



1978

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
THE SENATE

ARCHIVES BILL 1978

EXPLANATORY MEMORANDUM

(Circulated by authority of
the Attorney-General,
Senator the Honourable Peter Durack, Q.C.)

INTRODUCTORY NOTE

The Australian Archives (formerly the Commonwealth Archives Office) has been operating for over thirty years under administrative arrangements first laid down during World War II to provide for:

- the disposal of records produced in the course of Government business;
- the preservation of Government records of continuing value and of related material of national significance;

and

- access by scholars and the public to the archival resources of the Commonwealth in accordance with the Government's access policy.

It is the purpose of this legislation to provide the Archives with a statutory basis for its operations and for the proper disposition of all Government records. The Bill establishes the Archives within the Department administered by the responsible Minister and confers on the Director-General of Archives certain statutory powers and functions to enable him to give effect to the legislation.

At present, a number of institutions are established to maintain and preserve material of national significance. These include the Australian National Gallery, the Australian War Memorial, and the National Library of Australia. Material in the custody of such institutions will, in general terms, be outside the scope of the legislation. The role of the Archives in relation to the records of Government and related material produced by persons and organisations associated with the Commonwealth is defined. The special role of the Australian War Memorial for the custody and management of certain Government records which are also "war relics of the Commonwealth" within the meaning of the Australian War Memorial Act is provided for.

The legislation gives the Archives certain advisory functions in relation to the archival resources of Australia as a whole. In pursuance of these functions, the Archives will seek the co-operation of State Archives and other custodial institutions in fostering the preservation and development of such material.

Provision is made for Government records which are no longer required for current uses by Government agencies to be transferred to the custody of the Archives and the deposit of such material out of official custody is prohibited. Records so transferred are to be arranged and described by Archives staff and made available, as required, for the use of Government. Detailed descriptions of records and other archival materials (including those in the custody of other institutions) will be recorded in the Australian National Register of Records. The Archives will assist Government agencies in determining which records are to be destroyed and which are to be preserved to meet the continuing needs of Government, or because of their interest or value for research, in the public interest. The legislation provides that the generality of Government records more than thirty years old are to be made available for public access and for arrangements to be made for other forms of access. Records to which the public is entitled to have access under the legislation will be recorded in an Australian National Guide to Archival Material which will also include details of other archival materials of general public interest. The provisions relating to access have been drafted in close association with the draft Freedom of Information legislation.

Special provision has been made for the records of the Governor-General, the Parliament, the Courts, Cabinet, the Federal Executive Council, and Royal Commissions. These records may be transferred to the custody of the Archives on terms and conditions agreed on between the Archives and those responsible for their custody.

Clause 1: This clause is formal (short title).

Clause 2: This clause provides for the Archives legislation to come into operation on a date or dates to be fixed by Proclamation.

Clause 3: This clause defines and sets out the interpretation of certain terms as they are employed in the legislation.

Under sub-clause (1) a number of terms are defined. These include:

- An "authority of the Commonwealth" which means statutory authorities and other offices and bodies, excluding the courts, which are set up by the Commonwealth or over which the Commonwealth has control.

Clause 3:
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- A "Commonwealth institution" which means an authority of the Commonwealth, a Department of State, a body set up by or in accordance with the Constitution, a Commonwealth court, or the Administration of a Territory. The Archives legislation concerns itself principally with the records of Commonwealth institutions.
- a "Commonwealth record" which means a record, other than certain records internal to the operation of the Archives itself (e.g. the Registers and Guide maintained in accordance with Part VIII), which is the property of the Commonwealth or a record deemed under sub-clause 3(6) to be a Commonwealth record. It is the purpose of the Archives legislation to provide for the preservation and use of Commonwealth records and to establish the Archives as the agency of Government with the duty to do this.
- A "current Commonwealth record" which means a Commonwealth record required for use in a Commonwealth institution. Such records are not required to be transferred to the custody of the Archives.
- "Exempt material" which means material in the custody of another agency of the Commonwealth (e.g. the Australian War Memorial, the National Library of Australia, and the Australian National Gallery) which it is their duty to preserve. Such material is exempted from the provisions of the legislation. A similar exclusion will be necessary should a national museum be established.
- "Material of the Archives" which means records and other objects in the custody of the Archives.
- "Record" which is defined as a document or object that has been kept by reason of any information or matter that it contains or can be obtained from it or by reason of its connexion with any event, person, circumstance or thing.

In general terms, the legislation provides that all "Commonwealth records" which are in the custody of a "Commonwealth institution", other than "current Commonwealth records" or "exempt material" are to be transferred to the custody of the Archives where they become part of the "material of the Archives".

Clause 3:
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Under sub-clause (2), the "archival resources of the Commonwealth" are defined to include Commonwealth records and other material - except for "exempt material" or material more properly the concern of other Governments - which are of national significance or public interest. It will be a function of the Archives to encourage and foster the preservation of all of the archival resources of the Commonwealth and to take into its custody that part of the archival resources of the Commonwealth which it is its function to preserve and maintain.

A wide definition of the "archival resources of the Commonwealth" has been proposed because of the difficulty of defining - in legal terms - the differences between the areas of operation of the Archives and those of other custodial institutions concerned with collecting and preserving the same kinds of material (e.g. libraries and museums) whose collecting policies in the past have sometimes resulted in the deposit of official records out of official custody. It is intended that the Australian Archives established by this legislation should assume a national responsibility for developing and encouraging the preservation of all archival materials in Australia without in any way interfering with the autonomy of other archival or custodial institutions. It is not intended that the Archives will seek to have the custody and management of archival material which is more properly the concern of other institutions. By law, the Archives will be limited in this respect to material which is essentially of national or Commonwealth concern and as a matter of policy it will confine itself to material which is closely associated with the operation of Government and therefore likely to include or be related to records deposited with the Archives by Commonwealth institutions.

Special provision will be made for material in the collections of other "national institutions" (the War Memorial, National Library and National Gallery), themselves Commonwealth institutions, which it is their duty to exhibit and make available to the public but which also falls within the definition of Commonwealth records because it comprises records which (by gift or purchase) are the property of the Commonwealth (c.f. clause 3(1) - "Exempt material"). The Australian War Memorial is in a unique position because it has responsibility for keeping some Commonwealth records deposited with it by other Commonwealth institutions (viz. those Commonwealth records which are also "war relics of the

Clause 3:
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Commonwealth" within the meaning of the Australian War Memorial Act).

All material in the collections of "national institutions" (including any Commonwealth records transferred there prior to the passage of the Archives legislation) are excluded from the operation of the Archives legislation (c.f. clause 3(1) - "Commonwealth record"). Such material apart, all other Commonwealth records will be subject to the provisions of the legislation (e.g. in relation to custody, disposal, and regulation of public access) and the Director-General of Archives will have power to prevent, under clause 24, the deposit, hereafter, of Commonwealth records out of official custody and to encourage, under clause 5(2)(f), the deposit in Archives of records in the hands of persons (e.g. ex-Ministers and officials) or organisations which because of their official character or close relationship with the work of the Commonwealth Government ought not to be deposited out of official custody.

Sub-clauses (3) and (4) make clear the position of the Defence Force and Police forces of the Commonwealth whose records will be subject to the provisions of the legislation.

Sub-clause (5) provides that the records of Parliament shall be deemed to be the property of the Commonwealth and therefore subject to the legislation. Under clause 5, it will be within the functions of the Archives to accept the custody and management of the records of Parliament but under clause 18(1)(b) they are exempted from the clauses in the legislation dealing with disposal, custody and public access and are to be transferred to the Archives only on such conditions as may be determined by the responsible officers of the Parliament under clause 21.

Under sub-clause (6), the regulations may provide that certain records, normally in the possession of a Commonwealth institution, are Commonwealth records for all or any of the purposes of the legislation. This is to provide for :

- cases where the test of property (c.f. clause 3(1) - "Commonwealth record") is not sufficient to establish that records are Commonwealth records for certain purposes (e.g. seized enemy property), and

Clause 3:
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- cases where it is desirable to extend the provisions of the legislation over material which would otherwise be exempt (e.g. to extend the official access policy - c.f. Part V, Division 3 - over those "war relics of the Commonwealth" in the custody of the Australian War Memorial which contain information or matter of an official nature.)

Sub-clause (7) defines the open access period by reference to which the public is entitled, under Division 3 of Part V, to have access to the generality of Commonwealth records.

Clause 4: This clause ensures that the legislation operates in the External Territories of the Commonwealth.

Clause 5: Sub-clause (1) establishes the Australian Archives as an organisation within the Department administered by the Minister administering the Archives legislation. The Archives will not be a body corporate and will be part of the normal Departmental staffing and funding arrangements. There will, however, be established under clause 7 the statutory position of Director-General which is given certain statutory powers under this legislation.

Sub-clause (2) outlines the functions of the Archives which are as follows:

- Under sub-clause 5(2)(a), the Archives is responsible for ensuring the conservation and preservation of the archival resources of the Commonwealth, which are its special concern. In the exercise of this responsibility the Archives need not take into custody all material that is part of the archival resources of the Commonwealth provided it is satisfied that the material is being or can be adequately preserved or is more properly housed elsewhere.
- Under sub-clause 5(2)(b), the Archives is given a wider responsibility to encourage and foster, by offering advice and other assistance, the preservation of other archival resources relating to Australia which, while not part of the archival resources of the Commonwealth, it is nevertheless in the national interest to have preserved. It will not be the Archives role to seek the custody of such material but to advise on its preservation and, as requested, assist other institutions for that purpose.
- Under sub-clause 5(2)(c), the Archives is to promote, by offering advice and assistance to Commonwealth institutions, the efficient

Clause 5:
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and economical keeping of current Commonwealth records which have not yet been transferred to the custody of the Archives. It will be the role of the Archives to ensure the preservation of material of permanent or continuing value and that maximum use can be made of such material to meet the information needs of Government and the public when it has ceased to be of immediate use to the Commonwealth institution which produced it as well as to encourage Commonwealth institutions to make the maximum efficient use of the storage, retrieval, reference and disposal services offered by the Archives.

- Under sub-clause 5(2)(d), the Archives is to ascertain, by survey of records in Commonwealth institutions (c.f. clause 6(1)(b) and clause 27) and with the co-operation of other custodial institutions (c.f. clause 48(4)), what material constitutes the archival resources of the Commonwealth. Material which can be made available to the public will be made known through the Australian National Guide to Archival Material (clause 49).
- Under sub-clause 5(2)(e), the Archives is to have the custody and management of all Commonwealth records that are no longer required for the immediate purposes of the agency which produced them and which are worthy of permanent preservation. There will, however, be provision under clause 28 for records to be retained by the Commonwealth institution which produced them where it is necessary or desirable to do so and for the Archives (under clause 47) to deposit material transferred to its custody in the custody of another custodial institution where it is appropriate to do so. The Archives will also have the function of storing semi-current and non-current records which, while not intended for permanent preservation, have a continuing administrative use and are better preserved and more economically housed and serviced in low-cost, centralised archival storage than in high-cost, separately serviced office storage maintained by each government agency.
- Under sub-clause 5(2)(f), the Archives may seek to obtain the custody and management of records from non-Government sources which are part of the archival resources of the Commonwealth and which, in the opinion of the Director-General of the Archives, ought to be in the custody of the Archives. The material involved will be the records of persons (e.g. ex-Ministers and officials) and organisations who are or have been closely associated

Clause 5:
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with the Commonwealth and whose records often contain a high proportion of official material or material most properly and conveniently associated with Commonwealth records already deposited in the custody of the Archives from Commonwealth institutions. It is open to the Commonwealth to seek to recover by legal action any Commonwealth records out of official custody where the records can be shown to be the property of the Commonwealth but such an action could not extend to records containing official information which were not the property of the Commonwealth. The Commonwealth's right to seek the recovery of Commonwealth records under existing laws is unchanged by this legislation and, in addition, it will be a function of the Archives to encourage the deposit of all records of an official character in its custody. The wide definition of archival resources of the Commonwealth (c.f. clause 3(2)) recognises a situation in which the Archives is, to some extent, in competition with other custodial institutions (e.g. libraries, museums and galleries) for the custody of groups of records containing such material. There is often some difficulty in distinguishing precisely between the private and official nature of records amongst this kind of material and it is of cardinal importance, in any case, that groups of records should not be divided arbitrarily on the basis of such distinctions. In law, persons and organisations having custody of any Commonwealth records will be prohibited (by clause 24) from depositing them elsewhere than in the Archives but in order that this should not have the result of undesirably separating such records from associated papers, and to meet the difficulty which might arise in having to establish in all cases that records of an official nature are also Commonwealth records as defined in the legislation, the Archives is empowered to take into custody whole groups of records containing or likely to contain official material which ought properly to be preserved in official custody and not seek merely that portion which is of an official character. The Archives will not, as a matter of policy, seek to obtain the custody of the records of nationally significant persons or organisations not closely associated with the Commonwealth (e.g. those of literary or artistic figures or of commercial or industrial undertakings) which are more properly the concern of other custodial institutions, and subject to sub-clause 5(2)(g), no funding or resources will be allocated to the Archives to house

Clause 5:
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such records. Records received from non-Government hands under this sub-clause will be accepted into custody in accordance with sub-clause 6(2).

- Under sub-clause 5(2)(g), the Archives may, with the approval of the Minister, accept custody of records which would not normally be deposited in its custody (e.g. records of persons or organisations not associated with the Commonwealth) if, for example, no other storage is available and it seems desirable, in the national interest, that they be preserved.
- Under sub-clause 5(2)(h), the Archives is to encourage the use of archival materials. The Archives will, in accordance with its other functions, ensure that material in its custody is used as widely and profitably as possible. It will also seek to encourage and promote, with the co-operation of other custodial institutions, the use of all other archival resources relating to Australia.
- Under sub-clause 5(2)(j), the Archives will ensure that all Commonwealth Records more than thirty years old are made available in accordance with sub-clause 30(1) and participate in arrangements for the accelerated and special release of Commonwealth records under clause 39.
- Under sub-clause 5(2)(k), the Archives is able, in order to encourage the preservation of the nation's archival heritage and in order to promote the keeping of current records in a manner consistent with the preservation of that heritage, to undertake research (and provide advice to those responsible) concerning the proper management and care of records and archives.
- Under sub-clause 5(2)(l), the Archives may, with the co-operation of other persons and institutions, seek to develop and foster co-ordinated activities designed to achieve the preservation and encourage the use of the nation's archival resources.
- Under sub-clause 5(2)(m), the Archives may, with the approval of the Minister and in accordance with arrangements made with a person responsible for exempt material, perform in relation to exempt material any of its functions relating to the archival

Clause 5:
(contd)

resources of the Commonwealth - i.e. sub-clause 5(2)(a), (d), (f), or (1). In particular, it is intended under this sub-clause to allow informal arrangements of a kind which have been made in the past between the Archives and one of the other national custodial institutions whereby the Archives agrees to act as an agent for or to house material normally held by one of those institutions.

Sub-clause (3) is intended to make it clear that the functions of the Archives do not derogate from the powers and functions of the Public Service Board or any other Commonwealth institution, particularly as set out in the Public Service Act and Audit Act; for the efficient and economical conduct of Government business in relation to the keeping of current Commonwealth records.

Clause 6:

Sub-clause (1) provides for certain specific powers to be conferred on the Archives in pursuance of its functions. The Archives may:

- Under sub-clause 6(1)(a), establish and control repositories to house material in its custody (including repositories established and maintained jointly - in the interests of economy and the co-operative development of the nation's archival resources - with other institutions, e.g. State Archives in State capitals or regional centres where both the State and the Commonwealth require archival facilities);
- Under sub-clause 6(1)(b), survey records (in accordance with clauses 5(2)(d) and 27) prior to transfer and/or disposal, accession records into the custody of the Archives, index, arrange and describe Commonwealth records in the custody of the Archives so as to facilitate their continued use by government and the public;
- Under sub-clause 6(1)(c), arrange for the acquisition of ownership or custody by the Commonwealth of material that forms part of the archival resources of the Commonwealth (e.g. material taken into custody under clause 5(2)(f)) including the assignment of copyright in such material to the Commonwealth;
- Under sub-clause 6(1)(d), maintain administrative histories of the Commonwealth and of Commonwealth institutions to assist official and public users of the Archives and make records (such as oral and photographic histories) which will amplify and illuminate the material in the custody of the Archives;

Clause 6:
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- Under sub-clause 6(1)(e), microfilm and, by other means, make copies - subject to the Copyright Act - of records in the custody of the Archives for sale to users as requested and for use in the Archives for reasons of preservation or facility of use;
- Under sub-clause 6(1)(f), arrange for the publication - subject to the Copyright Act - of material forming part of the archival resources of the Commonwealth or works based on such material;
- Under sub-clause 6(1)(g), publish indexes and finding aids to material in the custody of the Archives for use by researchers and other members of the public (c.f. clause 49);
- Under sub-clause 6(1)(h), authorise, in accordance with clause 24, the disposal of Commonwealth records;
- Under sub-clause 6(1)(j), assist, as requested, in the training of Commonwealth personnel responsible for keeping records to improve their knowledge and understanding of Archives procedures and requirements, in particular for the implementation of Part V of the legislation;
- Under sub-clause 6(1)(k), train, or assist in the training of, other persons (including persons from overseas countries and persons responsible for keeping material that is part of the archival resources of the Commonwealth) in proper techniques for the management and preservation of records, especially those of permanent value;
- Under sub-clause 6(1)(l), obtain and maintain equipment for using records (e.g. microfilm readers, data processing equipment);
- Under sub-clause 6(1)(m), provide information and facilities (including equipment) required by official and public users in utilising material in the custody of the Archives.

Under sub-clause (2) the Archives may accept custody of records which it receives from non-Government sources such as material brought into custody under sub-clause 5(2)(g) on conditions laid down by the depositor. This could have the result that the conditions of access applying to official material amongst such records will be different from the conditions of access which will be applied to Commonwealth records received from Government agencies. It is important for the Archives to be able to offer potential

Clause 6:
(contd)

depositors conditions of deposit which are comparable with those offered by other custodial institutions which also accept custody of this kind of material and it would be inappropriate for the Archives to be required, uniquely among such institutions, to apply the official access policy to records of this kind. There is, moreover, the difficulty of satisfactorily defining the differences between official and private material which makes it almost impossible to determine unequivocally in all cases which records would be subject to the official access policy if it were to apply. The Archives is not, however, obliged to accept conditions laid down by the depositor and could refuse to take records on conditions which it judged to be inappropriate. The Commonwealth could then seek to recover by legal action those records to which it had a legal right. As a general rule, the Archives will seek, with the concurrence of the depositor, to ensure - as, under this legislation, it alone is able to do - that the official access policy is applied to material amongst such records which it judges to be of an official character but, in the interests of ensuring that official material is not deposited out of official custody, it will be open to the Archives to accept the depositor's wishes on the conditions of access which are to apply. The Archives will also, under this sub-clause, be able to uphold the convention that the records of one administration are not made available to a subsequent administration and the papers of a Minister deposited with the Archives, for example, would be inviolable from scrutiny by a subsequent Government of a different political persuasion.

Clause 7:

This clause establishes the statutory office of Director-General of the Australian Archives who is to exercise all duties and powers conferred or imposed on him by the Archives legislation and may exercise any powers or duties conferred or imposed on the Archives. Power is given to the Minister to give directions, not inconsistent with the Archives legislation, to the Director-General in relation to the exercise of his powers and duties. It would not be open to the Minister to give directions to the Director-General which were inconsistent with the Act (e.g. which were contrary to conditions accepted by the Director-General under clauses 6(2) or 21).

Clause 8:

This clause gives the Director-General of Archives a general power of delegation.

Clause 9:

This clause provides that the staff of the Archives are to be employed under the Public Service Act.

- Clause 10: This clause establishes an Advisory Council on Australian Archives consisting of the Director-General, a Senator, a Member of the House of Representatives and ten others to be appointed by the Minister. The membership of the Council will be representative of the users of the Archives (both Commonwealth Public Service agencies - e.g. Government departments and authorities - and of the public - e.g. academic researchers and other user groups) and of other custodial institutions and authorities responsible for the preservation of archival resources in Australia (e.g. State Archives) and may include individuals specially fitted by their knowledge or experience to advise on the functions of the Archives.
- Clause 11: This clause provides that the Council shall furnish advice, as requested or on its own motion, to the Minister and the Director-General of Archives in respect of matters to which the functions of the Archives relate (c.f. clauses 5 and 6).
- Clause 12: This clause provides for the appointment by the Minister of a member of the Council, other than the Director-General, as Chairman and Deputy Chairman.
- Clause 13: This clause provides for the appointment of deputies for members of the Council who shall be entitled to attend meetings in the absence of the members of whom they are deputies and when attending to act as a member of the Council.
- Clause 14: This clause provides for the payment of remuneration and allowances for members of the Council.
- Clause 15: This clause provides for the termination of office of a member of the Council.
- Clause 16: This clause provides for the resignation of a member of the Council.
- Clause 17: This clause provides that the Council shall meet as necessary to perform its functions and for methods of convening, holding and presiding at meetings of the Council.
- Clause 18: This clause exempts certain records from the operation of the clauses in the legislation regulating disposal and custody of Commonwealth records and public access to them. In general terms, the legislation provides for the custody and management by the Archives of all Commonwealth records no longer required for immediate administrative purposes. This is provided for generally in the clauses dealing with the functions of the Archives (clauses 5 and 6) and explicitly in the clauses hereunder

Clause 18: (clauses 24-43). It would be inappropriate, however, for the more explicit provisions, which give the Archives, as an arm of the Executive, some degree of regulatory power over the treatment of records, to be made applicable to the records of those arms of the Government which traditionally enjoy a certain degree of independence and autonomy. These are:

- the Vice-Regal records;
- the records of Parliament; and
- the records of the Courts.

Such records may be transferred to the Archives in accordance with arrangements made under clause 21. Possession of a record by the Parliament or a court will establish conclusively that it is a record to which this clause applies and a certificate signed by the Official Secretary to the Governor-General will establish conclusively that a record is a Vice-Regal record. Such a certificate would be necessary if an appeal were made under sub-clause 37(1) against a decision not to grant access to a record to which this clause applies.

Clause 19: This clause exempts the records of Cabinet from certain provisions of the Bill and provides that a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet establishes conclusively (e.g. for the purpose of an appeal under sub-clause 37(1)) that a record is a record to which this clause applies. Cabinet records may be transferred to the custody of the Archives in accordance with arrangements made under clause 21.

Clause 20: This clause exempts the records of the Executive Council from certain provisions of the Bill and provides that a certificate signed by the Secretary to the Executive Council establishes conclusively (e.g. for the purposes of an appeal under sub-clause 37(1)) that a record is a record to which this clause applies. Executive Council records may be transferred to the custody of the Archives in accordance with arrangements made under clause 21.

Clause 21: This clause provides that records exempted from the normal operation of the Archives legislation under clauses 18, 19, or 20 may be transferred to the custody of the Archives on conditions including provision for access to the records by staff of the Archives or by the public.

Clause 22: This clause allows for certain records (e.g. some types of personnel records) to be exempted by regulation from the operation of all or part of the provisions of the Archives legislation relating to disposal, transfer and custody (Division 2) or public access (Division 3) where there is a secrecy provision of another law (which has been prescribed in the regulations) applying to the records. It will be necessary to determine in each particular case whether an obligation of secrecy should be regarded as applying perpetually or whether, subject to the effect of the lapse of time, some information can ultimately be made available for legitimate research purposes without breaching the rights to personal privacy or other reasons on the basis of which the obligation of secrecy was originally made.

Clause 23: This clause makes special provision for the custody of the records of Royal Commissions which will be determined by the Minister administering the Royal Commissions Act, 1902. The Archives may receive or retain custody of the records of a Royal Commission only in accordance with arrangements made by him. The records of Royal Commissions will be subject to the provisions of the legislation dealing with disposal and public access to records more than thirty years old.

Under sub-clause (4), the records of Royal Commissions which are more than thirty years old are made subject to the operation of the provisions of the Archives legislation in respect of public access notwithstanding a direction given by the Commission prohibiting publication of a document or matter contained in the records.

Under sub-clause (6), custody of the records of Royal Commissions conducted jointly by the Commonwealth and a State is to be determined by agreement between the Commonwealth and the State.

Clause 24: This clause, in pursuance of sub-clause 6(1)(h), prohibits the disposal, destruction, or transfer of custody or ownership of Commonwealth records except as provided for in sub-clauses (2) and (3). Sub-clause (1) ensures that records will not be destroyed or otherwise disposed of unless a judgement has first been made on whether or not they are required for permanent preservation and that Commonwealth records are not to be deposited out of official custody.

Clause 24:
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Sub-clauses (2) and (3) provide for the ways records may lawfully be disposed of. Special provision has been made to ensure that the requirements of other laws (e.g. the Treasury Bills Act 1914) and the normal requirements of efficient administration (e.g. the exchange or transfer of records between Commonwealth institutions in the normal course of public business) are not interfered with.

Sub-clause (2) sanctions destruction or disposal of records:

- as required by law;
- done with the permission of Archives;
- done in the normal course of the operations of a Commonwealth institution unless the Archives disapproves of the practice; or
- done for the purpose of returning a Commonwealth record out of official custody.

Sub-clause (3) provides for certain "ephemeral recordings" produced by Commonwealth institutions such as the Australian Broadcasting Commission for broadcasting purposes which, by amendments being made to the Copyright Act, they will be required in certain circumstances to deliver to the Archives. The recordings may be destroyed if Archives refuses to accept custody.

Sub-clause (4) makes it clear that the Archives is not able to destroy records without the consent of the responsible Commonwealth institution.

Sub-clause (5) deals with the special problem of automated records (e.g. computer tapes and discs). Because it is the data itself (in the form of electronic impulses, for example) rather than the medium on which it is recorded (the tape or disc which is re-usable and which may not itself be used for permanent storage of the data) which is important, control over disposal must in this case apply to the data itself rather than the medium on which it is recorded. Under sub-clause (5) it is made clear that it is the alteration of the data which is to be regulated under sub-clause (1).

Clause 25: This clause limits the operation of the provisions of clause 24 in relation to records more than 25 years old. Records of this age are not to be altered except as required by law or with the consent of Archives. This is to ensure that records which have been examined under clause 33 for access by the public and described in the finding aids produced by the Archives are not changed or added to. Unless such a provision is made there would be no way of ensuring that the descriptions in the finding aids were accurate or that decisions about public access to the records taken under clause 33 would remain valid.

Clause 26: This clause requires the transfer to the Archives of all Commonwealth records when they are no longer required and, in any case, when they are 25 years old. This is to ensure:

- that there is centralised, effective and economic management of non-current and semi-current records;
- that there is proper control over disposal of unwanted records and preservation of permanently valuable material;
- that the use of expensive office storage space in Commonwealth institutions for unwanted or little used material is kept to a minimum; and
- that the Archives has sufficient opportunity to arrange, describe and organise the clearance of records under clause 33 prior to their release for public use.

Certain records can be exempted from the operation of this clause under clause 28.

Clause 27: This clause allows the staff of the Archives to have reasonable access to records in the custody of Commonwealth institutions in order to survey and document the records, under sub-clause 6(1)(b), prior to arranging their transfer to the custody of the Archives under clause 26 and to determine, under clause 24, which records should be destroyed and which transferred for temporary or permanent preservation in Archives custody. Certain records can be exempted from the operation of this clause under clause 28.

Clause 28: This clause provides for the exemption of certain records from the operation of the clause requiring the transfer of records to the custody of the Archives (clause 26) or the clause permitting access to the records by Archives staff (clause 27). Generally, two kinds of records will be exempted:

- records with a continuing administrative purpose which could not be met if the records were transferred to the Archives (e.g. certain registers maintained by law); and
- records of a highly secret or confidential nature relating to matters of defence or security or to international relations.

This clause will also allow for the preservation by certain Commonwealth institutions of record materials for exhibition purposes or where it is more convenient for a Commonwealth institution, with the consent of the Archives and in accordance with the other provisions of the legislation, to make its own archival arrangements.

Under sub-clause (1) any Commonwealth institution may, with the consent of the Archives, exempt some or all of its records. If the Archives refuses its consent or if for any other reason the Commonwealth institution does not wish to seek Archives consent, the responsible Minister may, under sub-clause (2), exempt the records without the consent of the Archives provided that the Archives is notified of the decision.

Sub-clause (3) allows the Archives to accept records on conditions (e.g. under seal) provided that such conditions do not interfere with the operation of the clauses in the legislation dealing with public access (Division 3 of Part V).

Sub-clauses (4) and (5) allow an officer of a Commonwealth institution to deny access to staff of the Archives for up to one month to records which have not been exempted but in respect of which he thinks an exemption should be made under sub-clause (2).

Sub-clauses (6) and (7) ensure that exemptions under sub-clauses (1) and (2) shall not have the result of preventing staff of the Archives from examining, under clause 33, those records which are thirty or more years old to determine whether they should be made available for public access unless the records have been identified as exempt records by a Ministerial certificate under clause 32.

Clause 28: Sub-clause (8) provides that the Director-General of the Australian Security and Intelligence Organisation may exempt records without the consent of the Archives.
(contd)

Clause 29: This clause provides that records which have been transferred to the custody of the Archives are to be made available as reasonably required for the purposes of the responsible Commonwealth institution. Records more than 25 years old, which are available for public use or are being prepared for release to the public, will normally be used on the premises of the Archives.

Clause 30: This clause requires the Archives, in pursuance of sub-clause 5(2)(j), to make all Commonwealth records to which Division 3 applies (i.e. all Commonwealth records except those to which clauses 6(2), 18, 19, 20 or 22 applies), other than records which are exempt records under clause 31, available for public access when they become thirty years old (i.e. when they are in the open access period - c.f. clause 3(7)). Under sub-clause 2, the Archives is able to postpone release of records for a reasonable time pending examination under clause 33. For an initial period there will be some delays but eventually it is hoped that the Archives will be able to complete the examination of records regularly in advance of their reaching the open access period.

Clause 31: This clause defines the kinds of information or matter by reason of which records are to be exempted from the requirement that they be made available for public access. These are:

- under sub-paragraph (a), that the release of the information or matter would prejudice defence, security or international relations;
- under sub-paragraph (b), that the disclosure of the information or matter, communicated in confidence by other Governments, would be a breach of that confidence;
- under sub-paragraph (c), that the release of information or matter would prejudice Commonwealth/State relations;
- under sub-paragraph (d), that the release of the information or matter would adversely affect the Commonwealth's financial or property interests;
- under sub-paragraph (e), that the release of the information or matter would adversely affect the Commonwealth in any legal proceedings;

Clause 31:
(contd)

- under sub-paragraph (f), that the release of the information or matter would be a breach of confidence;
- under sub-paragraph (g), that the release of the information or matter would interfere with the administration or enforcement of the law;
- under sub-paragraph (h), that the release of the information or matter would unreasonably disclose information about the private affairs of a person;
- under sub-paragraph (j), that the release of the information or matter would unreasonably disadvantage the material interests of an undertaking.

Clause 32: This clause allows a Minister to apply a certificate in respect of an exempt record the release of which would be:

- prejudicial to the defence, security or international relations of the Commonwealth (c.f. clause 31(a));
- a breach of confidence with another Government in respect of information or matter supplied by that Government to the Commonwealth (c.f. clause 31(b)); or
- prejudicial to relations between the Commonwealth and any State (c.f. clause 31(c)),

where it would not be appropriate for the record to be treated in accordance with the Act in the normal way. A Ministerial certificate will be conclusive evidence in an appeal under sub-clause 37(1) before the Administrative Appeals Tribunal against a decision not to grant access and for refusing access to staff of the Archives under clause 28. A record to which a certificate applies will not be subject to the examination procedures outlined under clause 33. Where the regulations make provision that certificates are to apply only for a prescribed period of time, the certificates remain in force unless renewed under sub-clause (5), only until the prescribed period has elapsed. A Minister may delegate his power under sub-clause (7) and the exercise of the delegated power shall be deemed to be an exercise of the power by the Minister.

Clause 33: This clause provides for the identification of exempt records prior to release of the generality of records for public use. It applies to all Commonwealth records to which this Division applies except records in respect of which a certificate applies under clause 32.

Under sub-clause (1), the Director-General, in consultation with the responsible Minister or a person authorised by him, is to make arrangements for examining records to determine which open period records shall be deemed to be exempt records and, in the case of exempt records, the extent (if any) to which access can be given in part under clause 36. Decisions made under this sub-clause will be reviewable under clause 38 and a refusal to grant access based on a decision made under this clause will be subject to a right of appeal under sub-clause 37(1).

Under sub-clauses (2) and (3) examinations of records under sub-clause (1) are to take place, except in the case of records exempted from transfer to the Archives under sub-clause 28(1) or 28(2), on the premises of the Archives and are to be undertaken in accordance with programs approved by the Director-General of Archives. The effect of sub-clauses (1), (2) and (3) is to provide for a centralised and systematic clearance operation for all Commonwealth records according to uniformly applied and administered criteria of exemption co-ordinated by the Archives. This will prevent the application of inconsistent interpretations which might arise if the exemption criteria were separately applied by each Commonwealth institution and which would not be in harmony with the object of clause 30 in making all eligible records available for public access.

Sub-clause (4) provides for the review of decisions made under sub-clause (1) to take account of the effect of the lapse of time or other considerations which might give rise to a reconsideration of the decision.

Under sub-clause (5), the Archives is required to deal with all requests for public access in accordance with determinations made under this clause unless, on a review under clause 37, the Administrative Appeals Tribunal makes a contrary decision.

Clause 34: Under this clause, a person may have access in a specified form to a record which is made available for public access under this Division unless:

Clause 34:
(contd)

- giving access in the requested form (other than an opportunity to inspect the record) would interfere unreasonably with the operation of the Archives or of a Commonwealth institution;
- giving access in the form requested would not be appropriate having regard to the physical nature of the record;
- giving access in the form requested would be detrimental to the physical preservation of the record; or
- giving access in the form requested would involve an infringement of copyright (other than Crown Copyright) subsisting in the record.

All decisions made under this clause, except decisions refusing to grant access in the form requested because it would be detrimental to the physical preservation of the record, are subject to appeal under sub-clause 37(1).

Clause 35:

This clause enables the Director-General of Archives, in order to ensure the safe custody and proper preservation of records, to lay down reasonable conditions for the use of records made available for public access or to withhold records from public use, but, where records are withheld from use, copies may be provided. Decisions under this clause are not subject to appeal under sub-clause 37(1).

Clause 36:

This clause provides that a reasonably segregable portion of an exempt record, the release of which would not have the result of disclosing the information or matter by reason of which the record is deemed to be an exempt record, may be made available for public access where it is practicable to do so. Decisions made under this clause are to be made in accordance with arrangements made under sub-clause 33(1) and are subject to appeal under sub-clause 37(1).

Clause 37:

Under sub-clause (1), a person may, subject to clause 38, apply to the Administrative Appeals Tribunal for a review of:

- a decision refusing to grant access to a record on the ground that the record is an exempt record (within the meaning of clause 31) or that it is a record to which Division 3 does not apply (e.g. a record referred to in clause 6(2), 18, 19, 20 or 22);

Clause 37:
(contd)

- a decision refusing to grant access to a record in accordance with clause 36; or
- a decision refusing to grant access to a record in a particular form specified in clause 34(1) on a ground specified in clause 34(2)(a), (b) and (d).

It would not be appropriate for decisions made in accordance with clause 34(2)(c) or 35 (which are made pursuant to the primary responsibility of the Archives to ensure the preservation of permanently valuable material) to be made subject to appeal.

Sub-clause (2) provides that the Director-General of Archives shall be deemed, for the purposes of an appeal, to be the person who made the decision against which an appeal is lodged. Under sub-clause (3), the onus of establishing that a record is exempt is on the party claiming that it is an exempt record and the Tribunal is not restricted in its decisions by determinations made under clause 33. The Tribunal does not, however, have power to review a Minister's decision to apply a certificate under clause 32 establishing that a record is an exempt record or the decision to give a certificate under clause 18, 19 or 20 establishing that a record or part of a record is one to which this Division does not apply (sub-clause (4)). The Tribunal is given power, under sub-clause (5), to release all or part of a record on a review under sub-clause (1).

Under sub-clause (6), the Tribunal is required to make such order as it thinks necessary under subsection 35(2) of the Administrative Appeals Tribunal Act 1975 for holding an appeal in private, for restricting the publication of evidence or of information or matter submitted during an appeal, or for prohibiting or restricting the disclosure of information or matter to the parties to an appeal.

Under sub-clauses (7), (8), (9), (10) and (11), section 37 of the Administrative Appeals Tribunal Act 1975, which requires that material documents be lodged with the Tribunal, does not apply so as to require an exempt record to be produced unless it is necessary in the Tribunal's view to establish whether the record is an exempt record or whether part of an exempt record can be released in accordance with clause 36. The Tribunal may send a record so produced to the Federal Court of Australia where it is required or permitted to do so under section 46 of the Administrative Appeals Tribunal Act 1975 (sub-clause (11)). The Tribunal does not have power to require production of a record in respect of which a certificate made under clause 18, 19, 20 or 32 applies. Sub-clause (12) allows evidence of a certificate applying under clause

Clause 37: 18, 19, 20 or 32 to be given by affidavit or
(contd) otherwise and such evidence is admissible without
the production of the certificate or of the record
in question.

Clause 38: This clause provides that, before seeking a review
of a decision under sub-clause 37(1), a person
must first apply in writing under sub-clause (1)(a)
in a form specified in sub-clause (2) for access
to all or part of the record and, if he is then
refused access, apply further for a reconsideration
under sub-clause (1)(b) of that decision. This
is to allow the Administrative Appeals Tribunal to
satisfactorily identify the decision in respect
of which an appeal is lodged and to give the
Archives an opportunity to review the decision at
an appropriately senior level (c.f. sub-clause (4))
before the matter proceeds to the Tribunal. If,
after an application for a reconsideration of the
decision has been made under sub-clause (1)(b),
the person making the application has not been
informed of the result of his application within
fourteen days, he may take the matter to the
Tribunal in any case.

The Archives is obliged, under sub-clause (3), to
give the person all reasonable assistance in
identifying the record in respect of which an
application for access is made under sub-clause
(1)(a).

Where an application for a reconsideration of a
decision not to grant access is made under sub-
clause (1)(b), the Archives is required, under
sub-clause (4), to review any determination made
under clause 33 that the record is to be treated
as an exempt record. Under sub-clause (7), section
28 of the Administrative Appeals Tribunal Act 1975,
which entitles a person seeking a review of a
decision to a statement of the reasons for the
decision, does not apply. The Archives is required,
however, under sub-clauses (5) and (6), to notify
a person seeking access, in writing, of the
result of a reconsideration including, in the
case where a decision refusing to grant access
is upheld, the findings on any material questions
of fact relating to the decision other than
information or matter by reason of which the
record is deemed to be an exempt record. At
the same time, the person is to be informed
of his right to apply to the Administrative
Appeals Tribunal for a review of the decision.
Where a reconsideration has been requested
and the result has not been notified within the
fourteen days allowed, the Tribunal may, if
it thinks fit, adjourn an application to review
the decision, under sub-clause (8), for a
reasonable time to ensure that the reconsider-
ation is completed.

Clause 38: The Archives is required, under sub-clause (9),
(contd) to notify a person of the results of a decision
on an application made under sub-clause (1)(a)
or (1)(b) as expeditiously as possible and,
in the case of an application under sub-clause
(1)(b) only after the matter has been considered
by the Director-General of Archives or by
a person authorised by him to deal with
such an application.

Sub-clause (10) ensures that an application
for a review of a decision does not necessarily
lapse because it is out of time in a case
where the Archives has failed to notify a
person of the result of a reconsideration within
the required fourteen days.

Clause 39: Sub-clause (1) provides for the Minister, in
accordance with general arrangements approved
by the Prime Minister, to make whole classes
of records which are less than thirty years
old available for public access (accelerated
access).

Sub-clauses (2) and (3) provide for the Minister,
in accordance with general arrangements approved
by the Prime Minister, to make records which
are not otherwise available under the legislation
available to a person for a specified purpose
(special access). Special access may be made
conditionally and a person granted special
access on conditions is obliged to observe
those conditions.

Clause 40: This clause affords the Commonwealth and the
staff of the Archives:

- protection against actions for
defamation and breach of confidence;
and
- a defence in criminal proceedings
for wrongful disclosure of information
or matter contained in a record

where access is given to a record as being
a record to which access is required to be
given under Division 3 of the legislation.

Clause 41: This clause ensures that access to records
granted under normal administrative arrangements
(e.g. in the course of public business) or
as required by law (e.g. under Freedom of
Information legislation or the Ombudsman Act)
is not prevented by any provision of the
Archives legislation.

Clause 42: This clause provides that records which are made
available for public access in accordance with
the Archives legislation are automatically
de-classified.

Clause 43: This clause ensures that decisions relating to public access made prior to the commencement of the legislation are deemed to be decisions made under the legislation in accordance with section 33. Decisions so made not to release a record for public access thereby come within the operation of the appeals provisions (clauses 37 and 38).

Clause 44: This clause allows the Minister to determine that an object as defined in sub-clause 3(2) which is the property of the Commonwealth is of archival significance and is not to be disposed of except by deposit in the custody of the Archives.

Clause 45: This clause allows the Minister to determine that samples of a specified class of objects as defined in sub-clause 3(2) which are the property of the Commonwealth and are of archival significance shall, if required, be deposited in the custody of the Archives.

Sub-clauses (3), (4) and (5) provide that samples of Commonwealth currency and postage stamps shall be deposited in the custody of the Archives if required for archival preservation. Such a requirement will not be necessary if, in the opinion of the Archives, there are already adequate arrangements for the preservation of representative samples of such materials to document the history of this area of Commonwealth activity.

Clause 46: This clause provides for the location of material in the custody of the Archives in the branch of the Archives considered by the Director-General to be most appropriate taking into account:

- the needs of Government and of the public users of the material;
- the desirability of keeping related records together;
and
- the appropriateness of keeping material in the State or Territory to which it most closely relates.

Clause 47: This clause allows the Director-General of Archives to make arrangements for placing material of the Archives in the custody of another person or institution if he considers it is appropriate to do so (e.g. where the material would be more suitably held or displayed by an institution other than the Archives).

Clause 47: Sub-clause (3) makes special provision for the
(contd) deposit in the National Library of Australia of certain "ephemeral recordings" produced for broadcasting purposes by organisations other than Commonwealth institutions which, by amendments being made to the Copyright Act, will be delivered, under certain circumstances, to the Archives. Separate provision is made under sub-clause 24(3) for such material produced by Commonwealth institutions.

Clause 48: This clause provides for a National Register of Records to contain particulars of all material in the custody of the Archives and of other archival material as appropriate.

Clause 49: This clause provides for a National Guide to Archival Material which must contain particulars of all records examined under clause 33 (other than records in respect of which a certificate has been issued under clause 32) and may also contain such other particulars from the National Register of Records as may be of use to the public in using the Archives. Entry of this information in the Guide will ensure that the public can ascertain information about what records are available and about what records have been closed, but information about records in respect of which a certificate has been issued under clause 32 is not required to be entered in the Guide.

Sub-clause (4) provides that the Guide shall not include information or matter by reason of which a record is deemed to be an exempt record or the disclosure of which would be contrary to arrangements made by Archives under clauses 6(2), 21, 28(3) or 33(1).

Sub-clauses (5) and (6) provide that a copy of the Guide is to be kept in each State or Territory and may be inspected by the public.

Clause 50: This clause provides for a National Register of Research involving the use of archival material which the Archives will maintain with the assistance of other archives institutions. A copy of the Register is to be kept in each State and Territory and may be inspected by the public.

Clause 51: This clause requires the Archives to present an annual report.

Clause 52: This clause permits the Director-General of the Archives to provide copies of records in Archives custody in proceedings before a court which are prima facie to be accepted as true copies of the originals.

Clause 53: Sub-clause (1) allows for references to the Archives under other names in other laws and elsewhere to be read as references to the Australian Archives established under this legislation.

Sub-clause (2) sanctions the continuation of administrative arrangements already in force governing custody and disposal of Commonwealth records.

Sub-clause (3) sanctions the continuation of administrative arrangements already in force governing custody and disposal of records other than Commonwealth records which have been transferred to the custody of the Archives prior to the passage of the legislation.

Clause 54: This clause provides a general power for the making of regulations.