

**Legislative Council—No 220A**

As reported with amendments, report adopted, Standing Orders suspended and passed remaining stages, 17 October 2017

South Australia

**Industry Advocate Bill 2017**

A BILL FOR

An Act to provide for the appointment of the Industry Advocate and to provide for the powers and functions of the Industry Advocate.

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**The Parliament of South Australia enacts as follows:**

## **Part 1—Preliminary**

### **1—Short title**

This Act may be cited as the *Industry Advocate Act 2017*.

### **5 2—Commencement**

This Act will come into operation on a day to be fixed by proclamation.

### **3—Interpretation**

In this Act, unless the contrary intention appears—

***Deputy*** means the Deputy Industry Advocate appointed under this Act;

10 ***government contract*** means a contract entered into for any of the following purposes:

- (a) procurement operations of a public authority;
- (b) projects undertaken as public/private partnerships;

(c) infrastructure and construction projects funded, wholly or partly, by the Commonwealth government but managed, wholly or partly, by the State government;

(d) projects receiving State government funding or assistance;

5 **government expenditure** means expenditure by or on behalf of a public authority;

**Industry Advocate** means the person holding or acting in the office of the Industry Advocate under this Act;

**participants**, in relation to a contract, means the parties to the contract and any subcontractors or suppliers engaged for the purposes of the contract;

10 **prescribed public authority** means a person or body that has been declared by the regulations to be a prescribed public authority for the purposes of this Act;

**procurement operations** of an authority means—

(a) the procurement of goods or services required by the authority for its operations, including (without limitation) the procurement of—

15 (i) a supply of electricity, gas or any other form of energy; or

(ii) intellectual property; or

(iii) the delivery of a service by a third party on behalf of the authority; or

(b) the management of goods of the authority, including (without limitation) the care, custody, storage, inspection, stocktaking or distribution of goods of the authority; or

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(c) the management of the authority's contracts for services; or

(d) the disposal of goods surplus to the authority's requirements,

but does not include—

(e) the provision of funding to a third party by the authority that, in accordance with Treasurer's instructions, is classified as a grant; or

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(f) operations excluded from this definition by the regulations;

**public authority** means—

(a) an administrative unit or other agency or instrumentality of the Crown; or

(b) any incorporated or unincorporated body—

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(i) established for a public purpose by an Act; or

(ii) established for a public purpose under an Act (other than an Act providing for the incorporation of companies or associations, co-operatives, societies or other voluntary organisations); or

(iii) established or subject to control or direction by the Governor, a Minister of the Crown or any instrumentality or agency of the Crown (whether or not established by or under an Act or an enactment); or

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(c) a person or body declared by the regulations to be a public authority for the purposes of this Act,

but does not include a prescribed public authority;

*SAIPP* means the *South Australian Industry Participation Policy* established under section 4;

*Treasurer's instructions* means instructions issued by the Treasurer under Part 4 of the *Public Finance and Audit Act 1987*.

## 5 **Part 2—Establishment of SAIPP**

### **4—Establishment of SAIPP**

- (1) The Minister must establish and maintain a policy relating to industry participation in government contracts of a class, or classes, determined by the Minister and specified in the policy (the *South Australian Industry Participation Policy*).
- 10 (2) The Minister must, in establishing and maintaining the SAIPP, seek to promote—
  - (a) government expenditure that results in economic development for South Australia; and
  - (b) value for money for public expenditure; and
  - 15 (c) the economic development of the steel industry and other strategically important industries for South Australia; and
  - (d) capable businesses based in South Australia being given full, fair and reasonable opportunity to tender and participate in government contracts.
- (3) The SAIPP may operate by reference to, or incorporate, any guidelines.
- (4) The SAIPP and any guidelines referred to in the SAIPP—
  - 20 (a) must be available for inspection, free of charge, during ordinary business hours at a place or places determined by the Minister; and
  - (b) must be published on a website determined by the Minister.

## **Part 3—Industry Advocate**

### **5—Industry Advocate**

- 25 (1) There will be an Industry Advocate.
- (2) The Industry Advocate will be appointed by the Governor and is an agency of the Crown.

### **6—Functions**

The functions of the Industry Advocate are—

- 30 (a) to take action to further the objectives of the SAIPP (including, without limitation, by building the capability and capacity of businesses based in South Australia to participate in government contracts);
- (b) to receive and investigate complaints by and on behalf of business and their industry representatives about the SAIPP;

- (c) to make recommendations (taking into account requirements under any other law) to responsible officers for procurement and principal officers of public authorities to resolve complaints, remove impediments or improve procurement practices and processes;
- 5 (d) to refer unresolved complaints and issues to the Minister for consideration;
- (e) to review, and assist in the negotiations for, Industry Participation Plans to ensure they comply with the SAIPP prior to the finalisation of contract conditions;
- 10 (f) to investigate and monitor compliance with the SAIPP by participants in government contracts;
- (g) to take action to promote and ensure compliance with the SAIPP, including by issuing directions to participants in government contracts requiring them to comply with their contractual obligations in respect of the SAIPP and reporting to the Minister in relation to non-compliance where appropriate;
- 15 (h) to encourage the adoption of industry participation policies by local government;
- (i) to investigate and monitor compliance with local government industry participation policies by participants in contracts to which such policies apply;
- 20 (j) to take any other action considered necessary for the purpose of exercising the functions conferred on the Industry Advocate;
- (k) to exercise other functions conferred on the Industry Advocate by the Minister or under this or any other Act.

### **7—Ministerial direction**

- 25 (1) Subject to this section, the Minister may give directions to the Industry Advocate.
- (2) The Minister—
  - (a) may not give a direction in relation to a particular investigation being carried out by the Industry Advocate; and
  - (b) must consult with the Industry Advocate before giving a direction.
- 30 (3) A Ministerial direction to the Industry Advocate—
  - (a) must be communicated to the Industry Advocate in writing; and
  - (b) must be included in the annual report of the Industry Advocate under this Act.

### **8—Terms and conditions of appointment**

- 35 (1) The Industry Advocate will be appointed for a term not exceeding 5 years and on conditions determined by the Governor and, at the end of a term of appointment, will be eligible for reappointment.
- (2) The appointment of the Industry Advocate may be terminated by the Governor on the ground that the Industry Advocate—
  - (a) has been guilty of misconduct; or
  - 40 (b) has been convicted of an offence punishable by imprisonment; or

(c) has become bankrupt or has applied to take the benefit of a law for the relief of insolvent debtors; or

(d) has been disqualified from managing corporations under Chapter 2D Part 2D.6 of the *Corporations Act 2001* of the Commonwealth; or

5 (e) has, because of mental or physical incapacity, failed to carry out duties of the position satisfactorily; or

(f) is incompetent or has neglected the duties of the position.

(3) The appointment of the Industry Advocate is terminated if the Industry Advocate—

10 (a) becomes a member, or a candidate for election as a member, of the Parliament of a State or the Commonwealth or a Legislative Assembly of a Territory of the Commonwealth; or

(b) is sentenced to imprisonment for an offence.

(4) The Industry Advocate may resign by notice in writing to the Minister of not less than 3 months (or such shorter period as is accepted by the Minister).

15 **9—Deputy and Acting Industry Advocate**

(1) The Minister may appoint a person (who may be a Public Service employee) to be the Deputy Industry Advocate.

(2) The Deputy may—

(a) act as the Industry Advocate during any period for which—

20 (i) no person is for the time being appointed as the Industry Advocate; or

(ii) the Industry Advocate is absent from, or unable to discharge, official duties; and

25 (b) when not so acting, perform functions or exercise powers of the Industry Advocate by delegation from the Industry Advocate.

(3) The Minister may appoint a person (who may be a Public Service employee) to act as the Industry Advocate during any period for which—

(a) no person is for the time being appointed as the Industry Advocate or the Industry Advocate is absent from, or unable to discharge, official duties; and

30 (b) no person is for the time being appointed as the Deputy or the Deputy is absent from, or unable to discharge, official duties.

(4) The terms and conditions of appointment of the Deputy or other person appointed to act as the Industry Advocate will be determined by the Minister.

**10—Honesty and accountability**

35 The Industry Advocate, the Deputy and any other person appointed to act as the Industry Advocate are senior officials for the purposes of the *Public Sector (Honesty and Accountability) Act 1995*.

## 11—Staff etc

- (1) The Industry Advocate's staff consists of—
- (a) Public Service employees assigned to assist the Industry Advocate; and
  - (b) persons employed by the Industry Advocate, with the consent of the Minister and on terms and conditions determined by the Minister, to assist the Industry Advocate.
- (2) The Industry Advocate may, under an arrangement established by the Minister administering an administrative unit of the Public Service, make use of the services or staff of that administrative unit.

## 12—Delegation

- (1) The Industry Advocate may delegate to a person (including a person for the time being performing particular duties or holding or acting in a particular position) a function or power under this or any other Act (except a prescribed function or power).
- (2) The Minister may delegate to a person (including a person for the time being performing particular duties or holding or acting in a particular position) a function or power under this Act.
- (3) A function or power may only be delegated to a person who is not a Public Service employee with the consent of the Minister.
- (4) A delegation—
- (a) must be by instrument in writing; and
  - (b) may be absolute or conditional; and
  - (c) does not derogate from the power of the delegator to act in a matter; and
  - (d) is revocable at will.
- (5) A delegated function or power may, if the instrument of delegation so provides, be further delegated in accordance with that instrument.

## 13—Power to require information and documents

- (1) The Industry Advocate may, by written notice served personally or by post, require a participant in a contract to give the Industry Advocate, within a reasonable time specified in the notice, information or documents in the participant's possession that the Industry Advocate requires for the performance of the Industry Advocate's functions under this Act.
- (2) A participant required to give information or documents to the Industry Advocate under this section must provide the information or documents within the time stated in the notice.
- Maximum penalty: \$20 000.
- (3) A participant cannot be compelled to give information or a document under this section if the information or document is privileged on the ground of legal professional privilege.
- (4) A natural person cannot be compelled to give information or a document under this section if the information or document might tend to incriminate the person of an offence.

(5) If a participant gives the Industry Advocate a document in compliance with a requirement under this section, the Industry Advocate may retain the document for so long as is necessary to make a copy of the document, or to otherwise inspect the document, and the document must then be returned to the participant.

5 (6) In this section—

*participant* in a contract includes a former participant in a current or former contract.

#### 14—Issue of directions

10 (1) If the Industry Advocate reasonably believes that a participant in a government contract is not complying with their contractual obligations in respect of the SAIPP, the Industry Advocate may, by notice in writing, direct the participant to comply with those obligations.

15 (2) If, following receipt of a notice under this section, the participant is of the opinion that, in the circumstances, failure to comply with the obligations is reasonable and justifiable, the participant may provide a response to the Industry Advocate outlining their opinion and the reasons for it.

(3) The Industry Advocate must, before reporting to the Minister on a failure to comply with a direction under this section (in accordance with section 15), give the participant a reasonable opportunity to provide a response under subsection (2) or to comply with the direction.

### 20 Part 4—Miscellaneous

#### 15—Reports to Minister

The Industry Advocate—

25 (a) may report to the Minister in relation to any current or former government contract or other matter relevant to the functions of the Industry Advocate; and

(b) must report to the Minister in relation to any failure to comply with a direction under section 14 (unless the Industry Advocate is satisfied that the failure to comply with the obligations was reasonable and justifiable).

#### 16—Confidentiality

30 (1) A person must not divulge or communicate personal information, information relating to trade secrets or business processes or financial information acquired by reason of being, or having been, employed or engaged in, or in connection with, the administration of this Act, except—

35 (a) with the consent of the person to whom the information relates; or

(b) as authorised by the Industry Advocate or the person's employer; or

(c) in connection with the administration of this Act; or

(d) to a police officer or a member of the police force of another State, a Territory of the Commonwealth or the Commonwealth; or



(e) to a person concerned in the administration of another law of the State, or a law of another State, a Territory of the Commonwealth or the Commonwealth, relating to trade or commercial practices or the protection of consumers; or

5 (f) for the purposes of legal proceedings.

Maximum penalty: \$20 000.

(2) Information that has been disclosed under this section for a particular purpose must not be used for any other purpose by—

(a) the person to whom the information was disclosed; or

10 (b) any other person who gains access to the information (whether properly or improperly and whether directly or indirectly) as a result of that disclosure.

Maximum penalty: \$20 000.

### **17—Application of *Freedom of Information Act 1991***

15 The Industry Advocate is an exempt agency for the purposes of the *Freedom of Information Act 1991* in respect of information other than—

(a) financial and administrative information relating to the operations of the Industry Advocate; and

(b) statistical information that does not identify any particular person or business.

### **18—Regulations**

20 The Governor may make such regulations as are contemplated by this Act or as are necessary or expedient for the purposes of this Act.