

Regulatory Impact Statement

**GOVERNMENT PROCUREMENT (SECURE LOCAL JOBS) CODE 2018,
Disallowable Instrument DI2018-283**

**GOVERNMENT PROCUREMENT (SECURE LOCAL JOBS CODE MODEL CONTRACT TERMS)
DETERMINATION 2018
Disallowable Instrument DI2018-282**

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**GOVERNMENT PROCUREMENT (SECURE LOCAL JOBS) AMENDMENT REGULATION 2018
(NO 1)
Subordinate Law SL2018-22**

**Prepared in accordance with the
Legislation Act 2001, section 34**

Overview

This regulatory impact statement relates to the following proposed laws:

1. The *Government Procurement (Secure Local Jobs) Code 2018* (the Code), which will be made via disallowable instrument;
2. the *Government Procurement (Secure Local Jobs Code Model Contract Terms) Determination 2018* (model terms), which will be made via disallowable instrument; and
3. the *Government Procurement (Secure Local Jobs) Amendment Regulation 2018* (Amendment Regulation), which will amend the *Government Procurement Regulation 2001*.

The proposed laws are components of a Secure Local Jobs Package (the Package) and are enabled by the passage of the *Government Procurement (Secure Local Jobs) Amendment Act 2018* (Amendment Act).

Background

The Package is responsive to a government policy commitment to use its procurement and market power to raise workplace standards. The proposed laws introduce a suite of measures designed to direct Government contracts to businesses with exemplary ethical and labour standards.

The Amendment Act, Code, Amendment Regulation and model terms are the key legislative components of the Package.

Information required by section 35 of the *Legislation Act 2001*

(a) The authorising law

The *Government Procurement Act 2001* (Procurement Act), as amended by the Amendment Act, is the authorising law for the proposed laws. Specifically, the Code will be made under section 22M of the Procurement Act as amended by the Amendment Act, which provides that “the Minister may make a code (the secure local jobs code) that sets out workplace standards and related requirements and that applies to an entity that holds a secure local jobs code certificate”.

The model terms will be made under subsection 22G(4) of the Procurement Act, as amended by the Amendment Act, which states that the Minister may determine model terms for incorporation into contracts for territory-funded work that relate to the requirements of part 2B of the Government Procurement Act or the Code.

The Amendment Regulation will be made under section 52 of the Procurement Act, which states that the Executive “may make regulations for the Act”, and that “the regulations may make provision in relation to procurement by territory entities”. Further sections of the Procurement Act, as amended by the Amendment Act, specifically provide that certain things are to be prescribed by regulation, including:

- requirements for a labour relations, training and workplace equity plan (LRTWE plan) made by a tenderer (subsection 22G(6));
- services or works excluded from the definition of *territory-funded work* (section 22F, Schedule 1 of the Amendment Act);
- the threshold value of services or works that are primarily for labour to be classified as *territory-funded work* (section 22F, Schedule 1 of the Amendment Act); and
- details to be included in the Secure Local Jobs Code Register (section 22N).

While the Amendment Act commences on 15 January 2019, the proposed laws are to be made in advance of this in order to allow industry sufficient time to prepare for the new requirements. This is permitted by section 81 of the *Legislation Act 2001*, which allows for the exercise of the power to make to make a statutory instrument between notification and commencement of the Act that grants that power.

(b) Policy objectives of the proposed laws

The Package

The Code, model terms and Regulation are foundational elements of the multi-faceted Package, which aims to:

- ensure that government contracts are only awarded to companies who do the right thing by their employees, including abiding by their workplace relations legal obligations;

- legislate a transparent regime where employers and employees understand the Government’s requirements and expectations;
- encourage fairer, better local jobs for workers;
- incentivise employers to shift their behaviour and lift their labour standards; and
- enable the Territory to oversee and ensure compliance.

The objectives of the Package are predominantly to achieve social policy goals and to strengthen the due diligence framework that supports government procurement, which is a community expectation.

One of the objectives of the Package is to promote job security and improve conditions for workers in industries that are prone to insecure work and vulnerable employment, including those with high proportions of visa workers and young people.

There is a concern that the current ACT Government procurement framework does not adequately ensure that entities that the Territory contracts are fully compliant with their labour obligations.¹ While a majority of companies are compliant, it is important to be able to prevent those companies that are not from obtaining government work.

There is ample evidence that businesses do not always comply with their legal obligations to their employees.² A Fair Work Ombudsman monitoring campaign conducted in late 2017 found that 40 per cent of businesses operating in the ACT that were re-audited following initial intervention from the Fair Work Ombudsman continued to be non-compliant with their workplace obligations.³ The Senate Standing Committee on Education and Employment recently reported that “underpayment is so prevalent in some sectors that it can no longer be considered an aberration; it is becoming the norm”, and that that “it is difficult, in light of the sheer weight of evidence presented to the committee, to conclude anything other than

¹ Standing Committee on Economic Development and Tourism, Legislative Assembly of the ACT, *Inquiry into the Government Procurement (Secure Local Jobs) Amendment Bill 2018*, proof transcript.

² Standing Committee on Economic Development and Tourism, Legislative Assembly of the ACT, *Inquiry into the Government Procurement (Secure Local Jobs) Amendment Bill 2018*, proof transcript. <https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/december-2017/20171219-act-compliance-monitoring-campaign-mr>

³ <https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/december-2017/20171219-act-compliance-monitoring-campaign-mr>

that the system is being exploited by employers seeking to avoid their obligations to workers".⁴

Unscrupulous behaviour by entities has been found to not just have a detrimental impact on workers who were exploited, but also had a negative effect on the Australian economy by placing downward pressure on working conditions and wages and undercutting legitimate, law-abiding employers.⁵ While it is beneficial to the economy to raise labour standards, it is also a community expectation.

The Code

The specific objectives of the proposed Code, as outlined in clause 3(1) of the Code, are to:

- (a) support the awarding of territory-funded work to businesses that meet the highest ethical and labour standards across their business;
- (b) work alongside the Local Industry Participation Policy to provide for the creation of secure local jobs being a key consideration when awarding territory-funded work;
- (c) promote job security in the Territory and reduce the incidence of insecure work;
- (d) ensure entities that choose to tender for territory-funded work and/or are awarded territory-funded work comply with their employee and industrial relations obligations in respect of their workers, contractors and sub-contractors, particularly with regard to the fair treatment of workers and upholding their workplace rights and safety;
- (e) promote workforce diversity and inclusive workplaces;
- (f) help the Territory to identify, and engage in procurement with, entities that have a track record of compliance with Industrial Laws and in so doing foster a level playing field for businesses competing for territory-funded work;

⁴ Senate Standing Committee on Education and Employment, Parliament of Australia, *Report on the Inquiry into the Incidence of, and Trends in, Corporate Avoidance of the Fair Work Act 2009*, September 2017.

⁵ Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: the Exploitation of Temporary Work Visa Holders*, May 2016.

- (g) foster and promote cooperative, constructive relationships between employers, employees and their representatives in the Territory; and
- (h) promote improved industrial relations planning and management at both the enterprise level and on specific projects.

Amendment Regulation

The objective of the Amendment Regulation is to support the implementation of the Code and Package by providing further detail about some of the requirements, including the LRTWE plan, Secure Local Jobs Code Register (the Register), and scope of the term *territory-funded work*.

Model terms

The objective of the model terms is to further support the operation of the Code and ensure compliance with the requirements.

(c) Achieving the policy objectives

The Package

The Package makes use of procurement power to achieve the Government's policy objectives. The leveraging of governments' purchasing power to pursue policy objectives in addition to the goods or services being purchased can be an effective way to create positive changes. Many OECD countries use public procurement policies to do so.⁶ Given the magnitude of the ACT Government's annual spend on contracts, there is an opportunity to use its significant purchasing power to create a positive behavioural shift.⁷

The requirements of the package apply to procurements for territory-funded work, which is defined by section 22F of the Amendment Act (and, once delayed commencement of Schedule 1, is also refined in scope by the Amendment Regulation). Territory-funded work in

⁶ https://www.oecd-ilibrary.org/docserver/gov_glance-2013-en.pdf?expires=1537499410&id=id&accname=guest&checksum=A919EF8178F4BD933883096C7358CA73, 129.

⁷ The annual spend on contracts that are likely to be captured under the Secure Local Jobs Code requirements is estimated to be in the order of \$600 million per annum, with most of the expenditure being undertaken in the building and construction sector.

the first instance, largely covers the following specified types of contract being, construction work, cleaning, traffic control services and security services. At a later date, to be fixed by the Minister the requirements will extend to new procurements for services or works for a Territory Entity that are primarily for labour with an estimated contract value above \$200,000. This application is expected to commence by mid-2019.

The Package imposes requirements for the entirety of the procurement process to achieve the Government's policy objectives. Requirements include:

- pre-qualification for potential tenderers through the use of a certification scheme that requires compliance with the Code;
- assessment of tenderers responding to procurement proposals valued above \$25,000 with reference to their LRTWE plan; and
- model terms for insertion into contracts for territory-funded work that require compliance with the Code.

With limited exemptions, where the requirements apply, a Territory Entity can only accept a response in relation to a procurement or enter into a contract for procurement with an entity that holds a valid Secure Local Jobs Code Certificate. The requirements of the Code apply for so long as the entity holds a Secure Local Jobs Code Certificate.

The Package includes mechanisms via which the government can actively verify compliance with workplace obligations at the tender assessment stage and throughout the duration of a contract, and take action where non-compliance is identified. While the Package aims to encourage compliance from the start, there will also be the possibility to take a tailored approach to address behaviours that fall short. This includes referring matters to other regulators with responsibility for enforcing certain laws.

A majority of the Package's compliance and oversight tools are contained in the Procurement Act as amended by the Amendment Act, which sets out the overall framework and governance for the Package. This includes the establishment of the statutory role of Secure Local Jobs Registrar (the Registrar). The Registrar is responsible for administration of and monitoring compliance with the Code, receiving and responding to complaints about

apparent non-conformance with the Code, and supporting Territory Entities to comply with the Code. Appeal mechanisms are incorporated in the new arrangements to ensure further administrative oversight and fairness to all involved.

The Code

Application

The requirement to abide by the Code is reinforced at multiple, interconnected levels. Under section 4, the Code applies to entities that hold a Secure Local Jobs Code Certificate (Certificate). A contractor or subcontractor is required to hold a Certificate for the duration of the procurement process. This is also required by the Amendment Act.

The Code applies to Territory Entities in so far as the Amendment Act and section 10 of the Code places obligations on them regarding the procurement process, which further ensures compliance with the Code.

Requirements for entities the Code applies to

The Code clearly sets out the Government's expectations of the entities it contracts with for territory-funded work, and sets out how entities are able to achieve those expectations.

The Code sets obligations for entities it applies to regarding:

- code certification (section 7);
- subcontractors engaged to work on territory-funded work (section 8);
- provision of contact persons for territory-funded work (section 9);
- adherence to existing applicable laws and instruments (section 11);
- compliance with reasonable requests for information (section 12);
- workplace representation (section 13);
- employee representation and workplace inductions (section 14);
- respecting employees' right to collectively bargain (section 15); and
- respecting employees' right to freedom of association (section 16).

The Code details how entities may meet these requirements. This includes by understanding, recognising and protecting their employees' rights, making their employees

aware of their rights, and, in some cases, adopting (or not adopting) policies and practices, or facilitating conduct, in order to ensure their employees' rights are recognised.

Secure Local Jobs Code Certificates

The Code also provides information about Certificates. This supports the framework for certification that is established by the Amendment Act.

Amendment Regulation

The Amendment Regulation outlines the requirements for LRTWE plans, provides what details are to be included in the Register, and assists in defining the scope of the application of the new arrangements introduced by the Package.

LRTWE Plans

Section 22G of the Procurement Act states that a Territory Entity must not accept a response to a procurement proposal with a value of \$25,000 or more for Territory-Funded Work unless a tenderer submits a LRTWE plan. The plan forms part of the tender assessment process, and a Territory Entity must consider the LRTWE plan when assessing responses to a procurement proposal.

While the Amendment Act establishes the requirement to submit a LRTWE plan, the Amendment Regulation sets out the requirements for the plan. Under the Amendment Regulation, a LRTWE plan is to be developed in consultation with a tenderer's employees and is to be assessed as part of a competitive assessment process. The plan requires a tenderer to detail how they will achieve best practice employment conditions. The LRTWE plan must also include how the tenderer will ensure compliance with the Code.

The Amendment Regulation prescribes additional requirements for LRTWE plans for responses to procurement proposals valued above \$5 million, relating to increasing employment opportunities for local workers, and the provision of training and career development opportunities to workers.

Details for the Register

The Amendment Regulation prescribes details to be included in the Register for each Code Certificate in addition to those required by section 22N of the Procurement Act. The Regulation requires the inclusion of the Code Certificate number, expiry date, the contact details of the entity (unless the certificate is held by an individual) and the approved auditor who conducted the audit report submitted with the application for the Code Certificate.

Prescribed excluded services or works and prescribed value of services or works

The requirements under the Package apply to *territory-funded work*, which is defined by reference to the type and value of services or works. The Amendment Regulation, in addition to section 22F of the Amendment Act, will define the scope of territory-funded work once Schedule 1 of the Amendment Act commences at a date fixed by the Minister. The prescribed services that are excluded from the application of the requirements are selected because these are not industry sectors targeted by the Package. One of the key focuses of the Package is services or works in industries prone to insecure work or exploitation of workers, or tend to have a relatively large proportion of vulnerable workers.

Model terms

The model terms will be included in contracts for territory-funded work in order to support achievement of the Code's objectives.

(d) Consistency of the proposed law with the authorising law

The Procurement Act provides for the development, implementation, monitoring, and review of policies and practices regarding the process of procurement by Territory entities. The proposed laws both form part of implementation of Government procurement policy, and the Code itself sets out key procurement policies.

The Amendment Regulation will be made in accordance with section 52 of Procurement Act, which gives the Executive the express power to make regulations for the Act. Subsection 52(2) states that “the regulations may make provision in relation to procurement by territory entities.”

The Code will be made via disallowable instrument in accordance with section 22M of the Procurement Act, which states:

The Minister may make a code (the Secure Local Jobs Code) that sets out workplace standards and related matters and that applies to an entity that holds a secure local jobs code certificate.

The model terms will be made via disallowable instrument in accordance with section 22G of the Procurement Act, which states:

(4) The Minister may determine model terms for incorporation into contracts for territory-funded work that relate to the requirements of this part or the code.

(5) A determination under subsection (4) is a disallowable instrument.

(e) The proposed law is not inconsistent with the policy objectives of another Territory law

The proposed laws are not inconsistent with the policy objectives of another Territory law. On the contrary, the proposed laws strongly complement the policy objectives of existing Territory laws relating to procurement, work health and safety, ethical and labour standards, and the Code requires compliance with existing laws.

(f) Reasonable alternatives to the proposed law

Alternative: maintain the status quo

Regulation of Government Procurement

Procurement by Territory entities is regulated by a number of legislative instruments and policies. This includes the Procurement Act, which was amended by the Amendment Act to facilitate adoption of the Code, and the *Government Procurement Regulation 2007*, which the Amendment Regulation seeks to amend.

Section 22A of the Procurement Act requires a Territory Entity to pursue value for money in undertaking any procurement activity. In pursuing value for money, which is defined as the best available procurement outcome, a Territory Entity must have regard to probity and ethical behaviour, management of risk, open and effective communication, and optimising whole of life costs.

The IRE Strategy is one of the key initiatives the Territory uses to ensure that the entities it engages to perform building work on any ACT Government site are compliant with their industrial relations and employment obligations. Before entities are permitted to tender for building work or be engaged to perform building work on any ACT Government site, they are required to hold a current IRE Certificate. They must maintain a current IRE Certificate for the duration of the time they are engaged on an ACT Government site. An IRE Certificate is only granted following an audit by an Approved Auditor that certifies compliance with the IRE Strategy.

Other policies and strategies in place include the Canberra Region Local Industry Participation Policy, ACT Work Health and Safety Active Participation Active Certification Policy, and the Ethical Suppliers' Declaration.

Workplace standards

In addition to legislation and policies relating to Government procurement, a number of Acts and subordinate instruments of the Commonwealth and Territory deal with matters relating to industrial relations, employment and/or workplace safety. Examples include the *Fair Work Act 2009* (Cth) (FW Act), *Work Health and Safety Act 2011* (WHS Act), and *Work Health and Safety Regulation 2011* (WHS Regulation).

The FW Act is the main source of employment rights and conditions for workers in the Territory. It provides for minimum entitlements for employees through the National Employment Standards (NES) and awards. The NES provides ten minimum entitlements relating to things such as maximum weekly hours, parental leave, and annual leave. The WHS Act and WHS Regulation both set out employers' obligations regarding health and safety at their workplaces.

Further relevant pieces of existing legislation are listed in the Code under the definition of 'Prescribed Legislation'.

Why the Status Quo is insufficient

The commitment to deliver a reform package was an acknowledgement that current measures require improvement. The current system is not considered to be the most efficient, effective means of achieving the Government's policy objectives. A proactive policy approach is needed to create behavioural change.

Under the status quo, the Government has limited ability to address breaches of industrial laws by the entities it procures goods or services from and hold those entities to account. The Legislative Assembly Standing Committee into the Extent, Nature and Consequence of Insecure Work in the ACT received evidence suggesting that the effectiveness of the current employment and industrial relations regulatory regime is inadequate.⁸

Stakeholders have stated that the current, non-legislated system means that it is difficult to enforce standards.⁹ It is critical to increase employers' perceived risk of detection of unscrupulous behaviours.¹⁰

In the Report on the *Inquiry into the Incidence of, and Trends in, Corporate Avoidance of the Fair Work Act 2009*, the Senate Standing Committee on Education and Employment concluded that many employers only begin taking their employees seriously when the financial incentive to underpay workers is removed, and there are few tangible disincentives in place for employers considering underpaying their staff.¹¹ While this inquiry considered compliance with the FW Act and underpayment of workers, this conclusion is likely to hold true for employers' compliance with other industrial laws and obligations as well.

⁸ Standing Committee on Employment, Education and Youth Affairs, Legislative Assembly of the ACT, Report on the Inquiry into the Extent, Nature and Consequence of Insecure Work in the ACT, May 2018.

⁹ Standing Committee on Economic Development and Tourism, Legislative Assembly of the ACT, *Inquiry into the Government Procurement (Secure Local Jobs) Amendment Bill 2018*, proof transcript.

¹⁰ Dr Tess Hardy and Dr Joo-Cheong Tham, Submission to Senate Standing Committee on Education and Employment, Parliament of Australia, *Inquiry into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*.

¹¹ Senate Standing Committee on Education and Employment, Parliament of Australia, *Report on the Inquiry into the Incidence of, and Trends in, Corporate Avoidance of the Fair Work Act 2009*, September 2017, pages 70, 72.

The ACT does not have jurisdiction to enforce the FW Act, the main source of employment rights and conditions for Canberra’s workers. While the effectiveness of the FW Act is dependent on its proper enforcement, the Standing Committee into Education, Employment and Youth Affairs heard evidence that compliance activities by the FWO to enforce workplace standards are limited due to resource constraints.¹²

There is an imperative for the Territory to do more to ensure that the entities it contracts with for territory-funded work comply with their industrial obligations, including those under the FW Act.

Without the Code, Amendment Regulation and model terms being implemented, the Amendment Act will not be able to achieve its policy objectives.

(g) Brief assessment of the benefits and costs of the proposed laws

Code

Benefits

The inclusion of these requirements in the Code means that the Government is able to verify an entity’s compliance with existing requirements before it directs public monies to it. This will ensure a level playing field, so that unscrupulous employers cannot gain a competitive advantage by avoiding their legal obligations.

By clearly setting out the Government’s expectations, and making it clear how these can be met, the Code makes it easier for entities to meet those expectations. It also makes it easier for businesses who may be unsure of how to treat their employees to understand their obligations under existing laws, and if necessary, modify their behaviour.

Undergoing an audit in order to obtain a Secure Local Jobs Code Certificate also provides the opportunity for issues relating to an entity’s compliance with existing legislation to be identified early and rectified. This is not just beneficial for employees, it is also beneficial for

¹² Standing Committee on Employment, Education and Youth Affairs, Legislative Assembly of the ACT, Inquiry into the Extent, Nature and Consequence of Insecure Work in the ACT, Alex White, Unions ACT *Proof Transcript of Evidence, 8 September 2017*, pages 3.

employers who want to do the right thing. Research has found that small businesses can be overconfident about their compliance with existing employment obligations, and may fail to ensure they are doing the right thing.¹³ There is also evidence that there is a lack of knowledge about appropriate wages or conditions for employees.¹⁴ The Fair Work Ombudsman has reported that most employers want to do the right thing by their employees, and will often rectify their behaviour once they are made aware of their obligations.¹⁵

The Code also makes it easier for employees to understand their rights and how an employer should treat them, which helps prevent unscrupulous behaviour. It will also be easier for workers to assess potential employers, and may opt to choose an employer that holds a Secure Local Job Code Certificate because they can be better assured that they will be treated as they should be.

As the obligations under the Code apply to the entirety of an entity's operations, this will lead to a positive flow-on effect for employees of the entity who are not necessarily going to be working on a contract for territory-funded work. There is opportunity for additional flow-on benefits to companies who may not be required to comply with the Code – for example, those who are not seeking territory-funded work – who can look to the Code to understand how they should treat their employees as well. The benefit of the Code is also extended to employees of subcontractors engaged for territory-funded work.

Some of the Code's requirements ensure further compliance with the Code, including those relating to: code certification (section 7), subcontractors (section 8), provision of contact persons (section 9) and compliance with reasonable requests for information (section 12).

¹³ <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/april-2018/20180426-small-business-showcase>

¹⁴ Senate Standing Committee on Education and Employment, Parliament of Australia, *Report on the Inquiry into the Incidence of, and Trends in, Corporate Avoidance of the Fair Work Act 2009*, September 2017, page 112.

¹⁵ Fair Work Ombudsman submission to Senate Standing Committee on Education and Employment, Parliament of Australia, *Inquiry into the Fair Work (Protecting Vulnerable Workers) Bill 2017*, May 2017.

For example, the requirements relating to subcontractors ensure transparency and prevent companies from contracting out to avoid their obligations.

Costs

Many of the obligations under the Code already apply to entities who undertake territory-funded work, meaning that the Code requires minimal changes to work practices for employers who are already meeting their legal obligations.

There will be an increased regulatory compliance burden for Territory Entities in administering the Code, and an increased costs for the Territory in implementing compliance and enforcement measures. Where project costs increase as a result of the new requirements, those costs are likely to be passed on to the Territory.

Some stakeholders have raised concerns about the impact of the requirements on small to medium enterprises. However, most Territory contracts in the building and construction sector are with small to medium enterprises (less than 200 employees). This demonstrates that the IRE Certification requirements have not resulted in small to medium size businesses being unable to compete for ACT Government work. It is similarly expected that small to medium enterprises will be able to compete for government work under the new requirements.

Entities face the following financial costs:

Application

- There will be no application fee for the Local Jobs Code Certificate.
- There will be minor administrative costs (e.g. time spent) associated with completing the application form.

Audits

- The Code requires an entity to pay for the audit by an Approved Auditor required to apply for a Secure Local Jobs Code Certificate.
- Audit costs will vary, and will be set by the approved auditors.

- Based on experience with IRE Certification, the cost for these audits is likely to range from approximately **\$200 to \$1,300**, with the **average cost being \$550**, with auditor disbursements being additional to this fee.
- Based on the number of businesses expected to require a Code Certificate, and the anticipated average cost of an audit, it is expected that the total impact on business will be approximately **\$490,000**, noting this does not include auditor disbursements or costs in relation to preparing a LRTWE plan.
- A Code Certificate will be valid for a standard time frame of 18 months, but the Registrar may grant a Certificate for up to 30 months.
- A majority of the potentially relevant covered contracts expiring in the next 3 years are in the construction industry.
- It is likely that many of the entities who will be required to obtain a Code Certificate have obtained an IRE Certificate, and would have factored this expense into their business costs.

Amendment Regulation

<i>Requirement</i>	<i>Benefits</i>	<i>Costs</i>
LRTWE plan	<p>Preparing the plan ensures that a tenderer commits time and resources to considering how they are going to commit to and achieve the best work environment for their employees.</p> <p>The LRTWE plan is a transparent way of evaluating work practices, and is an opportunity for a tenderer to demonstrate the ways in which they are a good employer and</p>	Administrative costs associated with preparing the plan, such as the time spent creating the plan and time spent consulting with employees in developing the plan.

Requirement	Benefits	Costs
	<p>their commitment to best practice.</p> <p>The requirement to prepare the plan in consultation with employees allows for employee engagement in organisational decisions.</p> <p>Research has found that workplaces that include employees in change processes perform better.¹⁶ Effective employee engagement is associated with raising productivity and performance.¹⁷ Employee engagement also impacts positively on retention and absenteeism.¹⁸</p> <p>An employer's work practices can have a direct impact on the quality of work it provides.</p> <p>Commitment to a reduction in insecure work not only benefits the workers themselves, but the community. Evidence</p>	

¹⁶ Farmakis-Gamboni et al. 2014, p 20; Fakhfakh F, Perotin V and Robinson A (2011), 'Workplace change and productivity: does employee voice make a difference', in S Hayter (ed) *The Role of Collective Bargaining in the Global Economy, Negotiating for Social Justice*, International Labour Organization, Edward Elgar Publishing Limited. (2011: 127)

¹⁷ Rayton, B, Dodge, T & D'Analeze, G 2012, *The Evidence: Employee Engagement Task Force "Nailing the evidence" workgroup*. Engage for Success, 4.

¹⁸ Rayton, B, Dodge, T & D'Analeze, G 2012, *The Evidence: Employee Engagement Task Force "Nailing the evidence" workgroup*. Engage for Success, 5.

Requirement	Benefits	Costs
	presented to the Legislative Assembly Standing Committee detailed the significant consequences arising from insecure work for the individual worker, their families, the community as a whole and employers. ¹⁹ ACTCOSS, for example, identified likely flow-on effects to government services such as housing and healthcare. ²⁰	
Details for the Register	<p>Transparency & ability for compliance/complaints</p> <p>Provides ability to confirm validity of certificate and the expiry date.</p> <p>Consumers can show support for companies that treat their employees well by choosing to give their business to those listed on the Register as holding a Secure Local Jobs Code Certificate</p> <p>Workers can assess potential employers according to whether they hold a Certificate or not</p>	Administrative cost for Registrar in maintaining Register

¹⁹ ACTCOSS, Proof Transcript of Evidence, 8 September 2017, p.16; St Vincent de Paul Society, Submission 18; Ms Overton-Clarke, PSSSC, Proof Transcript of Evidence, 8 September 2017, p.77

²⁰ ACTCOSS, Proof Transcript of Evidence, 8 September 2017, p.19.

Requirement	Benefits	Costs
Excluded Services or Works	Targeted approach of Package	The requirements do not ensure the protection of all employees/cover all contracts
Prescribed Value of Works	Targeted approach of Package	The requirements do not ensure the protection of all employees/cover all contracts

Model terms

The model terms will ensure that in addition to legislative enforcement and compliance powers, contractual remedies will be available for breaches of obligations. Under contract law, remedies available for breach of contract, depending on the case, may include award of damages, injunctions, and restitution. This would enhance compliance with the Code and provides a further financial disincentive for entities who have contracts for territory-funded work to breach their workplace obligations.

(h) Brief assessment of the consistency of the proposed laws with Scrutiny of Bill Committee principles

The Standing Committee on Justice and Community Safety's (Legislative Scrutiny Role) Terms of Reference require the Committee to consider whether (among other things) a regulation:

- i. is in accord with the general objects of the Act under which it is made;
- ii. unduly trespasses on rights previously established by law;
- iii. makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions; or
- iv. contains matters which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly.

An analysis of the proposed law against each of these items follows.

i. Accordance with the general objects of the Act under which it is made

The Procurement Act provides for the development, implementation, monitoring, and review of policies and practices regarding the process of procurement by Territory Entities. The

Procurement Act was amended by the Amendment Act to bring the Package to fruition and facilitate the adoption of the Secure Local Jobs Code.

ii. Rights previously established by law

The Code contains provisions that serve to protect rights previously established by law by requiring entities to respect and recognise their employees' rights in areas including freedom of association, representation, and the right to collectively bargain.

Subsection 12(a) of the Human Rights Act 2004 (HR Act) provides that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily. Given the requirements of the proposed laws may apply to individuals to the extent that they operate as sole traders, or to individuals as employees of Code Certified Entities, some provisions of the proposed laws have the potential to engage and limit subsection 12(a) of the HR Act.

The nature of the right affected

Subsection 8(1) of the Code requires a Code Certified Entity to provide details of a proposed subcontractor prior to engaging a subcontractor in relation to territory-funded work. Subsection 9(1) of the Code requires a Code Certified Entity to provide the Territory Entity with a contact person or persons, workforce locations and working hours for territory-funded work for the purposes of assisting the exercise of a lawful right of entry in accordance with the WHS Act or FW Act. Under subsection 9(5), a person may make a request to the Registrar to access this information for the purposes exercising a lawful right of entry under the WHS Act or FW Act. Under subsection 9(7), the Registrar is required to grant access to this information if satisfied that the applicant is a permit holder under the FW Act or WHS permit-holder under the WHS Act, and that the applicant requires the information for the purposes of exercising lawful right of entry.

Section 12 of the Code requires a Code Certified Entity to comply with any reasonable request for information, access to records and directions given by the Registrar or an approved auditor for the purposes of investigating Code compliance.

Section 12AD of the Regulation sets out what details are to be included in the Register, which is established by section 22N of the Amendment Act. This includes details of an entity's secure local jobs certificate such as the identifying number and expiry date, as well as the contact details of the entity (unless the certificate is held by an individual), and the name of the Approved Auditor who completed the report included as part of the application for the certificate. Subsection 22N(2) of the Amendment Act requires the Register to be accessible and searchable by the public. Particular attention has been paid to the drafting of this clause in relation to the engagement of human rights which are considered not to be engaged by this provision as it relates to business information and business contact details (not including individual contact details).

The importance of the purpose of the limitation

The purpose of the proposed laws 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.

The proposed laws, as part of the Package, enable the Territory to leverage the procurement process to ensure that the Territory is contracting with entities that are meeting their workplace standards and obligations.

The proposed laws are part of ensuring that the Territory has another mechanism by which 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. Further, regarding section 9 of the Code, the provision of information to WHS permit-holders under the WHS Act or permit holders under the FW Act to assist in the exercise of lawful right of entry enables these important roles to be performed effectively to protect the rights, health and safety of employees.

The importance of incorporating an ability for the Registrar or an approved auditor to request information in section 12 of the Code is clear. The Code places conditions on those entities that wish to contract with the Territory for territory-funded work. To ensure the

integrity of the Code and operation of the requirements, it is also necessary to ensure that the conditions that are applied to such work are complied with. Compliance with the Code is what will enable the Territory to achieve its objective in doing what it can to ensure that the Territory contracts only with those entities that meet the highest ethical and labour standards.

The nature and extent of the limitation

As indicated above the limitation will apply to a limited classes of entities that contract with the Territory. In addition, the Information Privacy Act 2014 will apply to any of the information collected under the proposed laws, and as such, the Territory Privacy Principles would apply to that information being personal information with regards to its disclosure etc.

The ability for the Registrar or approved auditor to request information under section 12 of the Code will only be used for the purposes of investigating Code Compliance and thus only applies in circumstances where the Registrar or an approved auditor is seeking information to substantiate a compliance decision, for example, placing a condition on a code certificate, auditing an entity or investigating a complaint about an entity. Furthermore, section 12 of the Code is limited to Code Certified Entities, being those entities that wish to contract with the Territory to carry out work that is funded by the Territory and ultimately, the Canberra community.

Given the importance of obtaining information to support these decisions being made by the Registrar it is appropriate that there be sanction for not complying with such a request. While most entities might comply with such a request, schemes of a regulatory nature often must consider scenarios where a legislative requirement is not complied with. It is noted however, that the sanctions in this case are not criminal in nature, rather, they are economic and affect only the entity's ability to contract with the Territory.

Any less restricted means available to achieve the purpose the limitation seeks to achieve

The proposed laws are part of the Package which 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 Code and Package as a whole by facilitating communication and engagement between those with a legislative duty in respect of the workplace and the Territory.

The limitations under the proposed laws are considered to be the least restrictive means of ensuring the effectiveness of the purpose of the proposed laws and Package as a whole and are reasonably justified on the basis that the provisions:

- will only apply to a limited class of entities;
- the Information Privacy Act will apply to the collection and use of the information by the Registrar;
- entities that 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.

Regarding section 12 of the Code and requests for information by the Registrar or an Approved Auditor, while this limitation may engage s12(a) of the HR Act, the limitation under section 12 of the Code is considered to be appropriate and justified. It is the least restrictive means of ensuring that the Registrar appointed is able to make informed and considered decisions about an entity's compliance, having regard to the information that is provided by the entity on which compliance action is being contemplated.

Strict liability offences

The proposed laws do not create any strict liability offences.

iii. *Non-reviewable decisions*

While section 6 of the Code states that an entity may apply for an exemption from an obligation under the Code that is inconsistent with a Commonwealth law in force in the Territory, the decision as to whether to grant an exemption is made under section 22P of the

Procurement Act, and not the Code. Further, decisions by the Registrar under section 22P have been addressed by the Minister for Employment and Workplace Safety in response to comments in Report 21 of the Scrutiny Committee. Section 9 of the Code requires the Registrar to maintain a register of contact persons for territory-funded work, and provides that a person may request access to this information for the purpose of exercising right of entry under the FW Act or WHS Act. Under subsection 9(7), the Registrar is required to release information requested if satisfied that:

- (a) *the applicant is a permit holder under the Fair Work Act 2009 (Cth) or a WHS entry permit-holder under the Work Health and Safety Act 2011; and*
- (b) *the applicant requires the information for the purpose of exercising any right of entry under the Fair Work Act 2009 (Cth) or the Work Health and Safety Act 2011.*

While a decision made by the Registrar under this section is not reviewable by the ACT Civil and Administrative Tribunal (ACAT), decisions relating to the release of contact details for the purposes of exercising a right of entry would relate to a narrow set of circumstances, and an error in decision making under this provision would only be an error of law. As such, it is appropriately reviewable as a question of law under the *Administrative Decisions (Judicial Review) Act 1989*.

iv. Matters properly dealt with in an Act of the Legislative Assembly

The Procurement Act, as amended by the Amendment Act, expressly gives powers to the Minister/Executive to make the proposed laws via subordinate laws.

Section 52 of the Procurement Act gives the Executive the express power to make regulations for the Act. Subsection 52(2) states that “the regulations may make provision in relation to procurement by territory entities”. The Amendment Regulation will be made in accordance with this section.

The Code will be made via disallowable instrument in accordance with section 22M of the Procurement Act as amended by the Amendment Act, which states:

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

The model terms will be made via disallowable instrument in accordance with section 22G of the Procurement Act, as amended by the Amendment Act, which states:

(4) The Minister may determine model terms for incorporation into contracts for territory-funded work that relate to the requirements of this part or the code.

(5) A determination under subsection (4) is a disallowable instrument.

The Code and model terms will be made as disallowable instruments because both are detailed and may change over time. Under the *Legislation Act 2001*, a disallowable instrument may be disallowed or amended by the Legislative Assembly. In this respect, it is subject to the same scrutiny as a regulation. The potential for disallowance is recognised as a safeguard to address concerns as to parliamentary scrutiny of delegated legislation. It is recognised by the Australian Law Reform Commission as being a powerful tool, which acts as a discipline on rule-makers.²¹

In a Ministerial Statement on the review of the Procurement Act presented on 23 November 2003, the then Treasurer noted that the majority of the operative provisions that govern procurement activities of the ACT Government agencies are contained in disallowable instruments. It is appropriate for the operative provisions to continue to be contained in disallowable instruments and regulations.

²¹ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Final Report, December 2015, page 59.