



ACT
Government

Chief Minister, Treasury and
Economic Development

Freedom of Information Publication Coversheet

The following information is provided pursuant to section 28 of the *Freedom of Information Act 2016*.

FOI Reference: CMTEDDFOI 2021-244

Information to be published	Status
1. Access application	Published
2. Decision notice	Published
3. Documents and schedule	Published
4. Additional information identified	No
5. Fees	N/A
6. Processing time (in working days)	20
7. Decision made by Ombudsman	N/A
8. Additional information identified by Ombudsman	N/A
9. Decision made by ACAT	N/A
10. Additional information identified by ACAT	N/A

From: [REDACTED]
To: [CMTEDD FOI](#)
Cc: [REDACTED]
Subject: FOI Request - CMTEDD - Secure Local Jobs Code
Date: Monday, 13 September 2021 1:31:38 PM

Good afternoon,

RE: FOI REQUEST – CMTEDD SECURE LOCAL JOBS CODE ADVISORY COUNCIL'S REVIEW REPORT

I write to request under the *Freedom of Information Act 2016* the following:

- Secure Local Jobs Code Advisory Council's **review report** on the Operation of the Secure Local Jobs Code (December 2020)

Should you require any further information or clarification about my request, please contact my office on [REDACTED]





ACT
Government

Chief Minister, Treasury and
Economic Development

Our ref: CMTEDDFOI 2021-244



FREEDOM OF INFORMATION REQUEST

I refer to your application under section 30 of the *Freedom of Information Act 2016* (the Act), received by the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) on 13 September 2021.

Specifically, you are seeking: *"Secure Local Jobs Code Advisory Council's review report on the Operation of the Secure Local Jobs Code (December 2020)."*

Authority

I am an Information Officer appointed by the Director-General under section 18 of the Act to deal with access applications made under Part 5 of the Act.

Timeframes

In accordance with section 40 of the Act, CMTEDD is required to provide a decision on your access application by 12 October 2021.

Decision on access

Searches were completed for relevant documents and one document was identified that falls within the scope of your request.

I have included as **Attachment A** to this decision the schedule for the relevant document. This provides a description for the document that falls within the scope of your request and the access decision for that document.

I have decided to grant partial access to the document relevant to your request.

My access decisions are detailed further in the following statement of reasons and the document being released to you is provided as **Attachment B** to this letter.

In accordance with section 54(2) of the Act a statement of reasons outlining my decisions is below.

Statement of Reasons

In reaching my access decisions, I have taken the following into account:

- the Act;
- the content of the document that falls within the scope of your request; and
- the *Information Privacy Act 2014*.

Exemption claimed

My reasons for deciding not to grant access to the identified documents and components of these documents are as follows:

Information that would, on balance, be contrary to the public interest to disclose under the test set out in section 17 of the Act

Public Interest

The Act has a presumption in favour of disclosure. As a decision maker I am required to decide where, on balance, public interests lies. As part of this process I must consider factors favouring disclosure and non-disclosure.

In *Hogan v Hinch* (2011) 243 CLR 506, [31] French CJ stated that when ‘used in a statute, the term [public interest] derives its content from “the subject matter and the scope and purpose” of the enactment in which it appears’. Section 17(1) of the Act sets out the test, to be applied to determine whether disclosure of information would be contrary to the public interest. These factors are found in subsection 17(2) and Schedule 2 of the Act.

Taking into consideration the information contained in the documents found to be within the scope of your request, I have identified that the following public interest factors are relevant to determine if release of the information contained within these documents is within the ‘public interest’.

Factors favouring disclosure in the public interest:

- (a) *disclosure of the information could reasonably be expected to do any of the following:*
- (ii) *contribute to positive and informed debate on important issues or matters of public interest;*

I consider that disclosing the contents of the information sought would significantly contribute to open discussion and informed debate on the matters contained in the report. I am satisfied there is a public interest in the Secure Local Jobs Code to ensure that the government’s purchasing power is used to reward businesses who do the right thing by treating employees fairly. The release of this information would help to create positive and informed debate on issues of importance to the public.

I am satisfied that these are relevant considerations favouring disclosure in this case, and in the interests of enhancing transparency and accountability, I afford them significant weight.

I also note the FOI Act has an express pro-disclosure bias which reflects the importance of public access to government information for the proper working of a representative democracy. This concept is promoted through the objects of the FOI Act. I have considered this overarching concept in making my decision in relation to access.

Factors favouring nondisclosure in the public interest:

(a) disclosure of the information could reasonably be expected to do any of the following:

(x) prejudice trade secrets, business affairs or research of an agency or person.

I have also considered the impact of disclosing information which relates to business affairs. In the case of *Re Mangan and The Treasury [2005] AATA 898* the term 'business affairs' was interpreted as meaning 'the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs'. Schedule 2 section 2.2(a)(xi) allows for government information to be withheld from release if disclosure of the information could reasonably be expected to prejudice the trade secrets, business affairs or research of an agency or person. I am satisfied that release of this information could have an impact on the business affairs of the organisations identified as this information is not publicly available. Accordingly, I have decided this information is not in the public interest to release.

Having applied the test outlined in section 17 of the Act and deciding that release of personal or agency information contained in the documents is not in the public interest to release, I have chosen to redact this specific information in accordance with section 50(2). Noting the pro-disclosure intent of the Act, I am satisfied that redacting only the information that I believe is not in the public interest to release will ensure that the intent of the Act is met and will provide you with access to the majority of the information held by CMTEDD within the scope of your request.

Charges

Pursuant to Freedom of Information (Fees) Determination 2018 processing charges are applicable for this request because the total number of pages to be released to you exceeds the charging threshold of 50 pages. However, the charges have been waived in accordance with section 107(2)(e) of the Act.

Online publishing – Disclosure Log

Under section 28 of the Act, CMTEDD maintains an online record of access applications called a disclosure log. Your original access application, my decision and documents released to you in response to your access application will be published in the CMTEDD disclosure log after 3 days after the date of my decision. Your personal contact details will not be published.

You may view CMTEDD disclosure log at <https://www.cmtedd.act.gov.au/functions/foi>.

Ombudsman Review

My decision on your access request is a reviewable decision as identified in Schedule 3 of the Act. You have the right to seek Ombudsman review of this outcome under section 73 of the Act within 20 working days from the day that my decision is published in CMTEDD disclosure log, or a longer period allowed by the Ombudsman.

We recommend using this form [Applying for an Ombudsman Review](#) to ensure you provide all of the required information. Alternatively, you may write to the Ombudsman at:

The ACT Ombudsman
GPO Box 442
CANBERRA ACT 2601

Via email: actfoi@ombudsman.gov.au

ACT Civil and Administrative Tribunal (ACAT) Review

Under section 84 of the Act, if a decision is made under section 82(1) on an Ombudsman review, you may apply to the ACAT for review of the Ombudsman decision. Further information may be obtained from the ACAT at:

ACT Civil and Administrative Tribunal
Level 4, 1 Moore St
GPO Box 370
Canberra City ACT 2601
Telephone: (02) 6207 1740
<http://www.acat.act.gov.au/>

Should you have any queries in relation to your request please contact me by telephone on 6207 7754 or email CMTEDDFOI@act.gov.au.

Yours sincerely



Katharine Stuart
Information Officer
Information Access Team
Chief Minister, Treasury and Economic Development Directorate

12 October 2021



ACT
Government

Chief Minister, Treasury and
Economic Development

FREEDOM OF INFORMATION REQUEST SCHEDULE

WHAT ARE THE PARAMETERS OF THE REQUEST	Reference NO.
Secure Local Jobs Code Advisory Council's review report on the Operation of the Secure Local Jobs Code (December 2020)	CMTEDDFOI 2021-244

Ref No	Page number	Description	Date	Status	Reason for Exemption	Online Release Status
1	1-37	Review of the Operation of the Secure Local Jobs Code	Jan 2021	Partial release	Sch 2 s2.2 (a)(xi)	Yes
Total No of Docs						
1						

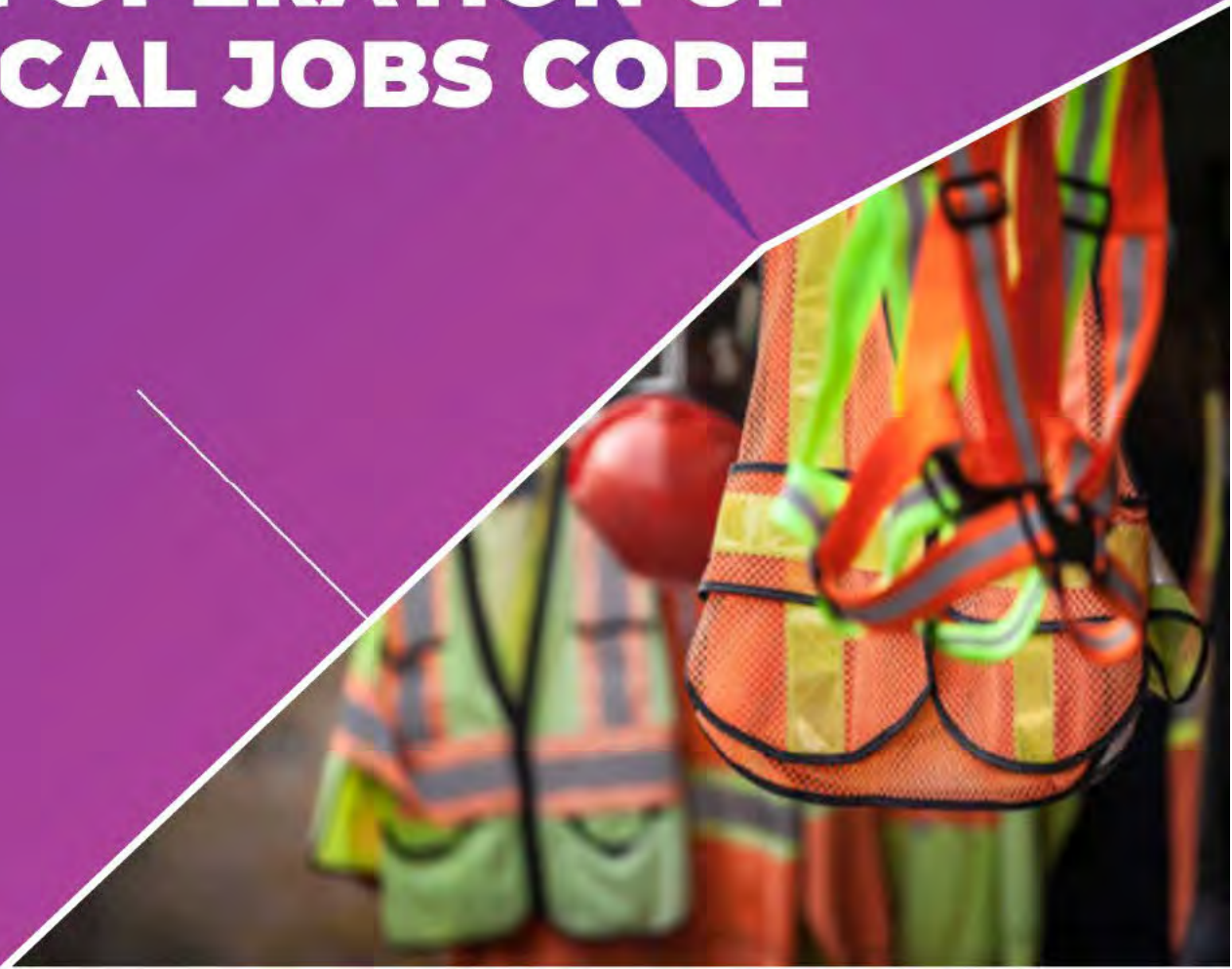
SECURE LOCAL JOBS CODE ADVISORY COUNCIL

REVIEW OF THE OPERATION OF THE SECURE LOCAL JOBS CODE

JANUARY 2021



ACT
Government



Executive summary



The ACT Government spends approximately \$1.5 billion every year on procurement.

Government can use its buying power to generate social value above and beyond the value of the goods, services or works being procured.

The Secure Local Jobs Code package of measures ensures Government contracts in industries vulnerable to insecure work are only awarded to businesses that meet the highest ethical and labour standards.

The operation of the Code has played an important role in providing more secure work for businesses and employees while driving the local economy.

This is the first review of the ACT Government's Secure Local Jobs Code (the Code), which came into effect on 15 January 2019.

The Secure Local Jobs package of measures 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 *Government Procurement Act 2007* (the Act) is the overarching legislative instrument for the Code and outlines the review requirements.

Terms of reference for the review were established by the Secure Local Jobs Code Advisory Council and have expanded upon the requirements for the review outlined in s22ZD of the Act.

The review is due to the Minister within 2 years of the commencement of the Code, being 15 January 2021.

Review recommendations have outcomes relating to:

- ▶ alignment with the ACT Government procurement values and policies to deliver on policy objectives
- ▶ operational efficiency and effectiveness – this may require legislative amendments to the *Secure Local Jobs Code*, *Government Procurement Act 2007*, and *Government Procurement Regulation 2007*
- ▶ regulatory function of the Code
- ▶ enhancing education and training tools
- ▶ improving efficiency and reducing red tape for businesses
- ▶ better access to and use of data and information to inform compliance and enforcement
- ▶ resourcing requirements to effectively administer the Code
- ▶ future mechanisms to consistently evaluate the operation of the Code.

Recommendations

Legislative amendments

1. Amend section 22S of the *Government Procurement Act 2001* to:
 - ▶ enhance the Registrar's powers to obtain information or documentation to improve compliance with Code* obligations and make determinations
 - ▶ provide the Registrar with appropriate inspection and entry powers for the purpose of undertaking investigations into non-compliance with Code obligations.*
2. Enhance the existing suite of tools to put greater emphasis on pre-procurement measures:
 - ▶ amend Part 4, s12AC of the *Government Procurement Regulation 2007* (Labour Relations, Training and Workplace Equity (LRTWE) Plan requirements) to provide greater clarity on performance standards and expectations for industry, and incorporate other Government indicators such as gender and diversity quota targets as appropriate
 - ▶ inclusion of a Code Certified Entity's history of compliance with Code obligations.
3. Amend s22G of the *Government Procurement Act 2001* to increase the threshold for LRTWE Plan submission for territory-funded construction work from \$25,000 to \$200,000.

Governance arrangements

4. Implement a two-stage procurement process, with the first stage to assess compliance with Code obligations and other Government policy initiatives and procurement values. The two-stage assessment process could operate on a pass/fail basis. Tenderers who are successful in the first stage then proceed onto the second stage where technical elements are assessed.
5. Implement a centralised database within the Secure Local Jobs Code Branch to:
 - ▶ enable the Secure Local Jobs Code Branch to perform centralised evaluation LRTWE Plans and record evaluation data
 - ▶ require contract managers provide quarterly reporting on compliance with LRTWE Plan commitments
 - ▶ manage Code Certified Entities compliance and history of past performance
 - ▶ record and monitor performance against Government policy initiatives and procurement values
 - ▶ provide data and information to the Secure Local jobs Code Branch to inform industry liaison activities and educate Code Certified Entities on expectations and best practice including additional tailored support for small and medium business.
6. Establish and implement a set of key performance indicators to inform decision making and enable the Advisory Council to effectively monitor the operation of the Code.
7. Develop and implement further educational resources for industry and Territory Entities to support compliance with Code obligations (i.e. clarify definitions of territory-funded work and tailor to individual industry requirements).
8. Maintain existing arrangements for external approved auditors. Consider future options to in-house the audit function in line with other Government priorities as appropriate.*

*Sch 2.2(a)(xi) and other industry stakeholders did not fully support this recommendation without further understanding the operational impacts.

Recommendations (continued)

Resourcing requirements

9. Advisory Council members endorse additional resourcing to support operations, education, industry engagement and compliance with the Code, noting the equal importance of each of these functions. Options for additional staffing of the Secure Local Jobs Code Branch:
 - ▶ enable effective administration of the Secure Local Jobs Code package of measures **(+2 FTE)**
 - ▶ deliver pro-active education to industry and Territory Entities on Code obligations and requirements for procurement, including tailored support for small and medium business (industry liaison) **(+3 FTE)**
 - ▶ effectively manage and analyse data, develop educational and reporting content **(+1 FTE)**
 - ▶ compliance and enforcement activities to ensure compliance with Code obligations **(+4 FTE)**
 - ▶ undertake centralised assessment of LRTWE Plans and manage ongoing compliance **(+2 FTE)**.
- ▶ provide in-house legal advice and support to the Registrar **(+1 FTE)**
 - ▶ the additional resources would be separated into administrative and compliance functions to maintain stakeholder relationships, support appropriate skills development, and reduce the risk of conflict of interest.
10. Provide funding to develop and implement ICT systems to:
 - ▶ effectively support the operations of the Code (i.e. IT architecture including development of a centralised database to manage Code Certified Entities administration and compliance with Code obligations, compliance investigations and enforcement activities, LRTWE Plan assessment and whole of government reporting on compliance with LRTWE Plan commitments under contract, educational and training activity data, performance data by industry and customer relationship management activities)
 - ▶ capture and analyse data to enhance compliance with Code obligations and inform decision making.

Operation of the Code

- ▶ Background
 - Secure Local Jobs Code timeline
- ▶ Legislative framework
- ▶ Advisory Council
- ▶ Secure Local Jobs Code Branch
 - Registrar
 - Compliance unit
 - Resourcing requirements

Background

The Secure Local Jobs Code package of measures delivers on the ACT Government's 2016 commitment to drive better outcomes for workers in businesses and organisations that tender for territory-funded work. This commitment is achieved by using the Government's purchasing power to uphold workplace standards and create a level playing field.

On 2 August 2018, the Minister for Workplace Safety and Industrial Relations introduced the *Government Procurement (Secure Local Jobs) Amendment Bill 2018* into the Legislative Assembly.

The bill aimed to:

- ▶ define the type of contracts subject to the new arrangements
- ▶ outline the pre-qualification audit regime
- ▶ establish a certification scheme for tenderers and contractors (Code certificate)
- ▶ set new rules for procurement and management of Government contracts, including a requirement for certain tenderers/contractors to have a Secure Local Jobs Certificate and to submit a Labour Relations, Training and Workplace Equity (LRTWE) Plan
- ▶ set up Government infrastructure to manage Secure Local Jobs including complaint handling, investigation and appeal mechanisms, including the establishment of a Ministerial Advisory Council and the statutory role of Registrar.

Public consultation on the draft Bill, Regulation and Code was facilitated through the Procurement ACT website and Economic Development and Tourism Committee.

The Code came into effect on 15 January 2019 and applies to ACT Government contracts for construction, cleaning, security, traffic management and services predominantly for labour over \$200,000. The Code sets clear expectations for employers and service providers including:

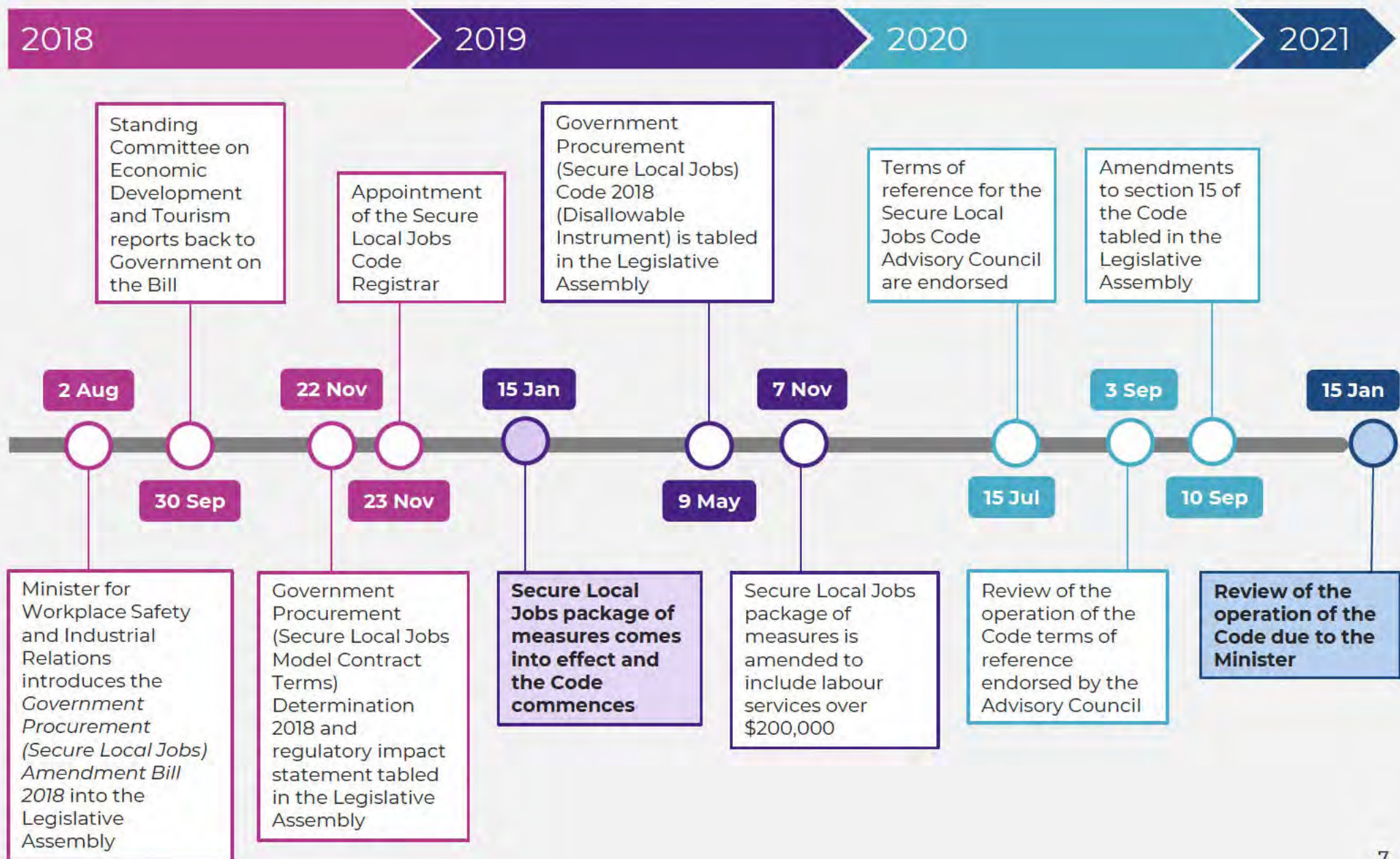
- ▶ pay and employment conditions
- ▶ insurance, tax and superannuation
- ▶ health and safety, including training and inductions
- ▶ collective bargaining, freedom of association and representation rights.

Within the first 2 years of operation a Registrar has been appointed, enabling the approval of auditors and audit guidelines, issuance of Secure Local Jobs Code certificates and facilitation of education and training programs. The Secure Local Jobs Code Ministerial Advisory Council has been established with a full complement of members being appointed.

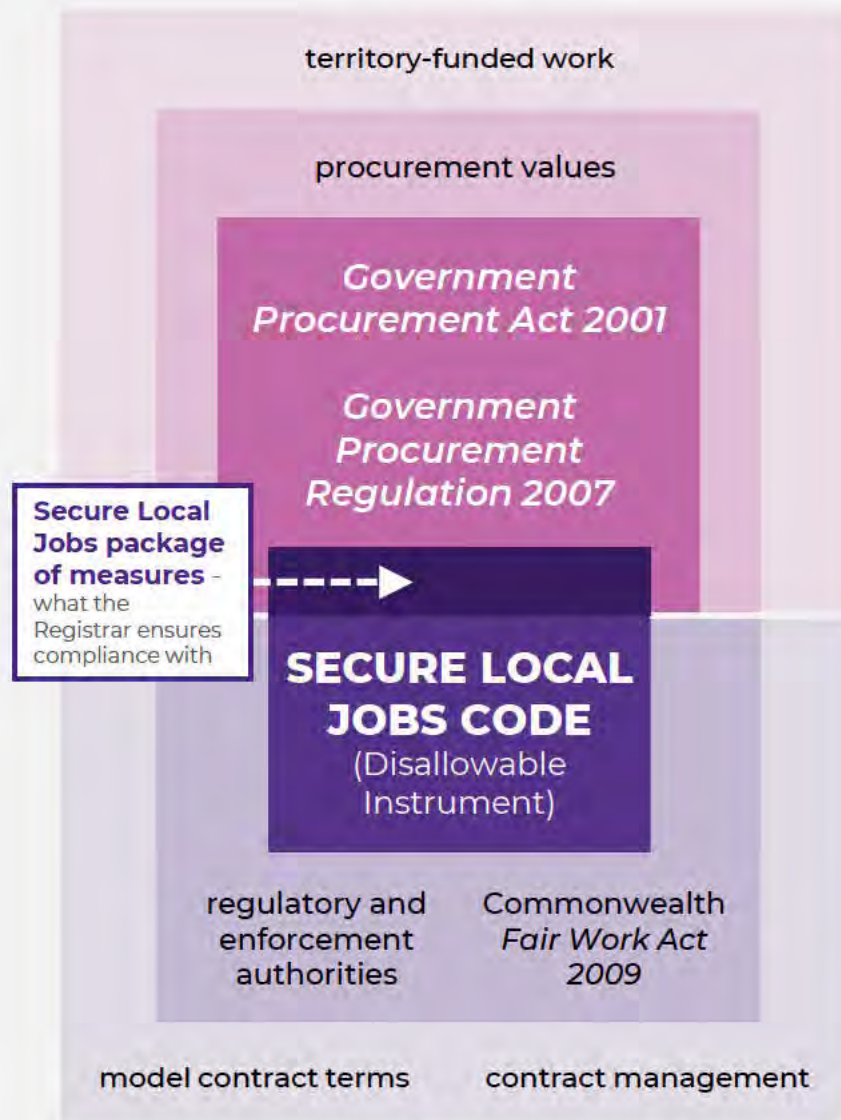
The ACT is the first Australian jurisdiction to implement a Secure Local Jobs Code.



Secure Local Jobs Code timeline



Legislative framework



WITHIN current legislative framework

Administrative powers

- issue certificates
- check for compliance
- issue sanctions
- train and educate
- facilitate the right to remedy
- refer to other regulatory and enforcement authorities

LRTWE Plans

- procurement value threshold
- describe compliance with the Code
- best practice workplace standards
- security of employment

Prescribed values and excluded services or works

Register of Code Certified Entities

Exemptions

Requirements for territory-funded work relating to the Code

- Territory Entities
- Code Certified Entities
- certification process

Model contract terms

- Code Certified Entity compliance with the Code
- Code certificate validation
- sub-contractor compliance

OUTSIDE current legislative framework

Regulatory powers

- limitations on enforcing Code compliance
- no ability to cancel contracts
- limited ability to obtain evidence

Industrial law

- must not conflict with Commonwealth *Fair Work Act 2009*
- must not conflict with other regulators

Territory Entity compliance

- no ability to sanction Territory Entity non-compliance, can only educate and facilitate right to remedy

Contract management

- Registrar has no role in contract management
- limited contract management and compliance reporting to Registrar, including LRTWE Plans
- model contract terms matters

LRTWE Plans

- unclear how LRTWE Plans promote best practice
- no clear weighting or evaluation framework
- no centralised database or ability to evaluate past performance

Advisory Council

CURRENT MEMBERSHIP

Chair

Dr Damian West, Deputy Director-General Workforce Capability and Governance, CMTEDD

Members

Graham Catt, CEO, Canberra Business Chamber

Matthew Harrison, Secretary, UnionsACT

Lyndal Ryan, ACT Branch Secretary, United Workers Union

Zachary Smith, Assistant Secretary, CFMEU

Menka Zarzour, State Operation Manager, Millennium Services Group

Secure Local Jobs Code Registrar

David Robertson (non-voting member)

Secretariat

Secure Local Jobs Code Branch

Advisory Council

The Secure Local Jobs package of measures outlined the establishment of an Advisory Council under section 22ZA of the *Government Procurement Act 2001* (the Act).

The Advisory Council advises the Minister about:

- ▶ matters relating to the operation of the Code
- ▶ anything else in relation to local jobs and procurement by Territory Entities requested by the Minister
- ▶ any other function given to the Council under this Act

Terms of reference outlining governance requirements for the Council were reviewed and endorsed in July 2020. All decisions are reached by consensus.

Council members are appointed by the Minister and include the Registrar, three members appointed after consultation with the people or bodies that the Minister considers represent the interests of employees and three members considered by the Minister to have appropriate qualifications or experience to assist

the Council to exercise its functions. Appointment of employer representative members and other members is at the Minister's discretion.

Current membership includes representatives from UnionsACT, United Workers Union ACT, CFMEU ACT Branch, Canberra Business Chamber and Millennium Services Group Ltd.

The Deputy Director-General Workforce Capability and Governance CMTEDD is a voting member and Chair of the Advisory Council. The Secure Local Jobs Code Registrar is also a member, however has non-voting status.

Clause 22ZD of the Act specifies that the Advisory Council must undertake a review of the operation of the Code before its second year of operation, being 15 January 2021 and must present a report of the review to the Minister within 6 months of the review commencing.

Secure Local Jobs Code Branch



Registrar

The Registrar is responsible for the administration of the Code. This includes but is not limited to:

- ▶ providing support to the Advisory Council
- ▶ promoting an understanding and acceptance of the Code
- ▶ developing and presenting educational programs to help Code Certified Entities and Territory Entities to meet their Code obligations
- ▶ investigating and applying sanctions to Code Certified Entities for non-compliance with Code obligations
- ▶ general governance functions in accordance with ACT Public Sector Management.

The Registrar is operationally separated from other ACT Government procurement and industrial relations policy areas. This enables the Registrar to meet the legislative requirements of the Code for both the public and private sector.

Compliance unit

Administration

- ▶ manage enquiries
- ▶ maintain website and inbox
- ▶ data management
- ▶ Advisory Council support
- ▶ review and update legislation.

Code certification and renewals

- ▶ Code certificate applications
- ▶ Code certificate renewals
- ▶ auditor applications
- ▶ auditor renewals.


Education

- ▶ Territory Entity compliance with Code obligations (procurement and contract management)
- ▶ industry
- ▶ approved auditors.

Compliance

- ▶ complaints
- ▶ investigations
- ▶ compliance projects.

Review

- ▶ Terms of reference
 - ▶ Methodology (Appendix A)
 - ▶ (a) Compliance with the Code
 - ▶ (b) The coverage of the provisions
 - ▶ (c) Complaints and disputes
 - ▶ (d) Impact on small and medium business
 - ▶ (e) Audit function
- 

Terms of reference

Section 22ZD part 2B of the *Government Procurement Act 2001*

(a) Compliance with the code and other requirements:

- ▶ How well has industry complied with the obligations under the Secure Local Jobs Code package?
- ▶ How well have Territory Entities complied with the obligations under the Secure Local Jobs Code package?
- ▶ What would enhance compliance with Code obligations for industry/Territory Entities?
- ▶ How effective has enforcement of the Secure Local Jobs Code obligations been? What impediments are there to enforcement of the Code and how can these be addressed?

(b) The coverage of the provisions including the procurements subject to the provisions;

- ▶ Is the scope and coverage of procurements for territory-funded work adequate?
- ▶ Does the Secure Local Jobs Code package of measures need to be improved/enhanced? If so: why and how?
- ▶ Can the SLJC be incorporated into contracts whenever they are renewed or varied?
- ▶ Have Labour Relations, Training and Workforce Equity (LRTWE) Plans contributed to achieving the objectives of the Secure Local Jobs Code? What improvements to LRTWE Plans could be made?

(c) Complaints and disputes:

- ▶ Are there any practical improvements that could be made to the current provisions and processes for dealing with complaints and disputes?

Additional items:

(d) Examination of the impact of the legislation on procurement with small and medium local business.

(e) Explore options for building capacity over time to have the auditing work undertaken by public servants.

(a) Compliance with the Code

1855 Code Certified Entities

Construction
1,574 (86%)

Labour
120 (5%)

Cleaning
87 (5%)

Security
60 (3%)

Traffic management
14 (1%)

30 Approved auditors



Source: Secure Local Jobs Code Register as at 8 December 2020.

How well has INDUSTRY complied with the obligations under the Secure Local Jobs Code package?

Observations

As at 8 December 2020, the Registrar had issued a total of 2,122 Secure Local Jobs Code certificates since the Code commenced. 136 investigations have been undertaken resulting in 11 sanctions. Sanction categories primarily relate to Section 8(2) and Section 11(1)(a) of the Code, Code certified sub-contractors and applicable industrial law, respectively.

All sanctions have occurred within the construction industry, which makes up approximately 86% of all Code Certified Entities.

There has only been one instance where an entity has been refused certification (with the right to remedy), and one case where the Registrar removed a Code certificate. In comparison to other similar regulatory functions within the ACT, this would indicate a generally high level of compliance overall.

The observed high level of compliance could be attributed to a range of factors, including:

- ▶ limited investigation powers
- ▶ limited ability to obtain evidence
- ▶ difficulty obtaining useful data

- ▶ inadequate resourcing to interrogate data for compliance or undertake investigations.

There have been many challenges associated with stakeholders' expectations around compliance and enforcement activities and the role and scope of the Registrar.

The Code allows the Registrar to verify that entities the Territory does business with are meeting their workplace obligations – in other words – they must be audited at the point of applying for a Secure Local Jobs Code Certificate and then may be audited (internal investigation or external compliance audit) during the term of their certification to ensure ongoing compliance with Code requirements.

The result of this approach is that the Registrar has a limited capacity to investigate non-compliance and enforce sanctions. This may explain why industry compliance with the Code may appear higher than other Government regulatory functions.

There is limited available evidence or data to monitor industry compliance with the Code in a qualitative way.

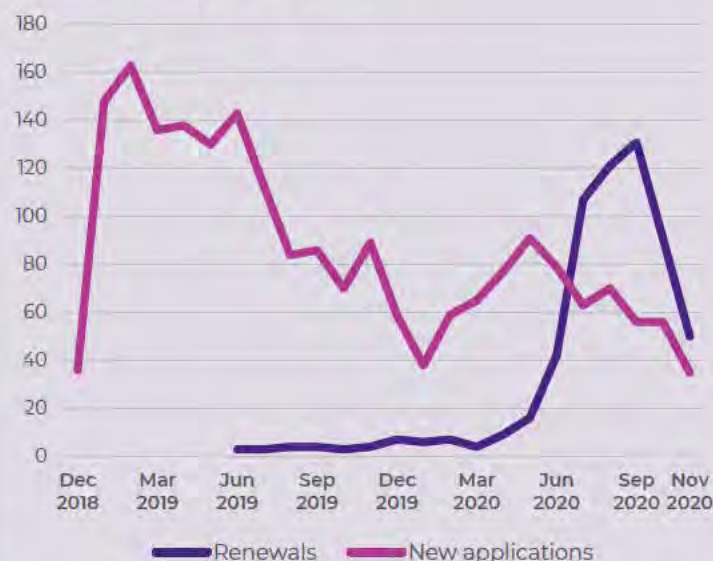
(a) Compliance with the Code

Since July 2019, new Code certificate applications have decreased by

76% ▼

Renewals spiked sharply from July 2020 – November 2020, reflecting the average 12-18 month expiry period.

CERTIFICATE APPLICATIONS AND RENEWALS OVER TIME



How well has INDUSTRY complied with the obligations under the Secure Local Jobs Code package?

Issues

Registrar's powers

- ▶ limited powers under the *Government Procurement Act 2001* to conduct investigations and obtain evidence
- ▶ the Registrar has not exercised the external compliance audit function to date
- ▶ Code Certified Entities are often unresponsive or slow to respond to information requests.

Resourcing

- ▶ Code certificate applications and renewals are cyclical which creates surge demand for staff
- ▶ People: inadequate staffing, skills shortage (data management and analysis, reporting, investigations)
- ▶ Systems: manual data processing, no centralised system for reporting or compliance.

Data management

- ▶ difficulty obtaining data (source, quality, consistency, manual processing)
- ▶ limitations of Excel as a data collecting and analytical tool
- ▶ reliance on third parties to provide data.

Opportunities

Registrar's powers (see page 18).

Resourcing

Provide increased staffing and other resources to the Secure Local Jobs Code Branch sufficient to:

- ▶ enable effective administration of the Secure Local Jobs Code package of measures
- ▶ deliver pro-active education to industry and Territory Entities on Code obligations and requirements for procurement
- ▶ undertake compliance and enforcement activities to ensure compliance with Code obligations
- ▶ provide legal advice and support to the Registrar.

Data management

Provide funding to develop and implement systems to:

- ▶ support operations of the Code
- ▶ use data to enhance compliance with Code obligations and inform decision making
- ▶ improve efficiency and reduce red tape for businesses.

(a) Compliance with the Code

What is a Territory Entity?

As outlined in the Government Procurement Act 2001, Territory Entity —

(a) means —

- (i) an administrative unit; or*
- (ii) a Territory Entity under the Auditor-General Act 1996; or*
- (iii) the Office of the Legislative Assembly; or*
- (iv) an officer of the Assembly; and*

(b) for an unincorporated Territory entity — includes a member of the entity acting on behalf of the Territory.

A Territory Entity does not include —

- (a) the University of Canberra; or*
- (b) a Territory owned corporation; or*
- (c) another entity established under the Corporations Act; or*
- (d) an entity declared under the regulations not to be a Territory Entity.*

How well have Territory Entities complied with the obligations under the Secure Local Jobs Code package?

Observations

As at 4 December 2020 there were 548 contracts with Code Certified Entities reported on the ACT Government Contracts Register.

The Contracts Register is the primary data source to identify territory-funded contracts with Code obligations. Due to delays in uploading contract information (new contracts and variations) and the data being provided to the Secure Local Jobs Code Branch quarterly, it is often inaccurate by the time it is reviewed.

There is no direct reporting from directorates or contract managers to the Registrar or Secure Local Jobs Code Branch regarding Code Certified Entities compliance with the Code while under contract.

Contracts are between the Code Certified Entity and Territory Entity. There is no role for the Registrar in managing contracts, however it is not the role of contract managers to determine if there is a breach of the Code or to provide advice on how contractors should comply with the

Code; this needs to be referred to the Registrar.

The complexity of this process means that it is difficult for the Registrar to have any oversight of Territory Entity compliance with the Code.

The Secure Local Jobs Code Branch provides education and training to Territory Entities and responds to enquiries from contract managers on a daily basis about complying with their Code obligations.

Although there has been significant and ongoing investment in training and education, tender evaluation teams and contract managers have limited understanding of their Code obligations across the procurement lifecycle. This can be impacted by change in personnel, having multiple contract managers and varied reporting requirements.

Feedback from the internal consultation process acknowledged the importance of tailored education and supported additional education and training for Territory Entities.

(a) Compliance with the Code

How well have Territory Entities complied with the obligations under the Secure Local Jobs Code package?

PROCUREMENT RISKS		CONTRACT MANAGEMENT RISKS	
TENDER	EVALUATION	AWARD	ONGOING
Issues <ul style="list-style-type: none"> ▶ lack of clarity around the scope of procurements covered by the Code ▶ lack of clarity around the purpose and objectives of LRTWE Plans ▶ Code requirements conflated with other procurement policies. 	Issues <ul style="list-style-type: none"> ▶ inconsistent evaluation of LRTWE Plans ▶ tender evaluation teams cannot assess compliance with the Code, they can only assess their historical performance ▶ no consolidated repository of past performance. 	Issues <ul style="list-style-type: none"> ▶ no oversight of other current contracts (for Territory Entity or Registrar) ▶ no oversight for Registrar to identify contract manager non-compliance ▶ inaccurate list of associated entities. 	Issues <ul style="list-style-type: none"> ▶ inaccurate or delayed reporting ▶ inaccurate contact details of contractors ▶ no direct reporting of contractor or contract manager compliance with the Code to the Registrar.
Opportunities <ul style="list-style-type: none"> ▶ enhance education training for contract managers ▶ provide more information and targeted questions in the LRTWE Plan application form ▶ review the application threshold for LRTWE Plans, consider this based on industry requirements. 	Opportunities <ul style="list-style-type: none"> ▶ centralise the assessment of LRTWE Plans to develop expertise, evaluate consistently and monitor compliance over contract duration* ▶ develop Secure Local Jobs Code centralised database to manage Code Certified Entities data and compliance. 	Opportunities <ul style="list-style-type: none"> ▶ Registrar receives a copy of the contract and LRTWE Plan (centralised database) ▶ identify high risk contracts and provide higher level of support to contract managers ▶ increase data capture for larger (high risk) contracts with more formal contract management processes. 	Opportunities <ul style="list-style-type: none"> ▶ contract managers provide regular reports to the Registrar for compliance checking.

* Advisory Council members agreed on the centralised assessment of LRTWE Plans, however differed in their views on where the function should be performed within Government .

(a) Compliance with the Code

In order to take a more active approach to the enforcement of the Code, the Regulator requires a significant overhaul to its staffing and legal support that would enable it to act with proper independence of government.”

– Sch 2.2(a)(xi)

“It is important for the ACT Government and the Registrar to continue educating Code Certified Entities about their obligations under the Code. This could be achieved through regular updates to the Code Certified Entities and industry associations about areas in which the Registrar considers additional education or reminders are required.”

– Sch 2.2(a)(xi)

“A further measure to assist businesses understand their obligations could be seminars and meetings or possibly a hotline for applicants to call if they need clarification on any area of the Code.” – Sch 2.2(a)(xi)

What would enhance compliance with Code obligations for industry/ Territory Entities?

Industry compliance

Section 8(2) of the Code:

Code certified sub-contractors

- ▶ principal contractor must regularly, or at a time that coincides with sub-contractor payment schedules, supply documentation evidencing Code compliance
- ▶ the Secure Local Jobs Code Branch conduct pro-active audits/investigations to ensure principal contractors are ensuring sub-contractor compliance with the Code.

Section 11(1)(a) of the Code: applicable industrial law

- ▶ provide the Registrar with powers of entry, inspection powers and the ability to request information from a site or Territory premises to assist the Registrar in making a determination on compliance with the Code.

LRTWE Plans (see page 26).

Territory Entity compliance

Additional support

- ▶ tailored education and training for contract managers to better understand Code obligations and Contract Model Terms
- ▶ identify high risk contracts and provide higher level of support to contract managers with high risk projects
- ▶ provide further clarity around scope and definition of territory-funded work and Code requirements.

Contract management

- ▶ adherence to the Code obligations must continue to be expressed as a fundamental term of contract (Contract Model Terms) for all future tenders within the scope of the Code
- ▶ contract managers provide LRTWE Plans and reports to centralised database
- ▶ consider options for a centralised area or the Registrar to lead active certification audit processes while under contract.

(a) Compliance with the Code



136 completed compliance investigations

12 investigations currently underway



11 Code Certified Entities sanctioned

1 Code certificate removed



How effective has enforcement of the Secure Local Jobs Code obligations been?

What impediments are there to enforcement of the Code and how can these be addressed?

Observations

The Code allows the Registrar to respond where non-compliance with Code requirements is identified, such as via an adverse finding from a Regulator or Court in relation to a workplace law or non-compliance with Code obligations (for example, use of non-certified sub-contractors).

The response to identification of possible non-compliance may be via internal investigation or engagement of an external auditor initiated by the Registrar or reactive following receipt of a complaint provided to the Registrar.

The Registrar can only sanction non-compliance as it relates to the operation of the Code. If acts of non-compliance come into conflict with the *Fair Work Act 2009* (Commonwealth) or other regulatory authorities, the matter must be referred along with the available evidence.

Sections 8, 9, 11, 13, 14, 15 and 16 of the Code allow the Registrar to take action against non-compliance.

Sections 8 and 9, are 'strict liability' offences where 'not doing something' can be assumed to constitute a breach. Evidence can be obtained and sanctions issued under the powers available to the Registrar.

Sections 13, 14, 15, 16 may be 'strict liability' offences, where a Notice to Produce can be issued. If there is insufficient evidence produced, further enquiries need to be made. There is no legislative requirements or ability for the Registrar to interview a person or request records for an entity or person that is not a Code Certified Entity.

Section 11 can be difficult to assess under the current powers available to the Registrar. For example, an allegation of a worker not being paid correctly must be referred to the Fair Work Ombudsman or the Australian Building Construction Commission. These authorities are under no obligation to advise of the outcomes of their investigations. Without the outcomes of those investigations, the Registrar cannot make a determination of a breach.

(a) Compliance with the Code

Case study: Investigating non-compliance (internal audit)

The Secure Local Jobs Code Branch received information from an ACT Government inspector that a developer had been engaging non-certified sub-contractors to perform work.

The compliance unit had previously met with the developer regarding their alleged non-compliance. As per the legislative requirements, this was a pre-arranged site visit which meant that the developer could ensure no non-certified entities were on site.

The compliance unit did an ad hoc 'drive by' to identify non-certified sub-contractors. Due to the large nature of the site there was limited visibility of the site office and no visibility of where the work was being conducted. As a result, no infringement points or sanctions have been imposed on this developer to date.

How effective has enforcement of the Secure Local Jobs Code obligations been?

What impediments are there to enforcement of the Code and how can these be addressed?

Issues

- ▶ the Registrar has limited powers to obtain information which makes it difficult to identify and build a sound evidence base to monitor compliance and enforce sanctions
- ▶ the Registrar may appoint an auditor to conduct an audit if a complaint has been made or there are reasonable grounds to suspect that a Code Certified Entity has failed to comply with the code. There is no ability for the Registrar to conduct a proactive audit
- ▶ the Registrar has no ability to check the authenticity of the approved auditor's findings by issuing a Request for Information to the auditor. There is a risk that the Registrar cannot ensure auditor compliance
- ▶ Sch 2.2(a)(xi) and other industry stakeholders did not fully support enhancing the Registrar's powers for the purposes of investigating non-compliance with Code obligations (i.e. site entry and to obtain information) without further understanding the operational impacts.

Opportunities

Amend section 22S of the *Government Procurement Act 2001* to:

- ▶ enhance the Registrar's powers to obtain information or documentation to improve compliance with Code obligations and make determinations
- ▶ provide the Registrar with appropriate inspection and entry powers for the purpose of undertaking investigations into non-compliance with Code obligations.

(b) The coverage of the provisions

Definitions of territory-funded work:

- ▶ *Construction work is defined in the Work Health and Safety Regulation 2011, section 289*
- ▶ *Cleaning work defined in ANZSIC Class 73*
- ▶ *Traffic management means services which redirect vehicles around a temporary disruption to a public road for the purpose of ensuring safety to workers or the public*
- ▶ *Security work means services by a person who carries on a security activity within the meaning of the Security Industry 15 Act 2003, section 7*
- ▶ *Any services worth over \$200,000 not listed as an excluded service.*

Is the scope and coverage of procurements for territory-funded work adequate?

Observations

Based on internal and external stakeholder consultation, the scope of industries and services covered by the definitions of territory-funded work is generally agreed to be sufficiently broad and does not need to be expanded.

The definition and scope of procurements covered by the Code could be clearer and better articulated as procurement officers are often unaware of the scope and coverage of territory-funded work. For example, the Registrar receives daily requests for interpretation on whether a particular procurement is within scope.

Significant training has been delivered to directorates and industry, along with the available online guidance materials however there is still a level of uncertainty.

Requests for clarification and interpretation of definitions of territory-funded work are also received from businesses wanting

to understand if they need a Code certificate in order to tender for work.

Expanding the scope beyond territory-funded work would require separating the Secure Local Jobs package of measure out from the *Government Procurement Act 2001*.

(b) The coverage of the provisions

"[We] see the Secure Local Jobs Code as a positive step to ensuring only professional and ethically managed companies tender for ACT Government contracts - it ensures a level playing field for all businesses within the ACT."

– Sch 2.2(a)(xi)

"If the Secure Local Jobs Code is to remain, there should not be any broadening of the scope of industries and services covered. Rather, the Code should as a matter of priority exclude small, low-cost procurement activities and only apply at a meaningful level of business turnover."

– Sch 2.2(a)(xi)

"Current selection appears to remain valid. With the increase in gig economy, Sch 2.2(a)(xi) would recommend that consideration be given to ACT Government procurement spend to understand if the scope needs to be broadened to cover other products and services."

– Sch 2.2(a)(xi)

Is the scope and coverage of procurements for territory-funded work adequate?

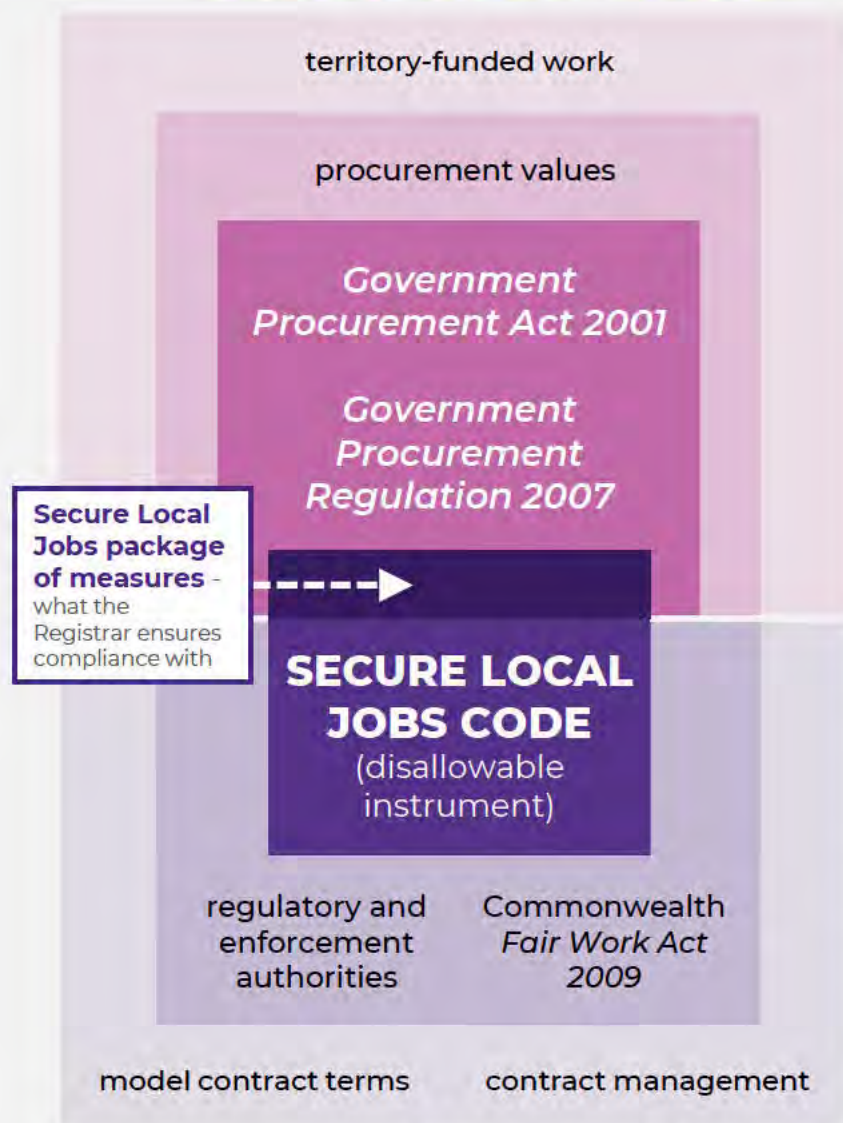
Issues

- ▶ the definition and scope of procurements covered by the Code could be clearer and better articulated as procurement officers are often unaware of the scope and coverage of territory-funded work
- ▶ the Registrar receives daily requests for interpretation on whether a particular procurement is within scope. This takes up a significant amount of time and diverts resources from other core business
- ▶ procurements under \$25,000 are not reported across Government which makes it difficult to identify and manage compliance with Code obligations under this threshold.

Opportunities

- ▶ simplify the definition of territory-funded work to provide clarity about procurements 'in scope'
- ▶ develop additional resources (communications tools, decision trees) to clarify definitions of territory-funded work
- ▶ develop additional resources (communications tools, decision trees) to clarify definitions the scope of procurements covered by the Code specific to each industry
- ▶ provide additional resources to the Secure Local Jobs Code Branch to respond to queries from Territory Entities and industry (industry liaison) and develop educational material.

(b) The coverage of the provisions



Does the Secure Local Jobs Code package of measures need to be improved/enhanced? If so: why and how?

Observations

The *Government Procurement Act 2001* (the Act) provides the Registrar with limited administrative powers to:

- ▶ approve auditors
- ▶ issue Code certificates to entities
- ▶ sanction Code certificates
- ▶ undertake investigations into compliance (i.e. can request info from Code Certified Entities following complaint)
- ▶ initiate audits of Code Certified Entities for compliance purposes.

The Act does not have comprehensive investigative, inspection, regulatory or enforcement powers like other regulatory bodies such as the Work Safety Commissioner and Commissioner for Revenue.

The Registrar's powers are administrative for the purposes of procurement. The Registrar operates within the limitations of being an

administrative function and refers to other regulators for investigation, enforcement and evidence of non-compliance with prescribed legislation.

Positive obligations on Code Certified Entities assist the Registrar to enhance Code compliance activities as they enable evidence to be obtained simply through internal compliance unit investigations. For example, principal contractors must use Code certified sub-contractors and must notify the Registrar within 5 days of an adverse finding.

The Registrar can initiate an internal investigation or engage an approved auditor to investigate non-compliance with Code obligations. To date, the Registrar has only initiated internal investigations and has not engaged an approved auditor to conduct an audit on a Code Certified Entity.

(b) The coverage of the provisions

Issues

- ▶ there have been many challenges associated with stakeholders' expectations around compliance and enforcement activities and the role and scope of the Registrar
- ▶ the Registrar has administrative powers to enhance compliance with the Code using the Government's purchasing power to promote compliance with applicable law, not prosecuting for non-compliance with applicable law.

Does the Secure Local Jobs Code package of measures need to be improved/enhanced? If so: why and how?

Opportunities

Enhance the existing suite of tools to put greater emphasis on pre-procurement measures. These may include:

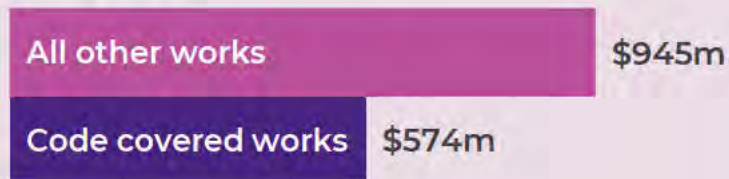
- ▶ strengthen requirements to obtain a Code certificate
- ▶ providing resourcing to enable the Secure Local Jobs Code Branch to perform centralised LRTWE Plan assessments with IT systems to support reporting on LRTWE Plan commitments whilst under contract
- ▶ requiring tender evaluation teams to consider tenderer's past history of compliance with Code obligations and any sanctions applied by the Registrar
- ▶ resourcing of the Secure Local Jobs Code Branch to enable pro-active compliance initiatives with Code Certified Entities (for example, spot checking of contracted entities).

Amend the *Government Procurement Act 2001* and *Government Procurement Regulation 2007*. These may include:

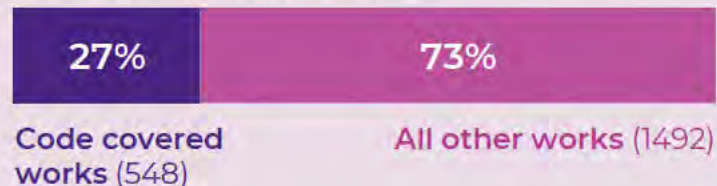
- ▶ redraft legislation and package of measures to provide the Registrar with increased powers for investigation and enforcement
- ▶ redraft legislation to provide the Registrar with powers of entry, inspection powers and the ability to request information from a site or Territory premises to assist the Registrar in making a determination on compliance with Code obligations
- ▶ redraft LRTWE Plan requirements in the legislation
- ▶ review the application threshold for LRTWE Plans and consider this based on industry requirements.

(b) The coverage of the provisions

VALUE OF territory-funded WORKS (CURRENT CONTRACTS) COVERED BY THE CODE



PROPORTION OF territory-funded WORKS (CURRENT CONTRACTS) COVERED BY THE CODE



Source: ACT Government Contracts Register. Data includes all ACT Government contracted works recorded on the Contracts Register from 15 Jan 2019 as at 4 December 2020. Please note this does not include contracts under \$25,000.

Can the SLJC be incorporated into contracts whenever they are renewed or varied?

Observations

Incorporating the Code as part of a contract renewal or variation is a change of procurement scope – this may require the Territory to provide the contractor with the opportunity to review their offer.

The Registrar cannot cancel contracts:

- ▶ termination rights for Territory contracts are a matter of individual contract and are administered by individual Territory Entities
- ▶ failure to maintain a Code certificate while under contract is a breach of contract – the right to remedy provisions may be hindered by the Code.

There is inconsistent reporting of new contracts and contract variations across directorates to the Contracts Register within the legislated timeframes (i.e. contracts over \$25,000 must be reported within 21 days of contract execution).

Issues

- ▶ not all directorates use the OSQAR tool for simple procurements of goods or services (\$25,000 - \$200,000)
- ▶ OSQAR does not cover construction works
- ▶ what happens if a Code certificate is removed from a Code Certified Entity (other open Government contracts, contract remedy requirements, reapplication period, impact upon project delivery, for example, half way through building a bridge?)

Opportunities

- ▶ consider obtaining further legal advice on varying existing contracts to incorporate the Secure Local Jobs Code requirements.

(b) The coverage of the provisions

Have Labour Relations, Training and Workforce Equity (LRTWE) Plans contributed to achieving the objectives of the Secure Local Jobs Code?
What improvements to LRTWE Plans could be made?

Observations

Procurements covered by the Code with an estimated value of \$25,000 and above require tenderers to develop and submit LRTWE Plans. These have a weighting of 10% at the evaluation stage.

Procurement officers or tender evaluation teams assess individual LRTWE Plans for each procurement. There is currently no evaluation framework to assess LRTWE Plans which means that there can be variation of assessment ratings and inconsistent feedback to tenderers.

For example, directorate procurement officers regularly enquire with the Registrar about what constitutes a good LRTWE Plan and a poor plan? The current lack of clarity means that Plans are being rated generally (i.e. everyone gets a score of 7/10) or they are being assessed inconsistently (i.e. a tenderer gets an 8/10 from one evaluation team and a 6/10 from another).

Consultation feedback suggested

that clarifying the scope and purpose of LRTWE Plans at the tender application and evaluation stage would be useful.

The \$25,000 threshold can be challenging for small businesses or sole traders tendering for low value procurements as it adds an extra layer of administration, often for business owners. For businesses with small numbers of staff it is unclear what the value is to them or the Territory.

Ongoing compliance with LRTWE Plans throughout the life of the contract is also problematic.

Contractor compliance with LRTWE Plan commitments is not being managed effectively through contract management processes.

There is no central database to record LRTWE Plans or contractor compliance with commitments made in plans. This means past performance is not informing tender evaluations.

Current LRTWE Plan thresholds

Procurement threshold	LRTWE Plan requirements
< \$25,000	No LRTWE Plan required
> \$25,000	LRTWE Plan required for: <ul style="list-style-type: none">▶ construction▶ traffic management▶ security▶ cleaning
> \$200,000	LRTWE plan required for: <ul style="list-style-type: none">▶ labour services

The \$25,000 threshold does not always make sense. For example, a \$25,000 contract could be a 12 month contract for a sole trader cleaning company or a couple of days for a contract in construction.

(b) The coverage of the provisions

Have Labour Relations, Training and Workforce Equity (LRTWE) Plans contributed to achieving the objectives of the Secure Local Jobs Code?

What improvements to LRTWE Plans could be made?

Issues

The intended outcomes of LRTWE Plans are unclear to businesses

- ▶ the questions used to develop a LRTWE Plan are open ended and give little indication of what the Territory is hoping to achieve
- ▶ LRTWE Plans do not include a section detailing how contractors will ensure sub-contractor compliance
- ▶ this in combination with the issues around inconsistent assessments can leave businesses unsure of best practice and what they should be aiming for.

The scope of application for LRTWE Plans is too broad

- ▶ the current \$25,000 threshold is too low as the risk to the Territory for small contracts is low but the likelihood of non-compliance is high and difficult to monitor
- ▶ the process to develop and maintain LRTWE Plans requires an extra layer of administration, particularly for small businesses and sole traders where there is limited application

- ▶ it is difficult to demonstrate progress against commitments in a LRTWE Plan over the life of a short or small contract.

LRTWE Plans are not assessed consistently

- ▶ each LRTWE Plan is assessed by individual procurement officers or tender evaluation teams. This means that businesses with multiple tenders across Government can receive variable assessment ratings
- ▶ businesses do not clearly understand what makes a good LRTWE Plan, what they should be aiming for, or how they can improve going forward
- ▶ there is no consistent framework to evaluate LRTWE Plans or to capture the data.

Limited oversight of compliance while under contract

- ▶ the Registrar has no oversight of contractor or contract manager compliance with LRTWE Plans throughout the life of the contract.

Opportunities

Procurement threshold	LRTWE Plan requirements
< \$25,000	No LRTWE Plan required
> \$25,000	LRTWE Plan required for: <ul style="list-style-type: none">▶ traffic management▶ security▶ cleaning
> \$200,000	LRTWE Plan required for: <ul style="list-style-type: none">▶ labour services▶ construction

- ▶ review the application threshold for LRTWE Plans, consider thresholds based on industry needs
- ▶ provide targeted questions and metrics to encourage best practice in application form, for example minimum of 10% female workforce
- ▶ centralise LRTWE Plans to consistently evaluate and provide feedback to industry on best practice
- ▶ contract managers regularly report to the Registrar (centralised database) on contractor compliance with Code obligations while under contract.

(c) Complaints and disputes



29 complaints received

12 complaints investigated



7 investigations resulted in no further action

5 sanctions issued from complaint investigations



Are there any practical improvements that could be made to the current provisions and processes for dealing with complaints and disputes?

Observations

The ACT Government Solicitor has provided advice to successive Registrar's dealing with complaints on the operation and interpretation of Section 15 of the Code. Successive Registrars have acted on this advice when dealing with complaints or allegations of non-compliance with obligations in Section 15 of the Code.

This has resulted in industry stakeholders being dissatisfied with the Registrar for failing to deliver compliance outcomes aligned to their understanding and expectations of the scope of the Code and the regulatory powers of the Registrar.

The implementation of Smart forms has standardised complaint submissions and provides prompts for information which has improved consistency. Often insufficient evidence is available to initiate an investigation.

Issues

- ▶ There have been many challenges associated with stakeholders' expectations around complaints to the Registrar for alleged breaches of the Code, for example the Registrar removing a Code certificate and cancelling the contract between the Territory and the Code Certified Entity
- ▶ The Registrar has no legislated authority to cancel a contract between the Territory and a Code Certified Entity. Termination rights for Government contracts are a matter of individual contract and are administered by individual Territory Entities.

Opportunities

- ▶ complaints submissions would benefit from additional supporting evidence – this would provide a firmer evidence base to initiate an investigation
- ▶ review Complaint Guidelines.

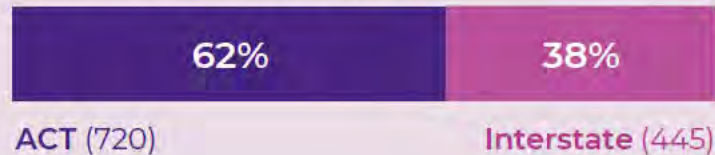
(d) Impact on small and medium business

Examine the impact of the legislation on procurement with small and medium local business

Proportion of contracted Code Certified Entities THAT ARE SMALL BUSINESSES



Proportion of contracted Code Certified Entities BASED IN THE ACT



Source: Secure Local Jobs Code Register as at 4 December 2020. Small business is defined as any business with 0-19 employees as per the Australian Bureau of Statistics.

Observations

It is difficult to ascertain the impact of the Secure Local Jobs Code on small and medium sized businesses as there is limited data available.

Consultation feedback focussed largely on LRTWE Plans.

The requirements for LRTWE Plans may have a disproportionately prohibitive effect on small businesses. Due to their smaller size they may not have the personnel or knowledge at their disposal while larger businesses tend to have more defined processes in place. For businesses with small numbers of staff it is unclear what the value is to them or the Territory.

Smaller businesses tend not to have staff that are specialised with this kind of employment relations. This reinforces the need for the Registrar to provide education to ensure they are equipped to comply.

The Code adds another procurement hurdle for businesses. There are numerous procurement requirements that must be met by an entity seeking to enter into contracted work with the Territory. Many of these requirements use different systems and are managed by different areas of the ACT Government.

This requires entities to be across varying sets of requirements and engage with different areas of Government for one contract.

It is important that the Registrar strikes the right balance between ensuring compliance and not imposing an undue burden on businesses when determining the length of an entity's Code certification.

(d) Impact on small and medium business

Examine the impact of the legislation on procurement with small and medium local business

"The additional level of extra compliance and paperwork means that many [small businesses] are effectively excluded from bidding for relevant procurement work."

– Sch 2.2(a)(xi)

"Any move to increase the regulatory burden of the Secure Local Jobs Code in the short term would threaten the viability of many local businesses at a time when they most cannot afford to absorb this cost."

– Sch 2.2(a)(xi)

"We believe the enforcement of the Secure Local Jobs Code obligations has been effective as it ensures better documentation and reporting processes are in place, especially for smaller entities."

– Sch 2.2(a)(xi)

Issues

- ▶ the process to develop and maintain LRTWE Plans requires an extra layer of administration, particularly for small businesses and sole traders where there is limited application
- ▶ it is unclear what the value of LRTWE Plans is for small businesses and sole traders where there is limited application
- ▶ the initial audit process can be considered cost prohibitive for small businesses particularly when there is significant competition with bigger companies and no guarantee of winning the tender.

Opportunities

- ▶ refer to considerations for LRTWE Plans (see page 26)
- ▶ ensure any changes to the Code align with procurement legislation and policies to ensure a more streamlined process for businesses (i.e. implementation of the *Labour Hire Licensing Act 2020*)
- ▶ increase resourcing to provide tailored education on Code operations and obligations to support small and medium businesses to engage with ACT Government tenders
- ▶ continue to be diligent in assessing applications for Code certification, and ensure that the length of certification strikes the appropriate balance between promoting compliance and not imposing undue burden on businesses.

(e) Audit function

Audit pricing

Business size	Indicative cost
Micro-business (0-9 employees)	\$450 - \$750
Small business (10-49 employees)	\$500 - \$1300
Medium business (50-249 employees)	\$600 - \$1600
Large business (250+ employees)	\$700 - \$2900

In-housing the audit function would standardise costs and allow better access to information supporting investigations however costs of audits may increase if in-housed. For example, the market currently sets costs with some variation and entities can make an informed decision by seeking quotes from one of the 30 approved auditors.

Costs for obtaining an audit to obtain a Code certificate are generally expected to be passed on to Government through the procurement process. Code certificates are typically valid for 18-24 months depending on the business.

Explore options for building capacity over time to have the auditing work undertaken by public servants

Observations

Audits to obtain Code certification

An entity is required to have an audit undertaken by an approved auditor in order to submit an application for Code certification (including application for renewal of Code Certificate).

Approved auditors perform a function to inform the Registrar and are required to meet certain standards in order to maintain their approved auditor status. When there is a lack of awareness of the Code and its obligations, approved audits may provide advice to applicant on Code requirements as well as conducting an audit.

Compliance audits

The Registrar may engage an approved auditor to undertake an audit to identify non-compliance.

The compliance audit function has not been exercised. As the operation of the Code touches on a number of existing regulated areas, compliance auditing is challenging and may not deliver certainty of outcome for the Territory. This is mainly because key aspects of what is being audited relate to whether the contractor has

complied with legal obligations that are regulated outside of the Code (i.e. industrial relations matters). Unless the relevant tribunal or regulatory body has found the contractor to have breached the relevant regulatory framework, audit findings are likely to be resisted by a contractor.

Further, contractual enforcement of such an audit finding may be problematic and is likely to be resisted by the contractor, who may wish to mount legal challenge should the Territory seek to terminate a contract for non-compliance with Code obligations.

Alignment with other ACT Government audit functions

Consultation feedback on in-housing the audit function provided a wide range of responses.

Auditors and industry stakeholder consultation feedback supported maintenance of the existing audit arrangements whilst unions recommended in-housing the audit function. There is currently limited data available to make an informed decision about the benefits of in-housing the audit function.

(e) Audit function

Explore options for building capacity over time to have the auditing work undertaken by public servants

Issues

Maintaining the current system of approved auditors

- ▶ Registrar has no access to information that informs audit reports
- ▶ quality and consistency of audit reports can vary, however the Registrar conducts regular training with approved auditors to outline performance expectations
- ▶ reliance on approved auditors to provide comprehensive advice to inform the Registrar's decision on issuing a Code Certificate
- ▶ perceived risk of commercial relationships is actively managed through the Audit Guidelines
- ▶ the secondary audit function is yet to be exercised and it is difficult to demonstrate the value or benefit of this function at this time
- ▶ maintaining an independent audit function mitigates risk by separating powers of Government auditing its own legislation and regulation.

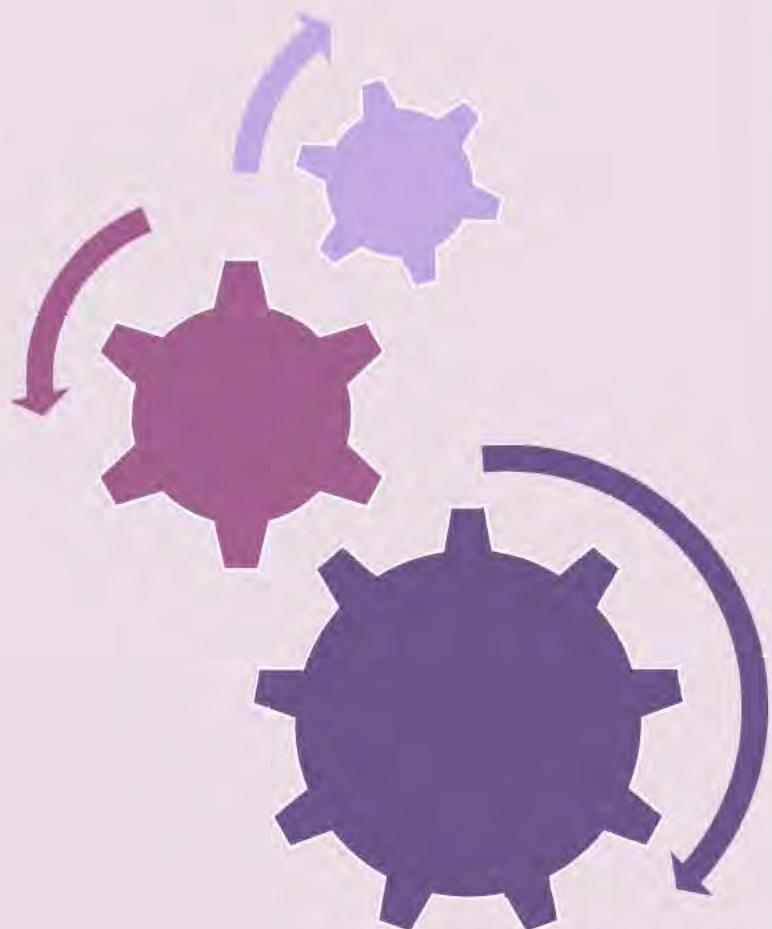
In-housing the audit function

- ▶ in-housing the audit function would have a financial impact upon approved auditors, most of which are local small businesses
- ▶ there would be no competitive pricing options for applicants to seek quotes (potential cost escalation for small business applicants)
- ▶ there is limited information available about market demand, pricing, operating overheads. Costs associated with in-housing would likely be passed on applicants with no guarantee of obtaining territory-funded work
- ▶ introducing risk to Government by removing the separation of powers to audit its own legislation and regulation
- ▶ Sch 2.2(a)(xi) and other industry stakeholders did not support in-housing the audit function without further understanding the operational impacts.

Opportunities

- ▶ maintain existing external audit arrangements but engage through Government to avoid perceived conflicts of interest
- ▶ consider separate funded review to assess market demand, pricing, operating overheads through evidence-based analysis and full costing associated with in-housing the audit function
- ▶ review purpose of secondary audit function in conjunction with any recommended changes to investigation and enforcement powers
- ▶ explore options to in-house the audit function in line with other Government priorities (i.e. implementation of the *Labour Hire Licensing Act 2020*).

Appendix A: **Methodology**



Review methodology

- ▶ review relevant legislation as it relates to the operation of the Code
- ▶ uphold stringent governance protocols, including:
 - understand and comply with relevant legislation
 - project management framework and an evidence-based approach
 - information management (document security, record keeping, handling sensitive information with care)
 - accountability and engagement
- ▶ identify and review relevant information and documentation including the governance and accountability framework and related policy and procedures
- ▶ identify and document internal controls and procedures used to give effect to the policies and guidelines and to ensure compliance and evaluating the effectiveness of these controls
- ▶ interviews and discussions with key staff at CMTEDD and other relevant Territory Entities, industry representatives and other stakeholders, and
- ▶ an engagement quality control review.

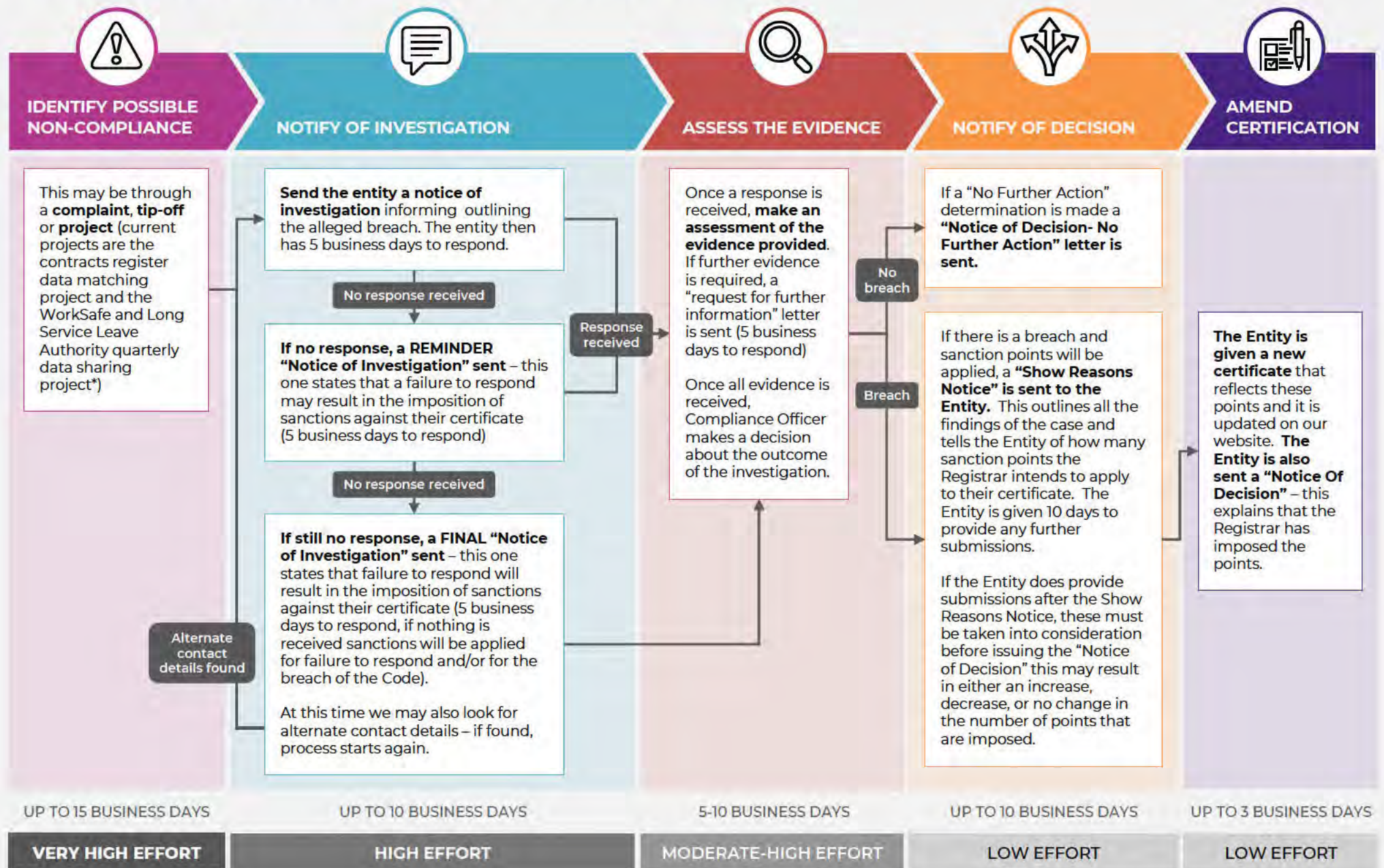
Appendix B: **Stakeholder engagement summary**

Government stakeholder consultation	
Procurement ACT	Glenn Bain - Executive Group Manager, Commercial Services and Infrastructure Sanaz Mirzabegian - A/g Executive Branch Manager, Procurement Policy and Capability Dave Purser - Executive Branch Manager, Goods & Services Procurement
Workplace Safety and Industrial Relations	Michael Young - Executive Group Manager, Workplace Safety and Industrial Relations (WSIR) Ellen Lukins - Senior Director, Regulator Policy (WSIR)
Major Projects	Adrian Piani - Executive Group Manager, Infrastructure Delivery Partners David Grey - Senior Director, Contracts and Prequalification Damon Hall - Executive Group Manager, Projects Development and Support
Procurement ACT	Kyla Kerkow - Senior Director, Procurement Policy and Capability Claire Hendrie - Director, Procurement Policy and Capability
TCCS	Elita Barrett - Senior Director, Procurement and contract management
EPSDD	Bruce Fitzgerald - Executive General Manager, Urban Renewal
ACT Health	Colm Mooney - Executive Group Manager, Infrastructure and Health Support Services Andrew Murphy - Director, Procurement Contracts
JACS	Melissa Tierney - Executive Branch Manager - ICT, Capital Works & Infrastructure Kuga Kugathan - Senior Director, Capital Works and Infrastructure
Education	Andrew Parkinson - Executive Branch Manager, Infrastructure and Capital works

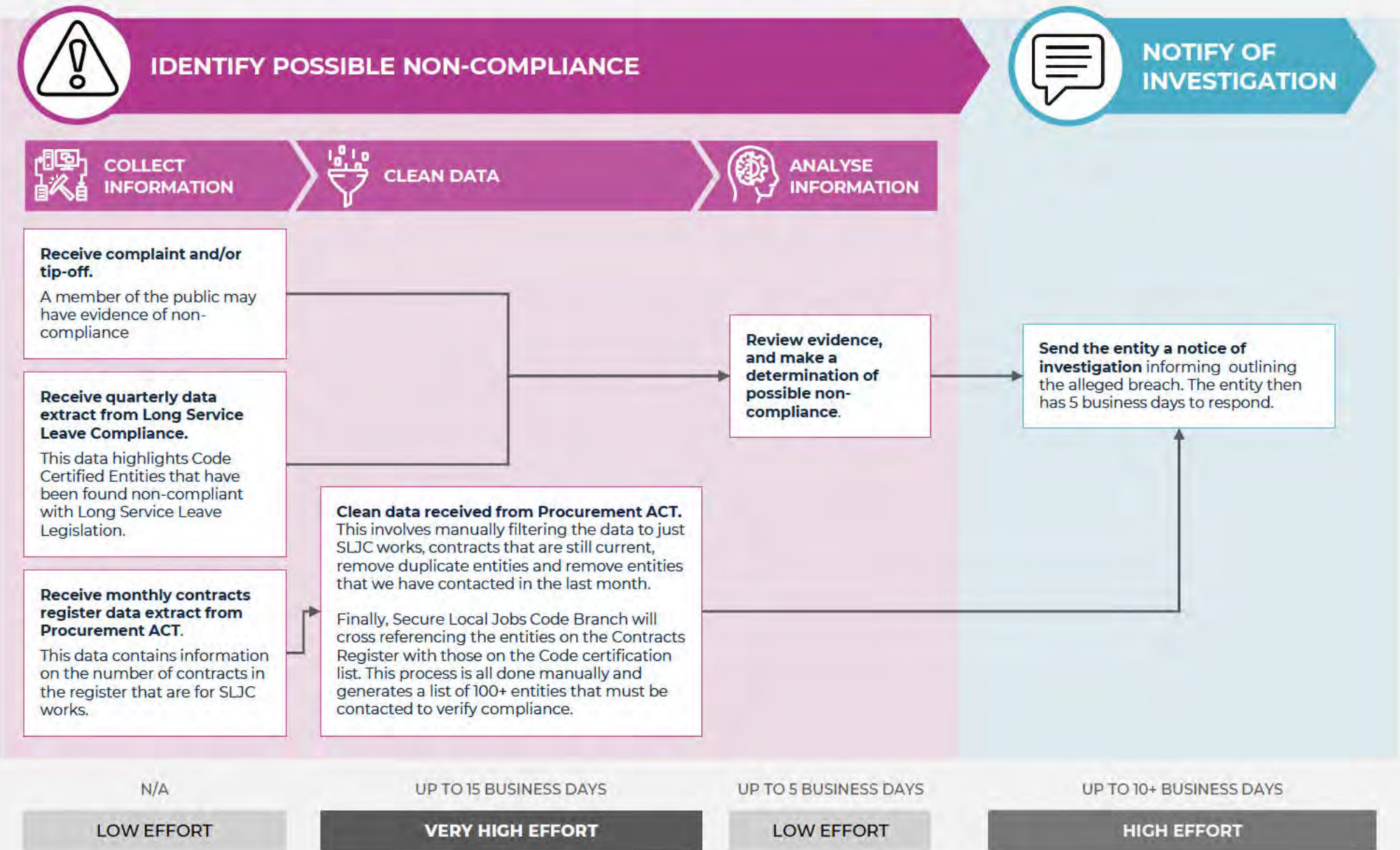
Industry stakeholder submissions

Sch 2.2(a)(xi)

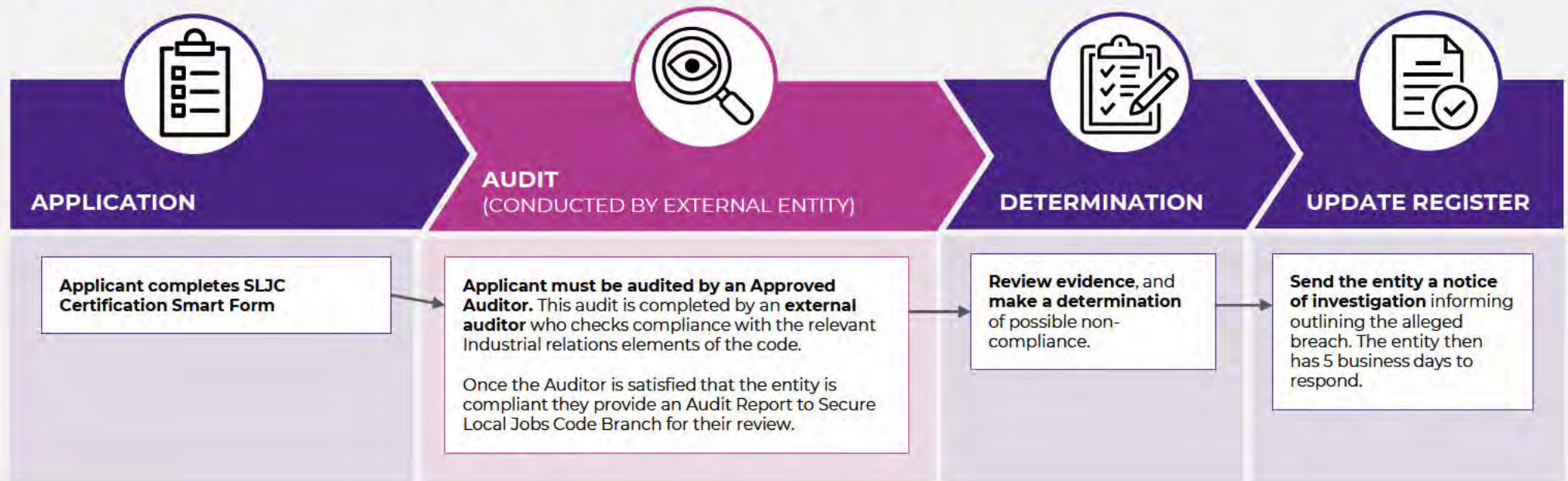
Investigating non-compliance



Identify possible non-compliance



Certification and renewal process



CONTACT INFORMATION

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Secure Local Jobs Code Registrar

Secure Local Jobs Code Branch

Workforce Capability and Governance | CMTEDD | ACT Government

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