

2004

THE LEGISLATIVE ASSEMBLY FOR
THE AUSTRALIAN CAPITAL TERRITORY

Auditor-General Amendment Bill 2004

Explanatory Statement

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Outline

This Bill amends the *Auditor-General Act 1996* to clarify and strengthen the Auditor-General's powers.

Strict liability offences

The Bill contains offences of strict liability. A strict liability offence means that there is no fault element for any of the physical elements of the offence (*Criminal Code 2002*, section 23) but the defence of mistake of fact (section 36) is available for that offence. Other defences, such as intervening conduct or event (section 39), are also available.

The application of strict liability is consistent with the current *Auditor-General Act 1996*, a regulatory scheme to assist the Auditor-General in the performance of his/her duties. The majority of offences proposed in the Bill carry a maximum penalty of 50 penalty units, imprisonment for six months or both. The penalties are as currently in the Act. The retention of the imprisonment penalty with strict liability reflects the importance of ensuring that the Auditor-General is able to carry out his or her duties effectively. Among other things, the Auditor-General is required to determine whether public sector resources are appropriately managed. To achieve this aim, the Auditor-General must have appropriate access to relevant information, premises and things.

Clauses

Clause 1 - Name of Act

This is a formal provision that provides the name of the Act, the *Auditor-General Amendment Act 2004*.

Clause 2 - Commencement

This is a formal provision specifying that the Act commences on the day after its notification day.

Clause 3 - Act amended

This is a formal provision specifying that the Act amends the *Auditor-General Act 1996*.

Clause 4 - New Section 3B

This clause provides that other legislation applies in relation to offences against the Act.

Clause 5 - Functions and powers - Part 3, new note

This clause inserts a new note before section 9 which states that certain provisions of Part 3 of the Act, in relation to functions and powers, apply to an independent auditor.

Clause 6 - Performance audits - New Section 12(1A)

This clause has been inserted to make it clear that the Auditor-General may conduct a single performance audit covering activities common to more than one agency.

Clause 7 - Section 12

This is a formal provision that provides for renumbering of the subsections when the Act is next republished.

Clause 8 - Section 14

This clause omits existing section 14, which deals with the Auditor-General's power to obtain information, and substitutes the following sections: new section 14, Power to obtain information etc; new section 14A, Power to administer oath or affirmation; new section 14B, Failure to comply with notice under s14(1); new section 14 C, Attendance before Auditor-General - offences; new section 14D, Privileges against self-incrimination and exposure to civil penalty.

New section 14 (1) gives the Auditor-General power to require a person, by written notice, to do any 1 or more of the following: give stated information; produce a stated document; attend and answer questions before the Auditor-General. Paragraphs 14(1)(a) to (c) include a new requirement that the notice provides a 'stated reasonable time'. The substituted section removes the 'reasonable excuse' defence from section 14 (offences/ defences for this section are outlined under section 14B below).

New section 14(2) states what a notice issued under section 14(1) must contain, including a statement to the effect that failure to comply with the notice is an offence.

New section 14(3) removes any doubt that the Auditor-General may require an explanation in relation to something done or not done by a person. Under the current legislation, doubt has been expressed about whether 'explanations' are actually 'information' and therefore whether the Auditor-General has the power to direct that explanations be provided.

New section 14(4) provides that the regulations may prescribe fees and expenses payable to a person given a notice under 14(1).

New section 14A gives the Auditor-General power to require a person to answer questions on oath or affirmation and provides that the Auditor-General may administer an oath or affirmation that the answers the person will give will be true. Inclusion of this section is consistent with the powers of the Commonwealth Auditor-General and most State auditors-general.

New section 14B creates strict liability offences for failure to comply with a notice issued under section 14. The defences of 'mistake of fact' and 'intervening conduct or event' are available under the Criminal Code.

New section 14C creates the following strict liability offences in relation to a person who is required to attend and answer questions before the Auditor-General under section 14(1)(c): failure to swear an oath or make an affirmation; failure to answer questions; failure to continue to attend as required by the Auditor-General until excused from further attendance. The clause specifies a maximum penalty of 50 penalty units, imprisonment for six months or both, consistent with the current Act.

New section 14D provides protection for witnesses so that, other than an offence against the Act or part 3.4 of the Criminal Code, any information, document or thing obtained as a result of a notice issued under section 14 is not admissible in evidence against the person.

Clause 9 - Section 15 Access to premises and things

This clause omits existing section 15 and inserts new section 15 and section 15A.

The principal change relates to new paragraph 15(2)(c). This paragraph requires a person to give 'reasonable help' to the Auditor-General or an authorised person.

New section 15A creates a strict liability offence where a person fails to comply with a requirement under paragraph 15(2)(c). However, the person must be informed to the effect that failure to comply with the requirement is an offence. The clause specifies a maximum penalty of 50 penalty units.

Clause 10 - Section 16 Audit fees

This clause omits existing section 16 and inserts new section 16. There are two principal changes in the new section.

The term 'prescribed person' has been replaced with 'entity' to ensure that financial statement audits are paid for by those entities being audited. No persons are prescribed under section 16 under the current legislation.

New paragraph 16(1)(c) provides that fees are payable if the entity's accounts or records are audited under any Territory law. This change has been made to fulfil the intention of the section, so that all agencies pay fees for audits of their financial statements. Currently section 16(1) only relates to financial statements audited under the *Financial Management Act 1996* and does not apply to certain other bodies, even though those bodies may already pay for audits of their financial statements.

Clause 11 - Section 19 - Reporting Sensitive Information

This clause omits existing section 19 and inserts new sections 19 and 19A. The effect of the replacement sections is similar to the current provisions.

New section 19 adds two additional grounds under which the Auditor-General may exclude information from a report: section 19(1)(a), unreasonable disclosure of personal information; and 19(1)(c) disclosure of information having a commercial value. The language of these grounds is consistent with the *Freedom of Information Act 1989* and the *Government Procurement Act 2001*.

New paragraph 19(2) provides that the Auditor-General may include information in a report if the Auditor-General is satisfied that the substance of the information is already public knowledge.

Clause 12 - Section 32

This clause omits section 32 and inserts new section 32. The amendment is consequential on other amendments.

Clause 13 - New Sections 32A to 32D

The clause inserts new sections 32A to 32D into part 6. New Section 32A is consequential on other amendments and provides a definition for protected information for part 6.

New Section 32B replaces omitted Section 34 (see below) and creates a strict liability offence where a person is exercising, or has exercised, a function of the Auditor-General and discloses protected information. The clause specifies a maximum penalty of 50 penalty units, imprisonment for six months or both, consistent with the current Act.

New Section 32C provides that the Auditor-General or an authorised person may give a direction prohibiting or restricting the disclosure of protected information. This section will allow the Auditor-General to require any person who receives information related to an audit to keep that information confidential. The Auditor-General is often required to provide information to a person to seek an explanation, for natural justice reasons or for third party verification purposes. Section 32C(4) creates an offence for disclosure of information where a direction under 32C(1) is in force. The clause specifies a maximum penalty of 50 penalty units, imprisonment for six months or both, consistent with the offence at 32B.

Clause 14 - Section 34

This clause omits Section 34 (new Section 32B replaces Section 34).

Clause 15 - Part 6

This clause provides for the renumbering of the Sections under Part 6 when the Act is next republished.

Clause 16 - Dictionary, note 2

This clause inserts new definitions into the dictionary.

Clause 17 - Dictionary, new definition of protected information.

This clause inserts the definition for protected information.