

Government Procurement (Secure Local Jobs) Code 2018

Disallowable instrument DI2018–283

made under the

Government Procurement Act 2001, s22M(1) (Secure local jobs code)

EXPLANATORY STATEMENT

Overview

This explanatory statement relates to the *Government Procurement (Secure Local Jobs) Code 2018* (the Code).

The Code provides the detailed requirements introduced by the Secure Local Jobs Package (the Package), covering workplace standards such as collective bargaining, freedom of association, health and safety, workplace inductions and union workplace representation.

The requirement to comply with the Code is reinforced at multiple levels and applies to an entity who holds a Secure Local Jobs Code Certificate (Certificate):

- The requirement to hold a Certificate is established by *the Government Procurement Act 2001* (GPA) (as amended by the *Government Procurement (Secure Local Jobs) Amendment Act 2018*):
 - o a territory entity cannot accept a response to a procurement for territory-funded work unless a tenderer holds a certificate
 - o a territory entity cannot enter into a contract for procurement for territory-funded work unless the other entity holds a certificate
- Territory-funded work is defined by reference to the kind of services or work, and initially covers specific industries. The term will later be broadened to include any contract primarily for labour with an estimated value at or above \$200 000.

The authority to make the Code is contained in section 22M of the GPA, which states that –

(1) The Minister may make a code (the secure local jobs code) that sets out workplace standards and related requirements that applies to an entity that holds a secure local jobs code certificate.

...

(5) The Code is a disallowable instrument.

Section 22M of the GPA also sets out what requirements may be included in the Code.

Regulatory impact statement

A regulatory impact statement has been prepared for the Code and is available on the ACT Legislation Register. The regulatory impact statement also addresses two related legislative instruments, the *Government Procurement (Secure Local Jobs Code) Amendment Regulation 2018* and *Government Procurement (Secure Local Jobs Code Model Contract Terms) Determination 2018*.

Human rights implications

During the development of this Regulation regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004* (HRA). Human rights implications are discussed in detail in the Regulatory Impact Statement for the Code.

CLAUSE NOTES

Clause 1 Name of instrument

This clause provides the instrument is the *Government Procurement (Secure Local Jobs) Code 2018*.

Clause 2 Commencement

This clause provides that the instrument commences on 15 January 2019.

Clause 3 Secure local jobs code

This clause states that in this instrument, the Minister makes the Secure Local jobs Code as set out in the Schedule.

Schedule

Part 1 Preliminary

Section 1 Name of instrument

This section provides that the instrument in the Schedule is to be referred to as the Secure Local Jobs Code (the Code).

Section 2 Definitions

This section provides definitions for key terms used in the Code.

Section 3 Objectives

This section sets out the objectives of the Code.

Section 4 Application of the Code

This section sets out who the Code applies to. The Code applies to entities that hold a secure local jobs code certificate (Certificate) – these are referred to under the Code as Code Certified Entities. The Code also applies to territory entities to the extent that section 10 imposes obligations on them.

Section 5 Code Oversight and Administration

This section sets out the roles/functions of relevant entities/persons under the Code, being the Minister, Registrar, the responsible Chief Executive Officer and the Secure Local Jobs Advisory Council.

Section 6 Interaction with Commonwealth laws

This section states that a Code Certified Entity may apply for an exemption from an obligation of the Code under section 22P of the GPA where there is evidence that the obligation is inconsistent with a Commonwealth law. The decision to grant the exemption is made by the Registrar under section 22P of the GPA and not under the Code.

Part 2 Requirements for Territory-Funded Work

Section 7 Code Certification

This section sets out when an entity is required to hold a certificate (and will therefore be covered by the code). An entity is required to hold a certificate for the entirety of the procurement process:

- when it responds to a procurement for territory-funded work;
- when it enters into a contract, agreement or other arrangement (with a territory entity or subcontractor) for territory-funded work; and
- for the duration of the contract, agreement or other arrangement for territory-funded work.

In this way, the obligation to hold a Certificate, and thus abide by the Code, is enforced on multiple levels, at all stages of procurement.

Section 8 Subcontractors

This section sets out obligations for Code Certified Entities relating to subcontractors engaged for territory-funded work. A Code Certified Entity needs to provide details of any proposed subcontractor prior to engaging the subcontractor on territory-funded work. The Code Certified Entity is also required to ensure that the Subcontractor has a valid Certificate and complies with the Code in relation to territory-funded work.

This section ensures transparency and oversight, and ensures that a Code Certified Entity cannot contract out of its obligations under the Code. It also broadens the application of the Code to entities that may otherwise not have a direct relationship with the Territory in relation to territory-funded work, but nevertheless are engaged in connection with territory-funded work. This ensures the policy intention of the Code to ensure optimal labour standards for all workers on territory-funded work is achieved.

Section 9 Contact Persons for Territory-Funded Work

This section relates to contact persons for territory-funded work. The provision of this information facilitates lawful right of entry by WHS permit-holders under the *Work Health and Safety Act 2011* (WHS Act) and permit holders under the *Fair Work Act 2009* (FW Act).

Subsection 9(1) requires a Code Certified Entity to provide details relating to workplaces and contact persons for territory-funded work. Subsection 9(2) requires this information to be provided before any territory-funded work starts. Subsection 9(3) requires that a Code

Certified Entity informs the territory entity of any change in the details provided under subsection 9(1) within 14 days.

The Registrar is required by subsection 9(4) to maintain a record of the information provided under subsection 9(1). A person may request access to this information for the purposes of exercising a lawful right of entry under the FW Act or WHS Act under subsection 9(5), and must specify that this is the purpose for which the information is sought. Under subsection 9(6), the person requesting the information in accordance with subsection 9(5) must be a WHS permit-holder under the WHS Act or permit holder under the FW Act, depending on which kind of lawful right of entry the request for the information relates to. Under subsection 9(7), the Registrar is required to give the information to the person where it is satisfied that the person is a permit holder under the FW Act or a WHS permit-holder under the WHS Act, and the person applying for the information needs the information to exercise a lawful right of entry under these laws.

The provision of this information enables these people to effectively perform their roles and exercise their right of entry. This is recognised as an important mechanism to protect workers' rights and health and safety under existing legislation in force in the Territory.

Section 10 Requirements for territory entities

This section sets out requirements for territory entities under the Code, subject to exemptions granted under the GPA.

This section outlines a number of obligations imposed on territory entities relating to:

- requiring compliance with the Code by relevant entities it contracts with;
- requiring entities responding to a request for quote, proposal, tender or establishment of a panel arrangement to confirm they will comply with the requirements of the Code if engaged on territory-funded work and while they hold a valid Certificate, comply with any model terms and conditions inserted into contracts for territory-funded work, and comply with requests from authorised entities in monitoring and investigating compliance with the Code;
- taking into account a tenderer's LRTWE plan as required by the GPA; and
- taking into account any report from the Registrar regarding an entity's past compliance with the Code or terms of the entity's LRTWE plan included in any contract for territory-funded work.

Part 3 Obligations of a Code Certified Entity

Section 11 Adherence to the Law

Subsection 11 (1) requires a Code Certified Entity to comply with all applicable: Industrial Law; orders, directions and decisions by listed bodies regarding a matter concerning the Prescribed Legislation; and any Industrial Instrument that applies to the entity.

Under subsection 11(2), a Code Certified Entity is required to notify the Registrar of any Adverse Ruling made against it or its subcontractors within 5 working days of the ruling being made, or the Entity becoming aware of the ruling being made. This helps the Registrar

determine any further steps that may be necessary in terms of ensuring compliance with the Code.

Section 12 Requests for information

This section requires a Code Certified Entity to abide by reasonable requests by the Registrar or an approved auditor for information, access to records or other directions made for the purposes of investigating compliance in accordance with the Code and GPA. This enables the Registrar and any approved auditor to effectively perform their roles.

Section 13 Workplace Representation

This section relates to workplace representation. A Code Certified Entity is required to facilitate the conduct of an election of a union workplace delegate or other employee representative if requested to do so by at least two employees. Subsections 13(2) and (4) outline how a Code Certified Entity is required to treat any union workplace delegate or other elected employee representative, to ensure that their rights are recognised and that they are best able to perform their role. Subsection 13(3) clarifies that employees are able to choose whether they are represented in a grievance or dispute.

Section 14 Employee Representation and Workplace Inductions

This section requires a Code Certified Entity to understand and respect their employees' rights. This includes the right to freedom of association and right to representation at work.

Subsection 14(2) outlines how a Code Certified Entity may achieve this. This section also outlines requirements that the Code Certified Entity must meet regarding induction training for new employees.

Section 15 Recognition of the Right to Collectively Bargain

This section requires a Code Certified Entity to inform employees of their employment rights. This includes informing employees of their right to collectively bargain. The section outlines how a Code Certified Entity may achieve this. The section also includes requirements relating to collective bargaining and the development of Enterprise Agreements.

Section 16 Freedom of Association

This section requires a Code Certified Entity to respect its employees' rights relating to freedom of association, and sets out how a Code Certified Entity may respect, protect and recognise the right to freedom of association.

Part 4 Certification Process

Section 17 Application for Code Certification

Subsection 17(1) provides that a “current” report from an approved auditor to be submitted with an application for a Certificate is one that has been issued in the last 20 business days.

Subsection 17(2) sets out what the Registrar may consider in deciding whether to grant a Certificate. This subsection does not limit the information the Registrar may consider.

Subsection 17(3) states that for a Certificate to be granted, the applicant must have a satisfactory history of compliance with applicable Industrial Laws as set out in subsection 11(1) of the Code. The applicant’s Associated Entities also must have a satisfactory history of compliance with these matters.

Section 18 Costs of the Approved Auditor

Subsection 18(1) states that an entity is to pay for the audit by an approved auditor for the purposes of applying for a Certificate. Subsection 18(2) provides that the Registrar is to pay for the cost of an audit where it appoints an approved auditor to investigate possible non-compliance in accordance with section 22R of GPA.

Part 5 Transitional Arrangements

Section 19 Code applies to new procurements

This section clarifies that section 7 (code certification) and 10 (requirements of territory entities) apply to new procurements and responses to new procurements for territory-funded work and new contracts for procurement that relate to new procurements for territory-funded work.