

Ethical Supplier Mandate 2021

Version 2.0

Queensland Government Procurement



**Queensland
Government**

Table of Contents

1	Introduction	4
2	The Ethical Supplier Mandate.....	4
2.1	Policy intent.....	4
2.2	Application.....	5
2.2.1	For breach of the Ethical Supplier Threshold.....	5
2.2.2	For all other categories of non-compliance.....	5
2.2.3	Suppliers and subcontractors.....	6
2.2.4	International suppliers.....	6
2.2.5	Joint ventures.....	6
3	What is non-compliance under the Mandate?	6
4	Types of non-compliance.....	7
4.1	Categories of non-compliance and applicable demerits.....	8
4.2	Investigating a potential non-compliance.....	15
4.2.1	Compelling evidence.....	15
4.2.2	Referral to the Tripartite Procurement Advisory Panel.....	15
5	Procedural fairness.....	16
6	Tripartite Procurement Advisory Panel (the Panel)	16
7	Decision maker	16
8	Penalties under the Mandate.....	17
8.1	Penalties.....	17
8.2	Demerits.....	17
8.2.1	Issuing demerits.....	17
8.3	Imposing a sanction	18
8.4	The impacts of a sanction for the supplier	19
9	Appeal process	19
10	The Procurement Compliance Portal.....	19
10.1	Check the Portal.....	19
11	QGP Compliance Branch	20
12	Review of the Mandate	20
	Appendix 1 – Definitions	21

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Contact us

Queensland Government Procurement within the Department of Energy and Public Works is committed to continuous improvement. If you have any suggestions about how we can improve this guide, or if you have any questions, contact us at ethicalsupply@epw.qld.gov.au.

Disclaimer

This document is intended as a guide only for the internal use and benefit of government agencies. It may not be relied on by any other party. It should be read in conjunction with the Queensland Procurement Policy, your agency's procurement policies and procedures, and any other relevant documents.

The Department of Energy and Public Works disclaims all liability that may arise from the use of this document. This guide should not be used as a substitute for obtaining appropriate probity and legal advice as may be required. In preparing this document, reasonable efforts have been made to use accurate and current information. It should be noted that information may have changed since the publication of this document. Where errors or inaccuracies are brought to attention a reasonable effort will be made to correct them.

Administration

This version of the policy replaces the Ethical Supplier Mandate 2019 and takes effect from 1 September 2021.

1 Introduction

The Ethical Supplier Mandate (the Mandate) and the Ethical Supplier Threshold (the Threshold) are an integral part of the *Buy Queensland* procurement approach and Queensland's economic recovery plan.

Queensland Government is committed to supporting ethically, socially and environmentally responsible Queensland businesses and keeping the economy moving by backing small business. The Mandate and the Threshold support the overarching Queensland Procurement Policy (QPP) and keeping Queenslanders in quality, secure and safe local jobs.

The purpose of this *Ethical Supplier Mandate 2021* (the Mandate 2021) policy document is to assist government buyers and suppliers in complying with **Clause 28** of the QPP:

*“Agencies use best endeavours to do business with ethically, environmentally and socially responsible suppliers, and will seek to influence the supply chain in this regard. As part of this commitment, agencies will not procure dumped goods or engage suppliers suspended as a result of accruing demerit points under the **Ethical Supplier Mandate**.”*

The Mandate is related to the Threshold – they are complementary policies under the *Buy Queensland* approach, as set out in the QPP. The Mandate sets out the system for penalising suppliers that breach the supplier requirements for doing business with Queensland Government which are set out in the Mandate and the Threshold.

This document should be read in conjunction with:

- the *Queensland Procurement Policy (QPP)*
- *Guidelines: Ethical Supplier Mandate*
- *Guidelines: Ethical Supplier Threshold*.

The documents are available online at:

<https://www.epw.qld.gov.au/about/strategy/buy-qld/compliance-complaints/ethical-suppliers>

2 The Ethical Supplier Mandate

2.1 Policy intent

The Mandate outlines how the Queensland Government will manage instances where a supplier fails to comply with a policy, legislative or contractual requirement¹ and how penalties will be applied.

The Mandate will assist to ensure that businesses supplying to government uphold their social, economic and environmental commitments as made in tenders and contracts or required by policies or laws. The Mandate will hold suppliers who do not comply with their commitments to account.

The Mandate will only impact suppliers that a decision maker, on advice from the Tripartite Procurement Advisory Panel (the Panel) considers knew or ought to have known that its conduct was in breach of a requirement of the Mandate or the Threshold.

The Mandate is not intended to penalise one-off honest mistakes or oversights which the supplier promptly corrects and has been found not to have met the non-compliance criteria outlined in **Section 3**.

Non-compliance under the Mandate is assessed on a case-by-case basis by the decision maker, on advice from the Panel and taking into account mitigating factors.

See **Sections 3, 6 and 7** for further information.

¹ Contractual requirements are not intended to apply to standard project delivery management processes (i.e., handling defects). Rather, it is intended to apply to specific commitments or requirements as agreed under the contract.

The definition of ‘supplier’ includes subcontractors within the supply chain (see **Appendix 1 – Definitions**).

The framework of the Mandate provides a scaled approach to non-compliant actions, with a range of penalties including:

- a demerit system
- potential for sanction (exclusion from government tendering – see **Appendix 1 – Definitions**).

2.2 Application

The Mandate applies to suppliers engaged by any procuring agency that is covered by the QPP.

The compliance and enforcement process set out in the Mandate as outlined in **Sections 2.2.1** and **2.2.2** operates in relation to the following:

2.2.1 For breach of the Ethical Supplier Threshold

For breach of the Ethical Supplier Threshold, as referred to in **Section 4.1 ‘Categories of non-compliance’ Types of non-compliance 10(a)** the government will use the processes and penalties provided in the Mandate to apply equitable consideration and penalty of any breach of the Threshold in relation to conduct committed on contracts entered into:

- on or after 1 August 2019 for budget sector agencies for the procurement categories of Building Construction and Maintenance (BCM) and Transport and Infrastructure Services (TIS) only
- on or after 1 September 2021 for all other procurement categories and agencies as the Mandate comes into effect (see **Section 2.2.2**).

For breach of the Threshold prior to the Mandate 2021 coming into effect (in relation to conduct committed on or after 1 August 2019 to 31 August 2021) within entities and categories not covered by the Mandate refer to the *Guidelines: Ethical Supplier Threshold 2019* for the compliance and enforcement process.

2.2.2 For all other categories of non-compliance

For all other types of non-compliance under **Section 4.1 ‘Categories of non-compliance’**, a supplier may be subject to penalties under the Mandate in connection with a contract with a procuring agency where the Mandate has been declared to apply to the procuring agency and the relevant procurement category as set out below.

The Mandate has commenced for the following categories:

- for the BCM category in relation to contracts entered on or after:
 - for budget sector agencies – 1 August 2019
 - for statutory bodies – 1 February 2022
 - for GOCs, commercial entities² and water entities³ - 31 March 2023
- for TIS category in relation to contracts entered on or after:
 - for budget sector agencies – 1 October 2019
 - for statutory bodies – 1 February 2022
 - for GOCs, commercial entities² and water entities³ - 31 March 2023

Implementation for the remaining categories of procurement is being considered in 2023.

When a government buyer as defined by the QPP (including water entities³ and commercial entities²) is acting as a supplier, the Mandate does not apply to those entities.

² Seqwater and Queensland Rail

³ Mount Isa Water Board and Gladstone Area Water Board

Other information about the Mandate's application

While the compliance and enforcement process as set out in the Mandate will apply to breaches of the Threshold, the balance of the obligations as set out in the Mandate only takes effect when the Mandate is implemented for the relevant procurement category and the procuring entity.

New penalties as outlined (e.g. aggravated and new categories of non-compliance) can only be applied to contracts entered on or after the date the *Ethical Supplier Mandate 2021* policy came into effect on 1 September 2021. For contracts entered into before this date, refer to the types of non-compliance as outlined under the *Ethical Supplier Mandate 2019*.

2.2.3 Suppliers and subcontractors

The Mandate's definition of 'supplier' includes subcontractors within the supply chain (see **Appendix 1**). This means that subcontractors may be subject to a penalty, and suppliers may be penalised for non-compliance by their subcontractors; except where the supplier has taken reasonable action to prevent the non-compliance by their subcontractors.

Principal contractors must use their best endeavours not to engage suppliers that have been sanctioned under the Mandate to do business with government. Principal contractors who are found to have failed to use best endeavours in their subcontracting practices including engaging sanctioned suppliers may be found non-compliant under the Mandate and subject to penalty.

See *Guidelines: Ethical Supplier Mandate* for further information.

2.2.4 International suppliers

There will be occasions where an international supplier is the preferred, or sole market supplier. Where a company has a place of business located in Australia, the Mandate applies.

Where there is no Australian business presence, government buyers should conduct due diligence on international suppliers for employment and related records verifying alignment with the intent of this policy.

2.2.5 Joint ventures

Where a company partners with another company to deliver on a contract, the partners are jointly responsible for any non-compliance that occurs.

Penalties may apply to all partners, unless the decision maker determines there is a reason not to (e.g. where there is clear evidence that one partner is solely responsible).

3 What is non-compliance under the Mandate?

Non-compliance under the Mandate is where a supplier has been found to have breached a policy or legislative or contractual requirement (including a requirement not to breach regulatory laws) as set out in **Section 4.1** 'Categories of non-compliance':

- for a breach of the Ethical Supplier Threshold:
 - on or from 1 August 2019 for budget sector agencies in the procurement categories of BCM and TIS
 - on or from 1 September 2021 for all other entities and categories or
- otherwise – from the date the Mandate applied to the relevant procurement category.

A supplier's conduct will be considered non-compliant if the decision maker, on advice from the Panel considers that the supplier knew, or ought to have known, that the conduct was non-compliant.

This may include, but is not limited to, where the decision maker considers that the supplier's conduct was deliberate, negligent, or repeated.

Non-compliance is assessed on a case-by-case basis by the decision maker, on advice from the Panel, allowing for assessment and taking into account mitigating factors.

A supplier will not be penalised for failing to comply with a requirement in a contract where it can be established that the procuring agency agreed to vary the contract to remove that requirement.

However, this does not apply where a supplier is required at law to comply with a requirement, irrespective of the contract terms (for example, an obligation under the WHS Act).

4 Types of non-compliance

There are four categories of non-compliance outlined in the table below. These categories of non-compliance and applicable demerits are described in **Section 4.1**.

Categories of non-compliance	
Minor non-compliance	Two (2) demerits applied per instance
Moderate non-compliance	Five (5) demerits applied per instance
Major non-compliance	Ten (10) demerits applied per instance
Aggravated non-compliance	Twenty (20) demerits applied per instance

4.1 Categories of non-compliance and applicable demerits

Types of non-compliance	Minor non-compliance	Moderate non-compliance	Major non-compliance	Aggravated non-compliance
Demerits (per non-compliance)	Two (2) demerits	Five (5) demerits	Ten (10) demerits	Twenty (20) demerits
1. Local Benefits				
a) Commitment to employment of local workers	Supplier failed to deliver part of the local benefit commitment related to engagement, with an undelivered margin of 1%-25%	Supplier failed to deliver part of the local benefit commitment related to engagement, with an undelivered margin of 25%-50%	Supplier failed to deliver part of the local benefit commitment related to engagement, with an undelivered margin of 50%-75%	Supplier failed to deliver part of or the whole of the local benefit commitment related to engagement, with an undelivered margin of 75%-100%
b) Other commitments	Supplier failed to deliver part of a commitment ⁴ to local benefits, with an undelivered margin of 1%-25%	Supplier failed to deliver part of a commitment ⁴ to local benefits, with an undelivered margin of 25%-50%	Supplier failed to deliver part of a commitment ⁴ to local benefits, with an undelivered margin of 50%-75%	Supplier failed to deliver part of or the whole of a commitment ⁴ to local benefits, with an undelivered margin of 75%-100%
2. Apprentices and trainees – Queensland Government Building and Construction Training Policy and BPP commitments				
a) Commitment to engagement hours	Supplier failed to deliver part of the commitment to apprentice and trainee engagement hours, with an undelivered margin of 1%-25%	Supplier failed to deliver part of the commitment to apprentice and trainee engagement hours, with an undelivered margin of 25%-50%	Supplier failed to deliver part of the commitment to apprentice and trainee engagement hours, with an undelivered margin of 50%-75%	Supplier failed to deliver part of or the whole of the commitment to apprentice and trainee engagement hours, with an undelivered margin of 75%-100%
b) Other commitments	Supplier failed to deliver part of a commitment ⁵ to apprentices and trainees, with an undelivered margin of 1%-25%	Supplier failed to deliver part of a commitment ⁵ to apprentices and trainees, with an undelivered margin of 25%-50% Error! Bookmark not defined.	Supplier failed to deliver part of a commitment ⁵ to apprentices and trainees, with an undelivered margin of 50%-75%	Supplier failed to deliver part of or the whole of a commitment ⁵ to apprentice and trainee commitments, with an undelivered margin of 75%-100%

⁴ Where the commitment does not relate to employment of local workers.

⁵ Where the commitment does not relate to apprentice and trainee engagement hours.

Types of non-compliance	Minor non-compliance	Moderate non-compliance	Major non-compliance	Aggravated non-compliance
Demerits <i>(per non-compliance)</i>	Two (2) demerits	Five (5) demerits	Ten (10) demerits	Twenty (20) demerits
3. Aboriginal and Torres Strait Islander business and engagement				
a) Commitment to Indigenous business engagement	Supplier failed to deliver part of the commitment to Indigenous businesses or Indigenous Economic Opportunities Plan values, with an undelivered margin of 1%-25%	Supplier failed to deliver part of the commitment to Indigenous businesses or Indigenous Economic Opportunities Plan values, with an undelivered margin of 25%-50%	Supplier failed to deliver part of the commitment to Indigenous businesses or Indigenous Economic Opportunities Plan values, with an undelivered margin of 50%-75%	Supplier failed to deliver part of or the whole of the commitment to Indigenous businesses or Indigenous Economic Opportunities Plan values, with an undelivered margin of 75%-100%
b) Indigenous business ownership status- at time of contract signing		Supplier failed to demonstrate ownership complying with the Queensland Government definition of an Indigenous business, for the purpose of the Queensland Indigenous Procurement Policy (QIPP), for the supply of non-Indigenous goods and services under the value of \$2,000	Supplier failed to demonstrate ownership complying with the Queensland Government definition of an Indigenous business, for the purpose of the QIPP, for the supply of: - Indigenous-specific goods (e.g. artwork, crafts); or - Non-Indigenous goods and services valued at \$2,000 or more Supplier failed to demonstrate ownership complying with the Queensland Government definition of an Indigenous business, for the purpose of the QIPP, as part of weighted criteria in an open procurement process	Supplier failed to demonstrate ownership complying with the Queensland Government of an Indigenous business, for the purpose of the QIPP, in a Set-Aside or Select Offer ⁶ procurement process

⁶ Where the criteria for eligibility for the Select Offer is 50% or more Indigenous ownership of the business.

Types of non-compliance	Minor non-compliance	Moderate non-compliance	Major non-compliance	Aggravated non-compliance
Demerits <i>(per non-compliance)</i>	Two (2) demerits	Five (5) demerits	Ten (10) demerits	Twenty (20) demerits
4. Workplace Health and Safety (WHS) – including BPP commitments				
a) Commitment to standards	During the past three years ⁷ a minor non-compliance history is demonstrated through the provision of the Compliance History check and accompanying assessment ⁸ by the Office of Industrial Relations Workplace Health and Safety Queensland (WHSQ), the WHS regulator in liaison with the Electrical Safety Office as required	During the past three years a moderate non-compliance history is demonstrated through the provision of the Compliance History check and accompanying assessment ¹⁰ by WHSQ, the WHS regulator in liaison with the Electrical Safety Office as required	During the past three years a major non-compliance history is demonstrated through the provision of the Compliance History check and accompanying assessment ¹¹ by WHSQ, the WHS regulator in liaison with the Electrical Safety Office as required	During the past three years the supplier is convicted of industrial manslaughter, or a Category 1 offence under the WHS Act

⁷ The past three years as from the alleged non-compliance being referred to the Queensland Government Procurement (QGP) Compliance Branch, applicable from the date the Ethical Supplier Mandate applies to the relevant procurement category.

⁸ This assessment will analyse the average number of notices (including the seriousness of the notices) have been issued⁹ over the three-year period and take into account the number of projects carried out by the supplier, size of the supplier and experience of the supplier.

⁹ Notices will include improvement notices, prohibition notices and infringement notices (including the seriousness of the notices) issued by a WHSQ inspector to the supplier.

¹⁰ This assessment will determine if an above average number of notices have been issued⁷ over the three-year period based on the number of projects carried out by the supplier, size of the supplier and experience of the supplier and take into account the seriousness of the notices.

¹¹ This assessment will determine if a significant number of notices have been issued over the three-year period issued on one project carried out by the supplier and will take into account the seriousness of the notices; or if the supplier has been issued with one or more Court sanctions or one or more enforceable undertakings for a WHS or Electrical Safety Office (ESO) non-compliance. 'Significant number of notices' means approximately 100 notices, including improvement notices, prohibition notices and infringement notices issued by a WHSQ inspector to the supplier. 'Court sanction' refers to Category 2 or 3 offences under the WHS Act.

Types of non-compliance	Minor non-compliance	Moderate non-compliance	Major non-compliance	Aggravated non-compliance
Demerits (per non-compliance)	Two (2) demerits	Five (5) demerits	Ten (10) demerits	Twenty (20) demerits
5. Industrial relations (IR) – including BPP commitments				
a) Commitment to Best Practice Principles (BPP)	Supplier has been found ¹² to be non-compliant with a BPP industrial relations commitment; however, has rectified the issue	Supplier has been found ¹² to be non-compliant with a BPP industrial relations commitment; however, has not rectified the issue	Supplier has been found (including by compelling evidence for underpayment of wages or superannuation) or pleads guilty to non-compliant activity related to underpayment of a contracted BPP commitment, where restitution has been made	Supplier has been found (including by compelling evidence for underpayment of wages or superannuation) or pleads guilty to non-compliant activity related to underpayment of a contracted BPP commitment, where restitution has not been made
b) Commitment to standards	Supplier does not have an industrial relations management plan (IRMP) where this is a condition of contract; or fails to comply with an IRMP	Supplier is issued a FWO <i>infringement notice</i> for breach of a workplace law relating to record-keeping or pay slips	Supplier is successfully prosecuted for breach of a workplace law relating to record-keeping or pay slips, including for a failure to pay an infringement notice issued by the FWO	Supplier is convicted of the criminal offence of wage theft under <i>Qld Criminal Code</i>
	Supplier is issued a <i>Contravention letter</i> or a <i>Letter of Caution</i> by the Fair Work Ombudsman (FWO) notifying of a failure to observe a workplace law/s and for the remedy of any non-observance (and remedial action is taken)	Supplier is issued a FWO <i>Compliance notice</i> for a breach/s of Australian workplace law/s with direction to remedy the breach <u>and</u> the remedial action is taken as directed	Court order/s issued against a supplier (with or without civil penalty) but no conviction recorded in relation to the underpayment of wages or breach/s of Australian workplace law/s ¹³	Supplier is successfully prosecuted, with conviction recorded, for failure to comply with a <i>Compliance notice</i> issued by the FWO for underpayment of wages or breach/s of Australian workplace law/s ¹³

¹² Considered to be non-compliant by the Panel (supported by sufficient evidence following investigation).

¹³ Through a small-claims action under the *Fair Work Act 2009*.

Types of non-compliance	Minor non-compliance	Moderate non-compliance	Major non-compliance	Aggravated non-compliance
Demerits (per non-compliance)	Two (2) demerits	Five (5) demerits	Ten (10) demerits	Twenty (20) demerits
	Supplier self-reports to the FWO for isolated or 'one-off' instance of non-compliance and the non-compliance is remedied	Supplier self-reports broad non-compliance of an Australian workplace law/s to FWO <u>and</u> enters into an enforceable undertaking, including for restitution, without undue delay	Supplier is issued a <i>FWO Notice</i> under section 712AA of the <i>Fair Work Act 2009</i> <u>and</u> has not complied as directed	Supplier is successfully prosecuted, with conviction recorded, for underpayment of wages or breach/s of Australian workplace law/s ¹⁴
			Supplier enters into an enforceable undertaking including for restitution in response to detected non-compliance without undue delay <u>and</u> where self-reporting did not occur ¹⁵	
			Supplier fails to fulfil an enforceable undertaking ¹⁵	
6. Security of payment				
a) Adjudication standards	Supplier has been issued with more than two (2) warnings by the Queensland Building and Construction Commission (QBCC) for breach of s76 BIF Act in a 12-month period, or has received a reprimand as a result of disciplinary action for such a breach	Supplier failed to pay an adjudicated amount within the timeframe applicable to the adjudication decision	Supplier has a judgement debt lodged against them for non-payment	Supplier is the recipient of five (5) or more adverse adjudication decisions over the life of the contract
b) Breaches of the Building Industry Fairness (BIF) Act	Supplier has been issued with a penalty infringement notice by QBCC for breach of s76 of the BIF Act (or has had a disciplinary penalty imposed of an amount equal to or greater than a penalty infringement notice)	Supplier has been found/pleads guilty to a breach of s76 of the BIF Act, or has had its license suspended or cancelled following disciplinary action for such a breach	Supplier's breach of s 76 caused significant financial hardship to the claimant	

¹⁴ Through a small-claims action under the *Fair Work Act 2009*.

¹⁵ Subject to severity, this may be considered a major or aggravated non-compliance.

Types of non-compliance	Minor non-compliance	Moderate non-compliance	Major non-compliance	Aggravated non-compliance
Demerits <i>(per non-compliance)</i>	Two (2) demerits	Five (5) demerits	Ten (10) demerits	Twenty (20) demerits
7. Payment standards				
a) Payments not covered by the BIF Act	Supplier failed to meet payment obligations ¹⁶ with supply chain	Supplier falsified documentation related to a failure to deliver payment obligations ¹⁶ with supply chain	Supplier has an adverse judgement against it related to the non-payment of creditors related to the contract	Supplier has more than one adverse judgement against it related to the non-payment of creditors related to the contract
8. [other] Contractual and policy				
a) Other commitments (including not engaging sanctioned suppliers when doing business with government) <i>demerits here cannot duplicate those applied in other rows</i>	Supplier failed to deliver any minor contract or policy commitment ¹⁷	Supplier failed to deliver any moderate contract or policy commitment ¹⁷	Supplier failed to deliver any major contract or policy commitment ¹⁷	Supplier failed to deliver any aggravated contract or policy commitment ¹⁷

¹⁶ Obligations are determined by the contractual arrangements and pre-agreed terms.

¹⁷ Discretion will remain with the Panel in determining the severity of the non-compliance (i.e., minor, moderate, major or aggravated).

Types of non-compliance	Minor non-compliance	Moderate non-compliance	Major non-compliance	Aggravated non-compliance
Demerits <i>(per non-compliance)</i>	Two (2) demerits	Five (5) demerits	Ten (10) demerits	Twenty (20) demerits
9. Communication and Cooperation				
a) Co-operation with requests ¹⁸	Supplier failed to action a request from the QGP Compliance Branch or procuring agency within 10 business days ¹⁹	Supplier failed to action a request from the QGP Compliance Branch or procuring agency within 5 business days of receiving a written warning relating to the outstanding activity ¹⁹	Supplier formally refuses a QGP Compliance Branch or procuring agency request ¹⁹	Supplier submits false or misleading information in response to a QGP Compliance Branch or procuring agency request
10. Ethical Supplier Threshold (the Threshold)				
a) Demerits under the Threshold				Supplier breaches the Threshold requirements. <ul style="list-style-type: none"> Refer to Clause 19 of the <i>Queensland Procurement Policy (QPP)</i> and the <i>Guidelines: Ethical Supplier Threshold</i> for further information

¹⁸ All requests are subject to, and bound by, relevant Australian and Queensland privacy laws and principles.

¹⁹ Without valid legal excuse (i.e., a justified claim of confidentiality or privilege). Procuring agencies should not further engage suppliers or approve suppliers as subcontractors while QGP Compliance Branch information requests remain outstanding.

4.2 Investigating a potential non-compliance

Procuring agencies or the QGP Compliance Branch are responsible for managing investigations into potential non-compliance under the Mandate (i.e., alleged non-compliance) and referring regulatory matters to regulators or law enforcement agencies, where necessary.

When the QGP Compliance Branch is conducting the investigation, it assumes the requisite authority, roles and function for the duration of the compliance process under the Mandate.

4.2.1 Compelling evidence

The Mandate is the mechanism for government to assess supplier behaviour; not to determine guilt in terms of legislative compliance. Consequently, compelling evidence (see **Appendix 1** – Definitions) can be used to assess the behaviour of a supplier (even without a regulator outcome).

Where a regulatory non-compliance is referred to a regulator or law enforcement agency, no further action will be taken under this Mandate until resolution of the regulatory or law enforcement process (including any appeal process), unless the procuring agency has obtained compelling evidence of a non-compliance relating to the following:

- underpayment of superannuation
- underpayment of wages or
- some instances of sham contracting.

Where compelling evidence is available which indicates the non-compliance did occur (e.g., payslips showing incorrect payment of wages), the agency must refer the matter to the Panel (via the QGP Compliance Branch) for consideration of appropriate penalty under the Mandate.

This would occur in addition to the agency referring the matter to the relevant regulator for regulatory compliance action, or to a law enforcement agency for investigation under wage theft offences for example.

Compelling evidence can be used to refer a matter to the Panel even where the breach of law has not yet been established by a court or regulator.

The Panel has discretion to determine whether to wait for a finding by a regulator before making recommendations on a penalty (e.g., particularly regarding complex regulatory matters, such as some instances of sham contracting).

4.2.2 Referral to the Tripartite Procurement Advisory Panel

Where an alleged non-compliance is supported with compelling evidence obtained by the procuring agency, or confirmed by a regulator or other decision-making body, the procuring agency will refer the non-compliance to the Panel (see **Section 6**) via the Strategy and Coordination Unit within the QGP Compliance Branch (see **Section 11**) for recommendation regarding a penalty.

Collating non-compliance

Procuring agencies may choose to collate non-compliance for referral to the QGP Compliance Branch. Agencies may allow up to twenty (20) business days to collate any further alleged non-compliance that may be identified on the same contract. This allows the identified non-compliance to be escalated as a single process. Any non-compliance identified outside of this twenty (20) day period is then treated as a new matter.

Where necessary, the Deputy Director-General – Procurement (DDG – Procurement) within the Department of Energy and Public Works may review an investigation by an agency into a non-compliance allegation where the matter was not progressed to the Panel. The DDG – Procurement may decide, based on the evidence available, to recommend that the procuring agency refers the non-compliance to the Panel for advice on an appropriate penalty.

If a non-compliance is referred, all supporting documentation and relevant information is provided to the Panel in order for a holistic and informed recommendation to be made.

Refer to the *Guidelines: Ethical Supplier Mandate* and *Guidelines: Ethical Supplier Threshold* for further information on the above processes.

5 Procedural fairness

Suppliers suspected of non-compliance will be offered up to four opportunities to respond to procedural fairness steps throughout the process. This includes:

- *Show Cause Notice*: issued when the procuring agency or QGP Compliance Branch is investigating an alleged non-compliance under the Mandate or breach of the Threshold
- *Extenuating Circumstances Notice*: issued before the Panel is convened and recommendations on penalty are determined
- *Proposed Sanction Notice*: issued by the decision maker to suppliers that may be subject to a sanction (issued after receiving the Panel recommendation, and before issuing an *Outcome Notice*) and
- *Outcome Notice*: issued following a decision about a penalty under the Mandate, giving the supplier an opportunity to appeal (see **Section 9**).

Refer to the *Guidelines: Ethical Supplier Mandate* for further information regarding this process.

Complainants who have made a complaint which has resulted in an investigation and a penalty being issued under the Mandate can be informed of the progress at key milestones in a general way without breaching privacy provided information sharing authority has been provided in the contract.

Anonymous complaints cannot be actioned under this policy except where there is sufficient information in the complaint or otherwise available to enable an investigation to be undertaken.

Agencies should seek specific legal advice before publishing any information about penalties.

6 Tripartite Procurement Advisory Panel (the Panel)

The Panel is comprised of three members with the requisite knowledge and experience to make assessments of non-compliance under the Mandate and make recommendations to the Queensland Government on appropriate penalties (see **Appendix 1** – Definitions).

The Panel may seek independent advice from experts with knowledge and experience of the particular type of non-compliance being considered, as required. The Panel will be bound by and subject to a Code of Conduct and relevant privacy principles as outlined in their Terms of Reference (TOR).

The Panel will consider alleged non-compliance submissions and associated evidence (as referred by procuring agencies via the QGP Compliance Branch) and prepare a recommendation to the decision maker:

- as to whether, in its view, there is a non-compliance under the Mandate²⁰ and
- what penalties might be appropriate such as number of demerits, or period of sanction.

The Panel will consider any contract management actions that the procuring agency (or the principal contractor in the case of a subcontractor) has taken in relation to the non-compliance when considering the possible penalty.

The Panel's recommendation on penalties will be given to the relevant decision maker to consider (refer to **Section 7**).

7 Decision maker

The decision maker for imposing penalties under the Mandate (see **Appendix 1** – Definitions) will be the head of the procuring agency or such suitably qualified and senior delegate.

Decisions made regarding an appropriate penalty under the Mandate for a supplier engaging in unethical conduct will be a separate decision to any regulatory matter being handled by a regulator or law enforcement agency.

²⁰ The procuring agency is responsible for contract management actions and the Panel is to make recommendations under the *Ethical Supplier Mandate 2021*, not action under the contract.

For further information about this process refer to the *Guidelines: Ethical Supplier Mandate*.

8 Penalties under the Mandate

8.1 Penalties

Where the Panel's recommendation is to confirm an alleged non-compliance by a supplier, they will also make a recommendation about appropriate penalties to be applied under the Mandate, including penalties for breach of the Threshold.

Possible penalties include the application of:

- **demerit points** under the Mandate and/or
- **a sanction** (see **Appendix 1** – Definitions).

Demerits will be issued to suppliers on a sliding scale for minor, moderate, major and aggravated compliance issues (refer to **Section 4.1**).

For the most aggravated non-compliance (see aggravated non-compliance/s **Section 4.1**) a sanction may be issued.

In addition to referring an alleged non-compliance to the Panel for advice on penalties, the procuring agency may activate any contractual remedies that are available (e.g. this could include any liquidated damages clauses, termination of contract, or clauses about the publication of a penalty decision) where these are set out in the contract.

8.2 Demerits

Demerits can only be issued for non-compliant activity that is in scope of the Mandate (see **Section 2.2**). Demerits cannot be applied retrospectively prior to the Mandate commencing application to the relevant procurement category.

Suppliers can be issued demerits ranging from zero (0), two (2), five (5), ten (10), or twenty (20) per instance of non-compliance. Refer to **Section 4.1** for further information.

Demerits will expire 12 months from the date they are issued; unless they are applied to a sanction (see **Section 8.3**). All demerits applied to a sanction will be retired and will not contribute to future penalty considerations under the Mandate or Threshold policies.

Demerits and penalties are applied (or not) based on the information and evidence available at the time of the non-compliance consideration. Where a supplier continues to perform non-compliant activities on the same contract and in relation to a previous non-compliance under the Mandate, the matter will be re-opened for consideration of a higher penalty. This process involves an investigation at agency level for the new non-compliance activity, with the Panel forming a new recommendation on the whole matter.

For example, if a supplier has received two (2) demerits for a minor non-compliance, but the activity that led to the accrual of those points is also a factor in the consideration of a moderate non-compliance or other non-compliance type, the original two (2) demerits will be reconsidered for replacement by five (5) demerits if a moderate non-compliance is substantiated. Demerits will not be stacked, and a single instance of non-compliance will not be penalised repeatedly.

8.2.1 Issuing demerits

Demerits are issued by the decision maker, following recommendation of the Panel and will expire 12 months from the date they are issued.

Where a supplier is issued:

- **no demerit points**
 - an *Outcome Notice* will be issued to the supplier under the Mandate stating that:
 - the complaint is dismissed and is now closed and
 - no penalty has been issued.
 - there will be no further action taken against the supplier under the Mandate.

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- **less than twenty (20) demerits** (cumulative within a 12-month period)
 - an *Outcome Notice* will be issued to the supplier under the Mandate
 - there will be no impact on any existing contracts with Queensland Government under the Mandate (however for future contracts the supplier's previous history may be taken into account to assess the risk to government when tenders are considered) and
 - the procuring agency may take related contract management actions as appropriate.
 - **twenty (20) demerits or more** (cumulative within a 12-month period)
 - a *Proposed Sanction Notice* will be issued to the supplier under the Mandate stating that:
 - the complaint has been substantiated
 - outlining the proposed penalty, including the period of the proposed sanction and
 - providing a final opportunity for the supplier to advise why they should not be subject to a sanction.
 - an *Outcome Notice* will be issued to the supplier under the Mandate
 - a sanction may be applied (see **Sections 8.3** and **8.4**) and
 - the procuring agency may take related contract management actions as appropriate.

Information about a supplier's non-compliance under the Mandate will be available to Queensland Government procuring agencies via the online register available here: <https://www.forgov.qld.gov.au/complete-supplier-check>.

For further information about this process, see *Guidelines: Ethical Supplier Mandate*.

Where demerits have been applied against a supplier, which subsequently ceases to trade, then the Panel may recommend the demerits be imposed on an entity related to the supplier where it determines that the entity:

- is a company that continues the business of the supplier or
- is a related body corporate of the supplier.

8.3 Imposing a sanction

Sanctions will be determined by the decision maker on advice from the Panel.

Sanctions can include:

- suspending a supplier's prequalification for a defined period
- making a supplier ineligible for contract award for a defined period
- not exercising contract extension options
- suspending a supplier from any Queensland Government panel or contracting framework for a defined period
- a suspended sanctions penalty, pending successful implementation of any recommended corrective actions.

The Panel will review all non-compliances in scope of the sanction consideration and provide a recommendation to the decision maker regarding the appropriateness of a sanction, and if required, the extent of the proposed sanction.

The Queensland Government will, unless it determines otherwise, sanction suppliers once the supplier has received twenty (20) demerits in a 12-month period from the date of the decision. A supplier may be sanctioned for a single aggravated non-compliance under the Mandate, or for multiple non-compliances where accumulation of twenty (20) demerits occurs within a 12-month period.

Upon accumulating the minimum twenty (20) points, a supplier may only be sanctioned once and after their accumulated demerit points are applied to the sanction they expire.

For example, if the decision maker applied a sanction to a supplier secluding them from government contracts for a period of three months, the demerits that led to that sanction would be applied to the penalty and reset the supplier back to zero (0) demerits. Demerits once applied to a sanction expire

and cannot be used to re-prosecute the supplier or contribute to future non-compliance considerations.

8.4 The impacts of a sanction for the supplier

For the period of a sanction (up to 12 months), the supplier will not be permitted to enter contracts with the Queensland Government.

If the sanctioned supplier has an existing contract with government, extension options under that contract will not be exercised. The procuring agency may also take related contract management actions as appropriate.

Information that a supplier is under a current sanction will be available to government procurement officers to ensure that the sanctioned supplier is not permitted to enter any contracts with Queensland Government during the period of the sanction. This information will also be referred to the administrators of prequalification and registration systems, and Chief Procurement Officers for implementation.

Information about a supplier's sanction may be published online by the procuring agency or the DDG – Procurement where the original contract permits it. All information handled under the Mandate will be managed in line with the relevant privacy legislation.

Decisions regarding a sanction will not take into account that there may be impacts on any potential federal or interstate procurement that a supplier may undertake.

Where a supplier is registered under the National Prequalification System for Civil (Road and Bridge Construction Contracts [NPS]), any sanction decision under the Mandate will be referred to the agency responsible for the administration of that System (in Queensland, Department of Transport and Main Roads), to be actioned in accordance with that System.

This referral will not alter the implementation of sanctions outside of that System.

9 Appeal process

An appeal process will be available to suppliers who have been penalised for non-compliance under the Mandate. A supplier (see **Appendix 1** – Definitions) can appeal a decision to apply demerits or a sanction if they believe:

- the process outlined in the Mandate has not been followed;
- show cause details, extenuating circumstances or specific supporting evidence were not taken into account in the original decision and / or
- the decision was not in line with the penalty guidelines.

The appeal process is a review of the process and outcome. It is not an opportunity to revisit the facts of the non-compliance that gave rise to the demerits or sanction. It is not a re-investigation of the non-compliance.

Refer to the *Guidelines: Ethical Supplier Mandate* for further information on the process.

10 The Procurement Compliance Portal

The QGP Compliance Branch maintains a register recording all instances of supplier non-compliance under the Mandate or the Threshold.

Procuring agencies can request information about a supplier's compliance history, including as authorised by access to information contract clauses (see **Appendix 2** of the *Guidelines: Ethical Supplier Mandate*).

10.1 Check the Portal

The QGP Compliance Branch maintains the Procurement Compliance Portal (the Portal) which provides agencies a secure online tool confirming whether a supplier is subject to any current

penalties under the Mandate or Threshold (available here: <https://www.forgov.qld.gov.au/complete-supplier-check>).

Procuring agencies must check the Portal before procuring, unless engaging a prequalified supplier, or completing a low-value threshold procurement (see **Appendix 1** – Definitions).

A pre-qualified supplier (see **Appendix 1** – Definitions) means a supplier registered with:

- the Prequalification System of the Capital Works Management Framework
- the National Prequalification System for Civil (Road and Bridge) Construction Contracts
- arrangements administered by General Goods and Services, Department of Energy and Public Works or
- QBuild as a prequalified supplier.

11 QGP Compliance Branch

Compliance with the QPP (including **Clause 28** the Ethical Supplier Mandate) is monitored by the QGP Compliance Branch which reports to the DDG – Procurement.

Further information about the role of the QGP Compliance Branch, including how to make a complaint regarding an alleged non-compliance under the Mandate, is available here: www.hpw.qld.gov.au/about/strategy/buy-qld/compliance-complaints.

The Strategy and Coordination Unit within the QGP Compliance Branch will manage the functions of the process related to the Mandate.

The QGP Compliance Branch monitors and refers complaints regarding possible non-compliance under the Mandate. Alleged non-compliance received by the QGP Compliance Branch will be referred to the relevant procuring agency for investigation.

The QGP Compliance Branch also undertakes audits of BPP projects which may identify a potential non-compliance under the Mandate. In that case the matter will be referred to the procuring agency to investigate.

12 Review of the Mandate

Government will consider the extension of the Mandate in 2023.

This review will determine the potential expansion of the Mandate to other categories of procurement and entities including special purpose vehicles.

Appendix 1 – Definitions

Term	Description
Breach	A failure by the supplier to comply with one or more requirements of the Ethical Supplier Threshold as determined by a regulator or the decision maker.
Business day	A day that is not a Saturday, Sunday or a public holiday in Queensland.
Compelling evidence	<p>Compelling evidence of a non-compliance under the Mandate or breach of the Threshold having occurred (e.g., pay slips indicating underpayment of wages or superannuation, or ATO records, bank statements) regardless of whether the evidence has or has not been considered by any regulator or court, or whether or not there is any relevant regulator.</p> <ul style="list-style-type: none"> – A non-compliance can be dealt with based on compelling evidence, even where the non-compliance standard is breach of a law that has not been established by a court or regulator (including as set out in the Threshold). The same applies in the case of breach of the Local Benefits Test or other contractual requirements where there is no regulator. – A decision regarding imposing a penalty under the Mandate can be made where compelling evidence exists for relevant non-compliance. Procedural fairness will still apply and suppliers will have a chance to challenge an allegation or rectify a non-compliance.
Complainant	The person who has made a complaint regarding an alleged non-compliance under the Mandate.
Date of issue	<p>The date of issue means the day the Notice was provided to the supplier, where the method of issue results in immediate receipt (for example, in person, email).</p> <ul style="list-style-type: none"> – Where same day delivery is not possible (i.e., post) the date of issue is five (5) business days after the Notice was posted.
Declared by the Minister	<p>Declared in writing by the Minister responsible for the category, in consultation with:</p> <ul style="list-style-type: none"> – the Minister for Energy, Renewables and Hydrogen and Minister for Public Works and Procurement, and – the Premier and Minister for Trade.
Deputy Director-General – Procurement	The Deputy Director-General – Procurement (DDG – Procurement) of Queensland Government Procurement within the Department of Energy and Public Works.
Decision maker	The head of the procuring agency or such suitably qualified and senior delegate, to make decisions regarding whether a non-compliance under the Ethical Supplier Mandate or a breach of the Ethical Supplier Threshold occurred from the dates the policies apply (following recommendation from the Tripartite Procurement Advisory Panel) and whether a penalty in the form of demerits and or a sanction should be applied.
Ethical Supplier Threshold	<p>The Ethical Supplier Threshold described in the Queensland Procurement Policy, that is, whether a supplier has on or after 1 August 2019:</p> <ol style="list-style-type: none"> (a) contravened a civil remedy provision of Chapter 2 or Chapter 3 of the <i>Fair Work Act 2009</i> (Cth), or committed an offence against the <i>Fair Work Act</i> (b) contravened a civil remedy provision of Chapter 2, 3, 4, 5, or 7 of the <i>Industrial Relations Act 2016</i>, or committed an offence against the <i>Industrial Relations Act</i>, or failed to pay employment related levies, or other payments, established under Queensland legislation (c) failed to make superannuation contributions on behalf of employees in accordance with law (d) purported to treat employees as independent contractors, where they are not

	<ul style="list-style-type: none"> (e) required persons who would otherwise be employees to provide an Australian Business Number so that they could be treated as independent contractors (f) engaged persons on unpaid work trials or as unpaid interns, where they should be treated as employees (g) entered into an arrangement for the provision of labour hire services with a person who is not licensed under the <i>Labour Hire Licensing Act 2017</i>, or a supplier who is an unlicensed supplier under the Act (h) paid employee wages below those provided for in an applicable modern award (including for people with disability, 'suppliers' must provide award-based wages (using the Supported Wage System where appropriate)).
Guidelines	<p>A document detailing information and guidance that assists a user to fulfil a policy requirement or understand concepts about a related process.</p> <ul style="list-style-type: none"> – Guides may include specific steps that should be followed to complete a given process in support of a policy requirement
Low value procurement	<p>Low value procurement is defined by an agency's existing purchasing threshold, where this value is less than \$20,000 (per purchase or order).</p> <ul style="list-style-type: none"> – Where an agency's low value procurement threshold exceeds \$20,000, that agency's definition of low value spend will be capped at \$20,000 for the purpose of the Mandate and the Threshold.
Non-compliance	<p>A failure by the supplier to comply with a policy, legislative or contractual requirement as set out in Section 4.1 '<i>Categories of non-compliance</i>' (within the <i>Ethical Supplier Mandate 2021</i>) or Section 2.2 '<i>Types of non-compliance</i>' (within the <i>Ethical Supplier Mandate 2019</i>) where the supplier knew or ought to have known the conduct was non-compliant as decided by the decision maker, on advice from the Panel. This may include, but is not limited to, where the decision maker considers that the supplier's conduct was deliberate, negligent, or repeated.</p>
Policy requirement	<p>A requirement of:</p> <ul style="list-style-type: none"> – the <i>Queensland Procurement Policy</i> (QPP) – the <i>Queensland Government Procurement Strategy</i> – procurement-related policies and instruments as listed in Schedule 3 to the QPP – procurement-related guidance and codes approved by the DDG – Procurement Queensland Government Procurement or a contractual term, designed to effect a policy requirement, in a Queensland Government contract, a subcontract to a Queensland Government contract, or a contract in a supply chain supporting a Queensland Government contract or a requirement of a law or regulation specified in this Mandate.
Pre-qualified supplier	<p>A pre-qualified supplier means a supplier registered with:</p> <ul style="list-style-type: none"> – the Prequalification System of the Capital Works Management Framework – the National Prequalification System for Civil (Road and Bridge) Construction Contracts – arrangements administered by General Goods and Services, Department of Energy and Public Works or – QBuild as a prequalified supplier.
Procuring agency	<p>An agency subject to the QPP, including a budget sector agency, a statutory body, special purpose vehicle or Government-Owned Corporation.</p> <ul style="list-style-type: none"> – The 'department sponsoring the project' for the purposes of the <i>Capital Works Management Framework</i> is the 'procuring agency' for the purposes of this Mandate. – For the purposes of this Mandate, the procuring agency is the agency responsible for the contract during which the supplier's non-compliance occurred

Queensland Government contract	<p>A contract between any person and the Crown in the right of the State of Queensland or a related entity, including deeds for common-use supply arrangements and other arrangements as declared by the DDG – Procurement.</p> <ul style="list-style-type: none"> – Also includes any contractual term in a contract that is designed to give effect to a policy requirement in a Queensland Government contract, a subcontract to a Queensland Government contract, or a contract in a supply chain supporting a Queensland Government contract.
Sanction	<p>A sanction is a penalty that prevents the supplier from doing business with Queensland Government for a set period of time of up to 12 months. Sanctions will be determined by the decision maker on advice from the Panel.</p> <p>Sanctions can include:</p> <ul style="list-style-type: none"> – suspending a supplier’s prequalification for a defined period – making a supplier ineligible for contract award for a defined period – not exercising contract extension options – suspending a supplier from any Queensland Government panel or contracting framework for a defined period and – a suspended sanctions penalty, pending successful implementation of any recommended corrective actions.
Supplier	<p>A contractor or consultant or other party to a Queensland Government contract, other than the Crown and its related entities, or a subcontractor to a supplier.</p> <ul style="list-style-type: none"> – The definition of ‘supplier’ includes but is not limited to the definition within the QPP. – The definition of ‘supplier’ includes subcontractors within the supply chain. – The principal supplier under contract to the procuring agency is responsible for conduct of suppliers within their supply chain. – Suppliers may be penalised for non-compliance by their subcontractors, in addition to any penalties applied to the subcontractor, except where the supplier has taken reasonable action to prevent the non-compliance by their subcontractors.
Tripartite Procurement Advisory Panel (the Panel)	<p>An expert panel of knowledgeable nominees, with equal representation from employers, unions and chaired by an independent government appointee having substantial experience in relevant fields.</p> <ul style="list-style-type: none"> – Initial non-compliance is considered by three (3) standing members reflecting equal industry representation and the independent chair. Appeals will be considered by five (5) members of the Panel not involved in the original consideration, with the exception of the chair. <p>The Panel may seek information from independent subject matter experts in relevant areas (e.g., WHS, industrial relations) as needed, to inform their recommendations on appropriate penalties for an alleged non-compliance.</p>