

**Submission
No 11**

**INQUIRY INTO PROCUREMENT PRACTICES OF
GOVERNMENT AGENCIES IN NEW SOUTH WALES AND
ITS IMPACT ON THE SOCIAL DEVELOPMENT OF THE
PEOPLE OF NEW SOUTH WALES**

Organisation: CFMEU Manufacturing

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CFMEU Manufacturing

Submission

LEGISLATIVE COUNCIL- STANDING COMMITTEE ON SOCIAL ISSUES

Inquiry into the procurement practices of government agencies in New South Wales and its impact on the social development of the people of New South Wales.

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Executive Summary

The CFMEU Manufacturing Division appreciates the opportunity to contribute to the Legislative Council's Inquiry into the procurement practices of government agencies in New South Wales (NSW) and their impact on social development.

Our division represent manufacturing and production workers in a variety of sectors including timber and wood products, pulp, and paper, building products and furniture, fit out materials including carpets, windows, doors and mattresses, textiles, clothing, footwear (TCF), as well as workers in allied services sectors like forestry and laundering.

Job security, improved wages, and better working conditions for our members are central to our mission.

The alignment of government procurement practices with these goals is crucial for the economic stability of our members.

Real job security can be generated through direct purchases and government funding of infrastructure, housing, health, and education projects.

Moreover, as a major player in the market our members produce for, the NSW government can set industry standards by being an exemplary customer.

This involves ensuring supply chains are free from labour abuses, there are elevated levels of compliance by suppliers with industrial laws, and fair employment conditions are promoted throughout the supply chain.

Procurement gives the Government the opportunity to link its economic and practical needs with its social agenda, as the procurement decisions of governments have flow-on impacts for employment, industry development, and the broader NSW economy.

To maximise the benefit to NSW from government procurement and to achieve a greatest value system, a three-pronged approach needs to be mandatorily applied.

The three fundamental requirements of this approach, include:

1. robust conditions of participation, with a focus on ethical procurement and labour standards throughout the supply chain.
2. full, fair, and reasonable access for local industry; and
3. a clear and transparent weighting system for local benefits.

This submission will present three case studies to illustrate key points and make interim recommendations for immediate implementation. Additionally, it will address the terms of reference and expected objections to a more effective NSW procurement system. These objections often stem from misconceptions and misapplications of concepts such as "Value for Money" and Australia's international treaty and trade agreement obligations.

Throughout the submission, recommendations will be supplied to guide the development of a more robust and socially responsible procurement framework in NSW.

Case Studies and Implications for Procurement Practices

1. Menstrual Products for NSW Schools:

- *Background:* The NSW Government awarded a contract for tampons and sanitary pads in schools to an overseas supplier, neglecting locally made alternatives.
- *Impact:* This decision affects local jobs in manufacturing and upstream in raw material production, contrary to lessons learned during the COVID-19 pandemic about the importance of domestic production.
- *Lesson:* Procurement decisions should prioritize local production for essential goods to support domestic industries and employment.

2. Timber Supplier for Advanced Manufacturing Research Facility

- *Background:* Western Parkland City Authorities (WPCA) favoured a European timber supplier over local options due to specific project requirements and certification preferences.
- *Impact:* Local softwood manufacturers were excluded, despite offering cost competitiveness, quicker lead times, and other advantages. The decision also overlooked the use of locally sourced plantation pine feedstock.
- *Lesson:* Procurement specifications should prioritize Australian Standards® and not exploit technical standards to exclude local industries, ensuring fair consideration for domestic suppliers.

3. TCF Industry and Sphinx Clothing:

- *Background:* Sphinx Clothing, an NSW company with Commonwealth Government orders, operates within an Ethical Clothing Australia (ECA) accredited supply chain.
- *Impact:* Sphinx Clothing and other TCF manufacturers can contribute to NSW Government uniform production if provided with opportunities to build capability.
- *Lesson:* Emulating Victoria's approach, NSW should mandate the procurement of locally and ethically manufactured uniforms, promoting local job retention and encouraging industry investment.

Cross-Cutting Lessons and Recommendations:

- *Australian Standards®:* Specify Australian Standards® in tender documentation to support local industries and ensure fair competition.
- *Ethical Considerations:* Prioritize ethical considerations, such as ECA accreditation, in procurement decisions to uphold labour standards and transparency.
- *Local Job Retention:* Promote local job retention by prioritizing domestic suppliers, particularly when they offer cost competitiveness, quicker lead times, and other advantages.
- *Supply Chain Transparency:* Emphasize the importance of transparent and ethical supply chains, supporting accreditation bodies like ECA.
- *Lesson from COVID-19:* The pandemic underscores the need for self-sufficiency and domestic production, highlighting the importance of procuring essential goods locally.

Overall Recommendation: Develop a comprehensive and socially responsible procurement framework that prioritizes local industries, adheres to ethical standards, and considers the broader economic and social impacts of procurement decisions.

Interim Measures and Recommendations Based on Lessons from Case Studies

1. **Prioritise Ethical Employment Practices:**

- **Objective:** The government should prioritize products from companies that engage in positive industrial relations by adhering to lawful obligations to their employees, recognising unions as a legitimate representative of their workforce and have no current workplace disputes.
- **Specifics:**
 - Companies with no more than 10% of employees in non-permanent employment should be prioritised.
 - A union confirmation of companies' adherence to labour laws and dispute-free status is essential.
 - Ensure an Award+ model for any sub-contracts to remove the incentive to use sub-contracting to undercut conditions.

2. **Ensuring Safety and Local Manufacturing:**

- **Objective:** Emphasize the safety of public service workers and consumers by prioritising locally made products meeting Australian standards.
- **Specifics:**
 - Prioritise locally made products, giving additional preference to those using local materials or components.
 - Collaborate with local stakeholders to identify and overcome barriers to local production.
 - Pilot this initiative by purchasing uniforms and products that are locally made to Australian standards.

3. **Develop and Implement Innovative Programs to Combat Worker Exploitation:**

- **Objective:** Collaborate with unions to develop and trial innovative programs preventing worker exploitation in supply chains.

4. **Improve Transparency in Government Contracts:**

- **Objective:** Promote transparency by publishing quarterly lists of companies receiving government contracts.
- **Specifics:**
 - Include information on the company's location, type of product or service obtained, and a site contact.
 - Facilitate accountability and adherence to procurement aims.

5. **Put in Place an Efficient Procurement Dispute Resolution System:**

- **Objective:** Set up a swift and cost-efficient mechanism for resolving procurement disputes.
- **Specifics:**
 - Ensure a fair and expedited process for addressing disputes to keep the efficiency of government procurement. It also removes the conflict of interest where the Department procuring an item is left to decide if they have procured it properly.

6. **Protect Public Service Workers:**

- **Objective:** Take reasonable steps to secure agreed-upon principles in relevant industrial instruments, particularly when affecting the safety and job security of public service workers.
- **Specifics:**
 - Collaborate with relevant stakeholders to embed these procurement principles into industrial instruments.

These interim measures align with the CFMEU Manufacturing Division's commitment to job security, safe work, and fair pay for workers. They supply a foundation for a socially responsible procurement framework that reflects the values and priorities of the community and workers in NSW.

Summary of Recommendations in Response to Terms of Reference

1. **Model Customer Approach:**
 - *Objective:* Change the NSW Government's procurement approach to become a model customer, aligning procurement with policy goals like promoting job security in manufacturing and ensuring fair wages and labour law compliance.
2. **Comprehensive "Value for Money" Approach:**
 - *Objective:* Exercise a more comprehensive approach to "value for money" and enforce contractor and agency compliance with this approach.
3. **Training for Procurement Officials:**
 - *Objective:* Provide training and guidance for procurement officials on conducting a comprehensive "value for money" procurement approach, with a requirement to justify procurement decisions in writing.
4. **Accreditation to Ethical Clothing Australia:**
 - *Objective:* Direct the NSW Procurement Board to require agencies to specify a requirement that local textile, clothing, and footwear suppliers be accredited to Ethical Clothing Australia (ECA).
5. **Adherence to Australian Standards:**
 - *Objective:* Direct the Procurement Board to ensure that agencies and contractors specify Australian Standards® in tender documents wherever possible, promoting the use of NSW timber in appropriate state government projects.
6. **Hierarchy of Risk Aversion:**
 - *Objective:* Develop and implement a hierarchy of risk aversion for non-compliance with labour laws, with a gold standard including high union density and the presence of union collective bargaining agreements.
7. **Weighting System for Local Content:**
 - *Objective:* Develop a sufficient weighting system for local content based on socio-economic benefits, directly weighed against other value for money considerations, including price.
8. **Exercise of Statutory Functions by Procurement Board:**
 - *Objective:* Direct the Procurement Board to exercise statutory functions under new procurement arrangements.
9. **Clarification of Trade Agreement Exemptions:**
 - *Objective:* Change NSW Government Procurement guidelines to explain exemptions in Australia's trade agreements, allowing for the preference of local procurement, and confirm that Free Trade Agreements are not a barrier to developing a weighting system considering socio-economic benefits.
10. **Adoption of Best Practices:**
 - *Objective:* Adopt best practices from Australian States and Territories to encourage ethical conduct and promote social development through government procurement spend.

These recommendations collectively aim to transform the NSW Government's procurement practices into a model that prioritizes social responsibility, fair labour practices, and economic development.

Response to the Terms of Reference: Summary and Recommendations

That the Standing Committee on Social Issues inquire into and report on the procurement practices of government agencies in New South Wales and its impact on the social development of the people of New South Wales, and in particular:

(a) the current state of procurement by New South Wales government agencies

CFMEU Manufacturing Comment

The NSW Government, given its substantial purchases, is a crucial market for local industries. There exists a significant opportunity for the government to serve as a model procurer, using its economic leverage to align with broader policy goals. Regrettably, this potential has been neglected for many years.

Recommendation 1: The NSW Government revise its procurement approach to align with policy objectives such as job security, compliance with labour laws, fair wages, and conditions.

(b) the effectiveness of whole-of-government and agency procurement arrangements, including standing offers, panels, and prequalification schemes, in ensuring that suppliers and their subcontractors deliver value for money and comply with relevant policies and regulations, including labor laws, at the qualification, contract negotiation stage, and contract management stages of procurement

CFMEU Manufacturing Comment

NSW Government procurement lacks effectiveness in serving the interests of taxpayers, workers, and citizens. The global shift toward conservative economic principles has influenced the perception that governments should not use procurement for policy outcomes. Despite rules outlined in the NSW Procurement Policy Framework, the assessment of "value for money" by procurers is inconsistent.

Recommendation 2: NSW Government, as a model customer, should adopt a comprehensive approach to "value for money" and ensure compliance by contractors and agencies.

(c) current capacity of procurement officials in government agencies to assess suppliers and ensure they, and their subcontractors, deliver value for money and comply with relevant policies and regulation, including labor laws, at the qualification or contract stage and throughout the contract management stage

CFMEU Manufacturing Comment

Procurement decisions often overlook the production costs associated with ethical, sustainable, and quality production. Procurement officers tend to prioritize the "cheapest price" without adequate consideration of factors like sustainability, whole-of-life costs, and local economic benefits.

Procurement officials often lack expertise in assessing noncompliance with labor laws and reputation risks. Adopting existing industry, environmental, and community standards can compensate for this deficiency.

Recommendation 3: NSW Government provide training and guidance to procurement officials on a comprehensive approach to "value for money" procurement and require written justifications for procurement decisions.

(d) any opportunities that may exist for co-regulation and other incentives to improve labor market governance and enforcement through the procurement process to ensure the process delivers both value for money and social outcomes.

CFMEU Manufacturing Comment

Opportunities for co-regulation include specifying quality certification and accreditation programs. Ethical Clothing Australia's voluntary opt-in scheme and Responsible Wood's Australian Standard for Sustainable Forest Management serve as examples. Effective co-regulation occurs where all parties have access to the resources needed to advance their interests. Any co-regulation scheme needs to make provisions for these resources. High density and union agreements are a key indicator of compliance with labour laws and should be recognized.

Recommendation 4: NSW Government mandate the Procurement Board to require contractors and agencies to specify accreditation to Ethical Clothing Australia for textile, clothing, and footwear products.

Recommendation 5: NSW Government direct agencies and contractors to specify Australian Standards® in tender documents, ensuring safety and quality.

Recommendation 6: NSW Government develop a hierarchy of risk aversion for exposure to non-compliance with labour laws, with "minimal risk accreditation" being high union density and union collective bargaining agreements.

(e) the evaluation criteria used in tenders and how they are weighted in making a decision to award a contract

CFMEU Manufacturing Comment

Consideration of local content is inadequately addressed in the current NSW procurement system. The dominance of the "cheapest price" criterion often overlooks other important factors, such as social, economic, and labor market outcomes, as well as environmental considerations.

Recommendation 7: Develop a weighting system for local content based on socio-economic benefits, directly weighed against value-for-money considerations.

(f) current approaches to transparency and accountability of procurement by New South Wales government agencies,

CFMEU Manufacturing Comment

The NSW Government's Procurement Board aims for strategic procurement, best value, competition, and accessibility, as per the PWP Act. There is potential to enhance procurement under new arrangements.

Recommendation 8: Direct the NSW Government Procurement Board to exercise statutory functions under new procurement arrangements.

(g) the New South Wales Government's procurement practices

CFMEU Manufacturing Comment

The NSW Procurement Policy Framework emphasizes compliance with international obligations, but it lacks clarity on preferencing local procurement.

Recommendation 9: Amend NSW Government Procurement guidelines to clarify exemptions in Australia's trade agreements, allowing preference for local procurement.

(h) procurement best practice to encourage ethical conduct and promote social development in other jurisdictions, both nationally and internationally

CFMEU Manufacturing Comment

Encouraging ethical conduct in labor relations, as demonstrated by the ACT's Secure Local Jobs Code, is commendable. Adopting best practices from other Australian states and territories, such as local benefits tests and employment contribution tests, is essential.

Recommendation 10: NSW Government should adopt best practices from other Australian states and territories to encourage ethical conduct and promote social development in procurement.

Response to the Terms of Reference: Detailed

CFMEU Manufacturing is willing to provide further evidence to the committee on any queries arising from this submission including the below.

That the Standing Committee on Social Issues inquire into and report on the procurement practices of government agencies in New South Wales and its impact on the social development of the people of New South Wales, and in particular:

(a) the current state of procurement by New South Wales government agencies, in particular:

(i) the value of procurement, through whole of government or agency procurement arrangements

(ii) the policies, schemes, and contracts of all categories that New South Wales government agencies procure, including labour

(iii) the number of whole of government procurement arrangements available to New South Wales government agencies

(iv) the application of the New South Wales Procurement Policy Framework and the devolved nature of the responsibilities and obligations of New South Wales government agencies under the framework

(v) the value/volume of New South Wales government agencies procurement undertaken outside of whole of government procurement arrangements

(vi) the accreditation program for goods and services procurement and construction procurement

CFMEU Manufacturing Comment

The NSW Government is, by measure of both the quantity and type of the goods and services it buys and by its reputation as a purchaser of substance, an important market for local industry.

The Government's procurement spend provides an opportunity for it to be a model procurer and leverage its position in the economy as a major customer to drive policy outcomes consistent with its broader agendas.

This is an opportunity which for years has been foregone.

(b) the effectiveness of whole of government and agency procurement arrangements, including standing offers, panels and prequalification schemes, in ensuring that suppliers and their subcontractors deliver value for money and comply with relevant policies and regulations, including labour laws, at the qualification, contract negotiation stage and contract management stages of procurement

CFMEU Manufacturing Comment

NSW Government procurement is not effective in delivering in the interests of NSW taxpayers, workers, or citizens.

Since the 1980s, the global approach to the role of government procurement has changed alongside the growth of the conservative economic consensus of deregulation and liberalisation. In terms of governments' role as a consumer, conservatives argue that that governments **should not use** government procurement to achieve policy outcomes and let the market determine what is procured based on who can supply at the lowest price.¹

Even with this economic consensus of deregulation and liberalism being discredited, NSW Government agencies often point out that they are restricted in their ability to achieve policy outcomes through procurement by rules and procedures.

In New South Wales rules and procedures are documented in the NSW Procurement Policy Framework. These rules and procedures include 'value for money' requirements. In NSW, according to the NSW Procurement Board "the overarching requirement for procurement is value for money"²

The framework argues that for most procurement activities there are at least three broad types of benefits, costs and risks which need to be considered:

- up-front benefits/costs and risks
- after-purchase benefits/costs and risks
- benefits/costs associated with the fitness-for-purpose of the goods or services procured.³

The NSW Procurement Board argues that the Board's Statement on Value for Money assists decision-makers to make informed and supportable decisions about value for money when planning procurement.⁴ Despite this, CFMEU Manufacturing maintains that the way "value for money" is assessed by contract and agency procurers is extremely inconsistent.

A lack of guidance and monitoring often allows the procurer to purchase based on the cheapest price without sufficient reference and consideration of financial and non-financial costs and benefits of different potential suppliers (and often with little regard for reputational risk) Plainly, production considerations (such as ethical and sustainable production) or Whole of life cost" (including durability, reliability, warranty conditions and quality) are often ignored or not properly in overall "value for money" decisions.

Other rules and procedures which by procurers are often misunderstood and/ or abused are Australia's international obligations outlined in our trade agreements. **(See TOR item g)**

c) current capacity of procurement officials in government agencies to assess suppliers and ensure they, and their subcontractors deliver value for money and comply with relevant policies and regulation, including labour laws, at the qualification or contract stage and throughout the contract management stage

CFMEU Manufacturing Comment

¹ See Jones & Wacey, In the National Interest: SUPPORTING LOCAL JOBS AND INDUSTRY THROUGH GOVERNMENT PURCHASING, A Joint CFMEU and TCFUA Research Paper, December 2017, 7

² NSW PROCUREMENT POLICY FRAMEWORK FOR NSW GOVERNMENT AGENCIES ISSUED BY THE NSW PROCUREMENT BOARD July 2015 Version 4, 10

³ Ibid

⁴ Ibid

There are production costs associated with ethical, sustainable, and quality production compared to cheap imports and this needs to be considered adequately when procurers make their procurement decisions based on “value for money.”

In addition, as argued above agency procurement officers often use the “cheapest price” as a proxy for value for money and ignore factors like sustainability of production, whole of life costs and benefits and local economic benefit.

NSW Government procurers are not unique in this regard. A 2014 Senate inquiry into the Commonwealth Government’s procurement procedures found that, despite the rules requiring consideration of both financial and non-financial costs and benefits in assessing value for money, departmental and agency procurement officials are often using the direct price of a project as an inappropriate proxy for ‘value for money’. That is, they are incorrectly using ‘value for money’ to justify making a procurement decision based purely on the cheapest price.⁵

The Australian National Audit Office reported that one of the key failings that they identified is that often, is that when procurers write down why something supplies the best value for money, they have not given the range of reasons or the range of considerations.

The ANAO also found that, key areas for agencies to improve procurement practices and outcomes include 'better demonstrating and considering value for money when making procurement decisions'.

Mr Stuart Turnbull, Executive Director, Defence, Performance Audit Services Group, ANAO, told the committee of the difficulty of auditing value for money decisions made by agencies in procurement processes commented:

“One of the key failings that we have identified is that often, when [agencies] write down why something supplies the best value for money, they have not given the range of reasons or the range of considerations. Then it is difficult for the auditors to come along and make an assessment about their judgements and the appropriateness.”⁶

Whereas Mr Steve Chapman, Deputy Auditor-General also reported that audits have “identified that there may be benefit in providing clear and practical guidance to agency staff on specific matters such as value for money and documentation of procurement decisions.”⁷

Procurers are often not experts on the levels of noncompliance with labour laws in certain sectors and reputation risks associated with certain procurements (Exploitation in the supply chain, illegally logged or unsustainably produced timber, child labour etc)

The use, adoption and specification of existing industry, environmental and community standards is an opportunity to make up for a lack of ability (See the concept below)

⁵ In the National Interest, 9

⁶ The Senate Finance and Public Administration References Committee, Report, Commonwealth procurement procedures, 65 - Committee Hansard, 21 March 2015, p. 15. [Commonwealth procurement procedures \(aph.gov.au\)](http://aph.gov.au)

⁷ Ibid, 36 - Committee Hansard, 21 March 2014, p. 12.

(d) any opportunities that may exist for co-regulation, and other incentives to improve labour market governance and enforcement through the procurement process to ensure the process delivers both value for money and social outcomes

CFMEU Manufacturing Comment

Opportunities for coregulation include specifying existing quality certification and accreditation programs on a need's basis.

Ethical Clothing Australia (ECA) operate on a voluntary opt-in scheme. This means there are companies manufacturing TCF products in Australia who are not ECA-accredited where sham contracting is used and TCF sweat shops continue in Australia.

Sham contracting, although unlawful, means that homeworkers/outworkers are not treated as employees by those who engage them and therefore do not receive employee benefits such as minimum award wages, paid leave, and superannuation.

Ongoing monitoring, compliance, and education activities are key to ensuring that gains made in improving the position of homeworkers/outworkers are not foregone. The role of ECA and its Code of Practice remains critical for this function.⁸

Likewise, specification of local timber used for NSW government funded construction should be accredited to Responsible Wood's Australian Standard for Sustainable Forest Management. Responsible Wood is the Australian member of the Programme for the Enforcement of Forestry Certification (PEFC) International. This is consistent with the recommendations of the NSW CFMEU Manufacturing timber committee that NSW timber to be used in all appropriate state government projects.

A vital element of any co-regulation scheme is the effective resourcing of worker representatives to advance their interests. Without the paid time, expertise and resources to advance their interests, co-regulation or co-operative approaches risk becoming a polite mask of a broken system.

Likewise, products such as building products and furniture that conform with Australian Standards® can be specified to ensure safety and quality. This can aid in the combating the prevalence of unconforming and dangerous building and consumer products in the community.

There are also indicators that can be adopted to the improve of labour market governance and enforcement through the procurement process to ensure the process delivers both value for money and social outcomes.

The most obvious indicator to demonstrate minimal risk that a potential supplier follows its industrial relations obligations is that the supplier has high trade union density amongst its own workforce and the workforces of its supply chain.

Another key marker is the supplier and its supply chain have a union agreed enterprise bargaining agreements.

⁸ See Ethical Clothing Australia Pre-Budget submission: [Ethical Clothing Australia - 2021-22 Pre-Budget Submissions \(treasury.gov.au\)](https://www.treasury.gov.au/submissions/12345)

These considerations are more important when considering risk than judicial-based assessment such as convictions and undertaking for breaches of labour and occupation health and safety laws.

(e) the evaluation criteria used in tenders and how they are weighted in making a decision to award a contract, in particular consideration of:

(i) local content

(ii) value for money

(iii) social, economic and labour market outcomes

(iv) environmental considerations, such as sustainable sourcing, energy efficiency and waste reduction

(v) innovation

(vi) subcontracting arrangements

CFMEU Manufacturing Comment

There would appear to be little if any consideration of the benefit of local content in the NSW procurement system currently operates. As discussed above, the predominance of “cheapest price” in value for money assessments often has precedence over other whole of life factors and other considerations such as social, economic, and labour market outcomes, environmental considerations, such as sustainable sourcing, energy efficiency and waste reduction, innovation, and subcontracting arrangements.

Considerations such as innovation, sustainable procurement, encouraging small and medium enterprises and disposal of goods post procurement are all theoretically important in the NSW Procurement Policy Framework. For example, regarding Sustainable Procurement the Framework states:

“Sustainable procurement achieves the Government’s commitment to spend public money efficiently, economically, and ethically. Sustainable procurement considers issues such as:

- **Environmental management**
- Pollution control, waste minimisation, recycling, and disposal options
- Energy efficiency and resource consumption
- Adopting environmental technologies and biodiversity
- **Ethical procurement**
- Planning laws and asset design use and maintenance, including heritage and culture and production
- **Socio/economic benefits**
- Social procurement and social investment
- Skills development, workplace and supply chain diversity
- Employee rights and conditions, unfair competition, and ethical behaviour.”⁹

The reality is that how these considerations are weighed in relation to (cheapest price) is not usually sufficient (if it occurs at all) nor transparent.

⁹ NSW PROCUREMENT POLICY FRAMEWORK FOR NSW GOVERNMENT, 12
https://info.buy.nsw.gov.au/_data/assets/pdf_file/0012/600240/procurement_policy_framework_-_july_2015_0_1.pdf

- (f) current approaches to transparency and accountability of procurement by New South Wales government agencies, in particular:
- (i) function and requirements of the New South Wales Government Procurement Board and the New South Wales Procurement Policy Framework
 - (ii) record keeping arrangements for procurement activities
 - (iii) Agency annual self-reports and outcome reports

CFMEU Manufacturing Comment

The New South Wales Government's Procurement Board's goals are set out in section 171 of the PWP Act, which are to:

- develop and implement a government-wide strategic approach to procurement
- ensure best value for money in procurement by and for agencies improve competition and
- facilitate access to government procurement business by the private sector, especially by SMEs and regional enterprises reduce administrative costs for agencies associated with procurement simplify procurement processes while ensuring probity and fairness.

It also includes procurement of goods and services (including construction) by or for an agency to either exercise statutory functions or pursuant to statutory powers of procurement.

Section 176 of the PWP Act places the following obligations on agencies:

- exercise functions in accordance with Board policies and Directions
- adhere to the principles of probity and fairness
- obtain value for money in the exercise of procurement functions
- provide information on procurement functions to the Board as requested¹⁰

The use of these powers could be important under a fresh approach to NSW Government procurement.

g) the New South Wales Government's procurement practices, in particular its ability to:

- (i) prioritise local content, local manufacturing, and local jobs*
- (ii) improve opportunities for quality training and workforce participation*
- (iii) provide opportunities for diversity, inclusion and the participation of disadvantaged groups, including women and minorities*
- (iv) support local suppliers, and small and medium enterprises*

CFMEU Manufacturing Comment

The Framework stresses the need for "appropriate regard for applicable policy and international agreement requirements"¹¹ and that "agencies must comply with International obligations."¹²

¹⁰ Ibid, 4

¹¹ Ibid, 14

¹² Ibid, 6

However, the Framework is completely inadequate in specifying opportunities within Australia's free trade obligations when it comes to preferencing local procurement simply saying: "For procurement covered under the FTAs, agencies must treat a supplier from the other country the same as a domestic supplier"¹³

According to CFMEU Manufacturing, NSW government agencies can *treat* a supplier "from the other country" differently (even if it is an SME) than a domestic supplier if that domestic supplier is a SME. By way of background, indeed, the cornerstone of Australia and as a result State and Territory Jurisdiction Governments is an obligation is that all potential suppliers to government must: "be treated equitably based on their commercial, legal, technical and financial abilities and not be discriminated against due to their size, degree of foreign affiliation or ownership, location, or the origin of their goods and services."¹⁴ However, Australia's obligations do not apply to "any form of preference to benefit small and medium enterprises."¹⁵

This issue was explored in detail in the 2014 inquiry into Commonwealth Procurement. The clear take out was that if Government procurement contracts can be awarded to an SME, the principle of non-discrimination does not apply. This conclusion was based on the evidence provided by the committee by Dr Nick Seddon, a lawyer and academic specialising in government contracts, who responded to the question of whether the Australian government can develop a policy of buying Australian products: "[T]here is no room to move on that because of the free trade agreements that have been entered into by the Commonwealth government on behalf of Australia, *unless an exemption applies.*"¹⁶ (*Our emphasis*)

Dr Seddon later qualified that if the Commonwealth Procurement Rules are read in the context of the provisions of Australia's international obligations: "It is pretty clear that deciding whether to grant a contract to an SME is exempt from the basic principle that you should not give local preference."¹⁷

This interpretation of Australia's obligations is supported by the Department of Foreign Affairs and Trade who when providing advice on Australia's accession to the WTO Government Procurement Agreement commented that

"The GPA provides the same flexibilities as our existing trade agreements in order to ensure governments can continue to support *Australia's* small and medium sized enterprises, which, of course, make up around 99 per cent of the number of all Australian businesses."¹⁸ (*our emphasis*)

"... the Australian negotiating team did seek extensive exceptions for SMEs in the application of this agreement to our own market, and yet we also sought the coverage of commitments

¹³Ibid, 6- The framework does concede that "Some goods procurement is exempt, such as health and welfare services, education services, and motor vehicles.

¹⁴ For example: the Australia's Commonwealth Procurement Rules; [Encouraging Competition | Department of Finance](#)

¹⁵ For example see World Trade Organization: ACCESSION OF AUSTRALIA TO THE AGREEMENT ON GOVERNMENT PROCUREMENT Decision of the Committee of 17 October 2018, ANNEX 7 GENERAL NOTES, 17 [Microsoft Word - GPA-CD-1 - Committees Decision on Australias Accession.docx \(dfat.gov.au\)](#)

¹⁶ Commonwealth procurement procedures, 9, Committee Hansard, 28 April 2014, p. 1

¹⁷ Ibid

¹⁸ MINA, Mr George, First Assistant Secretary, Office of Trade Negotiations, Department of Foreign Affairs and Trade, Official Committee Hansard JOINT STANDING COMMITTEE ON TREATIES Defence Support - France; WTO Government Procurement; Prisoner Transfer - UAE MONDAY, 11 FEBRUARY 2019 CANBERRA, 7 [Joint Standing Committee on Treaties 2019 02 11 6902 Official.pdf;fileType=application/pdf \(aph.gov.au\)](#)

by other markets for SMEs to participate in their contracts, and we were successful on both counts. We were able to preserve policy flexibility for Australia for small and medium-sized enterprises at Commonwealth and state and territory levels and we were able to secure in large part the coverage of the commitments made by the other 47 parties to the agreement, so we're both able to preserve the policy flexibility at home and also able to access the procurement markets of others for SMEs."¹⁹

The NSW Government interprets this SME "carve out" narrowly: "The Small and Medium Enterprises Policy Framework maximises opportunities for SMEs to gain government business, have greater access to government procurement opportunities, and deal more easily with government"²⁰

A similar small footprint approach from the Commonwealth was commented on by Dr Seddon in 2014: "[T]hey say that government agencies, when making purchasing decisions, must not discriminate against SMEs. That does not answer the question: can they discriminate in favour of SMEs—that is, give them a bit of a boost?"²¹

In Australia, an SME is defined as having two hundred or fewer employees. Already this accounts for about 80% of employment in the economy.²² DFAT even point out that 'SMEs' is undefined in Australia's commitment to members companies on accession to the, which provides us with further flexibility in how we categorise SMEs and the application of the exception".²³

Given preferencing locally clearly benefits local SME's the barriers the development of a proper weighting system of local economic benefit are not offended by Australia's international obligations. The procurement advice from the Australian Capital Territory's (ACT's) Government supplies examples of several types of procurements that are specifically excluded from coverage under trade agreements including procurements that involve any form of preference to benefit small and medium enterprises.²⁴

(h) procurement best practice to encourage ethical conduct and promote social development in other jurisdictions, both nationally and internationally

CFMEU Manufacturing Comment

Domestic examples on encouraging ethical conduct in labour relations which CFMEU Manufacturing commends to committee to analyze include the ACT's Secure Local Jobs Code which strengthens procurement practices, so contracts are only awarded to businesses that meet the highest ethical and labour standards.²⁵

¹⁹Report 185 Defence Support-France; WTO Government Procurement; Prisoner Transfers-UAE Joint Standing Committee on Treaties, 20- Mr Mina, DFAT, Committee Hansard, Canberra, 11 February 2019, p. 8 [Report185.pdf;fileType=application/pdf \(aph.gov.au\)](#)

²⁰ NSW PROCUREMENT POLICY FRAMEWORK FOR NSW GOVERNMENT, p 12.

²¹ Commonwealth procurement procedures, 9, Committee Hansard, 28 April 2014, p. 1

²² See: In the National interest, I 23

²³ National Interest Analysis [2018] ATNIA 15 with attachment on consultation Revised Agreement on Government Procurement (Annex to the Protocol Amending the Agreement on Government Procurement, adopted on 30 March 2012 (GPA/113)) [2018] ATNIF 34, 9, footnote 4: [WTO GPA Print Pack.pdf \(dfat.gov.au\)](#)

²⁴AUSTRALIAN FREE TRADE AGREEMENTS PROCUREMENT FACTSHEET: PFW-04-20220, 7 [Australian-Free-Trade-Agreements-Factsheet.pdf](#)

²⁵See: [Secure local jobs - Procurement ACT](#)

Consideration of the benefits obtained from local procurement need to be given adequate weighting in evaluation criteria. This approach is already undertaken by States and Territories through different approaches and methodologies.

For example, the Queensland Government has introduced a 'local benefits test' where a weighting of up to 30% will be applied for all significant projects; the South Australian Government has an 'Employment Contribution Test' where a weighting of 15-20% may be applied; the Northern Territory Government stipulates all tenders must include a minimum 30% weighting criteria for local content; and the Victorian Government's Local Industry Development Plan mandates an outline of commitment to 'local content' where procuring agencies must include a 10% weighting for local content.²⁶

In Victoria for strategic projects, government specifications can also include requirements to use 100% Australian fabricated steel (or other percentage) and indeed there is the policy flexibility to specify other products' local content including, explicit PPE and Textile Clothing and Footwear products. In addition, in Victoria, all consultants including but not limited to architects, designers, engineers, and other advisers must preference solutions that maximise the use of local materials, finishes, products, goods, and services including fittings, fixtures, and equipment wherever possible.²⁷

²⁶ In The National Interest, 23

²⁷ See: [Local Jobs First - Local Jobs First](#)