

# WESTERN AUSTRALIAN JOBS BILL 2017

## EXPLANATORY MEMORANDUM

### OVERVIEW

The purpose of this Bill is to use the State Government procurement process to enhance local industry participation in the supply of goods and services to or for agencies or the State, with a particular focus on benefits to small and medium enterprises.

This Bill provides for the development of a Western Australian Industry Participation Strategy; obliges agencies to require participation plans in the procurement of certain supplies of goods or services, to assess and consider those participation plans in the procurement process and incorporate supplier commitments into supply contracts; and provides for the determination of strategic projects.

### CLAUSE NOTES

#### Part 1 - Preliminary

##### Clause 1: Short title

This clause provides the short title of the Bill when enacted and its citation.

##### Clause 2: Commencement

This provides that Part 1 of the Bill when enacted (other than sections 3 and 4) comes into operation on the day of Royal Assent and the rest of the Bill on a day to be fixed by proclamation, and allows different days to be fixed for different provisions. This ensures that the commencement date of the Act, regulations and the Western Australian Industry Participation Strategy (WAIPS) can be coordinated.

##### Clause 3: Terms used

This clause contains definitions of various terms used in the Bill. Of particular importance are the definitions of 'agency', 'goods or services', 'local industry', 'small or medium enterprise', 'supply' and 'WAIPS supply'.

The definition of an "agency" includes all departments, all sub-departments and all statutory bodies which are "agencies" within the meaning of the *Financial Management Act 2006* (other than universities listed in Schedule 1 of that Act), government trading entities (including their subsidiaries), and any other person or body, or person or body of a class, prescribed in regulations. This meaning gives effect to the Government's intention to capture a broad range of government procurement expenditure for the purposes of the Bill.

The definition of 'goods or services' is broad and specifically includes goods or services for or in connection with public works. The definition also allows the Government to prescribe additional kinds of things as 'goods or services' for the purposes of the Bill.

As the State is a party to the *Australia and New Zealand Government Procurement Agreement*, the meaning of 'local industry' is intended to be consistent with the commitments of the State under that Agreement.

The use of 'small or medium enterprise' is consistent with existing meanings used in procurement policies of other Australian jurisdictions, which are based on businesses with less than 200 full-time equivalent employees. Various international free trade agreements to which the Commonwealth is a party and which apply to Western Australian government procurement preserve capacity for government measures to support local small or medium enterprises in the context of government procurement.

The definition of 'supply' is 'a supply of goods or services to or for an agency or the State'. The additional reference to 'the State' in this definition is intended to deal with contracting complexities in relation to in particular large supplies, for example those procured through public private partnerships, where there is a supply to government but it may not necessarily be the case that the supply is "to or for an agency". Arrangements which are in substance the provision of a Government grant will not be captured as "supplies".

The kinds of supplies to which the obligations of the Bill and the WAIPS will apply (a 'WAIPS supply') will be prescribed in regulations for the purposes of clause 5(1).

#### **Clause 4 : Act binds Crown**

This clause provides for the Bill when enacted to bind the Crown.

### **Part 2 – Western Australian Industry Participation Strategy**

#### **Clause 5: Western Australian Industry Participation Strategy**

This clause provides for one of the key objectives of the Bill, that is, to require the Minister to develop and implement the WAIPS. The WAIPS will be a written strategy about the participation by local industry in activities for or in connection with particular supplies.

The particular supplies to be captured by the Bill and WAIPS will be those which meet the criteria prescribed in regulations for the purposes of clause 5(1). Criteria are proposed to include monetary value thresholds for various kinds of supplies.

The WAIPS is not subsidiary legislation for the purposes of the *Interpretation Act 1984*.

Subject to the provisions of the Bill, the detail of the WAIPS will be a matter for the Minister of the day. Clause 5(3) also allows the Minister to amend or replace the WAIPS.

### **Clause 6: WAIPS provisions**

This clause, without limiting clause 5, allows for the WAIPS to include different provisions for different classes of supply, participation plan or supply contract; and for the WAIPS to include guidelines as to its application and procedures to be followed in complying with it.

For example, the WAIPS may provide for different participation plan requirements, depending on the class of the WAIPS supply. Monetary value thresholds may be one determining feature for classes of supply. Different participation plan requirements could be set for lower-value supplies, with a focus on reducing regulatory compliance burdens on industry, particularly small and medium enterprises, for those supplies.

### **Clause 7: WAIPS objectives**

When developing, amending or replacing the WAIPS, the Minister must have regard to the objectives set out in clause 7. The objectives are:

- promoting the diversification and growth of the Western Australian economy by targeting supply opportunities for local industry;
- providing suppliers of goods or services with increased access to, and raised awareness of, local industry capability;
- encouraging local industry to adopt, where appropriate, world's best practice in workplace innovation and the use of new technologies and materials;
- promoting increased apprenticeship, training and job opportunities in Western Australia; and
- promoting increased opportunities for local industry to develop import replacement capacity by giving local industry, in particular small or medium enterprises, a full, fair and reasonable opportunity to compete against foreign suppliers of goods or services.

### **Clause 8: WAIPS principles**

This clause sets out that the WAIPS must take into account and be consistent with existing principles related to the procurement process, namely the need to achieve value for money, as the primary consideration, when making procurement decisions, as well as the need to ensure probity and accountability for procurement processes and procurement decisions.

### **Clause 9: WAIPS to be consistent with other requirements**

Clauses 9(a) and (b) require the WAIPS to be consistent with the *State Supply Commission Act 1991*, supply policies under that Act and any other written law that relates to the procurement of goods and services by agencies. Clause 23 deals with the Bill's interaction with certain other statutory obligations imposed on agencies.

Clause 9(c) requires the WAIPS to be consistent with section 92 of the Commonwealth Constitution.

### **Clause 10: WAIPS to be publicly available**

This clause will have effect that the WAIPS will be a public document, to be published on a website maintained by or on behalf of the department principally assisting the Minister in the administration of the Bill once enacted.

## **Part 3 – Participation Plans**

### **Clause 11: Participation Plan**

Clause 11(1) establishes the concept of a 'participation plan', which is a written statement that outlines, in accordance with the WAIPS, the commitments of a prospective supplier in relation to the participation by local industry, in particular small or medium enterprises, in activities for or in connection with a WAIPS supply.

Clause 11(2) also requires that, without limiting clause 11(1), where a WAIPS supply is determined to be a strategic project under Part 4, the commitments outlined in a participation plan for that WAIPS supply must address the matters specified in the determination made under Part 4.

Clause 11(1) contemplates that the WAIPS will provide detail on the required form and content of participation plans. By virtue of clause 6(a), these requirements may vary for different classes of a WAIPS supply.

Clause 11(3) allows flexibility in the form of participation plans. That is, a participation plan could be a separate document or form part of other tender or offer documents submitted by a prospective supplier. The intention is to provide capacity to reduce regulatory burdens on businesses in particular in the course of lower value procurements of goods and services.

### **Clause 12: Procurement agency to require participation plan**

Clause 12(1) sets out the obligation on a procurement agency for a WAIPS supply to require each prospective supplier to submit a participation plan in the course of the procurement process for the WAIPS supply. The WAIPS will provide guidance on the process for doing so.

Subclause (2) authorises the making of regulations to provide that the obligation in subclause (1) does not apply to a procurement agency in relation to a WAIPS supply of a prescribed class or in prescribed circumstances. Given the breadth and constantly evolving nature of government procurement activity to which the Bill applies, capacity is needed to adjust the application of clause 12(1) in this manner through regulations. The use of regulations, rather than Ministerial determination, as the mechanism for such adjustment ensures Parliamentary scrutiny of it.

### **Clause 13: Participation plan to be considered in procurement process**

This clause provides that the procurement agency for a WAIPS supply must assess and consider the participation plan submitted by the prospective supplier when evaluating the offer to supply made by the prospective supplier. The procurement agency must do so in accordance with the WAIPS.

### **Clause 14: Participation plan commitments to be incorporated in supply contract**

Clause 14(a) provides that the procurement agency for a WAIPS supply must ensure that any supply contract entered into with a prospective supplier in relation to the WAIPS supply incorporates, to the extent required by the WAIPS, the commitments outlined in the participation plan of the prospective supplier. The requirement to incorporate commitments "to the extent required by the WAIPS" allows the WAIPS to set out detail as to how commitments are to be incorporated, in a way that achieves the specified objectives and principles for the WAIPS and that is also appropriate in a contracting context.

Clause 14(b) provides that the supply contract entered into with a prospective supplier in relation to the WAIPS supply must include a requirement for reports to be given to the procurement agency, in accordance with the WAIPS, on the extent to which the incorporated commitments are being, or have been, met. The intention of including a reporting clause in supply contracts is to assist agencies in monitoring the implementation of the commitments made and in reporting on the outcomes.

### **Clause 15: Minister may exempt procurement agency from s. 12(1)**

This clause gives the Minister the power to, in writing given to the procurement agency for a WAIPS supply, exempt the procurement agency from the obligation in clause 12(1). Under clause 15(2), the Minister also has the power to, in writing given to the procurement agency for a WAIPS supply, amend or revoke an exemption. An example of a circumstance in which this power may be used is where the Minister considered that, in the context of a particular WAIPS supply, there would not be an overall benefit if participation plan requirements were applied.

Clause 15(3) is aimed at transparency and requires that the procurement agency for a WAIPS supply publish on a website maintained by or on behalf of the agency, a

notice of an exemption given to the agency, and if the exemption is amended or revoked, notice of the amendment or revocation.

### **Clause 16: Delegation**

Clauses 16(1) and (2) provide that the Minister may delegate the powers to grant, amend or revoke exemptions under clauses 15(1) and 15(2) to the chief executive officer of the Department and that the delegation must be in writing signed by the Minister.

Clause 16(3) provides that a delegation may authorise the chief executive officer to further delegate the powers to another officer of the Department in accordance with any conditions specified in the delegation.

Clause 16(4) provides that a person exercising a power that has been delegated to the person under, or as authorised under, this clause is taken to do so in accordance with the terms of the delegation unless the contrary is shown.

## **Part 4 – Strategic Projects**

### **Clause 17: Determination of strategic project**

This clause provides the framework for ‘strategic projects’, another key element of the Bill.

Clause 17(1)(a) provides that if the Minister considers that a WAIPS supply is of strategic significance to the Western Australian economy, the Minister may, in writing given to the procurement agency for the WAIPS supply, determine that the WAIPS supply is a ‘strategic project’.

Under clause 17(2), the Minister must not make a determination in respect of a WAIPS supply unless the WAIPS supply meets the criteria prescribed in regulations for the purposes of this subclause. It is intended that regulations will be made to include monetary value thresholds as criteria.

Importantly, under subsection 17(1)(b), where a WAIPS supply is determined to be a strategic project, the Minister may determine that the participation plans required by the procurement agency in respect of the WAIPS supply are to outline commitments addressing matters specified in the determination. This will effectively allow the Minister to include in the determination, matters to be addressed by prospective suppliers in participation plans relating to the WAIPS supply which are additional to (or different from) those contained in the WAIPS.

Clause 17(3) provides that the Minister may amend or revoke a determination.

Under clause 17(4), a notice of the determination given to the agency, and any amendment or revocation, must be published on a website maintained by or on behalf of the procurement agency for the WAIPS supply.

## **Clause 18: Consultation**

This clause has been included to formalise a process for the Minister to consult with the Minister responsible for the procurement agency for a WAIPS supply, where they are not the same, before making, amending or revoking a determination under clause 17 in respect of that WAIPS supply.

## **Part 5 – Reporting**

### **Clause 19: Minister to report on implementation of Act and WAIPS**

This clause requires the Minister to prepare a report, after the end of each financial year, on the implementation of the Bill once enacted and the WAIPS in that financial year, and for the Minister to cause the report to be tabled in each House of Parliament (or dealt with under clause 21), before the 30 November after that financial year.

This is intended to ensure transparency and accountability, through Parliamentary and public scrutiny of whether the Bill once enacted and the WAIPS are achieving the goals of increasing local industry participation in WAIPS supplies.

### **Clause 20: Agencies to provide information to Minister**

This clause is intended to assist the Minister to prepare the report for Parliament under clause 19(1), by requiring agencies, on request, to provide to the Minister any information the Minister requires for the purposes of preparing the report.

Clause 20(2) is intended to provide an opportunity for an agency responding to a request by the Minister under clause 20(1) to identify information which it considers should not be included in the report under clause 19 due to its confidential or commercially sensitive nature and to request that the information not be included in the report.

Clause 20(2) recognises that the government trading entities as defined in the Bill, together with some other agencies, operate to varying degrees in a competitive commercial environment. With such agencies, there should be an opportunity for consideration of whether public release of information of a confidential or commercially sensitive nature in particular circumstances may be contrary to the public interest in that it may damage the interests of the agency or of persons who deal with it. Clause 20(2) is modelled on provisions which exist in the constituting legislation of each government trading entity as defined in the Bill.

Subclause 20(3) provides the Minister with discretion in that the Minister may, but is not required to, comply with a request under subclause (2).

### **Clause 21: Laying report before House of parliament when House not sitting**

This is a standard clause providing for a situation in which the Minister has prepared a report under clause 19 but a House of Parliament is not sitting and the Minister is of the opinion that the House will not sit again before the date referred to in clause 19(2).

In that situation the Minister must transmit a copy of the report to the Clerk of the House, and it will be taken to have been laid before the House. A record of this transmission must then be made on the first sitting day of the House after receipt by the Clerk.

## **Part 6 – Miscellaneous**

### **Clause 22: Obligation imposed on department**

This clause is of a technical legal nature and has been included in the Bill to put beyond doubt where an obligation imposed on an agency by the Bill rests in the case of an agency which is a department of the Public Service, given that departments are not separate legal entities. This clause provides that where the Bill imposes an obligation on a department of the Public Service, that obligation is placed on the chief executive officer of the department.

### **Clause 23: Obligation imposed under Act overrides other obligations**

This clause provides that to the extent that any obligation imposed on an agency under the Bill conflicts or is inconsistent with an obligation imposed on the agency under the Act that establishes or continues the agency, the obligation imposed under the Bill will prevail to the extent to which the obligations conflict or are inconsistent.

This is intended to support the application of the provisions of the Bill to agencies and to clarify Parliament's intention where there is a conflict of obligations on agencies.

### **Clause 24: Effect of contravention of Act or WAIPS**

Clause 24(1) provides that if an agency or any other person contravenes the Bill or the WAIPS, neither criminal nor civil liability will attach only as a result of that contravention.

Clause 24(2) provides that a procurement decision made, or supply contract entered into, in respect of a WAIPS supply is not invalid only because an agency or any other person has contravened the Bill or the WAIPS in relation to the WAIPS supply.



### **Clause 25: Regulations**

This clause is a general regulation-making power that provides for the Governor to make regulations prescribing matters:

- required or permitted to be prescribed under the Bill; or
- necessary and convenient for giving effect to the Bill.

### **Clause 26: Review of Act**

This clause requires that the Minister carry out a review of the operation and effectiveness of the Bill once enacted within five years of the section coming into operation. The Minister must then prepare a report based on the review and lay it before both Houses of Parliament.

It is considered that up to five years is an appropriate timeframe to allow the new framework to be in effect before conducting a review.