

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

GOVERNMENT CONTRACTS CONFIDENTIALITY BILL 2000

EXPLANATORY MEMORANDUM

Circulated by authority of
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Independent

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OUTLINE

The objective of this Bill is to establish a simple regime under which the Government and its agencies only agree to confidentiality clauses with businesses on a specified list of grounds, and that all contracts which do involve confidentiality are notified to the Auditor-General and to an oversight committee of the Legislative Assembly.

DETAILS OF THE BILL

Clauses 1, 2 and 4 These standard clauses provide for the short title and commencement of the Bill, and the use of statutory notes.

Clause 3 This is a definitions clause.

The term *government agency* is adopted for special use in this legislation. Note that the term *Territory instrumentality* is further defined by the *Interpretation Act 1967* and the *Public Sector Management Act 1994*.

Clause 5 This clause governs the scope of the application of the legislation. The significant features of this clause are:

- The application of the legislation is not retrospective.
- The clause extends to cover all forms of contracts, including subsequent amendments to contracts;
- The clause covers the whole government sector, by use of the defined term *government agency*;

Clause 6 This clause contains the forceful provision that a confidentiality clause is legally ineffective if it has not been agreed to under the process outlined in this legislation.

Clause 7 This clause places a particular requirement on government agencies to ensure that contractors are aware of this legislation.

Note that as a matter of law all persons are assumed to know the law, thus this clause is strictly unnecessary. However it assists in developing awareness of the process put in place by this legislation.

Clause 8 This clause contains the requirements placed upon agencies which are central to the operation of this scheme – the *grounds* upon which a confidentiality clause must be based, together with the factors which mitigate against such a clause being agreed to.

The grounds listed in subclause (2) are drawn from the current Government guidelines regarding confidentiality. The list limits the use of confidentiality to the specified reasons, although no internal definition of those grounds is attempted. The nature of the scheme of this Bill is to require decision-makers to exercise a discretionary judgement, acting in the certain knowledge that their judgement will be scrutinised. It is not the intent of this legislation to lay down detailed prescriptions for all circumstances, as this approach would lead to a complex body of interpretation which could, in itself, become a cause for avoidance of the intent of this legislation.

Decision-makers would also be required to advert to a specified list of reasons why confidentiality should *not* be used (subclause (3)).

Clause 9 This requirement aims to ensure that all parties formally acknowledge the role of this legislation and the effect it has on their agreement. Together with subclause 6(b) it constitutes a condition for the validity of the confidentiality clause.

The clause will assist in preventing any later claim that the effect of the legislation was not accepted by the contracting parties.

Clause 10 This clause provides that the Auditor-General will become the holder of a register of all contracts within the public sector which include confidentiality clauses.

Each contracting agency must provide a copy of a relevant contract to the Auditor-General within 14 days.

Clause 11 Under this clause the Auditor-General, after registering each contract with a confidentiality clause under clause 10, would then be required to transmit a copy of the contract to the Assembly oversight committee within 14 days.

The clause uses flexible generic language to allow the Assembly (through the Speaker) to confer the oversight role upon whichever committee is most appropriate from time to time. This allows for the legislation to self-adjust to keep up with the changing structure of the Assembly committee system, without the need for an amendment to the Act.

In addition, it would be possible to nominate more than one committee to be involved in the oversight role, in any manner which the Assembly determined to be appropriate.

The clause also provides (subclause (3)) that every government agency must, when requested, provide supporting information to the Assembly committee to justify the decision to use a confidentiality clause.

Clause 12 This clause protects government agencies from any action which might otherwise be brought against them for disclosing information (to the Auditor-General or to the Assembly) in accordance with this Act.

Clause 13 The intent of this clause is to ensure that this legislation is not construed to adversely affect other disclosure arrangements, nor to adversely affect any other legal rights to the protection of confidences other than are required to implement the scheme of this Act.

Clause 14 This is a standard regulation power. This power will assist in implementing any supporting arrangements for the scheme of this Act.
