128 Chalmers Street
Surry Hills, NSW, 2010
Phone: 02 9699 3686
Fax: 02 9699 3717
Email: campaign@aftinet.org.au
ACN 097 603 131
ABN 83 659 681 462
www.aftinet.org.au

Submission to the Joint Select Committee on

Government Procurement

March 2017

Contact Dr Patricia Ranald

AFTINET

128 Chalmers Street Surry Hills NSW 2010

Phone: (02) 9699 3686

Fax: (02 9699 3717

Email: campaign@aftinet.org.au

Introduction

The Australian Fair Trade and Investment Network (AFTINET) is a national network of 60 organisations and many more individuals supporting fair regulation of trade, consistent with human rights, labour rights and environmental sustainability. AFTINET welcomes this opportunity to make a submission to the Joint Select Committee on Government Procurement.

AFTINET supports the development of trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules. AFTINET supports the principle of multilateral trade negotiations, provided these are conducted within a transparent, accountable framework that safeguards the interests of all countries and is based on principles of human rights, labour rights and environmental sustainability.

AFTINET supports the following principles for trade negotiations

- Trade negotiations should be undertaken through open, democratic and transparent parliamentary processes that allow effective public consultation to take place about whether negotiations should proceed and the content of negotiations.
- There should be regular public consultation during negotiations, including publication of proposals and draft texts.
- Before an agreement is signed, the text should be published for public and parliamentary debate to test if it is in the national interest. Comprehensive studies of the likely economic, social and environmental impacts of the agreement should be undertaken and made public for debate and consultation before signing.
- Parliament should vote on the whole agreement, not only the implementing legislation.
- Trade agreements should not undermine human rights, labour rights and environmental protection, based on United Nations and International Labour Organisation instruments.
- Trade agreements should not undermine the ability of governments to regulate in the public interest, including the ability of governments to have national policies which encourage industry development and local employment, including procurement policies.

AFTINET welcomes the opportunity to make a submission on the implementation of Commonwealth Procurement Rules. In our view, these changes should be implemented in a way which ensures that governments can use procurement policies to encourage industry development and local employment. Negotiations for current and future trade agreements should ensure that trade agreement provisions do not prevent procurement policies from meeting these goals.

This submission will address the following specific terms of reference.

The extent to which CPR 17 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

(ii) trade agreements that the Commonwealth Government is currently negotiating, including the WTO Agreement on Government Procurement

The WTO Government Procurement Agreement (GPA)

The GPA is a voluntary plurilateral agreement and does not include all WTO members. According to information at the time of writing on the WTO website, only 47 of 164 WTO members have acceded to the GPA, of which 28 are members of the European Union, which joined as a bloc.

This is because most governments wish to retain the policy flexibility to allow some local preference for government procurement to encourage both competitive procurement and local industry development and employment.

In the past there have been bipartisan Australian government policies to retain this flexibility, and successive Australian governments have not joined the GPA because they did not want to reduce this flexibility.

AFTINET believes there is no clear justification as to why the previous policy has changed. It is claimed that the fact that China may accede to the GPA is a reason for Australia to join, in order to gain access to Chinese procurement markets.

Claims that accession to the GPA would benefit Australian companies through access to large procurement markets like China must be treated with scepticism, given the experience of the AUSFTA procurement chapter which is discussed below.

There is much evidence to suggest that the main beneficiaries of open procurement markets are large global companies which have the capacity and economies of scale to monitor overseas procurement markets and tender for large government contracts. This means it is not a level playing field for most Australian companies. In fact, most governments recognise this and have developed policies intended to ensure that local small and medium-sized enterprises (SMEs) are considered and given preference in tendering processes.

Past Australian policies allowed preferential measures for Australian companies. The signing of the AUSFTA and other bilateral agreements with procurement chapters limited the scope for preferences to be applied to Australian companies. However, these agreements give government scope to retain preferential arrangements for SMEs (DFAT, 2004).

Such preferences have been fully exploited by other governments. The US has a Small Business Set-aside Program, the South Korean government has a quality certification and preference program for products of small Korean firms (Thurbon, 2014, Australia Institute, 2016:10).

There is evidence that Australian government policy has not fully utilised the capacity to give preference to local companies, and that Australian government departments are not aware of, and do not implement this policy.

The 2014 Senate inquiry into government procurement processes found that Australian Commonwealth Procurement Rules (CPRs) issued by the Minister for Finance could allow for a broad interpretation of value for money in tendering processes. A broad interpretation could take into account benefits such as local employment, skills and industry development, as well as preference for small and medium-size enterprises. However, the CPRs lacked clarity about how they should be applied in practice, especially when a conflict exists between securing a minimal contract price and maximising local economic, jobs and industry benefits.

SMEs and their business organisations like AUSBUY, AUSVEG, the Australian Information Industry Association, Australian Paper Manufacturers and others confirmed in evidence to the committee that government departments were not aware of the SME policy and did not promote it. Many departments appear to be under the impression that trade rules preclude any consideration of broader interpretations of value for money or preference for SMEs (Finance and Public Administration References Committee: 16 – 19, 41- 3).

It is to be hoped that the results of this Inquiry will change that situation and ensure that departments can take into account broader considerations including local employment and industry development.

This is what occurs elsewhere. The US advocates for open procurement markets abroad while using domestic policies to ensure continued local preference for local companies.

For example, the AUSFTA procurement chapter committed the Australian Government to open up procurement from all federal government agencies, with a short list of exceptions for agencies and particular goods or services. All state governments made commitments covering most of their agencies, with exceptions for particular goods and services. This contrasted with the US federal government agency commitments, which had a far longer list of exceptions. Almost half of US state governments made no commitments under the AUSFTA.

There is evidence that these US policies of restricted commitments and preferences for local companies have resulted in limited access by Australian companies to US procurement markets. The Australian Industry Group submission to the Productivity Commission *Inquiry into Australia's Bilateral and Regional Trade Agreements* cited a survey the AIG conducted of Australian exporters to the US in 2009, five years after the AUS FTA came into effect. The survey found that 87% of Australian exporters to the US said that the AUSFTA had been either of low effectiveness or not effective in assisting their access to US government contracts (Australian Industry Group: 9).

After the Global Financial Crisis, the US Federal Government also enacted specific additional 'Buy American' legislation for federal government spending programs which give preference in procurement to local suppliers, with a specific aim of creating local employment. This was done through the US *Recovery and Reinvestment Act (2009),* section 1605, which applies to all US states. The US Trump administration is likely to maintain such policies.

In summary, 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. This puts Australian businesses, especially SMEs looking to grow their capacities, at a disadvantage in competing for government procurement contracts in Australia.

Australian companies are also disadvantaged in competing for overseas procurement contracts, since Australia's free trade agreement partners like the US and South Korea have taken full advantage of interpretations which enable them to preference local SMEs, making it difficult for Australian companies to win contracts (Thurbon 2014, Senate Finance and Public Administration References Committee vii).

It is clear Australian government policies have not fully exploited the flexibility allowed under current trade agreements. At the same time, there is evidence that procurement chapters in trade agreements have not enabled Australian companies to access overseas procurement markets. Australian businesses are therefore being harmed by more competition domestically while also being denied the ability to gain more work overseas; effectively being squeezed from two sides.

It is therefore legitimate to question whether Australia's accession to the WTO GPA would lead to increased procurement opportunities for Australian firms. In addition, 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.

Accession to the WTO GPA will involve negotiation with existing GPA members, including the US and other bilateral trade agreement partners. This process could include requests for Australia to give up some of its current procurement exemptions in the AUSFTA and other agreements.

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.

Current Australian Government commitments and exemptions on Government Procurement in other trade agreements

In addition to the Closer Economic Relations Agreement with New Zealand[1], Australia has made commitments on government procurement in other bilateral trade agreements with the US, Singapore, Chile, South Korea and Japan. The core of these commitments is national treatment and non-discrimination for international companies seeking government procurement contracts, which means that international suppliers must be treated as if they were domestic suppliers.

The Australian Schedules of Commitments for entities covered by these agreements list the Commonwealth, state and territory government agencies and business enterprises that are covered by the agreements.

However, all the agreements include exemptions for certain categories of procurement at federal, state and territory level. These include defence procurement and procurement from other government entities. They also include measures necessary to protect intellectual property, public morals, order or safety, human, animal or plant life, health, and for goods and services produced by people with disabilities, prison labour and philanthropic and not-for-profit institutions. There are also exceptions for blood products, financial services, superannuation funds and other investment management services and for services related to the sale and distribution of public debt.

Importantly, there is a general exemption for all governments for small and medium enterprises (SMEs) discussed above. This means that governments can give preference in procurement to local SMEs. There are also exceptions for measures to promote the health, welfare, economic and social advancement of Indigenous people, and for measures to protect national treasures of artistic, historic or archaeological value.

With these exceptions, the Commonwealth has listed most of its entities and government business enterprises.

State lists of commitments vary. In addition to the positive lists of state government agencies, some states have listed exemptions for specific services, which include education services, health services, welfare services, motor vehicles and government advertising.

These commitments are covered by state-to-state dispute settlement procedures in these agreements.

In addition, the Singapore FTA, Chile FTA, Korea FTA and Japan FTA all have identical review clauses which allow individual companies to seek review of government procurement decisions in domestic courts if they can argue that the tendering process did not conform with the terms of the agreement. These provisions should not be confused with Investor-State Dispute Settlement (ISDS) which permits recourse to international tribunals.

The AUSFTA procurement chapter has a more elaborate review mechanism, which provides substantial additional rights for companies to appeal the initial review decision to a higher domestic court. The AUSFTA also contains additional clauses which include timeframes, interim measures to delay the tendering decision pending resolution of a challenge, suspending the award of a contract and written reports of the review decision (AUSFTA article 15.11). Again, this should not be confused with ISDS, as there are no ISDS provisions in the AUSFTA.

[1] In the Closer Economic Relations Agreement with New Zealand, New Zealand is effectively treated as part of Australia for procurement purposes and vice versa. There is no provision for dispute settlement procedures applying to procurement arrangements with New Zealand.

WTO GPA Review process and dispute mechanism

The WTO GPA has identical wording to the more elaborate AUSFTA-style review process for complaints by individual companies.

This means that accession to the WTO GPA would give governments from all GPA signatories more review rights than they have under current FTAs, except for the AUSFTA.

Such a review process should be accessible to both Australian and foreign companies.

In addition, a government can use the WTO dispute settlement process if it considers that another government is failing to carry out its obligations under the agreement or has implemented measures which nullify or impair the benefits or prevent the attainment of any objective of the agreement.

Recommendations

1. Given the evidence that procurement chapters in current trade agreements have not resulted in demonstrably improved access for Australian companies to external procurement markets, accession to the WTO GPA is unlikely to be in Australia's national interest.
2. Before any decision to accede to the GPA, the Australian Government should follow the example of trading partners like the US and South Korea and ensure that the implementation of Australian procurement policies maximises opportunities for Australian companies to access Australian procurement markets and maximises domestic economic and employment benefits of procurement decisions. The recommendations of this inquiry report should aim to achieve this.
3. If the Australian Government does proceed with accession to the WTO GPA, the Government should ensure that all of Australia's current procurement exemptions in trade agreements are retained and not traded away. Federal and state governments should also retain the flexibility to introduce new exemptions if circumstances change.
4. If the Australian Government does proceed with accession to the WTO GPA, the Australian Government should ensure that any domestic judicial review process for government procurement decisions is available to Australian companies as well as foreign companies.
5. The Australian Government should not make additional commitments on government procurement in other trade agreements.
6. If the Australian Government does proceed with accession to the WTO GPA, the text of Australia's commitments in the GPA should be published for public and parliamentary scrutiny before the decision to sign it is made by Cabinet, and should be subject to an independent evaluation of the economic, social and environmental costs and whether it is in Australia's national interest. Parliament should vote on the whole agreement, not only on the implementing legislation.

References

The Australia institute (2016) *Why Manufacturing Still Matters: why the decline of Australian manufacturing is not inevitable and what government can do about it*, Canberra, June, found at

http://www.tai.org.au/sites/defualt/files/Manufacturing%20Briefing%20Paper%20FINAL.pdf

The Australian Industry Group (2010) Submission to the Productivity Commission *Inquiry into Australia's Bilateral and Regional Trade Agreements,* February, found at

http://www.pc.gov.au/inquiries/completed/trade-agreements/submissions/sub007.pdf

Department of Foreign Affairs and Trade (2004) *Guide to the Australia-United States Free Trade Agreement* found at http://www.dfat.gov.au/about-us/publications/trade-investment/australia-united-states-free-trade-agreement-guide-to-the-agreement/Pages/15-government-procurement.aspx

Senate Finance and Public Administration References Committee (2014) *Report on the Inquiry into Commonwealth Procurement Procedures*, June, found at

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Commonwealth_procurement_procedures/Report/index

Thurbon, Elizabeth, (2014) "Australia's procurement policy leaves our exporters behind," *The Conversation*, October, found at

http://theconversation.com/australias-procurement-policy-leaves-our-exporters-behind-32569