

**2021**

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

**GOVERNMENT PROCUREMENT AMENDMENT BILL 2021**

**EXPLANATORY STATEMENT  
and  
HUMAN RIGHTS COMPATIBILITY STATEMENT  
(*Human Rights Act 2004*, s 37)**

**Presented by  
Chris Steel MLA**

# GOVERNMENT PROCUREMENT AMENDMENT BILL 2021

The Bill is **not** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

## OVERVIEW OF THE BILL

The purpose of this Bill is to amend the *Government Procurement Act 2001* (the Act) to give effect to the relevant recommendations from the Secure Local Jobs Advisory Council's (the Council) Review of the Operation of the Secure Local Jobs Code (the Review).

The Secure Local Jobs Code (the Code) strengthens the ACT Government's procurement practices so that territory-funded contracts in industries that are vulnerable to insecure work, are only awarded to businesses that meet the highest ethical and labour standards.

The Bill aims to increase the overall effectiveness of the Code. It also enhances the compliance measures of the Code. This is achieved by providing appropriate inspection and entry powers for the purpose of undertaking investigations into suspected non-compliance with the Code obligations. The Bill also allows for obtaining information or documentation to improve compliance with Code obligations and to make determinations.

To further increase the effectiveness of the Code, the Bill imposes that if the Registrar suspects an entity may have failed to comply with the Code, their certificate may be suspended or be subject to conditions for a reasonable period. It also provides complainants with the right to request reviews of decisions made by the Registrar in circumstances where they lodged a complaint about a Code certified entity.

When tendering for Territory funded work, suppliers that have previously contracted with the Territory for territory-funded work will need to expressly confirm their compliance with the Code and with commitments in the Labour Relations, Training and Workplace Equity (LRTWE) Plan in relation to the contract. This allows the Secure Local Jobs Code Registrar access to current information in relation to Code and LRTWE Plan compliance, moving the Secure Local Jobs Code certificate from a point in time document to a contemporary document.

The Bill increases the monetary threshold for requiring a LRTWE Plan in services or works procurements that are primarily for construction work, from a total estimated value of \$25,000 to \$200,000. The increase aligns with the threshold for Territory Funded work in section 22F of the Act. The change in threshold also reduces administrative burden to develop and maintain LRTWE Plans for low value

procurements particularly for small businesses and sole traders where the associated cost exceeds the benefits of regulation in this space.

## **CONSULTATION ON THE PROPOSED APPROACH**

Consultation across ACT Government Directorates and Agencies was conducted in undertaking the Review, which led to the Bill. Internal government consultation included Procurement ACT, Workplace Safety and Industrial Relations, Major Projects Canberra, and Directorate procurement representatives.

The Council appointed under the Act conducted the Review. The Council comprises members that represent the interest of employees and members that have the appropriate qualifications or experience to assist the Council to exercise its functions. As such, members represent the views of relevant stakeholders including industry.

## **CONSISTENCY WITH HUMAN RIGHTS**

The Bill has the potential to engage and promote section 27B of the *Human Rights Act 2004* (the HR Act). The Bill supports the right to work and the right to the enjoyment of just and favourable conditions at work, as Code Certified Entities (entities) that are contracted by the Territory are required to comply with the highest workplace standards. Section 22SA of the Act gives the Registrar the power to suspend an entity's Secure Local Jobs Code Certificate which potentially both promotes and limits the right to work. The purpose of the limitation is to ensure contractors for Territory work comply with obligations under the Secure Jobs Code including maintaining the highest workplace standards. The power to suspend a certificate is the minimum necessary to achieve this purpose as suspension under this section is not in itself, grounds for terminating existing contracts with the Territory and only prevents an entity's ability to tender for new work with the Territory while their certificate remains suspended. These powers enhance the purpose of the Secure Local Jobs Code which in turn promotes the right to work under Section 27B of the HR Act.

The Bill also has the potential to engage and promote the right to a fair hearing under section 21 of the HR Act. The review provisions relating to a decision of the Registrar regarding Code certified entities, as well as notification of the Registrar's decisions, ensures procedural fairness for complainants and entities.

The Bill has the potential to engage and limit section 12(a) of the HR Act. The requirements of the Bill may apply to individuals engaging in territory funded work as defined in section 22F(1) of the Act, to the extent they operate as sole traders. Recording, collecting or otherwise using a sole trader's personal information or the personal information of other persons that entities hold for compliance, gives rise to a potential limitation on the right to privacy. Such information obtained may include employment related information such as contracts of employees, payslips of

employees and other identifying documents related to investigating compliance with the Code.

### **1. Nature of the right and the limitation (ss 28(2)(a) and (c))**

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

The Bill outlines measures to increase compliance with the Code. Set under subsection 2B.4.2, these measures are to:

- allow for inspection and entry powers for the purpose of undertaking investigations into non-compliance with the Code obligations;
- obtain information or documentation to improve compliance with the Code obligations and make determinations; and
- give information or documentation to a responsible authority of workplace law if the information or documentation is relevant to exercising their functions.

The powers to enter and inspect will only apply to entities that on reasonable grounds, are suspected to have not complied with the Code or where it is necessary to investigate a possible non-compliance with the Code. The powers may only be exercised by authorised officers and certain procedural requirements apply to the investigation, including production of identification and obtaining consent of the occupier. Information obtained by the authorised officer may be personal information, and as a consequence may limit a person's right to privacy.

The *Information Privacy Act 2014* will apply to any personal information or documents collected under section 22UF and 22UG of the Bill and Territory Privacy Principles will apply to that information.

### **2. Legitimate purpose (s 28(2)(b))**

The purpose of the Bill is to increase the overall effectiveness of the Code by helping to ensure that territory funded contracts in industries that are vulnerable to insecure work, are awarded only to businesses that meet the highest ethical and labour standards.

The Bill allows for further mechanisms to ensure entities remain compliant with their obligations under the Code. Compliance with these obligations will provide safe and secure jobs for Canberrans, by encouraging entities to meet the highest standards relating to pay, employment conditions, superannuation, the health and safety of their workers and payment of tax in line with both the Code obligations and workplace laws.

### **3. Rational connection between the limitation and the purpose (s 28(2)(d))**

The Bill aims to ensure entities are complying with their obligations under the Code, with the overall aim of ensuring the Territory is only conducting business with organisations that meet their industrial relations and employment obligations and

treat workers fairly. To achieve these outcomes as successfully as possible, it is necessary that the Act grants power to enter the premises of an entity whilst they are conducting territory funded work, to investigate non-compliance or possible non-compliance. It is also essential that during this time, information or documents may be gathered in relation to the non-compliance.

#### **4. Proportionality (s 28(2)(e))**

The limitation on a persons right to privacy is confined to activities by authorised officers carrying out compliance activities under the Act.

The limitation under the Bill is reasonably justified on the basis that:

- it only applies to Code Certified Entities that are conducting territory funded work for the purposes of investigating non-compliance or possible non-compliance;
- only authorised officers are permitted to enter premises to obtain information;
- entry to a premises used for residential purposes is not permitted without the occupiers consent;
- only information and documents relevant to Code related compliance and exercise of powers under the Act is permitted; and
- the *Information Privacy Act 2014* will apply to the collection and use of information and documents.

## Government Procurement Amendment Bill 2021

### *Human Rights Act 2004 - Compatibility Statement*

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Government Procurement Amendment Bill 2020**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA  
Attorney-General

## **CLAUSE NOTES**

### **Clause 1 Name of the Act**

Clause 1 names the Act as the *Government Procurement Amendment Act 2021*.

### **Clause 2 Commencement**

Clause 2 provides that the Act will commence on 1 March 2022.

### **Clause 3 Legislation amended**

Clause 3 provides that the Bill amends the *Government Procurement Act 2001* and the *Government Procurement Regulation 2007*.

### **Clause 4 Amended part 2B Section 22F (1) (b)**

Clause 4 substitutes the current definition of territory-funded work in Section 22F (1) (b) to services or works that are primarily for construction work (other than excluded services or works) and shifts the other definitions to Section 22F (1) (c).

### **Clause 5 Amended section 22G (1) (b)**

Clause 5 substitutes the current LRTWE plan tender submission requirements stating that a Territory entity must not accept a response in relation to a procurement for territory-funded work from a tenderer unless the tenderer submits the LRTWE plan if required under subsection 22G (1A).

### **Clause 6 New section 22G (1A)**

Clause 6 adds that a tenderer is required to submit a LRTWE plan if the tender is for territory funded work as mentioned in section 22F (1) (a) or section 22F (1) (b) and has an estimated value of \$200,000 or another value prescribed by regulation. It also adds that a tenderer is required to submit a LRTWE plan if the tender is for territory funded work as mentioned in section 22F (1) (c) and has an estimated value of \$25,000 or another value prescribed by regulation.

### **Clause 7 New heading division 2B.4**

Clause 7 changes the Division 2B.4 heading from 'Non-Compliance with Code' to 'Ensuring Compliance with Code' and inserts a subdivision titled 'Compliance measures' at Division 2B.4.1.

### **Clause 8 Amended section 22Q (3) (a)**

Clause 8 replaces 'person who made the complaint' with 'complainant'.

## **Clause 9    New section 22Q (5)**

Clause 9 inserts a new section in relation to complaints made by anyone who believes on reasonable grounds, that an entity who holds a Code certificate has failed to comply with the Code. The section states that within 14 days after making the decision, the Registrar must tell the complainant about their decision if they have decided to take no action on the complaint.

It also states that within 14 days after making the decision, the Registrar must tell the complainant about their decision if they are satisfied that the entity that is subject of the complaint has failed to comply with the Code. They must also tell the complainant what action was taken under section 22T.

Lastly, it states that the above, and section 22Q (3) (a) does not apply if the complaint is made anonymously.

## **Clause 10    Amended section 22S (1) (e)**

Clause 10 substitutes one of the current grounds for the Registrar to make a written request for relevant information from an entity that holds a certificate from where the Registrar has reasonable grounds to suspect the entity has failed to comply with the Code, to where the Registrar is reviewing or considering the entity's compliance with the Code.

## **Clause 11    New section 22SA**

Clause 11 inserts a new section that allows for the suspension, imposition of conditions or amending of an entity's certificate if the Registrar has reasonable grounds to suspect an entity may have failed to comply with the Code.

## **Clause 12    New section 22T (2) (d)**

Clause 12 inserts the new measure that the Registrar must take into account any information, document or anything else obtained under subdivision 2B.4.2 (access to premises) in deciding whether there has been a failure to comply with the Code or whether to take any actions under section 22T (1).

## **Clause 13    New section 22U heading**

Clause 13 substitutes the current heading from 'Guidelines for audits, complaints and requests for information' to 'Compliance guidelines'.

## **Clause 14    New section 22U (1) (d)**

Clause 14 inserts a new provision to allow the Minister to make guidelines about an authorised person's access to premises under subdivision 2B.4.2

## **Clause 15    New subdivision 2B.4.2**

Clause 15 inserts subdivision 2B.4.2 titled 'Access to Premises' which outlines access to premises provisions under which the Registrar may enter the premises of



a Code Certified Entity performing territory-funded work if the Registrar believes on reasonable grounds, that an entity has not complied with the Code or where it is necessary to investigate an entity's possible non-compliance with the Code.

Section 22UA defines authorised person, certified contracted entity, occupier and premises for the purposes of subdivision 2B.4.2.

Section 22UB further defines the meaning of an authorised person and the requirements of the identity card in which the authorised person must hold for the purposes of subdivision 2B.4.2.

Section 22UC outlines the circumstances under which an authorised person may enter a premises, being at any reasonable time, either that the public is entitled to use or that is open to the public, or at any time with the occupiers consent or at any time the Registrar suspects on reasonable grounds that an entity has failed to comply with its obligations under the Code and immediate entry to the premises is necessary to investigate if the entity has failed to comply. This section also clarifies the arrangements for entry on premises that are also used for residential purposes.

Section 22UD outlines that an authorised person must produce an identity card when asked by the occupier of the premises.

Section 22UE applies if an authorised person intends to ask the occupier of premises to consent to the authorised person entering the premises as outlined under section 22UC (1) (b). The section provides details on actions that need to be taken before, during and after asking for consent and the production of an Acknowledgment of Consent.

Section 22UF outlines the general powers that an authorised person has on entering a premises. These powers include inspecting or examining and copying or taking extracts from any documents relating to noncompliance, or suspected noncompliance with the Code by an entity. It also gives power to an authorised person to take photographs, films, audio, video or other recordings and requires the occupier or anyone else on the premises to give information, answer questions or produce documents or anything else to an authorised person. The occupier also must give copies of documents produced and provide reasonable help to an authorised person to exercise a power under subdivision 2B.4.2. This section also provides that the Registrar may take any action mentioned in section 22T (1) (a) to (e) if the Certified Contracted Entity fails to comply with the above or obstructs or hinders an authorised person exercising a power under this subdivision.

Section 22UG relates to the disclosure of information obtained under subdivision 2B.4.2. It states that the Registrar may give any information, document or anything else obtained under subdivision 2B.4.2 to a responsible authority if the Registrar considers that the information, document or other thing is relevant to exercising the functions of the responsible authority and the disclosure of the information, document or other thing to the responsible entity is appropriate. It also provides definitions for a responsible authority and workplace law.

Section 22UH outlines that an authorised person must take all reasonable steps to ensure that they cause as little inconvenience, detriment and damage as practicable when using their powers under subdivision 2B.4.2.

22UI outlines that an official, as defined in this section, is not civilly liable for anything done, or omitted to be done, honestly and without recklessness exercising a function under division 2B.4.2 or in the reasonable belief that the act or omission was in the exercise of a function under division 2B.4.2. It also states that any civil liability would attach to the Territory instead of the official.

#### **Clause 16 New section 50A**

Clause 16 inserts a new section which outlines provisions if a complainant applies to the ACT Civil and Administrative Tribunal (ACAT) for review of a reviewable decision in relation to an entity that holds a Code certificate (the affected entity). It states that the Registrar, must, within 7 days, give the affected entity written notice stating that the complainant has made an application to the ACAT, along with a copy of the application and any notice given by the ACAT in relation to the application. The affected entity may, within 7 days after the Registrar's notice is given, apply to the ACAT to be joined as a new party on the application. It also states that if an affected entity makes an application to be joined as a new party in the above event, the ACAT must join the affected entity as a new party to the complainant's application.

#### **Clause 17 Amended Schedule 2**

Clause 17 includes additional reviewable decisions for code certified entities and complainants for decisions made under section 22SA and following complaints under section 22Q.

#### **Clause 18 Dictionary, new definitions**

Clause 18 adds definitions for subdivision 2B.4.2 defining authorised person, complainant, occupier and premises.

#### **Clause 19 New section 12AC (1) (i)**

Clause 19 includes an additional element required in LRTWE Plan submissions in section 12AC (1). It states that if a tenderer has previously engaged with the Territory or a Territory Entity under contract for a procurement for territory-funded work they must provide details on how they complied with the Code, and their commitments in the LRTWE Plan in relation to the contract.