

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

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Abstract

International organisations emphasise how Governments around the world must use the public procurement process to aid a global drive to eliminate human trafficking in their supply chains. In this significant and original contribution, the authors examine a leading procurement model, the Australian Commonwealth Procurement Rules (CPR), for the purpose of examining whether the CPR model satisfies the necessary standards of Legal Certainty and Effectiveness for addressing the risk of trafficking occurring in public sector supply chains. The research 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 Australia CPR model, making appropriate reference to US and UK models where appropriate. 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. System failure is demonstrated by analysis of the CPR, showing either how key CPR provisions fail to satisfy these 2 key tests, or because there is a complete absence of appropriate provisions to comprehensively deal with the risk of trafficking in public sector supply chains. This article should serve not only as a guide to countries yet to address human rights considerations in their public procurement supply chains, but also as a blueprint for countries around the world seeking to re-evaluate whether existing provisions in their domestic procurement frameworks are fit to tackle the global scourge of trafficking in public supply chains.

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I Introduction

Public procurement activities present Governments and the public sector with opportunities to use their 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 per cent 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, a key element of the sustainable procurement agenda — using procurement processes to combat human trafficking in supply chains — has not translated into significant deployment at the implementation level. While 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 actual implementation of measures at the national level has been slow. Additionally, where anti-trafficking measures have been attempted through these countries' respective national procurement frameworks, they have proven, to a degree, ineffective and deficient.⁴

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:

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1. See generally Christopher McCrudden, 'Using Public Procurement to Achieve Social Outcomes' [2004] 28(4) *Natural Resources Forum* 257; Lin Li and Ken Geiser, 'Environmentally Responsible Public Procurement (ERPP) and its Implications for Integrated Product Policy (IPP)' (2005) 13(7) *Journal of Cleaner Production*, 705; Lutz Preuss, 'Addressing Sustainable Development Through Public Procurement: The Case of Local Government' (2009) 14(3) *Supply Chain Management* 213.
 2. 'Public Procurement', *Organisation for Economic Co-operation and Development* (Web Page) <<https://www.oecd.org/governance/ethics/public-procurement.htm>>.
 3. UK Home Office, 'Principles to Guide Government Action to Combat Human Trafficking in Global Supply Chains', *UK Home Office* (Policy Paper, 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', *Australian Department of Foreign Affairs and Trade* (Joint Statement, 24 September 2018) <<https://www.foreignminister.gov.au/minister/marise-payne/media-release/principles-guide-government-action-combat-human-trafficking-global-supply-chains>>; UK Home Office, 'UK Government Modern Slavery Statement' (Corporate Report, 26 March 2020) <<https://www.gov.uk/government/publications/uk-government-modern-slavery-statement>>.
 4. For example, the US *Federal Acquisition Regulation* 48 CFR ('FAR') § 22.17 (2022) 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] 48(2) *Public Contracts Law Journal* 423; John G Bradbury, 'Human Trafficking and Government Contractor Liability' (2008) 37(4) *Public Contract Law Journal* 907; Victoria Starks, 'The US Government's Recent Initiatives to Prevent Contractors from Engaging in Trafficking in Persons: Analysis of Federal Acquisition Regulation Subpart 22.17' (2008) 37(4) *Public Contract Law Journal* 879.
 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 (excessive working hours, exposure to harmful substances, etc) and is prohibited by international and domestic laws: see further section II below.

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's focus 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 scope⁸; and third, must be capable of full force and effect.⁹

Applying these two principles, this paper will analyse the *CPR* for the purposes of examining whether the current *CPR* regime meets the necessary standards of legal certainty and effectiveness. This exercise shall be undertaken by examining key *CPR* provisions in order to assess whether the risk of trafficking is adequately addressed in the *CPR* model. This should serve not only as a guide to countries yet to address human rights considerations in their public procurement supply chains, but also as a blueprint for other countries around the world seeking to re-evaluate whether existing

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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. Maxeine 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: James Maxeine, 'Some Realism About Legal Certainty in Globalization of the Rule of Law' (2008) 31(1) *Houston Journal of International Law* 27. Wiggen observes inter alia 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: Janicke Wiggen, 'Directive 2014/24/EU: The New Provision on Co-operation in the Public Sector' (2014) 3 *Public Procurement Law Review* 83. See also John Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47.
 7. Martin-Ortega 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: Olga Martin-Ortega, 'Human Rights Risks in Global Supply Chains: Applying the UK Modern Slavery Act to the Public Sector' (2017) 8(4) *Global Policy* 512.
 8. Christopher Bovis, 'The Priorities of EU Public Procurement Regulation' (2020) 21 *ERA Forum* 283.
 9. Pachnou acknowledges 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: 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) 2 *Public Procurement Law Review* 55. 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, that is to say, they must be *effectively* available in order to ensure some chances of successful enforcement of substantive rules. Halonen agreed with Pachnou (in summary) that the principle requires that rules must be applied by the EU Member States in such a way as to ensure their full force and effect: Kirsi-Maria Halonen, 'Termination of a Public Contract: Lifting the Veil on Art 73 of 2014/24 Directive' (2017) 4 *Public Procurement Law Review* 187.

provisions in their domestic procurement legislation or procurement frameworks are fit for purpose to tackle the global problem of human trafficking.

The rest of this paper is structured as follows. Part II 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. Part III analyses relevant provisions under 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 Part IV, alongside a series of recommendations for other countries.

II Context and Background: Public Procurement, Sustainable Procurement and Trafficking in the Commonwealth

A 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', to '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 (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 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 exploitative labour practices 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 exploitative practices occurring within the public procurement context.

Trafficking is a growing global industry with an approximate annual turnover of one hundred and 50 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

10. Steve New, 'Modern Slavery and the Supply Chain: The Limits of Corporate Social Responsibility?' (2015) 20(6) *Supply Chain Management* 697; Louise Shelly, 'Human Trafficking as a Form of Transnational Crime' in Maggy Lee (ed), *Human Trafficking* (Routledge, 2011) 22.

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

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) art 3.

13. *Ibid.*

14. John Howe, 'The Regulatory Impact of Using Public Procurement to Promote Better Labour Standards in Corporate Supply Chains' (2010) (Legal Studies Research Paper No 528, University of Melbourne, 16 February 2011); Osita Agbu, 'Corruption and Human Trafficking: The Nigerian Case' (2003) 4(1) *West Africa Review* 1.

15. Raimo Väyrynen, 'Illegal Immigration, Human Trafficking, and Organized Crime' (Discussion Paper No 2003/72, UNU WIDER, 2003).

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 Part III.¹⁸

B International Drivers to Use Public Procurement to Combat Human Trafficking

I *The United Nations*. From the UN perspective, the 2015 Sustainable Development Goals encourage Governments to eradicate trafficking under Target 8.7,¹⁹ Target 8.8²⁰ and Target 10.3.²¹ Furthermore, Target 12.7 requires governments to adopt public procurement practices that promote sustainable development (eg, 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

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16. ‘Forced Labour, Modern Slavery and Human Trafficking’, *International Labour Organization* (Web Page, 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: Kamala Kempadoo, Jyoti Sangera and Bandana Pattanaik (ed), *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (Routledge, 2nd ed, 2005).
 18. See the 8th and 9th United Nations Forums on Business and Human Rights: ‘9th UN Forum on Business and Human Rights: Preventing Business-Related Human Rights Abuses’, *The Office of the High Commissioner for Human Rights* (Web Page, November 2020) <<https://www.ohchr.org/EN/Issues/Business/Forum/Pages/2020ForumBHR.aspx>>; ‘8th UN Forum on Business and Human Rights: Time to Act, Governments as Catalysts for Business Respect for Human Rights’, *The Office of the High Commissioner for Human Rights* (Web Page, November 2019) <<https://www.ohchr.org/EN/Issues/Business/Forum/Pages/2019ForumBHR.aspx>>.
 19. *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, UN GAOR, 70th sess, 4th plen mtg, Agenda Items 15 and 116, UN Doc A/RES/70/1, (21 October 2015, adopted 25 September 2015) hereafter ‘SDGs’. Target 8.7 calls for States to: ‘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. ‘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’: Ibid target 8.8.
 21. ‘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’: Ibid target 10.3.
 22. ‘Promote public procurement practices that are sustainable, in accordance with national policies and priorities’: Ibid target 12.7. The respect for human rights forms part of the social pillar under sustainable development and is significant to achieving the UN SDGs.
 23. *Human Rights Council, 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 16 June 2011). <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 a 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 *The Office of the High Commissioner for Human Rights*, ‘Frequently Asked Questions About the Guiding Principles on Business and Human Rights’ (United Nations Publication, 2014) <https://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf>.

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

2 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 *Convention Concerning Forced or Compulsory Labour* of 1930²⁵ and *Protocol of 2014 to the Forced Labour Convention*²⁶ ‘undertakes to suppress the use of forced or compulsory labour’, while the *Convention concerning the Reduction of Hours of Work to Forty a Week* of 1935,²⁷ the *Convention concerning Minimum Age for Admission to Employment* of 1973²⁸ and the *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* of 1999²⁹ deal with extreme labour conditions and child labour.³⁰ In addition to these Conventions, the *Labour Clauses (Public Contracts) Convention* and *Labour Clauses (Public Contracts) Recommendation* of 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 *Labour Clauses (Public Contracts) Convention* also advocates for the use of labour conditions, tender evaluation

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24. Ibid 8; Claire O’Brien and Olga Martin-Ortega, ‘The Role of the State as Buyer Under UN Guiding Principle 6’ (Research Paper No 14/2018, Faculty of Law, University of Groningen).
 25. *Convention Concerning Forced or Compulsory Labour* opened for signature 28 June 1930, ILO No 29 (entered into force 1 May 1932). This remains the most ratified ILO Convention as 178 out of 187 member countries have ratified the Convention.
 26. *Protocol of 2014 to the Forced Labour Convention*, opened for signature 28 May 2014, Annex to ILO No 29 (entered into force 9 November 2016). 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.
 27. *Convention concerning the Reduction of Hours of Work to Forty a Week*, opened for signature 22 June 1935, ILO No 47 (entered into force 23 June 1957).
 28. *Convention concerning Minimum Age for Admission to Employment*, opened for signature 26 June 1973, ILO No 138 (entered into force 19 June 1976).
 29. *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, opened for signature 17 June 1999, ILO No 182 (entered into force 19 November 2000).
 30. Nikolaus Hammer, ‘International Framework Agreements: Global Industrial Relations Between Rights and Bargaining’ (2005) 11(4) *European Review of Labour and Research* 511, 518–9.
 31. According to Article 1(1) of the *Labour Clauses (Public Contracts) 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: see *Labour Clauses (Public Contracts) Convention*, opened for signature 29 June 1949, ILO No 94 (entered into force 20 September 1952); *Labour Clauses (Public Contracts) Recommendation*, ILO No 84, 32nd sess (29 June 1949).

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 (Public Contracts) Convention* and *Labour Clauses (Public Contracts) 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

3 Organisation for Security and Co-Operation in Europe ('OSCE'). The eradication of trafficking has been part of the Organisation for Security and Cooperation's 'three dimensions' since its establishment.³⁵ Stemming from the third dimension of human rights, the OSCE encouraged governments to actively eradicate trafficking,³⁶ affirming that governments have the 'prime responsibility' to protect their citizens' human rights and can do so through their public procurement frameworks.³⁷ The OSCE recommended that governments should follow examples of existing frameworks such as the *California Transparency in Supply Chains Act*³⁸ and the anti-trafficking provisions in the US *Federal Acquisition Regulation ('FAR')*.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

32. *Labour Clauses (Public Contracts) Convention* (n 31) art 5.

33. According to the 2008 review of the *Labour Clauses (Public Contracts) Convention* (n 31) and *Labour Clauses (Public Contract) Recommendation* (n 31), 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*: International Labour Office, *Labour Clauses in Public Contracts: Integrating the Social Dimension into Procurement Policies and Practices*, ILC, 97th sess. Agenda Item 3, Report 3 (part 1B), 59–61 <https://www.ilo.org/ilc/ILCSessions/previous-sessions/97thSession/reports/WCMS_091400/lang-en/index.htm>.

34. Countries such as Spain, Tanzania, Singapore, Finland, France and Nigeria have ratified the *Convention*: 'Ratifications of C094 — Labour Clauses (Public Contracts) Convention, 1949 (No 94)' *NORMLEX Information System on International Labour Standards* (List) <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312239>. 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* (Stevens & Sons, 3rd ed, 1983) 198–9.

35. The OSCE's three dimensions are politico-military, the economy and environment and the respect for human rights: 'Who We Are', *Organization for Security and Co-operation in Europe* (Web Page) <<http://www.osce.org/whatistheosce>>.

36. Organisation for Security and Co-operation in Europe, 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* (Occasional Paper Series No 7, 3 November 2014).

37. *Ibid* 47.

38. *California Transparency in Supply Chains Act of 2010*, ch 556, 2010 Cal Stat 93. 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. *FAR* (n 4) § 22.15, 22.17.

40. *Ending Exploitation: Ensuring that Businesses do not Contribute to Trafficking in Human Beings*.

trafficking practices to continue to be awarded public contracts due to prosecutorial difficulties securing trafficking convictions.

C COVID-19 and Trafficking

Before moving to look at the Commonwealth specifically, one further factor is worthy of mention, namely, the COVID-19 pandemic. Aggravating the global lack of concerted action to deploy procurement to tackle the scourge of human trafficking is the global pandemic (COVID-19), which has resulted in many rushed and improperly regulated procurements taking place⁴¹ amidst a background of globally increased unemployment rates and rising levels of extreme poverty, factors which can contribute to the exploitation of vulnerable workers and children.⁴² Governments' pandemic-induced rush to procure vital medical supplies make it highly likely that measures designed to address trafficking before the pandemic have taken a back seat. For example, the necessity to secure medical hazmat equipment supplies to save front line workers lives can come at the expense of human/workers' rights protection,⁴³ further aggravating an uncertain landscape.

D 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 per cent of contracts awarded to suppliers in Australia.⁴⁴ The regulation of public procurement in Australia is based on a devolved system. The federal and state governments have

41. For example, the UK Cabinet Office granted UK contracting authorities permission to rely on the extreme urgency ground when procuring for COVID-19: UK Cabinet Office, 'Procurement Policy Note 01/20: Responding to COVID-19' *GOV.UK* (Policy Note, 18 March 2020) <<https://www.gov.uk/government/publications/procurement-policy-note-0120-responding-to-covid-19>>. Notwithstanding this, major public concern was expressed about the allocation of personal protective equipment contracts during the COVID-19 pandemic in early 2020. The UK National Audit Office found in late 2020 that UK Contracting authorities had frequently provided insufficient documentation on key decisions, and the award of a significant number of contracts awarded was not published in a timely manner: see National Audit Office Comptroller and Auditor General, *Investigation into Government Procurement during the COVID-19 Pandemic* (Report, 26 November 2020) <<https://www.nao.org.uk/report/government-procurement-during-the-covid-19-pandemic/>>. In 2021, the High Court in London held a judicial review proceeding brought by the Good Law Project alleging that the 'Secretary of State acted unlawfully by failing to comply with the Transparency Policy and Principles' during the COVID-19 procurement. On this issue, the Court found in favour of the GLP, stating that 'the Secretary of State had a common law duty to comply with the Transparency Policy absent good reason to depart from it': *R (Good Law Project Ltd & ors) v Secretary of State for Health and Social Care* [2021] EWHC 346 [132] (Chamerlain J).

42. See United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons* (Report, 2020) <<https://www.unodc.org/unodc/data-and-analysis/glotip.html>>. The report comes at a time when global suffering has vastly increased vulnerabilities to trafficking. Its Executive Summary states that extreme poverty is expected to rise for the first time in decades, with the continuing COVID-19 crisis casting a long shadow over our societies and economies. With many millions more women, men and children in every part of the world out of school, out of work, without social support and facing diminished prospects, targeted action is urgently needed to stop crimes like trafficking in persons from adding to the pandemic's toll.

43. Samuel Lovett, 'Government Continued to Source PPE from Malaysia Suppliers Accused of Modern Slavery' *The Independent* (online, 14 March 2021) <<https://www.independent.co.uk/news/health/covid-ppe-gloves-malaysia-nhs-government-latest-b1812320.html>>; Pete Pattison, 'Human Rights Must Not Be 'Trampled' in Global Rush for PPE, Say MPs' *The Guardian* (online, 22 November 2020) <<https://www.theguardian.com/law/2020/nov/21/human-rights-must-not-be-trampled-in-global-rush-to-secure-ppe-say-mps>>.

44. 'Statistics on Australian Government Procurement Contracts', *Australian Government Department of Finance* (Web Page, 28 March 2020) <<https://www.finance.gov.au/government/procurement/statistics-australian-government-procurement-contracts>>.

separate procurement rules and policies that apply to their procuring entities.⁴⁵ At the federal level, which is the subject of this paper, the authority to regulate public procurement stems from the *Public Governance, Performance and Accountability Act 2013* (Cth) ('*PGPA Act*'),⁴⁶ the *Public Governance, Performance and Accountability Rule 2014* (Cth)⁴⁷ and the *Public Governance, Performance and Accountability (Financial Reporting) Rule 2015* (Cth).⁴⁸ The PGPA generally 'establishes a coherent system of governance and accountability for public resource' through s 105B(1) of the *PGPA Act*, authorising the Minister for Finance to regulate public procurement by adopting 'written instruments' that promote the *efficient, effective, economic and ethical* use of public resources.⁴⁹ The Minister for Finance's written instruments in public procurement include five Procurement Connected Policies,⁵⁰ Procurement Guidelines⁵¹ and the *Commonwealth Procurement Rules 2020* (Cth) ('*CPR*').⁵²

Implemented and updated periodically by the Department of Finance, the *CPR* applies to all federal procuring entities procuring goods and services⁵³ whether below or above stipulated procurement thresholds.⁵⁴ 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.⁵⁵

E 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*.⁵⁶ In no particular order, the five connected policies are (1) the Indigenous Procurement Policy, which encourages contract awards to indigenous-owned businesses by setting

45. Dominic Dagbanja, 'Developments in Sustainable Public Procurement Law and Policy in Ghana and Australia' (2020) 6 *Public Procurement Law Review* 359; Veiko Lember, Rainer Kattel and Tarmo Kalvert, *Public Procurement, Innovation and Policy: International Perspectives* (Springer, 2013) 35–41.

46. *Public Governance, Performance and Accountability Act 2013* (Cth) ('*PGPA Act*').

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

48. *Public Governance, Performance and Accountability (Financial Reporting) Rule 2015* (Cth). Other legislative or statutory acts supplementing the above legislation include the *Australian Constitution*, *Public Service Act 1999* (Cth), *Crimes Act 1914* (Cth), *Auditor-General Act 1977* (Cth), *Modern Slavery Act 2018* (Cth) and the various *Appropriation Acts* (Cth).

49. *PGPA Act* (n 46).

50. The Procurement Connected Policies are discussed in part II(C) below.

51. Australian Government Department of Finance, 'Procurement Practice', (Web Page, 29 March 2022) <<https://www.finance.gov.au/government/procurement/buying-australian-government/procurement-practice>>.

52. *Commonwealth Procurement Rules 2020* (Cth) ('*CPR*'). This edition of the *CPR*, which commenced on 14th December 2020, repealed the previous *CPR* made on 20 April 2019.

53. 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': *Ibid* r 2.7–2.8.

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

55. Dagbanja (n 45); Alexandra Wedutenko and Ban-Ya Yim, 'What's in a Name: The New Commonwealth Procurement Rules' *Clayton Utz* (Blog Post, 21 June 2012) <<https://www.claytonutz.com/knowledge/2012/june/what-s-in-a-name-the-new-commonwealth-procurement-rules>>.

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

aside contracts and requiring minimum Indigenous participation requirements for contracts valued at or over AUD \$7.5 million in specified sectors⁵⁷; (2) Workplace Gender Equality Procurement Principles require potential suppliers with more than a hundred employees to demonstrate that they comply with the *Workplace Gender Equality Act 2012* (Cth)⁵⁸; (3) the Black Economy Procurement Connected Policy requires potential suppliers tendering for contracts over \$4 million Australian dollars (AUD) to certify that they have a satisfactory tax record by furnishing a statement to that effect from the Australian Taxation Office⁵⁹; (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 performance⁶⁰ 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.⁶¹

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.⁶² However, as this paper shows, many *effectiveness* and *legal certainty* deficiencies are evident when we examine the CPR, thereby causing the question to arise: why has no Procurement Connected Policy been developed specifically to cater for combating trafficking in the Commonwealth procurement governance model?⁶³

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57. The Indigenous Procurement Policy came into effect from 1st July 2015 and targeted indigenous businesses in sectors including education, communication, employment, finance, health and social services: see George Denny-Smith and Martin Loosemore, 'Assessing The Impact Of Australia's Indigenous Procurement Policy Using Strain Theory' in Paul Chan and Chris Neilson (eds), *Proceedings of the 33rd Annual Conference* (Association of Researchers in Construction Management, 2017) 652; George Denny-Smith and Martin Loosemore, 'Cultural Counterfactuals: Assessing the Impact of Indigenous Social Procurement in Australia' in Chris Gorse and Christopher J Neilson (eds), *Proceeding of the 34th Annual Conference* (Association of Researchers in Construction Management, 2018) 435.
58. The Workplace Gender Equality Procurement Principles came into effect from 1 August 2013: 'Workplace Gender Equality Procurement Principles', *Australian Government Workplace Gender Equality Agency* (Web Page) <<https://www.wgea.gov.au/what-we-do/compliance-reporting/wgea-procurement-principles>>.
59. The Australian Treasury, 'Black Economy Procurement Connected Policy - The Australian Treasury' *Australian Government, The Treasury* (Web Page) <<https://treasury.gov.au/policy-topics/economy/black-economy/procurement-connected-policy>>.
60. 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'.
61. Code for Tendering and Performance of Building Work applies to procurement carried out on or after 2 December 2016. See 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.
62. Olga Martin-Ortega and Claire Methven O'Brien (eds), *Public Procurement and Human Rights: Opportunities Risks and Dilemmas for the State as Buyer* (Edwards Edgar Publishing, 2019) 1; Jolien Grandia and Joanne Meehan, 'Public procurement as a policy tool: Using procurement to reach desired outcomes in society' [2017] 30(4) *International Journal of Public Sector Management*, 302.
63. This question is discussed in Part II(D) below.

F Public Procurement and Trafficking in the Commonwealth of Australia

The call to implement a policy or statutory instrument to tackle trafficking in Commonwealth supply chains can be traced back to the 2013 inquiry of the Parliamentary Joint Standing Committee on Foreign Affairs, Trade and Defence.⁶⁴ 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 supplied goods and services are free of human rights abuses, but 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.⁶⁵ The Committee noted that in June 2017, the Parliament Joint Select Committee on Government Procurement reported on the effectiveness and adequacy of the *CPR*.⁶⁶ 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'.⁶⁷ Furthermore, tackling modern slavery through public procurement was explicitly mentioned in the Federal Government's National Action Plan 2015–2019.⁶⁸ Additionally, in 2013, then 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'.⁶⁹

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 *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* (Cth), but this is not an adequate substitute to address the matter of concern.⁷⁰ Essentially, s 15 of the *Modern Slavery Act* requires the Minister to publish a modern slavery statement covering all Commonwealth procuring

64. Commonwealth of Australia, 'Trading Lives: Modern Day Human Trafficking' (June 2013, Canberra) <https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jfadt/slavery_people_trafficking/report.htm>, Recommendation 7.

65. Parliament of Australia, 'Modern slavery and global supply chains: Interim report of the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into establishing a Modern Slavery Act in Australia' (August 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Interim_Report/section?id=committees%2Freportjnt%2F024092%2F24952#footnote116target>.

66. 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.

67. 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>.

68. The Australian Government, 'National Action Plan to Combat Human Trafficking and Slavery 2015–19' (2014) <<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/TraffickingNationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf>>.

69. 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#f71274>>.

70. *CPR* (n 52) r 7.27.

entities.⁷¹ 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 such actions are to be assessed.⁷² While inclusion of the *Modern Slavery Act* to the *CPR* is a welcome development as it signifies the Government is concerned about trafficking within its supply chains, it does not however detail procedures which procuring entities should follow to mitigate the award of contracts to suppliers tainted by trafficking. For this reason, 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 a model ‘off the shelf’.

III Tackling Trafficking under the Commonwealth Procurement Rules

This section of the paper analyses *CPR* provisions that identify, prevent or mitigate the risk of trafficking in the public procurement process and highlights their limitations. The rules address several different aspects, including 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.

A 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.⁷³ 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.⁷⁴ 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*.

Ethical purchasing refers to ‘honesty, integrity, probity, diligence, fairness and consistency’ in the procurement process and being defined in such terms means that it is often narrowly interpreted as equating to corruption-free procurement.⁷⁵ Rules 6.5 to 6.8 of the *CPR* govern ethical purchasing. Rule 6.6 covers issues such as conflicts of interest, fair treatment of suppliers, use of public resources and compliance with policies on gifts or hospitality. Of more relevant significance to this paper’s enquiry is r 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

71. *Modern Slavery Act 2018* (Cth), s 15.

72. *Ibid.*

73. *CPR* (n 52) div 1, r 4.1–7.26.

74. *Ibid.*

75. *CPR* (n 52) r 6.5; Sope Williams-Elegbe, ‘Fighting Corruption in Procurement: A Comparative Analysis of Disqualification Measures’ (PhD Thesis, University of Nottingham, 2011) 35.

any resulting order. Officials should seek declarations from all tenderers confirming that they have no such unsettled orders against them.⁷⁶

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 because traditionally it was the personnel of a procuring entity who were the target of legal prohibitions, for example, anti-corruption laws. However, r 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, r 6.7 is noteworthy because, in not defining the type of benefits obtainable from suppliers,⁷⁷ 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 benefit (ie, cheaper products) to procuring entities, and thus, such benefits are prohibited under r 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 exploitative or slavery-like practices falls within r 6.7’s ‘dishonest, unethical and unsafe practices’ which procuring entities must not benefit from.⁷⁸

A further legal certainty problem arises with r 6.7’s requirement that suppliers who have been found guilty of violations of ‘*employee entitlement*’ should not be engaged by procuring entities, that is, 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 2009* (Cth) (*FWA*), 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 to be absent from employment on public holidays and so forth.⁷⁹ These entitlements must be available to each employee in a non-discriminatory manner unless the *FWA* excludes specific groups or classes of employees from receiving the entitlements. As these entitlements relate to labour rights, it could be argued that r 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, commercial sex acts and other exploitative labour conditions listed under existing federal laws to remedy the lack of legal certainty as to r 6.7’s scope.

Such clarification of employee entitlements may not on its own be enough because another notable limitation on the *effectiveness* of r 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,

76. *CPR* (n 52) r 6.7.

77. Addressing this provision to procuring entities is important because they are the legal entity, ie a party to the contract with a supplier tainted with trafficking.

78. *CPR* (n 52) r 6.7.

79. *Fair Work Act No.28 2009* (Cth).

given the diverse, highly sophisticated and organised nature of trafficking, it may be difficult to convict traffickers, especially legal persons with global networks.⁸⁰ To this end, it is argued that r 6.7's requirement for a final conviction to be obtained against a supplier before r 6.7's prohibition comes into effect is no longer appropriate. It brings the *CPR* out of line with the most recent international thinking⁸¹ in this respect.⁸² 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 of convictions.⁸³ The disparity between the lack of convictions and reported incidents is a testament to the difficulties surrounding errant suppliers' successful prosecution. Thus, this limitation, if maintained, will remain a significant obstacle to procuring entities seeking to exclude suppliers tainted by trafficking practices.

Therefore, it is recommended that r 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.⁸⁴ The practicalities of such an exclusion are extensively discussed in Part III(C) below.

Finally, a major problem arises with the effectiveness of r 6.7 with the exclusion of *suppliers* from the scope of r 6.7's prohibition. As currently drafted, r 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. This represents a major lacuna in the *CPR* and calls its effectiveness into question if this lacuna is not remedied.

In summary therefore, all the *CPR* r 6.7 currently 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 r 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.

80. 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>.

81. OSCE (n 36) 44.

82. 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.

83. 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 authorities 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.globalslaveryindex.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) <<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Report-of-the-interdepartmental-committee-on-human-trafficking-and-slavery-july-2015-to-june-2016.pdf>>.

84. OSCE (n 36) 44.

B Procurement Planning

I *Planning 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.⁸⁵

According to the *CPR*, a range of different activities or exercises take place during the planning phase. For example, *CPR* rr 7.8 and 7.9 govern the development and publication of annual procurement plans on AusTender⁸⁶ and r 8 addresses risk assessments and management. Concerning the latter, r 8.1 encourages procuring entities to be ‘mindful of the risks [which the procuring entity faces making] ... informed decisions in managing these risks and [so that it] identifies and harnesses potential opportunities’ to mitigate these risks.⁸⁷ Furthermore, r 8.2 mandates procuring entities to identify, analyse, allocate and treat risk when conducting a procurement.⁸⁸ The Commonwealth is aware that some sectors are more prone to trafficking and labour exploitations 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.⁸⁹ However, 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* r 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.⁹⁰

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 due diligence before going to the market. 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

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

86. AusTender, ‘Welcome to the Australian Government’s procurement information system’, (Web Page, 2021) <<https://www.tenders.gov.au/>>.

87. *CPR* (n 52) r 8.1.

88. *Ibid*.

89. Department of Home Affairs, ‘Information sheet for Commonwealth Government procurement officers’ (Information Sheet) <<https://www.homeaffairs.gov.au/criminal-justice/files/human-trafficking-info-sheet-comm-gov-procurement-officers.pdf>>.

90. Louise de Koker and Kayne Harwood, ‘Supplier Integrity Due Diligence in Public Procurement: Limiting the Criminal Risk to Australia’ (2015) 37(2) *Sydney Law Review* 217; Claire M O’Brien et al, ‘Public Procurement and Human Rights: A Survey of Twenty Jurisdictions’ (Report, International Learning Lab, July 2016) <<https://globalnaps.org/wp-content/uploads/2018/08/public-procurement-and-human-rights-a-survey-of-twenty-jurisdictions.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), ‘2020 List of Goods Produced by Child Labor or Forced Labor’ (Report, September 2020) <https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2019/2020_TVPRAList_Online_Final.pdf>.

be created by each procuring entity. Instead, it could be collectively developed by key government departments such as the Department of Finance, the Attorney-General's Department 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 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 *FAR* 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. This due diligence prompts procuring entities to include a condition in the tender documents 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 (by the bid winner) in bid solicitation documents.⁹⁵

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.⁹⁶ 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.

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

92. *CPR* (n 52) r 10.6.

93. *FAR* (n 4) § 22.15.

94. *Ibid* § 22.1503.

95. *Ibid* § 22.17.

96. *The UK Public Contracts Regulations 2015* (UK) SI 2015/102 reg 49, 57(1) ('Public Contracts Regulations').

excluded from further participation in a tender competition.⁹⁷ Accordingly, drafting an appropriate technical specification presents an excellent opportunity to address trafficking concerns.⁹⁸

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’.⁹⁹ 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, for example, environmental policy or characteristics.¹⁰⁰ Research conducted by Parikka-Alhola found that in most procurements where environmental objectives are being promoted, ‘over 60% of the environmental criteria were presented in technical specifications’.¹⁰¹ However, while environmental characteristics are increasingly used in the design of technical specifications, social characteristics are not as widely used. This is 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, that is, they must (just as in the case of environmental or any other extra-mural characteristics) relate to the procurement subject matter.¹⁰²

Currently, the *CPR* (rr 10.9 to 10.13) does not contain *any rules* that require procuring entities to incorporate relevant social characteristics (eg, 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 of nationality *and* provided that they relate to the procurement subject matter. As an illustration, in the case of *Commission v Netherlands (‘Dutch Coffee’)*,¹⁰³ the technical specification required payment of a living wage and use of fair trade products that possessed the Max Havelaar label.¹⁰⁴ While the specification was deemed illegal due to the requirement to possess a specific brand label (which could constitute discrimination because that label was not available to all potential bidders), the Court of Justice was

97. Abby Semple, *A Practical Guide to Public Procurement* (Oxford University Press, 2015) 106.
98. 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) 19(3) *International Journal of Human Rights*, 341.
99. 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.
100. Abby Semple, ‘Socially Responsible Public Procurement (SRPP) under EU Law and International Agreements: The GPA, CETA and the EU-Ukraine Deep and Comprehensive Free Trade Area’ (2017) 12(3) *European Procurement & Public Private Partnership Law Review* 293.
101. Katriina Parikka-Alhola, ‘Promoting environmentally sound furniture by green public procurement’ (2008) 68(1) *Ecological Economics* 472.
102. Martin-Ortega, Outhwaite and Rook (n 98).
103. 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.
104. The Max Havelaar label is given to organisations that produce their coffee in accordance with the principles of fair trade.

of the view that inserting social criteria into the technical specifications (seeking promotion of fair labour conditions) was legitimate because it would 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, that is, via 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 that 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. This will bring the *CPR* into conformity with Target 12.7 of the UN Sustainable Development Goals. Hence, for example, the procurement can, within the technical specifications, impose a range of relevant requirements, such as a requirement that tenderers commit to payment of legislatively mandated minimum wage levels; or 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.¹⁰⁵ 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.¹⁰⁶

C 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 pre-qualify potential suppliers using the procurement framework's mandatory exclusion and supplier-qualification selection criteria.¹⁰⁷ 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.¹⁰⁸ Instead, r 10.17 of the *CPR* 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.¹⁰⁹ 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

105. Corvaglia (n 98) 185.

106. *Ibid.*

107. For example, reg 57 of the UK *Public Contracts Regulations* (n 96) specifies a list of exclusion grounds and § 9 of the US *Federal Acquisition Regulation* (n 4) regulates contractors' qualification.

108. The *CPR*'s conditions for participation (r 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 r 10.17 and r 10.19. Discussion follows immediately below.

109. *CPR* (n 52) r 10.17.

engaged in trafficking-related activities, such as child labour, forced labour, smuggling and labour violations.

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.¹¹⁰ 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).¹¹¹ 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).¹¹²

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* rr 10.15–10.19).¹¹³ 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 to cater for trafficking at the supplier qualification stage in the procurement context arises when *CPR* r 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, and become compliant with UN Sustainable Development Goals for conduct of public procurement.

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' practices regarding labour regulations, including ethical employment practices, workplace health and safety; and environmental impacts.¹¹⁴

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 must submit for consideration along with their tender (the UK approach). As already discussed earlier above, r 6.7 is not sufficient to address this issue because it only requires declarations as to past convictions but

110. Koker and Harwood (n 90).

111. *CPR* (n 52) r 10.25.

112. Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press, 2004) 317–22.

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

114. *CPR* (n 52) r 10.19.

does not extend to require declarations as to unethical practices not the subject of judicial determination.¹¹⁵ Third, another issue relating to r 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 *FAR*, procuring entities are required to exclude suppliers that do not demonstrate sufficient integrity and do not operate ethically.¹¹⁶ 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.¹¹⁷ 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 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 evaluating the bid and contract award stages threatens Australia's credibility that it operates a procurement legal framework possessing 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.¹¹⁸ 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 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'.¹¹⁹

Thus, in order to maintain the integrity of the Commonwealth *CPR* procurement regime, it is essential 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) would 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, the adoption of such measures will undoubtedly increase the *CPR* model's effectiveness to act as a tool for the disruption of labour trafficking and conduct of unethical labour practices via the public procurement process and additionally address the lack of legal certainty.

115. See discussion in Part III.A above.

116. *FAR* (n 4) § 9.104-1(d) provides that, 'To be determined responsible, a contract must ... Have a satisfactory record of integrity and business ethics'.

117. *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) ('Directive 2014/24').

118. Koker and Harwood (n 90).

119. *Ibid* 238.

Measure 1: Disclosure of Trafficking-Related 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 or labour violations. 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. For example, decisions made by an employment tribunal or department of labour against a supplier for mandating employees to work excessive hours would be covered by this measure.¹²⁰

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 competent suppliers from participating in tendering exercises, thereby having an indirect effect of limiting competition to those that are free of criminal convictions,¹²¹ unless they are accompanied by ‘self-cleaning’ measures.¹²² 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 and labour exploitation at the supplier qualification stage. Thus, other flanking 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 *during* contract performance.¹²³ Such certification should be submitted along with the tender, as this will form part of the supplier qualification process, and can also be made a contractual condition should the supplier be successful in winning the tender. The certification

120. 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.

121. Arrowsmith (n 113) 1277.

122. 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’s *Public Contracts Regulations* (n 96) reg 57 (13) and the EU procurement Directives: see, eg, Directive 2014/24, Art 57. Sylvia de 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; Sue Arrowsmith, Hans-Joachim Priess and Pascal Friton, ‘Self-cleaning as a defence to exclusions for misconduct: an emerging concept in EC public procurement law?’ (2009) 18 *Public Procurement Law Review* 257.

123. *FAR* (n 4) § 22.15 and 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.

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 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 underpinning a contractual commitment for which financial penalties can be provided in the contract awarded to the successful tenderer should a breach be subsequently detected.

D Contract Award

As part of the process of determining a contract award, procuring entities must evaluate tenders received against pre-defined evaluation criteria set out in the procurement documentation to determine the ranking of competing submitted tenders.¹²⁴ 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.¹²⁵

The *CPR* r 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'.¹²⁶ Beyond this general provision, the *CPR* does not specify the content of such criteria.¹²⁷ 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.¹²⁸ The flexibility afforded to procuring entities under r 7.12 is advantageous for the procuring entities because it means that procuring entities can adopt evaluation criteria without any infringement or conflict with the current *CPR*. This approach can be contrasted with the comprehensive approach adopted in international procurement frameworks, 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 provided that they can be genuinely linked to the procurement subject matter.¹²⁹ In this way, award

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

125. For discussion on how to promote socially responsible public procurement at the award stage, see Semple (n 100) 298; Corvaglia (n 98) 182; Paula Faustino, 'Award Criteria in the New Directive on Public Procurement' (2014) *Public Procurement Law Review* 124.

126. *CPR* (n 52) r 7.12 (emphasis added).

127. Telles and Butler (n 124).

128. *Ibid* 131.

129. The *Public Contracts Regulations* (n 96) reg 67.

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.¹³⁰ It is submitted that the Commonwealth should consider and follow this approach followed in other jurisdictions, by supplementing the *CPR* with ample guidance on r 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 and conditions 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).¹³¹ This lack of anti-trafficking contract terms 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.¹³²

Including anti-trafficking contract terms 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.¹³³ Countries such as the US, and South Africa,¹³⁴ 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.¹³⁵ 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*.¹³⁶

130. Directive 2014/24 (n 117) art 67; *Public Contracts Regulations* (n 96) 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 (ed), *Smart Public Procurement and Labour Standards* (Hart Publishing, 2018) 86.

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

132. Procuring entities should include a range of remedies in the contract to inhibit suppliers tempted to breach anti-trafficking provisions. 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.

133. 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.

134. Phoebe Bolton, 'Government Procurement as a policy tool in South Africa' (2006) 6(3) *Journal of Public Procurement* 193; Phoebe Bolton, 'An Analysis of the Preferential Procurement Legislation of South Africa' (2007) 16(1) *Public Procurement Law Review* 36; 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.

135. For example, under § 22.17 of the *FAR* (n 4), procuring entities in the US must insert anti-trafficking 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.

136. Martin-Ortega, Outhwaite and Rook (n 98).

E 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 clauses.¹³⁷ 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.¹³⁸

Contract management is lightly regulated under r 7.26 of the *CPR*. According to r 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'.¹³⁹ 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*.¹⁴⁰ For example, in the *Commission v Netherlands*,¹⁴¹ Dutch procuring entities were in principle able to assess the conformance to specified fair trade product production standards by requiring suppliers of food products to supply products meeting fair trade production standards. The European Court of Justice held against the procuring entities because they were not permitted to specify that fair trade had to be demonstrated by use of a particular named fair trade label, the Max Havelaar label: to do so was discriminatory against suppliers holding other fair trade labels meeting the same objective fair trade product production standards. Applied to the Australian context, it is unclear whether requiring such certification of the standard surrounding *contract performance* is applicable under r 7.26. Despite the lack of legal certainty with r 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 r 7.26, to improve the effectiveness of the rule, it is recommended that procuring entities should request an annual (and also) end of contract certificates, similar to the certification of knowledge mentioned in Part III(C) earlier above. The certifications should specify that the supplier has not engaged or supplied products or performed services tainted by trafficking practices. This effective approach is adopted in Subpart 22.17 of the US *FAR*. The annual submission is a continuous reminder to suppliers that the federal government adopts a zero-tolerance policy on engaging in trafficking. Therefore, it minimises the risk of contract performance being tainted by trafficking. Suppliers that

137. World Bank, 'Contract Management Practice' (Guide, September 2018) <<https://thedocs.worldbank.org/en/doc/277011537214902995-0290022018/original/ProcurementContractManagementGuidance.pdf>>.

138. *Ibid.*

139. *CPR* (n 52) r 7.26 (emphasis added).

140. For example, EU Directive 2014/24 (n 117) art 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'.

141. *Commission v Netherlands* (n 103) (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 III(B)(2)).

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.

IV Conclusion

Tackling modern slavery 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 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 paper demonstrates 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 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 labour exploitation and trafficking via public procurement systems and identifies pitfalls for countries to avoid if seeking to emulate the Australian *CPR* model. Appropriate reference to US, EU and UK models was made where appropriate and will assist countries seeking to design improved models for tackling morally exploitative practices within national and global supply chains.

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