission 7*, p. 7.

²² Ms Megan Motto, Chief Executive Officer, Consult Australia, *Committee Hansard*, Canberra, 19 April 2017, p. 41

United States of America

7.32 The fundamentals of the USA Government procurement framework are established through the *Federal Acquisitions Regulation* (FAR) and supplemented by:

- legislation including the *Buy America Act* and the *Berry Amendment*; and
- Presidential Executive Orders.

Federal Acquisitions Regulation

7.33 Similarly to the Australian Government's CPRs, FAR outlines the principles and rules which guide officials' use of public funds to procure goods and services. The first principle of FAR is:

... to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives.²³

7.34 FAR covers the entire procurement process from identifying a need for procurement, to contract management, including:

- market research and acquisition planning;
- describing procurement needs;
- procurement methods and competition requirements;
- contracting, including: administration, modification, quality assurance and auditing;
- small business programs;
- the application of labour laws; and
- sustainable acquisitions.²⁴

7.35 Witnesses to the inquiry praised the breadth of the FAR, particularly its incorporation of human rights.

²³ United States (US) Government, *Federal Acquisitions Regulation*, May 2014, Section 1.102, <<https://www.acquisition.gov/browsefar>> viewed 24 May 2017.

²⁴ US Government, *Federal Acquisition Regulation (FAR)*, <<https://www.acquisition.gov/browsefar>> viewed 25 May 2017.

- 7.36 The United Nations International Children's Emergency Fund Australia (UNICEF Australia) said FAR protects human rights by prohibiting the purchase of goods 'produced by forced or indentured labour'.²⁵
- 7.37 UNICEF Australia claimed that international recognition of the role governments can play in improving supply chain practices is increasing. It acknowledged that the Australian Government's new CPRs are an improvement. Particularly, clause 10.18 which requires officials to inquire whether suppliers comply with 'relevant regulation', specifically 'labour regulation, including ethical employment practices'. However, it suggested that the CPR requirements do not cover the full range of 'civil, political, economic, social and cultural' rights outlined in the United Nation's *Universal Declaration of Human Rights*:

This is a significant omission. It is not only incomplete and inaccurate, but from a practical perspective such an omission fails to harness the significant purchasing power of the Government to seek policy consistency and efforts to achieve the protection, promotion and realisation of human rights.²⁶

- 7.38 UNICEF Australia would like to see the Australian Government's CPRs amended to directly reference international human rights principles and conventions.²⁷

Buy American Act

- 7.39 The *Buy American Act* (not to be confused with the similarly named, *Buy America Act*) was introduced in 1933, although it has been 'substantially' amended since. The Act aims to protect American businesses and labour by restricting the USA Government purchase of goods which are not substantively domestically produced. 'Domestically produced' is defined generally, as materials mined or produced in the USA or manufactured products 50 per cent comprised of American manufactured components (by cost).
- 7.40 The Act comes into effect when the cheapest supplier bid for government procurement is deemed not to be 'domestic'. In these circumstances:

²⁵ UNICEF Australia, *Submission 24*, p. 10.

²⁶ UNICEF Australia, *Submission 24*, pp. 10–11.

²⁷ UNICEF Australia, *Submission 24*, pp. 10–11.

... the procuring agency must add a certain percentage of the low offer's price to that offer before determining which offer is the lowest priced or "best value" for the government. This percentage generally ranges from 6 per cent, in cases where the lowest domestic offer is from a large business; to 12 per cent, when the lowest domestic offer is from a small business; to 50 per cent, for Department of Defense procurements, although agencies may adopt higher percentages by regulation.²⁸

- 7.41 The Act generally applies to the procurement of goods expected to value at or above \$3 500. However there are exceptions, including when goods to be procured are for use outside of the USA or when the use of domestic goods would not be in the public interest. The Act can also be waived pursuant to the *Trades Agreement Act* which enables some 'foreign products' to be treated the same as domestic products for the purposes of procurement. For example, goods produced or substantially transformed in a country which is a signatory to the WTO GPA.²⁹
- 7.42 The Australian Workers' Union (AWU) suggested that the USA Government's approach to government procurement is 'well in advance of Australia's'.³⁰ It argued that the *Buy American Act* demonstrates that Australia's international trade obligations are 'no legal impediment' to 'stronger procurement policies' which recognise the value of purchasing goods from Australian manufacturers.³¹

Berry Amendment

- 7.43 The Berry Amendment is a statutory requirement that limits the American Department of Defense from procuring items such as clothing, fabrics and other made-up textiles which are not grown, reprocessed or produced domestically.³²

²⁸ Congressional Research Service, *The Buy American Act – Preference for "Domestic" Suppliers: In Brief*, April 2016, p. 1, <<https://fas.org/sgp/crs/misc/R43140.pdf>> viewed 25 May 2017.

²⁹ Congressional Research Service, *The Buy American Act – Preference for "Domestic" Suppliers: In Brief*, April 2016, p. 1, <<https://fas.org/sgp/crs/misc/R43140.pdf>> viewed 25 May 2017; Australian Workers Union (AWU), *Submission 36*, p. 28.

³⁰ AWU, *Submission 36*, p. 27.

³¹ AWU, *Submission 36*, p. 3.

³² Department of Commerce (US), *The Berry Amendment*, <<http://web.ita.doc.gov/tacgi/eamain.nsf/BerryAmendment/Berry%20Amendment?OpenDocument>> viewed 25 May 2017.

- 7.44 AWU noted the effect of the Berry Amendment and suggested that the Australian Government could introduce similar legislation to guarantee demand for Australian steel during scheduled warship and submarine construction projects.³³

Buy American and Hire American Presidential Executive Order

- 7.45 On 18 April 2017, the USA President issued the *Buy American and Hire American Presidential Executive Order*. The order outlines the President's intention to maximise government procurement of domestically produced goods. It does not make 'substantive' changes to existing US Government procurement processes; rather it requires the Department of Commerce to report on possible legislative and policy changes to achieve this aim.³⁴
- 7.46 The Department of Foreign Affairs and Trade (DFAT) acknowledged the order, noting that section six states that the order should not be 'construed' as affecting the USA's international trade obligations.³⁵

Small Business Act

- 7.47 The *Small Business Act* provides for the creation of the Small Business Administration whose function is to 'aid, counsel, assist and protect ... the interests of small business concerns'.³⁶ Types of aid provided by the Administration include:
- facilitating technology transfers;
 - ensuring the interests of small businesses are adequately represented in international trade deals;
 - enhancing small businesses' ability to compete against exports; and

³³ AWU, *Submission 36*, p. 4.

³⁴ Department of Foreign Affairs and Trade (DFAT), *Submission 25.2*, p. 1; Office of the Press Secretary, *Presidential Executive Order on Buy American and Hire American*, <<https://www.whitehouse.gov/the-press-office/2017/04/18/presidential-executive-order-buy-american-and-hire-american>> viewed 22 May 2015.

³⁵ DFAT, *Submission 25.2*, p. [1].

³⁶ US Small Business Administration, *Authority*, <<https://www.sba.gov/about-sba/what-we-do/authority>> viewed 25 May 2017.

- supporting small businesses' to participate in government procurement.³⁷
- 7.48 Section 15(g) of the Act establishes goals for the participation of small business in US Government procurement. It requires 'not less than 23 per cent of the total value of all prime contracts for each fiscal year' to be awarded to small businesses. Furthermore, it specifies that agencies should seek to engage small businesses from a wide variety of industries.³⁸
- 7.49 ASBFEO highlighted the US Government's goals for small business participation and noted that the Australian Government's 10 per cent target is comparatively 'unambitious'.³⁹
- 7.50 Ms O'Neil, National Secretary of the Textile Clothing and Footwear Union Australia (TCFUA), also reflected positively on US Government initiatives supporting SMEs to participate in government procurement. She claimed that they are 'supporting and growing jobs'.⁴⁰

Canada

- 7.51 The bulk of Canadian government procurement is conducted by the federal Department of Public Services and Procurement (DPSP) on behalf of other government agencies (approximately \$15 million of average annual procurement contracts valued at \$18 million).⁴¹
- 7.52 DPSP conducts procurement according to a *Supply Manual* which describes the principles and procedures governing procurement. The manual reflects

³⁷ US Small Business Administration, *Small Business Act*, Section 15(g), p. 217, <<https://www.sba.gov/about-sba/sba-performance/policy-regulations/laws-regulations/statutes-governing-sba/small-business-act-current-through-public-law-114-328>> viewed 25 May 2017.

³⁸ US Small Business Administration, *Small Business Act*, Section 15(g), p. 217, <<https://www.sba.gov/about-sba/sba-performance/policy-regulations/laws-regulations/statutes-governing-sba/small-business-act-current-through-public-law-114-328>> viewed 25 May 2017.

³⁹ ASBFEO, *Submission 19.1*, p. [3].

⁴⁰ Ms Michele O'Neil, National Secretary, Textile Clothing and Footwear Union of Australia (TCFUA), *Committee Hansard*, Canberra, 19 April, 2017, p. 63.

⁴¹ Government of Canada, *Public Services and Procurement Canada*, 'Overview of the Department', <<https://www.tpsgc-pwgsc.gc.ca/apropos-about/cdi-mbb/1/survol-overview-eng.html>> viewed 26 May 2017.

the requirements of the Canadian Government legislation, policies and international trade agreements, including the *Canadian Content Policy*.⁴²

Canadian Content Policy

- 7.53 The *Canadian Content Policy* fosters the development of domestic industries by limiting competition for government procurement to suppliers of Canadian goods and services in specific circumstances.
- 7.54 The policy applies to competitive procurement administered by DPSP's Acquisitions Branch, which is expected to value \$25 000 or more and which is not subject to an exemption. For example, the policy does not apply to procurement conducted by other government agencies or government procurement subject to international trade agreements.⁴³
- 7.55 In applying the policy, Acquisitions Branch can conduct procurement which is:
- 'solely limited' to suppliers of Canadian goods and services (used in circumstances where officials know there are two or more such suppliers); or
 - 'conditionally limited' to suppliers of Canadian goods and services (used when officials are unsure whether two or more such suppliers exist).
- 7.56 In both cases suppliers are required to provide certification that the goods or services they offer are Canadian.
- 7.57 In 'solely limited' procurement, the evaluation of supplier bids proceeds as normal. However, if the procurement process was 'conditionally limited' officials must first determine whether there are two or more bids offering certified goods or services. If there are two or more, the evaluation will be limited to the bids with the certification; otherwise, all bids will be evaluated.⁴⁴

⁴² Government of Canada, *Public Services and Procurement Canada*, 'Supply Manual', <<https://buyandsell.gc.ca/policy-and-guidelines/supply-manual>> viewed 26 May 2017.

⁴³ Government of Canada, *Supply Manual*, '3.6 Annex: Canadian Content Policy', <<https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/annex/3/6>> viewed 26 May 2017.

⁴⁴ Government of Canada, *Supply Manual*, '3.6 Annex: Canadian Content Policy', <<https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/annex/3/6>> viewed 26 May 2017.

7.58 The ACTU approved of Canada's local content policies and claimed they defend its domestic steel manufacturing capabilities.⁴⁵

7.59 The Canadian Government also has an internal trade agreement with its provinces which enables procurement to support domestic industry.

Canadian Agreement on Internal Trade

7.60 The Canadian Agreement on Internal Trade (AIT) establishes a legal framework and institutions to diminish barriers to trade between Canadian provinces. It is specifically designed to address:

- 'discriminatory practices', such as favouring suppliers from the same province;
- 'unharmonised practices', such as unique product standards in each province; and
- the 'inequitable application of administrative practices', such as only advertising procurement locally.⁴⁶

7.61 Chapter five of the agreement explicitly provides for procurement evaluation criteria to be weighted to favour Canadian goods:

- 5 Except as otherwise required to comply with international obligations, a Party may accord a preference for Canadian value-added, subject to the following conditions:
 - g the preference for Canadian value-added must be no greater than 10 per cent;
 - h the Party shall specify in the call for tenders the level of preference to be used in the evaluation of the bid; and
 - i all qualified suppliers must be informed through the call for tenders of the existence of the preference and the rules applicable to determine the Canadian value added.

7.62 It also enables province governments to limit procurement to suppliers offering Canadian goods or services:

⁴⁵ Australian Council of Trade Unions (ACTU), *Submission 34*, p. 13.

⁴⁶ Mr Michael P. Leidy, 'The Canadian Agreement on Internal Trade: Developments and Prospects', *Working Paper of the International Monetary Fund*, April 1998, p. 4, <<https://www.imf.org/external/pubs/ft/wp/wp9851.pdf>> viewed 26 May 2017.

Except as otherwise required to comply with international obligations, a Party may limit its tendering to Canadian goods or suppliers, subject to the following conditions:

- a the procuring Party must be satisfied that there is sufficient competition among Canadian suppliers;
- b all qualified suppliers must be informed through the call for tenders of the existence of the preference and the rules applicable to determine Canadian content; and
- c the requirement for Canadian content must be no greater than necessary to qualify the procured good as a Canadian good.⁴⁷

7.63 AWU argued that the Canadian Government's use of the Agreement on Internal Trade to protect domestic industries is further proof that there is no legal impediment for Australia take similar action with Commonwealth procurement.⁴⁸

⁴⁷ Government of Canada, *Agreement on International Trade*, Chapter Five – Procurement, 'Article 504: Reciprocal Non-Discrimination', <<https://www.ic.gc.ca/eic/site/ait-aci.nsf/eng/il000006.html>> viewed 26 May 2017.

⁴⁸ AWU, *Submission 36*, p. 28.

8. Australian procurement models

Introduction

- 8.1 This chapter considers Australian best practice in procurement, including policies and practices which may be applicable at the federal level.
- 8.2 In discussing the merits of the new Commonwealth Procurement Rules (CPRs), witnesses shared their view of what constitutes 'best practice' in government procurement. Many suggested that the Victorian and South Australian (SA) Government procurement frameworks are highly successful. Some even urged the Australian Government to consider incorporating elements of the states' industry participation policies or strategic procurement project criteria, into the Commonwealth procurement framework.
- 8.3 A discussion of each state's approach to procurement follows along with stakeholder comments on the strengths of each model.

Victoria

- 8.4 The Victorian Government procurement framework is primarily established through a series of Victorian Government Purchasing Board (VGPB) policies. However, these policies are complemented by a range of other organisations and policies, including:
 - the Industry Capability Network Victoria (ICN), which facilitates the application of the whole-of-government Victorian Industry Participation Policy (VIPP); and

- Infrastructure Victoria, the Office of Projects Victoria and the Major Skills Guarantee Initiative (Skills Guarantee), which partner to plan and deliver major infrastructure procurement targeted at workforce development.

8.5 The roles of these organisations and the aims of the VIPP and the Skills guarantee are considered in the following paragraphs.

Victorian Government Purchasing Board

8.6 The VGPB is the Victorian Government agency with overall responsibility for government procurement. It maintains a suite of five policies which govern how state agencies undertake procurement and contract management:

- *Governance Policy;*
- *Complexity and Capability Assessment Policy;*
- *Market Analysis and Review Policy;*
- *Market Approach Policy;* and
- *Contract Management and Contract Disclosure.*¹

8.7 Like the Australian Government's CPRs, the first principle of these policies is 'value for money', defined as:

A balanced judgement of a range of financial and non-financial factors, taking into account the mix of quality, cost and resources; fitness for purpose; total cost of ownership; and risk.

8.8 However, unlike the CPRs, the VGPB policies do not mandate methods of procurement based on financial thresholds. Rather, the procurement approach employed is based on a 'complexity and risk' assessment, informed by:

- the complexity of the procurement, i.e. the level of difficulty involved in purchasing the required goods or services; and
- agencies' capabilities, i.e. their ability to perform procurement activities effectively (expertise and resources).

¹ Victorian Government Purchasing Board, 'About the VGPB', <http://www.procurement.vic.gov.au/About-the-VGPB> viewed 29 May 2017.

- 8.9 Considering the complexity and risk associated with procurement prompts agencies to determine whether required procurement can be undertaken independently, or whether ‘additional or special capability may be required’.²
- 8.10 The VGPB support state agencies to apply its policies by consulting in relation to ‘strategic procurement’ and through the provision of detailed guidelines, including:
- *Guide to improving access to government business for SMEs;*
 - *Guide to building innovation into the procurement process; and*
 - *Guide to environmental impact in procurement.*³
- 8.11 The VGPB’s role in procurement is complemented by the work of the ICN.

Industry Capability Network Victoria

- 8.12 ICN is a not-for-profit organisation funded by the Victorian Government to assist state agencies to apply the VIPP. It is a business network which assists local businesses to participate in government procurement by:
- liaising with state agencies and suppliers on procurement projects subject to the VIPP;
 - providing local suppliers with the opportunity to register interest in upcoming Victorian Government procurement by publishing a forward plan of ‘strategic projects’; and
 - administering the VIPP Management Centre, a secure online centre used by agencies and suppliers to manage and process VIPP documentation, or to contact ICN.⁴

² Victorian Government Purchasing Board, ‘*About the VGPB*’, <<http://www.procurement.vic.gov.au/About-the-VGPB>> viewed 29 May 2017; and ‘*Complexity and Capability Assessment Policy*’, <<http://www.procurement.vic.gov.au/Buyers/Policies-Guides-and-Tools/Complexity-and-Capability-Assessment-Policy>> viewed 29 May 2017.

³ Victorian Government Purchasing Board, ‘*Governance Policy*’, <<http://www.procurement.vic.gov.au/Buyers/Policies-Guides-and-Tools/Governance-Policy>> viewed 29 May 2017.

⁴ Industry Capability Network, ‘*Standard VIPP Process for Bidders*’, <<http://www.icn.org.au/sites/default/files/Standard%20VIPP%20Process%20for%20Bidders.pdf>> viewed 29 May 2017; Victorian Government, *Victorian Industry Participation Policy (VIPP) Guidelines*, p. 14,

- 8.13 ICN also evaluates whether the businesses contracted by the Victorian Government honour their commitments to use local content.⁵

Victorian Industry Participation Policy

- 8.14 The VIPP aims to leverage Victorian Government procurement to generate local jobs, boost economic activity and ensure small and medium enterprises (SMEs) are given 'full and fair opportunity' to participate in government procurement. It seeks to achieve this through:

promoting employment and business growth by expanding market opportunities for local industry;

providing contractors with increased access to, and raised awareness of, local industry capability;

exposing local industry to world's best practice in workplace innovation, e-commerce and use of new technologies and materials; and

developing local industry's international competitiveness and flexibility in responding to changing global markets by giving local industry a fair opportunity to compete against foreign suppliers.⁶

- 8.15 Procurement subject to the VIPP is categorised as either a 'standard project' or 'strategic project' depending on the scope of the purchase.

- 8.16 Standard procurement projects are those expected to value:

- \$1 million or more in regional Victoria;

<http://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0006/1312935/VIPP_General_Guidelines.pdf> viewed 29 May 2017.

⁵ Victorian Government, *Victorian Industry Participation Policy (VIPP) Guidelines*, p. 5, <http://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0006/1312935/VIPP_General_Guidelines.pdf> viewed 29 May 2017.

⁶ Victorian Government, *Victorian Industry Participation Policy (VIPP) Guidelines*, p. 4, <http://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0006/1312935/VIPP_General_Guidelines.pdf> viewed 29 May 2017; Industry Capability Network, 'Standard VIPP Process for Bidders', <<http://www.icn.org.au/sites/default/files/Standard%20VIPP%20Process%20for%20Bidders.pdf>> viewed 29 May 2017.

- \$3 million or more in metropolitan Melbourne or for state-wide activities.⁷
- 8.17 Suppliers bidding for a standard project subject to the VIPP may be required to indicate how they will involve local industry in the delivery of goods or services and provide a VIPP Plan outlining how these commitments will be achieved.⁸
- 8.18 Strategic projects subject to the VIPP are those expected to value \$50 million or more, or those deemed to be strategic by the Victorian Government.
- 8.19 Suppliers bidding for a strategic project must demonstrate how they will deliver a required minimum of local content throughout the procurement. Local content is defined as Australian or New Zealand goods or services, or imported goods to which local suppliers have added value. Suppliers must work with ICN to prepare a Local Industry Development Plan (LIDP) outlining their commitment to 'local content' and describing how this will be delivered. They are also required to meet any extra conditions imposed by the Victorian Government.⁹ According to the Australian Council of Trade Unions (ACTU) extra conditions may include:
- ... requirements to demonstrate other industry outcomes such as number of new and retained jobs, number of new and retained apprentices/ trainees, training and skills development of the workforce and technology transfer (such as through innovation, research and development, transfer of intellectual property or transfer of know-how).¹⁰
- 8.20 In both standard and strategic projects, procuring agencies must include a 10 per cent weighting for local content in overall procurement evaluation criteria. For example, if evaluation criteria provides for up to 100 points, ten of these points could be allocated to the evaluation of the VIPP or LIDP Plans provided by suppliers. A local content commitment of 95 per cent

⁷ Victorian Government, *'Local Jobs First: VIPP'*, <<http://economicdevelopment.vic.gov.au/victorian-industry-participation-policy>> viewed 29 May 2017.

⁸ Victorian Government, *Local Jobs First: Victorian Industry Participation Policy (VIPP) Agency Guidelines*, pp. 5–6.

⁹ Victorian Government, *Local Jobs First: Victorian Industry Participation Policy (VIPP) Agency Guidelines*, pp. 6–9 and 23–24.

¹⁰ Australian Council of Trade Unions (ACTU), *Submission 34*, p. 10.

within these plans would earn suppliers 9.5 points out of a possible ten towards their overall tender evaluation.¹¹

- 8.21 Many witnesses suggested that the operation of the VGPB policies in conjunction with the VIPP represent ‘best practice’ in procurement and urged the Australian Government to consider adopting similar policies.¹²
- 8.22 The ACTU said it ‘supports the national adoption of a policy which mirrors Victoria’s’; particularly the ability to mandate local content and apply weighted criteria provided for by the VIPP.¹³ It shared an example highlighting the economic benefits this approach can achieve:
- Examples of projects completed in 2015–16 include the \$989 million Victorian Comprehensive Cancer Centre (VCCC). The VCCC delivered 92 per cent local content and supported 2,084 local jobs including 185 apprentices and trainees. This is four times the original number of jobs anticipated.¹⁴
- 8.23 The Australian Workers’ Union (AWU) shared this view. It argued that the VIPP has been ‘instrumental’ in delivering considerable benefits, including ‘revitalising’ local manufacturing sector. Further, it suggested that the ongoing success of the Victorian Government procurement framework may indicate that such an approach is not contrary to Australia’s international trade agreements.¹⁵
- 8.24 Stakeholders also commended the longer term view of the VIPP. The ACTU highlighted the importance of providing a forward work plan of strategic procurement projects:

¹¹ Victorian Government, *Local Jobs First: Victorian Industry Participation Policy (VIPP) Agency Guidelines*, pp. 6–9 and 29.

¹² Australian Manufacturing Workers Union (AMWU), *Submission 18.1*, p. [6]; Australian Workers’ Union (AWU), *Submission 36*, pp. 3 and 25; ACTU, *Submission 34*, pp. 2–4; Mr Ian Cairns, National Manager, Industry Development and Government Relations, Australian Steel Institute (ASI), *Committee Hansard*, Canberra, 8 May 2017, p. 27; Australian Steel Institute (ASI), *Submission 27.1*, p. 7; Mr Christopher Walton, Chief Executive Officer, Professionals Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 23.

¹³ ACTU, *Submission 34*, pp. 2–3.

¹⁴ ACTU, *Submission 34*, p. 12.

¹⁵ AWU, *Submission 36*, pp. 3 and 25.

The forward plan ... provide[s] industry with early notification and ... enhance[s] opportunities to engage in government procurement projects.¹⁶

8.25 Mr Ian Cairns, National Manager of Industry Development and Government Relations at the Australian Steel Institute (ASI), also singled out the longer term view of the Victorian procurement framework for praise. He said the model 'gets a tick' from his organisation.¹⁷

8.26 The AWU suggested that a major strength of the Victorian procurement framework is its ability to enable the state government to impose additional requirements on the suppliers of strategic projects. It provided an example of the economic benefits which can be obtained through this mechanism:

The Victorian Government recently mandated the use of 100 per cent steel in its 50 level crossing replacement projects. This project is expected to provide a pipeline of certainty for 10,000 Victorian steel workers.¹⁸

Victorian infrastructure procurement agencies and initiatives

8.27 The Victorian Government procurement framework recognises the importance of major infrastructure procurement to the future of the state economy. There are dedicated government agencies and initiatives to ensure building and construction procurement is planned and implemented effectively, and in a manner which maximises benefit to the economy.

8.28 In 2008, the Victorian Government created Infrastructure Victoria, an independent statutory body to supply 'independent advice on infrastructure priorities'.¹⁹ It performs this function by providing:

... written advice to government on specific infrastructure matters ... [including]:

- assessment of any major infrastructure projects proposed by government or the private sector (market-led proposals);
- intergovernmental submissions; and

¹⁶ ACTU, *Submission 34*, p. 11.

¹⁷ Mr Cairns, ASI, *Committee Hansard*, Canberra, 8 May 2017, p. 28.

¹⁸ AWU, *Submission 36*, p. 25.

¹⁹ Victorian Government, *Office of Projects Victoria*, <<http://www.vic.gov.au/publicsectorreform/people/office-of-projects-victoria.html>> viewed 31 May 2017.

- government's infrastructure plans.²⁰

8.29 Complementary to the role of Infrastructure Victoria, is that of the Office of Projects Victoria (OPV), which was recently established to 'oversee the planning and delivery of infrastructure projects'.²¹ The Office aims to improve the Victorian public sector's project development and delivery capabilities by providing:

... expert advice on asset investment decisions and delivery, and by carefully monitoring the performance of major projects, the OPV will help to ensure we deliver the right infrastructure projects, on time and on budget.²²

8.30 Furthermore, all Victorian Government construction, infrastructure, civil engineering and capital works projects valued at, or more than, \$20 million are subject to the Skills Guarantee.

8.31 The Skills Guarantee is a whole-of-government policy which builds on the objectives of the VIPP by fostering workforce development and employment opportunities for Victorian trainees. Under the Skills Guarantee:

... all publicly funded works contracts with a pre-tender estimated value at or in excess of \$20 million (inclusive of GST) will be required to utilise Victorian registered apprentices, Victorian registered trainees or engineering cadets for at least 10 per cent of the contract works' total estimated labour hours. The Skills Guarantee will also apply to public-private partnership (PPP) projects valued over the applicability threshold.²³

8.32 Mr Christopher Walton, Chief Executive Officer of Professionals Australia, spoke positively about the Victorian Government's approach to major infrastructure procurement and urged the Australian Government to 'look' at adopting similar initiatives. He suggested that the creation of Infrastructure Victorian depoliticised the prioritisation of projects:

²⁰ Infrastructure Victoria, *About Us*, <<http://www.infrastructurevictoria.com.au/about-us>> viewed 6 June 2017.

²¹ Victorian Government, *Office of Projects Victoria*, <<http://www.vic.gov.au/publicsectorreform/people/office-of-projects-victoria.html>> viewed 31 May 2017.

²² Victorian Government, *Office of Projects Victoria*, <<http://www.vic.gov.au/publicsectorreform/people/office-of-projects-victoria.html>> viewed 31 May 2017.

²³ Department of Economic Development, Jobs, Transport and Resources, *Major Projects Skills Guarantee: Explanatory Guide*, January 2016, p. 4.

... they brought in Infrastructure Victoria and said, 'Let's take out the ribbon-cutting parliamentarians deciding the best interests'.²⁴

- 8.33 Furthermore, Mr Walton felt that the introduction of the Office of Projects Victoria and the Skills Guarantee were important steps towards addressing the lack of technical expertise in both the public and private sectors. He suggested that the Office of Projects Victoria helps ensure the Victorian Government remains an 'informed purchaser' and safeguards strong procurement outcomes. Similarly, he viewed the Skill Guarantee as an effective strategy for compelling businesses to participate in workforce development.²⁵ Although, he did suggest that the Skills Guarantee needs to be measurable:

The Victorian Government now has a skills guarantee requiring 10 per cent of jobs on a procurement project to be apprentices or cadetships. That needs to be measured, because if it just says you get extra ticks if you do some training, then the private sector will tell you it means nothing.²⁶

South Australia

- 8.34 The merits of the SA procurement framework were also discussed at length throughout the inquiry.
- 8.35 SA Government procurement is primarily based on the policies of its State Procurement Board, supplemented by the Office of the Industry Advocate's (OIA) South Australian Industry Participation Policy (IPP).²⁷ The role of these two organisations and objectives of the IPP are considered in the following paragraphs.

State Procurement Board

- 8.36 The SA State Procurement Board is responsible for 'facilitating strategic procurement' through the issue of a robust Procurement Policy Framework encompassing:

²⁴ Mr Walton, Professionals Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 25.

²⁵ Mr Walton, Professionals Australia, *Committee Hansard*, Melbourne, 19 April 2017, pp. 25–29.

²⁶ Mr Walton, Professionals Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 24.

²⁷ Government of South Australia, *State Procurement Board: Procurement Policy Framework*, September 2016, p. 3.

- governance and reporting requirements; and
- procurement planning, supplier selection and contract management.²⁸

8.37 The first principle of the framework is value-for-money; defined broadly to include factors like environmental and sustainability issues, contribution to government priorities and flexibility. The Procurement Policy Framework notes:

A key principle of value-for-money is that 'lowest price' does not always represent the best outcome when evaluating alternative offers ...

The achievement of value needs to be considered within the context of creating 'public value'.²⁹

8.38 Generally, SA Government agencies conduct procurement independently. However, the Department of the Premier and Cabinet oversees 'strategic' whole-of-government procurement projects as it affords it the opportunity to negotiate contracting terms which deliver 'great social and environmental change'.³⁰

Office of the Industry Advocate

8.39 The OIA is an 'independent unit' within the state public sector; focussed on using government procurement to generate local jobs, provide local suppliers with opportunities to participate in government supply chains and driving local investment. It aims to do this by:

- building the capacity of local businesses to successfully bid for government procurement; and

²⁸ Government of South Australia, *State Procurement Board: Procurement Policy Framework*, September 2016, pp. 3 and 6.

²⁹ Government of South Australia, *State Procurement Board: Procurement Policy Framework*, September 2016, p. 5.

³⁰ State Procurement Board, *Information for Suppliers*, <<http://www.spb.sa.gov.au/content/information-suppliers>> viewed 31 May 2017; South Australian Department of the Premier and Cabinet, *Strategic Procurement*, <<http://dpc.sa.gov.au/what-we-do/services-for-government/strategic-procurement>> viewed 31 May 2017.

- initiating procurement reforms that remove impediments to industry participation and provide greater economic benefit to the state.³¹

8.40 The OIA has been instrumental in strengthening the IPP and is now responsible for its implementation and compliance.³² To support its performance of these duties, the OIA is imbued with the authority to:

- request meetings with government buyers on behalf of local companies;
- review acquisition plans and tender documentation in key contracts to assess any unnecessary impediments to local companies bidding;
- review tender awards to evaluate if assessment criteria has been applied;
- review contracts and assess if IPP Plans are being applied well by the prime contractor; and
- review tenders post award and, when necessary, make recommendations to the relevant agency, the Chief Executive or Minister for improving industry participation going forward.

8.41 The OIA is involved at every stage of procurement subject to the IPP:

... to ensure the economic contribution to the State from the procurement can be maximised through the design of appropriate specifications, market approach, evaluation plans, IPP Plans and compliance and reporting on industry participation.³³

South Australian Industry Participation Policy

8.42 The IPP is designed to 'ensure that capable South Australian [SME] are given full, fair and reasonable opportunity to tender and participate in significant public and private sector projects'.³⁴ It does not accord 'special treatment' to local businesses, according to current Industry Advocate, Mr Ian Nightingale:

³¹ Office of the Industry Advocate, *About Us*, <<http://www.industryadvocate.sa.gov.au/about-us>> viewed 31 May 2017.

³² Mr Ian Nightingale, Industry Advocate, Department of State Development South Australia, *Committee Hansard*, Canberra, 29 March 2017, p. 1; Government of South Australia, *South Australian Industry Participation Policy: Procedural Guidelines*, October 2016, p. 4.

³³ Office of the Industry Advocate, *South Australian Industry Participation Policy Procedural Guidelines*, October 2016, p. 5.

³⁴ Office of the Industry Advocate, *South Australian Industry Participation Policy Procedural Guidelines*, October 2016, p. 3.

It is important to note the emphasis of the policy in South Australia is not about special treatment or price preferencing but rather about recognising the important contribution businesses make to the South Australian economy through labour and supply inputs.³⁵

8.43 The IPP applies to all government expenditure above \$33 000 for the following activities:

- the procurement of goods or services;
- public-private partnership projects;
- federally-funded infrastructure projects being managed by the SA Government; and
- private sector projects receiving significant SA Government support.³⁶

8.44 The IPP places increasing obligations on procuring agencies and prospective suppliers as the expected value of procurement rises. For procurement expected to value between \$33 000 and \$220 000, procuring agencies (not undertaking direct procurement) must seek at least one quote from a local source. They are also required to perform an Employment Contribution Test (ECT) to determine capacity for local businesses to provide the required goods or services, and to consider resulting economic benefit to the state.³⁷

8.45 For procurement expected to value between \$220 000 and \$4 million (\$1 million in regional SA), procuring agencies are encouraged to consult the ICN throughout the market research phase of procurement. An ECT must be conducted and its findings incorporated into the overall tender evaluation with a minimum weighting of 15 per cent.

8.46 For procurement expected to value between \$4 million (\$1 million in regional SA) and \$50 million, prospective suppliers must prepare a Standard IPP Plan. The IPP Plan is assessed by the OIA and its findings must be incorporated into the overall tender evaluation with a minimum weighting of 15 per cent.

³⁵ Mr Nightingale, Industry Advocate, Department of State Development South Australia, *Committee Hansard*, Canberra, 29 March 2017, p. 1.

³⁶ Office of the Industry Advocate, *South Australian Industry Participation Policy Procedural Guidelines*, October 2016, p. 4.

³⁷ Office of the Industry Advocate, *South Australian Industry Participation Policy Procedural Guidelines*, October 2016, p. 6.

8.47 For procurement expected to value at, or above \$50 million, prospective suppliers must prepare a Tailored IPP Plan. The Tailored IPP Plan should detail potential for SME participation in research, design and delivery work, and economic benefits to the state. It is assessed by the OIA and its findings must be incorporated into the overall tender evaluation with a minimum weighting of 15 per cent.³⁸

8.48 Mr Nightingale said that the independent assessment of IPP Plans by his office is important as it ensures that the value accorded to the unique economic benefits offered by different suppliers is not influenced by the prices quoted:

My office scores those industry participation plans, and we provide that score back to the purchasing agency, so it puts no burden on the agency...

The staff in my office who are scoring those industry participation plans are not seeing the price and they are not seeing the other aspects of the quote, and that is quite deliberate...

... so they are not being influenced by the price that has been quoted.³⁹

8.49 Mr Nightingale explained that the role of the OIA extends to finalising the IPP Plan of the successful bidder and monitoring compliance with the resulting contract (which includes obligations from the IPP Plan):

Once the successful tenderer has been identified then my office goes back and fine-tunes that industry participation plan with all of the commitments that were made in it so it is completely accurate. Once that fine-tuning or that finalisation has been done, the industry participation plan becomes an addendum to the contract and it is a commitment in the contract.

... if I found that any of those commitments were not being fulfilled, I would issue a notice of direction to the company to provide evidence why they were not delivering on that particular element.⁴⁰

³⁸ Office of the Industry Advocate, *South Australian Industry Participation Policy Procedural Guidelines*, October 2016, p. 7.

³⁹ Mr Nightingale, Industry Advocate, Department of State Development South Australia, *Committee Hansard*, Canberra, 29 March 2017, p. 1.

⁴⁰ Mr Nightingale, Industry Advocate, Department of State Development South Australia, *Committee Hansard*, Canberra, 29 March 2017, p. 4.

- 8.50 The SA Government is currently considering enshrining the independence of the OIA in legislation. Mr Nightingale, said becoming a statutory body will strengthen the OIA's ability to monitor supplier compliance with contracted industry participation plans:

... at this point in time, my role is as a third party to the contract. If you can imagine, it is between a particular agency and that minister and the head contractor. If I had a company that refused to give me [information] ... then I would need to go back to Cabinet, Cabinet would need to agree to instruct the relevant Minister and then that Minister would need to instruct his or her [Chief Executive] CE. The proposed bill would give me the power to require that that information relating to the commitments made in the industry participation plan be provided to me by law. The bill also provides financial penalties if that is refused. That is something the industry has been asking for, for a long while...⁴¹

- 8.51 Weightings applied to any procurement subject to the IPP where an ECT or IPP Plan is required, can be increased by the procuring agency, a Minister or the State Premier to leverage economic benefits.⁴² Mr Nightingale said that the minimum weightings have already increased since they were first introduced from an original requirement of two per cent, to the current 15 per cent. He suggested that they could be increased further in the future.⁴³ However, Mr Nightingale pointed out that the current configuration of the IPP, combined with the Industry Advocate role, is still securing significant economic benefits for the state:

The average value of State Government goods and services contracts awarded to suppliers with a predominant workforce within the State has grown from 65 per cent to almost 80 per cent ...

On the average reported levels of procurement spending, this increase raises the economic contribution to the State by over \$230 million per annum.⁴⁴

- 8.52 Mr Nightingale used an example to illustrate these benefits:

⁴¹ Mr Nightingale, Industry Advocate, Department of State Development South Australia, *Committee Hansard*, Canberra, 29 March 2017, p. 4.

⁴² Office of the Industry Advocate, *South Australian Industry Participation Policy Procedural Guidelines*, October 2016, p. 15.

⁴³ Mr Nightingale, Industry Advocate, Department of State Development South Australia, *Committee Hansard*, Canberra, 29 March 2017, p. 3.

⁴⁴ Office of the Industry Advocate, *Submission 4*, pp. 2–3.

The Premier has signed a contract with CSC Australia Pty. Limited (CSC), a global ICT services supplier, for the provision of End User Computing (EUC) services to the South Australian Government. The Industry Participation commitments include creating job opportunities through partnership with industry, with the supplier increasing its workforce in [SA] from 100 to more than 700 by the end of the contract, including the creation of 400 new jobs. In addition it is also expected to deliver savings of \$11 million per annum.⁴⁵

- 8.53 Businesses also appear to support the OIA and the IPP. According to Mr Nightingale:

The feedback ... from industry over the last couple of years is that they appreciate the consistency. It is a very consistent model ... every industry participation plan is the same—it has the same format, and that goes back to the simplicity—they know exactly what they are providing ...⁴⁶

- 8.54 Many witnesses to the inquiry were familiar with the SA Government procurement framework and the role of the OIA. All spoke positively of the model and many recommended that the Australian Government incorporate elements of it into the Commonwealth procurement framework.⁴⁷

- 8.55 The Industry Advocate himself suggested that a corresponding position should be introduced at the federal level to direct and support the application of the new CPRs:

My recommendation to the Commonwealth is that they consider some sort of independent office to oversee [the new clauses] use. It maintains consistency. It can provide advice to agency staff who need it.⁴⁸

- 8.56 The AMWU and Ms Megan Motto, Chief Executive Officer of Consult Australia, agreed.⁴⁹ Ms Motto suggested that:

⁴⁵ Office of the Industry Advocate, *Submission 4*, p. 3.

⁴⁶ Mr Nightingale, Industry Advocate, Department of State Development South Australia, *Committee Hansard*, Canberra, 29 March 2017, p. 2.

⁴⁷ Office of the Industry Advocate, *Submission 4*, pp. 4–6; Mr Derek Lark, Executive Director, Industry Capability Network Limited (ICN), *Committee Hansard*, Canberra, 8 May 2017, p. 3; Mr Cairns, ASI, *Committee Hansard*, Canberra, 8 May 2017, p. 28, 29; Professionals Australia, *Submission 16.1*, p. 2; AMWU, *Submission 18.1*, p. [6]; AWU, *Submission 36*, p. 19.

⁴⁸ Mr Nightingale, Industry Advocate, Department of State Development South Australia, *Committee Hansard*, Canberra, 29 March 2017, p. 5.

⁴⁹ AMWU, *Submission 18.1*, p. [6].

... [advocates] are very useful consultation mechanisms that provide forums to fill the gap between the experiences on the ground of industry and the experiences of procurement agencies.⁵⁰

- 8.57 The AMWU argued that an Industry Advocate could help identify areas without a local industry presence and 'allow future tenders to be quarantined for Australian SMEs to help grow a local capacity'.⁵¹
- 8.58 Mr Nightingale also suggested that the requirement of CPR clause 10.30 to consider economic benefit could be strengthened by incorporating employment and investment outcomes as explicit criteria for consideration, in line with the IPP. Similarly, Professionals Australia submitted that considering workforce development in Commonwealth procurement will encourage businesses to employ for the longer term:

Tenders will be encouraged to invest long term, and build a workforce capable on winning future contracts, rather than a workforce based on one project.⁵²

- 8.59 PT Blink advocated for a CPR requirement to consider the potential of procurement to drive economic benefit early in an approach to market;⁵³ this is a current responsibility of the OIA.
- 8.60 A number of witnesses commented on the possibility of a 'uniform' analytical framework for assessing supplier bids for procurement; in a manner similar to SA agencies' use of the ECT to assess local business capacity to participate in procurement. Ms Michele O'Neil, National Secretary of the Textile Clothing and Footwear Union of Australia (TCFUA) said consistency is 'really important'. She argued:

Any sort of framework that is applied in a consistent manner across different departments would be important for our industry because we often see a very inconsistent approach, depending on which department you are dealing with.⁵⁴

⁵⁰ Ms Megan Motto, Chief Executive Officer, Consult Australia, *Committee Hansard*, Canberra, 19 March 2017, p. 11.

⁵¹ AMWU, *Submission 18.1*, p. [4].

⁵² Professionals Australia, *Submission 16.1*, p. [2].

⁵³ PT Blink, *Submission 45*, p. 5.

⁵⁴ Ms Michele O'Neil, National Secretary, Textile Clothing and Footwear Union of Australia (TCFUA), *Committee Hansard*, Melbourne, 19 April 2017, p. 62.

- 8.61 However, Ms Motto warned that a 'one size fits all solution' would be inappropriate for more complex or larger procurement projects, particularly construction projects.⁵⁵
- 8.62 Finally, Mr Nightingale suggested that the CPRs should allow procurement evaluation criteria to be weighted to favour greater consideration of economic contribution where more than one supplier bid is competitive.⁵⁶ The AWU may also support this measure. It said that weighting consideration of IPP plans as part of overall tender evaluation in SA provides domestic suppliers with a 'significant boost' when competing against 'lower quality imports'.⁵⁷

⁵⁵ Ms Motto, Consult Australia, *Committee Hansard*, Melbourne, 19 April 2017, p. 42.

⁵⁶ Office of the Industry Advocate, *Submission 4*, p. 5.

⁵⁷ AWU, *Submission 36*, p. 27.

9. Conclusion

Introduction

- 9.1 Chapter nine relates the Committee's views on evidence heard throughout the inquiry. It details sixteen recommendations to improve the operation of the Australian Government's new Commonwealth Procurement Rules (CPRs).

Support for new Commonwealth Procurement Rules

- 9.2 The Committee supports the introduction of the revised Commonwealth Procurement Rules. It believes that, implemented effectively, the new clauses will enable a broader, more accurate consideration of value-for-money in procurement decision making which may result in savings for the Australian Government and provide important support to Australian industry and the economy.
- 9.3 The Committee recognises that Australian industry has been advocating for these changes for some time and commends the Australian Government for acting to address these concerns, building on the significant work and policy reform agendas of previous governments to improve Commonwealth procurement practices.

Implementation issues

- 9.4 Although the Committee supports the intent of the new Commonwealth Procurement Rules, it is concerned that ineffective implementation may hinder their ability to enhance procurement outcomes. Many of the new clauses lack clarity or leave too much to the discretion of officials.

- 9.5 The Committee believes that a three pronged approach is necessary to address implementation issues and ensure the new rules are applied consistently, transparently and to maximum effect. It would like to see:
- the publication of comprehensive implementation guidelines coupled with public service wide training to support officials to apply the rules in the manner in which they are intended;
 - the introduction of procurement connected policies to safeguard the Australian Government's role as a model procurer; and
 - the establishment of an independent Australian Industry Participation Advocate modelled on the South Australian (SA) system to facilitate consideration of economic benefit required by clause 10.30.
- 9.6 In the following paragraphs the Committee outlines implementation issues specific to each clause, and those applying to the CPRs more generally.

New clauses

Clauses 10.10 and 10.37: Australian standards

- 9.7 The Committee is pleased to see that the new Commonwealth Procurement Rules require suppliers to adhere to relevant international or Australian standards wherever it is appropriate to do so. The Committee believes this will help safeguard the quality of goods and services supporting Australian Government programs and policies. It will also ensure the Australian Government is not complicit in the infiltration of non-conforming products in industries such as building and construction. The Committee anticipates that requiring suppliers to comply with Australian standards, where applicable, may also help level competition between Australian and international suppliers for Commonwealth procurement.
- 9.8 The Committee notes concerns that compliance with Australian standards, particularly with regard to large projects that may encompass multiple standards, may increase the regulatory burden on suppliers. However, evidence provided to the Committee indicated that this possibility could be mitigated by efficient and well-considered implementation.
- 9.9 However, it was evident to the Committee that there is some confusion about whether Australian or international standards should apply in cases where it may be appropriate to employ either. Stakeholders noted that clause 10.9(c) of the CPRs appears to require the application of international

technical standards in the first instance, apparently contradicting clauses 10.10 and 10.37 which look to preference the application of Australian standards. The Committee recognises that many Australian and international standards are aligned and that the application of one standard over another may not always result in material difference to procurement outcomes. Nonetheless, it would like to see the interaction of these clauses clarified through redrafting or through comprehensive implementation guidelines.

Recommendation 1

9.10 The Committee recommends that the Department of Finance revise clause 10.9(c) of the Commonwealth Procurement Rules to require all goods purchased by the Australian Government to comply with Australian standards unless none are applicable.

9.11 The Committee also acknowledges the concerns of some stakeholders that requiring international suppliers to comply with Australian standards contravenes Australia's international trade obligations. However, it accepts Department of Foreign Affairs and Trade (DFAT) assurances that the new CPRs comply with Australia's existing free trade agreements.

Clause 10.18: Relevant regulations

9.12 The Committee shares stakeholder views that the Australian Government should be a model procurer, ensuring that all businesses within its supply chains comply with international and domestic regulation, including employment, environmental, and work, health and safety legislation. With this in mind, the Committee supports the introduction of clause 10.18 but is concerned that it leaves too much to the discretion of officials with the phrase 'relevant regulations and/or regulatory frameworks'.

9.13 The Committee would like to see the introduction of comprehensive implementation guidelines explicitly defining the meaning of 'relevant regulation' and clarifying whether international suppliers should be required to comply with Australian, international or country of origin regulation. This may include a list of all applicable Australian and international regulation, agreements and principles.

9.14 Furthermore in recognition of the Australian Government's leadership role, the Committee considers it appropriate that procurement connected policy is established to ensure Commonwealth purchasing is conducted in line with

best practice. Specifically in relation to human rights, environmental sustainability, and subcontractor terms and conditions applied to subcontractors throughout the supply chain.

- 9.15 The Committee shares stakeholders' apprehension that human rights are not explicitly provided for in the CPRs. It sees scope for the introduction of a procurement connected policy targeting industries at high risk of breaching human rights, and requiring these suppliers to be audited or accredited if they are participating in Commonwealth procurement.

Recommendation 2

- 9.16 The Committee recommends that the Attorney-General's Department oversee the introduction and application of a procurement connected policy requiring Commonwealth agencies to evaluate suppliers' compliance with human rights regulation.**

- 9.17 The Committee believes it is also necessary to introduce procurement connected policy which sets clear whole-of-life environmental sustainability standards for Commonwealth procurement.

- 9.18 The Committee acknowledges that whole-of-life costs and environmental impact are already included in the CPRs, but feels they are not currently afforded due weight of consideration. Evidence to the inquiry supports this conclusion.

- 9.19 Clause 4.5(e) of the CPRs explicitly requires Commonwealth agencies to consider the environmental sustainability of goods and services to be procured as part of value for money considerations.¹ Despite this explicit requirement, the Commonwealth's procurement of recycled copy paper appears to have rapidly declined following the abolition of the ICT Sustainability Policy.

Recommendation 3

- 9.20 The Committee recommends that the Department of Environment oversee the introduction and application of a procurement connected policy requiring Commonwealth agencies to evaluate the whole-of-life environmental sustainability of goods and services to be procured.**

¹ Department of Finance, *Commonwealth Procurement Rules*, July 2014, paragraph 4.5(e).

- 9.21 The Committee heard that, although the Commonwealth's relationship with prime contractors reflects best practice in working conditions, these conditions do not always flow through to subcontractors in the supply chain. Indeed, witnesses reported that Commonwealth agencies' unwillingness to acknowledge and monitor subcontractors may be resulting in practices such as delayed payments, the inappropriate transfer of risk and an imbalance of power.
- 9.22 As such, the Committee believes that a procurement connected policy is needed to require agencies to engage prime contractors in a manner which mandates their provision of best practice terms and conditions to subcontractors and builds in reporting obligations to monitor compliance.

Recommendation 4

- 9.23 **The Committee recommends that the Department of Industry, Innovation and Science enhance the procurement connected policy for Australian Industry Participation Plans, requiring that good procurement practices are implemented down through the supply chain so that both prime and subcontractors:**
- **implement best practice terms and conditions; and**
 - **are contractually obligated to report on those terms and conditions.**

Clause 10.30: Economic benefit

- 9.24 The Committee anticipates that, if implemented effectively, clause 10.30 will complement the value-for-money considerations provided for in Division One of the Commonwealth Procurement Rules. It will enable more accurate and nuanced consideration of the value of goods and services offered by both domestic and international suppliers by considering suppliers' role in the Australian economy. The Committee feels that the effect of the clause will depend on its ability to overcome a culture of 'lowest cost' as value-for-money which persists in some Commonwealth agencies.
- 9.25 The Committee believes this culture is widespread and the introduction of implementation guidelines may not facilitate the effective application of this clause. Its first preference to safeguard the operation of clause 10.30 is the formation of an Industry Participation Advocate, based on the South Australian model, to:

- provide independent, consistent and transparent evaluation of the unique economic benefits offered by different suppliers;
- support Commonwealth agencies to draft tenders which provide opportunities to domestic businesses without contravening Australia's international agreements;
- inform the creation and application of industry participation plans; and
- review contracts to ensure suppliers are delivering the economic benefits committed to during tender processes.

9.26 The introduction of a Commonwealth Industry Participation Advocate is discussed in more detail towards the end of the chapter.

9.27 In the absence of an Industry Participation Advocate, the Committee accepts that comprehensive implementation guidelines may go some way towards overcoming the primacy of cost in value-for-money considerations. However, to be effective guidelines must:

- explicitly define what constitutes economic benefit;
- outline how rubrics or weighted criteria may be used to compare the unique economic benefits offered by different suppliers and in assessing economic benefit as part of the overall tender evaluation; and
- describe techniques for assessing the veracity of suppliers' claims of economic benefit and for ensuring these benefits are delivered.

9.28 The Committee feels strongly that any guidelines introduced should define economic benefit as broadly as possible without contravening Australia's international trade agreements. At a minimum, the Committee believes economic benefits should encompass: social benefits; regional, state and the national economic impact; potential tax revenue; employment and innovation opportunities; workforce training; and building Australian industry capability.

9.29 The Committee accepts evidence that the use of assessment rubrics or weighted criteria could help ensure that clause 10.30 of the CPRs is applied in a more fair and transparent manner. Specifically, these tools could aid officials to:

- compare and rank the unique economic benefits offered by different suppliers; or

- guide how consideration of economic benefit informs overall tender evaluation.
- 9.30 The Committee would like to see any implementation guidelines introduced prescribe the appropriate use of rubrics and weighted criteria except for large or complex procurement projects where use of criteria may be detrimental. For example, complex procurement involving the careful evaluation of a range of subtle qualitative factors (such as those undertaken by the Department of Defence), or procurement with potential social ramifications.
- 9.31 The Committee considers that economic benefit should receive a minimum 15 per cent weighting, following the example of the South Australian Office of the Industry Advocate, across a tender. Weightings applied to any procurement above the economic benefit threshold can be increased by the procuring agency or a Minister to leverage best economic benefits (for example, for strategic sectors of the economy, for depressed sectors of the economy or on a region by region basis). Weighting factors should be included in the request documentation.
- 9.32 The Committee considers it essential that any guidelines introduced encourage officials to validate suppliers' claims of economic benefit and require the delivery of economic benefits to be contracted. It would like to see implementation guidelines describe techniques for assessing the veracity of suppliers' claims and advice on incorporating the delivery of economic benefit into contracts.
- 9.33 In this regard, the Committee notes the example of the Government of the United Kingdom (UK) which requires primary contract terms and conditions to be applied equally to sub-contractors up to three levels removed. The Committee notes the Commonwealth Contracting Suite (CCS) contains a clause applying the obligations of the contracts to all sub-contractors.² The CCS only applies to contracts for less than \$1 million. The Committee recommends that this clause is made mandatory in all Commonwealth contracts.

² Commonwealth Contracting Suite, clause 10.

Recommendation 5

- 9.34 The Committee recommends that all Commonwealth contracts contain a similar clause to Commonwealth Contracting Suite clause 10, ensuring that the obligations of prime contractors apply to all sub-contractors.**
- 9.35 The Committee notes the evidence from the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) that the practice of bundling contracts may disadvantage and discourage SMEs. The Committee is aware that other Parliamentary committees are also grappling with this issue and that it may warrant further scrutiny.
- 9.36 The Committee notes that the UK's Public Contracts Regulations 2015 specifically encourages the splitting of larger contracts into a series of smaller contracts to enhance SME access to government procurement. The Committee considers that this practice would be of particular benefit to rural and regional small and medium enterprises (SMEs). Recent media comment on Defence procurement outcomes in these areas appears to support this conclusion.³
- 9.37 For Commonwealth entities operating in rural and regional areas, using local suppliers provides an important means of integrating into the community. To reinforce the positive effects of these clauses, the Committee recommends that an exemption for rural and regional SMEs be added to Appendix A: Exemptions from Division 2 to encourage the use of local suppliers by government agencies operating in these areas.

Recommendation 6

- 9.38 The Committee recommends that rural and regional small and medium businesses be added to the list of exemptions under Appendix A: Exemptions from Division 2 of the Commonwealth Procurement Rules.**
- 9.39 The Committee considers that the effectiveness of clause 10.30 can only be measured using accurate and comprehensive data, noting that a number of Australian states successfully collect data on locally procured content. The Committee considers that the current mechanisms for collecting information

³ Ashley Manicaros, 'NT businesses miss out on millions of dollars of RAAF Base Tindal Defence contracts to southern firms', *NT News*, April 19 2017, <<http://www.ntnews.com.au/business/nt-businesses-miss-out-on-millions-of-dollars-of-raaf-base-tindal-defence-contracts-to-southern-firms/news-story/8e9bb23b2303c26151f79c49fcfbf15b>> viewed 22 June 2017.

are inadequate. A suitable framework should be developed and applied rigorously to ensure that relevant data is available to monitor and evaluate the degree of Commonwealth procurement that is supplied by Australian-owned businesses, contains Australian-manufactured goods, or uses Australian-based services. The Committee therefore recommends that data reporting and collection be improved.

Recommendation 7

9.40 The Committee recommends that the Department of Finance and the Department of Industry, Innovation and Science jointly develop and implement a framework to collect relevant data on the degree of Commonwealth procurement that is supplied by Australia-owned businesses, contains Australian-manufactured goods, or uses Australian-based services.

Clause 10.31: Australia's international agreements

9.41 The Committee heard some stakeholder reservations regarding the compatibility of the new Commonwealth Procurement Rules with Australia's international trade agreements, including:

- concerns that clause 10.30 may infringe the Australia–New Zealand Government Procurement Agreement (ANZGP);
- concerns that clauses 10.10 and 10.37 may be incompatible with a European Union–Australian Trade and Investment Relationship; and
- concerns that Australia's accession to the World Trade Organisation's Government Procurement Agreement (WTO GPA) will require a 'watering down' of the new clauses.

9.42 The Committee notes DFAT's assurances that the CPRs comply with Australia's current free trade agreements and that minimal changes will be required to accede to the WTO GPA. It notes the Australian Government's recent introduction of the *Government Procurement (Judicial Review) Bill 2017* into the House of Representatives which has now been referred to the Senate Standing Committee on Finance and Public Administration, due to report on 4 August 2017. The Committee has concerns about this enabling legislation and believes it should not be progressed until WTO GPA negotiations are finalised.

- 9.43 The Committee considers that the new CPRs will improve procurement outcomes and should be protected. It understands that the CPRs have been developed to align with the principles in Australia's current trade agreements and believes it is important that future agreements do not conflict with, or diminish, the impact of the benefit to the Australian economy or the ability to preference small to medium sized enterprises. The Committee urges that the Government ensure that its trade negotiators are fully aware of the implications of the terms of any future trade agreements on the successful implementation of the amended CPRs or any further changes to the CPRs that may be implemented.
- 9.44 Further, the Committee recommends that, in negotiating future trade or WTO agreements, Australia does not enter into any commitments that could undermine the Australian government's ability to support Australian businesses.

Recommendation 8

- 9.45 The Committee recommends that, in negotiating future trade or World Trade Organisation agreements, Australia not enter into any commitments that undermine the Australian government's ability to support Australian businesses.**

Other implementation issues

- 9.46 The Committee received evidence on a range of other implementation issues throughout the inquiry, including:
- Commonwealth agencies are not aware of, or have a culture of underutilising Division Two rule exemptions listed in Appendix A of the CPRS; particularly those supporting small and medium sized enterprises to engage with Commonwealth procurement;
 - the lack of transparency around the value of state and territory procurement funded by the Commonwealth, and the percentage of Australian goods and services purchased through these arrangements;
 - Commonwealth agencies are deliberately or inadvertently inappropriately shifting risks onto suppliers including SMEs; and
 - Commonwealth agencies no longer possess the technical expertise to make informed procurement decisions, particularly in regard to infrastructure.

- 9.47 Evidence to the inquiry was anecdotal and in the scope of the inquiry the Committee did not have capacity to further investigate these claims. It may be that comprehensive implementation guidelines, training, or the recruitment of technically qualified professionals is required to address these issues.

Addressing implementation issues

Comprehensive implementation guidelines and training

Guidelines

- 9.48 The Committee feels that comprehensive implementation guidelines will be critical to the application of the CPRs in a manner which improves procurement outcomes. Rather than supporting successful implementation, the Committee is concerned that the current guidelines developed by the Department of Finance have the potential to undermine the intent of the new CPRs. It therefore recommends that Finance issue guidelines addressing all implementation issues identified in this report as a matter of priority.
- 9.49 In particular, the Committee wants to see that economic benefit is explicitly defined, weighted and delivered. The Committee also wishes to promote the consideration of innovative solutions early in the design and scoping phase.

Recommendation 9

- 9.50 **The Committee recommends that the Department of Finance, or the proposed Australian Industry Advocate, publish comprehensive implementation guidelines for the new Commonwealth Procurement Rules as a matter of priority. The guidelines should:**
- **explicitly define what constitutes economic benefit;**
 - **prescribe a minimum 15 per cent weighting across a tender in accordance with the economic benefit criteria;**
 - **procuring agency or Minister to retain discretion to increase weighting to leverage economic benefit;**
 - **encourage maximisation of economic opportunities and benefits when assessing a tender for the degree of local content and participation;**

- **outline how rubrics or weighted criteria may be used to compare the unique economic benefits offered by different suppliers and in assessing economic benefit as part of the overall tender evaluation;**
- **describe techniques for assessing the veracity of suppliers' claims of economic benefit and for ensuring these benefits are delivered; and**
- **encourage the consideration of innovative solutions during the scoping and design stage of procurement projects.**

9.51 The Committee considers that a qualitative assessment of economic benefit may encourage discretionary decision making by officials that is inconsistent with the objectives of the CPR17 amendments. The Committee accepts that there may be a valid reason for employing such assessment within certain specific areas, for example capability assessment. However, the Committee recommends that the comprehensive guidelines developed by Finance prohibit the use of qualitative assessments *across whole tenders*.

Recommendation 10

9.52 **The Committee recommends that, in order to limit discretionary decision-making, promote consistency and safeguard transparency, the guidelines prohibit the use of qualitative assessments across whole tenders.**

9.53 The Committee also encourages greater emphasis be placed in the guidelines on the need for accurate records to be kept of procurement decisions. Such detailed records are essential to address concern over a perceived lack of transparency and accountability. The Committee recommends that the guidelines specifically require that a record of a procurement decision include the reason for the tender approach chosen, the reason for the choice of the selected tender and the economic benefit score. Additionally as much information as possible should be placed in the public domain.

Recommendation 11

9.54 **The Committee recommends that the guidelines specifically require that, for all procurements over \$4 million, a record is created including:**

- **the reason for the tender approach chosen;**
- **the reason for the selection of the preferred tenderer; and**

- **details of the economic benefit score.**

Training

- 9.55 Furthermore, the Committee would like to see the introduction of the guidelines supported by a public service wide training program. Departments and agencies should be required to certify that an individual has undergone procurement training before that individual can be delegated a procurement authority.

Recommendation 12

- 9.56 The Committee recommends that the Department of Finance design and deliver a public service wide training program to support the effective implementation of the new Commonwealth Procurement Rules in line with new guidance material.**

Recommendation 13

- 9.57 The Committee recommends that the Australian government ensures that all departments and agencies must ensure that an individual has successfully undergone procurement training before that individual can be delegated a procurement authority.**

Industry Participation Advocate

- 9.58 The Committee believes that the best way to ensure the effective implementation of clause 10.30 of the CPRs is by establishing an Australian Industry Participation Advocate based on the SA model.
- 9.59 As noted in Chapter eight of the report, the Office of the Industry Participation Advocate (OIA) is instrumental in generating SA jobs, providing opportunities for local suppliers to participate in government supply chains and in driving local investment. It is involved in every stage of the procurement process, from the design of an approach to market which maximises benefit to the state economy, through to monitoring suppliers' delivery of these benefits. It supports government agencies to consider local business capability in relation to procurement and aides businesses to successfully sell their goods and services to government.
- 9.60 The Committee would like to see an Australian Industry Advocate established to perform similar functions, specifically:

- aiding Commonwealth agencies to design procurement processes which maximise benefits to the Australian economy and increase opportunities for SME participation;
- supporting Australian businesses to access Commonwealth procurement by promoting opportunities and assisting businesses to promote the economic benefits they can offer;
- providing independent, transparent and consistent evaluation of the unique economic benefits offered by different suppliers;
- guiding Commonwealth agencies' application of weighted criteria and assessment rubrics to overall procurement evaluations; and
- monitoring suppliers' delivery of contracted economic benefits.

9.61 As is the case with SA, the Australian Government should consider establishing a statutory office under legislation within the responsibility of the Minister for Industry, Innovation and Science. The Committee believes that doing so will ensure the integrity, independence and impact of the role by clearly delineating its responsibilities and authority to compel action and impose penalties on non-compliant contractors.

9.62 The Committee understands that the establishment of a statutory Australian Industry Advocate will provide the transparency and consistency in procurement decision making that industry craves. It will also ensure that procurement subject to CPR clause 10.30 achieves outcomes which represent true value-for-money.

9.63 The Committee understands that the establishment of an Australian Industry Advocate would not contravene international trade obligations as the role would not impact international suppliers' ability to bid for procurement, or result in bias when evaluating value-for-money. In line with the SA model, assessments of economic benefit would not consider the origin of suppliers, but rather the commitments they make to the local economy. Further, the Industry Advocate could equally work with Commonwealth agencies to maximise the economic benefit arising from the procurement of goods and services from international suppliers, as from those domestically based. In fact, the Committee sees potential for an Australian Industry Advocate to make it easier for international suppliers to secure Commonwealth procurement by partnering with local businesses.

Recommendation 14

9.64 The Committee recommends that the Australian Government legislate as a statutory authority under the responsibility of the Minister for Industry, Innovation and Science an Australian Industry Advocate to:

- aid Commonwealth agencies to design procurement processes which maximise benefits to the Australian economy and increase opportunities for SME participation;
- support Australian businesses to access Commonwealth procurement by promoting opportunities and assisting businesses to promote the economic benefits they can offer;
- provide independent, transparent and consistent evaluation of the unique economic benefits offered by different suppliers;
- guide Commonwealth agencies' application of weighted criteria and assessment rubrics to overall procurement evaluations; and
- monitor suppliers' delivery of contracted economic benefits.

Review of the new Commonwealth Procurement Rules

9.65 The Committee notes the Department of Finance intends to conduct a review of the new Commonwealth Procurement Rules 'after a year of operation' which will include consultation of its Senior Procurement Officials Reference Group.⁴

9.66 The Committee would like to see this review include supplier feedback regarding the operation of the new CPRs. It recommends that the feedback received by the Committee on the possible rewording of the new clauses identified in this report be considered during the review. It also recommends that the findings of the review be made public.

Recommendation 15

9.67 The Committee recommends that the Department of Finance incorporate supplier feedback, including on the rewording of clauses identified in this

⁴ Department of Finance, *Submission 30.1*, p. 2.

report, into its 12 month review of the new Commonwealth Procurement Rules. It also recommends that the findings of the review are made public.

- 9.68 While the Committee is encouraged by the reception that the amendments to the CPRs have received, it is acutely aware that the success of the amendments will depend on the implementation. With this in mind, the Committee considers that it is extremely important that the implementation is monitored and evaluated to ensure that the intent of the amendments is achieved.
- 9.69 The Committee recommends that a Parliamentary inquiry is established by March 2018 to evaluate:
- supplier feedback regarding the operation of the new CPRs;
 - consideration of the interaction between the CPRs and the Anti-dumping framework;
 - the effect of recent changes to Australian Industry Participation Plan policy; and
 - the interaction of the CPRs framework with tax law, multi-national tax avoidance and tax treaties.
- 9.70 The inquiry should report by the end of 2018.

Recommendation 16

- 9.71 **The Committee recommends that a Parliamentary inquiry is established by March 2018 to evaluate:**
- **supplier feedback, including on the rewording of clauses identified in this report;**
 - **interaction with the Anti-dumping framework and the tax system; and;**
 - **recent changes to the Australian Industry Participation Plan policy.**

The inquiry should report by the end of 2018.

Senator Nick Xenophon

Chair

22 June 2017

A. List of Submissions

- 1 Bus Association Victoria Inc
- 2 Welding Technology Institute of Australia
- 3 Delegation of the European Union to Australia
- 4 The Industry Advocate
- 5 Australian Chamber of Commerce and Industry
- 6 Building Products Innovation Council
- 7 buildingSMART Australasia
- 8 The Australian Institute For Non-Destructive Testing
 - Attachment 1
- 9 Consult Australia
 - 9.1 Supplementary to submission 9
- 10 Australian Fair Trade and Investment Network (AFTINET)
 - 10.1 Supplementary to submission 10
- 11 Electrical Trades Union of Australia
- 12 Australasian Certification Authority for Reinforcing and Structural Steels (ACRS)
 - Attachment 1

- 13 New Zealand High Commission
- 14 International Learning Lab on Public Procurement and Human Rights
- 15 Australian Taxation Office
- 16 Professionals Australia
 - 16.1 Supplementary to submission 16
 - Attachment 1
- 17 Export Council of Australia
 - Attachment 1
- 18 Australian Manufacturing Workers' Union (AMWU)
 - 18.1 Supplementary to submission 18
 - Attachment 1
 - Attachment 2
 - Attachment 3
- 19 Australian Small Business and Family Enterprise Ombudsman (ASBFEO)
 - 19.1 Supplementary to submission 19
- 20 Australian Forest Products Association (AFPA)
- 21 Ethical Clothing Australia
 - 21.1 Supplementary to submission 21
- 22 Australian National Audit Office
 - 22.1 Supplementary to submission 22
 - Attachment 1
 - Attachment 2
- 23 Green Building Council of Australia
- 24 UNICEF Australia
- 25 Department of Foreign Affairs and Trade

- 25.1 Supplementary to submission 25
- 25.2 Confidential
- 26 *Name Withheld*
- 27 Australian Steel Institute
 - 27.1 Supplementary to submission 27
 - Attachment 1
 - Attachment 2
- 28 Professor A. Cassimatis, Ms J Bosse, Mr A Fraser and Mr T Pattanasri
- 29 Joint Academic and Civil Society Group
 - 29.1 Supplementary to submission 29
- 30 Department of Finance
 - 30.1 Supplementary to submission 30
 - 30.2 Supplementary to submission 30
- 31 Mr Kurt Gruber
 - Attachment 1
- 32 Anti-Slavery Australia
 - 32.1 Supplementary to submission 32
- 33 Australian Human Rights Commission
- 34 Australian Council of Trade Unions
- 35 The Construction Forestry Mining and Energy Union of Australia (CFMEU) and the Textile Clothing and Footwear Union of Australia (TCFUA)
 - 35.1 Supplementary to submission 35
- 36 The Australian Workers' Union (AWU)
 - 36.1 Supplementary to submission 36
 - Attachment 1
 - Attachment 2

- Attachment 3
- 37 South Coast Labour Council
 - 37.1 Supplementary to submission 37
- 38 Australian Paper
 - 38.1 Supplementary to submission 38
- 39 Department of Defence
 - 39.1 Confidential
 - 39.2 Supplementary to submission 39
- 40 Department of Human Services
- 41 Department of Industry, Innovation and Science
- 42 Bureau of Steel Manufacturers of Australia Limited
- 43 Equality Rights Alliance
- 44 Printing Industries Association of Australia
 - Attachment 1
 - Attachment 2
- 45 PT Blink Limited
- 46 Dr Elizabeth Thurbon, UNSW Australia
 - Attachment 1
 - Attachment 2
- 47 Council of Textile & Fashion Industries of Australia Ltd
- 48 ProductWise Pty Ltd
- 49 *Confidential*
- 50 Australian Catholic Bishops Conference
- 51 Ms Karen Lenton
- 52 Mr Robert Schweitzer

53 Rossiter's Pty Ltd

B. List of Witnesses

Wednesday, 29 March 2017

CANBERRA

Industry Participation Advocate SA

AiGroup

Consult Australia

Wednesday, 19 April 2017

MELBOURNE

Joint Academic and Civil Society Group

*South Coast Labour Council and Australian Fair Trade and Investment Network
(AFTINET)*

Mr Robert Schweitzer, private capacity

Professionals Australia

Rossi Boots

Consult Australia

Australian Manufacturing Workers' Union

Textile Clothing & Footwear Union of Australia

Council of Textiles and Fashion

Monday, 8 May 2017

CANBERRA

Industry Capability Network

Ethical Clothing Australia

Australian Small Business and Family Enterprise Ombudsman

Australian Small Business and Family Enterprise Ombudsman

Australian Forest Products Association and Australian Paper

Australian Steel Institute (ASI)

Anti-Slavery Australia

Australian National Audit Office (ANAO)

Department of Defence

Department of Foreign Affairs and Trade

Department of Finance