

Tackling Human Trafficking in Governments Supply Chains: Legal Certainty & Effectiveness Issues Under the Australian Commonwealth Procurement Rules Model

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1.0 Introduction

Public procurement activities present Governments and the public sector with everyday opportunities to use their massive purchasing power as the medium through which to promote attainment of social, economic and environmental objectives, also known as the sustainable procurement agenda.¹ Typically accounting for 12% of a nation's GDP, Governments and the wider public sector as major purchasers of goods, works and services are in a strong position to leverage behaviour change on their suppliers' operations and supply chain practices in the drive to attain these worthy objectives.² However, despite holding this strong leverage position, an emerging element of the sustainable procurement agenda is the use of public procurement process to combat human trafficking in supply chains. This agenda has not however translated into significant deployment at the implementation level, for example, although advanced economies such as Australia, New Zealand, Canada, the United States (US) and the United Kingdom (UK) have issued a joint statement of intent stating that they will "*analyse, develop, and implement measures to identify, prevent and reduce the risk of human trafficking in government procurement supply chains*";³ the actual implementation of measures at the national level has been slow, and where anti-trafficking measures have been attempted through these countries' respective national procurement frameworks, they have proven, to a degree, ineffective and deficient.⁴

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¹ Christopher McCrudden, 'Using Public Procurement to Achieve Social Outcomes' [2004] *Natural Resources Forum* 28, 257-267; Lin Li and Ken Geiser, 'Environmentally responsible public procurement (ERPP) and its implications for integrated product policy (IPP)' (2005) *Journal of Cleaner Production* 13(7), 705-715; Lutz Preuss, 'Addressing sustainable development through public procurement: the case of local government' (2009) *Supply Chain Management: An International Journal* 14(3), 213-223.

² Organisation for Economic Co-operation and Development (OECD), *Public Procurement* (2021) <<https://www.oecd.org/governance/ethics/public-procurement.htm>>.

³ The UK Home Office, 'Principles to guide government action to combat human trafficking in global supply chains' (Home Office, 13th March 2020) <<https://www.gov.uk/government/publications/trafficking-in-supply-chains-principles-for-government-action/principles-to-guide-government-action-to-combat-human-trafficking-in-global-supply-chains-html-version>>; Australian Ministry for Foreign Affairs, 'Principles to Guide Government Action to Combat Human Trafficking in Global Supply Chains' (Joint statement, 24 September 2018) <https://foreignminister.gov.au/releases/Pages/2018/mp_mr_180924.aspx?w=E6pq%2FUhzOs%2BE7V9FFYi1xQ%3D%3D>; The UK Government has taken this initiative forward in the publication of 'The UK Government Modern Slavery Statement' (Home Office, 26 March 2020) <<https://www.gov.uk/government/publications/uk-government-modern-slavery-statement>>.

⁴ For example, the US Federal Acquisition Regulation (Subpart 22.17) on Combating Trafficking in Persons has been heavily criticised by several authors such as Tara Woods, 'Utilizing Supply Chain Transparency measures to Trafficking in Persons: A Comparative Analysis of Swedish Systems' [2019] *Public Contracts Law Journal* 48(2), 423 – 444; John G Bradbury, 'Human Trafficking and Government Contractor Liability' (2008) *Public Contract Law Journal* 37(4), 907-921; Victoria Starks, 'The U.S. Government's Recent Initiatives to Prevent Contractors from Engaging in Trafficking in Persons: Analysis of Federal Acquisition Regulation Subpart 22.17' (2008) *Public Contract Law Journal* 37(4), 879-905.

In this paper, the authors will analyse this problem by examining, as a case study, the measures adopted by the Commonwealth of Australia's federal procurement system which seeks to reduce the risk of human trafficking contaminating public sector supply chains.⁵ Guiding this study shall be a key question possessing a dual focus:

To what extent do the Commonwealth Procurement Rules ('CPR') provide for legal certainty and effectiveness in addressing trafficking in Commonwealth supply chains, and what lessons can other countries learn from Australia's model?

In the context of this paper on using procurement to tackle trafficking, the principle of *legal certainty* can be understood as referring to the idea that the law must be sufficiently clear, transparent and capable of clear meaning in order to provide its subjects with "admirable reliance as to what their obligations are".⁶ The principle of *effectiveness* in the current context will focus on the applicability and functionality of public procurement rules for them to be capable of combating trafficking.⁷ Such rules must first exist; second be easy to use, rather than suffer from loopholes or lack of scope;⁸ and third must be capable of full force and effect.⁹

⁵ Trafficking will be the term chiefly used in this paper to describe a severe violation of human rights occasioned by use of forced labour, child labour and severe labour conditions (e.g. excessive working hours, exposure to harmful substances etc) and is prohibited by international and domestic laws: see further section 2 below.

⁶ Mark Fenwick, and Stefan Wrba, 'The Shifting Meaning of Legal Certainty' in Mark Fenwick and Stefan Wrba (eds) *Legal Certainty in a Contemporary Context* (Springer, 2016) 1-6; James Maxeine, 'Some realism about legal certainty in globalization of the rule of law' (2008) *Houston Journal of International Law* 31(1), 27 -46 adds that legal certainty *inter alia* means that laws and decisions must be definite and clear and that legitimate interests and expectations must be protected; J Wiggen, 'Directive 2014/24/EU: the new provision on co-operation in the public sector' (2014) *Public Procurement Law Review* 3, 83-93 observed *inter alia* that that a provision can add legal certainty where it establishes that the assessment of whether or not a criterion is fulfilled will depend on quantitative criteria alone, rendering a qualitative assessment redundant; or a provision can add legal certainty where it makes it clear when exemptions will apply; or where it simplifies an activity, this can also bring legal certainty. See also John Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy*, 47.

⁷ Olga Martin-Ortega, 'Human Rights Risks in Global Supply Chains: Applying the UK Modern Slavery Act to the Public Sector' (2017) *Global Policy* 8(4), 512-521 states that the requirement for effectiveness in public procurement mechanisms to detect and prevent modern slavery are vital because public buyers have a heightened responsibility to combat human rights violations in their supply chains, and new obligations are needed to reflect this responsibility and effective guidance should be developed, as well as sanctions for non-compliance. Public buyers are key actors in bringing positive change and their role should be taken seriously in order to guarantee the appropriate role public buyers can play in the combat against modern slavery.

⁸ Christopher Bovis, 'The priorities of EU public procurement regulation' (2002) *ERA Forum*, 21:283-297.

⁹ Despina Pachnou, 'Enforcement of the EC procurement rules: the standards required of national review systems under European Union law in the context of the principle of effectiveness' (2000) *Public Procurement Law Review* 2, 55-74 acknowledge that the notion of effectiveness is very broad, observing that effectiveness in the context of EU procurement meant that rules must be applied in such a way as to ensure their full force and effect. That means that EU Member States should do all in their power to ensure that the rules are applied and that stricter standards than the ones governing the application of domestic rules have to be followed where national standards are not adequately high to ensure compliance. While this observation was made in the context of the effectiveness of EU procurement remedies and rules, this observation is interesting in the context of the current paper because it will become clear throughout this paper how the Commonwealth's CPR rules frequently do not strive to attain the higher aspirations for procurement to be used to tackle trafficking in supply chains. Pachnou considers that although the principle of effectiveness is very broad, it requires the existence of rules and procedures, which are neither impossible nor unduly difficult to use, which are, that is to say, *effectively* available, in order to ensure some chances of successful enforcement of substantive rules. Kirsi-Maria Halonen, 'Termination of a public contract - lifting the veil on art.73 of 2014/24 Directive' (2017) *Public Procurement Law Review* 4, 187-199 agreed with Pachnou, the principle requires (in summary), that rules must be applied by the EU Member States in such a way as to ensure their full force and effect.

The paper will demonstrate how key elements of the CPR model fail to provide for the required degree of legal certainty and effectiveness to tackle trafficking in public supply chains. System failure is demonstrated by analysis of key CPR provisions which either fail to satisfy these two key tests, or because of the complete absence of appropriate provisions to comprehensively deal with the risk of trafficking. Proposals to strengthen deficiencies and close gaps in the CPR model are considered and analysed. This should serve not only as a guide to countries yet to address human rights considerations in their public procurement supply chains, but also serve as a blueprint for other countries seeking to re-evaluate whether their existing domestic procurement legislation or frameworks are fit for purpose to tackle the global problem of human trafficking in the public purchasing context. Appropriate reference to US and UK models is made where appropriate, and will assist countries seeking to design improved models for tackling trafficking within national and global supply chains.

The rest of this paper is structured as follows. Section 2 shall provide contextual background relating to the regulation of public procurement in Australia and explores the connection between public procurement, sustainable procurement and combating trafficking. Section 3 analyses Commonwealth Procurement Rules that seek to define, identify, prevent, or mitigate the risk of trafficking in the procurement process, highlighting their limitations and proposing ways to remedy deficiencies identified by the authors. Final conclusions will be provided in Section 4, alongside a series of recommendations for other countries.

2.0 Context and background: Trafficking, Public Procurement, Sustainable Procurement and Modern Slavery in the Commonwealth

2.1 “Trafficking” and Governments’ failure to prohibit it in procurement legislation

Human trafficking has withstood the test of time, although the terminology has changed over the years from “slavery”, “trafficking” to “modern slavery”.¹⁰ Despite the generationally interchangeable terminology, “trafficking” will be the term chiefly used in this paper because it is widely prohibited by international and domestic legal systems¹¹ and describes a severe violation of human rights occasioned by use of forced labour, child labour and severe labour conditions (e.g. excessive working hours, exposure to harmful substances, etc). Defined under Article 3(a) of the Trafficking in Persons Protocol (Palermo Convention), human trafficking is "the recruitment, transportation... of persons, by means of

¹⁰ Steve New, ‘Modern slavery and the supply chain: the limits of corporate social responsibility?’ (2015) *Supply Chain Management* 20(6), 697-707; Louise Shelly, ‘Human Trafficking as a form of transnational crime’ in Maggy Lee (eds), *Human Trafficking* (Routledge 2011) 22.

¹¹ A. Yassime Rassam, ‘Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade under Customary International Law’ (1999) *Virginia Journal of International Law* 39 (2), 303 – 352.

the threat or use of force or other forms of coercion...for the purpose of exploitation.¹² The Protocol goes on to clarify the meaning of exploitation by stating that "*exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs*".¹³ This definition illustrates how matters such as commercial sex acts, child labour, forced labour, excessive working policies, exposure to hazardous substance and poor equipment, and fraudulent or misleading recruitment practices all fall under the umbrella term of 'trafficking'.¹⁴ Thus, any reference to trafficking hereafter in this paper encapsulates the above practices occurring within the public procurement context.

Trafficking is a growing global industry with an approximate annual turnover of one hundred and fifty billion dollars (USD).¹⁵ Statistics produced by the International Labour Organisation (ILO) suggest that at any given time, an estimated 40.3 million people are enslaved, with one in four victims being a child.¹⁶ These statistics make trafficking "one of the three evils" that plague the 21st century.¹⁷ Despite strong signals from international organisations that Governments should address trafficking within their global supply chains, countries such as Australia are yet to *effectively* address this issue, as shall be discussed below and in Section 3.¹⁸

2.1.1 International drivers to use public procurement to combat human trafficking

(a) The United Nations

¹² United Nations General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* RES/55/25 (New York, 15th November 2000), Article 3.

¹³ Ibid.

¹⁴ John Howe, 'The Regulatory Impact of Using Public Procurement to Promote Better Labour Standards in Corporate Supply Chains' (2010) *University of Melbourne Research Paper* No.528; Osita Agbu, 'Corruption and Human Trafficking: The Nigerian Case' (2003) *West Africa Review* 4(1), 1-13.

¹⁵ Raimo Väyrynen, 'Illegal immigration, human trafficking, and organized crime' (Discussion Paper No. 2003/72, UNU Wider, Helsinki).

¹⁶ International Labour Organization, 'Forced labour, modern slavery and human trafficking' (2021) <<http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>>.

¹⁷ According to Kempadoo, drug trafficking and terrorism are the other two evils that plague the 21st century. See Kamala Kempadoo, 'From Moral Panic to Global Justice: Changing Perspectives on Trafficking' in Kamala Kempadoo, Jyoti Sangera and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (2nd edn, Routledge, 2005).

¹⁸ United Nations Forum on Business and Human Rights, 'Preventing business-related human rights abuses: The key to a sustainable future for people and planet' (Geneva, 16 -18 November 2020) <<https://www.ohchr.org/EN/Issues/Business/Forum/Pages/2020ForumBHR.aspx>>; United Nations Forum on Business and Human Rights, 'Time to act: Governments as catalysts for business respect for human rights' (Geneva, 25 -17 November 2019) available at <<https://www.ohchr.org/EN/Issues/Business/Forum/Pages/2019ForumBHR.aspx>> .

From the UN perspective, the 2015 Sustainable Development Goals encourage Governments to eradicate trafficking under Target 8.7,¹⁹ Target 8.8,²⁰ and Target 10.3.²¹ Furthermore, Target 12.7 requires governments to adopt public procurement practices that promote sustainable development (for example, ensuring that public procurement practices ensure respect for human rights).²² Additionally, the aforementioned UN Guiding Principles (UNGPs) on Business and Human Rights' (2011) reminds Governments of their existing obligation to protect their citizens from human rights abuses, by promoting "*respect for human rights by business enterprises with which they conduct commercial transactions*".²³ The commentary under UNGP Principle 6 explicitly refers to "procurement activities" as an area where governments can "promote awareness of and respect for human rights" by implementing effective legislation to meet this objective.²⁴

(b) *International Labour Organisation (ILO)*

The International Labour Organisation ('ILO') has enacted many Conventions and Recommendations to tackle trafficking or exploitation of workers, which *de facto* includes exploitation exerted by government suppliers. For example, the Forced Labour Convention of 1930²⁵ and Protocol 2014²⁶ "*undertakes to suppress the use of forced or compulsory labour*"; while the Forty-Hour Week

¹⁹ United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1, (25 October 2015), hereafter SDGs <<https://sdgs.un.org/goals>>. Target 8.7: "Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms."

²⁰ Ibid Target 8.8: "Protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment."

²¹ Ibid Target 10.3: "Ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard."

²² Ibid Target 12.7: "Promote public procurement practices that are sustainable, in accordance with national policies and priorities." The respect for human rights forms part of the social pillar under sustainable development and is significant to achieving the UN SDGs.

²³ UNHRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy Framework' UN Doc. A/HRC/17/31, (21 March 2011 adopted 16th June 2011) (UNGPs) <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf>. UNGP 6 states that "States should promote respect for human rights by business enterprises with which they conduct commercial transactions". The UNGPs does not create a new legal obligation on States, rather, it provides guidance on existing legal obligations, which in this instance relates to the protection of human rights. So, although it does not create a new obligation, there is still an obligation on governments to protect human rights as provided for in international human rights treaties. For in-depth discussions on the legal status of the UNGPs, see UNHRC, *Frequently Asked Questions About the Guiding Principles on Business and Human Rights* (2014) <https://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf>, accessed 21st January 2020, 8.

²⁴ Ibid, 8; Claire O'Brien and Olga Martin-Ortega, 'The Role of the State as Buyer Under UN Guiding Principle 6' (University of Groningen Faculty of Law Research Paper Series No. 14/2018).

²⁵ C029 - Forced Labour Convention, 1930 (No. 29). Convention concerning Forced or Compulsory Labour (Entry into force: 01 May 1932). This remains the most ratified ILO Convention as 178 out of 187 member countries have ratified the Convention.

²⁶ P029 - Protocol of 2014 to the Forced Labour Convention, 1930. The Protocol of 2014 to the Forced Labour Convention sought to address gaps in the 1930 Forced Labour Convention by making the link between forced labour and trafficking clearer and modernising the obligations on members to prohibit forced labour. Some of the measures under the 2014 Protocol to prevent forced labour include: requiring enacting members to educate and inform people (including private entities) of forced labour, enforce legislation that prohibits forced labour across all government sectors, support due diligence by public and private entities, providing appropriate and effective remedies, and assistance to victims

Convention 1935,²⁷ the Minimum Age Convention 1973,²⁸ and the Worst Forms of Child Labour Convention 1999²⁹ deal with extreme labour conditions and child labour.³⁰ In addition to these Conventions, the Labour Clauses (Public Contracts) Convention and Recommendation 1949 require member states to apply labour clauses related to *wages (including allowances), hours of work and other labour conditions* to specified public contracts.³¹ The Convention also advocates for the use of labour conditions as tender evaluation criteria, adequate systems for inspection and sanctions such as withholding contracts, suspension and debarment against suppliers who do not comply with fair labour clauses.³²

Despite this recognition of public procurement as a useful tool in addressing trafficking, many ILO member states including Australia, have failed to see the relevance of incorporating labour clauses in public contracts and thus, have not ratified this Convention.³³ As a result, the Labour Clauses Convention and Recommendation have not resulted in public procurement frameworks' upgrading their protection of workers human rights against trafficking or labour exploitation on a mass scale.³⁴

(c) Organisation for Security and Co-Operation in Europe (OSCE)

The eradication of trafficking has been part of the Organisation for Security and Cooperation “three dimensions” since its establishment.³⁵ Stemming from the third dimension of human rights, the OSCE

²⁷ ILO, C047 - Forty-Hour Week Convention, 1935 (No. 47). Convention concerning the Reduction of Hours of Work to Forty a Week.

²⁸ ILO, C138 - Minimum Age Convention, 1973 (No. 138). Convention concerning Minimum Age for Admission to Employment.

²⁹ ILO, C182 - Worst Forms of Child Labour Convention, 1999 (No. 182). Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

³⁰ Nikolaus Hammer, ‘International Framework Agreements: global industrial relations between rights and bargaining’ (2005) *European Review of Labour and Research* 11(4), 511-530.

³¹ ILO, C094 - Labour Clauses (Public Contracts) Convention, 1949 (No. 94). Convention concerning Labour Clauses in Public Contracts and R084 - Labour Clauses (Public Contracts) Recommendation, 1949 (No. 84) Recommendation concerning Labour Clauses in Public Contracts. According to Article 1(1) of the Labour Clauses Convention, the Convention strictly applies to specific public contracts which includes construction, alteration, repair or demolition of public works; the manufacturing, assembly, handling or shipment of materials, supplies or equipment; and service contracts awarded by a central procuring entity

³² *Ibid* Article 5.

³³ ILO, *Report III (Part 1B): General Survey concerning the Labour Clauses (Public Contracts) Convention*, 1949 (No. 94) and Recommendation (No. 84) (97th session, 2008) < https://www.ilo.org/ilc/ILCSessions/previous-sessions/97thSession/reports/WCMS_091400/lang--en/index.htm > accessed 28th April 2021, 59 - 61. According to the 2008 review of the Convention and Recommendation, many ILO member countries believe that their national labour law extends to public contracts, and as a result countries such as the United States of America, Bangladesh, Portugal and Sweden have not ratified the Convention.

³⁴ ILO, *Ratifications of C094 - Labour Clauses (Public Contracts) Convention, 1949 (No. 94)* <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312239> accessed 7th April 2021 Countries such as Spain, Tanzania, Singapore, Finland, France and Nigeria have ratified the Convention. The UK ratified the Convention in 1950 and in 1982 “denounced” the Convention by issuing a notice to the ILO Director General. The denouncement of the Convention was due to the Government’s disagreement with the policy underlying the Convention and also partly due to the rescission of the Fair Wages Resolution which had similar provisions with the Convention. See Paul Davies and Mark Freedland, *Kahn-Freund’s Labour and the Law* (3rd edn, Stevens & Sons Ltd, 1983) 198-199.

³⁵ OSCE, ‘Who we are’ (2021) <<http://www.osce.org/whatistheosce>>. The OSCE three dimensions are: politico-military, the economy and environment, and the respect of human rights.

encouraged governments to actively eradicate trafficking as recently as 2014,³⁶ affirming that governments have the 'prime responsibility' to protect their citizens' human rights and can do so through their public procurement frameworks.³⁷ For example, the OSCE recommended that governments should follow examples of existing frameworks such as the California Transparency in Supply Chains Act³⁸ and the anti-trafficking provisions in the US Federal Acquisition Regulation.³⁹ It was also recommended that governments enact provisions that disqualify suppliers who have engaged in trafficking on the ground of "credible allegations...with sufficient evidence", instead of requiring a conviction by the final court of adjudication.⁴⁰ This recommendation is advantageous because many procurement frameworks rely on suppliers' conviction as a ground of exclusion, allowing suppliers tainted by trafficking practices to continue to be awarded public contracts due to prosecutorial difficulties securing trafficking convictions. In 2018, the OSCE developed Model Guidelines to assist States implement policies and legislation to tackle trafficking and promote the fair and ethical recruitment of workers in public supply chains.⁴¹ The Model Guidelines contain several elements which countries can use to strengthen the resilience of their public supply chains by proposing useful features such as a model law and model clauses that cover public procurement, ethical labour recruitment, monitoring and evaluation, enforcement and supply chain transparency.⁴²

2.2 The regulation model of Public Procurement in Australia

In 2019/20, the Commonwealth Procuring entities awarded 81,174 contracts valued at \$53.9 billion (AUD), with 88.3% of contracts awarded to suppliers in Australia.⁴³ The regulation of public procurement in Australia is based on a devolved system. The federal and state governments have separate procurement rules and policies that apply to their procuring entities.⁴⁴ At the federal level, which is the subject of this paper, the authority to regulate public procurement stems from the Public

³⁶ Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, '*Ending Exploitation - Ensuring that Businesses do not contribute to Trafficking in Human Beings: Duties of States and the Private Sector*' (OSCE, paper no 7, 2014).

³⁷ Ibid, 47.

³⁸ California Transparency in Supply Chains Act [SB 657], State of California, 2010. This legislation is a good model because it requires large retailers, including those engaged in commercial transactions with the State of California, to provide their consumers with information regarding their efforts to eliminate trafficking from their supply chains.

³⁹ The US Federal Acquisition Regulation, Subpart 22.15 and Subpart 22.17.

⁴⁰ OSCE (n 36), 44.

⁴¹ Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, '*Model Guidelines on Government Measures to Prevent Trafficking for Labour Exploitation in Supply Chains*' (Vienna, February 2018).

⁴² Ibid.

⁴³ Department of Finance, 'Statistics on Australian Government Procurement Contracts'(2020) <<https://www.finance.gov.au/government/procurement/statistics-australian-government-procurement-contracts->>.

⁴⁴ Dominic Dagbanja, 'Developments in sustainable public procurement law and policy in Ghana and Australia' (2020) *Public Procurement Law Review* 6, 359-379; Veiko Lember, Rainer Kattel and Tarmo Kalvert, *Public Procurement, Innovation and Policy: International Perspectives* (Springer, 2014) 35-41.

Governance, Performance and Accountability (PGPA) Act 2013,⁴⁵ the Public Governance, Performance and Accountability Rule 2014,⁴⁶ and the Financial Reporting Rule.⁴⁷ The PGPA generally "*establishes a coherent system of governance and accountability for public resources*" with section 105B(1) of the PGPA Act, authorising the Minister for Finance to regulate public procurement by adopting "*written instruments*" that promote *efficient, effective, economic and ethical* use of public resources.⁴⁸ The Minister for Finance's written instruments in public procurement include five Procurement Connected Policies,⁴⁹ Procurement Guidelines,⁵⁰ and the Commonwealth Procurement Rules (CPR).⁵¹

Implemented and updated periodically by the Department of Finance, the CPR applies to all federal procuring entities procuring goods and services⁵² whether below or above stipulated procurement thresholds.⁵³ The CPR contains provisions relating to procurement objectives, rules regarding the publication of opportunities, specifications, time limits, use of procurement methods and conditions for participation. There are also provisions regarding contract award and contract management, in effect, covering the entire procurement process. Complying with the CPR provisions is critical in mitigating the risk of bid challenges.⁵⁴

2.3 Sustainable Procurement - Australia's Procurement Connected Policies

Sustainable procurement, which refers to the promotion of social, environmental, and economic policies through public procurement, is at the forefront of the Commonwealth procurement framework in the form of five Procurement Connected Policies, alongside achievement of value for money under the CPR.⁵⁵ In no particular order, the five connected policies are: (1) the Indigenous Procurement Policy, which encourages contract awards to indigenous-owned businesses by setting aside contracts and requiring minimum Indigenous participation requirements for contracts valued at or over AUD 7.5 million in specified sectors.⁵⁶ (2) Workplace Gender Equality Procurement Principles require potential

⁴⁵ *The Public Governance, Performance and Accountability Act (No.123) 2013* (Cth).

⁴⁶ *The Public Governance, Performance and Accountability Rule 2014* (Cth).

⁴⁷ Other legislative or statutory Acts supplementing the above legislation include the Constitution, *Public Service Act 1999* (Cth), *Crimes Act 1914* (Cth), *Auditor-General Act 1977* (Cth), *Modern Slavery Act 2018* (Cth) and the *Appropriation Acts*.

⁴⁸ PGPA Act (n 45).

⁴⁹ The Procurement Connected Policies are discussed in section 2.2 below.

⁵⁰ Department of Finance, 'Procurement Practice' (2021) <<https://www.finance.gov.au/government/procurement/buying-australian-government/procurement-practice>>.

⁵¹ Commonwealth Procurement Rules (CPR), 14th December 2020. This edition of the CPR repeals the Commonwealth Procurement Rules - 20 April 2019 (F2019L00536).

⁵² Ibid, Rules 2.7 and 2.8 of the CPR describe acquisitions covered by the CPR, which include "goods and services by a relevant entity for its use, on behalf of another entity or a third party".

⁵³ Ibid, Rule 9.7 sets out the procurement thresholds and that determines which provisions of the CPR apply to each contract, depending on its size and the procuring entity involved.

⁵⁴ Dagbanja (n 44); Alexandra Wedutenko and Ban-Ya Yim, 'What's in a name? The new Commonwealth Procurement Rules' (Clayton Utz, 21 June 2012) <<https://www.claytonutz.com/knowledge/2012/june/what-s-in-a-name-the-new-commonwealth-procurement-rules>>.

⁵⁵ Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement and Legal Change* (Oxford University Press, 2007) 114.

⁵⁶ Indigenous Procurement Policy came into effect from 1st July 2015 and it targeted indigenous businesses in sectors including education, communication, employment, finance, health and social services; George Denny-Smith and Martin Loosemore,

suppliers with more than a hundred employees to demonstrate that they comply with the Workplace Gender Equality Act 2012;⁵⁷ (3) the Black Economy Policy requires potential suppliers tendering for contracts over 4 million Australian dollars (AUD) to certify that they have a "satisfactory tax record"⁵⁸; (4) the Australian Industry Participation Plans for Government Procurement policy requires suppliers awarded contracts exceeding \$20 million AUD to prepare and implement an industry participation plan outlining how Australian industries will be included in the contract performance;⁵⁹ and (5) the Code for Tendering and Performance of Building Work requires procuring entities to apply the Building Code 2016 to all works contracts, to ensure that health and safety, freedom of association and other regulations are adhered to by federal suppliers.⁶⁰

These five Procurement Connected Policies are evidence that the Commonwealth Government is prepared to address social injustice and promote compliance with key policies or legislation through public procurement. As such, there appears to be no reason for not effectively addressing human rights violations through the public procurement process as well, as such would appear to be a legitimate pursuit of government policy and a legitimate concern of the public procurement process.⁶¹ However, as this paper develops, many *effectiveness* and *legal certainty* deficiencies shall be identified in the course of this paper when we examine the CPR, and thereby causes the question to arise: why has no Procurement Connected Policy been developed specifically to cater for combating trafficking in the Commonwealth procurement governance model?⁶²

2.4 Public Procurement and Trafficking in the Commonwealth of Australia

The call to implement legislation to tackle trafficking in Commonwealth supply chains can be traced back to the 2013 Parliamentary Joint Committee report.⁶³ Thus, not only has the Commonwealth Government realised for some time that there is an inescapable and compelling obligation to exercise ethical and moral leadership in ensuring procurement processes are free of human rights abuses, but

‘Assessing The Impact Of Australia's Indigenous Procurement Policy Using Strain Theory’ in Paul Chan and Chris Neilson (eds) *Proceeding of the 33rd Annual ARCOM Conference* (Association of Researchers in Construction Management, 2017), 652-661; George Denny-Smith and Martin Loosemore, ‘Cultural Counterfactuals: Assessing the Impact of Indigenous Social Procurement in Australia’ in Chris Gorse and Chris Neilson (eds), *Proceeding of the 34th Annual ARCOM Conference* (Association of Researchers in Construction Management, 2018), 435-444.

⁵⁷ Workplace Gender Equality Procurement Principles came into effect from 1 August 2013.

⁵⁸ Anthony Forsyth, ‘Restoring the Rule of Law through Commercial (Dis)incentives: The Code for the Tendering and Performance of Building Work 2016’ (2018) 40 *Sydney Law Review* 93.

⁵⁹ Australian Industry Participation Plans for Government Procurement 2001; Australian Government, *Australian Industry Participation Plans User Guide for developing an AIP Plan* (March 2020) <www.industry.gov.au/aip>. The AIPP was developed in accordance with the Australian Industry Participation Framework, which seeks to “promote, develop and maintain a sustainable Australian industry capability by encouraging competitive Australian industry participation in investment projects”.

⁶⁰ Code for Tendering and Performance of Building Work applies to procurement carried out on or after 2 December 2016.

⁶¹ Olga Martin-Ortega and Claire .M. O’Brien (eds), *Public Procurement and Human Rights: Opportunities risks and dilemmas* (Edwards Edgar Publishing, 2019) 1-17; Jolien Grandia and Joanne Meehan, ‘Public procurement as a policy tool: Using procurement to reach desired outcomes in society’ [2017] *International Journal of Public Sector Management* 30 (4), 302-209.

⁶² This question is discussed in section 2.4 below.

⁶³ Commonwealth of Australia, ‘Trading Lives: Modern Day’ (June 2013, Canberra) <https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jfad/slavery_people_trafficking/report.htm>, see Recommendation 7.

there have been calls to amend the CPR to reflect this objective. For example, a Parliamentary Committee consultation on the issue of supply chain reporting considered the issue of modern slavery in the government's supply chain.⁶⁴ The Committee noted that in June 2017, the Parliament Joint Select Committee on Government Procurement reported on the effectiveness and adequacy of the Commonwealth Procurement Rules.⁶⁵ The report recommended that the Attorney General Department "oversee the introduction and application of a procurement connected policy requiring Commonwealth agencies to evaluate suppliers' compliance with human rights regulation".⁶⁶ Furthermore, tackling modern slavery through public procurement was explicitly mentioned in the Federal Government's National Action Plan 2015 – 2019.⁶⁷ Additionally, in 2013, former Prime Minister Gillard announced a "government strategy to reinforce ethical behaviour in procurement so that no firm providing goods or services to the Commonwealth is tainted by slavery or people-trafficking anywhere in the supply chain".⁶⁸

Despite these indications at the political and legislative level that use of the procurement process to combat trafficking is a legitimate pursuit, *no dedicated procurement policies addressing trafficking* have been published by the Commonwealth's Minister for Finance, nor were relevant subject-specific provisions included in revisions to the Commonwealth Procurement Rules (CPR) undertaken in 2017, 2018 or 2019. There was some progress in the 2020 revision of the CPR, which provided that procuring entities must now consider reporting requirements under the Modern Slavery Act 2018, but this is not an adequate substitute to address the matter of concern.⁶⁹ Essentially, Section 15 of the Modern Slavery Act requires the Minister to publish a modern slavery statement covering all Commonwealth procuring entities.⁷⁰ The statement must include the risks of modern slavery practices occurring in the operations and supply chains of all procuring entities; actions to be taken by the procuring entities to address those risks, including due diligence and remediation processes; and provisions on how the effectiveness of

⁶⁴ Parliament of Australia, 'Supply chain reporting in Australia' (Inquiry into Establishing A Modern Slavery Act in Australia) (2018) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Interim_Report/section?id=committees%2Freportjnt%2F024092%2F24952#footnote116target>.

⁶⁵ The Joint Committee on Government Procurement was established on the 1st December 2016 by an agreement from the House of Representatives and the Senate. The purpose of the Committee was to inquire into and report on the Commonwealth procurement framework.

⁶⁶ Australia Parliament Joint Select Committee on Government Procurement Rules, 'Buying into our Future: a review of amendments to the Commonwealth Procurement Rules', (Australian Parliament, June 2017, Canberra), 130 <http://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024068/toc_pdf/BuyingintoourFuture.pdf;fileType=application%2Fpdf>.

⁶⁷ The Australian Government, 'National Action Plan to Combat Human Trafficking and Slavery 2015–19' <<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/TraffickingNationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf>>.

⁶⁸ Parliament of Australia, 'International Women's Day Breakfast' (Department of Prime Minister and Cabinet, March 2013) <<https://pmtranscripts.pmc.gov.au/release/transcript-19138>> ; Business and Human Rights Resource Centre 'World Vision welcomes PM's anti-slavery commitment [Australia]' (Business & Human Rights Resource Centre, 8 March 2013) <<https://www.business-humanrights.org/en/australia-prime-minister-commits-to-ensuring-that-goods-services-in-commonwealth-supply-chain-are-not-tainted-by-slavery-human-trafficking-world-vision-welcomes-announcement#c71274>>.

⁶⁹ CPR (n 51), Rule 7.27

⁷⁰ *Modern Slavery Act 2018* (Cth), Section 15.

such actions are to be assessed.⁷¹ While inclusion of the Modern Slavery Act to the CPR is a welcome development because it signifies the Government is concerned about trafficking within its supply chains and creates a legal obligation on procuring entities to review the risk of trafficking, it does not however provide detailed procedures which procuring entities should follow to mitigate the award of contracts tainted by trafficking. By not providing such detailed procedures for procuring entities to follow in the event that they discover their supply chain has been tainted by trafficking, the Modern Slavery Act does not address the inadequate provision that exists in the CPR regime. As we shall see below, the CPR has major deficiencies in this regard and the absence of a dedicated Procurement Connected Policy aggravates this lacuna. The next section analyses relevant provisions in the CPR that directly or indirectly address trafficking, and shall demonstrate their shortcomings both in terms of lack of legal certainty and effectiveness, and how this serves as a warning to other countries seeking to emulate such model “off the shelf”.

3.0 Tackling trafficking under the Commonwealth Procurement Rules

This section of the paper analyses provisions of the Commonwealth Procurement Rules that identify, prevent, or mitigate the risk of trafficking in the public procurement process and highlights their limitations. The rules address a number of different aspects, including the procurement objectives and various elements of the procurement process (procurement planning, supplier qualification, evaluation of tenders, and contract award). Each of these will now be examined in turn.

3.1 Public Procurement Objectives - Ethical Purchasing

The CPR recognises various procurement objectives that are critical when procuring goods, works or services, including the achievement of value for money, efficiency, effectiveness, economical and ethical purchasing, accountability and transparency.⁷² We focus on the standout objective on this list relevant to the current enquiry, namely, *ethical purchasing*, because this procurement objective is directly relevant to addressing trafficking in Commonwealth supply chains.⁷³ Before defining ethical purchasing and discussing CPR 6.7 which attempts to address this issue, it must be observed that the Commonwealth’s attempt to address ethical purchasing suffers from several deficiencies which inhibit *both its effectiveness and legal certainty*.

CPR 6.5 defines *ethical purchasing* as referring to “honesty, integrity, probity, diligence, fairness and consistency” in the procurement process and being defined in such terms, is often narrowly interpreted as equating ethical procurement as meaning corruption-free procurement.⁷⁴ Rules 6.5 to 6.8 of the CPR

⁷¹ Ibid.

⁷² CPR (n 51), Division 1, Rule 4.1- 7.26.

⁷³ Ibid.

⁷⁴ CPR (n 51), Rule 6.5; This is the definition used by the CPR but note that ethical purchasing can also be defined more broadly at international level: for example, CIPS refers to ethical procurement as “the procurement process respects fundamental international standards against criminal conduct and human rights abuses (like modern slavery) and responds immediately to such matters where they are identified” and “that products are purchased in a responsible sustainable way” CIPS “Ethical and Sustainable Procurement” www.cips.org/Documents/About%20CIPS/1/CIPS_Ethics_Guide_WEB.pdf;

govern ethical purchasing. Rule 6.6 covers issues such as conflicts of interest, fair treatment of suppliers, use of public resources and compliance with legal requirements or policies on gifts or hospitality. Of more relevant significance to this paper's enquiry is Rule 6.7, which states:

Relevant entities must not seek to benefit from supplier practices that may be dishonest, unethical or unsafe. This includes not entering into contracts with tenderers who have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and who have not satisfied any resulting order. Officials should seek declarations from all tenderers confirming that they have no such unsettled orders against them.⁷⁵

So far as *legal certainty* is concerned, this Rule is worthy of comment on several grounds. First, it is addressed to "*relevant entities*" (procuring entities) and not to a procuring officer. This is significant firstly because traditionally, it was the personnel of a procuring entity who were the target of legal prohibitions, e.g., corruption laws. However, Rule 6.7 now goes a step further because it makes procuring entities the subject of prohibited behaviour, namely in this instance the procuring entity itself must not benefit financially from an unethical or dishonest supplier.

Second, Rule 6.7 is noteworthy because, in not defining the type of benefits obtainable from suppliers,⁷⁶ it could be argued that engaging in commercial transactions with suppliers tainted by slavery practices such as child labour and forced labour provides a form of financial benefits (i.e. cheaper products) to procuring entities, and thus such benefits are prohibited under Rule 6.7, though the matter is not beyond legal doubt. Therefore, for the avoidance of doubt, it is submitted that the Commonwealth should provide legal certainty on this point, making it explicitly clear that the award of contracts to suppliers that engage in trafficking falls within Rule 6.7's "dishonest, unethical and unsafe practices" which procuring entities must not benefit from.⁷⁷

A third legal certainty problem arises with Rule 6.7's requirement that suppliers who have been found guilty of violations of "*employee entitlement*" should not be engaged by procuring entities, i.e., procuring entities must not transact with such suppliers. The lack of legal certainty arises because the term "*employee entitlement*" is not a defined term in the CPR. Some illustration of what employee entitlement could mean could be found in the Fair Work Act (FWA) 2009, the primary legislation governing Australia's labour conditions. Under the FWA, employees are entitled to unpaid parental leave, annual leave, return to work guarantee, compassionate leave, extended service leave, entitlement

the Centre for Global Education York (www.cgeyork.org) and Wilberforce Institute for the Study of Slavery and Emancipation (www.hull.ac.uk) jointly define ethical purchasing as "purchasing which takes into account social and environmental considerations"; the European Union defines social procurement as procurement that "is socially responsible public procurement by buying ethical products and services, and by using public tenders to create job opportunities, decent work, professional inclusion and better conditions for disabled and disadvantaged people. www.ec.europa.eu.

⁷⁵ CPR (n 51), Rule 6.7.

⁷⁶ Addressing this provision to procuring entities is important because they are the legal entity i.e. a party to the contract with a supplier tainted with trafficking.

⁷⁷ CPR (n 51), Rule 6.7.

to be absent from employment on public holidays, and so forth.⁷⁸ These entitlements must be available to each employee in a non-discriminatory manner unless the FWA excludes groups or classes of employees from receiving the entitlements. As these entitlements relate to labour rights, it could be argued that Rule 6.7 addresses labour exploitation as suppliers exploiting their workers' entitlements should not be awarded a contract. However, this interpretation of 'employee entitlements' does not negate the ambiguity caused by the undefined term. To remedy this lack of legal certainty, the Commonwealth should define the term in Appendix B of the CPR. Such an amendment should explicitly include trafficking practices such as forced labour, child labour, recruitment fees, and commercial sex acts, as set out under existing federal laws, in order to remove lack of legal certainty as to Rule 6.7's scope.

Such clarification of employee entitlements may not on its own be enough, because another notable limitation on *the effectiveness* of Rule 6.7's prohibition relates to the requirement for there to be finality of "*judicial decisions*" relating to denial of employee entitlements. Naturally, on one hand, this requirement for judicial determination reflects the traditional respect for due process and presumption of innocence to be observed in a legal system observing the 'Rule of Law'. However, given the diverse, highly sophisticated and organised nature of trafficking, it may be difficult to convict traffickers, especially legal persons with global networks.⁷⁹ To this end, it is argued that Rule 6.7's requirement for a final conviction to be obtained against a supplier before Rule 6.7's prohibition comes into effect is no longer appropriate. It brings the CPR out of line with the most recent international thinking⁸⁰ in this matter.⁸¹ The difficulty in obtaining a final judgment for trafficking is evidenced in statistics showing a wide divergence between the estimated number of suspected trafficking-related offences in Australia and the number ultimately convicted.⁸² The disjunction between the lack of conviction and reported incidents is a testament to the difficulties surrounding errant suppliers' successful prosecution. Thus,

⁷⁸ *Fair Work Act No.28 2009* (Cth).

⁷⁹ United Nations Office on Drugs and Crime (UNODC), 'Organized crime involvement in trafficking in persons and smuggling of migrants. Vienna: UNODC' (2010) <http://www.unodc.org/documents/human-trafficking/FINAL_REPORT_06052010_1.pdf>.

⁸⁰ OSCE (n 36), 44.

⁸¹ Indeed this new thinking also makes the EU approach look out of touch: Art 57 (1) of European Union's Directive 2014/24/EU permits contracting authorities to exclude a supplier subject of "a conviction by final judgement" for "child labour and other forms of trafficking" but not where there is credible evidence presented but no prosecution yet obtained.

⁸² The U.S Department of State, '2020 Trafficking in Persons Report: Australia' (2020) <<https://www.state.gov/reports/2020-trafficking-in-persons-report/australia/>>. According to this report, between 2016 and 2019, the Australian government investigated over 663 suspected cases of trafficking and this resulted in prosecution against 12 defendants and conviction of eight. It is likely that these convictions were against individuals and not legal persons; Global Slavery Index, 'Australia' (2018) <<https://www.globallslaveryindex.org/2018/findings/country-studies/australia/>>. Global Slavery Index estimates "that on any given day in 2016, there were 15,000 living in conditions of modern slavery in Australia, a prevalence of 0.6 victims of modern slavery for every thousand people in the country"; Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: The Australian Government Response 1 July 2015 – 30 June 2016, Australian Government* (Australia Government, June 2016). Available from <<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Report-of-the-interdepartmental-committee-on-human-trafficking-and-slavery-july-2015-to-June-2016.pdf>>.

this limitation, if maintained, will remain a significant obstacle to procuring entities seeking to exclude suppliers tainted by slavery practices.

Therefore, it is recommended that Rule 6.7 should be further amended to require procuring entities to exclude suppliers from tendering exercises where there is *a judgment or credible allegations against such suppliers engaging in trafficking practices*. This would bring the CPR into line with international thinking as suggested in the OSCE paper on ending exploitation.⁸³ The practicalities of such an exclusion are extensively discussed in Section 3.3 below.

Finally, a major problem arises with the effectiveness of Rule 6.7 with the exclusion of *suppliers* from the scope of Rule 6.7's prohibition. As currently drafted, Rule 6.7 is directed at prohibiting actions by procuring entities, but it fails to prohibit actions by non-compliant suppliers: in other words although the Rule does prohibit procuring entities entering into contracts where suppliers have violated "*employee entitlements*", the rule does not prohibit such suppliers from seeking *to enter into* contracts with procuring entities nonetheless. This represents a major lacuna in the CPR and calls its effectiveness into question if this lacuna is not remedied.

Currently all that CPR Rule 6.7 requires is that officials seek declarations from all bidders that they have not been subjected to a judgment denying employee entitlements. This is a very weak regime because of (a) the considerable lack of legal certainty whether Rule 6.7 covers slavery and trafficking practices at all (as discussed above); and, (b) even if it does, the requirement for judicial finality leaves the way open for suppliers engaging in slavery practices to be awarded contracts by unsuspecting procuring entities until such time as a judgment convicting the supplier is handed down.

3.2 Procurement Planning

3.2.1 Trafficking due diligence

Procurement planning is essential to any tendering exercise. It leads to a well-developed tender specification for the goods or services sought; better risk identification and management; and allows procuring entities to be proactive, instead of reactive, to problems unidentified at this pre-tender advertisement stage.⁸⁴

According to the CPR, a range of different activities or exercises take place during the planning phase. For example, CPR Rules 7.8 and 7.9 govern the development and publication of annual procurement plans on AusTender⁸⁵ and Rule 8 addresses risk assessments and management. Concerning the latter,

⁸³ OSCE (n 36), pp.44.

⁸⁴ Khi V. Thai, *International Handbook of Public Procurement* (Taylor and Francis, 2009) 11.

⁸⁵ AusTender, 'Welcome to the Australian Government's procurement information system' (2021) <<https://www.tenders.gov.au/>>.

Rule 8.1 encourages procuring entities to be "*mindful of the risks [which the procuring entity faces in making]...informed decisions in managing these risks and identifies and harnesses potential opportunities*" to mitigate these risks.⁸⁶ Furthermore, Rule 8.2 mandates procuring entities to identify, analyse, allocate and treat risk when conducting a procurement.⁸⁷ The Commonwealth is aware that some sectors are more prone to trafficking and labour exploitation within its supply chain. This is evident from reports published by the Commonwealth, which shows that the apparel, cleaning and agriculture sectors are prone to labour exploitation,⁸⁸ yet the legal obligation to consider trafficking and labour exploitation as risks is not explicitly mentioned in the CPR, and this gives rise to lack of legal certainty as to the scope of the procurement planners' obligations during the procurement planning phase. Trafficking, labour exploitation or other synonyms are not explicitly mentioned under CPR Rule 8, yet it is undoubtedly a risk factor that should be considered in every procurement, leading to the development and implementation of strategies to mitigate such risks during the rest of the procurement cycle.⁸⁹

In addition to revising the CPR to remove this lack of legal certainty, it is further proposed that the government *expand on its existing data* by producing a comprehensive list of products prone to trafficking practices or require procuring entities to carry out a high level of human rights due diligence before going to the market. Human rights due diligence refers to "the process of identifying human rights risks in an organisation's supply chain, preventing them from occurring or mitigating those risks and reducing their impact".⁹⁰

Updating this list enables procuring officers to conduct risk assessments and determine what information or documentation potential suppliers must submit for the qualification process. Other reports and research produced by recognised institutions and countries can help the Commonwealth draft the recommended list.⁹¹ Conducting due diligence at this stage of the procurement cycle might be resisted because it creates an administrative burden on procuring officers and may require additional costs from taxpayers in developing this list of high-risk products. Although these are valid concerns against the list's production, the list does not necessarily have to be created by each procuring entity.

⁸⁶ CPR (n 51), Rule 8.1.

⁸⁷ Ibid.

⁸⁸ Australia Attorney General, 'Information Sheet for Commonwealth Government procurement officers', <<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/HumanTrafficking-Information-sheet-for-Commonwealth-Government-procurement-officers.pdf>> accessed 5th August 2019.

⁸⁹ Louise de Koker and Kayne Harwood, 'Supplier Integrity Due Diligence in Public Procurement: Limiting the Criminal Risk to Australia' (2015) 37 *Sydney Law Review*. 217; Claire O'Brien et al, 'Public Procurement and Human Rights: A Survey of Twenty Jurisdictions' (International Learning Lab, 19 July 2016) <<https://www.hrprocurementlab.org/blog/reports/public-procurement-and-human-rights-a-survey-of-twenty-jurisdictions/>>.

⁹⁰ Olga Martin-Ortega and Andy Davies, 'Protecting Human Rights in the supply chain' (CIPS, 2017)

<https://www.lupc.ac.uk/sites/default/files/Knowledge%20LUPC%20-%20Protecting%20Human%20Rights%20in%20the%20Supply%20Chain_1.pdf>

⁹¹ For example, the US Department of Labor list of products produced by forced labour and child labour, can be utilised by the Commonwealth procuring officers when procuring goods found on the list. Department of Labor (US), 'List of Goods Produced by Child Labor or Forced Labor' (2020) <https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2019/2020_TVPRAListOnlineFinal.pdf>.

Instead, it could be collectively developed by key government departments such as the Department of Finance, Department of Justice, and the Minister for Trade, or in collaboration with leading public sector players.

Another way to improve legal certainty in the procurement planning phase can be brought about by revising the CPR to make it clear that trafficking can be addressed by appropriate conditions and award criteria. Rule 10.6 of the CPR lists six vital pieces of information which must be included in procurement documentation: these include the tender's acquisition scope and coverage; minimum content and format requirements; conditions for participation; evaluation criteria; dates for delivery; and any other terms or conditions relevant to the evaluation of submissions.⁹² These generic requirements of themselves are not explicitly sensitised to the tackling of trafficking through the procurement process. Accordingly, it is suggested that any State seeking to improve these matters, such as the Commonwealth, may learn by drawing on the experiences of jurisdictions such as the US and UK which are leading on this issue.

For example, in the US, Subpart 22.15 of the US Federal Acquisition Regulation provides an example of a procurement framework that utilises the tender planning stage to address the risk that the goods being sought might be of a category typically produced by forced or indentured child labour.⁹³ Unlike the Commonwealth model, there is no lack of legal certainty evident in this respect under this US model: under the US FAR, procuring entities *must check* if the acquisition falls within the list of products commonly produced by forced / indentured child labour before publishing the tender solicitation documents, which can contain a stipulation that anti-child labour certification will be required from the successful bidder prior to contract award.⁹⁴ Similarly, Subpart 22.17 of the FAR (prohibiting trafficking practices during contract performance) requires US federal procuring entities to include the Subpart's anti-trafficking provisions pertaining to the contract performance stage (by the bid winner) in bid solicitation documents.⁹⁵ While Subpart 22.17 of the FAR is cited as the leading global framework for tackling trafficking, it has been criticized by Woods, Bradbury, and Starks for lack of enforcement due to its zero-reporting of violations despite strong evidence detailing suppliers engagement in the prohibited trafficking practices.⁹⁶ Furthermore, Subpart 22.17's temporal approach of tackling trafficking 'during the period of contract performance' limits the government's ability to prohibit this illegal practice outside of its contractual relationship with the supplier. Additionally, Subpart 22.17 has been criticised for lacking positive incentives that should encourage suppliers to refrain from engaging

⁹² CPR (n 51), Rule 10.6.

⁹³ FAR (n 39), Subpart 22.15.

⁹⁴ Ibid, Subpart 22.1503.

⁹⁵ FAR (n 39) Subpart 22.17

⁹⁶ Woods, Bradbury, and Starks (n 4).

in trafficking.⁹⁷ Despite these criticisms, Subpart 22.17 (albeit limited) contains several advantageous provisions that should be adopted in tackling trafficking through public procurement frameworks.

In the UK, legal certainty is catered for by the requirement for suppliers to declare whether they have been found guilty of trafficking, and this condition is specified in the published procurement documents.⁹⁸ Essentially, this stage of the procurement process acts as a process of self-elimination. Potential suppliers who acquire the procurement documentation by expressing an interest in the procurement opportunity will be able to assess whether they meet the anti-trafficking conditions stipulated in the document before preparing or submitting a tender. Potentially, this means that those suppliers who are tainted by a trafficking conviction should naturally eliminate themselves from the tendering process.

3.2.2 Technical specification

A second method for addressing trafficking during the tender planning stage is through the technical specifications part of the tender. Currently the CPR model fails to take advantage of this opportunity, hence resulting in a major lack of legal certainty as to whether this is legally possible under the Commonwealth CPR model. Technical specifications define the physical and operational characteristics required of goods, services or works, and as such, form a critical part of the procurement process. Suppliers whose tenders do not meet the technical specification must be excluded from further participation in a tender competition.⁹⁹ Accordingly, drafting an appropriate technical specification presents an excellent opportunity to address trafficking concerns.¹⁰⁰

Caldwell, Bakker and Reed argue that the functional aspect of the specification describes "what the product or services have to do", and the technical aspect considers the "properties and characteristics of the product and activities the supplier must perform".¹⁰¹ This means that technical specifications can be influenced not only by the procurement's subject matter, but also by institutional and national policies and practices, e.g., environmental policy or characteristics.¹⁰² Research conducted by Parikka-Alhola found that in most procurements where environmental objectives are being promoted, "over 60% of the

⁹⁷ Nicole Fleury, 'Offering the carrot to complement the stick: Providing positive incentives in public procurement frameworks to combat human trafficking' (2019) 48 Pub.Cont.L.J. 397.

⁹⁸ The UK Public Contracts Regulations 2015, Reg 49 and 57(1).

⁹⁹ Abby Semple, *A Practical Guide to Public Procurement* (Oxford University Press, 2015) 106.

¹⁰⁰ Maria Anna Corvaglia, *Public Procurement and Labour Rights: Towards Coherence in International Instruments of Procurement Regulation* (Hart Publishing, 2017) 82-84. Approaches to devising technical specifications vary widely. For example, technical specifications can address a range of issues such as supply chain issues; see also Olga Martin-Ortega, Opi Outhwaite and William Rook, 'Buying power and human rights in the supply chain: legal options for socially responsible public procurement of electronic goods' [2015] *The International Journal of Human Rights* 19(3), 341-368.

¹⁰¹ Nigel Caldwell, Elmer Bakker and John Read, 'The Purchasing Process in Public Procurement' in Louise Knight et al (eds), *Public Procurement: International cases and commentary* (Routledge 2007)) 149-159.

¹⁰² Abby Semple, 'Socially Responsible Public Procurement (SRPP) under EU Law and International Agreements' (2017) 12 *European Procurement & Public Private Partnership Law Review* 293.

environmental criteria were presented in technical specifications".¹⁰³ However, while environmental characteristics are increasingly used in the design of technical specifications, social characteristics are not as widely used probably because traditionally, procurement officers did not see pursuit of social agendas as part of the tender's remit, and also because of the fear of unwittingly causing discrimination to occur, as the cases discussed below will attest. However, notwithstanding such risks, inclusion of social characteristics within a tender's technical specifications is permissible, *provided that* the social characteristics satisfy a crucial parameter, i.e., they must (just as in the case of environmental or any other extra-mural characteristics) relate to the procurement subject matter.¹⁰⁴

Currently, the CPR (Rules 10.9 to 10.13) do not contain *any rules* that require procuring entities to incorporate relevant social characteristics (e.g., addressing labour exploitation or slavery) within the technical specifications. Therefore, it is recommended that, *where appropriate, Commonwealth procuring entities should incorporate social characteristics that address labour exploitation within public tenders' technical specification.* European Union Law already takes this approach: Directive 2014/24/EU permits procuring entities to use labour conditions and labels as part of the technical specification, *as long as* these characteristics are not discriminatory as to nationality *and* provided that they relate to the procurement subject matter. As an illustration, in the case of *Commission v Netherlands (Dutch Coffee)*,¹⁰⁵ the technical specification required payment of a living wage and use of fair trade products that possessed the Max Havelaar label.¹⁰⁶ While the specification was deemed illegal due to the requirement of a specific label (which could constitute discrimination because that trade label was not available to all potential bidders) nevertheless the Court of Justice agreed that inserting social criteria into the technical specifications (seeking promotion of fair labour conditions) was legitimate because it did not give any bidder an unfair advantage. Thus, the matters condemned in this case were not due to deployment of social characteristics requirements seeking to address labour exploitation, but rather was related to where such characteristics deployment would achieve discrimination, i.e., national measures or specific trade labels which constrain or hinder suppliers from other Member States from participating in the tendering exercises.

In proposing transplanting this European Union approach into the CPR, the authors recommend the CPR be revised to explicitly make it clear that deployment of social and labour conditions in tenders' technical specifications where appropriate to do so, is legally permissible. Hence for example, the procurement can, within the technical specification impose a range of relevant requirements, such as a requirement that tenderers commit to payment of the legislatively mandated minimum wage levels; or

¹⁰³ Katriina Parikka-Alhola, 'Promoting environmentally sound furniture by green public procurement' [2008] *Ecological Economics* 68, 472-485.

¹⁰⁴ Martin-Ortega, Outhwaite and Rook (n 100).

¹⁰⁵ For example, Recital 99 of Directive 2014/24 provides that in "*technical specifications contracting authorities can provide such social requirements which directly characterise the product or service in question, such as accessibility for persons with disabilities or design for all users*"; Case C-368/10 *Commission v. Kingdom of the Netherlands* [2012] ECR I-284

¹⁰⁶ The Max Havelaar label is given to organisations that produce their coffee in accordance with the principles of fair trade.

that the products or services to be acquired are to be produced or supplied free from use of forced or child labour; or that suitable and safe equipment and facilities be used, etc.¹⁰⁷ In construction contracts, procuring entities could require potential suppliers to include their equipment, facilities, and working conditions to satisfy the technical specifications' technical and performance aspects.¹⁰⁸ The limitation of the EU approach is that the social characteristics condition which the public purchaser wishes to impose, must be linked to the subject matter of the procurement (whether inserted into the tender's technical specification or award criteria). This constraint curtails the extent to which procurement can be used to address trafficking in public contracts in the European Union.¹⁰⁹ This constraint - the linkage to subject matter of the contract - is imposed by EU law. Whether Australia would decide to adopt this constraint (which has been developed in the EU jurisprudence¹¹⁰ and consolidated in the EU legislation) would be a matter for the legislator.

3.3 Qualification of Suppliers Stage

The CPR model exhibits several major weaknesses in terms of its *effectiveness* to combat trafficking in procurement as becomes evident when analysis is undertaken of the CPR's requirements for the suppliers qualification stage of a public procurement. In this section of the paper, the authors shall identify the problem and propose how it may be remedied. It will be seen how the CPR employs an approach that is no longer fit for purpose, which allows errant suppliers to enter the tender process because the CPR is not assessing them from a trafficking compliance perspective at this early stage. This represents a fundamental weakness in the CPR model as currently constituted.

Many international procurement frameworks approach the matter of "not letting the fox into the henhouse" by allowing their procuring entities to qualify potential suppliers using the procurement framework's mandatory exclusion and supplier-qualification selection criteria.¹¹¹ Currently, the CPR does not take such an approach. It does not explicitly provide for the exclusion of suppliers guilty of criminal activities such as trafficking from the procurement process.¹¹² Instead, Rule 10.17 of the CPR

¹⁰⁷ Corvaglia (n 100), 185.

¹⁰⁸ Ibid.

¹⁰⁹ For example, Art 67 of Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC OJ [2014] L.94] provides inter alia that tenders can be awarded "...on the basis of criteria, including qualitative, environmental and/or social aspects, [provided that they are] linked to the subject-matter of the public contract in question...". Art 42(1) provides inter alia that "...the technical specification shall lay down the characteristics required of a works, service or supply....provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

¹¹⁰ See for example Case 31/87 *Gebroeders Beentjes BV v State of the Netherland* [1988] ECR 4635; Case C-368/10 *Commission v. Kingdom of the Netherlands* [2012] ECR I-284; Case C-448/01 *Evn, Wienstrom v Austria* ECLI:EU:C:2003:65; Case C-513/99 *Concordia Bus Finland Oy Ab v. Helsingin kaupunki and HKL-Bussiliikenne* [2002] ECR I-7123.

¹¹¹ For example, Regulation 57 of the UK Public Contracts Regulations 2015 specifies a list of exclusion grounds and Subpart 9 of the US Federal Acquisition Regulation regulates contractors' qualification.

¹¹² The CPR's conditions for participation (Rule 10.15-10.19) does not list criminal offences rather, it provides generic conditions relating to the suppliers technical, commercial and legal capabilities, as well as labour regulations, workplace health and safety and environmental impacts as outlined in Rule 10.17 and Rule 10.19. Discussion follows immediately below.

provides for mandatory supplier exclusion from further participation in the tender where potential suppliers have not satisfied the *commercial, financial and technical* conditions for participation.¹¹³ It is submitted that this provision is not sufficient for the purpose of addressing trafficking in public supply chains. To remedy this lacuna, the CPR should address this gap, by introducing an exclusion list that permits procuring entities to exclude suppliers convicted of, or against whom there is strong credible evidence presented, that they have been engaged in trafficking practices.

In a well-designed supplier qualification system, each competing supplier's eligibility to go forward and be evaluated as the winning tenderer first requires a determination to be made as to the supplier's *integrity and capability* to perform the contract were they to be eventually selected as the winning bid.¹¹⁴ To set the background to achieve this objective, procuring entities must set clear conditions for participation in the tender, and elaborate supplier evaluation criteria in the procurement documentation against which suppliers will be assessed, assuming they pass the eligibility and capacity to perform the contract stage.¹¹⁵ Only those suppliers who satisfy such tender participation conditions and provide an otherwise compliant tender, can go forward to the tender evaluation stage, to decide whether they, rather than others, should be awarded the contract.¹¹⁶

However, the Commonwealth's CPR model approaches the qualification of suppliers by reference to assessing only *the capacity and capability* of a supplier to perform the contract (CPR Rules 10.15 to 10.19).¹¹⁷ This paper therefore recommends that Rules 10.17 and 10.19 be amended to include provisions that will require tenderers to demonstrate *anti-trafficking integrity* at the supplier-qualification stage. We also submit that clear guidelines are required to be developed to steer procuring officers on how to assess suppliers under such amended CPR Rules.

A further example of how the CPR is not sufficiently effective for assessing the risk of trafficking at the supplier qualification stage in the procurement context arises when CPR Rule 10.19 is considered, presenting yet another example of how major revision of the Commonwealth's CPR model is required if it is to become effective for combating non-compliant suppliers.

Rule 10.19 states that:

"Officials must make reasonable enquiries that the procurement is carried out considering relevant regulations and/or regulatory frameworks, including but not limited to tenderers'

¹¹³ CPR (n 51), Rule 10.17.

¹¹⁴ Koker and Harwood (n 89).

¹¹⁵ CPR (n 51), Rule 10.25.

¹¹⁶ Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press, 2004) 317 -322.

¹¹⁷ Sue Arrowsmith, *The Law of Public and Utilities Procurement* (3rd edn, Sweet & Maxwell 2014) 1183.

practices regarding labour regulations, including ethical employment practices, workplace health and safety; and environmental impacts." ¹¹⁸

Rule 10.19 insufficiently addresses trafficking at the supplier assessment stage on several grounds. First, exhibiting lack of legal certainty, the Commonwealth does not provide a definitive (nor regularly updated) list of labour regulations or unethical practices that procuring entities should always consider when conducting their due diligence on suppliers. Second, the CPR does not detail for procuring officers what constitutes "reasonable enquiries". For example, should procuring entities carry out mandatory criminal checks on all suppliers who have submitted a tender? Or should there be some form of uniform declaration/certification that suppliers should be required to submit for consideration along with their tender (the UK approach).¹¹⁹ As already discussed earlier above, Rule 6.7 is not sufficient to address this issue because it only requires declarations as to past convictions, *but does not extend to* require declarations as to unethical practices not the subject of judicial determination.¹²⁰ Third, another issue relating to Rule 10.19 concerns the lack of transparency relating to procuring entities' decisions when reasonable enquiry has shown that a potential supplier is tainted by trafficking. For example, under the US Federal Acquisition Regulation, procuring entities are required to exclude suppliers that do not demonstrate sufficient integrity and do not operate ethically.¹²¹ The EU Public Sector Directive 2014/24/EU takes a somewhat narrower approach by requiring mandatory exclusion of suppliers convicted of trafficking by a final judgment.¹²² However, in contrast to these two models, the CPR model provides *no guidance on this key matter*. So, while it is expected that procuring entities should exclude such suppliers, the lack of clarity and lack of legal certainty as to whether there is a legal obligation to exclude, may lead to procuring entities' approaches to this question varying widely across the Commonwealth's procuring entities and territories.

This failure by the CPR to require procuring entities to use the tendering process to adequately pre-qualify potential suppliers on trafficking grounds before they can proceed to the bids' evaluation and contract award stages calls into question whether the CPR possesses effective mechanisms to prevent the awarding of contracts to errant suppliers. This may lead to poor performance, delay in completing contracts, reputational damage to the procuring entity, increased costs, as well as administrative burdens.¹²³ It is critical that an effective assessment of every potential supplier, *including the practices adopted in their organisation and supply chain*, is conducted at this (early) qualification of suppliers

¹¹⁸ CPR (n 51), Rule 10.19.

¹¹⁹ The UK Public Contracts Regulations 2015 require potential suppliers to declare offences listed under Reg 57(1). Modern slavery and trafficking offences are listed under Reg 57(1)(ma).

¹²⁰ See discussion in section 3.1.

¹²¹ Federal Acquisition Regulation, Subpart 9.104-1(d) "Have a satisfactory record of integrity and business ethics".

¹²² Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EU [2014] OJ L94/65, Art 57(1).

¹²³ Koker and Harwood (n 89).

stage in the public tender process, in order to determine the integrity of all tenderers well in advance of them being allowed to proceed to the tender evaluation and contract award stage. According to Koker and Harwood, if adequate integrity checks are not performed, *unscrupulous suppliers can access and abuse public procurement*.¹²⁴

Thus, it is essential, in order to maintain the integrity of the Commonwealth CPR procurement regime, that effective due diligence of suppliers is conducted at the supplier qualification stage to prevent unethical suppliers accessing public contracts. This would enable procuring entities to uncover trafficking practices adopted by potential or incumbent suppliers and allow for the adoption of measures designed to prevent or mitigate against occurrence of this illegal activity contaminating the public procurement system of the Commonwealth.

To enable procuring entities to prevent the award of contracts to suppliers tainted by trafficking practices, the following measures (if adopted) should strengthen the CPR model by leading to the effective exclusion of unscrupulous suppliers at the supplier-qualification stage of the procurement process. If procuring entities adopt these recommendations as pre-conditions for participation, they will need to be brought to potential tenderers attention in tender preparatory documentation in order to comply with observance of transparency. As the following discussion will now illustrate, they will undoubtedly increase the CPR model's effectiveness to act as a tool for preventing trafficking via the public procurement process, and additionally seek to address a lack of legal certainty.

Measure 1: Disclosure of Trafficking offences

The first measure proposed is to require potential suppliers to disclose whether they have been subject to any judicial or administrative orders relating to trafficking. Such disclosure would encompass all judgments or decisions rendered against a supplier by an institution recognised by the Commonwealth, irrespective of whether the decision is interim or final. This disclosure should include administrative decisions relating to labour conditions, e.g. decisions made by an employment tribunal or department of labour against a supplier for mandating employees to work excessive hours.¹²⁵

It is to be noted that while the exclusion of suppliers convicted of trafficking offences is an essential and customary way of addressing trafficking through procurement, adopting this recommendation may have unintended consequences for procuring entities. For example, the disclosure of offences might deter otherwise eligible suppliers from participating in tendering exercises, thereby having an indirect

¹²⁴ Ibid.

¹²⁵ Sope Williams, 'Coordinating public procurement to support EU objectives - a first step? The case of exclusions for serious criminal offences' in Sue Arrowsmith and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge University Press, 2009) 490-498.

effect of limiting competition to those that are free of criminal convictions¹²⁶, unless they are accompanied by “self-cleaning” measures.¹²⁷ Such a measure could also increase procuring officers' responsibilities by requiring them to carry out more due diligence, such as checking the alleged violation with the relevant judicial or administrative bodies.

Moreover, it could be argued that the disclosure of trafficking offences or practices do not prevent suppliers from engaging in future prohibited practices; instead, it notifies procuring entities of the supplier's past conduct. It is important to note that this recommendation relies solely on suppliers' conviction, and so will not catch all offending suppliers as convictions for trafficking are difficult to obtain in practice, due to supply chain complexities and the difficulties of acquiring tangible evidence to support a successful prosecution. Therefore, while this recommendation may help identify suppliers tainted with trafficking, on its own it is not sufficient to adequately address trafficking at the supplier qualification stage. Thus, other measures, as detailed below, should also be adopted alongside.

Measure 2: Certification of commitment not to engage in trafficking

In addition to the disclosure of prior offences, potential suppliers should be required to certify that they will not engage in trafficking practices either *during or after* contract performance.¹²⁸ Such certification should be submitted along with the tender, as this will form part of the supplier's qualification process, and can also be made a contractual condition should the supplier be successful in winning the tender. The certification language should be consistent with a template provided by the procuring entity in the procurement documentation. Doing so will avoid disparities in the certification submitted by various suppliers. To ensure the certification remains effective, procuring entities should require this certification from all contractors and subcontractors at regular intervals throughout the performance of the contract as well.

The certification commitment provides a better prospect of tackling trafficking rather than sole reliance on the disclosure of prior offences alone, because it focuses on the supplier's practices, current and

¹²⁶ Arrowsmith (n 117) 1277.

¹²⁷ Self-cleaning refers to measures adopted by suppliers to remediate or cleanse itself of past misconduct, ensuring that the misconduct does not happen again. For example, by paying compensation to victims; changing its operations and organisational structures; or collaborating with investigations. Self-cleaning measures are permitted under the UK Public Contracts Regulations (Reg 57 (13) and the EU procurement Directives e.g. Directive 2014/14, Art 57. S Mars, ‘Chapter 11: Exclusion and self-cleaning in Article 57: discretion at the expense of clarity and trade?’ in Grith S. Ølykke and Albert Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Edgar Publishing, 2016), 253–273; Sue Arrowsmith, Hans-Joachim Priess, & Pascal Friton, ‘Self-cleaning as a defence to exclusions for misconduct: an emerging concept in EC public procurement law?’ (2009) *Public Procurement Law Review* (6).

¹²⁸ FAR (n 39), Subpart 22.15 and Subpart 22.17 permit procuring entities to request certifications that products produced by forced or indentured child labour or trafficking will not be supplied to federal procuring entities. Subpart 22.17 certification is effective as it extends to all government suppliers (contractors, subcontractors, employees and agents) and requires contractors to carry out due diligence to determine that neither itself, subcontractors or agents have engaged in the prohibited trafficking practices. Additionally, contractors must take appropriate remedial measures where a violation of the trafficking practices has occurred. In contrast to the effectiveness of Subpart 22.17, the certification under Subpart 22.15 lacks effectiveness as contractors only are required to not submit end products produced by forced or indentured force labour. The ineffectiveness is due to the limitation of scope (only to forced or indentured child labor) and subject (only contractors), creating a loophole for subcontractors to engage in other forms of child labor.

future, and encourages behaviour change or maintenance of ethical behaviour during contract performance. Adopting this kind of measure covers practices that suppliers have not been convicted of, thereby mitigating the weaknesses of confining disclosure only to offences for which a conviction followed. Furthermore, it can also constrain future unethical supplier behaviour by forming a contractual commitment for which financial penalties can be provided in the contract awarded to the successful tenderer should a breach be subsequently detected.

3.4 Contract Award

As part of the process of determining a contract award, procuring entities must evaluate tender(s) received against pre-defined evaluation criteria set out in the procurement documentation to determine the ranking of competing submitted tenders.¹²⁹ The contract award stage of the procurement process therefore presents another critical phase of the procurement process which presents a key opportunity to use the procurement process to tackle trafficking.¹³⁰

The CPR Rule 7.12 requires procuring entities to include 'relevant' evaluation criteria and "*the relative importance of those criteria*" in the request documentation "*to enable the proper identification, assessment and comparison of submissions*".¹³¹ Beyond this general provision, the CPR does not specify the content of such criteria.¹³² Thus, procuring entities have considerable discretion in this area, as long as the evaluation criteria are applied fairly and transparently. The weight attached to each criterion should reflect the priorities of the procuring entity.¹³³ The flexibility afforded to procuring entities is advantageous because it means that procuring entities can adopt evaluation criteria without any infringement or conflict with the current CPR. This approach is adopted in international procurement frameworks as well, such as the European Union's Directive 2014/24/EU and the UK Public Contracts Regulations, which explicitly permit contracting authorities to include social criteria (such as trading conditions and suppliers' production processes) in the tender award criteria as long as they can be genuinely linked to the procurement subject matter.¹³⁴ In this way, award criteria relating to labour conditions can form part of the tender award evaluation criteria as long as they do not restrict competition; do not give rise to discriminatory treatment between suppliers; are proportionate to the nature of the contract; and are applied uniformly, fairly and transparently.¹³⁵ It is submitted that the Commonwealth should consider and follow this approach followed in other jurisdictions, by

¹²⁹ Pedro Telles and Luke Butler, 'Public Procurement Award Procedures in Directive 2014/24/EU' in Francois Lichere, Roberto Caranta and Steen Treumer (eds) *Modernising Public Procurement: The New Directive* (Djof Publishing, 2014) 178.

¹³⁰ For discussion on how to promote socially responsible public procurement at the award stage, see Semple (n 99), 298; Corvaglia (n 100) 182; Paula Faustino, 'Award Criteria in the New Directive on Public Procurement' (2014) *Public Procurement Law Review* 124.

¹³¹ CPR (n 51), Rule 7.12.

¹³² Telles and Butler (n 129).

¹³³ *Ibid.*, at 131.

¹³⁴ The UK Public Contracts Regulations 2015, Reg 67.

¹³⁵ Directive 2014/24, Art 67; UK Public Contracts Regulations 2015, Reg 67; Abby Semple, 'Living Wages in Public Contracts: Impact of the RegioPost Judgement and the Proposed Revisions to the Posted Workers Directive' in Albert Sánchez Graells (eds), *Smart Public Procurement and Labour Standards* (Harts Publishing, 2018) 86.

supplementing the CPR with ample guidance on Rule 7.12 in order to make it clear to procuring entities how to include social considerations such as labour conditions in public tenders' award criteria.

Another significant part of the contract award process where trafficking can be addressed is in the awarded public contract. The public contract presents a crucial opportunity for procuring entities to tackle trafficking within their supply chains primarily through the insertion of anti-trafficking contract terms, and providing effective contract remedies for breach, to deter suppliers from engaging in unethical activities.

The inclusion of contract terms in the awarded contract to address trafficking is not regulated in the CPR and is not included in the Commonwealth Contract Terms, a generic non-negotiable template used by federal procuring entities when awarding contracts.¹³⁶ This lack of contract terms to prevent human trafficking in public contracts contributes to the lack of effectiveness in the Commonwealth procurement framework because the absence of such terms in the contract means that pertinent legally enforceable provisions are not being used, when they could be, to *contractually* deter suppliers from engaging in trafficking practices when implementing procurement contracts.¹³⁷

Including contract terms to prevent human trafficking in all public contracts is not a revolutionary proposal: procuring entities already use contract conditions to ensure supplier observance of procuring entities' social or environmental objectives and preferences.¹³⁸ Countries such as the US, and South Africa¹³⁹ all use contract conditions to promote observance of ethical labour conditions, by making observance during the period of *contract performance* the subject of essential contractual conditions.¹⁴⁰ Thus, the assumption is that nothing precludes Commonwealth (or other) procuring entities from using the contract to address trafficking practices during contract performance, notwithstanding their absence from the CPR.¹⁴¹

¹³⁶ Department of Finance, 'Commonwealth Contracting Suite (CCS)' (updated 20 April 2021) <<https://www.finance.gov.au/government/procurement/commonwealth-contracting-suite-ccs>>.

¹³⁷ Procuring entities should include a range of remedies in the contract to inhibit suppliers tempted to breach anti-trafficking provisions (suggested for inclusion in the CPR by the authors) as discussed above in sections 3.1 to 3.4. Remedies such as suspension of payment; termination of the contract; suspension; and debarment, should all be available to procuring entities when suppliers fail to address trafficking practices within their supply chains.

¹³⁸ Sue Arrowsmith, 'A Taxonomy of Horizontal Policies' in Sue Arrowsmith and Peter Kunzlik (eds) *Social and Environmental Policies in EC Procurement Law* (Cambridge University Press 2009) 121- 127.

¹³⁹ Phebe Bolton, 'Government Procurement as a policy tool in South Africa' [2006] JPP 6(3), 193-217; Phebe Bolton, 'An Analysis of the Preferential Procurement Legislation of South Africa' (2007) *Public Procurement Law Review*, 16(1), 36-67; Christopher McCrudden, 'EC public procurement law and equality linkages: Foundations for interpretation in Sue Arrowsmith and Peter Kunzlik (eds) *Social and Environmental Policies in EC Procurement Law* (Cambridge University Press 2009) 271.,

¹⁴⁰ For example, under Subpart 22.17 of the FAR, procuring entities in the US must insert Clause 52.222-50 in all contracts. That Clause prohibits contractors, subcontractors, employees and agents from engaging in forced labour, commercial sex acts with labour, severe forms of trafficking, provision of inadequate housing, confiscation of identity documents, recruitment fees, misleading recruitment practices, and so forth.

¹⁴¹ Martin-Ortega, Outhwaite and Rook (n 100).

3.5 Contract Management

Contract management's primary purpose is to ensure suppliers perform the contract to the required standard and in accordance with their contractual obligations, which should include adherence to anti-trafficking contract terms which seek to prevent trafficking or impose on them obligations to conduct due diligence to identify, prevent and mitigate trafficking risks in the supply chain.¹⁴² Therefore, every procuring entity should have a procedure or strategy for managing and monitoring contracts, as doing so is likely to improve performance, manage budgets, ensure satisfactory delivery of the services, minimise risks and ensure the procuring entity continues to obtain value for money during the contract performance period.¹⁴³

Contract management is lightly regulated under Rule 7.26 of the CPR. According to Rule 7.26, “*where applying a standard for goods or services, relevant entities must make reasonable enquiries to determine compliance with that standard, including gathering evidence of relevant certifications*”.¹⁴⁴ While the requirement of certifications to validate the standard of the goods or services supplied would obviously come under this requirement, it is unclear whether such standard is confined to certification of the quality of the product or services specified in the technical specification, or whether it also includes *contract performance conditions*.¹⁴⁵ For example, in the *Commission v Netherlands*¹⁴⁶, the Dutch procuring entity was able to assess the standard used in producing the condiments supplied to the procuring entity by requiring suppliers to provide a Max Havelaar label which denoted that the products were produced under “fair trade” conditions. Applied to the Australian context, it is unclear whether requiring such certification of the standard surrounding contract performance is applicable under Rule 7.26. Despite the lack of legal certainty with Rule 7.26, it could be argued that nothing precludes federal procuring entities from requesting such certification from their suppliers, as long as the requirement of such certification is set out in the procurement documents and is not limited to a particular certification label or constitute an arbitrary form of discrimination between potential suppliers.

Furthermore, if certification relating to the standard of contract performance is permitted under Rule 7.26, to improve the effectiveness of the Rule it is recommended that procuring entities should request

¹⁴²World Bank, ‘Contract Management Practice’ (World Bank, September 2018) <<http://pubdocs.worldbank.org/en/277011537214902995/CONTRACT-MANAGEMENT-GUIDANCE-September-19-2018-Final.pdf>> 1.

¹⁴³ Ibid.

¹⁴⁴ CPR (n 51), Rule 7.26.

¹⁴⁵ For example, under Directive 2014/24/EU, Article 44 specifies that the certification shall be “as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions”.

¹⁴⁶ *Commission v Netherlands* (n 105) (though note on that occasion specifying a particular label was deemed illegal because it constituted discriminatory treatment of suppliers not possessing that label because it did not afford them the opportunity to demonstrate possession or adherence to an equivalent standard: had it done so, then specifying a particular label or standard would not be necessarily illegal - see further section 3.2.2 above).

an annual (and also) end of contract certification, similar to the certification of knowledge mentioned in section 3.3 earlier above. The certifications should specify that the supplier has not supplied products or performed services tainted by trafficking practices. Suppliers that fail to provide such annual and end-of-contract certification would lie open to being subject to remedies such as suspension of payment, termination of contract or suspension and debarment.

4.0 Conclusion

Tackling trafficking in public sector supply chains has been advocated by many international organisations such as the United Nations, the International Labour Organization, the Organization for Security and Co-operation in Europe and leading economies, including the Commonwealth of Australia, US, EU and UK. This paper analysed the Australia's Commonwealth Procurement Rules for the purposes of examining whether the current CPR regime meets the necessary standards of legal certainty and effectiveness, by examining key CPR provisions in order to assess whether the risk of trafficking is adequately addressed in the CPR procurement model. The authors demonstrate how key elements of the CPR model fail to provide for the required degree of legal certainty and effectiveness to tackle trafficking, with system failure demonstrated by analysis of key CPR provisions which either fail to satisfy one or other of these two key tests, or because of the complete absence of appropriate provisions to comprehensively deal with the risk of trafficking in the public sector supply chain. The research in this paper generates new insights for countries seeking to tackle trafficking via public procurement systems and identifies pitfalls for countries to avoid if seeking to emulate the Australian CPR model. It also illustrates how sometimes, States can fall short of their proclaimed noble objective to use the procurement process to tackle trafficking in their supply chains, by failing to enact sufficiently comprehensive legislation. Finally, it should be noted that using public procurement in a more robust manner such as has been discussed in this article will not on its own solve the problem of trafficking in public supply chains. Other measures such as measures to combat transnational organised crime, adoption of more comprehensive trafficking policies and regulatory systems, as well as reform of prosecutorial systems and resourcing are needed to operate alongside this paper's recommendations. The use of the public procurement system to combat trafficking represents a significant step forward, and contributes to the jigsaw of measures needed to tackle trafficking in public supply chains.