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AUSTRALIAN GOVERNMENT RESPONSE TO THE COMPETITION POLICY REVIEW

WHAT DOES IT MEAN FOR COMMONWEALTH PROCUREMENT?

On 24 November 2015, the Australian Government issued its response to the Competition Policy Review (**Harper Review**).

Two recommendations from the Harper Review are directly relevant to Commonwealth procurement. This update considers the potential impact of the Australian Government's response to those recommendations, including as relevant to the *Commonwealth Procurement Rules 2014* (**CPRs**).

BACKGROUND

Recommendation 18 of the Harper Review (Government procurement and other commercial arrangements) relevantly provides that:

- all Australian governments should review their policies governing commercial arrangements with the private sector and non-government organisations, including procurement policies ...; and
- procurement ... policies and practices should not restrict competition unless:
 - the benefits of the restrictions to the community as a whole outweigh the costs; and
 - the objectives of the policy can only be achieved by restricting competition.

Recommendation 24 of the Harper Review (Application of the law to government activities) relevantly provides that the *Competition and Consumer Act 2010* (Cth) (**CCA**) should be amended so that the competition law provisions

apply to the Crown in right of the Commonwealth ... insofar as [it] undertake[s] activity in trade or commerce.

The Australian Government supports Recommendation 18 in principle and:

- notes that the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) requires Government entities when imposing requirements on others for the use or management of public resources to take into account the effects of imposing those requirements; and
- provides that the Government will ensure through the *Efficiency Through Contestability Programme*, that government functions are systematically assessed, including for improved efficiency through competitive arrangements, where appropriate.

The Australian Government supports Recommendation 24 in principle and provides that it will consult further with the states and territories on the implications of extending the CCA to apply to government activities in trade or commerce.

POTENTIAL IMPACTS - RECOMMENDATION 18

Recommendation 18 and the Australian Government's response potentially impact on:

- the circumstances in which a procurement may be conducted by limited tender, as set out in the CPRs; and

- the exemption under paragraph 2.6 of the CPRs, which provides that an accountable authority may determine measures necessary for the maintenance or restoration of international peace and security, to protect human health, for the protection of essential security interests, or to protect national treasures of artistic, historic or archaeological value.

The CPRs are issued under section 105B(1) of the PGPA Act and officials from all non-corporate Commonwealth entities, together with officials from the 20 corporate Commonwealth entities listed in section 30 of the *Public Governance, Performance and Accountability Rule 2014* (Cth), must comply with the CPRs when performing duties related to procurement.

Achieving value for money is the core rule of the CPRs. Paragraph 4.4 of the CPRs provides that procurements should encourage competition. Section 5 of the CPRs describes competition as a key element of the Australian Government's procurement framework and provides that effective competition requires the use of competitive procurement processes. These provisions are clearly consistent with Recommendation 18.

However, Division 2 of the CPRs sets out the circumstances in which a procurement may be conducted by a limited tender¹, namely:

- a procurement valued at less than the procurement threshold (\$80,000 for non-corporate Commonwealth entities for procurements other than construction services, \$400,000 for prescribed corporate Commonwealth entities for procurements other than construction services and \$7.5 million for non-corporate and corporate Commonwealth entities for the procurement of construction services); or
- a procurement that is specifically exempt and set out in Appendix A of the CPRs, for example the leasing or procurement of real property or accommodation, procurement of

motor vehicles and contracts for labour hire; or

- a procurement which meets the requirements set out in paragraph 10.3 of the CPRs, for example for reasons of extreme urgency brought about by events unforeseen by the Commonwealth entity, the goods and services could not be obtained in time under an open tender or a prequalified tender.

In addition, exemptions from compliance with the CPRs may be determined under paragraph 2.6 of the CPRs. As an example, the Secretary of the Department of Defence has determined that specified goods and services are Defence Exempt Procurements, as a measure necessary to protect essential security interests. The list of Defence Exempt Procurements is set out in the Defence Procurement Policy Manual and includes the procurement of:

- goods which fall within specified US Federal Supply Codes (for example, FSC 10 Weapons and FSC 66 Instruments and Laboratory Equipment); and
- services including the design, development, integration, test, evaluation, maintenance, repair, modification, rebuilding and installation of military systems and equipment.

It is interesting that the Australian Government's response to Recommendation 18 does not refer to the CPRs.

In our view, the question raised by the Australian Government's response to Recommendation 18 is whether the:

- circumstances in which a procurement may be conducted by limited tender, as set out in the CPRs; and
- the exemptions available under paragraph 2.6 of the CPRs,

are consistent with the two-part test set out in Recommendation 18?

This is a complex question which will require the Australian Government to balance the relative merits of high-level, strategic issues, for example, competition on the one hand and national security on the other.

On closer analysis, the Australian Government's response to Recommendation 18 appears limited to

¹ A limited tender involves the Commonwealth entity approaching one or more potential suppliers, other than via an open approach to market or a prequalified tender. Under the now repealed Commonwealth Procurement Guidelines, this was referred to as 'direct sourcing'.

non-corporate Commonwealth entities and, to some extent, corporate Commonwealth entities. We say this because:

- only non-corporate Commonwealth entities and corporate Commonwealth entities must comply with section 18 of the PGPA Act (which requires entities, when imposing requirements on others for the use or management of public resources, to take into account the effects of imposing those requirements) - Commonwealth companies are not subject to this section of the PGPA Act; and
- the *Efficiency Through Contestability Programme* appears to apply to non-corporate Commonwealth entities only - neither corporate Commonwealth entities nor Commonwealth companies are covered.

This means that any change to Commonwealth procurement arising from the *Efficiency Through Contestability Programme* will be limited to the 96 non-corporate Commonwealth entities and will not extend to cover the 68 corporate Commonwealth entities or 15 Commonwealth companies² covered by the PGPA Act.

Considering Recommendation 18 more broadly, the Harper Review:

- notes that government procurement processes have often been risk-averse and prescriptive³; and
- recommends that tendering with a focus on outcomes, rather than outputs, and trials of less-prescriptive tender documents could encourage bidders to suggest new and innovative methods for achieving the government's desired result⁴.

Within the Australian Government, the Department of Defence recognises the importance of outcomes-focussed procurement in the acquisition and sustainment of materiel, as evidenced by its use of functional and performance specifications in the acquisition of materiel and performance and

productivity based contracting methodology for the sustainment of such materiel.

However, government must be careful to ensure that its procurement processes comply with appropriate probity standards⁵. Unless procurement processes are clear and transparent, and potential suppliers and tenderers are treated equally, industry may not have sufficient confidence in the process to meaningfully participate, which in turn, limits the ability of government to achieve value for money in the procurement process.

POTENTIAL IMPACTS - RECOMMENDATION 24

Recommendation 24 and the Australian Government's response potentially impact more broadly on the procurement of goods and services by the Commonwealth.

This recommendation:

- seeks to extend the agreement reached previously by governments under the National Competition Policy, namely that the CCA applies to the Crown insofar as it carries on a business, either directly or through an authority; and
- would result in the CCA applying to the Crown insofar as it undertakes activity in trade or commerce.

Despite the inclusion of proposed model drafting as part of the Harper Review, the Australian Government's response is to state that it will consult further with the states and territories on the implication of this recommendation.

It may be that the new competition principles and reform agreement, which the Australian Government will seek to negotiate with the Council of Australian Governments during the next 12 months, will provide further guidance regarding any such change to the CCA.

² As at 30 September 2015.

³ Page 270

⁴ Page 51

⁵ Including those set out in *Ethics and Probity in Procurement*, available from the Department of Finance at <http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/accountability-and-transparency/ethics-and-probity/principles.html>

WHERE TO FROM HERE?

Non-corporate Commonwealth entities undertaking a portfolio stocktake, contestability review or functional and efficiency review under the *Efficiency Through Contestability Programme* should consider the Australian Government's response to Recommendation 18 of the Harper Review.

Once negotiated with the Council of Australian Governments, Commonwealth entities should review the new competition principles and reform agreement as relevant to the procurement of goods and services by the Commonwealth.

MORE INFORMATION

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