

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

ARCHIVES AMENDMENT BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Communications and the Arts, the
Hon. Michael Lee, MP)

ARCHIVES AMENDMENT BILL 1994

GENERAL OUTLINE

This Bill makes amendments of a minor policy nature to the *Archives Act 1983* concerning the application of the Archives Act to records of Government Business Enterprises (and other commercial bodies) and to the records of the National Witness Protection Program.

Amendments relating to Government Business Enterprises

These amendments are intended to ensure that records of the Commonwealth are not inadvertently removed from the operation of the Archives Act as a consequence of a change in structure of certain bodies such as Government Business Enterprises. The Bill provides for:

- bodies that are either established for a public purpose or subject to Commonwealth control to remain subject to the Archives Act unless specifically excluded from the operation of the Act; and
- the prior records of bodies which are subsequently removed from the application of the Archives Act to remain subject to the Act unless specifically excluded from its application.

However, the proposed amendment will not prevent the transfer of Commonwealth records to commercial bodies where the Government decides this is necessary.

Amendments relating to the records of the National Witness Protection Program

These amendments are intended to make special provision for access to and custody of records of the National Witness Protection Program. The Bill will:

- permit the Australian Federal Police to retain custody of certain sensitive documents relating to the National Witness Protection Program rather than requiring those records to be transferred to the Australian Archives;
- ensure that certain highly sensitive documents relating to the National Witness Protection Program are exempted from public disclosure under the Archives Act; and
- make specific provision for the Commissioner of the Australian Federal Police, or a staff member associated with the National Witness Protection Program, to provide documents and or evidence to a private hearing of the Administrative Appeals Tribunal.

FINANCIAL IMPACT STATEMENT

The proposed amendments will not have any significant financial impact. However, the amendments relating to Government Business Enterprises will result in minor savings through improved efficiency in the process associated with the commercialisation, incorporation and sale of Government bodies.

NOTES ON CLAUSES

Clause 1 - Short title

1. This clause provides for the Act to be cited as the *Archives Amendment Act 1994* and identifies the *Archives Act 1983*, as the Act which is to be amended.

Clause 2 - Commencement

2. This clause provides for the commencement of the Act. Subclause 2(1) provides that sections 1 and 2 of the Act will commence on the date of Royal Assent.

3. Subclause 2(2) provides that paragraph 3(c) and sections 6, 7 and 8 of the Act will commence immediately after the commencement of the *Witness Protection Act 1994*.

4. Subclauses 2(3) and (4) provide that all other provisions of the Act will commence on a day to be fixed by Proclamation, or six months after Royal Assent, whichever is earlier.

Clause 3 Definitions: 'Authority of the Commonwealth' and 'National Witness Protection Program'

5. The Archives Act operates to preserve and facilitate public access to, amongst other things, the records of Commonwealth Authorities. Section 3 of the Archives Act provides that bodies that are 'authorities of the Commonwealth' are subject to the Act.

6. Clause 3 repeals paragraph (c) of the definition of 'authority of the Commonwealth'. A revised paragraph (c) is substituted by paragraph (a).

7. Paragraph (a) of clause 3 provides that 'Commonwealth-controlled companies or Commonwealth-controlled associations' are subject to the Archives Act, unless they are prescribed in the Regulations to the Act not to be a 'Commonwealth-controlled company' or 'Commonwealth-controlled association'.

8. Paragraph (b) of clause 3 defines the terms 'Commonwealth-controlled association' and 'Commonwealth-controlled company'. The term 'Commonwealth-controlled association' is defined to mean any association over which the Commonwealth is in a position to exercise control. The term 'Commonwealth-controlled company' is defined to mean any incorporated company over which the Commonwealth is in a position to exercise control'. This definition of 'Commonwealth-controlled company' would include, for example, but is not limited to companies in which the Commonwealth is the sole or majority shareholder or where the Commonwealth is in a position to control the membership or composition of the board of directors of the company.

9. Paragraph (c) of clause 3 relates to the National Witness Program. It defines the term 'National Witness Protection Program' by reference to the program established by the Witness Protection Act 1994.

Clause 4 - requirement where company no longer established for a public purpose

10. The purpose of these amendments is to clarify the procedures for the removal of a body, such as a Government Business Enterprise from the application of the

Archives Act and to prevent the inadvertent removal of the body from the application of the Act.

11. Paragraph 3(1)(a) of the Archives Act provides that an 'authority of the Commonwealth' includes bodies established for a public purpose. However, when such a body is subsequently incorporated and/or privatised, and declared not to have been established for a public purpose, the body is immediately removed from the operation of the Archives Act. It was not the Government's intention that, by the use of this device, records created subsequent to the incorporation and up to the privatisation of a Government Business Enterprise would no longer be Commonwealth records under the Archives Act.

12. New section 3A will prevent the inadvertent removal of the records of a body from the application of paragraph 3(1)(a) of the Archives Act. Where a body is established for a public purpose, proposed section 3A will require the Government to expressly state that a body is to be taken never to have been established for a public purpose, for the purposes of the Archives Act, before it will no longer apply to that body. This will ensure proper consideration as to whether the Archives Act should continue to apply to these bodies once their structure is altered or whether the records created prior to incorporation will remain Commonwealth records.

13. Section 3A provides that a body can be excluded from paragraph (3)(1)(a) of the Archives Act either under the legislation associated with the change in the structure of the body or, in cases where no such legislation exists, by amendment of the Archives regulations.

14. New section 3B provides that the proposed amendments in relation to Government bodies will not have a retrospective application. Section 3B states that these amendments will not apply to bodies that were excluded from the application of the Archives Act prior to the commencement of these amendments.

Clause 5 - Records of companies that cease to be authorities of the Commonwealth

15. These amendments are designed to prevent the inadvertent removal of the prior records of a body from the application of the Archives Act where that body is subsequently no longer subject to the Act. The removal of prior records from the operation of the Archives Act occurs when these bodies are incorporated in such a way that no new legal entity is created upon incorporation. This means that upon incorporation, the body is deemed to have always existed in its new form as a body which is not subject to the Archives Act.

16. Clause 5 inserts new section 28A. Paragraph (a) of new section 28A expressly provides that the prior records of Government bodies, that are no longer subject to the Archives Act, will remain subject to the Act.

17. Paragraph (b) of new section 28A permits the Australian Archives to make arrangements with the new company or association in order to preserve those records deemed to be part of the archival resources of the Commonwealth and to provide access to the records in the same manner as would occur if the company or association were still subject to the Archives Act.

Clause 6 - Custody of records of the National Witness Protection Program

18. The purpose of these amendments is to permit the Australian Federal Police to retain custody of records concerning witnesses and participants who are connected with the National Witness Protection Program.

19. Subsection 29(1) allows a decision to be taken by a Commonwealth body that certain records are not required to be transferred to the Australian Archives or that Archives is required to observe special conditions in having access to the document. Section 29 provides that such decisions normally require the agreement of the Director-General of Archives except where the responsible Minister so determines.

20. Clause 6 inserts new subsection 29(9). New subsection 29(9) will provide that the agreement of the Director-General of Archives is not required for the making of such a decision by the Australian Federal Police under subsection 29(1) where this decision relates to documents which contain information about people who:

- have been assessed for inclusion in the NWPP program; or
- are or have been witnesses in the NWPP program.

21. Clause 6 states that definition of the term 'witness' has the same meaning as that contained in the Witness Protection Act 1994. This means the term 'witness' in clauses 6 and 7 of the proposed Act includes a person:

- who has agreed to give evidence concerning an offence or possible commission of an offence to the Australian Federal Police;
- who makes a statement to the Australian Federal Police; or
- who for any reason requires protection under the National Witness Protection Program, including a relative or person associated with a participant in the program.

Clause 7 - Exemption of certain records of the National Witness Protection Program

22. The purpose of this amendment is to prevent the public disclosure of documents that would disclose the existence, identity or location of a witness or participant connected with the National Witness Protection Program.

23. Section 33 of the Archives Act provides that certain records are exempt from public access. Subparagraph 33(1)(e)(ii) exempts confidential information provided by a person concerning law enforcement, from public disclosure. Section 39 of the Act permits the Australian Archives to neither confirm nor deny the existence of a record which would be exempt under Subparagraph 33(1)(e)(ii).

24. Clause 7 inserts new subsection 1A into section 33 of the Act. Subsection 1A provides that records concerning the provision of confidential information including confidential information provided:

- to the National Crime Authority;
- to the Australian Federal Police; or
- by a person who is or has been a witness under the National Witness Protection Program

are exempt from public disclosure under Subparagraph 33(1)(e)(ii).

25. Clauses 6 and 7 are not intended to apply to all non-sensitive documents created by or relating to the National Witness Protection Program (for example documents of an administrative or budgetary nature that would not reveal information concerning a witness or person assessed for inclusion in the program). These documents will be subject to the access provisions of the Archives Act.

Clause 8 - Hearing of proceedings by Tribunal

26. The purpose of this amendment is to make arrangements for the Australian Federal Police to attend private hearings conducted by the Administrative Appeals Tribunal where the Tribunal is reviewing a decision by the Australian Archives to refuse access to a document concerning the National Witness Protection Program.

27. Section 47 of the Archives Act permits the Administrative Appeals Tribunal to conduct private hearings to consider whether certain documents should be exempt from public disclosure. Paragraph 47(2)(a) provides for particular persons to produce the document and, or evidence relating to the document to the Tribunal in the course of the private hearing (for example, a Minister or a member of her or his staff or a member of a Commonwealth department or agency).

28. Clause 8 inserts new subparagraph (iia) into paragraph 47(2)(a) of the Archives Act. Subparagraph (iia) provides for the Commissioner of the Australian Federal Police or a staff member of the Australian Federal Police connected with the National Witness Protection Program to provide documents and or evidence to a private hearing of the Tribunal.



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