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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

GOVERNMENT PROCUREMENT (SECURE LOCAL JOBS) AMENDMENT BILL 2018

EXPLANATORY STATEMENT

**Presented by
Rachel Stephen-Smith MLA
Minister for Workplace Safety and Industrial Relations**

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Purpose of the Bill

The purpose of this Bill is to amend the *Government Procurement Act 2001* (the Act) to facilitate the adoption of the *Secure Local Jobs Code* (the Code).

The reforms enact the Secure Local Jobs Package, an integrated suite of measures aimed at ensuring that ACT Government contracts are awarded to businesses that meet the highest ethical and labour standards.

The Bill establishes new tender evaluation and contract oversight requirements for Territory entities as well as internal governance and supporting infrastructure, including a statutory role of registrar to oversee the new arrangements.

The Bill aims to ensure compliance with the Code by establishing a prequalification audit regime, the *Secure Local Jobs Code Certificates* (Code Certificate). It requires a Territory entity to comply with requirements for applicable procurement proposals, including that a supplier has a Code Certificate. A Code Certificate may only be granted if the supplier meets the requirements of the Code.

Non-conformance with the Code may result in a supplier's Code Certificate being suspended or cancelled, or have conditions imposed on the Code Certificate. Enforcement activities may have the consequence of a Territory entity being unable to enter into a contract for procurement with this supplier.

Exemptions from requirements may be granted under certain conditions.

The Bill also establishes the Local Jobs Code Advisory Council, a tripartite advisory body under the Act to oversee, monitor and advise the Minister on the operation of the Code.

Finally, the Bill inserts additional oversight in the form of provisions allowing certain decisions made by the registrar to be subject to external review in the ACT Civil and Administrative Tribunal (ACAT).

Human Rights Considerations

Given the requirements of the Bill may apply to individuals to the extent that they operate as sole traders, the Bill has the potential to engage and limit subsections 8(3) and 12(a) of the *Human Rights Act 2004* (HR Act) and are discussed below.

Under section 22F(1)(b) of the Bill, *territory funded work* is defined by reference to specific types of work for the purposes of the Bill. The effect is that entities who perform *territory funded work* or who tender for services or works for a territory entity must hold a Code Certificate.

The reason for applying these additional requirements on these specific types of work in the first instance is because they have been identified as areas prone to higher risk of work injury or insecure work arrangements. To the extent that the Bill imposes these additional obligations on these types of work such that section 8(3) of the HR Act may be engaged is

considered to be justified on this basis. There is no other reasonably available or less restrictive way to achieve this without applying an additional regulatory burden on all entities working in the Territory.

The nature of the right affected – 12(a)

Section 12(a) of the HR Act protects the right of individuals not to have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

The Bill sets out the obligations of a Territory entity when undertaking procurement activities by amending the *Government Procurement Act 2001* to include provisions to require that entities who choose to contract with the Territory must comply with certain requirements and obligations. The new requirements will apply to limited classes of contract defined as territory funded work and include obtaining a Code Certificate.

The Bill sets out the foundation and technical requirements for establishing the Code to apply to territory funded work procured by Territory entities. Under the Bill, the Code may lawfully require entities seeking to contract with the Territory to provide information about the entity, and its subcontractors, to the registrar. This information includes the provision of the physical addresses, working hours, and contact details of a contact person for each of the entity's work sites, and its subcontractor's work sites under section 22M

(2)(b)(ii). Under section 22M(3)(b), the Code may require the registrar keep records of the abovementioned details and grant access to these records to entities seeking to exercise their right of entry under a Territory law.

The importance of the purpose of the limitation

The purpose of the Bill is to help ensure that the Territory contracts with entities with exemplary ethical and labour standards. Entities can choose to contract with the Territory and the Territory can also choose who it contracts with. This Bill leverages the procurement process to ensure that the Territory is contracting with entities that are meeting their workplace standards and obligations. This Bill will provide another mechanism for the Territory to satisfy itself that the businesses it contracts with are looking after the health, safety and rights of workers. Information regarding an entity that contracts with the Territory and its subcontractors allows the Territory to ensure that contractors and subcontractors are complying with the Code.

The nature and extent of the limitation

As indicated above the limitation will only apply to a limited classes of entities who contract with the Territory. In addition, the *Information Privacy Act 2014* will apply to any of the information collected under section 22M(2)(b)(ii), and as such, the Territory Privacy

Principles would apply to that information being personal information with regards to its disclosure etc.

There are no criminal sanctions applied under the Bill. Sanctions are economic in that an entity may be limited in its ability to contract with the Territory.

The relationship between the limitation and its purpose

The Bill is aimed at ensuring entities that the Territory contracts with are complying with their obligations with respect to workplace standards and requirements, including the rights, health and safety of its workers. The information required for a contact person for an entity's work site is necessary to ensure the effectiveness of the purpose of the Bill by facilitating communication and engagement between those with a legislative duty in respect of the workplace and the Territory.

Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

The limitation under the Bill is considered to be the least restrictive means of ensuring the effectiveness of the purpose of the Bill and is reasonably justified on the basis that it:

- will only apply to a limited class of entities;
- the *Information Privacy Act 2014* will apply to the collection and use of the information by the registrar;
- entities who choose to contract with the Territory will be expected to know about their obligations and requirements under Code; and
- no criminal sanctions will apply in circumstances where the information is not provided.

Government Procurement (Secure Local Jobs) Amendment Bill 2018

CLAUSE NOTES

Clause 1 Name of Act

This clause names the Act as the *Government Procurement (Secure Local Jobs) Amendment Act 2018*.

Clause 2 Commencement

This clause provides that, apart from schedule 1, the Act will commence on 15 January 2019. Schedule 1 will commence on a day fixed by the Minister by written notice. However, if schedule 1 has not commenced within 12 months of the Act's notification day, schedule 1 will commence on the first day after that period. To ensure that subsection (3) is not displaced, subsection (4) states that section 79 of the *Legislation Act 2001* does not apply to schedule 1.

Clause 3 Legislation amended

This clause provides that the Bill amends the *Government Procurement Act 2001*.

Clause 4 New part 2B

Clause 4 inserts part 2B, which contains key provisions for implementation of the Code.

Division 2B.1 specifies part 2B's application and inserts definitions for part 2B.

Section 22D ensures that part 2B does not apply to a procurement by a territory entity and the Commonwealth or a State, or one of their entities.

Section 22E inserts definitions for purposes of part 2B. Some of the defined terms are covered in other sections under part 2B, so in section 22E these terms are defined by reference to the relevant section.

approved auditor is defined by reference to section 22O.

audit guidelines are the guidelines made by the Minister about matters relating to audits under section 22U(1)(a).

code is defined by reference to section 22M.

council is defined by reference to section 22Z.

registrar is defined by reference to section 22V.

secure local jobs code certificate is defined as a certificate granted under section 22J.

secure local jobs register is defined by reference to section 22N.

tenderer, as the term relates to a procurement proposal, is defined as an entity that submits a quote, tender or other response to a procurement proposal.

territory funded work is defined by reference to section 22F.

workplace standards are the obligations of an entity regarding their workplaces, including those listed under the definition.

Section 22F defines ‘territory funded work’ for the purposes of part 2B. This term is consequential for the application of part 2B, and in particular, the requirements for procurement. ‘Territory funded work’ is defined as services or works that are for a territory entity and primarily for any of the types of services or works listed. A number of the types of services or works listed are defined by reference to the Australian and New Zealand Standard Industrial Classification 2006 (ANZSIC).

Subsection 22F(2) exempts the adoption of the ANZSIC as in force from time to time from being a notifiable instrument under section 47(6) of the *Legislation Act*. Section 47(6) is displaced because the ANZSIC is subject to copyright and is publically available free of charge on the Australian Bureau of Statistics website.

The definition of ‘territory funded work’ in section 22F will be amended upon the commencement of schedule 1 of the Bill.

Division 2B.2 imposes requirements for procurement on territory entities, and in doing so, imposes requirements on entities seeking to contract with a territory entity for procurement for territory funded work.

Section 22G places requirements on a territory entity in terms of accepting a response to a procurement proposal and entering into a contract for procurement for territory funded work.

Under subsection 22G(1), a territory entity can only accept a response if the tenderer holds a Code Certificate. Any conditions on the certificate must be appropriate for the procurement. If the procurement proposal is valued at \$25 000 or more, the tenderer must also submit a labour relations, training and workplace equity plan for the entity to be able to accept a response. A territory entity is required to consider this plan in considering responses to the procurement proposal.

Under subsection 22G(3), a territory entity must not enter into a contract for procurement with a contractor unless the contractor holds a Code Certificate, and any conditions on the certificate are appropriate for the procurement. To provide additional legal protection for local workers, any model terms determined by the Minister under subsection 22G(4) must be included in the contract. There are examples of the kinds of model terms that the Minister may determine must be included provided under subsection 22G(4).

Subsection 22G(6) outlines what a labour relations, training and workplace equity plan is. The regulation may prescribe requirements for a labour relations, training and workplace equity plan.

Subsection 22H enables the responsible chief executive officer for a territory entity to exempt a territory entity for a procurement proposal or procurement if it is for certain kinds of emergency work, and the requirements for procurement under section 22G cannot be complied with because of the emergency. The registrar and council are to be notified within 7 days of the exemption being granted. The term 'responsible chief executive officer' is defined in the dictionary of the current *Government Procurement Act 2001*.

Subsection 22H(3) outlines how an exemption from section 22G may be granted to a territory entity. An exemption may be granted if there is no suitable entity available at a reasonable cost that will meet the requirements in section 22G. An exemption must be in writing, and the council must be notified of the exemption within 7 days after the exemption is granted.

Division 2B.3 deals with Code Certificates and the Code.

Section 22I inserts requirements for applications for Code Certificates. An application by an entity for a Code Certificate must include a current report from an approved auditor that states the entity meets the requirements in the Code. The regulation may also prescribe additional requirements for an application for a Code Certificate.

Section 22J provides the registrar with the power to decide on an application for a Code Certificate. The registrar may grant a Code Certificate if the applicant meets the Code's requirements and is not prohibited from applying for a certificate as a result of a compliance action taken under section 22T.

Section 22K provides that conditions may be imposed on a Code Certificate by regulation, the registrar, or under section 22T.

Under section 22L, an entity that holds a Code Certificate is able to surrender its certificate to the registrar. The entity can only do so if it is not required to hold a Code Certificate under a contract with a territory entity. The notification to the registrar must be in writing. If the registrar is satisfied that the entity is not required to hold a Code Certificate under a contract with a territory entity, the registrar may allow the entity to surrender its certificate and update the secure local jobs code register accordingly. The registrar can request information from a territory entity in order to determine whether an entity seeking to surrender its Code Certificate is required to hold one under a contract with the territory entity.

Section 22M enables the Minister to make the Code via disallowable instrument. The Code sets out standards and imposes requirements on Code Certificate holders. The types of

standards and requirements that may be included in the Code are outlined under subsection 22M(2).

Subsection 22M(3) states that the Code may also impose record keeping and access requirements of the registrar regarding the details of contractors and subcontractors provided under subsection 22M(2)(b). Under section 22M(3)(b), the Code may include requirements for the registrar to grant access to those records in order to allow an entity to exercise its right of entry under an ACT law. For example, this may include a WHS permit-holder exercising their right of entry under the *Work Health and Safety Act 2012*.

For the avoidance of doubt, subsection 22M(4) states that the Code cannot include requirements that are inconsistent with the *Fair Work Act 2009* (Cwlth) or any other Commonwealth law. This makes it clear that the Code will not alter, impair or detract from the operation of the *Fair Work Act 2009* (Cwlth).

Section 22N requires the registrar to keep a secure local jobs code register, which must be searchable and publically accessible. The register must include the names of entities that hold a Code Certificate, the conditions or exemptions on an entity's Code Certificate, any compliance actions taken under section 22T, and any further information required by the regulation.

Section 22O allows the registrar to approve an auditor if the auditor meets the specified requirements. The registrar is required to revoke an auditor's approval if the auditor stops meeting the requirements under subsection 22O. The registrar is required to compile and maintain a publically available list of approved auditors.

Section 22P allows the registrar to exempt an entity from a requirement of the Code if satisfied that complying with the requirement would mean the entity would not be in compliance with a Commonwealth law. An entity must apply to the registrar to be considered for an exemption.

Division 2B.4 addresses non-compliance with the Code.

Section 22Q addresses complaints against entities that hold a Code Certificate. It outlines the circumstances in which a complaint can be made, and requirements for complaints.

Section 22Q also outlines powers and responsibilities that the registrar has in handling complaints. This includes not taking further action if the registrar is satisfied that the complaint lacks substance; is frivolous, vexatious or was not made in good faith; or considers that the complaint has been adequately dealt with.

If the substance of a complaint also includes a failure to comply with another law, the registrar may pass on the complaint to the authority who has responsibility administering the law, or inform the person who made the complaint that they can make the complaint to that authority.

Section 22R allows the registrar to appoint an approved auditor to audit an entity who holds a Code Certificate if a complaint is made under section 22R or the registrar has reasonable grounds to suspect the entity has not complied with the Code. An approved auditor appointed under section 22R must conduct an audit and give a report about the entity's compliance with the Code to the registrar. The audit and report must be made in accordance with the audit guidelines.

Section 22S allows the registrar to make a written request for relevant information from an entity who holds a Code Certificate in the circumstances provided in subsection 22S(1). The request must be made in accordance with any guidelines for requests for information made by the Minister. The entity is required to comply with the registrar's request for information within 7 days, unless the registrar allows them a longer time. If an entity does not comply with the registrar's request for information under section 22S, the registrar is able to undertake a number of the compliance actions outlined in section 22T against that entity.

Section 22T contains compliance actions available to the registrar if the registrar is satisfied that an entity that holds a Code Certificate has breached the Code. Section 22T also includes considerations the registrar must take into account in deciding whether to take any of the permitted compliance actions.

Section 22U enables the Minister to make guidelines for audits, complaints and requests for information via a disallowable instrument.

Division 2B.5 establishes the role and functions of the registrar.

Under section 22V, the registrar is a public servant appointed by the Minister for a maximum of 3 year. The appointment is made in accordance with part 19.3 of the *Legislation Act*, and the registrar may be reappointed if eligible.

Section 22W outlines the functions of the registrar. The registrar may be given any other function under the Act or another territory law. The registrar is not subject to direction by the director-general in the exercise of its functions.

Section 22X allows the Minister to give directions to the registrar in writing in relation to the exercise of its functions. The registrar is required to comply with a direction from the Minister. For transparency, the Minister must present a copy of any direction made under section 22X to the Legislative Assembly within 5 sitting days after the day it is given to the registrar.

Section 22Y gives the registrar power to delegate the registrar's functions to another public servant.

Division 2B.6 establishes the secure local jobs code advisory council and outlines its functions.

Section 22Z establishes the council.

Section 22ZA outlines the functions of the council, including providing advice to the Minister on the operation of part 2B and anything else in relation to local jobs and procurement by territory entities requested by the Minister. The council may be given additional functions under the Act.

Section 22ZB establishes the appointment of members of the council by the Minister. Three of the members of the council must represent the interests of employees, and the 3 other members must be considered by the Minister to have appropriate qualifications or experience to assist the council in undertaking its functions. Additionally, the registrar is a non-voting member of the council. The Minister must appoint one of the council members as chair.

Section 22ZC details procedures for proceedings of the council, including meetings. The council has discretion as to when, where and how proceedings are conducted, and whether it publishes its considerations.

Section 22ZD requires the council to review the operation of part 2B of the Act before the end of the second year of operation. The council must then present a report of the review to the Minister within 6 months after the day the review is started. Section 22ZD also includes considerations the council must take into account in reviewing the operation of the part 2B.

Clause 5 New part 4A

This clause inserts a new part 4A, which deals with notification and review of certain decisions made by the registrar.

Section 48 defines *reviewable decision* as a decision described in column 3 of schedule 2, made under the corresponding section of the Act listed in column 2 of schedule 2.

Section 49 requires the registrar, when he or she makes a reviewable decision, to give a reviewable decision notice to each entity mentioned in column 4 of schedule 2 in relation to the decision. The requirements for reviewable decision notices are in the *ACT Civil and Administrative Tribunal Act 2008*.

Section 50 allows an entity listed under column 4 of schedule 2 in relation to a reviewable decision to apply to the ACAT for review of the decision. If a form is approved under the *ACT Civil and Administrative Tribunal Act 2008*, the form must be used.

Clause 6 New part 11

Clause 6 inserts new part 11, which contains transitional arrangements.

Section 102 defines ‘commencement day’ as the day that section 4 of the *Government Procurement (Secure Local Jobs) Amendment Act 2018* commences.

Section 103 limits the application of division 2B.2, which imposes requirements for procurement by territory entities. Subsection 103(1) states that division 2B.2 only applies to new procurement proposals and new contracts for procurement that relate to a new procurement proposals.

Subsection 103(2) inserts definitions for the purposes of the section.

An ‘existing arrangement’ is defined as a panel arrangement, standing offer contract or public private partnership that was made, or entered into, before the commencement day.

‘New contract for procurement’ is defined as a contract for procurement entered into on or after the commencement day. ‘New contract for procurement’ includes a contract for procurement that was entered into on or after the commencement day under an existing arrangement.

A ‘new procurement proposal’ is defined as a procurement proposal made on or after the commencement day. A ‘procurement proposal’ includes a procurement proposal made on or after the commencement day under an existing arrangement.

A ‘standing offer contract’ is defined as a contract, or a common use contract, to supply goods, services or works that the Territory or a territory entity may procure from time to time during a stated period.

Under section 104, part 11 expires 30 months after the commencement day.

Clause 7 New schedule 2

The schedule sets out matters which comprise reviewable decisions under the Act, as mentioned in part 4A of the Act.

The table provides the relevant section of the Act, describes the corresponding decision that is reviewable, and the entity who is eligible to make an application to the ACAT for review of a decision under part 4A.

The kinds of decisions that are reviewable under schedule 2 relate to =Code Certificates.

Clause 8 Dictionary, note 2

This clause inserts a number of terms that are defined by the *Legislation Act 2001* under note 2 of the Act’s dictionary. The additional terms are: ‘appoint’, ‘Commonwealth’, ‘entity’, ‘establish’, ‘may’, ‘Minister’, ‘must’, and ‘State’.

Clause 9 Dictionary, new definitions

This clause inserts new definitions, for the purposes of part 2B, into the Act's dictionary.

The dictionary refers to section 22E for the meaning of the terms 'approved auditor', 'audit guidelines', 'code', 'council', 'registrar', 'secure local jobs code certificate', 'secure local jobs code register', 'tenderer', and 'workplace standards'. The meaning of 'territory-funded work' for the purposes of part 2B is located in section 22F.

Schedule 1 Amendments with delayed commencement

Part 1.1 Government Procurement Act 2001

This part, which has a delayed commencement date, affects the scope of the Act by replacing section 22F.

Clause [1.1] Section 22F

This clause replaces section 22F in order to add to the definition of 'territory funded work'. This is consequential in terms of the application of part 2B to procurement proposals and contracts for procurement.

The additional kinds of services or works that are inserted into the definition of 'territory funded work' by schedule 1 are primarily for labour (other than services or works prescribed by regulation) and have an estimated value equal or greater than an amount prescribed by regulation.

Subsection 22F(2) states that section 47(6) of the *Legislation Act* does not apply in relation to the ANZSIC. Section 47(6) of the *Legislation Act* provides that an incorporated document, and any amendment or replacement of such a document, are taken to be notifiable instruments. Section 47(6) is displaced because the ANZSIC is subject to copyright and is publically available free of charge on the Australian Bureau of Statistics website.