



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 2018-0215

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)	35
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](#)
Subject: Freedom of Information request
Date: Tuesday, 21 August 2018 1:58:23 PM

Please find online enquiry details below. Please ensure this enquiry is responded to within fourteen working days.

Your details

All fields are optional, however an email address OR full postal address must be provided for us to process your request. An email address and telephone contact number will assist us to contact you quickly if we need to discuss your request.

Title:

First Name:

Last Name:

Business/Organisation:

Address:

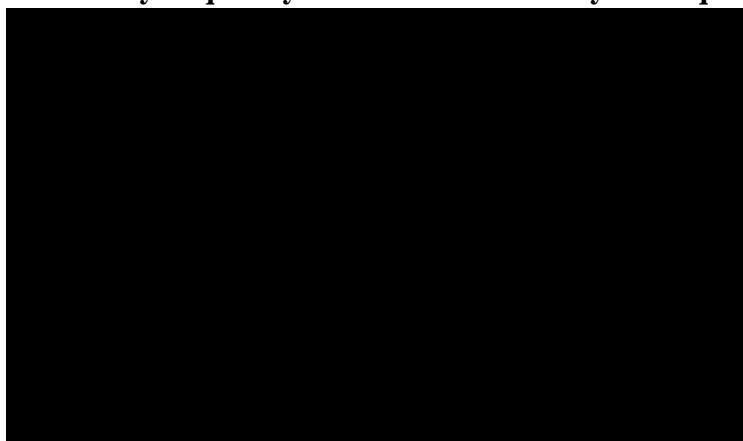
Suburb:

Postcode:

State/Territory:

Phone/mobile:

Email address:



Request for information

(Please provide as much detail as possible, for example subject matter and relevant dates, and also provide details of documents that you are not interested in.)

Under the Freedom of Information Act 2016 I want to access the following document/s (*required field):

Copies of any submissions (including draft submissions) made by the Construction, Forestry, Mining and Energy Union, or the Construction, Forestry, Maritime, Mining and Energy Union, in relation to the ACT Secure Local Jobs Code, including draft codes and versions, and the proposed Government Procurement (Secure Local Jobs) Amendment Bill 2018 and associated documents.

I do not want to access the following documents in relation to my request::

Thank you.
Freedom of Information Coordinator



ACT
Government

Chief Minister, Treasury and
Economic Development

Our ref: CMTEDDFOI 2018-0215

[REDACTED]

via email: [REDACTED]

Dear [REDACTED]

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 24 August 2018 in which you sought access to information under the *Freedom of Information Act 2016* (the Act).

Specifically, you sought access to:

“Copies of any submissions (including draft submissions) made by the Construction, Forestry, Mining and Energy Union, or the Construction, Forestry, Maritime, Mining and Energy Union, in relation to the ACT Secure Local Jobs Code, including draft codes and versions, and the proposed Government Procurement (Secure Local Jobs) Amendment Bill 2018 and associated documents.”

Authority

I am an authorised Information Officer appointed by the Director-General of CMTEDD 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 was required to provide a decision on your access application by 18 September 2018. However, the due date has been extended to 10 October 2018 due to third party consultation.

Third Party Consultation

In making this decision, I completed consultation with a relevant third party in accordance with section 38 of the Act. The views of identified third party were taken into account in making this decision.

Decision on access

A search of CMTEDD records was conducted and resulted in one document being identified that fall within the scope of your request.

I have decided to grant partial access to the document as I consider the redacted information would, on balance, be contrary to the public interest to disclose under the test set out in section 17 of the Act.

I have included as Attachment A to this letter the schedule of document. This provides a description of each document that falls within the scope of your request and the access decision for each of those documents. The document 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 decision is below.

Statement of Reasons

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

- the Act;
- the content of the documents that fall within the scope of your request; and
- the views of a relevant third party.

Exemption claimed

My reason for deciding not to grant full access to components of the identified document is as follows:

Public Interest Test

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.

Factors favouring disclosure (Schedule 2 section 2.1)

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 factor in favour of disclosure is relevant to determine if release of the information contained within these documents is within 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;*

The documents identified as being within the scope of the request provide CFMEU's views and recommendations in relation to the draft Secure Local Jobs Package. The

package is intended to be developed with input from the public. I consider the release of CFMEU submission is a matter of public interest as I consider it to be important information being considered by the Directorate in the development of the Package. I am satisfied that this factor favouring disclosure carries significant weight.

Factors favouring non-disclosure (Schedule 2 section 2.2)

Taking into consideration the information contained in the document found to be within the scope of your request, I have identified that the following public interest factor in favour of non-disclosure is relevant to determine if release of the information contained within these documents is within the 'public interest'.

- (a) *disclosure of the information could reasonably be expected to do any of the following:*
- (xi) *prejudice trade secrets, business affairs or research of an agency or person;*

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 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.

When considering the document and factors in favour of non-disclosure, I have considered the impact to a business if certain information is made public. In the submission, CFMEU has provided a live case example to support their position on the 'right to collective bargaining and freedom of association'. I consider the release of the identifying information of the business could prejudice business affairs of that business by damaging its reputation or creating unnecessary tension between the business and its employees. I am satisfied that this factor favouring non-disclosure carries very significant and as a result I have decided to exempt from release the identifying information of the business.

Noting the pro-disclosure intent of the Act, I am satisfied that redacting only the information that is not in the public interest to release, while releasing the rest of the documents will ensure the intent of the Act is met and will provide you with access to the majority of information held by CMTEDD within the scope of your request.

Charges

Pursuant to *Freedom of Information (Fees) Determination 2017 (No 2)* processing charges are not applicable for this request because the total number of pages to be released to you is below the charging threshold of 50 pages.

Online publishing – Disclosure Log

In accordance with section 28 of the Act, CMTEDD maintains an online record of access applications in the form of a disclosure log. Your original access application, my decision

and document released to you in response to your access application will be published in the CMTEDD disclosure log after 15 October 2018. Your personal contact details will not be published. The CMTEDD disclosure log is at <http://www.cmd.act.gov.au/functions/foi/disclosure-log>.

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.

If you wish to request a review of my decision 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,



Daniel Riley

Information Officer

Information Access Team

Chief Minister, Treasury and Economic Development Directorate

10 October 2018



ACT
Government

Chief Minister, Treasury and
Economic Development

FREEDOM OF INFORMATION REQUEST SCHEDULE

NAME	WHAT ARE THE PARAMETERS OF THE REQUEST	Reference NO.
	Copies of any submissions (including draft submissions) made by the Construction, Forestry, Mining and Energy Union, or the Construction, Forestry, Maritime, Mining and Energy Union, in relation to the ACT Secure Local Jobs Code, including draft codes and versions, and the proposed Government Procurement (Secure Local Jobs) Amendment Bill 2018 and associated documents.	CMTEDDFOI 2018-0215

Ref No	Page number	Description	Date	Status	Reason for Exemption	Online Release Status
1	1-8	Submission by the CFMEU regarding the draft Secure Local Jobs Package	16/4/2018	Partial	Sch 2 s2.2(a)(xi)	Yes
Total No of Docs						
1						

Submission by the CFMEU regarding the draft Secure Local Jobs Package

16 April 2018

1. Introduction

We thank the ACT Government for providing the draft Secure Local Jobs Package (Package) for feedback. We note that the ACT Government made an election commitment that it would introduce a Secure Local Jobs Package within the first one-hundred days of Government. While this Package is yet to be finalised, we also note that the Chief Minister, in his statement to the Legislative Assembly on the 13th February this year, stated that the introduction of the Package would be a key priority for the Government in 2018.

Given the ACT Government procures approximately \$1.8 billion of goods, services, and works annually, improving the industrial relations practices of entities tendering for Government contracts will substantially improve the working conditions of people in the ACT. We believe that not only will this benefit the workers directly engaged by companies tendering for Government work, but that this improvement in workplace culture will flow to the industry more broadly, benefitting even more workers and Canberrans.

However, the CFMEU does have concerns regarding some elements of the draft consultation document. In some instances, this document falls short of commitments previously made. Elsewhere, the document is vague with regard to enforceable obligations on entities contracting with the ACT Government. In both these instances, we believe previously made commitments should be upheld, and that clearly outlining the obligations and responsibilities of entities will improve compliance and protection for workers.

2. Coverage

The CFMEU agrees with the Package targeting industries that are prone to insecure work and vulnerable employment. As the document outlines, the Package will apply to all contracts, regardless of the value, for categories of labour identified as – cleaning, security, building and construction, and courier services.

However, there is a need to clearly specify which occupations will be covered to ensure the objectives of the package are met. In many instances, there are occupations that play a vital role in these industries, but which may not be formally defined as being within these industries. For example, traffic controllers play an integral role in the building and construction industry, especially with projects that are taking place in high traffic areas. Many of the employment arrangements in traffic control companies, and other

occupations that provide services to the construction feature similar employment arrangements to the industry as a whole. In addition, the ACT Government is a high-level user of traffic control workers on a labour hire basis for traffic control associated with special events and the like.

While this work is not performed in the construction industry it is often performed by the same employees of traffic control companies contracted to the ACT Government who are on other days performing work in the construction industry. It is reasonable that the same regulatory arrangements should apply to traffic control contracted to the ACT Government for special events, as applies in the construction industry more generally. As such, traffic controllers and other ancillary services, provided in connection with the stated industries should also be included.

Recommendation

- **Ensure occupations and sectors that play vital ancillary roles to the industries covered are also included in the coverage;**
- **Modify point (b) to say:**
 - ***“all contracts, regardless of the value, for categories of labour identified as – for or in connection with Cleaning; Security; Building and Construction; Courier Services and Traffic Control and Management, or any contracts for services primarily related to the above.”***

3. Local Jobs Code

While the CFMEU supports legislating the primary components of the Package, it is our view that some elements may be dealt with as a legislative instrument issued by the Minister.

As we have set out on previous occasions, the ACT Government retains administrative powers pertaining to contractual arrangements. Therefore, once a legislative provision was enacted that facilitated the making of a Local Jobs Code (Code), the relevant Minister would have the power to determine its contents. We believe this would be beneficial as it would allow the Government to more readily respond to changing circumstances in the affected industries.

Union Participation in Inductions

In terms of the Code itself, we propose that the elements relating to workplace inductions and meetings, the right to organise and collectively bargain, and delegate rights be set out in significant detail.

For example, the active participatory role of unions in inductions should be detailed specifically in the Code itself. This should specify that an opportunity will be provided to speak directly to the workers at inductions without the presence of management personnel for a reasonable time during the induction. It should be clearly stated that this is to occur during the induction, and not before the induction is commenced or once it is completed.

We understand some parties have raised the possibility that a requirement in the Code that relates to unions involvement in inductions may conflict with the right of entry provisions outlined in the Fair Work Act. This view is incorrect. Entities are entitled to invite union officials onto their site and this is what the Code would seek they agree to.

In addition, the Code is not an instrument or part of an instrument covered by the Fair Work Act.

The Right to Collective Bargaining and Freedom of Association

The Code should also ensure that entities covered by the Code respect the right of workers to organise and collectively bargain. This requires that the Code prohibits behaviours and activities aimed at limiting this right.

As one example, entities covered by the Code must acknowledge that the default representative of union members is the union, and should not attempt to bypass employee representatives by putting a proposed enterprise agreement to their employees directly. Similarly, they should not attempt to pressure employees into revoking the bargaining status of the relevant trade union or appointing or altering the status of any other bargaining representative.

The Union is aware that this kind of interference with employees' rights to representation has occurred in a number of instances with entities that tender for work with the ACT Government.

For example: **Sch 2 s2.2(a)(xi)**

██████████ The Company conducted a process wherein employees were encouraged or required to appoint individual bargaining representatives other than the Union. The effect of these appointments was to nullify each union members' pre-existing default right to Union representation. Employees of the Company gave statements to the Union that the Company did not inform them that by appointing an individual representative they would exclude the Union from bargaining. When some employees sought to reappoint the Union as their representative the Company again encouraged those employees to rescind their appointment of the Union and appoint individual representatives instead of the Union.

The Company also encouraged employees to resign from the Union during bargaining. While this process was ongoing the Company continued to purport to bargain with its employees and refused to meet with the Union. While the Union was eventually able to participate in negotiations in a limited manner, it is not coincidental that the agreement which was eventually concluded was significantly less beneficial for employees than other comparable agreements concluded with the Union.

It is the Union's view that there is no legitimate reason why an employer would or should conduct a process which requires employees to nominate a bargaining representative. Employees do not require assistance with this process. The requirements of the Fair Work Act 2009 are such that an employee may nominate their representative simply by identifying that representative in writing and providing the nomination to the employer.

In addition, union members are not required to identify a representative at all in order to be represented. In the circumstances, it can be reasonably concluded that employers who conduct bargaining representative nomination processes are doing so in an attempt to interfere with employees' freedom of association and rights to representation.

The Code must ensure that covered entities cannot bypass employee representatives and that the right of workers to be represented by their union in bargaining is respected. The Code should make it clear that code covered entities must not interfere in

employee choice in relation to bargaining representation and that it is not appropriate for code covered entities to encourage, incite, require, support or facilitate any process which affects an employee's right to appoint a bargaining representative of any kind or to rely on their union as their representative for the purpose of s 176 of the *Fair Work Act 2009*.

The Code must also recognise the right of workers to organise and collectively bargain by allowing payroll deduction of union membership fees, allowing the union to distribute material in the workplace, and giving consideration to the size of the entity, providing facilities for union delegates in the workplace. Similarly, the Code should specifically prohibit any entity from advising, encouraging, inciting or assisting an employee in resigning their membership from their trade union.

Union Delegates' Rights

With regards to the rights of delegates, the Code must be specific about having the right to perform duties within working hours for a specified minimum amount of time per week. The size and the nature of the entity will impact how much time is appropriate. For the building and construction industry, we believe that 2 hours per day is adequate. In addition, delegates should be allowed reasonable access to relevant training that will assist them in their obligations.

Paid Domestic Violence Leave

The CFMEU also believes that the Code should require that code covered entities provide their employees with an enforceable entitlement to 10 days paid domestic violence leave. Domestic and family violence continues to be a serious issue in the ACT and Australia more broadly.

We note that the ACT Government has already written to the Fair Work Commission in support of reform to national workplace laws that would make paid domestic and family violence leave a mandatory provision in all employment contracts. We also note that the ACT Government has included this leave entitlement in ACT public sector employment agreements.

Including a requirement in the Code that all entities must provide an enforceable entitlement to 10 days paid domestic and family violence would further the ACT Government's objective of ameliorating the negative effects of domestic violence in the local community.

Recommendations

- **The Code should specify a participatory role for unions in meetings and inductions in the Code.**
- **In the course of collective bargaining, the Code should specifically prohibit entities from any of the following conduct:**
 - Advising, encouraging, inciting, assisting or coercing an employee of the code covered entity to appoint a bargaining representative or revoke the bargaining status of a relevant bargaining representative including but not limited to their trade union;
 - Meeting with relevant employees regarding the enterprise agreement or any associated matter without first advising the relevant trade union(s) and giving them a reasonable opportunity to attend the meeting; and

- Distributing a draft enterprise agreement with the intent of seeking the approval from the workforce without first reaching agreement with all bargaining representatives.
- **The rights of delegates should be specified in the Code, including the ability to undertake their duties within work hours and the right to access relevant training.**
- **The Code should include a requirement for the provision of 10 days paid domestic violence leave.**

4. IRE Certification

The CFMEU supports the expansion of the IRE certification system outlined by the ACT Government in the consultation document. However, the system of independent auditing in which the auditor is procured by the entity has caused perverse incentives.

Auditors that undertake stringent audits or who recommend that a contractor not be granted an IRE Certificate risk losing future audit work. This has resulted in many auditors simply undertaking a desktop audit which relies on information provided directly by the contractor, rather than independently verifying the information directly. The CFMEU has observed this occurring in a number of instances in the ACT and has seen auditors recommend contractors be awarded IRE certificates based solely on information provided by the contractor.

It is the CFMEU's view that the auditing process should be conducted by the Government, which could be funded by charging contractors directly for the audit. This would ensure quality, independence, and that the objectives of the system are placed ahead of any profit motive.

In the absence of making the audit process a public service function, the group of approved auditors must be restricted and subject to more stringent duties. Auditors should be held to a strict code of conduct, similar to that of the Australian Accounting Standards Board. This would ensure that auditors act in an ethical way that is consistent with the objectives of the IRE Certificate strategy.

In addition, associated entities or persons of a contractor operating in the industry should be prevented from acting as an auditor. The current list of approved IRE auditors includes the Canberra Business Chamber, the Master Builders Association of NSW and the National Electrical Contractors Association of ACT. Given these organisations play a role in representing the contractors they are auditing, these organisation should not be permitted to undertake audits.

If the audit process is not a public function, at a minimum, auditors should be appointed or allocated to each IRE certificate applicant, by the ACT Government, at random from the pool of authorised auditors. This would avoid the risk of a conflict of interest arising in relation to auditor selection.

In addition, contractors should be restricted in the number of times they can use the same auditor. In circumstances where a further audit is required due to complaints raised regarding a contractor that had previously been granted an IRE Certificate, the company must be prevented from using the same auditor they used initially.

Recommendation

- **Make the IRE auditing process a public service function, the costs of which can be recovered by charging contractors directly**
- **In the absence of making the audit process a public service function, there should be more stringent requirements on the auditing process, including:**
 - Auditors must adhere to a code of conduct, similar to the Australian Accounting Standards Board;
 - Associated entities or persons of a contractor operating in the industry should be prevented from acting as an auditor;
 - Auditors should be appointed/allocated by the ACT Government on a random rotating basis.
 - Contractors should be restricted in the number of times they can use the same auditor; and
 - Where an audit has been triggered due to suspicious circumstances, the contractor should be prevented from engaging the auditor that was engaged previously.

5. Labour Relations, Training and Workplace Equity Plan

The CFMEU supports a provision that requires entities covered by the new arrangements to submit a Labour Relations, Training, and Workplace Equity (LRTWE) plan.

However, we would urge the Government to classify *‘ensuring employment participation amongst Aboriginal and Torres Strait Island workers, women, workers with a disability and workers from culturally and linguistically diverse backgrounds’* as a mandatory criterion, as opposed to one that is just desirable. These are matters critical to a diverse workforce, and which should not be omitted by any employer in their forward planning, especially one tendering for work with the ACT Government.

These changes would align the Package with the previously stated priorities of the ACT Government. In particular, the ACT Aboriginal and Torres Strait Islander Agreement 2015-2018, sets out “Employment and economic independence” as a key focus area and specifically identifies, “increased employment and private enterprise for Aboriginal and Torres Strait Islander peoples in the ACT” as the method of achieving this. Ensuring participation is a mandatory criterion in any LRTWE plans would assist in furthering this objective.

In addition, the approach to apprenticeships should also be a mandatory criterion. The state of the vocational training system for young apprentices is a matter of serious concern, with the number of completed apprenticeships in the ACT falling by one-third from 2015 to 2016.

The future of the construction industry depends on the next generation of construction workers receiving proper training. Ensuring that entities tendering for Government work provide apprenticeships is vital to ensuring the future success of the industry.

Recommendations

- **Include employment participation amongst Aboriginal or Torres Strait Islanders, women, persons with a disability and person from culturally and linguistically diverse backgrounds as a mandatory criterion.**

- **Include the approach to the provision of apprenticeships as a mandatory criterion.**

6. New Compliance Unit

The compliance unit is critical to achieving long-lasting cultural change in the industry. In particular, the Compliance and Enforcement Stream of the Unit must have full inspectorate powers, equivalent to those utilised by WorkSafe in the investigation of safety matters.

As well as being capable of performing investigations, it must be properly resourced to perform investigations into non-compliance with the Local Jobs Code, IRE compliance or LWRTE plans. The compliance unit should also have the ability to directly influence the procurement policies of directorates, so as to ensure that entities which are not Code compliant do not continue to tender and be awarded ACT Government contracts.

The Compliance Unit should be headed by a statutory officer with the unilateral capacity to issue decisions and sanctions in relation to compliance. To achieve this, it may be necessary to keep a degree of separation from the Administrative and Policy Streams, so as to ensure the position is free of real or apprehended bias.

Recommendation

- **Properly empower and resource a strong investigative function in the compliance unit, headed by a statutory officer with decision-making power.**

7. Enhanced Compliance and Enforcement framework

The strikes approach set out in the document is promising, but we propose using a point system, similar to that used for driving offences, would allow for a greater degree of flexibility in awarding penalties to an entity. As an example, the consultation document states that ‘the awarding of a strike will depend on the seriousness of the breach.’ A point system would ensure that any breach, regardless of severity, would be recognised in some way and that less serious breaches could be treated in an appropriate manner.

This would enable the framework to recognise a series of minor breaches in the granting of an IRE Certificate or in any future tendering, rather than just relying on whether or not a strike was awarded.

Regardless of whether or not a strike or a point system is adopted, penalties must also be attributable to associated entities and company directors. The building and construction industry consistently faces issues with pyramid contracting and phoenixing. These business arrangements are designed for the explicit purpose of avoiding liability.

Entities that are likely to fail assessments against either the Code or an IRE Certification audit could potentially use these arrangements to avoid accountability.

Recommendation

- **Adopt a points-based system for Code breaches.**
- **Ensure any breaches are also attributable to associated entities and company directors to ensure accountability.**

8. Conclusion

We thank the ACT Government for the opportunity to provide comment on the draft consultation Secure Local Jobs Package document. As noted previously, the CFMEU supports the adoption of this Package but notes some elements of the Package in which amendments should be made and where a great degree of clarity should be provided, so as to ensure the objectives are met.

If you wish to discuss the contents of our submission or any of our recommendations in greater detail, we are available for further discussion.