

Legal Framework for the Procurement of Public-Private Partnerships – an Australian Perspective in the European Union Context

Marta Andrecka

1	Introduction	386
1.1	A Deregulatory Approach	386
1.2	Background for the Comparison	387
2	What is a Public Private-Partnership?	388
3	Criticism and Challenges Associated with PPPs	389
4	PPP Regulation at EU level	389
4.1	EU Public Procurement law and PPPs	390
5	PPP regulation in Australia	391
5.1	National PPP Policy and Guidelines	392
5.2	Lack of Public Procurement Law in Australia	393
5.3	Public Authority as a Commercial Player	394
5.4	Other Sources of Australian Law	395
5.4.1	Contract Law	395
5.4.2	Process Contract	396
5.4.2.1	The request for a tender	396
5.4.2.2	Development of the process contract	397
5.4.2.3	The Hughes Aircraft case	398
5.4.3	Competition and Consumer Law.....	399
5.4.4	Misleading Conduct	400
5.4.4.1	Applicability to Public Authorities	400
5.4.4.2	‘Carries on a Business’	401
5.4.4.3	The McMillan Case	403
6	Conclusions	406
6.1	Suggestions	407

1 Introduction

Based on an assumption that in its current shape¹ the EU public procurement framework is a highly regulated and rigid system, in which delivery of successful PPP contracts may be hindered,² in this paper it will be considered, whether there could be a different, more beneficial way in which to award PPP contracts. The question is whether an exclusion of the PPP award contract from the Public Sector Directive³ could be an adequate solution. It is worth considering, whether such a change would provide the flexibility needed and whether, at the same time, it could lead to a lack of legal certainty and hinder the development of EU integration.

In order to answer the posed questions the author will apply a general systemic approach. The characteristics of this approach is to introduce and compare – at an overall level – the highly regulated European procurement system to another system which has an absolutely different approach towards procurement in order to investigate, whether an exclusion of PPP contracts from public procurement directives in the EU could be beneficial.

In the paper firstly the deregulatory approach and the background for the comparison will be explained. Secondly, the introduction to the concept of Public-Private Partnership (PPP) will be presented. Thirdly, a regulation of PPPs at the EU level will be given. Next, the author will introduce the regulation of PPPs in Australia with special focus on private sources of law such as contract law and competition and consumer law. Finally, the last section will provide conclusions.

When analysing whether it would be a *'better idea'* to award PPP contracts on the basis of the framework provided by the general rules of EU law, a similar system is studied, which regulates the award of PPP contracts on different grounds which could be described as a deregulatory approach.

1.1 A Deregulatory Approach

A deregulation is traditionally understood as a reversal of the intense regulation that has covered an area. For example, if currently in the Europe the award of a PPP is detail regulated by the public procurement directives, a deregulation would traditionally mean that the detail provisions are removed and the legal

1 'Current shape' refers to the procurement framework from 2004, which is currently in power, not the newly accepted package of Directives from 2014, as these are not yet implemented in the Member States.

2 This assumption is supported by the analyses and relevant conclusions presented in the author's PhD dissertation published in: Andrecka, Marta, *Public-Private Partnership in the EU Public Procurement Regime*, Saarbrücken, GlobeEdit Publishing, 2014.

3 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] OJ L134/114.

framework of the PPP contracts' award is based on the general provisions of EU Treaty. Also here, a deregulatory approach, which is represented by the Australian legal system, is understood as non-regulation or low regulation of an area. In the context of the Australian system, a deregulation is understood as lack of one cohesive and legally binding procurement framework for the award of a PPP contract.

1.2 Background for the Comparison

The Australian system is on the one hand very different from the EU regulation in regard to the awarding of PPP contracts, but at the same time, it holds several essential features which makes it relevant and beneficial to compare it to the EU system in order to illustrate benefits and risks of awarding PPP contracts based on the framework provided by general EU law and its principles.

The main difference between these two systems in terms of the subject of this paper is that, in Australia, there is no specialised national, binding legal framework regulating public procurement. Generally speaking, it means that the public authorities have more discretion and flexibility when awarding PPP contracts. On the other hand there are some similarities between the EU and Australian systems, which make the comparison legitimate.

First, Australia is a federal country, which can be compared to the EU with federal (European) law governing the most important aspects of the country (EU); specific areas of law where federal (EU) government has exclusive legislative rights, and States and Territories⁴ (Member States), which are responsible for the implementation of laws in their systems. Second, the relationship between federal and state law in Australia is similar to that of EU law and Member States' national laws in many different ways. Third, both systems have 'the highest' courts which are producing binding interpretation of laws of each system.⁵ Finally, it is important to underline that this study does not aim at comparing the EU and Australian legal systems as such. The aim is to compare a highly regulated procurement system (EU) with a deregulated legal framework for awarding PPP contracts. The Australian legal system is used as a representative of such a deregulated system, and due to its several similar features with the EU system it is valid to compare the two.

4 From now on, whenever the author will refer to the Australian 'State' it will mean 'State and Territory'.

5 The author acknowledges the fact that there are substantial differences between the CJ and the High Court in Australia, such as the fact that the CJ is not the last instance of appeal for private individual in Europe, where the High Court in Australia is. Furthermore, the parties are not in power to refer to the CJ, but only national courts and tribunals are. However, law making by producing binding law interpretation is valid in accordance to both courts.

2 What is a Public Private-Partnership?

In recent decades the Public Private Partnership (PPP) has become a very popular phrase used to describe all sorts of public-private collaborations.⁶ In the widest sense a PPP may be described as a form of long term (20 years and more) contractual collaboration between a public authority and one or more private entities, based on a co-operation with the objective to achieve public policies, efficiency and value for money through a concluded contract.⁷

There are two main reasons for establishing PPPs. Firstly, the fact that in the era of the world economic crisis public budgets are struggling to cover public activities, when the demand of citizens to receive good quality service increases every year. Therefore, private financing may be the only possibility for public authorities to carry out complex, high value projects.⁸ Secondly, there is a common opinion that private involvement in public projects has a potential to deliver the best value for money over the life of the contract.⁹ Value for money should not be understood as the lowest price, but rather as a combination of whole-life cost and quality to meet the users' needs.¹⁰

Initially PPPs were introduced as vehicles for the realisation of transport infrastructure projects such as tunnels, roads, and bridges, but throughout the years the application of PPPs has shifted into diverse sectors such as the education and health sectors, where PPPs became a 'go to' form of project implementation, waste management, urban development, information technology service, construction and operation of prisons and schools.¹¹ Despite the fact that PPPs are widely used and promoted by the Commission¹², there is no clear agreement on what exactly PPPs are.¹³ That may be due to the fact that there is no legal definition of PPPs at the European level.¹⁴

6 In the UK – Private Financial Initiative (PFI), in Poland- Partnerstwo Publiczno Prywatne, in Denmark Offentlig-private partnerskaber (OPP); Burnett, Michael, *Public-Private Partnerships (PPP) - A decision maker's guide*, European Institute of Public Administration, 2007, p. 7.

7 See: European Commission, Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions COM (2004)327 final, Brussels 30.04.2004, p. 3; (further: Green Paper on Public-Private Partnerships).

8 Arrowsmith, Sue, *Public Private Partnerships and the European Procurement Rules: EU Policies in Conflict?*, 2000, 37 CMLR, p. 710.

9 *Ibid.*

10 See: article 68 of the Directive 2014/24/EU.

11 Burnett, Michael, *Current Private Finance Initiative (PFI) Reform in the United Kingdom – How should it be measured?*, 2012, 2 EPPPL, pp. 118-119.

12 Communication of the European Commission to the Council, to the European Parliament, to the Economic and Social Committee and to the Committee of the Regions on Public-Private Partnerships in Trans-European Network Projects COM (97) 453.

13 IMF Financial Affairs Department, *Public-Private Partnerships*, March 2004, p. 6; Hodge Graeme, Greve Carsten, *The challenge of public-private partnerships: Learning from international experience*, Edward Elgar Pub, 2005, p. 1; Badcoe, Penny (ed), *Public Private Partnership and PFI*, London: Sweet & Maxwell, 1999, looseleaf, p. 1.00; Fischer

3 Criticism and Challenges Associated with PPPs

PPPs are specific types of collaborations, and even though they have a great potential to deliver value for money and innovation, PPPs are not a miracle solution, and their applicability must be assessed on a case-by-case basis. A balance between the aims and needs of the PPPs' partners needs to be ensured. On the one hand the public entities, which do not have purely commercial goals, and have their focus on fulfilling the obligation to deliver public policies, which often are not economically profitable. On the other hand, the PPPs' private partners for whom the gaining of profit is a crucial interest. Establishing and running successful PPPs between these two sectors is a difficult venture and will often face certain legal challenges.

PPPs are well known in practice, but they are a relatively new concept, when it comes to legislation. There are no specific rules regarding PPPs at EU level and often different approaches are applied to regulate them in different national systems. Therefore, there is a lack of legal unification or standardisation across the EU. As a consequence, parties are hesitant to participate in this type of partnership, as they lack proper knowledge and skills to be part of such long-term projects.¹⁵ A common complaint from the private sector is that PPP contracting takes much longer time than in the private sector. Also, there are very high bidding costs, political debates, and a complex negotiation process often causes delays and an over-budgeted PPP project implementation.¹⁶

4 PPP Regulation at EU Level

Which legal framework will be applicable to the award of the PPP contract will depend on the subject matter of the PPP, its value and the form in which it will be carried out. In practice the vast majority of PPP contracts will fulfil the definition of a public contract¹⁷, or concession¹⁸ and therefore will need to be

Kenneth, *ACT4PPP- A Transnational Initiative to Promote Public-Private Cooperation in Urban Development*, 2010, 2 EPPPL, p. 107.

14 Green Paper on Public-Private Partnerships.

15 Kwak, Young Hoon et al, *Towards comprehensive understanding of Public Private Partnerships for infrastructure development*, 2009, 51 California Management Review (2), pp. 51-78.

16 Milosavljevic, Miloš, Benkovic, Slađana, *Institutions and Development: Modern aspects of public private partnership*, 2009, 3 Perspectives of Innovations, Economics & Business, p. 27.

17 Article 1(2) (a) of Directive 2004/18/EC.

18 If a PPP is a concession Directive 2014/23/EU on the award of concession contracts is applicable.

awarded in accordance with the EU public procurement law.¹⁹ The Public Sector Directive provides rules governing public contracts, i.e. how public tenders should be advertised, what information should be included in public notices, and how transparency should be ensured. The main core of the procurement framework is to support the establishment of an EU internal market by opening up the competition for public contracts in the EU by ensuring transparency, non-discrimination and equality of treatment during the procurement process of the public contract award.

The Public Sector Directive will be applicable to PPPs, if the following requirements are fulfilled: firstly, the public authority involved in a PPP must fulfil the characteristics of the contracting authority.²⁰ This requirement usually will be satisfied, as the majority of public authorities involved in PPPs will represent state, regional or local authorities or bodies governed by public law or associations of bodies governed by public law.²¹ Secondly, the PPP's subject needs to be a provision of the public contract. Lastly, the public contract's value needs to exceed the threshold established in the Public Sector Directive.²²

4.1 *EU public procurement Law and PPPs*

Public procurement law faces many challenges. One of them is a lack of flexibility in tender procedures, which makes the procurement a rigid system to operate in. Also, the private sector often complains about how time consuming and cost-demanding tendering procedures are, and how detailed the requirements are. Some of the characteristics of the PPP will pose specific legal challenges for the public tender scheme. These may include complexity of the contract, long duration of the PPP, the length of the tender procedure, high costs of organisation of and participation in a tender and the availability of a bid submission by the consortia.²³ The challenges mentioned may cause practical difficulties such as delays and unpopularity of the tender, which consequently may lead to difficulties in securing value for money, or even the award of the PPP contract.

In addition to practical concerns, the main issue is that the award of a PPP contract in a public procurement scheme will cause legal challenges such as uncertainty and difficulties about how to apply procurement law.

19 Currently in power: Directive 2004/18/EC and Directive 2004/17/EC though new directives were adopted at the beginning of 2014: Public Sector Directive 2014/24/EU; Utilities Directive 2014/25/EU; Concession Directive 2014/23/EU.

20 Article 1(9) of Directive 2004/18/EC.

21 The same is applicable to the private party involved in PPPs which needs to fulfil the characteristics of the economic operator from article 1(8) of Directive 2004/18/EC.

22 Article 7 of the Directive 2004/18/EC.

23 Arrowsmith, Sue, *The Law of Public and Utilities Procurement*, Sweet and Maxwell, 2nd ed, 2005, p. 31. (further: Arrowsmith, *The Law of Public and Utilities Procurement*).

5 PPP Regulation in Australia

In Australia PPPs cover:

*“a long-term contract between the public and private sectors where government pays the private sector to deliver infrastructure and related services on behalf, or in support, of government’s broader service responsibilities.”*²⁴

In Australia there is not a legally binding definition of a PPP contract, but rather a common characteristic of a PPP-type of collaboration. Therefore, the lack of some of the above-mentioned elements in a PPP contract does not have any legal consequences.

It may be noticed that PPPs in Australia are always focused on infrastructure, and if a service is provided, it will have an additional character to the project and will not be the main focus of the private partner of the PPP. This is because a general rule states that the private partner cannot provide core services while delivering a PPP.²⁵ Core services are described as those involved in the delivery of specific services which a public authority wants to keep control of, due to the responsibilities associated with people using the service and the local community in general.²⁶ Examples of core services can be found in the health and education sectors. In the case of hospitals, usually the private partner in a PPP is allowed to build it and provide additional services like a car park, or waste disposal, but the public authority will provide the main medical service. That is quite different from the European approach, where the private partners often also will deliver such core services. Non-core services constitute additional or related services that the private partner will be allowed to provide in PPP contracts. The use of PPPs for provision of non-core services should be considered mostly for large, long term projects involving some kind of private capital investment.

The large projects mentioned can be identified as those, which exceed specific thresholds for potential PPP contracts; they vary between different States’ jurisdictions and range from \$10 million to \$30 million in terms of whole life costs.²⁷ That is contrary to the EU, where there is no threshold values predicted for using the PPP contracts; the only provided thresholds are for the applicability of the Public Sector Directive.²⁸

24 Point 2.1.1 *Overview of a PPP* in the National Public Private Partnership Guidelines: Overview, 2008, p. 3; (further: PPP Guidelines).

25 This view is changing and largely depends from the individual State policies. Currently, more and more private partners are allowed to deliver the core-services such as custodial and clinical services. See: Point 1 *Our Commitment* in the Policy Framework, the PPP Guidelines; see also: Japan External Trade Organization (JETRO) Asia and Oceania Division, Overseas Research Department, *Public Private Partnerships in Australia and Japan. Facilitating Private Sector Participation*, August 2010, p. 13.

26 Point 2.1.2 *Core and non-core services* in the PPP Guidelines.

27 Sharp, Leeanne, Tinsley, Fred, *PPP policies throughout Australia: A comparative analysis of public private partnerships* (2005) 5 Public Infrastructure Bulletin 1, p. 24; Point 3.1.3.

5.1 *National PPP Policy and Guidelines*

In 2008, the Commonwealth entity called the Infrastructure Australia in conjunction with the Commonwealth, State and Territory Government agencies developed and published the National PPP Policy and Guidelines.²⁹ The latter is a soft-law source, which provides 7 volumes with more than 800 pages of text guiding how to conclude a PPP tender and explains all matters relating to PPPs. The PPP Guidelines aim to encourage the private sector to invest in public infrastructure and additional services, where value for money can be accomplished. Eleven States and Territory government agencies now apply the PPP Guidelines, which replaced previous regional policies. It is expected that due to the establishment of one national policy for PPPs, a high level of uniformity in approaching public-private collaborations can be achieved. It may be an easier task to achieve such unification in Australia than in Europe, as the Australian States share the same legal tradition that is a common law structure. In Europe the task is more difficult, as EU law needs to be unified across Member States, and thus deals with challenges of different interpretation of law due to different legal systems (e.g. common law in the United Kingdom, civil law in Poland etc.), different countries' structures (e.g. centralised in France, decentralised in Germany etc.) culture and historical background. The Commission tries to meet the needs and also provides guidelines on PPPs³⁰, but the Commission is also restricted by the hard-law sources, and thus the guidelines are not laid down in such an extensive form as in Australia.

The PPP Guidelines provide extensive information which covers all possible aspects of the PPP contract award and at the same time leaves discretion in the public authorities' hands to design the tender procedure in a flexible way and adjust requirements of the tender procedure to the needs of specific PPP projects. However, at the same time such an approach leaves space for possible corruption, negligence and process malfunction. This is why the risk needs to be counteracted by applying other tools ensuring transparency of the process such as appointment of a Probity Practitioner and a detailed documentation of the process.³¹

in the *Policy Framework* of the PPP Guidelines, p. 6, refers to PPP contracts of a total capital value exceeding \$50 million.

28 Article 7 of Directive 2004/18/EC.

29 The Council of Australia Governments, the National Public Private Partnership Policy and Guidelines, 29 November 2008 available at: "www.infrastructureaustralia.gov.au/public_private/ppp_policy_guidelines.aspx".

30 European Commission and DG Regional Policy, Guidelines for Successful Public-Private Partnerships. 2003, available at: "ec.europa.eu/regional_policy/sources/docgener/guides/ppp_en.pdf"; Green Paper on Public-Private Partnerships.

31 Point 8.4 *Probity Practitioner* in the PPP Guidelines.

Nevertheless, the issue with guidelines is that they are not binding any party to proceed in the required manner. On one hand, it could be argued that the efficiency of the provisions is measured by its enforceability. Therefore, it is crucial to establish according to which law a legal action can be brought before the Australian court. On the other hand, in the context of this paper, the enforceability is not the crucial element, but it introduces new legal instruments that will be applicable to procurement situations in Australia, and from this perspective they will be analysed further.

5.2 Lack of Public Procurement Law in Australia

Besides the PPP Guidelines, there is no specialised legal framework that regulates public procurement across the country like in the US, Canada or the EU. The procurement system is underdeveloped and instead of one coherent system, there is a multitude of different sources of procurement law at different levels, addressing different entities (public parties in general, federal public parties, and/or state public parties). This makes the legal framework for public procurement complicated, as it is difficult to find out which law is applicable to a specific public tender. This affects the integrity and the transparency of the system.

The Australian government established the Commonwealth Procurement Rules (CPRs)³² a legislative instrument under section 64(3) of the Financial Management and Accountability Act 1997 (Cth),³³ which public authorities are legally required to follow.³⁴ The rules apply to public officials and bodies, which are organising public tenders at the Commonwealth level. The CPRs are not applicable to State public authorities, but, in a limited manner, they are applicable to public companies.³⁵ Its aim is to achieve value for money in public contracting,³⁶ which is to be achieved through encouraging competition³⁷ and ensuring transparency and an ethical procurement process.³⁸ In its scope, the CPRs are similar to the European Public Sector Directive, as they refer to similar principles (transparency, open competition non-discrimination), elaborate on treatment of confidential information³⁹ as well as distinguish between three procurement procedures: open, prequalified and limited tender.⁴⁰

32 Commonwealth Procurement Rules 2012 (CPRs).

33 Financial Management and Accountability Act 1997(Cth),

34 Reg. 7 of the Financial Management and Accountability Act 1997 (Cth).

35 See: the Commonwealth Authorities and Companies Act 1997 (Cth).

36 Sections 4.4-4.14 of the CPRs.

37 Section 5.3 of the CPRs.

38 Sections 7.2-7.23 of the CPRs.

39 Section 7.20 of the CPRs.

40 Sections 9.8-9.12 of the CPRs.

At the State level, there are multitudes of policies, plans and guidelines on procurement, which differ between States.⁴¹ What makes the legal framework even more complicated is the fact that the provisions regarding public tenders are also interpreted from miscellaneous statutory provisions.⁴² Like in Europe, some Australian States regulate procurement in a more normative way than others, and obviously these documents will have different legal power, some will provide binding provisions, and others will offer only recommendations and guidelines. Some of them may form the legal basis for holding the public authorities accountable in the case of negligence, but others will lack the necessary legal power.

5.3 *Public Authority as a Commercial Player*

The classification of public contracting in Australia is not as straightforward as it is in the EU, where a ‘*public*’ character of public purchasers is recognised and distinguished from other ‘*private*’ market participants. In Australia, the voices regarding this classification are divided. Arguments exist stating that if the public authority uses contracts, it is like any other party that makes contracts.⁴³ If the conducted activity is ‘*private*’, it should be governed by private law, and it should not make a difference, if one of the parties involved represents a government.⁴⁴ Other authors⁴⁵ argue that the public authority when buying still needs to be treated as a government representative, as it has specific obligations and a ‘*public mindset*’, which are not comparable to that of private entities. These obligations include spending taxpayers’ money in a reasonable and responsible way, with the aim to get the best value for money and securing the public interest. This means that gaining commercial benefits will not always be the public authorities’ priority, or at least not the only one.⁴⁶

41 New South Wales - Code of Practice for Procurement; Victoria - Procurement Policies (Master Manual); Queensland - Queensland Government Procurement Plan 2009–2012; South Australia - State Procurement Act 2004; Western Australia - Guide to Tendering with Western Australian Public Authorities; Northern Territory - Procurement Directions; Australian Capital Territory - Government Procurement ACT 2001, and Procurement Policy Unit; Tasmania - Purchasing Principles, and Purchasing Policies.

42 Section 106(1) of the Radiocommunications Act 1992; section 32(1)(a) of the Australian Land Transport Development Act 1988 (Cth).

43 O’Byrne, SK, *Public Power and Private Obligation: an Analysis of the Government Contract*, 1992, 14 Dailhouse LJ, p. 485.

44 Zines L, *The Inherent Executive Power of the Commonwealth*, 2005, 16 Public Law Review, p. 279.

45 Seddon, Nicholas, *Government contracts: federal, state and local* (the Federation Press, 4th ed, 2009) at 314 (further Seddon, *Government contracts: federal, state and local*); Finn PD, Smith J, ‘The Citizen, the Government and “Reasonable Expectations”’, 1992, 66 ALJ, pp. 149-150.

46 Seddon, *Government contracts: federal, state and local*, pp. 314-315.

When a private party may ‘act selfishly’⁴⁷ and focus solely on its needs, the public authority has to fulfil higher standards while conducting a tender. To these may be added: an obligation to secure open competition, transparency and equality of treatment.

5.4 Other Sources of Australian Law

There is no comprehensive procurement system in Australia, and when an abuse or violations occur in the procurement process, the claims are thus based on general law. Depending on the level (federal or state), addressees and objective matter of the issue at hand, different laws will be applicable; these include both private and public laws. Australian private law provides the only way in which unsatisfied bidders may claim damages for the wrongdoing by the public authority that occurred during the tender procedure.⁴⁸ Consequently, the main focus in further sections will be given to the private law remedies. Nevertheless it should be noted that when the private law remedies are limited or not available at all, there are available administrative law measures to resolve the PPP tender issues. Such as: a) the legitimate expectations, b) lack of procedural fairness and c) non-compliance with legislative requirements.⁴⁹

5.4.1 Contract Law

Contract law in its traditional understanding covers the relationship between parties from the moment that the preferred offer is chosen, and the contract is concluded.⁵⁰ It is not governing a process leading to the conclusion of the PPP contract, which is the focus of interest in this study. When a request for a tender is published (European contract notice), it is understood as an invitation to trade. The next step is the submission of offers by various private parties⁵¹ and the acceptance of one of the offers. The moment of ‘acceptance’ in contract law terminology, or the moment of ‘award’ in terminology of procurement law, constitutes the conclusion of a PPP contract.⁵²

47 *Ciro T, Goldwasser V, From Private Law to Public Regulation: A New Role for Courts?*, 2003, 2 *Bond Law Review* 15, p. 156.

48 *Seddon, Government contracts: federal, state and local*, p.p. 339, 344, 366.

49 See more in: *Andrecka, Marta, Public-Private Partnership in the EU Public Procurement Regime*, 2014 Saarbrücken, GlobeEdit Publishing.

50 *Graw S, An Introduction to the Law of Contract*, Lawbook Co. 4th ed, 2002, p. 25.

51 *Re Klown Production Pty Ltd Australian Trade Commission* (1992) 26 *Administrative Law Decisions* (Further: ALD).

52 *Milne v Sydney Corp* (1912) 14 *CLR* 54; *Northern Territory v Skywest Airlines Pty Ltd* (1987) 48 *Northern Territory Reports* (Further: NTR) 20.

However, if one bases procurement proceedings on the traditional understanding of contract law, it would be necessary to deal with unwanted consequences: a public authority might consider a proposal which does not meet the requirements published in the PPP contracts' request for a tender, or it might treat potential bidders discriminatory.⁵³ Therefore, a traditional understanding of contract law in a public procurement context is not helpful. Also, because it provides parties with contractual rights and obligations derived from the PPP contract only after the PPP contract is awarded and the contractual relationship after conclusion of a PPP contract is not *per se* of interest for public procurement.

Furthermore, the awarded PPP is establishing contractual rights and obligations between the public authority and the winner of the bid, and gives no contractual right to other bidders who were unsuccessful in the tender procedure. This means that a private party, which does not win the bid – even if it presented the best offer – has no contractual right to claim for damages or loss of earnings. Such a state of affairs is not fulfilling the legitimate expectations of the parties involved in the tender, which expect to be treated fairly and equally.⁵⁴

5.4.2 Process Contract⁵⁵

Due to the problems with the application of contract law to the tender procedures, authors and judges developed an institution of a process contract.⁵⁶ It is a non-traditional analysis of contract law proposing the existence of two contracts. First is the awarded contract ending the procurement process and second is the process contract that regulates the course of the award process.⁵⁷

5.4.2.1 The Request for a Tender

The process contract was developed to protect the '*integrity of the binding system*'⁵⁸ and is largely based on the request for a tender (RFT)⁵⁹. The latter is

53 Seddon, *Government contracts: federal, state and local*, p. 319.

54 See comments to: *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] a Weekly Law Reports (Further: WLR) 1195 at 1201; *Pratt Ltd v Palmerson North CC* [1995] 1 New Zealand Law Reports (Further: NZLR) 469 at 477-479; *Macquarie Generation v CNA Resources Ltd* [2001] New South Wales Supreme Court 1040 at 52-53.

55 Also referred to as 'implied contract' in Arrowsmith, *The Law of Public and Utilities Procurement*, pp. 107-112; 'pre-award contract' in Seddon, *Government Contracts: Federal, State and Local*, pp. 347-384.

56 See: *Hughes Aircraft Systems International Inc v Airservices Australia* (1997) 76 Federal Court Reports (Further: FCR) 151; Seddon, *Government contracts: federal, state and local*, p. 324; Arrowsmith, *The Law of Public and Utilities Procurement*, pp. 107-112; Ambler B, Wotton T, *Law Surrounding The Tender Process* in TressCox Lawyers' Government & Probity Newsletter, January 2011, p.1, available at: "www.tresscox.com.au/resources/resource.asp?id=676".

57 Seddon, *Government contracts: federal, state and local*, p. 319.

58 *R v. Ron Engineering & Construction (Eastern) Ltd* [1981] 1 Canada Supreme Court Reports (Further: CSCR), at 273.

to be understood in the concept of a process contract, as a moment in which the public authority binds itself by provisions established in this document.⁶⁰

Such an approach towards the RFT is controversial, as traditional contract law interprets it as an invitation to trade and to possibly negotiate, where no contractual obligations are stated.⁶¹ Further, the bidder provides an offer, and then the public authority accepts it by concluding a PPP contract.

In the non-traditional interpretation of contract law, the RFT is still understood as an invitation to trade, but at the same time it is an offer made by the public authority. This offer sets the terms and conditions of the procurement award, by which it is bound.⁶² These terms may include an expectation that the PPP contract will be awarded to a bidder that submits an offer proposing the lowest price, or that all participants should be treated equally. Therefore, when the public authority indicates that it will '*treat all bidders equally*' and '*trade fairly*'; it will be under a contractual obligation to do so. If later on, the public authority acts negligently, it will be in breach of its contractual obligations. This will allow the disgruntled bidder to claim for damages based on a breach of the process contract.

5.4.2.2 *Development of the Process Contract*

The existence of the process contract was established in the *Blackpool Borough Council* case⁶³, where the public authority wished to award a concession for operating pleasure flights. One of the bidders submitted an offer, but due to a mistake his tender was not considered, as it was claimed (by mistake) that it was not complying with the tender requirements. In this case the court ruled that the public authority was under a contractual obligation to consider offers that met the terms of the tender. Another case which also confirmed the existence of the process contract was the *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* case⁶⁴ concerning a public authority which sought sealed bids from two potential bidders for parcel of shares. The unsuccessful bidder challenged the lawfulness of the winning offer, which in accordance with RFT should be '*the highest*', claiming that the winning bidder's offer was not a legitimate bid. The court considered, whether the public authority was under a contractual obligation to award a contract to the '*highest bidder*'. It concluded in the affirmative, stating that the public authority promised to award the contract to the highest bidder. The promise was accepted, when the bidder submitted the offer, which not only was the highest bid, but also complied with the terms and conditions of the tender. When that happened, the public authority was under an obligation to conduct a second (award) contract.

59 The Commonwealth Procurement Guidelines (December 2008), p. 46.

60 Hughes Aircraft Systems International Inc v Airservices Australia (1997) 76 FCR 151.

61 Pratt Ltd v Palmerston North City Council 1995] 1 NZLR 469, pp. 478-479.

62 Seddon, *Government contracts: federal, state and local*, p. 326.

63 Blackpool and Flyde Aero Club v Blackpool Borough Council [1990] 1 WLR 1195.

64 [1986] Law Reports Appeal Cases (Further: AC) 207.

As Seddon points out⁶⁵, the existence of the process contract in Australia was confirmed in its early judgements,⁶⁶ followed by a phase in which the courts refused to acknowledge its existence⁶⁷, and nowadays it is used only in certain circumstances.⁶⁸

5.4.2.3 *The Hughes Aircraft Case*

For the first time, the Australian court confirmed the existence of the process contract in the *Hughes Aircraft* case.⁶⁹ The case regarded a public authority, which put to tender the provision and installation of a new air traffic control system in Australia. The RFT stated that the public authority would award the contract based on four weighted criteria, which were segregated in hierarchical order. The second most important criterion was price and the fourth was the ability of the bidder to secure jobs for Australian companies. In addition, the public authority stated that they would treat bidders equally, and that that they would trade fairly. Two bidders participated in the tender procedure Hughes and Thomson, the latter won the contract. The unsuccessful bidder (Hughes) challenged the award of the contract among others on the basis of breaches of contract and a claim based on section 82 of the Trade Practices Act 1974 (Cth) in respect of contraventions of section 52 of the Act⁷⁰ to which the court established that the public authority was guilty of charges.

It was ruled that the public authority did not proceed in accordance with the established RFT. It changed the hierarchy of the award criteria and did not inform parties about the change. As a consequence the contract was awarded to Thomson who secured the fourth criterion even though Hughes proposed lower prices for its services (the second criterion). The court ruled that the process contract governing the tender procedure was in place, and it was breached by the public authority, which failed to assess the submitted proposals accordingly to priority of the award criteria published in the RFT.⁷¹

65 Seddon, *Government contracts: federal, state and local*, p. 350.

66 *Dunton v Warrnambool Waterworks Trust* (1893) 19 Victorian Law Reports (Further: VLR) 84; *Stafford v South Melbourne* (1908) VLR 584; *Brisbane Board of Waterworks v Hudd* (1910) Weekly Notes, Queensland, 11.

67 *Streamline Travel Service Pty Ltd v Sydney City Council* (1981) 46 Local Government Reports of Australia, pp. 176-177.

68 *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 American Law Reports, p. 1.

69 *Ibid.*

70 Act replaced in 2010 by the Competition and Consumer Act (Cth) Act No. 51 of 1974 as amended, taking into account amendments up to Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012, *see*: section 18 schedule 2.

71 *Hughes Aircraft Systems International Inc v Airservices Australia* (1997) 76 FCR, p. 118.

The existence of a process contract was established on the basis of two events, the first of which being the letter dated 9 March 1993 from the public authority to the tenderers and second, the request to submit a final offer.⁷² The public authority argued that there was no intention to conclude any contract on its side, and that the letter from the 9th March, as well as the request to submit a final offer had character of ‘*administrative arrangements*’ not contractual terms, and for these reasons there was no establishment of any kind of the process contract. However, judge Finn J referred to the judgement in the *Pratt v Palmerston* case⁷³, where it was pointed out that whether the RFT is only an invitation to trade, or if it also constitutes the establishment of the process contract, will depend on the ‘*circumstances and the obligations expressly or impliedly accepted [by the parties]*’.⁷⁴ Also, it was underlined that in all contracts where the public authorities are involved, the terms imply that the public authority will deal fairly with the bidder as public law and policy should always be in mind in the background.⁷⁵ This statement underlines specifics of public contracts, which are not shared by the private contracts, namely the implied legal expectations that the public authority will act fairly and not discriminate.

The interpretation of the *Hughes Aircraft* case was acknowledge by many authors⁷⁶, as it presented a potential for special interpretation of the law in regard to public tenders. Unfortunately, it seems that the legal basis on which the *Hughes Aircraft* claim was successfully based is not available anymore, and that is due to the fact that most public authorities are excluding the existence of the process contract in public tenders.⁷⁷

5.4.3 Competition and Consumer Law

Another private law remedy that potentially could be used to challenge the legality of actions taken by the public authority during the procurement process is a provision of misleading conduct.⁷⁸ It can be found in the Competition and Consumer Act 2010 (Cth)⁷⁹ as well as in counterparts to the Commonwealth

72 *Ibid*, p. 180.

73 *Pratt Contractors Ltd v Palmerston North CC* [1995] 1 NZLR 469 at 478.

74 *Ibid*, quoted by the court in *Hughes Aircraft Systems International Inc v Airservices Australia* (1997) 76 FCR, p. 185.

75 Laycock S, *Direct Negotiation – Tendering Guidelines and Probity*, 1997, 13 BCL, p. 353.

76 Harvey J, *the Hughes Aircraft Case and the Private Law of Public Tender*, 1998, 5 Australian Journal of Administrative Law, p. 222; Seddon, *Government contracts: federal, state and local*, p. 336.

77 On the lawfulness of the process contract exclusion see: Andrecka, Marta, *Public-Private Partnership in the EU Public Procurement Regime*, 2014 Saarbrücken, GlobeEdit Publishing.

78 Again, the author would like to emphasise that the enforceability is not the main interest here, however from its perspective, different legal instruments will influence a tender situation in Australia what underlines the deregulatory approach of the Australian system.

79 Further ‘CCA’.

Act – amended Fair Trading Acts in States and Territories⁸⁰, as these are the main legislation governing trade in Australia. The misleading conduct is regulated in the CCA section 18 schedule 2 which states:

“(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive.”

5.4.4 Misleading Conduct

Misleading conduct was also referred to in the *Hughes Aircraft* case,⁸¹ where the fact that the public authority published certain weighted awarding criteria and introduced a scheme of how it wanted to proceed, and later on awarded the contract on a different basis than the one established in the RFT fulfilled the signs of misleading conduct.

In the *General Newspapers* case⁸² the court held that Telecom misled a candidate with the information that he would be put on a tendering list, when in fact it did not plan to establish a tender at all. It seems that the majority of negligence that can occur during a tender procedure can be caught up by the misleading conduct regulations. When assessing whether a misleading conduct has taken place the effect is decisive: i.e. did the action of one party lead the other party to an error?⁸³ If the answer is yes, then the conduct may exist. The intention of a party who misleads is not important, even if the statement of duty to care was taken, or if the party was acting in good faith is not enough.⁸⁴ Furthermore, ‘*silence*’ can fulfil signs of a misleading conduct too;⁸⁵ it depends on the circumstances and occurs only, if a party has a reasonable expectation to be informed.⁸⁶

In Australia there is a strict interpretation of misleading conduct, probably because the legislator wanted it to cover only actions occurring in trade. For this reason not all misleading actions are caught by this provision.⁸⁷ If the behaviour fulfils all the requirements of the misleading conduct definition, it may be a very powerful legal remedy of enforcement against: a) the public authority that misleads tenderers, b) the winning bidder who gave the wrong impression to the public authority, in which case the claim may be made by the public authority itself or also by the losing bidder.⁸⁸

5.4.4.1 Applicability to Public Authorities

The first and most important question is whether the provision of misconduct binds public authorities, when they are tendering. There is a need to recognise two different ‘*levels*’ of public authorities and these are States’ public authorities and Commonwealth’s ones. The CCA was introduced to unify competition and consumer law across Australia. In regard to the misleading conduct it is done by mirror provisions of section 18 schedule 2 of the CCA in

80 Fair Trading Act 1987 (NSW), Consumer Affairs and Fair Trading Act 1990 (NT), Fair Trading Act 1989 (Qld), Fair Trading Act 1987 (SA), Fair Trading Act 1999 (VIC), Australian Consumer Law Act 2010 (Tas) Fair Trading (Australian Consumer Law) Act 1992 (ACT), Consumer Affairs and Fair Trading Act (NT) (Part 4).

the Fair Trading Acts of States. Consequently, States are bound by the mirror provision of prohibition of misleading conduct established by their local legislation. However, public authorities to be bound by the regulation have to perform the conduct '*in trade and commerce*'.⁸⁹

The situation is more complicated, when it comes to the binding power of the misleading conduct provision for the public authorities representing the Commonwealth. Section 2a describes that the CCA is applicable to the Commonwealth only if it '*carries on a business*', either directly or by an authority of the Commonwealth, and when it does, it takes the form of a corporation.⁹⁰

5.4.4.2 '*Carries on a Business*'

Section 4(1) of the CCA states that the expression '*business*' should be understood as activities aiming to achieve profits as well as activities, which have a non-profit profile. The following actions do not constitute '*carrying on a business*': imposing or collecting taxes, levies, fees for licences, granting, refusing to grant, revoking, suspending or varying licences and agreements that do not constitute contracts as they are concluded between the same public authority's bodies.⁹¹ Tender procedures do not constitute an action which is not '*carrying on a business*', but the list is not exhaustive, so it is necessary to analyse what is meant by '*carrying on a business*'. It may be characterized as a repetitive activity concluded not necessarily with the aim of profit, for example are the electricity authority and the public university '*carrying on of a business*' when that conclude research for private companies.⁹² However,

81 Hughes Aircraft Systems International Inc v Airservices Australia (1997) 76 FCR 151.

82 General Newspapers Pty Ltd and Double Bay Newspaper Pty Ltd v AOTC Ltd (1993) 117 ALR 135.

83 Seddon, *Government contracts: federal, state and local*, p. 412.

84 *Ibid* p. 386.

85 Graw S, *An Introduction to the Law of Contract*, Lawbook, 4th ed, 2002, p. 278.

86 Education Equity Pty Ltd v Austock Funds Management Ltd & Anor [2012] Victoria Supreme Court 69.

87 Steinwall R, *Annotated Competition & Consumer Act 2010*, LexisNexis Butterworths 2011, pp. 1191-1235; Seddon N, Ellinghaus M, Cheshire & Fifoot's *Law of Contract*, LexisNexis Butterworths 9th Aus ed. 2008) at 11.102-11.134.

88 Seddon N, *Government contracts: federal, state and local* (the Federation Press, 4th ed, 2009), p. 386, Also *see*: Pourzand Family Trust v City of Nedlands and Anor (1996) BC9603903.

89 Seddon, *Government contracts: federal, state and local*, p. 408.

90 Section 2A(2) of the Competition and Consumer Act 2010.

91 Section 2C of the Competition and Consumer Act 2010.

92 Seddon, *Government contracts: federal, state and local*, p. 386.

public procurement does not fall so easily into the definition of ‘*carrying on a business*’, according to Australian judgements it is doubtful.⁹³

Seddon is a supporter of a wide understanding of the expression ‘*carries on a business*’ and proposes to understand it also as a ‘*governmental business*’.⁹⁴ A wide interpretation of the discussed term is supported by the judgement in the *Re Australian Industrial Relations Commission; Ex parte Australian Transport Officers Federation case*⁹⁵, where the court points out that the interpretation of the expression ‘*business*’ is dependent on the context and its circumstances and whether it is common to use this phrase in the context of ‘*business of government*’.⁹⁶ A similar interpretation can be found in the court’s judgement in the case *Hyde v Sullivan*⁹⁷, where the expression ‘*carries on a business*’ was defined as:

“[...] means to conduct some form of commercial enterprise, systematically and regularly with a view to profit and implicit in this idea are the features of continuity and system.”⁹⁸

However, there is case law, which gives an inconsistent picture of whether the public authority ‘*carries on a business*’ when purchasing or not. In the *Mid Density Development Pty Ltd v Rocdale Municipal Council case*⁹⁹ the court decided that the contracting out of the garbage collection was not a trading activity, but a sale of land was considered a business. The author does not find such an interpretation entirely appropriate. In the *Nader v Australian Pharmaceutical Industries Ltd case*¹⁰⁰ the court was advocating for applying a natural and common meaning of the expression ‘*business*’, which limits the interpretation of government trading activities as businesses. Also, in his work Seddon makes a comparison between the argumentation made by the court in the *Hungier v Grace case*¹⁰¹, i.e. that making a sequence of bank deposits is in some ways comparable to procurement.¹⁰² Therefore, the tender procedure is a series of single, regular transactions each with a certain purpose and aim, but the sum of them does not have an overall business purpose.¹⁰³

93 *Ibid.*

94 *Ibid.*

95 (1990)171 Commonwealth Law Reports, p. 226.

96 *Re. Australian Industrial Relations Commission; Ex parte Australian Transport Officers Federation case* (1990)171 CLR, p. 226.

97 (1956) 56 State Reports New South Wales, p. 113.

98 *Hyde v Sullivan* (1956) 56 SRNSW, p. 119.

99 (1992)39 FCR579, p. 585.

100 (1981) 57 FLR 89.

101 (1972) 127 CLR, p. 217.

102 Seddon, *Government contracts: federal, state and local*, p. 293.

103 *Ibid.*

In Australia, courts adopted a narrow interpretation of what constitutes 'carrying on a business', which causes exclusion from this expression of a procurement held by public authorities in a majority of situations. In the *JS McMillan Pty Ltd v Commonwealth*¹⁰⁴ case this narrow view was taken.

5.4.4.3 The McMillan Case

In the *McMillan* case a private company, McMillan Ltd, submitted an offer for a tender of the Australian Government Publishing Service (AGPS) assets.¹⁰⁵ The bidder was informed that his offer was non-compliant; consequently he was not shortlisted for the consecutive stage.¹⁰⁶ McMillan Ltd took legal action against the public authority to stop the tender procedure, claiming that it was excluded from the tender on the basis of a misleading conduct.¹⁰⁷

The problem with McMillan's exclusion arose from the drafting of the RFT. As the latter provided information about the fact that a successful bidder would in fact step into current work obligations as a replacement of the AGPS. However, no information was given on the terms of the work that the AGPS was providing including the price, which the AGPS was charging, for its services. Due to the lack of information regarding the *inter alia* price, McMillan submitted its offer with reservation to clauses 10.5 and 10.7. During the proceedings, the bidder claimed that he was assured that he would be shortlisted, and that a failure to accept the clauses would not result in an automatic disqualification. Even though no assurance was proved in the court's opinion, the court ruled that in fact the public authority was in breach of section 52 of the Trade Practice Act 1974 (Cth)¹⁰⁸ as the RFT indicated some flexibility in the evaluation of bids. Judge Emmet J pointed out that McMillan would have changed his bid, if he had understood that strict compliance with the clauses was necessary. Consequently, in the court's opinion, McMillan lost a chance to be shortlisted unfairly.

The controversial aspect of this judgement follows the establishment of the public authorities' misleading conduct, as the court continued by stating that even though the procuring authority was in fact at fault, it could not be held liable, as the Trade Practice Act (now the CCA) was not applicable, as the public authority was not 'carrying on a business'. Referring to the latter the court accepted that the Commonwealth was 'carrying on a business' through the AGSP, when it was providing services to the Commonwealth's departments¹⁰⁹, but the sale of AGSP assets apparently constitutes a different action, as the tender was not concluded by the AGSP, but by the Department of the Administrative Service of which the AGSP was part. The first issue that occurs in this statement – as correctly pointed out by Seddon in his article – is

104 (1997) 147 ALR 419.

105 *JS McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419.

106 *Ibid.*

107 *Ibid.*

108 Now section 18, schedule 2 of the CCA (2010).

109 (1997) 147 ALR 419, pp. 436-437.

the fact that the court agrees that the AGPS was ‘*carrying on a business*’ when providing services for the Commonwealth department when such an agreement in fact is concluded between two bodies of the same public authority which is the Commonwealth.¹¹⁰ Hence, this is an in-house agreement, which does not constitute ‘*carrying on a business*’ according to section 2C(1)(c)(i) of the Trade Practices Act (now the CCA). Second, the court analysed the expression ‘*carries a business*’ and made a distinction between activities which were ‘*purely governmental or regulatory*’ and others which constituted ‘*carrying on of a business*’¹¹¹ and argued that a provider of the service was ‘*carrying on a business*’, but the public authority that used these services did not, as it was involved in purely governmental activities.¹¹² In its decision the court states:

“*In so far as the Commonwealth, in the guise of the Department of the Senate, the Department of the House of Representatives and other departments, utilises the services provided or procured by AGPS, it does so in the carrying out of governmental functions.*”¹¹³

It is fully understandable when mentioning these departments which are in fact carrying governmental functions, but it was not the case in the *McMillan case*, where the Department of Administrative Services (DAS) was procuring the sale of assets, and this Department was not *per se* holding a governmental or regulatory function, but was providing commercial services for the Commonwealth such as contracting services, administrative support services, construction and property management, transport etc. It was fully involved in trading and commercial activities.

Therefore, it is difficult from the perspective of a natural understanding of the expression ‘*business*’ to state that such a department while tendering was not ‘*carrying on a business*’. However, in the *McMillan case* the court decided that the DAS was not ‘*carrying on a business*’ as it was part of the Commonwealth entity which primary activity is not to ‘*carry on a business*’, but to fulfil governmental and regulatory functions. The court decided that the words ‘*in so far as*’ in section 2A of the Trade Practices Act (now the CCA) had crucial meaning and limited activities, which could constitute ‘*carry on a business*’. At the same time the court underlined that because one body of the Commonwealth (here the AGPS, or the DAS) could ‘*carry on a business*’, it did not mean that the Commonwealth as a whole institution was ‘*carrying on a business*’.¹¹⁴

Judge Emmet J indicated that he was not happy with the results of the proceedings, however, it was not his job to determine the extent to which the Trade Practices Act (now the CCA) binds the Commonwealth, it is a job for

110 Seddon, Nicholas, *JS McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419: *The Trade Practices Legislation and Government Immunity*, 1998, 26 Fed.L.Rev. p. 405.

111 (1997) 147 ALR 419, pp. 436-437.

112 *Ibid.*

113 *Ibid.*

114 (1997) 147 ALR 419 at 438.

the Parliament.¹¹⁵ The interpretation of the *McMillan* case had its consequences, as other courts' decisions were based on it and referred to it.¹¹⁶ This brought the effect that as a general rule the procurement activity is excluded from the description of 'carrying on a business' in Australia.

In the majority of situations where the public authority conducts a tender, the CCA is not binding law for that authority. This problem is not major, when it comes to State's public authorities, as they are bound by their local legislation of the Fair Trading Acts, which mirrors provisions of the CCA in regard to misleading conduct, and they do not provide the requirement of 'carrying on a business'. The fact is that most PPP tenders will be governed by local Fair Trading Acts or by State's procurement law if such is established.¹¹⁷ However, in cases where the PPP procurement is held by the Commonwealth's public authority, this problem has major importance, as the Commonwealth is not bound by CCA law, if the procurement is not covered by the definition of 'carries on a business'. The effect is that such a state of affairs can potentially harm a private bidder, which has no civil remedies against the Commonwealth, as he or she cannot claim damages, and the only legal remedies available are those from the public law *repertoire*.

It is important to consider the purpose of the CCA's provision, which is to exclude the Commonwealth immunity and bind the Crown with the provisions of the CCA.¹¹⁸ That is a very important aim as the act is addressed both to private entities and to the public authorities and should be applicable to both in an equal manner, which is not currently the case. This is especially from the perspective of the requirement of fulfilment of a higher standard by the public authorities that such a distinction in application is unsatisfying. In fact the CCA is fully applicable to private entities on the commercial market, but the application of the act to the Commonwealth is excluded in procurement scenarios. The legislator could not intend this outcome; therefore there is a need to react. One option could be to delete the phrase 'carries on a business' as a requirement from the legislation, but that would require amendments in nine legislative acts.¹¹⁹ Moreover, that would open the Commonwealth's liability in respect of activities never intended to be covered by the CCA.¹²⁰ Thus, it is more reasonable to say that judges should act as they have a power and possibility to give an appropriately wide meaning to the expression

115 *Ibid.*

116 *Corrections Corp of Australia v Commonwealth* (2000) 104 FCR 448; *Sirway Asia Pacific Pty Ltd v Commonwealth* (2002) FCA 1152; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) FCA 50.

117 Besides NSW legislation, which mirrors the CCA. Furthermore, if a local NSW public authority is not carrying on a business, it is not bound by the NSW Fair Trading Act either.

118 Seddon, Nicholas, S. *McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419; *The Trade Practices Legislation and Government Immunity*, 1998, 26 Fed.L.Rev p. 407.

119 *Ibid.*

120 *Ibid.*

'*carries on a business*' where public procurement will be included in the scope including procurement of PPP contracts.

6 Conclusions

The Australian legal framework for the award of the PPP contract provides the public authority with a lot of discretion in designing public tenders. This is especially valuable as in such a case the freedom and flexibility is an extremely important factor for the future success of the project development. The system though lacks legal certainty, as it has many loopholes, exemptions and uncertainties, which leave room for negligence. Even the case law presents a heterogeneous line of judgements towards similar cases. Nevertheless, the Australian system '*works*'. This may be due to the fact that tenders are regarded as commercial activities, which in their character are mainly governed by private law. In a private law situation the private bidders possibly approach a tender with the expectation of the same risks that trading on the private market brings.

Public procurement law in the EU and in Australia is guided by two different purposes, public procurement in the EU is regulated by provisions in the TFEU and by the procurement directives, and Australia's procurement framework has emerged from reforms to the Commonwealth auditing practices. Where the EU seeks to open up Member States' procurement markets to competition and liberalise trade within the internal market, Australia aims at achieving the best possible management of its resources through the procurement process.¹²¹ The Commonwealth particularly stresses the financial management in '*promoting efficient, effective and ethical use of Commonwealth resources*'.¹²² Therefore, achieving value for money is the most important aspect of the procurement policy. Having in mind that these two systems were established for different purposes and have different aims, the fact that the tools to deliver the aims of the procurement policies are also different is not surprising.

The conclusion may be that the Australian PPP procurement framework is more effective in terms of available flexibility and discretion, but the EU's procurement system offers more legal certainty by providing an enforceable procurement framework.

121 Financial Management And Accountability Act 1997 Act No. 154 of 1997 as amended, taking into account amendments up to Financial Framework Legislation Amendment Act (No. 2) 2013.

122 Section 44 of the Financial Management And Accountability Act 1997 No. 154 of 1997 (Financial Management And Accountability Act 1997 Act No. 154 of 1997 as amended, taking into account amendments up to Financial Framework Legislation Amendment Act (No. 2) 2013, the wording of the provision was changed, but the same sense was kept).

A fact worth mentioning is that supplementary aims of the procurement in Europe are also to deliver efficiency and value for money. Hence, the question is, whether there are aspects of the Australian legal approach to procurement, which could be inspirational for the European legislator in regulating the award of PPP contracts.

6.1 Suggestions

From the above reasons it is interesting to consider, if the Australian solutions could be considered in the EU system. That would mean a deregulation of the EU's PPP award framework, and base it on the general contract, competition law or Treaty rules.

Applying contract law for the award of the PPP contract in an EU context would mean that the legal framework for PPPs would be decided individually by each Member State. This is due to the fact that contract law is not regulated at the EU level. In a sense, such an approach would ignore the purpose of establishing an internal market, and harmonization of the contract law across EU would be very difficult, as it was not designed to promote the EU market.

The second option would be to apply the EU competition law rules to PPP procurement. However, the consequences of transferring this particular Australian approach to the EU would require changing the fundamental private/public law distinction in the EU. In the EU as a matter of principle, competition law is addressed equally to public and private '*undertakings*'¹²³ that carry on activities of an industrial or commercial nature.¹²⁴ Though, the scope of the EU competition law applicability is limited to scenarios when the public undertakings develop an '*economic activity*'.¹²⁵ Throughout recent case law, the CJ developed a narrow concept of the '*economic activity*', which in many cases excludes the applicability of competition law to procurement scenarios. According to the mentioned case law, the nature of procurement activities must be determined according to whether or not the subsequent use of the goods/services purchased qualifies as an economic activity.¹²⁶ It means that all the PPP procurements that will not subsequently carry out economic

123 Wils WPJ, *The Undertaking as Subject of EC Competition Law and the Imputation of Infringements to Natural or Legal Persons*, 2000, 25 *European Law Review* 99; Louri V, "*Undertaking*" as a *Jurisdictional Element for the Application of EC Competition Rules*, 2002, 29 *Legal Issues of Economic Integration* 143.

124 Graells AS, *Public Procurement and the EU Competition Rules*, Hart 2011, p. 129.

125 *See*: Case 41/83 *Italy v Commission* (1985) ECR 873; Case T-319/99 *FENIN v Commission* (2003) ECR II-357, confirmed on appeal, Case 205/03 P *FENIN v Commission* (2006) ECR I-6295; Case T-155/04 *Selex v Commission* [2006] ECR-II-4797, confirmed on appeal, Case C-113/07 P *Salex v Commission* (2009) ECR I-2207.

126 Case T-319/99 *FENIN v Commission* (2003) ECR II-357 at 36, confirmed on appeal, Case 205/03 P *FENIN v Commission* (2006) ECR I-6295 at 26; Case T-155/04 *Selex v Commission* [2006] ECR-II-4797 at 65, confirmed on appeal, Case C-113/07 P *Salex v Commission* (2009) ECR I-2207 at 102,114.

activities, but social or those of a public interest will be excluded from application of the EU competition rules.¹²⁷

Therefore, the legal qualification of public behaviour when contracting is substantially different in the EU and in Australia. In Australia the conclusion of a PPP tender is understood as a commercial activity governed by private law. In Europe, public tendering is understood as a matter governed by public law. If applying the Australian approach, legal logic regarding public purchasing would need to be changed. When awarding a PPP contract the public authority would need to be understood as a private company.

The third option would be to exclude the awarding of the PPP contracts from the Public Sector Directive regime and award PPP contracts on the basis of the Treaty rules and principles. It seems that this approach would be possible to be apply, if there is enough will. That is due to the fact that even without the directive framework of the purpose of the EU, its main aims and values would stay in place. The difference would be that the detailed provisions would be removed and more freedom and flexibility – which is much needed in the context of PPP contracts – would be allowed when awarding PPP contracts. Of course, it is difficult to imagine a fully deregulated procurement system in the EU, as the procurement directives are in place. However, the newly adopted Directives already introduce certain changes.¹²⁸ Therefore, the author sees a possibility of introducing even more flexibility and simplification to the process of PPP contracts award.

That is a semi '*deregulation*' of the existing public procurement directives (even further than in the newly adopted package from 2014). The author suggests a deletion of the very detailed and rigid provisions and an addition of as much flexibility in the tender process as possible by basing the award of PPP contracts on general principles of EU and procurement law. Also, all procurement procedures should be available to use when needed without limitations, but provisions on how the transparency should be ensured during each tender should be in power. Additionally, the Commission should provide extensive guidelines for best practices in awarding PPP contracts to which all the detailed provisions, which exist right now in the public procurement, directives should be transferred. In the author's opinion this approach would not only meet the current goals of the legislator in regard to simplification of the procurement framework in general, but it would also deliver more flexibility, and allow better communication and negotiation between the parties involved in the award of PPP contracts. In this sense, the author believes all needs, both those of parties interested in establishing PPPs and those of policy makers as guardians of the internal market, would be satisfied.

127 See more: Graells AS, *Public Procurement and the EU Competition Rules*, Hart 2011, pp. 128-135.

128 Directive 2014/24/EU; Directive 2014/23/EU; Directive 2014/25/EU.