

House of Assembly—No 50

As laid on the table and read a first time, 30 November 2022

South Australia

Construction Industry Commissioner Bill 2022

A BILL FOR

An Act to establish the office of the Construction Industry Commissioner, to provide for the powers and functions of the Commissioner and for other purposes.

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The Parliament of South Australia enacts as follows:

1—Short title

This Act may be cited as the *Construction Industry Commissioner Act 2022*.

2—Commencement

5 This Act comes into operation 3 months after it is assented to by the Governor.

3—Objects of Act

The objects of this Act are as follows:

- 10 (a) to ensure respect for the rights of building and construction industry participants;
- (b) to ensure that building and construction industry participants are accountable for their unlawful conduct;
- (c) to promote compliance with this Act, the *Work Health and Safety Act 2012* (in so far as it relates to building and construction work), other laws relevant to building and construction work and the Building Code;
- 15 (d) to improve work health and safety in building work;
- (e) to encourage the pursuit of high levels of employment in the building industry, including to encourage youth employment with an emphasis on engaging apprentices;

- (f) to provide assistance and advice to building and construction industry participants in connection with their rights and obligations under this Act, the *Work Health and Safety Act 2012* (in so far as it relates to building and construction work), other laws relevant to building and construction work and the Building Code;
- (g) to promote respect for the rule of law.

4—Interpretation

In this Act, unless the contrary intention appears—

building and construction association means an industrial association whose rules allow membership by members of at least 1 of the following groups:

- (a) building and construction employers;
- (b) building and construction employees;
- (c) building and construction contractors;

whether or not those rules also allow membership by other persons;

building and construction contractor means a person who has entered into, or who has offered to enter into, a contract for services under which the person—

- (a) carries out building and construction work; or
- (b) arranges for building and construction work to be carried out;

building and construction employee means—

- (a) a person whose employment consists of, or includes, building and construction work; or
- (b) a person who accepts an offer of engagement as an employee for work that consists of, or includes, building and construction work;

building and construction employer means an employer who employs, or offers to employ, building and construction employees;

building and construction industry participant means any of the following:

- (a) a building and construction employer;
- (b) a building and construction employee;
- (c) a building and construction contractor;
- (d) a person who enters into a contract with a building and construction contractor under which the building and construction contractor agrees to carry out building and construction work or to arrange for building and construction work to be carried out;
- (e) a building and construction association;
- (f) an officer, delegate or other representative of a building and construction association;

building and construction work—see section 5;

Building Code has the same meaning as in the *Planning, Development and Infrastructure Act 2016*;

Commissioner means the person holding or acting in the office of the Construction Industry Commissioner;

Commonwealth Ombudsman means the person for the time being holding office as Ombudsman under the *Ombudsman Act 1976* of the Commonwealth;

5 **Deputy** means the person for the time being holding office as Deputy Construction Industry Commissioner;

Office of the Fair Work Ombudsman means the body known as the Office of the Fair Work Ombudsman established under the *Fair Work Act 2009* of the Commonwealth;

10 **WHS entry permit** and **WHS entry permit holder** have the same respective meanings as they have in the *Work Health and Safety Act 2012*.

5—Meaning of building and construction work

(1) Subject to subsections (3) and (4), **building and construction work** means any of the following activities:

- 15 (a) the construction, alteration, extension, restoration, repair, demolition or dismantling of buildings, structures or works that form, or are to form, part of land, whether or not the buildings, structures or works are permanent;
- (b) the construction, alteration, extension, restoration, repair, demolition or dismantling of railways (not including rolling stock) or docks;
- 20 (c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;
- (d) any operation that is part of, or is preparatory to, or is for rendering complete, work covered by paragraph (a), (b) or (c), for example—
- 25 (i) site clearance, earth-moving, excavation, tunnelling and boring; or
- (ii) the laying of foundations; or
- (iii) the erection, maintenance or dismantling of scaffolding; or
- (iv) the prefabrication of made-to-order components to form part of any building, structure or works, whether carried out on-site or off-site;
- 30 or
- (v) site restoration, landscaping and the provision of roadways and other access works;
- (e) transporting or supplying goods, to be used in work covered by paragraph (a), (b), (c) or (d) directly to building sites (including any resources platform)
- 35 where that work is being or may be performed,

but does not include any of the following:

- (f) the drilling for, or extraction of, oil or natural gas;
- (g) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that
- 40 purpose;
- (h) any work that is part of a project for—

- (i) the construction, repair or restoration of a single dwelling-house; or
- (ii) the construction, repair or restoration of any building, structure or work associated with a single dwelling-house; or
- (iii) the alteration or extension of a single dwelling-house, if it remains a single dwelling-house after the alteration or extension.

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(2) To avoid doubt, subsection (1)(f) and (g) do not prevent this Act from applying to building and construction work that is performed on land in which there is an interest relating to the mining of oil, gas or minerals.

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(3) Subsection (1)(h) does not apply if the project is part of a multi-dwelling development that consists of, or includes, the construction of at least 5 single dwelling-houses.

(4) In addition, building and construction work—

(a) includes any activity that is prescribed by the regulations for the purposes of this subsection; and

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(b) does not include any activity that is prescribed by the regulations for the purposes of this subsection.

(5) In this section—

land includes land beneath water.

6—Construction Industry Commissioner

(1) There will be a Construction Industry Commissioner.

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(2) The Commissioner will be appointed by the Governor and is an agency of the Crown.

7—Functions

(1) The functions of the Commissioner are—

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(a) to assist building and construction industry participants in their dealings within the industry and matters generally relating to the construction workplace; and

(b) to disseminate information to building and construction industry participants to assist them with matters generally relating to the building and construction industry; and

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(c) to receive notifications and complaints by or on behalf of building and construction industry participants (including disputes relating to safety, industrial action (threatened or taken), alleged breaches of laws relating to rights of entry to workplaces, allegations of coercion, threatening behaviour, intimidation or adverse action) and to facilitate the resolution of such notifications and complaints through measures considered appropriate by the Commissioner such as mediation or making representations on behalf of notifiers and complainants; and

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- 5 (d) to take any other action considered appropriate by the Commissioner for the purpose of facilitating and encouraging the fair treatment of building and construction industry participants in their commercial dealings with each other or in relation to any other matters generally relating to the building and construction workplace, but nothing in this paragraph affects any functions of the Small Business Commissioner in connection with the *Building and Construction Industry Security of Payment Act 2009*; and
- 10 (e) to refer matters to appropriate State authorities such as SA Police, the regulator (within the meaning of the *Work Health and Safety Act 2012*) or the Commissioner for Consumer Affairs following receipt of a complaint or enquiry from a building and construction industry participant that, in the opinion of the Commissioner, should be referred; and
- 15 (f) to refer matters to appropriate Commonwealth authorities such as the Commonwealth Ombudsman or the Office of the Fair Work Ombudsman following receipt of a complaint or enquiry from a building and construction industry participant that, in the opinion of the Commissioner, should be referred; and
- 20 (g) to monitor, audit and report on compliance with requirements under sections 117 and 118 of the *Work Health and Safety Act 2012* by the WHS entry permit holders (both within the meaning of that Act) in relation to entry into building and construction workplaces for the purposes of inquiring into suspected contraventions of the *Work Health and Safety Act 2012* at such workplaces; and
- 25 (h) to monitor and advise the Minister about practices that may adversely affect building and construction industry participants within the building and construction industry, including practices that may adversely affect productivity within the industry; and
- 30 (i) to report to the Minister on matters affecting building and construction industry participants at the request of the Minister; and
- (j) to report to the Minister on any aspect of the Commissioner's functions at the request of the Minister or on the Commissioner's own initiative; and
- (k) any other functions conferred on the Commissioner by or under this or any other Act.
- 35 (2) The Commissioner is to perform the functions with a view to the development and maintenance of relationships between building and construction industry participants in South Australia.

8—Ministerial direction

- (1) Subject to this section, the Minister may give directions to the Commissioner.
- (2) The Minister—
- 40 (a) may not give a direction in relation to the investigation, mediation or resolution of a particular complaint or matter; and
- (b) must consult with the Commissioner before giving a direction.
- (3) A Ministerial direction to the Commissioner must be communicated to the Commissioner in writing.

9—Terms and conditions of appointment

- (1) The Commissioner will be appointed for a term not exceeding 3 years and on conditions determined by the Governor and, at the end of a term of appointment, will be eligible for reappointment.
- 5 (2) The appointment of the Commissioner may be terminated by the Governor on the ground that the Commissioner—
- (a) has been guilty of misconduct; or
 - (b) has been convicted of an offence punishable by imprisonment; or
 - 10 (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
 - (e) has, because of mental or physical incapacity, failed to carry out duties of the position satisfactorily; or
 - 15 (f) is incompetent or has neglected the duties of the position.
- (3) The appointment of the Commissioner is terminated if the Commissioner—
- (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
 - 20 (b) is sentenced to imprisonment for an offence.
- (4) The Commissioner 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).

10—Deputy and Acting Commissioner

- 25 (1) The Minister may appoint a person (who may be a Public Service employee) to be the Deputy Construction Industry Commissioner.
- (2) The Deputy may—
- (a) act as the Commissioner during any period for which—
 - (i) no person is for the time being appointed as the Commissioner; or
 - (ii) the Commissioner is absent from, or unable to discharge, official duties; and
 - 30 (b) when not so acting, perform functions or exercise powers of the Commissioner by delegation from the Commissioner.
- (3) The Minister may appoint a person (who may be a Public Service employee) to act as the Commissioner during any period for which—
- 35 (a) no person is for the time being appointed as the Commissioner or the Commissioner is absent from, or unable to discharge, official duties; and
 - (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 Commissioner will be determined by the Minister.

11—Honesty and accountability

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

12—Staff etc

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

13—Delegation

- (1) The Commissioner 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.
- 20 (2) A function or power may only be delegated to a person who is not a Public Service employee with the consent of the Minister.
- (3) A delegation—
- (a) must be by instrument in writing; and
- (b) may be absolute or conditional; and
- 25 (c) does not derogate from the power of the delegator to act in a matter; and
- (d) is revocable at will.
- (4) A delegated function or power may, if the instrument of delegation so provides, be further delegated in accordance with that instrument.

14—Power to require information

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

15—Offence relating to threats, coercion etc

- (1) A person must not threaten, coerce or intimidate a person in relation to—
- (a) the performance of a function under this Act; or
 - (b) the exercise of a function under this Act; or
 - (c) the giving of a notification, or making of a complaint, under this Act.

Maximum penalty:

- (a) in the case of an individual—\$10 000;
- (b) in the case of a body corporate—\$50 000.

- (2) For the purposes of proceedings for an offence against this section, the conduct and state of mind of an officer, employee or agent of a body corporate acting within the scope of their actual, usual or ostensible authority will be imputed to the body corporate.
- (3) For the purposes of this section, a reference to *conduct* or *acting* includes a reference to failure to act.

16—Commissioner's power to suspend WHS entry permit

- (1) The Commissioner may, if satisfied that a WHS entry permit holder has contravened section 117(6)(a) of the *Work Health and Safety Act 2012*, suspend the holder's WHS entry permit for the prescribed period.
- (2) The Commissioner must, before suspending a WHS entry permit under subsection (1)—
- (a) give notice to the WHS entry permit holder of the proposed suspension; and
 - (b) allow the WHS entry permit holder a period of 21 days (or such longer period as the Commissioner thinks fit) to show cause why the WHS entry permit should not be suspended.
- (3) The Commissioner must give a WHS entry permit holder written notice of the suspension of their WHS entry permit under subsection (1).
- (4) A WHS entry permit holder who receives a notice of suspension under subsection (3) must ensure that the permit is returned to the authorising authority (within the meaning of the *Work Health and Safety Act 2012*) within 14 days of receiving the notice.

Maximum penalty: \$2 000.

- (5) This section applies despite any provision to the contrary in Part 7 of the *Work Health and Safety Act 2012*.
- (6) In this section—

prescribed period means—

- (a) in the case of a first instance of a contravention of section 117(6)(a) of the *Work Health and Safety Act 2012*—12 months; or
- (b) in any other case—24 months.

17—Confidentiality

5 (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—

- (a) with the consent of the person to whom the information relates; or
- (b) as authorised by the Commissioner or the person's employer; or
- (c) in connection with the administration of this Act; or
- 10 (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
- 15 (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
- 20 (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.

18—Annual report

25 (1) The Commissioner, on or before 30 September in every year, forward to the Minister a report on the Commissioner's operations for the preceding financial year.

(2) The report must contain—

- (a) information, in summary form, relating to the range of complaints and enquiries made to the Commissioner under this Act; and
- 30 (b) information about practices and conditions that adversely affect builders and contractors within the building and construction industry; and
- (c) any information required by the regulations.

(3) The Minister must, within 6 sitting days after receiving a report under this section, cause copies of the report to be laid before both Houses of Parliament.

19—Regulations and notices

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

(2) Without limiting the generality of subsection (1), the regulations may require the payment of fees in respect of measures designed to resolve a complaint taken by the Commissioner and provide for their payment, recovery or waiver.

- (3) The Minister may prescribe fees for the purposes of this Act by fee notice under the *Legislation (Fees) Act 2019*.