

TREASURER'S DIRECTIONS
GOVERNANCE – Accountability
Section G2.5: Guarantees and Indemnities

STATEMENT OF INTENT

Contractual arrangements involving guarantees and/or indemnities expose the Northern Territory to risks and obligations, and in some cases, these may be significant. In order to manage these risks, this Treasurer's Direction provides guidance on what constitutes guarantees and indemnities and the approval and accountability requirements for entering into contracts or agreements containing guarantees and/or indemnities.

MAIN FEATURES

Section 38 of the *Financial Management Act* requires each Accountable Officer and each employee of an Agency to comply with the Treasurer's Directions.

Guarantees and Indemnities

- Guarantees and indemnities result in the assumption by the Territory of a financial obligation, or the risk that a financial obligation will be incurred, for or on behalf of another person or entity.

Risk Assessment

- A comprehensive risk assessment is to be undertaken by the Agency that will be responsible for the administration of a guarantee and/or indemnity. That assessment must be undertaken prior to the giving of the guarantee and/or indemnity to ensure that the benefit to the Territory outweighs the accompanying risks. The assessment should be undertaken with the assistance of the Agency's legal advisors.

Approval Process for Instruments Containing Guarantees and Indemnities

- Delegate Approval Process: This is a process under which the Accountable Officer may approve guarantees and/or indemnities contained in instruments that are simple and less risky which are included within Categories 1-5 in Appendix A.
- Treasurer Approval Process: For instruments falling into Categories 6-9 in Appendix A or for instruments of high risk, unusual or sensitive nature or with an estimated risk of over \$ 5 million approval by the Treasurer will be required. The Indemnity/Guarantee Request Form at Appendix B is to be completed when seeking the Treasurer's approval for instruments containing guarantees and/or indemnities.
- Agencies must record all approved guarantee and/or indemnity in the Agency's Register of Contingent Liability.

Execution of Instruments Containing Guarantees and Indemnities

- Section 34 of the *Financial Management Act* restricts the execution of an instrument containing a guarantee and/or indemnity to the Treasurer or a delegate.

For authoritative instruction and guidance, reference should be made to the Financial Management Act, related Treasurer's Directions and associated commentary.

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AUTHORITIES

Section 34 and 39 of the *Financial Management Act*

REFERENCES

AASB 137 Provisions, Contingent Liabilities and Contingent Assets

AAS 29 Financial Reporting by Government Departments

Related Treasurer’s Directions:

A3.1 Accounting – Liabilities – Overview

A3.7 Accounting – Liabilities: Contingent Liabilities

F3.3 Framework – Legislative Structure: Delegations

WHAT ARE GUARANTEES AND INDEMNITIES?

G2.5.1	A guarantee is an undertaking on the part of the Territory to be responsible for another's debt or contractual performance if that other person does not pay or perform.
G2.5.2	An indemnity is an undertaking to compensate, protect or insure another person or entity against future financial loss, damage or liability.
G2.5.3	Guarantees and indemnities contained in instruments executed on behalf of the Northern Territory require Treasurer's approval under section 34 of the <i>Financial Management Act</i> .

- (i) The Territory may agree to assume financial liabilities or risks of another person or entity under an instrument which is legally binding for the Territory or an Agency (eg an agreement, contract or deed), by guaranteeing the obligations or indemnifying a person or entity.
- (ii) Any instrument that gives a guarantee and/or an indemnity must be executed by the Treasurer unless the Treasurer has delegated the power to execute to a Minister or a delegate. The delegate is not permitted to further delegate that power to any other person. Only the Treasurer or the Minister has the authority to delegate the powers under section 34 of the *Financial Management Act*.
- (iii) A guarantee arises from an undertaking to assume financial obligations of a person or entity under particular circumstances.

The following are examples of guarantees:

- the Territory provides a guarantee to a lender that it will meet the obligations of the borrower if the borrower is unable to pay; or
 - an Agency (on behalf of the Territory) agrees in writing to a third party to assume responsibility for service delivery if a service provider (acting as agent), engaged by the Agency, should fail to deliver a contracted service. In contrast, where the Agency feels compelled on public interest grounds, to take over from a failed service provider, although the Agency is not legally obliged to do it, there is no guarantee although the risk may be similar.
- (iv) An indemnity is an undertaking to compensate, protect or insure another person or entity against future financial loss, damage or liability.

The following are examples of indemnities:

- the Territory indemnifies for breach of contract or loss and damage arising from negligent actions under a contract; or
- the Territory indemnifies for breach of intellectual property rights or misuse of personal information.

- (v) The accountability mechanisms associated with guarantees and indemnities have been established because of the potential for significant financial exposure to the Territory resulting from guarantees and indemnities.
- (vi) These accountability mechanisms are established under section 34 of the *Financial Management Act*.

RISK ASSESSMENT

G2.5.4	Agencies are to conduct a comprehensive assessment of the risks associated with providing a guarantee and/or indemnity.
G2.5.5	Risk assessment is to be made in the context of the benefits of the arrangement to the Territory to ensure that the risks assumed by the Territory are commensurate with the objectives, scope and benefits of the agreement.
G2.5.6	Agencies are responsible for ensuring, in consultation with its legal advisers and through contract negotiations, that guarantees and/or indemnities contained in legal instruments do not present unacceptable risk exposure to the Territory.
G2.5.7	Over the life of each guarantee and/or indemnity, Agencies are to ensure that risk management strategies are in place to mitigate potential exposure arising from the granting of the guarantee and/or indemnity.
G2.5.8	If the level of associated risk from a guarantee and/or indemnity is assessed as having increased to the extent that claims are considered likely, Agencies are required to advise Treasury of the expected realisation of a liability and prepare contingency plans to meet such claims.

- (i) In providing a guarantee and/or indemnity, the Territory agrees to bear certain risks.
- (ii) An appropriate risk assessment of each guarantee and/or indemnity needs to be undertaken to ensure that the risks assumed by the Territory are acceptable given the objectives, scope and benefits of the agreement. This may require the assistance of the Solicitor for the Northern Territory, or a private commercial lawyer.
- (iii) Generally, responsibility for risks should be borne by the party best positioned to control, manage and mitigate the specific risk.

For example, an indemnity for breach of contract would generally be expected to be a reciprocal indemnity such that each party agrees to indemnify the other for a breach on its part. It would not be appropriate for the Territory to indemnify for breach of contract by both the Territory and the counterparty.
- (iv) Risks accepted by the Territory should be limited to matters which are within the control of the Territory unless there are sound and defensible reasons to do otherwise.

For example, a breach by the Territory is a matter within the control of the Territory and is therefore acceptable. However, as the Territory has no capacity to control the actions that may lead to a breach by the counterparty, indemnifying for a breach by the counterparty would not generally be appropriate.

(v) The capacity for a party to control and manage individual risks is often reflected in contributory liability provisions associated with indemnities. In such cases, the indemnity granted by a party should be limited to the extent that the beneficiary of the indemnity has contributed to the loss or damage.

(vi) Where the Territory grants an indemnity, it would generally be expected that a reciprocal indemnity is provided by the counterparty.

In the example above, this would involve the counterparty providing an indemnity to the Territory for breach of contract by the counterparty on equivalent terms to the indemnity provided by the Territory to the counterparty.

(vii) Where an Agency risk assessment determines that a risk stemming from a proposed guarantee and/or indemnity is inappropriate, the Agency must ensure that the likely risk is reduced to an acceptable level by negotiating with the counter-party for the removal or recasting of the inappropriate clause.

(viii) As part of the risk analysis Agencies are encouraged to seek legal advice. Agencies are responsible for obtaining legal advice prior to execution of instruments, including instruments containing guarantees and/or indemnities. Agencies are to use their best judgement on determining whether to consult legal advisors and/or the level of legal consultation. This decision should be made as part of the risk assessment in determining the level of risk and methods to mitigate such risk. Should a claim arise from such a risk Treasury will take into consideration the steps an Agency has taken to reduce the associated risks.

(ix) Prudent risk management will necessitate Agencies establishing and maintaining appropriate risk identification, management and mitigation strategies which remain in place for the duration of the guarantee and/or indemnity. These are to be documented within the risk assessment of the suggested indemnity request form Appendix B the Guarantee and Indemnity Approval Form.

(x) Where the level of risk associated with a guarantee and/or indemnity is assessed as having increased during the life of the arrangement to the extent that the Territory is considered more likely than not to be called upon to make financial compensation, the responsible Agency should record an actual liability in its financial records as distinct from a contingent liability. Further instructions and guidance in relation to contingent liabilities refer to Treasurer's Direction A3.7 Contingent Liabilities.

(xi) In these circumstances, Agencies are also required to advise Treasury of the changed circumstances and to prepare contingency plans to meet any demand made by the beneficiaries of the guarantee and/or indemnity. This ensures the Territory is in a position to respond to the resulting liability if and when it arises.

APPROVAL PROCESS FOR INSTRUMENTS CONTAINING GUARANTEES AND INDEMNITIES

G2.5.9	Agencies are to comply with either of two approval processes established under section 34 of the <i>Financial Management Act</i> prior to executing agreements containing guarantees and/or indemnities.
G2.5.10	The approval process to be used depends on categorisation of the instrument containing the guarantee and/or indemnity. <u>Appendix A</u> sets out these Categories of Instruments.
G2.5.11	Agencies are responsible for ensuring that all instruments containing guarantees and/or indemnities are appropriately categorised and the correct approval process are adopted.

- (i) Given the potential for significant financial exposure to the Territory resulting from guarantees and/or indemnities contained in instruments executed by the Territory, Section 34 of the *Financial Management Act* sets out rigorous accountability requirements to be followed prior to an instrument containing a guarantee and/or indemnity being executed.
- (ii) Section 34(1) of the *Financial Management Act* requires the Treasurer to agree to the giving of a guarantee or the granting of an indemnity.
- (iii) Section 34(2) of the *Financial Management Act* requires that any instrument that gives a guarantee and/or an indemnity must be executed by the Treasurer unless the Treasurer has delegated the power to execute to a Minister or a delegate.
- (iv) The Treasurer's powers under section 34(1) and (2) of the *Financial Management Act* have been delegated to Accountable Officers of the relevant Agencies. However these delegations have limitations. For further guidance on the delegation of powers and its limitations refer to Appendix A of Treasurer's Directions F3.3 Delegations provides. This is also explained in more detail in the following paragraphs.
- (v) To allow for a more efficient arrangement for approvals of instruments containing guarantees and indemnities, two separate approval processes are in place:
 - the Delegate Approval Process - for simple, straightforward and less risky guarantees and indemnities; and
 - the Treasurer Approval Process – for instruments which are riskier in nature or content, which cover more sensitive matters or have a risk threshold greater than \$5 million.

Section G2.5: Guarantees and Indemnities Approval Process

(vi) These processes are outlined in tabular form below.

Delegate Approval Process	Treasurer Approval Process
1. Agency analyses instrument providing risk analysis and risk assessment, legal review encouraged	1. Agency analyses instrument providing risk analysis and risk assessment, legal review encouraged
2. Agency seeks Ministerial endorsement	2. Agency seeks Ministerial endorsement
	3. Agency approaches Treasury for Treasurer's approval
3. Agency seeks delegate approval	4. Treasury analyses instrument and seeks approval
	5. Treasury advises of Treasurer's decision
4. Agency executes instrument	6. Agency executes instrument and provides copy of executed instrument to Treasury

(vii) The Agency is to determine which of the two processes is to be adopted based on categorisation of the instrument containing the guarantee and/or indemnity in accordance with Appendix A of these Directions.

(viii) Assistance may be sought from Northern Territory Treasury or Solicitor for the Northern Territory in categorisation of instruments containing guarantees and/or indemnities.

G2.5.12 **The Delegate Approval Process is to be used for guarantees and/or indemnities contained in Categories 1 to 5 of Appendix A.**

G2.5.13 **However, Agencies are to adopt the Treasurer Approval Process for instruments contained in Categories 1 to 5 where the resultant contingent liability is assessed as having a value or likely to have a value of \$5 million or more, or where the Treasurer's consideration is appropriate.**

(i) The Delegate Approval Process would generally be used for approvals of instruments containing guarantees and/or indemnities found in Categories 1 to 5 of Appendix A. Further instructions and guidance in relation to the Delegate Approval Process is found at Directions G2.5.15 to G2.5.17 below.

(ii) Notwithstanding an instrument containing a guarantee or indemnity falling within Categories 1 to 5 of Appendix A, the Treasurer Approval Process is to be adopted where the potential resultant contingent liability is valued at \$5 million or more, or if unquantifiable, the contingent liability is considered likely to be \$5 million or more.

- (iii) The Treasurer Approval Process should also be adopted where through the risk assessment process it is considered that the Treasurer Approval Process is appropriate. The circumstances under which this may arise include where:
- a. the instrument involves a sensitive matter;
 - b. the instrument requires the Territory to take on unusual or a disproportionately larger share of risk; or
 - c. the Treasurer should be made aware of the guarantees and/or indemnities given the unusual nature of the arrangement.

Further guidance and instructions in relation to risk assessment can be found in Directions G2.5.4 to G2.5.8.

- (iv) Under the Delegate Approval Process Minister's endorsement on the guarantee and/or indemnity that falls within Category 1 to 5 of Appendix A is required. Further instructions and guidance in relation to Ministerial endorsement is found in Direction G2.5.17

G2.5.14 **The Treasurer Approval Process is to be used for guarantees and indemnities contained in Categories 6 to 9 at Appendix A.**

- (i) Instruments contained in Categories 6 to 9 at Appendix A are considered to be riskier in nature and content or to cover more sensitive matters. On this basis, the Treasurer has not delegated his/her power to the Accountable Officer in relation to these instruments and the Treasurer Approval Process must be followed. The Treasurer Approval Process is outlined in more detail in paragraphs G2.5.19 to G2.5.21.

DELEGATE APPROVAL PROCESS

G2.5.15 **Under the Delegate Approval Process, the Treasurer delegates his/her authority to the Accountable Officer:**

- (a) to approve guarantees and/or indemnities contained in instruments to be executed on behalf of the Territory; and
- (b) to execute instruments effecting guarantees and/or indemnities.

G2.5.16 **The Agency is to seek the delegate's approval to guarantees and/or indemnities contained in instruments falling into Categories 1 to 5 of Appendix A.**

G2.5.17 **Prior to the Accountable Officer agreeing to give a guarantee or grant an indemnity, the responsible Minister is to form the view that the Territory would benefit from the arrangement and endorse the guarantee and/or indemnity.**

- (i) Under the Delegate Approval Process, the Treasurer has delegated his/her authority to the Accountable Officer to approve the Territory giving a guarantee or indemnifying a person or entity (under section 34(1)) and his/her authority to execute instruments effecting guarantees and/or indemnities (under section 34(2)), to the Accountable Officer. Further guidance and instructions on delegations can be found at Appendix A of Treasurer's Directions F3.3 Delegations.
- (ii) Guarantees and/or indemnities contained in instruments in Categories 1 to 5 of the Categories of Instruments at Appendix A are to be submitted for approval by the Accountable Officer, prior to this Agencies are required to seek Ministerial endorsement.
- (iii) Agencies are required to review instruments containing guarantees and/or indemnities to consider appropriateness of and risks associated with the guarantees and/or indemnities. Further instructions and guidance in relation to risk analysis and risk management is found in Directions G2.5.4 to G2.5.8.
- (iv) It is recommended such instruments be subject to legal review from the Agency's legal advisers. The legal review is expected to identify legal risks and concerns consequent on indemnities and guarantees contained in instruments which do not appear commensurate with the scope of the agreement. Legal review is to be completed before Ministerial endorsement or Accountable Officer approval of the guarantees and/or indemnity and execution of the instrument is sought.
- (v) To provide the Accountable Officer and the Minister with sufficient information to form a view on the appropriateness of the terms of the guarantee or indemnity, requests for delegate approval are to be accompanied by a standard form, such as Appendix B the Guarantee and Indemnity Approval Form which sets out, among other things, the scope of the arrangement and analysis of the risks and benefits arising from execution of the instrument.
- (vi) The risk analysis undertaken of guarantee and/or indemnity clauses contained in the instrument is to be summarised in the approval form (refer Appendix B Guarantee and Indemnity Approval Form) which is to accompany submissions requesting Ministerial endorsement and Accountable Officer approval under the Delegate Approval Process.
- (vii) The Accountable Officer may agree that standard indemnity clauses to be reflected in specific types of agreements. Further instructions and guidance in relation to the Standing Approval Process is found in Directions G2.5.34 to G2.5.25.
- (viii) Once Accountable Officer approval is obtained the instrument can also be executed by the Accountable Officer.
- (ix) Agencies are also to include the guarantees and indemnities approved under the Delegate Approval Process in their Register of Contingent Liabilities. Refer to Direction G2.5.27 for further guidance or instructions in relation to the Register of Contingent Liabilities.

G2.5.18 Section 46 of the *Interpretations Act* allows the Minister to delegate their functions under section 34 (1) of the *Financial Management Act* to the relevant Agency's Accountable Officer.

- (i) As mentioned previously under Section 34(1) of the *Financial Management Act* prior to obtaining approval, the Minister must form a view that the Territory would benefit from the arrangement and endorse the guarantee and/or indemnity.
- (ii) Section 46 of the *Interpretations Act* allows the Minister to delegate his/her power to exercise the function of Ministerial endorsement set out in section 34(1) of the *Financial Management Act* to a delegate such as the Accountable Officer. It is recommended that delegation of this power should be limited to the guarantees and indemnities set out in Categories 1 to 5 of Appendix A, of these Directions that have a quantifiable risk threshold below \$5 million.

TREASURER APPROVAL PROCESS

G2.5.19 Under the Treasurer Approval Process, the Treasurer

- (a) approves guarantees and/or indemnities contained in instruments to be executed by or on behalf of the Territory; and
- (b) has authority to execute instruments effecting guarantees and/or indemnities but has also delegated this function to the Minister and Accountable Officer of the relevant Agency.

G2.5.20 After Ministerial endorsement of the guarantees and/or indemnities has been obtained the Agency is to seek the Treasurer's approval of the guarantees and/or indemnities contained in instruments:

- which are high risk;
- of a sensitive or unusual nature ;
- with a risk threshold of above \$5 million; or
- falling into Categories 6 to 9 of Appendix A

G2.5.21 Requests for Treasurer approval of guarantees and/or indemnities are to be accompanied by the approval form as provided in Appendix B Guarantee and Indemnity Approval Form.

- (i) Under the Treasurer Approval Process, the Treasurer directly exercises his/her authority to approve the Territory giving a guarantee or indemnifying a person or entity for instruments falling into Categories 6 to 9 in Appendix A or for instruments of high risk, unusual and/or sensitive nature or with an estimated risk of over \$ 5 million.
- (ii) Guarantees and/or indemnities contained in instruments in categories 6 to 9 of the Categories of Instruments at Appendix A are to be submitted for approval by the Treasurer.

- (iii) Prior to obtaining approval under the Treasurer Approval Process, Ministerial endorsement of the guarantees and/or indemnities is required. The process for Ministerial endorsement is covered in more detail in Direction G2.5.22.
- (iv) To provide the Treasurer with sufficient information to form a view on the appropriateness of the terms of the guarantee or indemnity, requests for approval are to be accompanied by a standard form, refer Appendix B G2.5 Guarantee and Indemnity Approval Form, which sets out, among other things, the scope of the arrangement and analysis of the risks and benefits arising from execution of the instrument.

G2.5.22

Ministerial endorsement is to be sought for instruments under the Treasurer Approval Process prior to the Treasurer agreeing to give a guarantee or grant an indemnity. The responsible Minister is to form the view that the Territory would benefit from the arrangement and endorse the guarantee and/or indemnity.

- (i) While the Treasurer will form a view of the terms of the guarantee and/or indemnity, the responsible Minister can be expected to have a more comprehensive understanding of the subject matter of the agreement and the benefits/risks associated with the guarantee or indemnity. Accordingly the Minister's endorsement of the guarantee and/or indemnity provides a useful guide to the Treasurer and is a primary consideration for the Treasurer in the approval process.
- (ii) Prior to obtaining Ministerial endorsement, the Agency is responsible for reviewing instruments containing guarantees and/or indemnities to consider appropriateness of and risks associated with the guarantees and/or indemnities (hereafter called a risk analysis).
- (iii) The risk analysis undertaken by the Agency of guarantee and/or indemnity clauses contained in instruments are to be summarised in Appendix B - G2.5 Guarantee and Indemnity Approval Form which is to accompany submissions requesting the Treasurer's approval under the Treasurer Approval Process. For further guidance in relation to risk analysis and risk management refer to Direction G2.5.4 to G2.5.8.
- (iv) As part of the risk assessment an Agency may also request that the Agency's legal advisers conduct the legal review of the instrument containing the guarantee and/or indemnity. The legal review is expected to, among other things, identify and remedy any concerns with risk exposure which is not commensurate with the scope of the agreement. Legal review is to be completed before approval of the indemnity or guarantee and execution of the instrument is sought.
- (v) The Accountable Officer may agree that standard indemnity clauses to be reflected in specific types of agreements. Further instructions and guidance in relation to the Standing Approval Process is found at paragraphs G2.5.23 to G2.5.25.

- (vi) Once the Treasurer's approval is obtained, the Agency will be advised, the instruments may then be executed by the Minister or delegate as stated under section 34(2) of the *Financial Management Act*. Further guidance on delegations of power, refer to Appendix A of Treasurer's Directions F3.3 delegations.
- (vii) Agencies are also to include the guarantees and indemnities approved under the Treasurer Approval Process in their Register of Contingent Liabilities. Refer to paragraph G2.5.27 for further guidance and instructions in relation to the Register of Contingent Liabilities.

STANDING APPROVAL PROCESS

G2.5.23	The Treasurer may approve a standard indemnity clause to be contained in certain types of instruments.
G2.5.24	For Guarantees and/or indemnities subject to G2.5.12 and G2.5.13 a standard indemnity clause may be approved by the delegated Accountable Officer.
G2.5.25	Standing approvals granted prior to the issue of this Treasurer's Directions are still applicable.

- (i) A Standing Approval is given to a particular indemnity clause which is being used consistently in a particular type of agreement.
- (ii) The Agency must identify agreements that are regularly signed. The Agency negotiates with the other party to be able to continue to use the identical indemnity clause (word for word) in future agreements. Depending on the risk category the Agency obtains standing approval from either the Treasurer or the Accountable Officer.
- (iii) There are however instances where words in a Standing Approval Clause may be interchangeable. Examples are the names of the parties to the agreement are changed or phrases such as "the party", "the other party", "the Commonwealth" "the Australian Government" "the agreement, "the project" and Agency names. If in doubt the Agency must contact their legal representative for advice.
- (iv) If the indemnity clause relates to those items identified under category 1 to 5 of Appendix A of this Direction (also refer to Direction G2.5.15) then the Agency should then follow the Delegate Approval Process and include the request for Standing Approval.
- (v) Due to the high level of risk associated with the indemnities under category 6 to 9 of Appendix A of this Direction (also refer to Direction G2.5.19 and 20), approval of standard indemnities would be less common however it may be approved depending on the nature of the contract and the terms of the indemnity, as such Standing Approvals for indemnities under categories 6 to 9 of Appendix A of this Direction is to be approved by the Treasurer. The Agency should then follow the Treasurer Approval Process set out in Direction G2.5.19 to 21 and include the request for Standing Approval.

- (vi) Prior to obtaining Standing Approval from the Treasurer or the Accountable Officer, agencies should seek Ministerial endorsement.
- (vii) Agencies may also want to consider obtaining standing Ministerial endorsement, this process is entirely at the discretion of the Agency and would be dependent on matters such as the level of risk. Without the standing Ministerial endorsement agencies would be required to continue to seek Ministerial endorsement prior to the execution of an agreement even though the Treasurer or Delegate has given standing approval for the indemnity clause.
- (viii) Once Standing Approval (and standing Ministerial endorsement) has been granted agreements containing the approved standard indemnity may be signed by the Accountable Officer without the requirement of the section 34 approval process, provided that the clause is identical to that approved, and the agreement does not contain any further indemnities.
- (ix) To maximise the use of the approved standard indemnity, when entering into a contract, Agencies should negotiate with the other party to include the approved standard indemnity clause. Where the clause is different to that already approved (except in naming the parties or the agreement/project) the normal Delegate or Treasurer Approval Process applies.
- (x) Once the Accountable Officer has signed the Standing Approval agreement, a copy of the executed agreement must be kept on file, and the Standing Approval recorded on the Contingent Liability Register. Further guidance and instructions in relation to the Register of Contingent Liabilities is found at Direction G2.5.27.
- (xi) The delegation of powers of functions under section 39 of the *Financial Management Act* states that the delegation of powers and functions under *Financial Management Act* does not prevent the Treasurer from exercising his/her powers that have been delegated. Therefore standing approvals that have been granted prior to the issue of this Treasurer's Direction are still applicable.

REGISTER OF CONTINGENT LIABILITIES

G2.5.26

Agencies are to maintain a register of Contingent Liabilities including any guarantee or indemnity granted by the Territory of the Agency. The register is to contain at minimum the details specified by this Treasurer's Directions.

- (i) Agencies are to maintain a register of Contingent Liabilities including any guarantee and/or indemnity granted by the Territory. The guarantees and/or indemnities approved under both the Delegate Approval Process and the Treasurer Approval Process needs to be included in the register. While one register can be maintained, Agencies should identify the guarantees and/or indemnities approved under the two different processes. Further guidance on the relationship between guarantees/indemnities and contingent liabilities is found at Treasurer's Direction A3.7 Contingent Liabilities.

- (ii) The Register of Contingent Liabilities is to contain at minimum the following information.
- (a) name of the instrument;
 - (b) type of instrument (eg deed, grant, agreement);
 - (c) category in which the instrument falls (based on Appendix A);
 - (d) position of delegate providing approval
 - (e) date of delegate approval;
 - (f) date of execution;
 - (g) instrument expiry date;
 - (h) value of contingent liability
 - (i) expiry date of contingent liability (refer to the *Limitation Act*)

Agencies are to be aware that although an agreement has expired the Contingent Liability may still be current. The period of a Contingent Liability's validity is found in the *Limitations Act*.

- Section 12(1)(a) – Contracts
- Section 12(1)(b) – Torts
- Section 14(1) - Deeds

As such, the Agency must make the records available for the Auditor-General's review until the period of the Contingent Liability has expired. Further guidance and instructions in relation to the Auditor-General's review is found at Direction G2.5.28.

To assist Agencies a template for the register is found in Appendix C – G2.5 Register of Contingent Liability Pro-forma.

AUDITOR-GENERAL REVIEW

G2.5.27

Agencies are required to establish internal processes and controls to ensure compliance with the requirements for the management and recording of guarantees and indemnities which are subject to audit by the Auditor-General.

- (i) The Auditor-General may conduct periodic compliance audits of the Agency's internal processes. The audit process may include the following elements:
- i. compliance with section 34 of the *Financial Management Act*;
 - ii. examination of the extent to which risks have been assessed and documented;
 - iii. the extent to which the approval process complies with this Direction;
 - iv. the adequacy of legal documentation prepared when giving a guarantee or indemnity;
 - v. the adequacy of reporting of guarantees and/or indemnities, and the reliability of reports provided to the Northern Territory Treasury.

CATEGORIES OF INSTRUMENTS

DELEGATE APPROVAL PROCESS CATEGORIES 1 - 5

Category	Description of Instruments
1. Australian, State or Local Government Funding Arrangements	<ul style="list-style-type: none"> • Agreements with Australian, other State and Territory or local government bodies to facilitate funding for projects which the Territory Government would or might otherwise undertake at its own expense. • The category includes funding agreements to undertake capital and research projects, establish cooperative research centres and provide statistics or other data/material to government organisations for publication or research. • Category also includes agreements with the Charles Darwin University and the Batchelor Institute of Indigenous Tertiary Education.
2. Plant, Equipment and Software Purchase, Lease, Agency or Licence Arrangements	<ul style="list-style-type: none"> • Agreements with government or private sector organisations to procure, access or use material (eg hardware or software) required for the delivery of Agency outputs. • The agreements may be for purchase or lease with on-going maintenance by the provider or a licence to use. • Arrangements for access to databases or copyrighted material, access to electronic booking systems, Agency arrangements where the Territory acts as booking or sales agent on behalf of a private sector organisation or agreements to purchase, lease or use specific software or hardware. • Access to Australia Post or banking facilities and leases of equipment. • Real property purchase, sale or lease arrangements are captured under Category 3
3. Real Property Lease, Purchase and Sale Arrangements	<ul style="list-style-type: none"> • Agreements relating to the purchase, lease or sale of real property only. • The category includes memorandum of common provisions used for Government office accommodation leases, leases with car park providers, leases for private sector provided Government housing and agreements for auction of Government owned real property. • Plant and equipment purchase, sale or lease arrangements are covered under Category 2. • This category does not cover arrangements to access or enter private or other Government owned real property for specific events or to carry out specific works which are covered by Category 8.

<p>4. Public Displays, Exhibitions and Performances</p>	<ul style="list-style-type: none"> • Agreements relating to displays, conferences, exhibitions or performances organised or supported by Government. • This category does not cover arrangements to access or enter private or other Government owned real property unless it is for the purpose of holding a display or setting up an information booth. • Where access to real property is required for some other purpose, the agreement falls into Category 8. • The category includes agreements required to enable standing displays to be held (eg at shopping centres or expos), agreements with museums for travelling exhibits or agreements with producers of stage events or arts performances. • Agreements for use of convention, conference or exhibition facilities and arrangements for Government sponsorship of an event organised by a non-government organisation or private sector sponsorship of a Government organised event are also included.
<p>5. Employment and Consultancy Arrangements</p>	<ul style="list-style-type: none"> • Agreements relating to employment of individuals or engagement of non-government entities to provide advice or services. • The services could range from the provision of project advice or research to employment arrangements which fall outside the <i>Public Sector Employment and Management Act</i>. • The category includes agreements with other Governments for employee exchange, engagement for research and development projects and Agency arrangements where a Territory Government employee is seconded to or undertakes research/advisory work for or on behalf of another Government organisation or vice versa. • Volunteer agreements are also included in this category. • This category does not include any employment or consultancy work undertaken in the medical or allied health fields which is separately covered under Category 8.

TREASURER APPROVAL PROCESS CATEGORIES 6 - 9

Category	Description of Instruments
6. Director, Trustee and Board Member Indemnities (except for medical or allied health boards)	<ul style="list-style-type: none"> • Agreements covering protection from liability offered to Government appointees on boards of statutory corporations, tribunals and private sector bodies. • This category also covers indemnities provided to Government appointed trustees. • The category covers deeds of indemnities provided where legislative protection is considered insufficient to fully protect Government appointees. • This category does not cover medical or allied health boards.
7. Access or Entry Arrangements	<ul style="list-style-type: none"> • Agreements relating to ad hoc or once off access or entry to privately owned land, buildings or other real property for a specific purpose. • The category includes access or entry to land for necessary Government construction activity, for defence or security training exercises or to enable particular Government organised outdoor events to take place.
8. Medical and Allied Health Arrangements	<ul style="list-style-type: none"> • Agreements relating to engagement of medical or allied health specialists, arrangements related to health ethics committees or arrangements for the provision of medical or allied health services. • The category includes employment of specialists, engagement of community health service providers, arrangements with the Australian Defence force for medical and allied health service provision and research and development where patient trials are conducted. • This category also includes arrangements with medical or allied health boards.
9. Commercial Arrangements including Financial Guarantees	<ul style="list-style-type: none"> • Agreements which relate to Major Projects or joint public/private sector initiatives • Agreements which relate to provision by Government of financial guarantees. • This category includes public private partnership arrangements • This category includes provision of letters of comfort and arrangements which effectively require Government to underwrite aspects of transactions.