



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON ECONOMIC DEVELOPMENT AND TOURISM
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Submission Cover Sheet

Inquiry into Government Procurement (Secure Local Jobs) Amendment Bill 2018

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**Canberra
Business
Chamber**

SUBMISSION PAPER

Inquiry into Government Procurement (Secure Local Jobs) Amendment Bill 2018

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Introduction

The Canberra Business Chamber supports the Standing Committee on Economic Development and Tourism inquiry into Government Procurement (Secure Local Jobs) Amendment Bill 2018. The Chamber welcomes the Committee's willingness to look at this matter and seeks to put forward its views to the Committee for deliberation. The Chamber would also welcome the opportunity to present before the Committee to elaborate on any of the matters discussed within this submission.

Members of the Chamber are interested in business growth and prosperity of the Canberra region and recognise that business should meet their industrial relations and workplace obligations as a fundamental principle of their business operations. The ACT Government's leadership in upholding these principles to be eligible for ACT Government contracts is commendable. The Chamber's view is that the objective of the ACT Government procurement requirements is positive, however there are unintended consequences of the proposed implementation of the policy.

About Canberra Business Chamber

The Chamber is an employer organisation representing over 5,000 organisations and businesses in direct membership, and over 10,000 affiliated industry and association groups across the ACT Region. Members of the Chamber are typically small to medium sized businesses and community organisations.

The Chamber's aim is to represent the interests of the private sector, by providing access and avenues for members and industry to both Federal and Local Government to assist, shape and develop policies that are in the best interest of ACT business.

Canberra Business Chamber Response

Intended Procurement Objectives

The Canberra Business Chamber is supportive of the Government's stated procurement objectives which are to ensure that ACT Government contracts will be only be awarded to those businesses who meet their industrial relations and workplace obligations in all respects. A procurement process that is transparent and establishes consistent requirements for all participants (including compliance with all legal and workplace requirements) fosters a competitive business environment that delivers positive outcomes for the ACT economy.

We would also like to commend the ACT Government for taking steps toward removing the long-standing Memorandum of Understanding (MOU) with the Unions in this area. The Canberra Business Chamber has long been advocating for a transparent process with respect to ACT Government procurement practices and believes that the decision to remove the MOU is a positive step for those parties involved in the ACT procurement process.

However, despite the stated objectives and good intentions of the proposed Bill, the Canberra Business Chamber is concerned that the proposed legislation would have significant unintended consequences for businesses, employees and the local economy.

One of these concerns is the increased regulatory burden and red tape placed on business. There are many existing Federal and Territory laws that govern workplace relations in the ACT. These laws require employers to comply with obligations around terms and conditions of employment, collective bargaining, workplace flexibility, workplace protections and discrimination, amongst other things. Business owners who are found to have breached these existing laws face significant penalties and consequences, including being held personally liable. The Canberra Business Chamber is of the view that the introduction of further legislation of this nature is both duplicative and unnecessary and may not achieve the intended procurement objectives or outcomes the Government is seeking.

The Canberra Business Chamber is urging the ACT Government to proceed with caution around the introduction of any legislation that may see local business operators locked out of ACT Government work. The Canberra Business Chamber would welcome further consultation and discussion on this matter to identify issues that would negatively impact business and the local economy if implemented. A decision taken to adopt any resultant legislation, post consultation, would be done with the knowledge of the potential ramifications.

Basis for the Proposed Legislation

We note that the proposed legislation will initially apply to those businesses in the **construction, cleaning, traffic control, and security industries**, effective 1 January 2019. It is assumed that work in these industries has been characterised as being prone to “insecure work and vulnerable employment”. However, the Canberra Business Chamber is not aware of any evidence to support the selection of these industries and would request any data be made public, for the purposes of transparency, to demonstrate the targeting of these industries and any subsequent reforms.

It must be noted that the recent Inquiry into the extent, nature and consequences of insecure work practices in the ACT, found (by way of a dissenting report) no substantive or formal evidence of extensive insecure work practices in the above-mentioned industries, or evidence of operators setting up labour hire businesses to avoid their workplace and statutory obligations.

It is worth highlighting that the ACT economy was amongst the strongest growing economies in 2016/2017 financial year, with above trend growth forecast into 2017/2018. As the largest private sector employer, the building and construction industry has, and continues to, contribute significantly to this positive economic outlook. Accordingly, it is our view that there is a strong demand for labour, resulting in higher wage rates - somewhat contrary to the notion of insecure work and vulnerable employment.

Questions

- What is the evidentiary basis and rationale behind the industries captured under the proposal, and what is the basis for the adoption of such legislation?
- Have the findings of the Inquiry into the extent, nature and consequences of insecure work been considered and how have these informed the development of the proposed legislation?

Increased Administrative Burden on SMEs

We note that following an initial twelve (12) month period, the proposed legislation will then **capture all businesses** seeking to tender on ACT Government work for contracts that are primarily for labour and have an **estimated value of \$200,000 or greater**.

It is likely that this threshold will capture many small business operators, that by their very nature have limited capacity to dedicate resources to navigate complex processes and administrative requirements, and therefore could be disadvantaged by the proposed changes. It will be important to ensure that procurement requirements are not so complex or difficult to comply with that they lock businesses out of ACT Government funded work opportunities. In a small economy such as the ACT, this could significantly reduce competition for access to Government funded opportunities.

Under the proposed changes, businesses (identified) who seek to tender on ACT Government work will now be required to hold a local jobs certificate and comply with the Secure Local Jobs Code. These changes will mean additional administrative requirements and costs on SMEs.

It is important to understand the unique make-up and demographic of Canberra's private sector with respect to any procurement decisions. Currently, the ACT private sector is made up of predominantly small business owners (97%) who employ less than 20 employees. These businesses contribute greatly to the ACT economy by employing locally and investing back into the Canberra community. The Chamber would not be supportive of procurement changes or introduction of legislation that is overly complex or cumbersome for these operators.

The proposed reforms potentially have the effect of discouraging small to medium operators from tendering on such works. Some of these businesses may not have the resources or ability to sufficiently navigate these processes, and we would hope there would be further measures put in place to support businesses of this kind if the legislation was to succeed.

We also note that Employers tendering on procurement proposals for some contracts worth at least \$25,000 will also be required to submit a labour relations, training and equity plan. Whilst it is acknowledged that templates are being produced by ACT Government to support

businesses manage these administrative processes, we are concerned that despite these efforts many employers will be deterred from tendering on public sector work.

It also appears that under these proposed requirements, preference will be given to those tenderers who maximise full time employment. In many instances we know that the traditional Monday to Friday permanent employee arrangements are not relevant or viable for many businesses who operate in a globalised market, particularly those in the service sector industries captured by this proposal. Feedback from our members also indicates that these types of arrangements are not consistent with the needs or wants of both employees, and businesses in the ACT. The Chamber would not be supportive of the introduction of any legislation which limits workplace flexibility and employment options for employees and business.

Questions

- How does the legislation consider the unique make-up of Canberra's private sector SMEs with respect to the increased administrative burden and cost pressures under the proposal?
- Has an impact study on the local economy been prepared in relation the number of SMEs who, given the changes, may no longer tender on ACT Government work?
- Has consideration been given to the potential negative effects of the Labour relations, training and workplace equity plan, being reduced opportunities for self-employment and flexible work arrangements?

Reduced Competition and Increased Cost

Participation by competitive businesses in ACT procurement processes is essential to achieving economic efficiencies for the ACT Government. Deterring small and medium business from participating in these processes will have a negative impact on the desired outcome.

Under the proposed arrangements, it is highly probable that only larger national or multi-national companies will have the capability to tender on ACT Government contracts. We know first-hand that many of these operators do not employ locally or reinvest back into the Canberra community.

Reduced competition has negative consequences for Government, Business and the ACT economy. Reduced competition would increase the cost of public projects and expenditure. This likely outcome appears to run counter to the Government's stated procurement objectives of creating secure local jobs, and the recently introduced Local Industry Participation Policy; a policy which was implemented to ensure competitive local businesses could prosper and grow, via a weighted criterion favouring local operators.

Despite efforts to assist local companies gaining access to procurement opportunities under this policy, the application of these positive biases does not appear to be evident, as seen in the recent tender process for the ACT Public School cleaning contract. Of twenty-one (21) local cleaning companies who had been performing this Government work, only one (1) local business was awarded ongoing works with the remaining three (3) contracts being awarded to national businesses with head offices outside of Canberra. Consequentially, the impact on local business, employees, as well as local suppliers was significant, with some businesses closing and many resultant redundancies. This demonstrates that more needs to be done to support our local SMEs, not deny them opportunities to expand and develop. To introduce further regulation and administrative requirements on local business appears counterproductive and unnecessary and may only serve to disincentivise our critically and economically important SMEs from tendering for Government work.

Questions

- Has there been any modelling or assessments completed with respect to the anticipated timeframes and increased costs placed on our small to medium enterprise under the proposed reforms?
- Will there be a review of the current weighting criteria structure and application to ensure that procurement practices better support ACT small business operators in securing ACT Government work?

Interaction with existing Commonwealth Laws

It is proposed that the Secure Local Jobs Code (Code) will set additional legal obligations on entities and any subcontractors it engages with respect to workplace delegates, employee representation and collective bargaining. These obligations include, but not limited to: an obligation on employers to facilitate unlimited meetings with employees and elected delegates to discuss unspecified topics; provision of union membership applications forms and undefined information about union/s; as well as specifications on how and when induction training should be delivered and the content for such training. Whilst the details of the proposed obligation are not outlined in the Code, there are reasons to caution against a prescriptive approach that quantify the actions however do not quantify the extent to which these actions can be exercised.

Furthermore, there are proposed model contract terms and conditions which set additional legal obligations on business. These include the ability for a Territory contract officer to specify that an “industry expert or a union workplace delegate” can attend and possibly deliver staff induction sessions; the option to allow a nominated person to undertake education and awareness raising activities about the code at “reasonable times”; and to allow any nominated person to enter site to engage in discussions with any employees, inspect certain records and conduct interviews with any persons to demonstrate compliance with the code.

Whilst we understand the good intentions of the model terms, we are concerned that many

of these additional obligations are in direct conflict with existing Commonwealth laws, the fundamental pieces of legislation being the *Fair Work Act 2009* (Cth), 2016 Federal Building Code and the *Privacy Act 1988*.

Freedom of Association Principles

The existing federal legislation governing employment and workplace relations is the *Fair Work Act 2009* (Cth). The object of the Act is to provide a balanced framework for cooperative and productive workplace relations, which includes freedom of association provisions.

Division 4 of Part 3-1, General protections recognises the right to freedom of association and the right to be represented; specifically, to protect freedom of association by ensuring that persons are “free to become, **or not become**, members of industrial associations”.

These provisions are intended to provide protections in relation to a person’s freedom of association and participation and **non-participation** in industrial activities (see Explanatory Memorandum to the Fair Work Bill 2008, para 1400). Of note the Explanatory Memorandum states:

The protections in the Division revolve around the right to engage or not engage in certain industrial activities – namely, being a member or officer of an industrial association or engaging in activities of industrial associations...

“Industrial association” is defined in section 12 to include not only unions and employer associations but an association of employees, or independent contractors, or both (whether formed formally or informally), a purpose of which is the protection and promotion of their interests in matters concerning their employment, or their interests as independent contractors (as the case may be). Under the current proposal the Canberra Business Chamber is of the view that the risk of employee led discussions may constitute ‘industrial activities’, and that employees should be free to participate or not participate in such activities (rather than compelled to).

The creation of an obligation on employers of this nature may also risk placing employers in a position of needing to breach freedom of association requirements to comply with the procurement requirements outlined in the Local Jobs Code. This would be a highly unsatisfactory outcome – particularly considering the protections and prohibitions intended by Section 348 (coercion) and Section 350 (inducements) of the *Fair Work Act 2009* (Cth).

Right of Entry Provisions

The objects of Section 480 of the *Fair Work Act 2009* (Cth) establish a framework for officials of organisations to enter premises that balances the ‘right of occupiers of premises and employers to go about their business without undue inconvenience.’

It is proposed that the Local Jobs Code would allow an “authorised person” to enter worksites to inspect conditions of employment and hold discussions with any employee/s at any “reasonable time”. The *Fair Work Act 2009* (Cth) already provides a prescriptive mechanism for workplace entries which is clearly defined and understood by the parties. These include the notice periods required for such entries, where and when the discussions are to be held and clear rights and responsibilities for both Unions and Employers when on work sites. Under the proposal it appears that “any nominated person” can enter a site, at any reasonable time and to inspect the conditions of employment, hold interviews and discussions and make copies of and inspect any employee document related to their employment.

In the absence of any specific detail in the Code and model contract terms and conditions, it is difficult to understand how expanded legislated entry rights would not increase the risk of conflict under the existing Fair Work, Privacy and Work Health and Safety laws. Furthermore, it is not clear why further legislation of a similar nature is required, particularly, as it may give rise to significant inconsistency of the obligation and confusion for the parties involved.

Concerns have also been raised by Chamber members of the relevance of entrenching union roles in the procurement arena. There are inherent conflicts of interests that need to be carefully considered, and it is the Chamber’s view that ACT Procurement should be adequately resourced, so it can independently perform the required checks and balances without the need for third party involvement. This would also allow Government to deal directly with interested parties to satisfy its own requirements that those businesses are complying with, and meeting, their industrial relations obligations.

Right to Collectively Bargain

We are also concerned that certain aspects of the Code are written in a way that attempts to duplicate existing legislation, and in some instances, is misleading for many business owners who may not have a background or extensive knowledge in workplace relations matters or the *Fair Work Act 2009* (Cth). Part 2-4 of the *Fair Work Act 2009* (Cth), sets out the obligations on Employers and bargaining representatives for the making of enterprise agreements. As outlined above, the mechanisms and requirements of these legal obligations are known and understood by those involved. It is not clear why additional legislation of a similar nature is required, particularly as it may give rise to significant inconsistency of the obligation and confusion for the parties involved.

We note that under previous iterations of the Code it was stated (and clarified) that a Territory entity is not required to have an enterprise agreement, however under the proposed legislation it is not clear whether this remains the case. The Canberra Business Chamber would

not support any proposal that requires local business operators to make an enterprise agreement (where there is no lawful obligation to do so), notwithstanding, that such an obligation may also conflict with existing workplace laws, and again increases cost to business. We would also not support any ACT Government procurement practice that may seek to discriminate against an employer who does not operate under an enterprise agreement for the awarding of such work.

Work Health and Safety Act 2011 (ACT)

Under the *Work Health and Safety Act 2011 (ACT)* a person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of the workers they engage or whose activities they influence or direct.

Should the Local Jobs Code legislate how safety and induction information and consultation is to be delivered, this may be outside what is reasonably practicable. For example, the collective approach may mean that workers are not being inducted in an efficient manner, or in a way that is specific to the workplace that they will be working on. Work health and safety consultation is already regulated by Division 5-2 of Part 5, of the *Work Health and Safety Act 2011 (ACT)*, and there is a risk that the Local Jobs Code requirements may give rise to duplication or worse, conflict.

The proposed Local Jobs Code includes the provision that, on request, an election of a workplace delegate must be facilitated. In the absence of any details concerning the practical application of such approach, we are unable to assess the extent to which any requirement may conflict with the freedom of associations provisions, laws regulating registered organisations laws and the *Work Health and Safety Act 2011 (ACT)* which deals with the election of health and safety representatives.

The Code for the Tendering and Performance of Building Work 2016 (Building Code)

Based on the current proposal the Canberra Business Chamber has concerns that the reforms could give rise to inconsistency and conflict with the Federal Building Code, in particular; freedom of association, privacy considerations, induction provisions and concerns around the interaction of the Code and the *Fair Work Act 2009 (Cth)* and relevant workplace health and safety laws. These measures were implemented to address industrial behaviour that results in heightened risk, anti-competitive practices, unnecessary delays and inefficiencies. Combined, these work as a disincentive to investment. The Canberra Business Chamber is of the view that state and territory regulation and procurement practices should not have the effect of contradicting and undermining the existing federal frameworks set up to address any lawlessness.

Questions

- Can you please provide detail/s as to how employers are to facilitate meeting/s with employees in a way that would not contravene the Right of Entry provisions within the *Fair Work Act 2009* or Federal Building Code.
- Can you please provide detail around the required union information that is to be provided to employees and the purpose of the facilitated meetings outlined in the Code?
- What mechanisms will be in place to ensure that an employer will not be disadvantaged based on the industrial instrument used to engage its labour? Also, can you confirm there will be transparency for business in this process?
- Has consideration been given to National privacy laws with respect to authorised person/s accessing records and copies of employment related documentation for any employee?
- What protections will be put in place for those nominated contact person/s identified on the proposed register?

Compliance and Enforcement

We note the proposed legislation provides the ability for anyone, who on reasonable grounds, is of the view that a Code covered entity has not complied with the Code can make a complaint. Whilst the Canberra Business Chamber understands the basis for such a requirement, we are of the view that there must be further protections built into the legislation to support business.

During initial discussions with ACT Government it was proposed that the Code would provide business operators with the opportunity to a right of reply for any allegation of or apparent non-conformance with the Code. Disappointingly, it appears under the current proposal this option for business has been removed.

One area of the Bill we are in support of, is the option for business to apply for exemption, where the entity is able to prove that complying with the Code would result in the entity not complying with Commonwealth law/s. We welcome this inclusion, however would need more information as to the practical operation of such a requirement to understand how this may better support business in meeting all of their statutory obligations. The Canberra Business Chamber would certainly be interested to better understand the mechanisms and triggers for such situations and the grounds for when exemptions from the code will be granted.

Conclusion

The Canberra Business Chamber is supportive of legislative changes that uphold workplace standards and create a competitive and fair environment for business to participate in ACT Government procurement processes. The Canberra Business Chamber has long expressed the view that businesses need certainty in the operating environment to thrive and prosper. This includes a regulatory environment that strives to be nationally consistent to allow businesses to seamlessly work across borders and the ongoing reduction of red tape.

The Canberra Business Chamber welcomes this Inquiry and would be willing to attend a public hearing to voice concerns in relation to the proposed Bill. We trust the information provided in our submission will assist in shaping any new procurement legislation and we would urge the Government to proceed with caution to ensure positive outcomes for employees, businesses and the ACT economy.