Report 185

Defence Support-France; WTO Government Procurement; Prisoner Transfers-UAE

Joint Standing Committee on Treaties
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Committee Secretariat

Ms Julia Morris, Committee Secretary

Dr Narelle McGlusky, Inquiry Secretary

Mr Kevin Bodel, Senior Researcher

Ms Cathy Rouland, Office Manager
Terms of Reference

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

- matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
  - either House of the Parliament, or
  - a Minister; and
  - such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.
Executive summary

This Report contains the Committee’s review of three treaty actions:

- World Trade Organization (WTO) Revised Agreement on Government Procurement (Annex to the Protocol Amending the Agreement on Government Procurement, adopted on 30 March 2012 (GPA/113)); and

The purpose of the Agreement between the Government of Australia and the Government of the French Republic regarding the Provision of Mutual Logistics Support between the Australian Defence Force and the French Armed Forces is to establish basic terms, conditions and procedures for the mutual provision of logistic supplies and services to the military forces of Australia and France. French law requires a treaty-level agreement in order for such support to occur. The Agreement will enable the Australian and French defence forces to provide each other with logistic services in return for either a cash payment or the reciprocal provision of logistic supplies and services of equal value.

The Revised Agreement on Government Procurement enables Australia to accede to the WTO Agreement on Government Procurement (GPA) on the terms agreed between Australia and the Parties to the GPA, as set out in the Decision of the Committee on Government Procurement. The Agreement will provide legally binding rules for market access for Australian goods, service and construction suppliers to access the government procurement markets of GPA Parties. Australia has negotiated a range of exceptions including for small and medium enterprises and Indigenous businesses.
The Treaty between the Government of Australia and the Government of the United Arab Emirates concerning Transfer of Sentenced Persons allows Australian nationals imprisoned in the United Arab Emirates (UAE) and UAE nationals imprisoned in Australia to apply to serve the remainder of their sentences in their home countries. The Agreement completes a suite of bilateral crime cooperation treaties between the two countries. Transfer applications are initiated by the prisoners themselves. However, both governments determine a prisoner’s eligibility for transfer and the appropriate terms of sentence enforcement prior to a prisoner’s transfer.

The Committee has recommended that all three treaty actions be ratified.

The Report also contains the Committee’s review of the following four minor treaty actions:

- Transposition of Annex 2 (Product Specific Rules) of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area;
- 2018 Amendment to Annexes I and II of the International Convention against Doping in Sport;
- 2018 Amendments to the Annex to the International Convention for the Control and Management of Ships’ Ballast Water and Sediments; and
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List of Recommendations

Recommendation 1


Recommendation 2

3.56  The Committee supports the World Trade Organization Revised Agreement on Government Procurement (Annex to the Protocol Amending the Agreement on Government Procurement, adopted on 30 March 2012 (GPA/113)) and recommends that binding treaty action be taken.

Recommendation 3

4.40  The Committee supports the Treaty between the Government of Australia and the Government of the United Arab Emirates concerning Transfer of Sentenced Persons and recommends that binding treaty action be taken.
# Abbreviations

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<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>AANZFTA</td>
<td>Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area</td>
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<td>AFTINET</td>
<td>Australian Fair Trade and Investment Network</td>
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<td>BWMS Code</td>
<td>Code for Approval of Ballast Water Management Systems</td>
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<td>CIA</td>
<td>Central Intelligence Agency</td>
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<td>CPRs</td>
<td>Commonwealth Procurement Rules</td>
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<td>Committee on Trade in Goods</td>
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<td>DFAT</td>
<td>Department of Foreign Affairs and Trade</td>
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<td>ECA</td>
<td>Emission control Areas</td>
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<td>ECA</td>
<td>Export Council of Australia</td>
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<td>EEDI</td>
<td>Energy Efficiency Design Index</td>
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<td>EU</td>
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<td>FCC</td>
<td>Federal Circuit Court</td>
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<td>FJC</td>
<td>AANZFTA FTA Joint Committee</td>
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<td>FTAs</td>
<td>Free Trade Agreements</td>
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<td>GPA</td>
<td>Agreement on Government Procurement</td>
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<td>HS</td>
<td>World Customs Organization’s Harmonized Commodity Description and Coding System</td>
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<td>IMO</td>
<td>International Maritime Organisation</td>
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<td>ISTUE</td>
<td>International Standard for Therapeutic Use Exemptions</td>
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<td>ITP Act</td>
<td>International Transfer of Prisoners Act 1997 (Cth)</td>
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<td>Term</td>
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<td>MARPOL</td>
<td><em>International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto</em></td>
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<td>National Interest Analysis</td>
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<td>NOx</td>
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<td>SC-ROO</td>
<td>Sub-Committee on Rules of Origin</td>
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<td>SMEs</td>
<td>small and medium enterprises</td>
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<td>SOP</td>
<td>Standard Operating Procedure</td>
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<td>TPP-11</td>
<td><em>Comprehensive and Progressive Agreement for Trans-Pacific Partnership</em></td>
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<td>UAE</td>
<td>United Arab Emirates</td>
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<td>UNESCO</td>
<td>United Nations Education, Scientific and Cultural Organisation</td>
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<td>WADA</td>
<td>World Anti-Doping Agency</td>
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<td>WGEA</td>
<td>Workplace Gender Equality Agency</td>
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<td>WTO</td>
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1. Introduction

1.1 This report contains the Joint Standing Committee on Treaties’ review of the following treaty actions:

- Agreement between the Government of Australia and the Government of the French Republic regarding the Provision of Mutual Logistics Support between the Australian Defence Force and the French Armed Forces (Sydney, 2 May 2018);
- Revised Agreement on Government Procurement (Annex to the Protocol Amending the Agreement on Government Procurement, adopted on 30 March 2012 (GPA/113)); and

1.2 The Committee’s resolution of appointment empowers it to inquire into any treaty to which Australia has become a signatory, on the treaty being tabled in Parliament.

1.3 The treaties, and matters arising from them, are evaluated to ensure that ratification is in the national interest, and that unintended or negative effects on Australia will not arise.

1.4 Prior to tabling, major treaty actions are subject to a National Interest Analysis (NIA), prepared by Government. This document considers arguments for and against the treaty, outlines the treaty obligations and any regulatory or financial implications, and reports the results of consultations undertaken with State and Territory Governments, Federal and State and Territory agencies, and with industry or non-government organisations.

1.5 A Regulation Impact Statement (RIS) may accompany the NIA. The RIS provides an account of the regulatory impact of the treaty action where
adoption of the treaty will involve a change in the regulatory environment for Australian business. None of the treaty actions examined in this report required a RIS.

1.6 The Committee takes account of these documents in its examination of the treaty text, in addition to other evidence taken during the inquiry program.

1.7 Copies of the treaties considered in this report and the associated documentation may be obtained from the Committee Secretariat or accessed through the Committee’s website at:

- https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/WTOGovernmentProcurement; and

1.8 This report also contains the Committee’s views on four minor treaty actions:

- Transposition of Annex 2 (Product Specific Rules) of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area;
- 2018 Amendment to Annexes I and II of the International Convention against Doping in Sport;
- 2018 Amendments to the Annex to the International Convention for the Control and Management of Ships’ Ballast Water and Sediments; and

Conduct of the Committee’s review

1.9 The treaty actions reviewed in this report were advertised on the Committee’s website from the date of tabling. Submissions for the treaty actions were requested by 1 February 2019. One submission was received for the inquiry into Defence Support-France, two for the inquiry into Prisoner Transfers-UAE, and five for the inquiry into WTO Government Procurement.

1.10 The Committee held public hearings into the treaty actions in Canberra on 11 February 2019. The transcripts of evidence from the public hearings may be obtained from the Committee Secretariat or accessed through the Committee’s website as listed above.
1.11 A list of submissions received for the inquiries is at Appendix A. A list of witnesses who appeared at the public hearings is at Appendix B.
2. Defence Support-France


2.1 The purpose of the Agreement between the Government of Australia and the Government of the French Republic regarding the Provision of Mutual Logistics Support between the Australian Defence Force and the French Armed Forces (the proposed Agreement) is to establish basic terms, conditions and procedures for the mutual provision of logistic supplies and services to the military forces of Australia and France.¹

2.2 The proposed Agreement is necessary because:

…French law requires a treaty-level agreement whereas other countries have a different legal system and we have not necessarily needed to establish such a treaty.²


² Major General David Mulhall, Commander, Joint Logistics, Capabilities Joint Logistics Command, Department of Defence, Committee Hansard, Canberra, 11 February 2019, p. 2.
2.3 According to the National Interest Assessment (NIA), the proposed Agreement ‘aligns with’ Australia’s other military logistics support agreements.\(^3\)

**Scope**

2.4 The proposed Agreement enables one Party to provide logistic services in return for either a cash payment or the reciprocal provision of logistic supplies and services of equal value to the other Party.\(^4\)

2.5 The proposed Agreement applies to:

... the reciprocal provision of logistics supplies and services between Australian and French defence forces during combined exercises and training, operational deployments or other cooperative efforts such as peacekeeping operations, humanitarian and disaster relief operations and communication coordination of routine activities such as ship and aircraft visits.\(^5\)

2.6 The proposed Agreement defines logistic support as:

- food;
- water;
- billeting;
- transportation of personnel and equipment;
- petroleum, oils and lubricants;
- communication services;
- medical services;
- base operations support;
- storage services;
- temporary use of facilities;
- training services;
- common spare parts; and
- airport and sea port services.\(^6\)

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\(^3\) NIA, para 8.

\(^4\) NIA, para 4.


2.7 The proposed Agreement explicitly excludes the exchange of weapons systems, major end items of equipment, missiles or guided weapons and the transfer by either Party of any items which would be prohibited by the national laws and regulations of Australia or France.7

2.8 The proposed Agreement also obliges each Party to provide logistic services in accordance with international laws.8

2.9 According to the Department of Defence:

The benefit of having a standard agreement is to streamline the routine processes between us that otherwise would be dealt with on a case-by-case basis, with logistics arrangements needing to be developed for exchange of support for each exercise and activity.9

2.10 The proposed Agreement is explicitly limited to providing logistical assistance in ‘cooperative’ situations.10

2.11 A Party can only request logistics support if the Party is unable to obtain that support through its own military channels or from local resources.11

How the proposed Agreement works

2.12 The NIA states:

Emphasising the principle of reciprocity and mutual consent, the proposed Agreement provides that each Party make its best efforts under the terms of the proposed Agreement, and consistent with national priorities, to satisfy requests from the other for logistic supplies and services …12

2.13 The proposed Agreement does not bind either Party to consent to each request:

… If a request is made and we feel that our own needs would be degraded by satisfying a French request, then we are able to not proceed with their request.

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7 NIA, para 7.
8 NIA, para 7.
9 Major General Mulhall, Department of Defence, Committee Hansard, Canberra, 11 February 2019, p. 2.
10 The proposed Agreement, Article 2.
11 NIA, para 12.
12 NIA, para 13.
Similarly, if a request is made which is counter to our own national policy or international obligations, we can likewise reject such a request.\textsuperscript{13}

2.14 The proposed Agreement contains two mechanisms under which logistics support can be provided: Standard Operating Procedure (SOP) or Written Supplementary Arrangements.\textsuperscript{14}

2.15 SOP can be negotiated on Australia’s part by the Headquarters Joint Operations Command, Fleet Forces Command, Air, and Special Operations Headquarters, the Service Headquarters and Joint Logistics Command.\textsuperscript{15}

2.16 On France’s part, SOP can be negotiated by the Joint Defence Staff, or by the Armed Forces in New Caledonia.\textsuperscript{16}

2.17 Written Supplementary Arrangements may be negotiated on Australia’s part by Headquarters Joint Operations Command, Fleet Forces Command, Air, and Special Operations Headquarters, the Service Headquarters and Joint Logistics Command.\textsuperscript{17}

2.18 For France, Written Supplementary Arrangements can be negotiated by the Joint Defence Staff.\textsuperscript{18}

**Financial Arrangements**

2.19 The proposed Agreement states that the price of equipment and services provided under the Agreement are determined by the supplying party in accordance with the prices applicable to its own forces at the time of supply.\textsuperscript{19}

2.20 The method of payment (as discussed earlier, either in cash, by exchange in kind, or by exchange of equal value) is determined through mutual agreement.\textsuperscript{20}

\textsuperscript{13} Major General Mulhall, Department of Defence, *Committee Hansard*, Canberra, 11 February 2019, p. 4.

\textsuperscript{14} The proposed Agreement, Article 4.

\textsuperscript{15} The proposed Agreement, Article 4.

\textsuperscript{16} The proposed Agreement, Article 4.

\textsuperscript{17} The proposed Agreement, Article 4.

\textsuperscript{18} The proposed Agreement, Article 4.

\textsuperscript{19} The proposed Agreement, Article 4.

\textsuperscript{20} The proposed Agreement, Article 5.
2.21 In the event of a cash reimbursement, the supplying Party will provide an invoice and supporting documentation. The requesting Party must then settle the account within 60 days of the receipt of the invoice. If payment is not made within 60 days, a penalty fee for late payment will be applied.\(^{21}\)

2.22 A requesting Party can make a payment in kind for logistics support from the requested Party. Payment in kind involves identical or substantially the same logistics support provided by the requested Party.\(^{22}\)

2.23 The requesting Party must provide this exchange in kind within 90 days of the original transaction. If this requirement is not met, then the method of payment reverts to a cash reimbursement.\(^{23}\)

2.24 In the event that logistics support is provided on the basis of equal value exchange, then the requesting Party must provide logistics support to the monetary value of the support provided by the requested Party within 90 days. Failure to do so will result in the method of payment reverting to a cash payment.\(^{24}\)

2.25 The proposed Agreement also permits the loan of equipment between the Parties with rental fees negotiated by mutual agreement.\(^{25}\)

Other arrangements

2.26 The proposed Agreement sets out procedures to be observed in the event of claims related to injuries, deaths or damage or destruction of equipment.\(^{26}\)

2.27 Claims for events that occur in the jurisdiction of either of the Parties are covered by provisions in the Agreement between the Government of Australia and the Government of the French Republic regarding Defence Cooperation and Status of Forces.\(^{27}\)

2.28 Where claims relate to events outside the jurisdiction of each Party, the following will apply:

\(^{21}\) The proposed Agreement, Article 5.
\(^{22}\) The proposed Agreement, Article 5.
\(^{23}\) The proposed Agreement, Article 5.
\(^{24}\) The proposed Agreement, Article 5.
\(^{25}\) The proposed Agreement, Article 5.
\(^{26}\) The proposed Agreement, Article 7.
\(^{27}\) The proposed Agreement, Article 7.
each Party will waive claims against the other Party where those claims are the result of actions in the performance of official duties under the proposed Agreement;

- each Party is responsible for settling third party claims in relation to actions undertaken by its own personnel in the performance of official duties under the proposed Agreement; and

- in relation to claims of gross negligence or wilful misconduct, the Party to whom the relevant personnel belong will be responsible.\(^\text{28}\)

2.29 No legislative change will be required to implement the proposed Agreement.\(^\text{29}\)

**New Caledonia**

2.30 The NIA states:

The proposed Agreement also provides the basis for mutual logistical support between the Australian Defence Force and the French Armed Forces New Caledonia.\(^\text{30}\)

2.31 The French Constitution defines New Caledonia as fully part of France. The people of New Caledonia are full French citizens and elect representatives to the French Senate and French National Assembly.\(^\text{31}\)

2.32 In accordance with these constitutional arrangements, New Caledonia has no separate defence force. Defence forces located in New Caledonia are French and under the command of the French Joint Defence Staff in France.\(^\text{32}\)

2.33 The Department of Defence pointed out that ‘[t]here is no legal distinction between the references to [New Caledonia] and France.’\(^\text{33}\)

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\(^\text{28}\) The proposed Agreement, Article 7.

\(^\text{29}\) NIA, para 24.

\(^\text{30}\) NIA, para 6.


\(^\text{33}\) Commodore Peter Bowers, Director-General, Australian Defence Force Legal Services, Department of Defence, *Committee Hansard*, Canberra, 11 February 2019, p. 4.
2.34 Including New Caledonia in the proposed Agreement is unusual because the Agreement does not place any geographic limitations on where logistic support can be provided.

2.35 In other words, it is not necessary for the proposed Agreement to specifically identify New Caledonia.

2.36 The Department of Defence argued that the specific inclusion of New Caledonia was ‘a matter of focus of attention,’ and:

[The French] have robust capability, particularly in New Caledonia. Over recent years, particularly around humanitarian assistance and disaster relief activities, we’ve been working more and more in partnership with the French forces in New Caledonia.\(^{34}\)

2.37 New Caledonia is currently going through a process to determine whether it will become an independent nation. A referendum on independence took place in November 2018, at which the population voted to remain part of France. Further referenda are likely to be conducted in 2020 and 2022. The referendum process has largely been peaceful.\(^{35}\)

2.38 However, an independence movement in the 1980s resulted in a number of deaths and some civil unrest. France declared a state of emergency in New Caledonia for six months in 1985 as a result of the civil unrest.\(^{36}\)

2.39 Neighbouring Pacific Island nations support the independence movement in New Caledonia through the Melanesian Spearhead Group.\(^{37}\)

2.40 In relation to whether Australia would provide logistical assistance to France in relation to civil unrest in New Caledonia, the Department of Defence noted:

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\(^{34}\) Major General Mulhall, Department of Defence, *Committee Hansard*, Canberra, 11 February 2019, p. 3.


Should France make a request for Australian involvement, then that would be a policy decision made by the government of the day. Certainly this agreement would not oblige us to either assist within that activity or necessarily support that activity.\textsuperscript{38}

2.41 Civil unrest in New Caledonia appears unlikely. However, this is a sensitive time for New Caledonia and its Pacific Island neighbours. Referencing New Caledonia in the proposed Agreement at this time, and when the reference is unnecessary, may be misconstrued by Pacific Island nations.

2.42 In relation to whether Pacific Island nations have been appraised of the proposed Agreement, the Department of Foreign Affairs and Trade (DFAT) advised the Committee that it was:

\ldots not aware of any \ldots conversations that have happened with other Pacific nations in relation to this particular agreement.\textsuperscript{39}

**Conclusion**

2.43 The Committee suggests that it might be in Australia’s interests to advise Pacific Island nations of the proposed Agreement and its specific reference to New Caledonia in advance of the proposed Agreement coming into force.

2.44 With that exception, the Committee believes the proposed Agreement is in Australia’s interest and recommends that binding treaty action be taken.

**Recommendation 1**


\textsuperscript{38} Major General Mulhall, Department of Defence, *Committee Hansard*, Canberra, 11 February 2019, p. 4.

\textsuperscript{39} Mr Jarrod Howard, Assistant Secretary, Global Interests, International Policy Division, Department of Defence, *Committee Hansard*, Canberra, 11 February 2019, p. 4.
3. WTO Government Procurement

*Revised Agreement on Government Procurement*

3.1 This Chapter reviews the World Trade Organization (WTO) *Revised Agreement on Government Procurement* (Annex to the Protocol Amending the Agreement on Government Procurement, adopted on 30 March 2012 (GPA/113)) (the Agreement). The treaty action was tabled in the Parliament on 29 November 2018.

3.2 The Agreement will enable Australia to accede to the GPA on the terms agreed between Australia and the Parties to the GPA, as set out in the Decision of the Committee on Government Procurement of 17 October 2018 (GPA/CD/1), including its attachments (the Decision of the Committee).

**Overview**

3.3 According to the National Interest Analysis (NIA), Australia’s accession to the GPA will provide legally binding rules for market access for Australian goods, service and construction suppliers to access the government procurement markets of GPA Parties. The WTO estimates GPA Parties’ procurement markets to be worth over US$1.7 trillion annually. The GPA was revised in 2014, expanding the market access opportunities under the agreement by around an additional US$80 billion to US$100 billion annually.

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according to the WTO. The 2014 revision also brought changes that aligned the GPA more closely with Australian practices.²

3.4 The Committee noted that Australia has been an observer government for the WTO GPA since 1996 and queried why Australia has not joined the Agreement sooner. The Department of Foreign Affairs and Trade (DFAT) explained that the revision and expansion of the GPA in 2014 provided an opportunity for Australia to join the Agreement.³

3.5 DFAT also identified concerns that, originally, Australia would not meet the provisions of the Agreement in relation to judicial review.⁴ The necessary changes to address these concerns were incorporated into legislation introduced in 2018 to facilitate the implementation of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11). That legislation, the Government Procurement (Judicial Review) Act (Judicial Review Act), came into effect in October 2018.⁵

3.6 The Judicial Review Act was designed to meet the requirements of the TPP-11 but also fulfilled the requirements for the GPA. DFAT detailed the obligations that the Judicial Review Act addressed:

There were limitations on the access that we provided to suppliers to our judicial system, in our judgement, and we have now extended and made very clear and very accessible how a judicial review will operate with the Government Procurement Agreement … The main change that Australia’s made is a minor change … we have designated the Federal Circuit Court, which has a strong presence in regional Australia and which has a continuing presence in all states and territories, as the first point of contact should there be a requirement for judicial review of government procurement decisions.⁶

3.7 Asked to clarify why these changes were necessary to Australia’s judicial review processes and to whom the provisions would apply, DFAT told the Committee the changes applied to any supplier, both international and domestic, and would improve transparency and accessibility:

² NIA, para 3.
³ Mr George Mina, First Assistant Secretary, Office of Trade Negotiations, Department of Foreign Affairs and Trade (DFAT), Committee Hansard, Canberra, 11 February 2019, p. 11.
⁴ Mr Mina, DFAT, Committee Hansard, Canberra, 11 February 2019, p. 10.
⁵ Mr Nicholas Hunt, First Assistant Secretary, Procurement and Insurance Division, Department of Finance, Committee Hansard, Canberra, 11 February 2019, p. 10.
⁶ Mr Mina, DFAT, Committee Hansard, Canberra, 11 February 2019, p. 10.
... there was always the potential for suppliers ... to take action through the court system against a Commonwealth procurement process, but there wasn’t a lot of transparency or clarity about that process in terms of how it could be undertaken and the kinds of criteria that could be considered.

The Judicial Review Act empowers the Federal Circuit Court to hear appeals against processes, and it very clearly specifies the criteria that can be considered. The FCC is present in every state, territory and a range of rural and regional areas, and it has quite a low barrier to access, which is a benefit to [rural small and medium enterprises (SMEs)] ... The bill is about appealing departures from the Commonwealth Procurement Rules, specifically division 2 of the Commonwealth Procurement Rules, which relates most closely to our overseas obligations.7

3.8 There are currently 47 Parties to the GPA. The NIA suggests that accession may open new opportunities in the European Union (EU), Canada, European Free Trade Association states, Ukraine, New Zealand and Chinese Taipei. Australia does not currently have legally binding rules for procurement access to these countries. The NIA maintains that the GPA would also provide greater security and certainty for Australian firms against future protectionist measures introduced by GPA Parties.8

3.9 The NIA notes that, in some instances, the GPA improves on Australia’s government procurement outcomes from existing Free Trade Agreements (FTAs). For example, it broadens access under the Australia-United States FTA by including access to additional US states.9

3.10 Further, the NIA notes that nine additional WTO members are seeking to accede to the GPA, including some with large government procurement markets that Australia does not currently have relevant agreements with, including China and Russia.10

3.11 DFAT was asked if it could quantify the benefits and risks for Australian businesses. The Department explained that there is no consistent set of data that provides an indication of the success of Australian businesses tendering in the international procurement market. However, the Department is aware of instances where Australian businesses have been barred from the market in WTO member countries:

7 Mr Hunt, Department of Finance, Committee Hansard, Canberra, 11 February 2019, pp. 10–11.
8 NIA, para 4.
9 NIA, para 5.
10 NIA, para 11.
For instance, in respect of some agreements in countries like Italy, in a couple of instances Australian firms were successful in securing contracts and then had their contracts overturned because Australia was not a member of the GPA. In Finland in 2015 the international project consulting firm, again, was unable to tender because Australia was not a member of the GPA. Most recently, we’ve got an example from Cyprus, where a South Australian firm was clearly extremely competitive in respect of a desalination and water treatment project but was kept out of that project because Australia was not a member of the GPA.11

3.12 Asked for an estimate of the value of the business lost in these circumstances, DFAT reiterated the lack of data but provided the following example:

The two instances where Australian firms were shut out of the Italian procurement market—in 2008 and then again in 2010—involved contracts of the order of $41 million in the first instance and a very significant contract in the second instance, where the Italian firm with which the Australian firm was associated in consortium had raised 100 million euros to tender for the contract.12

3.13 The NIA suggests that accession to the GPA reinforces Australia’s support for the multilateral trading system and the importance of trade rules. Australia’s accession to the GPA is considered to demonstrate the commercially meaningful outcomes that the multilateral system can provide for Australian exporters.13

3.14 The NIA maintains that Australia’s accession to the GPA will ensure Australian firms are not at a competitive disadvantage relative to firms of GPA Parties. It also suggests that Australia may have a greater opportunity to influence the terms of new GPA Parties’ accession in line with the country’s national interest.14

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11 Mr Mina, DFAT, Committee Hansard, Canberra, 11 February 2019, p. 7.
12 Mr Mina, DFAT, Committee Hansard, Canberra, 11 February 2019, p. 8.
13 NIA, para 10.
14 NIA, para 12.
Consultation

3.15 The NIA claims that the consultation process showed strong support within the business community for Australia’s accession to the GPA.\footnote{NIA, para 7.}

3.16 Public consultation and stakeholder engagement on Australia’s accession to the GPA commenced with a call for public submissions in 2014.\footnote{NIA, attachment on consultation, para 43.} DFAT met with peak bodies and industry stakeholders and held a public consultation process that included consultation events, stakeholder meetings, and phone calls.\footnote{NIA, attachment on consultation, para 44.}

3.17 State and territory governments were consulted and all states and territories provided written support for Australia’s accession to the GPA.\footnote{NIA, attachment on consultation, para 45.} The Committee queried how possible anomalies between Commonwealth obligations and those of the states and territories would be reconciled. DFAT assured the Committee that the Department is working with states and territories to resolve any differences:

The manner in which we would incorporate state and territory government commitments—and we have been talking to the state and territory governments about this—is through discussions with the premiers and chief ministers. The Australian minister for trade has been keeping them fully apprised of the developments with the negotiations, and they have been confirming to us their intentions both to accede to the agreement and to bring their procurement practices into compliance with the agreement.\footnote{Mr Mina, DFAT, Committee Hansard, Canberra, 11 February 2019, p. 11.}

3.18 According to the NIA, civil society and industry groups provided the majority of GPA accession submissions, with peak bodies, industry associations and services institutes broadly supportive of Australia’s accession to the GPA.\footnote{NIA, attachment on consultation, para 47.}

3.19 The NIA notes that a concern raised by civil society stakeholders was the need to retain current exemptions in Australia’s existing government procurement system. This concern was also raised by submitters to the Committee and is discussed further in paragraph 3.33 below. The NIA
claims that Australia’s final offer maintains existing exceptions, particularly for SMEs, defence, health and Indigenous procurement.\textsuperscript{21}

3.20 The NIA states that stakeholder engagement will continue after the formal accession to raise awareness of the GPA.\textsuperscript{22}

\textbf{Reasons for Australia to take the treaty action}

\textit{Market access}

3.21 The following summary, from the NIA, shows possible new opportunities for Australian businesses to bid for government procurement services in countries with which Australia does not have existing FTA government procurement commitments. (The NIA contains further details of the countries for each section at paragraph 8.):

- accounting, auditing and taxation services;
- management consulting services;
- computer and related services;
- architectural engineering and other technical services;
- telecommunication and related services;
- environmental protection services;
- education services;
- financial services;
- insurance and banking and investment services;
- advertising services;
- health and social services; and
- construction services.\textsuperscript{23}

3.22 Other areas listed in the NIA include:

- construction and highway maintenance equipment;
- mining equipment and technology;
- agricultural machinery and equipment;
- water purification and sewage treatment equipment;
- environmental goods; and
- health and pharmaceutical supplies.\textsuperscript{24}

\textsuperscript{21} NIA, attachment on consultation, para 48.

\textsuperscript{22} NIA, attachment on consultation, para 50.

\textsuperscript{23} NIA, para 8.

\textsuperscript{24} NIA, para 9.
Exceptions to provide policy flexibility

3.23 According to the NIA the GPA includes a range of exceptions to provide policy flexibility, including:

- exceptions ensuring governments are not prevented from taking actions considered necessary for the protection of essential security interests in relation to certain procurements, or from imposing measures necessary to address public policy objectives;
- general exceptions according to which Parties are not prevented from taking measures necessary to protect public morals, order or safety; human, animal or plant life or health; the protection of intellectual property; or relating to goods or services provided by persons with disabilities, philanthropic institutions or prison labour (Article III);
- specific conditions under which Parties can apply technical specifications to promote and conserve natural resources or protect the environment (Article X:6); and
- exceptions relating to the following procurements: land and immovable property, non-contractual agreements, fiscal agency or depositary services, public employment contracts, international aid, and procurements related to troop stationing and international organisations (Article II:3).  

3.24 The NIA notes also that the GPA provides access to the legally-binding WTO dispute settlement mechanism for disputes brought by GPA Parties.  

3.25 The NIA indicates that Australia has negotiated specific exceptions from coverage in its offer, consistent with Australia’s existing FTAs. The NIA lists the following examples of Australia's exceptions:

- any form of preference to benefit small and medium enterprises (SMEs);
- measures for the health and welfare of Indigenous people;
- measures for the economic and social advancement of Indigenous people;
- protection of essential security, such as Defence materiel procurement, or defence services relating to support of military forces overseas or military systems and equipment;
- health and welfare services;
- plasma fractionation services;

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25 NIA, para 15.
26 NIA, para 16.
- government advertising services; and
- blood and blood-related products, including plasma derived products.\(^{27}\)

3.26 In addition, the NIA notes that there are also exceptions within Australia’s offer for states and territories. Each state and territory government has nominated exceptions which are included in the terms of Australia’s accession to allow them to address specific sensitivities and largely continue with existing procurement arrangements. This includes motor vehicle exceptions for South Australia, Victoria, New South Wales and the Australian Capital Territory.\(^{28}\)

**Exceptions for small and medium enterprises**

3.27 Although these exceptions were welcomed by submitters, there was general concern regarding their practical implementation, particularly with regard to SMEs. Asked to clarify the exemptions for SMEs, DFAT confirmed that Australia had sought and obtained extensive exceptions for these entities:

> … 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 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.\(^{29}\)

3.28 In practical terms, the Department of Finance explained that the Commonwealth Procurement Rules (CPRs) ensure that businesses cannot be discriminated against on the basis of size and ‘require agencies to consider the cost the potential suppliers will incur when they are participating in procurement processes’.\(^{30}\) Additionally the CPRs require consideration of a range of factors in the context of value for money which support SMEs including:

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27 NIA, paragraphs 17 and 18.
28 NIA, para 18.
30 Mr Hunt, Department of Finance, *Committee Hansard*, Canberra, 11 February 2019, p. 9.
… the benefits of doing business with competitive SMEs; barriers to entry … SME capabilities and their commitment to local and regional markets; and the potential benefits of having a larger, more competitive supplier base.  

3.29 The Department of Finance also drew attention to the targets set in the CPRs to secure ‘at least 10 per cent by value of contracts each year from SMEs’. Finance advised that in the next version of the CPRs ‘that target will be supplemented by an additional target of purchasing at least 35 per cent by value of contracts under the value of $20 million’. This change is expected to provide a ‘clearer picture of how SMEs are competing in the part of the procurement market’ in which such businesses are expected to be most competitive.

3.30 Further support for SMEs is expected to come from the introduction of a requirement for agencies to assess economic benefit when considering tenders:

… in March 2017, there was a new requirement included in the CPRs and that was for contracts over the value of $4 million and construction contracts over the value of $7.5 million to include an assessment of the economic benefit of the proposal, and that economic benefit is then considered as part of the value-for-money assessment in determining the awarding of that contract.

3.31 Asked if a greater economic multiplier was applied for SMEs in rural and regional areas when considering economic benefit, Finance said that such considerations were at the discretion of the agency involved:

We provide some guidance, so we leave it up to agencies to determine how best to measure that. But the guidance that we provide to help them to frame and do that economic benefit assessment does provide a range of examples of the kind of economic benefit that might be cited by suppliers and might be considered. Some of those examples include the benefit to SMEs, the engagement of local businesses, the transfer of skills and knowledge to local SMEs. So there is a range of criteria directly around local SMEs that can be considered in the context of that.

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31 Mr Hunt, Department of Finance, Committee Hansard, Canberra, 11 February 2019, p. 9.
32 Mr Hunt, Department of Finance, Committee Hansard, Canberra, 11 February 2019, p. 9.
33 Mr Hunt, Department of Finance, Committee Hansard, Canberra, 11 February 2019, p. 9.
34 Mr Hunt, Department of Finance, Committee Hansard, Canberra, 11 February 2019, p. 9.
35 Mr Hunt, Department of Finance, Committee Hansard, Canberra, 11 February 2019, p. 9.
36 Mr Hunt, Department of Finance, Committee Hansard, Canberra, 11 February 2019, p. 9.
3.32 The Export Council of Australia (ECA) stressed the importance of foreign government procurement for Australian businesses but cautioned that government procurement is a complex area and warned that ‘Australian SMEs are largely unaware of their rights under trade agreements’. The ECA acknowledged the work already being done by the Australian Government but urged it to provide more training, advice and support for SMEs seeking to enter the GPA market:

The ECA recommends that the Australian Government do more to raise awareness of these provisions, and educate SMEs about how to use them (including recourse for resolving disputes). This should be coupled with outreach about opportunities for Australian SMEs in major GPA and FTA markets, as well as advice on how to navigate key government procurement systems.

3.33 There is also some concern that the exemption of SMEs may come under pressure from other GPA Parties. In the Terms of Accession of Australia to the GPA, the European Union (EU), Iceland and Switzerland have included a clause which identifies the exemption of SMEs as discriminatory. For example, the EU’s terms include the following clause:

The provisions of Article XVIII shall not apply to suppliers and service providers of Japan, Korea, US and Australia in contesting the award of contracts to a supplier or service provider of Parties other than those mentioned, which are small or medium sized enterprises under the relevant provisions of EU law, until such time as the EU accepts that they no longer operate discriminatory measures in favour of certain domestic small and minority businesses.

3.34 Article XVIII of the GPA provides for access to judicial review in the case of a breach of the Agreement. The Australian Fair Trade and Investment Network (AFTINET) sees this as a threat to Australia’s ability to retain the exemption for SMEs in the future:

This means that Australian SMEs will have access to the European procurement market, but will not have access to the appeals mechanism. The EU reference to ‘discriminatory measures in favour of certain domestic small and minority businesses’ indicates a clear intention of the EU to pursue the

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37 Export Council of Australia (ECA), Submission 4, p. [3].
38 ECA, Submission 4, p. [3].
39 Accession of Australia to the Agreement on Government Procurement, Decision of the Committee of 17 October 2018, Attachment B, Part 1, 2.2.
removal of exemptions for SMEs, and for Aboriginal and Torres Strait Islander businesses.40

Modern Slavery Act and the GPA

3.35 The Committee asked if, under the GPA, the Australian Government would have the ability to prevent modern slavery or labour exploitation within procurement supply chains. DFAT assured the Committee that the policy flexibility built into the Agreement allows the Australian Government to exclude suppliers found to be involved in these practices:

… we have policy flexibility to exclude suppliers on grounds such as final judgements in respect of serious crimes, professional misconduct, integrity of the suppliers, and also unethical practices. This means that there is policy flexibility to ensure that suppliers found to be engaging in modern slavery practices that are criminalised under Australian law can be excluded from procurements. Further, we can take measures necessary to protect public morals, order and safety or measures relating to human health, provided such measures don’t arbitrarily or unjustly discriminate against suppliers from GPA parties.41

3.36 DFAT is also confident that the recently implemented Modern Slavery Act will reinforce the Australian Government’s ability to detect and act on malpractice in supply chains:

… the Modern Slavery Act, which passed parliament late last year, establishes a modern slavery reporting requirement. All large businesses doing business in Australia, including both domestic and foreign businesses with annual revenue over $100 million, and the Commonwealth government will be required to report on modern slavery through their supply chains … there is no direct connection with procurement but there is an indirect link. The Commonwealth Procurement Rules are quite clear on this. They say that entities must not seek to benefit from supply practices that may be dishonest, unethical or unsafe. There can be clarity about what is unethical or dishonest, but this reporting mechanism will help agencies to make judgements about the practices of businesses that are seeking to do business with the Commonwealth.42

3.37 Further, DFAT advised that, in addition to the Modern Slavery Act, Australia has a range of other mechanisms in place to ensure that the corporate

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40 Australian Fair Trade and Investment Network (AFTINET), Submission 3, p. 7.
41 Mr Mina, DFAT, Committee Hansard, Canberra, 11 February 2019, p. 11.
42 Mr Hunt, Department of Finance, Committee Hansard, Canberra, 11 February 2019, p. 12.
conducted by participants in the Australian procurement market meet Australian expectations:

- In 2018 the Government announced a new procurement-connected policy, which will require all businesses tendering for Commonwealth contracts valued over $4 million to provide a satisfactory Statement of Tax Record from the Australian Taxation Office. This policy will take effect from 1 July 2019 and will effectively debar firms with non-compliance tax behaviour. The treasury is presently consulting on the criteria that will be used.

- The Department of Home Affairs controls the import and export of certain goods to and from Australia. These controls prohibit the import or export of certain goods and provide restrictions on other goods.

- The Workplace Gender Equality Agency (WGEA) is responsible for the Workplace Gender Equality Procurement Principles and User Guide, which require Australian Government agencies to obtain a letter from tenderers with 100 or more employees indicating their compliance with their obligations under the Workplace Gender Equality Act 2012. A list of non-compliant employers is published on the WGEA website.

- The Commonwealth operates a devolved procurement framework, with individual Commonwealth agencies responsible for managing procurement processes to meet their business needs, in accordance with CPRs. This framework, and the Resource Management Framework more broadly, ensures the efficient, effective, economical and ethical use of public resources.

- Under the CPRs, procuring officials are able to determine appropriate eligibility criteria for a particular procurement and to request relevant information to assess the suitability of a potential supplier. Agencies are able to request and consider information from tenderers on any convictions and to exclude a potential supplier from consideration on various grounds, including if the supplier’s practices are dishonest, unethical or unsafe.43

### Obligations

3.38 The NIA maintains that the GPA obligations are broadly consistent with obligations contained in Australia’s existing FTA government procurement chapters.44 The following summary of Australia’s obligations under the GPA is taken from the NIA.

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43 Department of Finance, *Submission 5.*

44 NIA, para 23.
3.39 The GPA consists of 22 Articles and associated schedules. The GPA sets high quality standards for government procurement, reflecting the principles of non-discrimination (Article IV:1 and IV:2), transparency and procedural fairness (Article XVI).\textsuperscript{45}

3.40 The GPA requires that Parties treat suppliers from other GPA Parties no less favourably than their own domestic suppliers (known as the national treatment obligation: Article IV:1). Article IV:2 prohibits discrimination against local suppliers just because they are partly foreign owned or use foreign goods and/or services. Articles IX:3 and X:1 further prohibit creating specifications or procedures that create obstacles for foreign suppliers to compete for the contract.\textsuperscript{46}

3.41 The GPA includes obligations to promptly publish any laws, regulations, judicial decisions and other documents that affect covered procurement as well as a range of publication requirements around procurement notices (Article VI).\textsuperscript{47}

3.42 Parties must generally use an open tendering procedure for contracts above a certain threshold to ensure that government procurement is open to all suppliers, unless specified exceptions apply (Articles IX:4 and XII:1). This is already standard practice in Australia but not necessarily in other countries.\textsuperscript{48}

3.43 For open tenders, the GPA:

- encourages all procuring entities to put information on their procurement system (including notices and tender documentation) online and make such information readily accessible to the public (Article VII:1), whilst certain procuring entities are obliged to make tenders available through electronic means (Article VII:1(a));
- encourages procuring entities to publish, as early as possible in the financial year, a notice outlining its future procurement plans (known in Australia as an Annual Procurement Plan) (Article VII:4);
- requires procuring entities to allow suppliers no less than 40 days to submit a tender, although this can be reduced to as low as 25 days if the tender process is conducted solely electronically, and to 10 days in a

\textsuperscript{45} NIA, para 23.

\textsuperscript{46} NIA, para 25.

\textsuperscript{47} NIA, para 26.

\textsuperscript{48} NIA, para 27.
number of circumstances, including if the tender is both conducted electronically and relates to the purchase of commercial goods or services (Article XI:3-8); and
- requires procuring entities to limit any conditions for participation in a procurement to those that are essential to ensure the legal, financial, commercial and technical abilities of suppliers (Article VIII:1).  

3.44 Parties may use selective tendering or limited tendering, but only in specific circumstances outlined in the GPA. Where a Party uses selective tendering, certain procedural rules must be followed, and the system of pre-qualification must not create unnecessary obstacles to the participation of suppliers (Article IX:3–6).  

3.45 A Party may only use limited tendering in a narrow range of circumstances and only if limited tendering is not used to discriminate or avoid competition among suppliers. If a procuring entity uses limited tendering, it must publicly prepare a written report outlining the circumstances and conditions that justified the use of limited tendering (Article XIII).  

3.46 The GPA requires that procuring entities conduct procurement in a manner that avoids conflict of interest and prevents corrupt practices.  

3.47 The GPA provides access to the legally-binding WTO dispute settlement mechanism for disputes brought by GPA Parties (Article XX). Additionally, each party must establish or designate at least one impartial administrative or judicial authority to hear challenges by suppliers in relation to procurements. This review procedure must be timely, non-discriminatory and effective (Article XVIII).  

Implementation

3.48 The NIA states that Commonwealth procurement practices and legislation will be GPA compliant from 1 January 2019, including in light of amendments introduced to implement the TPP-11.  

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49 NIA, para 28.  
50 NIA, para 29.  
51 NIA, para 30.  
52 NIA, para 31.  
53 NIA, para 32.  
54 NIA, para 35.
3.49 The NIA also claims that Australian state and territory governments are currently largely compliant with GPA commitments, with minor changes to procurement rules required for implementation. The NIA reiterates that each state and territory supports Australia’s accession to the GPA, and has indicated that they will take the necessary steps to ensure their procurement policies and procedures comply with the GPA commitments prior to binding treaty action being taken.\textsuperscript{55}

3.50 The NIA notes that some GPA Parties will also amend their GPA Annexes in line with Australia’s offer. These amendments will apply from the date of entry into force of the GPA for Australia.\textsuperscript{56}

3.51 Asked how Australia can be certain that other Parties to the GPA are complying with their obligations, DFAT assured the Committee that it maintains close liaison with Australian businesses to ensure that they are aware of the obligations of foreign governments to allow Australian businesses to participate in procurement markets. The Australian Government will also alert foreign partners if Australia is concerned that partners are not fulfilling their obligations under the GPA. This process could include Australia’s participation in the WTO Committee on Government Procurement (GPA Committee). DFAT reiterated that the WTO GPA dispute settlement mechanism is also available if Australia suspects non-compliance:

> When things get really serious, we are in a position as a government: we would have status under this agreement to bring matters to the WTO’s so-called dispute settlement system and raise concerns in a very formal way, taking foreign partners to that dispute settlement system for debate. That would be available to us as a full member of this agreement.\textsuperscript{57}

### Conclusion

3.52 The Committee notes, as it has done in previous inquiries, that reliable quantitative data on the benefits of the Agreement would assist the Committee in its deliberations.

\textsuperscript{55} NIA, para 36.

\textsuperscript{56} NIA, para 37.

\textsuperscript{57} Mr Mina, DFAT, \textit{Committee Hansard}, Canberra, 11 February 2019, p. 13.
3.53 The Committee urges the Australian Government to resist any future pressure from other GPA Parties to weaken the exceptions Australia has gained, particularly for SMEs and Indigenous businesses.

3.54 The Committee notes the NIA assurance that stakeholder engagement will continue after formal accession to raise awareness of the GPA. It also acknowledges the work already being done by DFAT and other relevant agencies to educate Australian businesses, particularly SMEs, regarding accessing the opportunities provided by Australia’s FTAs. Nonetheless, the Committee reiterates the importance of this work and urges DFAT and other relevant agencies to continue to strengthen their role in this area and ensure Australian businesses have the support and knowledge required to take full advantage of these opportunities.

3.55 The Committee supports the Agreement and recommends that binding treaty action be taken.

**Recommendation 2**

3.56 The Committee supports the World Trade Organization Revised Agreement on Government Procurement (Annex to the Protocol Amending the Agreement on Government Procurement, adopted on 30 March 2012 (GPA/113)) and recommends that binding treaty action be taken.

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58 NIA, attachment on consultation, para 50.
4. Prisoner Transfers-UAE

Treaty between the Government of Australia and the Government of the United Arab Emirates concerning Transfer of Sentenced Persons

4.1 The Treaty between the Government of Australia and the Government of the United Arab Emirates concerning Transfer of Sentenced Persons (the proposed Treaty) will allow Australian nationals imprisoned in the United Arab Emirates (UAE) and UAE nationals imprisoned in Australia to apply to serve the remainder of their sentences in their home countries.¹

4.2 The proposed Treaty will complete a suite of bilateral crime cooperation treaties between Australia and the UAE, the first of which entered into force in 2011.²

4.3 Under the proposed Treaty, both governments determine a prisoner’s eligibility for transfer and the appropriate terms of sentence enforcement prior to a prisoner’s transfer.³


² NIA, para 4.

³ NIA, para 3.
Australia’s transfer of sentenced prisoners arrangements

4.4 According to the National Interest Analysis (NIA) the Australian international transfer of prisoners scheme allows the humanitarian, rehabilitative and community safety objectives of prisoner transfers to be met while ensuring, as far as possible, that the original sentence of a transferred prisoner is preserved.4

4.5 Transfers under the scheme are not intended to provide a more lenient or convenient sentence for prisoners.5

4.6 Australia is party to both multilateral and bilateral transfer of sentenced persons treaties.

4.7 The majority of Australia’s international transfers of prisoners take place under the multilateral Council of Europe Convention on the Transfer of Sentenced Persons (Council of Europe Convention), which facilitates the transfer of prisoners between Australia and 65 other Countries.6

4.8 The UAE is not a signatory to the Council of Europe Convention, so prisoner transfer requires a bilateral treaty.7

4.9 The proposed Treaty will add to Australia’s existing bilateral transfer of sentenced persons treaties with other countries not party to the Council of Europe Convention. Australia has bilateral treaties with:

- India;
- China;
- Cambodia;
- Vietnam;
- Hong Kong; and
- Thailand.8

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4 NIA, para 9.
5 NIA, para 9.
6 NIA, para 5.
7 NIA, para 5.
8 NIA, para 5.
Numbers involved

4.10 According to the NIA, from September 2002 to November 2018, there have been 87 prisoners transferred from Australia to foreign countries, and 32 prisoners transferred from foreign prisons to Australia.9

4.11 As at November 2018, Australia was processing 50 applications for transfer of prisoners out of Australia and 45 applications for transfer of prisoners to Australia. These applications have been made under both the Council of Europe Convention and Australia’s bilateral treaties.10

4.12 The Attorney-General’s Department advised the Committee that six Australians were incarcerated in the UAE, and all of them would be eligible to apply for transfer.11

4.13 According to the NIA, there are at least five prisoners in Australia who identify as UAE nationals.12

4.14 When the proposed Treaty comes into force, the Attorney-General’s Department will write to the relevant Minister responsible for prisons in each Australian state and territory asking that eligible prisoners be notified about the new Treaty.13

Reasons for Australia to undertake the treaty action

4.15 Australians imprisoned in a foreign country would usually be removed from that country upon release and return to Australia without the benefit of parole supervision or reintegration programs, and without having their criminal convictions recorded in Australia.14

4.16 There are a number of benefits to be gained when transferring Australian nationals incarcerated in the UAE, including:

- enhancing prospects for rehabilitation and reintegration into society by removing language and cultural barriers, allowing access to training and

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9 NIA, para 13.
10 NIA, para 14.
11 Attorney-General’s Department, Submission 2, p. 1.
12 NIA, para 16.
13 NIA, para 20.
14 NIA, para 10.
education programs whilst in custody, and facilitating contact with family and support networks;

- contributing to community safety by ensuring prisoners can be effectively supported, monitored, and supervised upon release from prison and by the recording of convictions in Australia; and
- relieving the hardship and financial burden on the Australian based relatives of Australians that are incarcerated in the UAE.\(^{15}\)

4.17 The Attorney-General’s Department advised the Committee of the advantages of having a transferred prisoner’s conviction recorded in Australia:

From a law enforcement perspective that is an advantage. That they have a previous conviction will then show up on police databases whereas if they’ve been convicted overseas that won’t necessarily be the case ...\(^{16}\)

4.18 Transfers of UAE nationals incarcerated in Australia to the UAE will benefit those prisoners by enabling them to be considered for any applicable rehabilitation or conditional release programs in the UAE that may not be available to non-citizens in Australia.\(^{17}\)

**Process for transfers**

4.19 Transfer applications are initiated by the prisoners themselves.\(^{18}\)

4.20 In every case, the prisoners, as well as the transferring and receiving countries, must consent to the transfer.\(^{19}\)

4.21 The agreed terms of the transfer will set out the manner in which the prisoner’s sentence will be enforced in the receiving country.\(^{20}\)

4.22 Under the *International Transfer of Prisoners Act 1997* (Cth) (ITP Act), where the prisoner has been convicted of state or territory offences, the consent of the relevant Australian State or Territory Government is also required.\(^{21}\)

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\(^{15}\) NIA, para 10.

\(^{16}\) Ms Karen Moore, Assistant Secretary, International Cooperation, International Division, Attorney-General’s Department, *Committee Hansard*, Canberra, 11 February 2019, p. 19.

\(^{17}\) NIA, para 6.

\(^{18}\) NIA, para 20.

\(^{19}\) NIA, para 19.

\(^{20}\) NIA, para 7.

\(^{21}\) NIA, para 7.
4.23 The proposed Treaty contains a number of safeguards and protections including:

- if the prisoner has been sentenced to death, a transfer cannot be effected unless the death penalty has been commuted to a term of imprisonment or life imprisonment; and
- double jeopardy protections, as the proposed Treaty does not allow for a prisoner to be tried for the same crime in the receiving country for which the sentence was imposed in the transferring country.  

4.24 The proposed Treaty also contains a number of requirements that must be met before a prisoner can be eligible for transfer:

- prisoners are only eligible to apply to transfer from the UAE to Australia if they are Australian nationals;
- similarly, a prisoner eligible for transfer from Australia to the UAE must be a national of the UAE;
- the prisoner’s convictions and sentence must be final and not subject to further legal appeal;
- there must be at least 12 months of the prisoner’s sentence remaining to be served on the day the transfer request is received unless otherwise agreed by UAE and Australia; and
- the conduct giving rise to the offence for which the person has been sentenced must constitute a criminal offence in both countries.

4.25 Once a prisoner makes a transfer request, the transferring country is required to notify the receiving country and provide a range of information relevant to the potential transfer, including the nature of the offence, conviction and sentence and any correctional, medical or social reports about the prisoner.

4.26 The receiving country is obliged to provide information relevant to the transfer, including how the sentence will be enforced.

4.27 The sentencing country is also required to take reasonable steps to inform sentenced persons of the full legal consequences of transfer. In Australia,

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22 NIA, para 17.
23 NIA, para 19.
24 NIA, para 21.
25 NIA, para 22.
this is done at the point in the transfer process when the Attorney-General’s Department writes to a prisoner to seek their consent to transfer.\textsuperscript{26}

4.28 For prisoners transferring to Australia, this letter will set out the expiry date of the prisoner’s sentence, the earliest possible date they could be released if granted parole, and any other relevant information, such as whether any particular parole conditions may be imposed on the prisoner upon their release.\textsuperscript{27}

4.29 Prisoners are given reasonable time to consider the proposed terms of transfer and to seek legal advice or make enquiries before deciding whether to consent.\textsuperscript{28}

4.30 Where a prisoner is deciding whether to consent to a transfer, the cost of obtaining legal advice is the responsibility of the prisoner. The Australian Government does not provide legal advice and nor will it pay for legal advice to be provided.\textsuperscript{29}

4.31 The State or Territory to which a prisoner transferred to Australia is sent is determined based on where the prisoner has the closest connection.\textsuperscript{30}

4.32 In all cases, the transferring country retains exclusive jurisdiction for the review, revisions, modification or cancellation of convictions that have been imposed by its courts.\textsuperscript{31}

4.33 If the transferring country makes a decision that affects the prisoner’s conviction or sentence, the receiving country is obliged to modify or terminate the enforcement of the sentence accordingly.\textsuperscript{32}

\textsuperscript{26} NIA, para 23.

\textsuperscript{27} NIA, para 23.

\textsuperscript{28} NIA, para 23.

\textsuperscript{29} Ms Moore, Attorney-General's Department, \textit{Committee Hansard}, Canberra, 11 February 2019, p. 18.

\textsuperscript{30} Ms Moore, Attorney-General's Department, \textit{Committee Hansard}, Canberra, 11 February 2019, p. 18.

\textsuperscript{31} NIA, para 25.

\textsuperscript{32} NIA, para 25.
Costs

4.34 The cost of continued enforcement of the sentence after transfer is to be borne by the receiving country, except for any costs incurred exclusively in the territory of the transferring country.\textsuperscript{33}

4.35 Generally speaking:

- the Commonwealth will meet the administrative costs involved in processing transfers;
- the State or Territory to which a prisoner returns will be responsible for meeting the costs of transporting the prisoner to Australia from an international departure point in the transfer country;
- if the State or Territory Minister considers that an incoming prisoner, or their family, is in a position to pay for costs associated with their transfer to Australia, they may seek reimbursement from the prisoner or their family; and
- the relevant State or Territory will meet the costs of the ongoing incarceration of the prisoner.\textsuperscript{34}

4.36 In relation to outgoing prisoners from Australia to the UAE, the UAE will bear the cost of transfers under the proposed Treaty, except those expenses incurred exclusively in Australia. This includes moving a prisoner from their current prison to the nearest point of international departure.\textsuperscript{35}

Implementation

4.37 The treaty will be given effect by making regulations under Section 8 of the ITP Act, declaring the UAE to be a transfer country for the purposes of the Act.\textsuperscript{36}

Conclusion

4.38 The Committee would like to thank the Attorney-General’s Department for its comprehensive NIA. It particularly appreciates the inclusion of concrete facts and figures regarding the number of people affected by the treaty

\textsuperscript{33} NIA, para 28.

\textsuperscript{34} NIA, para 29.

\textsuperscript{35} NIA, para 30.

\textsuperscript{36} NIA, para 31.
action. The provision of such detailed information in the NIA itself facilitates the work of the Committee, both by providing the Committee and Australian citizens with a practical and immediate understanding of the circumstances of a treaty’s application, and by avoiding any delays in the consideration process where further information or detail has to be sought.

4.39 The Committee agrees that the proposed Treaty is in Australia’s interests and recommends that binding treaty action be taken.

Recommendation 3

4.40 The Committee supports the Treaty between the Government of Australia and the Government of the United Arab Emirates concerning Transfer of Sentenced Persons and recommends that binding treaty action be taken.
5. Minor Treaty Actions

Minor Treaty Actions

5.1 Minor treaty actions are generally technical amendments to existing treaties which do not impact significantly on the national interest.

5.2 Minor treaty actions are presented to the Committee with a one-page explanatory statement and are listed on the Committee’s website. The Committee can choose to formally inquire into these treaty actions, or accept them without a formal inquiry and report.

5.3 The Committee has been asked to consider the following four minor treaty actions.

Transposition of Annex 2 (Product Specific Rules) of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area

5.4 The proposed treaty action is to amend the Annex 2 Product Specific Rules (PSRs) of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA). The amendment is a technical exercise to align the Annex 2 PSRs with the latest nomenclature of the World Customs Organization’s Harmonized Commodity Description and Coding System (HS). (The Annex 2 PSRs are 805 pages in length and consist primarily of a
table aligning various tariff headings and sub-headings with the relevant PSRs.)

5.5 In January 2018, the AANZFTA FTA Joint Committee (FJC) adopted a recommendation of the Committee on Trade in Goods (CTG) and the Sub-Committee on Rules of Origin (SC-ROO) to transpose the Annex 2 PSRs from HS2012 to HS2017 nomenclature. The AANZFTA Parties undertook to implement transposition of the Annex 2 PSRs by 1 January 2019.

2018 Amendment to Annexes I and II of the International Convention against Doping in Sport

5.6 The proposed treaty action amends Annexes I and II to the United Nations Education, Scientific and Cultural Organisation (UNESCO) *International Convention against Doping in Sport* [2007] ATS 10, (the Convention). Annex I (Prohibited List - International Standard) identifies the substances and methods which are prohibited in sport. Annex II (Standards for Granting Therapeutic Use Exemptions) outlines the means by which athletes can use medicines on the Prohibited List to treat legitimate medical conditions. Both Annexes I and II are an integral part of the Convention (Article 4 (3)).

5.7 The proposed amendments to Annexes I and II update the annexes to reflect the 2019 Prohibited List and the International Standard for Therapeutic Use Exemptions (ISTUE) (respectively) adopted by the World Anti-Doping Agency (WADA) on 20 September 2018, which takes effect on 1 January 2019.
2018 Amendments to the Annex to the International Convention for the Control and Management of Ships’ Ballast Water and Sediments

5.8 The proposed treaty action concerns amendments to the Regulations contained in the Annex to the International Convention for the Control and Management of Ships’ Ballast Water and Sediments (the Convention).5

5.9 The proposed amendments will bring into effect more stringent obligations for the treatment of ballast water in ships. These more stringent obligations take the form of a Code for Approval of Ballast Water Management Systems (BWMS Code).6 Ballast water is used by ships to provide stability when they have little or no cargo. Ballast water can contain pollutants and invasive marine species.

5.10 The Amendments were recommended by the Marine Environment Protection Committee (MEPC) of the International Maritime Organisation (IMO).7

2018 Amendments to Annex VI of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto Resolution MEPC.301(72)

5.11 The proposed treaty concerns the acceptance of technical amendments to Annex VI of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 Relating Thereto (MARPOL), relating to controls for Nitrogen oxide (NOx) emissions from diesel engines on ships in Emission Control Areas (ECA) and the required Energy

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7 Explanatory Statement 2 of 2019, para 3.
Efficiency Design Index (EEDI) for roll on – roll off cargo and passenger ships.\textsuperscript{8}

5.12 The proposed treaty action includes two specific amendments:

- Regulation 13 of MARPOL Annex VI, which sets controls for NOx emissions from diesel engines on ships. The amendment replaces the words “an emission control area designated under paragraph 6 of this regulation” with the words “a NOx Tier III emission control area”; and
- Regulation 21 of MARPOL Annex VI, which outlines required EEDI thresholds for consideration in the design of roll on – roll off cargo and passenger ships.\textsuperscript{9}

**Conclusion**

5.13 The Committee determined not to hold a formal inquiry into any of the minor treaty actions, and agreed that binding treaty action may be taken in each case.

Mr Russell Broadbent MP
Chair
20 March 2019


\textsuperscript{9} Explanatory Statement 3 of 2019, para 1.
A. Submissions

_Defence Support-France_
1 Mr Melville Miranda

_WTO Government Procurement_
1 Sutherland Shire Environment Centre
2 Mr Melville Miranda
3 AFTINET
4 Export Council of Australia
5 Department of Finance

_Prisoner Transfers-UAE_
1 Mr Melville Miranda
2 Attorney-General's Department
B. Witnesses

Monday, 11 February 2019

CANBERRA

*Defence Support-France*

Department of Defence

*WTO Government Procurement*

Department of Foreign Affairs and Trade
Department of Finance

*Prisoner Transfers-UAE*

Attorney-General’s Department
Department of Foreign Affairs and Trade