



Australian Capital Territory

Government Procurement Act 2001

A2001-28

Republication No 6

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About this republication

The republished law

This is a republication of the *Government Procurement Act 2001* (including any amendment made under the *Legislation Act 2001*, part 11.3 (Editorial changes)) as in force on 10 January 2005. It also includes any amendment, repeal or expiry affecting the republished law to 10 January 2005.

The legislation history and amendment history of the republished law are set out in endnotes 3 and 4.

Kinds of republications

The Parliamentary Counsel's Office prepares 2 kinds of republications of ACT laws (see the ACT legislation register at www.legislation.act.gov.au):

- authorised republications to which the *Legislation Act 2001* applies
- unauthorised republications.

The status of this republication appears on the bottom of each page.

Editorial changes

The *Legislation Act 2001*, part 11.3 authorises the Parliamentary Counsel to make editorial amendments and other changes of a formal nature when preparing a law for republication. Editorial changes do not change the effect of the law, but have effect as if they had been made by an Act commencing on the republication date (see *Legislation Act 2001*, s 115 and s 117). The changes are made if the Parliamentary Counsel considers they are desirable to bring the law into line, or more closely into line, with current legislative drafting practice.

This republication does not include amendments made under part 11.3 (see endnote 1).

Uncommenced provisions and amendments

If a provision of the republished law has not commenced or is affected by an uncommenced amendment, the symbol **U** appears immediately before the provision heading. The text of the uncommenced provision or amendment appears only in the last endnote.

Modifications

If a provision of the republished law is affected by a current modification, the symbol **M** appears immediately before the provision heading. The text of the modifying provision appears in the endnotes. For the legal status of modifications, see *Legislation Act 2001*, section 95.

Penalties

The value of a penalty unit for an offence against this republished law at the republication date is—

- (a) if the person charged is an individual—\$100; or
- (b) if the person charged is a corporation—\$500.



Australian Capital Territory

Government Procurement Act 2001

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10/01/05

Government Procurement Act 2001
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Australian Capital Territory

Government Procurement Act 2001

An Act about the procurement of goods, services and works by the Territory and Territory entities, and for other purposes

Part 1 Preliminary

1 Name of Act

This Act is the *Government Procurement Act 2001*.

2 Dictionary

The dictionary at the end of this Act is part of this Act.

Note 1 The dictionary at the end of this Act defines certain words and expressions used in this Act, and includes references (*signpost definitions*) to other words and expressions defined elsewhere in this Act.

For example, the signpost definition '*Territory entity*—see section 3.' means that the expression 'Territory entity' is defined in that section.

Note 2 A definition in the dictionary (including a signpost definition) applies to the entire Act unless the definition, or another provision of the Act, provides otherwise or the contrary intention otherwise appears (see Legislation Act, s 155 and s 156 (1)).

3 Meaning of *Territory entity*

(1) In this Act:

Territory entity—

- (a) means an administrative unit, or a Territory entity under the *Auditor-General Act 1996*; and
- (b) for an unincorporated Territory entity—includes a member of the entity acting on behalf of the Territory.

(2) However, *Territory entity* does not include—

- (a) the University of Canberra; or
- (b) the University of Canberra College Pty Limited ACN 080 888 231; or

- (c) an entity declared under the regulations not to be a Territory entity.

4 Notes

A note included in this Act is explanatory and is not part of this Act.

Note See *Legislation Act* 2001, s 127 (1), (4) and (5) for the legal status of notes.

4A Offences against Act—application of Criminal Code etc

Other legislation applies in relation to offences against this Act.

Note 1 *Criminal Code*

The Criminal Code, ch 2 applies to all offences against this Act (see Code, pt 2.1).

The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg *conduct*, *intention*, *recklessness* and *strict liability*).

Note 2 *Penalty units*

The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

Part 2 Government procurement board

Division 2.1 Establishment and functions

5 Government Procurement Board

There is an Australian Capital Territory Government Procurement Board.

6 Functions of board

The functions of the board are—

- (a) to develop, implement and review policies and practices about—
 - (i) the procurement of goods, services and works by Territory entities; and
 - (ii) the disposal of goods and works by Territory entities; and
- (b) to establish an accreditation system for the procurement and disposal activities of Territory entities; and
- (c) to develop and make guidelines for—
 - (i) the procurement of goods, services and works by Territory entities; and
 - (ii) the disposal of goods and works by Territory entities; and
- (d) to monitor the procurement and disposal activities, competencies and systems of Territory entities; and
- (e) to give advice to Territory entities on procurement and disposal issues; and
- (f) to review procurement and disposal proposals of Territory entities in accordance with the procurement guidelines; and

- (g) to assist in the development of training and development courses and activities relevant to the procurement and disposal activities of Territory entities; and
- (h) to provide advice to the Minister on any issue relevant to the procurement and disposal activities of Territory entities or the operation of this Act; and
- (i) to exercise any other function given to the board under this Act or any other Territory law; and
- (j) to do anything else—
 - (i) incidental, complementary or helpful to the board's other functions; or
 - (ii) likely to improve the effective and efficient exercise of the board's other functions.

Note A provision of a law that gives an entity (including a person) a function also gives the entity powers necessary and convenient to exercise the function (see Legislation Act, s 196 and dict, pt 1, def *entity*).

7 Procurement guidelines

- (1) The board may make procurement guidelines for this Act.
- (2) The procurement guidelines may make provision about—
 - (a) the procurement of goods, services and works by Territory entities; and
 - (b) the disposal of goods and works by Territory entities.

Examples

- 1 the policies and practices that must or may be observed
- 2 the procedures that must or may be followed
- 3 the accreditation of people involved, and procedures followed, in procurement and disposal activities
- 4 reporting on procurement and disposal activities

5 procurement and disposal proposals that are to be reviewed by the board

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (3) The procurement guidelines may apply, adopt or incorporate an instrument (or a provision of an instrument) as in force from time to time.

Note 1 The text of an applied, adopted or incorporated law or instrument, whether applied as in force from time to time or as at a particular time, is taken to be a notifiable instrument if the operation of the *Legislation Act 2001*, s 47 (5) or (6) is not disappplied (see s 47 (7)).

Note 2 A notifiable instrument must be notified under the *Legislation Act 2001*.

- (4) A procurement guideline is a disallowable instrument.

Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under the *Legislation Act 2001*.

- (5) The regulations may provide that prescribed activities are, or are not, to be regarded for this Act as—

- (a) procurement or disposal; or
- (b) procurement or disposal activities.

8 Ministerial directions to board

- (1) The Minister may give written directions to the board about the exercise of its functions.
- (2) Before giving a direction, the Minister must—
- (a) tell the board of the intent of the proposed direction; and
 - (b) give the board a reasonable opportunity to comment on the proposed direction; and
 - (c) consider any comments made by the board.

- (3) The Minister must present a copy of a direction given under this section to the Legislative Assembly within 6 sitting days after it is given.
- (4) The board must comply with a direction given to it under this section.
- (5) For the *Trade Practices Act 1974* (Cwlth), this Act authorises—
 - (a) the giving of a direction under this section; and
 - (b) the doing of, or the failure to do, anything by the board to comply with a direction under this section.

9 Reports to Minister

- (1) In addition to any other reports that the board is required to make under this Act or any other law, the board must give the Minister the reports the Minister requires.
- (2) A report under this section must be prepared in the form, and be based on the accounting or other policies or practices, (if any) that the Minister requires.

10 Providing information to Minister

The board must give the Minister any information about its operations that the Minister requires.

Division 2.2 Members of board

11 Constitution of board

The board consists of the following 7 part-time members:

- (a) the chairperson;
- (b) 3 public employee members;
- (c) 3 non-public employee members.

12 Appointment of members

- (1) The members are to be appointed by the Minister.

Note 1 For the making of appointments (including acting appointments), see Legislation Act, div 19.3.

Note 2 Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

- (2) A person appointed as chairperson, or as a public employee member, must be a public employee.

Note **Public employee** is defined in the *Legislation Act 2001*, dict, pt 1.

- (3) A person appointed as a non-public employee member must not be a public employee.
- (4) The instrument appointing, or evidencing the appointment of, a member must state whether the member is appointed as chairperson, a public employee member or a non-public employee member.

13 Term of appointment of members

A member must be appointed for a term of not longer than 5 years.

Note A person may be reappointed to a position if the person is eligible to be appointed to the position (see *Legislation Act 2001*, s 208 and dict, pt 1, def of *appoint*).

14 Honesty, care and diligence of members

In exercising the functions of member, a member must exercise the degree of honesty, care and diligence required to be exercised by a director of a company in relation to the affairs of the company.

15 Abuse of position

- (1) A person commits an offence if—
 - (a) the person uses information gained because of being a member of the board; and

- (b) the person does so with the intention of dishonestly obtaining a benefit for the person or someone else.

Maximum penalty: imprisonment for 5 years.

- (2) A person commits an offence if—

- (a) the person has stopped being a member of the board; and
- (b) the person uses information that the person obtained because of being a member; and
- (c) the person does so with the intention of dishonestly obtaining a benefit for the person or someone else.

Maximum penalty: imprisonment for 5 years.

- (3) In this section:

dishonestly—a person acts dishonestly if—

- (a) the person's conduct is dishonest according to the standards of ordinary people; and
- (b) the person knows that the conduct is dishonest according to those standards.

16 Ending of appointment of members

- (1) The Minister must end the appointment of the chairperson, or a public employee member, if the person ceases to be a public employee.
- (2) The Minister must end the appointment of a non-public employee member if the member becomes a public employee.
- (3) The Minister may end the appointment of any member—
 - (a) for misbehaviour or physical or mental incapacity; or
 - (b) if the member—

- (i) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment or remuneration for their benefit; or
- (ii) is absent, other than on leave approved by the Minister, from 3 consecutive meetings of the board; or
- (iii) contravenes section 14 (Honesty, care and diligence of members) or 20 (Disclosure of interests by members) without reasonable excuse; or
- (iv) commits an offence against section 15 (Improper use of information) or an indictable offence.

Note The appointment of a member also ends if the member resigns (see *Legislation Act 2001*, s 210).

17 Conditions of appointment generally

A member holds the position on the conditions not provided by this Act or any other Territory law that are decided by the Minister.

Division 2.3 Proceedings of board

18 Time and place of meetings

- (1) Meetings of the board are to be held at the times and places it decides.
- (2) However, the board must meet at least at once every month.
- (3) The chairperson—
 - (a) may at any time call a meeting of the board; and
 - (b) must call a meeting if asked by the Minister or at least 3 members.
- (4) The chairperson must give the other members reasonable notice of the time and place of a meeting called by the chairperson.

19 Procedure governing proceedings of board

- (1) The chairperson presides at all meetings at which the chairperson is present.
- (2) If the chairperson is absent, the member chosen by the members present presides.
- (3) Business may be carried out at a meeting of the board constituted in accordance with section 19A.
- (4) At a meeting of the board each member has a vote on each question to be decided.
- (5) A question is to be decided by a majority of the votes of the members present and voting but, if the votes are equal, the member presiding has a casting vote.
- (6) The board may conduct its proceedings (including its meetings) as it considers appropriate.
- (7) The board may hold meetings, or allow members to take part in meetings, by telephone, closed-circuit communication or another form of communication.
- (8) A member who takes part in a meeting conducted under subsection (7) is taken to be present at the meeting.
- (9) If—
 - (a) all members agree, in writing, to a proposed resolution; and
 - (b) notice of the resolution is given under procedures decided by the board;the resolution is a valid resolution of the board, even though it was not passed at a meeting of the board.
- (10) The board must keep minutes of its meetings.

19A Constitution of board

- (1) Business may be carried out at a meeting of the board only if 4 members are present, including 1 non-public employee member.
- (2) However, the review of a prescribed procurement proposal may be carried out at a meeting of the board consisting of—
 - (a) the chairperson and 1 non-public employee member; or
 - (b) the chairperson, 1 non-public employee member and 1 other member; or
 - (c) 2 public employee members and 1 non-public employee member.

Note The board's functions include reviewing procurement and disposal proposals of Territory entities in accordance with the procurement guidelines (see s 6 (f)).

- (3) Subsection (2) does not apply to a prescribed procurement proposal if—
 - (a) the chairperson gives a direction that the subsection does not apply to the proposal; or
 - (b) a member tells the chairperson that the member objects to the proposal being reviewed by the board as constituted under the subsection.

- (4) In this section:

prescribed procurement proposal means a particular procurement proposal or a particular kind of procurement proposal approved, in writing, by the chairperson for subsection (2).

procurement proposal means a proposal by a Territory entity for—

- (a) the procurement of goods, services and works; or
- (b) the disposal of goods and works.

20 Disclosure of interests by members

- (1) This section applies to a member if—
 - (a) the member has a direct or indirect financial interest, or a direct or indirect interest of any other kind, in an issue being considered, or about to be considered, by the board; and
 - (b) the interest could conflict with the proper exercise of the member's functions in relation to the board's consideration of the issue.
- (2) As soon as practicable after the relevant facts come to the member's knowledge, the member must disclose the nature of the interest to a meeting of the board.
- (3) The disclosure must be recorded in the board's minutes and, unless the board otherwise decides, the member must not—
 - (a) be present when the board considers the issue; or
 - (b) take part in a decision of the board on the issue.
- (4) Any other member who also has a direct or indirect financial interest in the issue must not—
 - (a) be present when the board is considering its decision under subsection (3); or
 - (b) take part in making the decision.

Division 2.4 Staff

21 Arrangements for staff

- (1) The board may arrange with the chief executive to use public servants in the administrative unit under the chief executive's control.

- (2) The *Public Sector Management Act 1994* applies to the management by the board of public servants the subject of an arrangement under subsection (1).

Division 2.5 Other matters

22 Power to obtain information and documents

- (1) In relation to the exercise of its functions, the board may, in writing, ask a Territory entity to give stated information or a stated document to the board within a stated time and in a stated way.
- (2) The Territory entity must comply with the request.

Part 3 **Notifiable contracts**

Division 3.1 **Preliminary**

23 **Pt 3 does not apply to Territory owned corporations etc**

- (1) This part does not apply to a Territory owned corporation or any other Territory entity established under the Corporations Act (each of which is an *excluded body*).
- (2) To remove any doubt, this part applies in relation to a contract entered into by—
 - (a) a Territory entity (other than an excluded body) with an excluded body; or
 - (b) an excluded body as an agent of a Territory entity (other than another excluded body).

Example for section

A government department (representing the Territory) enters into a notifiable contract with a Territory owned corporation. The government department, but not the Territory owned corporation, is required to notify the contract under this part.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

24 **Definitions for pt 3**

In this part:

confidential text, of a notifiable contract, means that part of the contract that a party to the notifiable contract (including the Territory or a Territory entity) is required to keep confidential under—

- (a) a provision of a contract (including the notifiable contract) that requires a party to the notifiable contract to keep any part of the notifiable contract confidential; or
- (b) any other requirement imposed by law that has the effect of requiring a party to the notifiable contract to keep any part of the notifiable contract confidential.

contract includes a contract as amended.

notifiable amendment, of a notifiable contract—see section 26.

notifiable contract—see section 25.

notifiable contracts register—see section 27 (1).

public text—the **public text** of a notifiable contract is—

- (a) the text (if any) of the contract that is not confidential text; and
- (b) any confidential text of the contract—
 - (i) that ceases to be confidential in accordance with the contract or by the agreement of the parties to the contract; or
 - (ii) the substance of which has become public knowledge.

responsible Territory entity, for a contract or proposed contract, means—

- (a) the Territory entity that is, or will be, responsible for the administration of the contract; or
- (b) if a Territory entity administers, or will administer, the contract for another Territory entity—the other Territory entity.

Example for par (b)

A Territory owned corporation administers a contract for an unincorporated government body. The body is the responsible Territory entity for the contract.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

25 **What is a *notifiable contract***

- (1) For this part, a ***notifiable contract*** is any of the following entered into by the Territory or a Territory entity:
- (a) a written contract for the procurement of goods, services or works;
 - (b) a written contract for the disposal of goods or works.
- (2) However, ***notifiable contract*** does not include the following:
- (a) a contract with a total consideration, or estimated total consideration, worth less than \$50 000 (or, if another amount is prescribed under the regulations, the other amount);
- Note* ***Contract*** includes a contract as amended, see s 24.
- (b) an intergovernmental agreement;
 - (c) a contract prescribed under the regulations.

Example of par (a)

The consideration for a contract for the purchase of swings by the Territory is \$45 000. The contract is later amended to increase the total consideration to \$52 500. The contract, as amended, is a notifiable contract.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (3) To remove any doubt, none of the following is a ***notifiable contract***:
- (a) a contract of employment;
 - (b) a contract for the settlement of a legal liability to an individual.

26 **Meaning of *notifiable amendment***

For this part, a ***notifiable amendment*** of a notifiable contract is any amendment that, either alone or counted with another amendment or other amendments that have not been notified in the notifiable contracts register, increases the total consideration for the contract by at least the greater of—

- (a) 10% (or, if another percentage is prescribed under the regulations, the other percentage) of the total consideration for the contract as already notified in the notifiable contracts register; and
- (b) \$20 000 (or, if another amount is prescribed under the regulations, the other amount).

Example

The consideration for a contract between the Territory and Acme Pty Ltd for the supply of road runner retention devices is \$190 000.

The minimum value for notification of an amendment, or a series of amendments, of the contract is \$20 000 (ie the greater of \$20 000 or 10% of the value of the contract which is \$19 000). The contract is amended on 3 occasions.

The 1st and 2nd amendments are for \$15 000 each. While neither of the amendments is separately notifiable, the total of the 2 amendments is \$30 000 and each of them is therefore a notifiable amendment. When the 2 amendments are notified on the register, the 2 amendments cannot be counted towards any other notifiable amendment. They increase the total consideration for the contract to \$220 000.

The 3rd amendment is for \$21 000. It is not a notifiable amendment because, even though it is more than \$20 000, it is less than 10% of the total consideration for the contract as amended by all previous notifiable amendments, ie \$22 000.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

Division 3.2 Notifiable contracts register

27 Keeping of register

- (1) The chief executive must keep a register of notifiable contracts (the *notifiable contracts register*).

Note The reference to the chief executive is to the chief executive of the administrative unit that administers this provision (and not to the chief executive of each administrative unit), see Legislation Act, s 163.

- (2) The register must be kept electronically.

Example of how register may be kept

The register may be kept in the form of, or as part of, 1 or more computer databases, and may include data compiled electronically from the databases.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (3) The chief executive may correct any mistake, error or omission in the register subject to the requirements (if any) of the regulations.

28 Contents of register

- (1) The notifiable contracts register must include the following for each notifiable contract:
- (a) the parties to the contract;
 - (b) the responsible Territory entity for the contract and any change in the responsible Territory entity for the contract;
 - (c) a brief description of what the contract is for;
 - (d) the date the contract was made;
 - (e) the date the contract ends;
 - (f) the value of the total consideration, or estimated total consideration, for the contract;
 - (g) if a notifiable amendment of the contract is made—
 - (i) the change in the value of the consideration to which the amendment relates; and
 - (ii) the date the amendment was made;
 - (h) whether any part of the contract is confidential text;

Note **Contract** includes a contract as amended, see s 24.

- (i) if any part of the contract is confidential text—a brief indication of what the confidential text relates to;
- (j) for a notifiable contract, and any notifiable amendment of the contract, held by the responsible Territory entity in electronic form—an electronic copy of the public text (if any) of the contract;
- (k) where anyone can obtain a printed copy of the public text (if any) of the contract as made and of any notifiable amendment of the contract;
- (l) anything else prescribed under the regulations.

Examples for par (i)

see examples for s 35 (1) (a)

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) The register may include anything else the chief executive considers appropriate.

Example

Information about and hypertext links to contracts that are not notifiable contracts.

- (3) The regulations may make provision in relation to documents that are to be entered in the register.

Example

requiring a document to be in portable document format (created in Adobe Acrobat 5.0) or in rich text format

29 Public access to material on register

- (1) The chief executive must ensure, as far as practicable, that a copy of the material mentioned in section 28 (1) is accessible at all times on a web site approved by the chief executive.
- (2) Access is to be provided without charge by the Territory.

30 Territory entities to provide material for register

- (1) The responsible Territory entity for a notifiable contract must, within 21 days after the day the contract is made—
 - (a) enter the material mentioned in section 28 (1) for the contract in the register; or
 - (b) give the material to the chief executive for entry in the register.
- (2) The entity must also, within 21 days after the day a change in the material mentioned in section 28 (1) happens—
 - (a) update the material for the contract in the register; or
 - (b) give the updated material to the chief executive for entry in the register.

Note **Contract** includes a contract as amended, see s 24.

- (3) However, subsection (2) only applies to a change mentioned in section 28 (1) (g) if the change is about a notifiable amendment.

Division 3.3 Availability of notifiable contracts

31 Public text of contracts to be made available

- (1) The responsible Territory entity for a notifiable contract must make the public text of the contract as made, and of any notifiable amendment of the contract, available to the public within—
 - (a) for the contract—21 days after the day the contract becomes a notifiable contract; or
 - (b) for the amendment—21 days after the day the amendment becomes a notifiable amendment.
- (2) The public text must be made available—
 - (a) if section 28 (1) (j) (Contents of register) applies to the public text—from the notifiable contracts register in accordance with section 29 (Public access to material on register); and

- (b) by allowing anyone to buy a printed copy of the public text, at a place mentioned in section 28 (1) (k) in relation to the contract, on payment of the reasonable costs of reproducing it.

Example

A notifiable contract for public works consists of computer-written text in a form that can be included on the register and a hand-drawn plan. The public text of the contract that is computer-written must be made available both in hardcopy and electronically from the notifiable contracts register. The public text of the hand-drawn plan must be made available in hardcopy.

If the responsible Territory entity has an electronically scanned copy of the plan, the public text of the scanned copy must also be made available from the register.

Note 1 A responsible Territory entity is not required to create an electronic copy of a document that is not in electronic form, see s 33.

Note 2 An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision when it appears (see Legislation Act, s 126 and s 132).

- (3) The requirement to make the public text of a notifiable contract (including any notifiable amendment of the contract) available ends when the contract ends, but the Territory entity may continue to make the public text available for any period after the contract ends.

Note **Contract** includes a contract as amended, see s 24.

32 **Making information and contracts available apart from pt 3**

- (1) This part does not prevent responsible Territory entities from making available information about, or the text of, government contracts otherwise than as required by this part if an agency is required under law to do so or can otherwise properly do so.

Examples

- 1 publishing information about a contract in a newspaper advertisement in addition to complying with s 28 (1) (Contents of register)

- 2 giving a person an electronic copy of a notifiable contract, without charge, on a floppy disk, CD or DVD

Note 1 The *Freedom of Information Act 1989* and *Territory Records Act 2002* provide for access to documents subject to certain exemptions.

Note 2 An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see *Legislation Act*, s 126 and s 132).

- (2) In this section:

government contract means a notifiable contract and any other contract to which the Territory or a Territory entity is a party.

33 Entities not required to create electronic copies

If a responsible Territory entity does not have a notifiable contract in electronic form, this part does not require the entity to create an electronic copy of the contract.

Division 3.4 Confidential text

34 Notice of effect of div 3.4 to contracting parties

- (1) This section applies in relation to a proposed notifiable contract if—
- (a) a party to the contract, including the Territory or a Territory entity, proposes that any part of the contract be confidential text; or
 - (b) any part of the contract will be confidential text because of a requirement imposed under law that requires a party to the contract to keep the part confidential.
- (2) The responsible Territory entity for the contract must ensure that this division is drawn to the attention of all the proposed parties to the contract (other than the Territory or a Territory entity).

35 Grounds for confidentiality of information

- (1) The responsible Territory entity for a contract to which section 34 applies must not propose that any part of the text of the contract be confidential text, or agree to any part of the contract being confidential text, unless satisfied that—
- (a) the disclosure of the text would—
 - (i) be an unreasonable disclosure of personal information about a person; or
 - (ii) disclose a trade secret; or
 - (iii) disclose information (other than a trade secret) having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or
 - (iv) be an unreasonable disclosure of information about the business affairs of a person; or
 - (b) a requirement imposed under law requires a party to the contract to keep the text confidential.

Examples for par (a)

- 1 intellectual property including software source codes
- 2 information on the design and operation of goods
- 3 hourly rates, on-costs and management fees
- 4 individual components of the total contract price

Example for par (b)

a failure to comply with the requirement would create an action for breach of confidence

Note 1 The Information Privacy Principles apply to a Territory entity. Personal information may be disclosed under a Territory law (see *Privacy Act 1988* (Cwlth), s 14, principle 11 (1) (d)).

Note 2 An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see *Legislation Act*, s 126 and s 132).

- (2) However, the responsible Territory entity for the contract must not propose that any part of the text of the contract be confidential text, or agree to any part of the contract being confidential text, if—
- (a) the substance of the information to which the text relates is public knowledge; or
 - (b) the effect of the proposal or agreement—
 - (i) would be to inappropriately restrict a Territory entity in the management or use of Territory assets; or
 - (ii) would not be in the public interest; or
 - (iii) would be to require the obligation of confidentiality to apply for longer than is reasonably necessary to protect the interest to which it relates.
- (3) In this section:

personal information—see the *Privacy Act 1988* (Cwlth), section 6.

36 Model confidentiality clause required for confidential text

The text of a notifiable contract must not be made confidential text unless—

- (a) a confidentiality clause that incorporates the substance of the model confidentiality clause in schedule 1, as far as is applicable, is included in the contract; and
- (b) the confidentiality clause does not limit disclosure of information to a greater extent than provided in the model confidentiality clause.

37 Invalidity of non-complying confidentiality clauses

A confidentiality clause in or applying to a notifiable contract is void if—

- (a) the clause does not comply with section 36; or

- (b) the clause was included in the contract in contravention of section 35 (Grounds for confidentiality of information).

38 Contracts and information to be given to auditor-general

- (1) In this section:

confidential text includes text that purports to be confidential text.

reportable contract means a notifiable contract that contains confidential text.

reporting period means a 6-month period ending on 31 March or 30 September.

- (2) The responsible Territory entity for a reportable contract must give the auditor-general—
 - (a) a copy of the contract (including the confidential text) within 21 days after the day the contract becomes a notifiable contract; or
 - (b) if there is any change in the confidential text of the contract—a copy of the relevant amendment of the contract, or the contract as amended, within 21 days after the day the confidential text is changed.
- (3) The entity must, for each relevant reporting period, give the auditor-general either—
 - (a) a list of the following:
 - (i) the reportable contracts that became notifiable contracts during the relevant period;
 - (ii) the reportable contracts which had confidential text changed during the relevant period; or
 - (b) a statement that no reportable contracts became notifiable or changed during the relevant period.
- (4) The list must contain—

- (a) the following information for each reportable contract mentioned in subsection (3) (a) (i):
 - (i) the parties to the contract;
 - (ii) a brief description of what the contract is for;
 - (iii) the date the contract was made;
 - (iv) the date the contract ends;
 - (v) the value of the total consideration, or estimated total consideration, for the contract; and
 - (b) for each reportable contract mentioned in subsection (3) (a) (ii)—the thing that the change relates to; and
 - (c) any other information prescribed under the regulations.
- (5) The list or statement must be given to the auditor-general within 21 days after the day each relevant reporting period ends.

39 Auditor-general's reporting obligations for contracts etc

- (1) As soon as practicable after the day each reporting period ends under section 38, the auditor-general must give the appropriate Legislative Assembly committee the information given to the auditor-general under section 38 (3) (a).
- (2) The auditor-general may also give the committee any other information the auditor-general considers appropriate.
- (3) A responsible Territory entity for a reportable contract under section 38 must, if asked by the committee, give the committee the information the committee requires about the decision to agree to the inclusion of confidential text in the contract.
- (4) For this section:

appropriate Legislative Assembly committee means a standing committee of the Legislative Assembly nominated, in writing, by the Speaker.

- (5) A nomination under subsection (4) is a notifiable instrument.

Note A notifiable instrument must be notified under the Legislation Act.

Division 3.5 Other matters

40 Effect of disclosure of confidential information

- (1) This section applies if confidential text, or information about confidential text, is disclosed under this part.
- (2) The disclosure does not affect the continuing force of the obligation of confidence.

41 Effect of other disclosure laws

This part does not affect any other law in force in the Territory about the disclosure of documents or information.

Note 1 The *Freedom of Information Act 1989* and *Territory Records Act 2002* provide for access to documents subject to certain exemptions.

Note 2 The Information Privacy Principles under the *Privacy Act 1988* (Cwlth) provide for the disclosure of personal information in certain circumstances.

42 No liability for complying with pt 3

- (1) The Territory or a Territory entity is not civilly liable to another party to a reportable contract, or to anyone else, for anything done honestly under this part.
- (2) In this section:

reportable contract—see section 38 (1) (Contracts and information to be given to auditor-general).

Part 4 Interest on commercial accounts

43 Application of pt 4

- (1) This part does not apply to a Territory owned corporation or any other Territory body established under the Corporations Act.
- (2) This part applies to a contract entered into by the Territory or a Territory entity for the procurement of goods, services or works, other than a contract—
 - (a) with a consideration of at least \$10 000 (or, if another amount is prescribed under the regulations, the other amount); and
 - (b) that states that this part does not apply to it.

44 Definitions for pt 4

In this part:

commercial account means an account given to the Territory or a Territory entity for the payment of money in relation to goods, services or works provided to the Territory or a Territory entity under a contract.

Examples of payments

a deposit, part payment, instalment payment or a bond or other refundable money

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

payment date, for a commercial account, means—

- (a) the day worked out in accordance with the contract as the day when the account is payable; or
- (b) in any other case—the day on which the account is received by the Territory or the Territory entity.

relevant date, for the payment of a commercial account, means the 25th day of the month after the month in which the payment date for payment of the account happens.

Note **Month** means calendar month, see Legislation Act, dict, pt 1.

45 Interest on unpaid accounts

- (1) This section applies if the Territory or a Territory entity does not pay a commercial account in full by the relevant date for the account.
- (2) The Territory or the Territory entity is liable to pay the creditor a further amount by way of interest on the amount of the account that remains unpaid from time to time.
- (3) Interest is payable at the rate worked out in accordance with the rules under the *Court Procedures Act 2004* applying to the Supreme Court as if the unpaid amount were a judgment of the Supreme Court.
- (4) If payment of the account is made by mail, the payment is taken to be made when it is posted.

46 Exclusion of inconsistent contractual terms

A term in a contract is void if—

- (a) for a contract with a total consideration worth less than the prescribed amount for section 43—the term excludes the application of this part to the contract; or
- (b) the term provides for the payment of interest on an unpaid commercial account that has been rendered under the contract.

47 Availability of funds to pay interest

- (1) Interest payable under this part is payable whether or not there is an appropriation available for the purpose.

- (2) If a commercial account is payable out of a trust banking account under the *Financial Management Act 1996*, section 51 (Departmental trust banking accounts), any interest payable under this part for the account is also payable out of the account.

48 Reporting of excluded contracts

- (1) The responsible chief executive officer for a Territory entity must include in the entity's annual report a statement of the number of contracts administered by the entity that were excluded from the operation of this part during the period to which the report relates.
- (2) In this section:

annual report means the report that the entity is required to prepare under the *Annual Reports (Government Agencies) Act 2004*.

responsible chief executive—see section 50 (Responsible chief executive to ensure Act complied with).

Part 5 Miscellaneous

49 Discounts for prompt payments

- (1) This section applies to a contract for the procurement of goods, services or works by the Territory or a Territory entity (other than a Territory owned corporation or any other Territory body established under the Corporations Act).
- (2) The Territory or the Territory entity must not enter into the contract unless satisfied—
 - (a) the best discount that can reasonably be obtained for the prompt payment of a commercial account rendered under the contract is available to the Territory or Territory entity; or
 - (b) if no such discount is available—that reasonable commercial negotiations would not result in the availability of such a discount.
- (3) In this section:
commercial account—see section 44.

50 Responsible chief executive to ensure Act complied with

- (1) The responsible chief executive officer for a Territory entity must ensure that the entity complies with this Act.
- (2) In this section:
department—see the *Financial Management Act 1996*, dictionary.
public sector company—see the *Auditor-General Act 1996*, dictionary.
responsible chief executive means—
 - (a) for a department—the responsible chief executive of the department under the *Financial Management Act 1996*; or

- (b) for a Territory authority—the chief executive officer of the authority under the *Financial Management Act 1996*; or
- (c) for a public sector company—the person responsible for managing the affairs of the company; or
- (d) for a joint venture or trust in which the Territory or a Territory entity has a controlling interest—the responsible chief executive of the department or Territory entity that is responsible for matters most closely related to that interest.

51 Approved forms

- (1) The Minister may, in writing, approve forms for this Act.
- (2) If the Minister approves a form for a particular purpose, the approved form must be used for that purpose.

Note For other provisions about forms, see Legislation Act, s 255.

- (3) An approved form is a notifiable instrument.

Note A notifiable instrument must be notified under the Legislation Act.

52 Regulation-making power

- (1) The Executive may make regulations for this Act.

Note Regulations must be notified, and presented to the Legislative Assembly, under the Legislation Act.

- (2) The regulations may—
 - (a) make provision in relation to any matter about which provision may be made by the procurement guidelines; and
 - (b) provide that prescribed things are, or are not, to be regarded as goods, services or works for this Act.
- (3) The regulations may also prescribe offences for contraventions of the regulations and prescribe maximum penalties of not more than 10 penalty units for offences against the regulations.

53 Review of Act

- (1) The Minister must review the operation of this Act as soon as practicable after 24 May 2006.
- (2) A report on the outcome of the review must be presented by the Minister to the Legislative Assembly by 24 November 2006.
- (3) This section expires on 31 December 2006.

Schedule 1 Model confidentiality clause

(see s 36)

M Confidentiality obligations of Territory

- (1) In this contract, **confidential information** means [*list of the kinds of information to be kept confidential*].
- (2) In giving effect to the principles of open and accountable government, the Territory may disclose documents and information unless it has otherwise agreed, or is otherwise required under law, to keep the information confidential.
- (3) Except as provided in this contract, the Territory must not disclose the confidential information to anyone without the prior written consent [*insert the name of the party or the party's representative*] (which consent will not be unreasonably withheld) except if the confidential information—
 - (a) is required or authorised to be disclosed under law; or
 - (b) is reasonably necessary for the enforcement of the criminal law; or
 - (c) is disclosed to the Territory's solicitors, auditors, insurers or advisers; or
 - (d) is generally available to the public; or
 - (e) is in the possession of the Territory without restriction in relation to disclosure before the date of receipt from [*insert the name of the party or the party's representative*]; or
 - (f) is disclosed by the responsible Minister in reporting to the Legislative Assembly or its committees; or
 - (g) is disclosed to the ombudsman or for a purpose in relation to the protection of the public revenue.

- (4) The *Government Procurement Act 2001*, part 3 (Notifiable contracts) applies to this contract.
- (5) The following grounds mentioned in that Act, section 35 (1) apply to this clause: [*list relevant grounds*].

Dictionary

(see s 2)

Note 1 The Legislation Act contains definitions and other provisions relevant to this Act.

Note 2 In particular, the Legislation Act, dict, pt 1, defines the following terms:

- administrative unit
- auditor-general
- body
- Corporations Act
- Territory owned corporation
- the Territory.

board, for part 2 (Government procurement board), means the Australian Capital Territory Government Procurement Board.

chairperson, for part 2 (Government procurement board), means the chairperson of the board.

commercial account, for part 4 (Interest on commercial accounts)—see section 44.

confidential text, of a notifiable contract, for part 3 (Notifiable contracts)—see section 24.

contract, for part 3 (Notifiable contracts)—see section 24.

member, for part 2 (Government procurement board), means—

- (a) the chairperson; or
- (b) a public employee member; or
- (c) a non-public employee member.

notifiable amendment, of a notifiable contract, for part 3 (Notifiable contracts)—see section 26.

notifiable contract, for part 3 (Notifiable contracts)—see section 25.

notifiable contracts register, for part 3 (Notifiable contracts)—see section 27 (1).

payment date, for a commercial account, for part 4 (Interest on commercial accounts)—see section 44.

procurement guidelines, for part 2 (Government procurement board), means the procurement guidelines under this Act.

public text, of a notifiable contract, for part 3 (Notifiable contracts)—see section 24.

relevant date, for the payment of a commercial account, for part 4 (Interest on commercial accounts)—see section 44.

responsible Territory entity, for a contract or proposed contract, for part 3 (Notifiable contracts)—see section 24.

Territory entity—see section 3.

Endnotes

1 About the endnotes

Amending and modifying laws are annotated in the legislation history and the amendment history. Current modifications are not included in the republished law but are set out in the endnotes.

Not all editorial amendments made under the *Legislation Act 2001*, part 11.3 are annotated in the amendment history. Full details of any amendments can be obtained from the Parliamentary Counsel's Office.

Uncommenced amending laws and expiries are listed in the legislation history and the amendment history. These details are underlined. Uncommenced provisions and amendments are not included in the republished law but are set out in the last endnote.

If all the provisions of the law have been renumbered, a table of renumbered provisions gives details of previous and current numbering.

The endnotes also include a table of earlier republications.

2 Abbreviation key

am = amended	ord = ordinance
amdt = amendment	orig = original
ch = chapter	par = paragraph/subparagraph
def = definition	pres = present
dict = dictionary	prev = previous
disallowed = disallowed by the Legislative Assembly	(prev...) = previously
div = division	pt = part
exp = expires/expired	r = rule/subrule
Gaz = gazette	renum = renumbered
hdg = heading	reloc = relocated
IA = Interpretation Act 1967	R[X] = Republication No
ins = inserted/added	RI = reissue
LA = Legislation Act 2001	s = section/subsection
LR = legislation register	sch = schedule
LRA = Legislation (Republication) Act 1996	sdiv = subdivision
mod = modified/modification	sub = substituted
o = order	SL = Subordinate Law
om = omitted/repealed	<u>underlining</u> = whole or part not commenced or to be expired

Endnotes

3 Legislation history

3 Legislation history

Government Procurement Act 2001 No 28

notified 24 May 2001 (Gaz 2001 No 21)
commenced 24 May 2001 (s 2)

as amended by

Statute Law Amendment Act 2002 No 30 pt 3.33

notified LR 16 September 2002
s 1, s 2 taken to have commenced 19 May 1997 (LA s 75 (2))
pt 3.33 commenced 17 September 2002

Government Procurement Amendment Act 2003 A2003-22

notified LR 19 May 2003
s 1, s 2 commenced 19 May 2003 (LA s 75 (1))
remainder commenced 1 July 2003 (s 2 and CN2003-4)

Annual Reports Legislation Amendment Act 2004 A2004-9 sch 1 pt 1.17

notified LR 19 March 2004
s 1, s 2 commenced 19 March 2004 (LA s 75 (1))
sch 1 pt 1.17 commenced 13 April 2004 (s 2 and see Annual Reports (Government Agencies) Act 2004 A2004-8, s 2 and CN2004-5)

Court Procedures (Consequential Amendments) Act 2004 A2004-60 sch 1 pt 1.27

notified LR 2 September 2004
s 1, s 2 commenced 2 September 2004 (LA s 75 (1))
sch 1 pt 1.27 commenced 10 January 2005 (s 2 and see Court Procedures Act 2004 A2004-59, s 2 and CN2004-29)

4 Amendment history

Title

title sub A2003-22 amdt 1.1

Dictionary

s 2 om R1 (LA s 89 (4))
ins A2003-22 s 4

Meaning of *Territory entity*

s 3 am 2002 No 30 amdt 3.387
sub A2003-22 s 4

Offences against Act—application of Criminal Code etc

s 4A ins A2003-22 amdt 1.2

Functions of board

s 6 am 2002 No 30 amdt 3.388
sub A2003-22 amdt 1.3

Procurement guidelines

s 7 am 2002 No 30 amdts 3.389-3.391; A2003-22 amdt 1.4,
amdt 1.5

Appointment of members

s 12 am 2002 No 30 amdt 3.392; A2003-22 amdt 1.6

Term of appointment of members

s 13 sub 2002 No 30 amdt 3.393

Abuse of position

s 15 sub A2003-22 amdt 1.7

Procedure governing proceedings of board

s 19 am A2003-22 s 5

Constitution of board

s 19A ins A2003-22 s 6

Other matters

div 2.5 hdg ins A2003-22 amdt 1.8

Power to obtain information and documents

s 22 sub A2003-22 amdt 1.8

Notifiable contracts

pt 3 hdg sub A2003-22 s 7

Preliminary

div 3.1 hdg ins A2003-22 s 7

Pt 3 does not apply to Territory owned corporations etc

s 23 sub A2003-22 s 7

Definitions for pt 3

s 24 sub A2003-22 s 7
def **confidential text** ins A2003-22 s 7
def **contract** ins A2003-22 s 7
def **notifiable amendment** ins A2003-22 s 7
def **notifiable contract** ins A2003-22 s 7
def **notifiable contracts register** ins A2003-22 s 7
def **public text** ins A2003-22 s 7

Endnotes

4 Amendment history

def **responsible Territory entity** ins A2003-22 s 7

What is a notifiable contract

s 25 sub 2002 No 30 amdt 3.394; A2003-22 s 7

Meaning of notifiable amendment

s 26 ins A2003-22 s 7

Notifiable contracts register

div 3.2 hdg ins A2003-22 s 7

Keeping of register

s 27 ins A2003-22 s 7

Contents of register

s 28 ins A2003-22 s 7

Public access to material on register

s 29 ins A2003-22 s 7

Territory entities to provide material for register

s 30 ins A2003-22 s 7

Availability of notifiable contracts

div 3.3 hdg ins A2003-22 s 7

Public text of contracts to be made available

s 31 ins A2003-22 s 7

Making information and contracts available apart from pt 3

s 32 ins A2003-22 s 7

Entities not required to create electronic copies

s 33 ins A2003-22 s 7

Confidential text

div 3.4 hdg ins A2003-22 s 7

Notice of effect of div 3.4 to contracting parties

s 34 ins A2003-22 s 7

Grounds for confidentiality of information

s 35 ins A2003-22 s 7

Model confidentiality clause required for confidential text

s 36 ins A2003-22 s 7

Invalidity of non-complying confidentiality clauses

s 37 ins A2003-22 s 7

Contracts and information to be given to auditor-general

s 38 ins A2003-22 s 7

Auditor-general's reporting obligations for contracts etc

s 39 ins A2003-22 s 7

Other matters

div 3.5 hdg ins A2003-22 s 7

Effect of disclosure of confidential information

s 40 ins A2003-22 s 7

Effect of other disclosure laws

s 41 ins A2003-22 s 7

No liability for complying with pt 3

s 42 ins A2003-22 s 7

Interest on commercial accounts

pt 4 hdg ins A2003-22 s 7

Application of pt 4

s 43 ins A2003-22 s 7

Definitions for pt 4

s 44 ins A2003-22 s 7

def **commercial account** ins A2003-22 s 7

def **payment date** ins A2003-22 s 7

def **relevant date** ins A2003-22 s 7

Interest on unpaid accounts

s 45 ins A2003-22 s 7

am A2004-60 amdt 1.152

Exclusion of inconsistent contractual terms

s 46 ins A2003-22 s 7

Availability of funds to pay interest

s 47 ins A2003-22 s 7

Reporting of excluded contracts

s 48 ins A2003-22 s 7

am A2004-9 amdt 1.25

Miscellaneous

pt 5 hdg ins A2003-22 s 7

Discounts for prompt payments

s 49 ins A2003-22 s 7

Responsible chief executive to ensure Act complied with

s 50 ins A2003-22 s 7

Approved forms

s 51 ins A2003-22 s 7

Regulation-making power

s 52 ins A2003-22 s 7

Endnotes

4 Amendment history

Review of Act

s 53 ins A2003-22 s 7
exp 31 December 2006 (s 53 (3))

Transitional provisions

pt 6 hdg ins A2003-22 s 7
exp 1 July 2004 (s 59)

Government Contractual Debts (Interest) Act

s 54 ins A2003-22 s 7
exp 1 July 2004 (s 59)

Public Access to Government Contracts Act—general

s 55 ins A2003-22 s 7
exp 1 July 2004 (s 59)

Public Access to Government Contracts Act—reportable contracts

s 56 ins A2003-22 s 7
exp 1 July 2004 (s 59)

First report by auditor-general under this Act

s 57 ins A2003-22 s 7
exp 1 July 2004 (s 59)

Transitional regulations

s 58 ins A2003-22 s 7
exp 1 July 2004 (s 59)

Expiry of pt 6

s 59 ins A2003-22 s 7
exp 1 July 2004 (s 59)

Model confidentiality clause

sch 1 ins A2003-22 s 8

Dictionary

dict am 2002 No 30 amdt 3.395
sub A2003-22 s 9
def **board** sub A2003-22 s 9
def **chairperson** sub A2003-22 s 9
def **commercial account** ins A2003-22 s 9
def **confidential text** ins A2003-22 s 9
def **contract** ins A2003-22 s 9
def **member** sub A2003-22 s 9
def **notifiable amendment** ins A2003-22 s 9

def **notifiable contract** ins A2003-22 s 9
 def **notifiable contracts register** ins A2003-22 s 9
 def **payment date** ins A2003-22 s 9
 def **procurement guidelines** sub A2003-22 s 9
 def **public text** ins A2003-22 s 9
 def **relevant date** ins A2003-22 s 9
 def **responsible chief executive** sub 2002 No 30 amdt 3.396
 om A2003-22 s 9
 def **responsible Territory entity** ins A2003-22 s 9
 def **Territory entity** sub A2003-22 s 9

5 Earlier republications

Some earlier republications were not numbered. The number in column 1 refers to the publication order.

Since 12 September 2001 every authorised republication has been published in electronic pdf format on the ACT legislation register. A selection of authorised republications have also been published in printed format. These republications are marked with an asterisk (*) in column 1. Except for the footer, electronic and printed versions of an authorised republication are identical.

Republication No	Amendments to	Republication date
1	not amended	24 May 2001
2	A2002-30	10 October 2002
3*	A2003-22	1 July 2003
4	A2004-9	13 April 2004
5	A2004-9	2 July 2004

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