

1980

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
THE SENATE

REFERENCE TO AUSTRALIAN GOODS
(COMMONWEALTH AUTHORITIES) BILL 1980

CORRIGENDUM

to

EXPLANATORY MEMORANDUM

Clauses 13A to 19 of the Explanatory Memorandum
should now be read as Clauses 14 to 20.

(Circulated by the Minister representing the Minister
for Administrative Services in the Senate)

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EXPLANATORY MEMORANDUM

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Clause 1

Title of Bill

Clause 2

Commencement: It will be necessary for the regulations provided for under the legislation to be drafted and approved before the legislation comes into operation.

Clause 3

Interpretation

The definition of "Commonwealth authority" is intended to insure that all Commonwealth authorities are subject to the Government's policy of preference to Australian-made goods through the operation of this legislation unless specifically exempted. The definition includes bodies established under Commonwealth and Australian Capital Territory laws but not the law of other Territories. It does not cover companies established under State law such as Qantas as the Commonwealth does not require legislative authority to direct such companies to comply with the preference policy. The definition also provides for intergovernmental bodies to be excluded from the provisions of the legislation by regulation (see below "intergovernmental bodies").

The definition of "goods" is self-explanatory. It will be noted that sub-clause (2) provides for services incidental to the supply of goods to be covered by the legislation in conformity with the preference arrangements for departments and authorities.

The definition of "intergovernmental bodies" is intended to cover the various bodies established under Commonwealth law but conducted jointly by the Commonwealth Government and another government, State or overseas. Except where the agreement of the other partner government or governments to a body being included under the scope of the legislation is obtained, each such body will be excluded by regulations as stated above.

A "list of registered tenderers" may be used as a basis for inviting tenders as an alternative to inviting tenders publicly, subject to the provisions set out in Clause 6.

The definition of "procurement" includes the stage of defining what is required and drawing up specifications for purposes of Clause 4.

The definitions of "tender price" are included for the purpose of clarifying later clauses, especially Clause 13.

Clause 4

Specification of requirement

This clause is designed to ensure that Australian-made goods will not be excluded from consideration by unnecessarily restrictive specifications. The guidelines to be provided will be similar to those already circulated to departments and authorities in connection with the preference policy.

Clause 5

Tenders or quotations to be invited

In order to ensure that Australian-made (or higher Australian content) goods can be offered to meet the requirements of authorities, it is necessary to provide for procedures which allow open opportunity to tender. Accordingly, the Bill provides for tendering and quotation procedures along the lines of those applicable to departments and to other bodies within the Public Account under Finance Regulations and Directions. Under the latter, tenders generally must be invited for purchases expected to cost \$5,000 or more, but this amount is likely to be raised soon to \$10,000. Whichever figure applies to departments will also be adopted in the regulations under this legislation. Lower value purchases will be subject to rules concerning the invitation of quotations as is the case under the Finance Regulations.

The clause also provides (sub-clause (3)) the necessary flexibility for purchases of certain categories of supplies (e.g. professional services) without public tender, and for particular purchases to be excepted by approval of the Secretary or his delegate when public tendering is impracticable or inexpedient because of the considerations set out broadly in sub-clause (4). It is intended that the Secretary's authority in this area shall be delegated to appropriate officers in authorities (see sub-clauses (6), (7) and (8)). These provisions are also similar to the Finance Regulations.

It should also be noted that there is a provision (sub-clause (5)) for authorities which already operate a properly regulated tender system meeting the same essential criteria as the one set out in the Bill (with the Secretary's approval) to continue to operate that system. Similarly, any authorities operating under the Finance Regulations and Directions will be permitted to continue to operate under those provisions (see sub-clause (9)).

Clause 6

List of registered tenderers

This clause has been included in recognition of the likely need for some authorities to follow procurement procedures offering more flexibility than a system of public tendering. Under this system an authority would be permitted to maintain lists of tenderers for its various requirements and to invite tenders only from suppliers registered on those lists. The authority would be required, however, to consider applications for inclusion in its lists at any time and to advertise periodically (as provided for in the regulations), the existence of its tenderer lists and its general requirements for goods. Tenderers would be removed from lists as necessary, such as when they did not

respond to several successive invitations to tender and did not otherwise indicate any continuing interest.

Clause 7

Postponement or cessation of action on tenders

The Minister responsible for administering this legislation (the Minister for Administrative Services) may, from time to time, form the impression that purchasing procedures in relation to a particular procurement have not been conducted in accordance with the provisions of this legislation. For example, it may emerge that specifications have (intentionally or otherwise) been drawn in an unnecessarily restrictive way, with the effect of disqualifying some Australian-made goods. The clause provides for the Minister to order the postponement of consideration of tenders whilst a matter is investigated, or to order the rejection of all tenders so that tenders may be re-invited on a proper basis.

Clause 8

Duty-paid price of goods

Commonwealth departments and some Commonwealth authorities are not required to pay Customs Duty. (In the case of bodies within the Public Account payment of duty would represent a payment by the Government to itself). It is a long-standing Government policy, however, that Australian producers are entitled to the same protection against import competition in sales to the Government as they enjoy under the Customs Tariff in relation to commercial transactions. Accordingly, this clause provides that for purposes of tender comparison, authorities are required to ensure that the appropriate amount of duty is included in any tenders for imported items.

The clause also makes provision (sub-clauses (2) and (3)) for the verification of the duty rate included in tenders where an incorrect rate appears to have been quoted or where the rate of duty quoted is no longer applicable. The clause also provides for the rejection of a tender where the correct rate is not provided following a request for verification. Sub-clause (4) defines "duty-paid price" for purposes of the clause.

Clause 9

Method of calculation of Australian content of goods

The clause enables regulations to be made in relation to the calculation of Australian content in tenders. The method to be used will be the same as now applies under administrative instructions issued by the Government and which was set out in a media release of 2 October 1979 by the Minister for Administrative Services. In essence, the value of imported content of a tender is deducted from the price and the remainder is deemed to be Australian content.

(Australian content normally relates to purchases for which public tenders must be invited, that is, at present purchases estimated to cost \$5,000 or more. For smaller purchases a simpler test of "origin" is used.)

Clause 10 Method of determination of origin of goods

This clause enables regulations to be made in relation to the determination of the origin of goods to be purchased at a cost below the value prescribed in the regulations at which public tenders must be invited. In general, those goods not identifiable as imported goods by the tests to be set out in the regulations will be deemed to be of Australian origin.

Clause 11 Australian content of goods or the origin of goods to be set out in tenders or quotations

This clause provides for the Australian content or origin of goods to be set out in tenders. In the case of quotations (below the threshold value for inviting public tenders) the authority has an option as to whether it calls for details of the origin or of the Australian content of the goods.

The clause also provides (sub-clause (3)) for an authority to seek appropriate information to substantiate the Australian content or origin of goods. If such information is not provided, the tender concerned may be excluded from further consideration.

Clause 12 Method of adjustment of tender price

This clause provides for tender prices to be adjusted by standard percentage factors in order to provide a definite margin of preference to Australian-made or higher Australian content goods. In the case of purchases where the content approach is followed (see notes on clauses 9, 10 and 11) the 20 percent factor is applied to the Australian content of the goods. In the case of purchases where the origin approach is used, the 20 percent factor is applied to the offer price of goods identified as being of imported origin. The percentage factors may be varied by regulation.

Clause 13 Acceptance of tenders or quotations

This clause provides the method to be used in selecting the quotation or tender to be accepted. For purposes of this clause, "tender prices" are prices adjusted in accordance with the formulae set out in Clause 12.

In accordance with normal Government practice, the clause provides that, subject to certain qualifications, the lowest suitable tender is to be accepted.

A "suitable" tender would be one which complied with all the significant requirements set out in the Request for Tender or Quotation documents. Sub-clause (3) provides for issues of suitability to be referred to the Minister for Administrative Services. The clause also incorporates (sub-clause (5)) a rule that in the case of tenders of substantial value (currently where the lowest suitable tender is \$100,000 or more), a suitable tender of higher Australian content may not be passed over in favour of one of lower Australian content (after preference adjustment) without the approval of the Minister even though the latter is the lowest suitable (adjusted) tender. (Cases below the \$100,000 threshold may also be referred to the Minister as a matter of discretion). Consistent with Clause 13A, however, if the difference in Australian content of the tenders is less than 10 percent the contents are considered equal and the case may be decided in favour of the lowest suitable tender (see sub-clause (6)).

After considering all aspects of a case (based upon a submission incorporating the comments of a number of Advising Departments) the Minister may direct that any of the suitable tenders referred to him be accepted or, if he considers it necessary, that all tenders be declined or, where in the call for tenders the Commonwealth reserves the right to accept separate tenders for each or any item or any part of an item, that two or more tenders be accepted (see sub-clause (9)).

It is necessary to free the Minister from the rule of accepting the lowest adjusted tender because there may be other factors with an important bearing on the decision. For example a tender with lower Australian content may incorporate attractive Offset proposals or a lower priced tender may after consideration of "through-life" costs be more expensive than another tender. It may also be appropriate to accept different tenders for different quantities or components in relation to the total requirement.

Other sub-clauses are of a machinery nature.

Clause 13A

Section 13 not to apply to certain tenders

It is recognised that calculations of Australian content by different companies may not be precisely comparable. Accordingly, this clause (sub-clause (1)) provides for the Australian content of tenders to be regarded as the same when they all fall within a range of ten percent (e.g. 70% to 80%). The tenders are not, in these circumstances, adjusted by the preference formulae.

Sub-clause (2) retains under Clause 13A the option provided in sub-clause 13(3) for referral of issues of suitability to the Minister for Administrative Services.

Clause 14 Commonwealth authority not to form company

The clause deals with the possibility that an authority may, itself or in conjunction with another authority, acquire or form a company which will then undertake purchases on behalf of the authority. Such procurement could then fall outside the provisions of this legislation. The clause provides that the formation or acquisition of such a company (which was to engage in procurement for the authority) would require the prior approval of the Minister for Administrative Services.

Clause 15 Publication of Australian content of goods

This clause incorporates the policy that information as to the level of Australian content of successful tenders may be provided to unsuccessful tenderers. The policy contributes to the general objective of maintaining a fair and open public tender system and also provides the opportunity for any inflated estimates of content not detected by government officials, to be identified and challenged by competitors.

Clause 16 Exemption

This clause provides for authorities, or certain purchases or categories of purchases by authorities to be exempted by the Minister for Administrative Services from the legislation for the reasons set out in sub-clause (1) and sub-clause (2).

Sub-clause (1) provides for exemption of an authority as a whole, while sub-clause (2) covers individual purchases and particular categories of goods. Thus the Minister may exempt

- an authority in respect of all of its purchases;
- a category of goods purchased by an authority; or
- a particular purchase by an authority.

The clause also exempts from the coverage of the legislation (sub-clause (3)) any purchases made from a Department of State of the Commonwealth or a State and further provides (sub-clause (4)) that the legislation does not apply to prescribed kinds of procurement. The latter provision enables certain exceptions to the provisions of the Finance Regulations and Directions to be incorporated under this legislation (e.g. purchases of bullion).

Clause 17 Delegation by Minister

This is a machinery clause providing for the Minister to delegate his power under the legislation.

Clause 18 Information to be furnished to Minister

This is a general machinery provision to enable the Minister to obtain from authorities any information necessary for purposes of administration of the legislation.

Clause 19 Regulations

This is a machinery clause enabling regulations to be made under the legislation.