

1983

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

ARCHIVES BILL 1983

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General
the Honourable Gareth Evans for and on behalf of
the Minister for Home Affairs and Environment
the Honourable Barry Cohen M.P.)

INTRODUCTORY NOTE

The Australian Archives has been operating for nearly forty years under administrative arrangements first laid down during World War II. Carrying out these arrangements involves the Archives in:

- surveying and evaluating Commonwealth records and authorising the destruction of those of temporary value;
- identifying and physically preserving records of administrative, community, cultural or educational value;
- providing storage services for records no longer required for current administrative use by Commonwealth institutions;
- regulating access to Commonwealth records in accordance with current Government policy;
- providing retrieval and reference services to Commonwealth institutions and to members of the public in respect of records in custody;
- providing management and descriptive information on the existence, nature and whereabouts of Commonwealth records and on the Commonwealth institutions past and present, responsible for them; and
- developing and providing policy advice on the broad management of Commonwealth records and advice to Commonwealth institutions and the public on records-related issues.

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.

The role of the Archives in making arrangements for the management of Government records and related material produced by persons and organisations associated with the Commonwealth is defined. Material in the custody of such institutions as the Australian National Gallery, the Australian War Memorial, the National Library of Australia and the Museum of Australia will, in general terms, be outside the scope of the legislation. The special role of the Australian War Memorial for the custody and management of certain Government records is provided for.

The arrangements established by the legislation cover a broad range of management activities. Commonwealth records which are no longer required for current use by Commonwealth institutions are to be transferred to the custody of the Archives. The Archives is empowered to arrange appropriately for their storage, description, preservation, physical conservation, retrieval and use. The Archives will play a central role in machinery designed to regulate the disposal or destruction of records and will assist Commonwealth institutions in identifying which records are to be destroyed, on the grounds of efficiency and economy and which are to be preserved in order to meet administrative, legal, community, research or educational needs. In providing for the generality of Commonwealth records more than 30 years old to be made available for public access, the legislation complements the provisions of the Freedom of Information Act. The access provisions of the Archives Bill 1983 have been drafted in close association with the Freedom of Information legislation, including the amendments to that legislation now proposed. Together these measures will comprise a comprehensive system of public access covering all classes of Commonwealth records.

The provisions of the Bill extend to the records of the official establishment of the Governor-General, the Cabinet and the Executive Council. Records of the Parliament and the Courts are also covered by the legislation. However, in this case, in order to give effect to the relationship between the Executive Government and the Parliament and the Courts, certain provisions of the Bill will be able to be applied by regulation after consultations. Royal Commission records are the subject of special provisions.

In order to assist Commonwealth institutions and the public as appropriate, the Archives is to have a broad role in providing information, advice and guidance covering the preservation, management and use of Commonwealth records and the functioning of related administrative machinery. It is to promote the efficient keeping of current records and is to undertake research into all aspects of the management and preservation of records. The Archives is also enabled to facilitate the use of records of administrative, legal, community, research or educational value whether or not these are in the custody of the Archives.

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:

Clause 3:
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- 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. Bodies established under a law of the Northern Territory or Norfolk Island are excluded.
- A "Cabinet notebook" which means a notebook or similar record containing notes of discussions or deliberations taking place at a meeting of the Cabinet or of a Committee of the Cabinet. These notes are made during the course of those discussions or deliberations by, or under the authority of, the Secretary to the Cabinet.
- A "Commonwealth institution" which means the official establishment of the Governor-General, the Executive Council, the Senate, the House of Representatives, an authority of the Commonwealth, a Department, a Federal court or a court of a Territory, other than the Northern Territory or Norfolk Island, or the administration of an external Territory other than Norfolk Island. The Archives legislation concerns itself principally with the records of Commonwealth institutions.
- A "Commonwealth record" which means a record, other than a Cabinet notebook, exempt material and 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 for related purposes and to establish the Archives as the Commonwealth institution 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 custodial institution of the Commonwealth (e.g. the Australian War Memorial, the National Library of Australia, the Australian National Gallery and the Museum of Australia) which it is their duty to preserve. Such material is exempted from the provisions of the legislation.

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- "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".

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 ensure that all existing and future Commonwealth records of administrative, legal, community, research or educational value and other similar material are conserved and preserved. It will also be the function of the Archives to take into its custody such part of those materials which it is its function to preserve and maintain and to ensure that adequate custodial and storage arrangements are made for the preservation and maintenance of such materials.

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 these other institutions. By law the Archives will be

Clause 3: limited in this respect to material which is
(contd) 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, National Gallery and the Museum of Australia) 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 form part of its national collections of material relating to Australian military history 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 forces and Police forces of the Commonwealth whose records will be subject to the provisions of the legislation.

Clause 3:
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Sub-clause (5) provides that the records of Parliament shall be taken 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. Under clause 18 they are exempted from the clauses in the legislation dealing with disposal, custody and public access, but by regulations under clause 20(2) all or any of these clauses may apply to them, subject to prescribed conditions and modifications. They may also be placed in the custody of the Archives, with access by Archives staff, 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
- 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 the material in the memorial collection in the custody of the Australian War Memorial which contains 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.

Sub-clause (8) ensures that the Australian Archives will not be entitled to take custody of Commonwealth records which are, and remain, in the possession of State or Territory authorities at the time Part II of the Bill comes into operation or of any other records in their possession unless it has the consent of the State, Territory or authority concerned. The autonomy of archival or custodial institutions other than the Australian Archives will thereby be assured.

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.
- 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 and economical keeping of current Commonwealth records. In order to meet the information needs of Government and the public, it will be the role of the Archives to promote efficient practices relating to the control, custody, preservation, accessibility, retention, destruction and storage of Commonwealth records within Commonwealth institutions. Using all appropriate means, the Archives will provide the necessary guidance, advice, information, education and services and will generally encourage the development of sound practices and methods.
- Under sub-clause 5(2)(d), the Archives is to ensure, by instituting surveys of records in Commonwealth institutions (c.f. clause 6(1)(b) and clause 28) and with the co-operation of other custodial institutions (c.f. clause 65(4)), that records which are of administrative, evidential, community, research or educational value are identified.

Clause 5:
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The management and descriptive information thus acquired will be contained, as appropriate, in the Australian National Register of Records (clause 65) and will be made available to officials and the public through the Australian National Guide to Archival Material (clause 66).

- 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 Commonwealth institution which produced them. There will, however, be provision under clause 29 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 64) to deposit material transferred to its custody in the custody of another person where it is appropriate to do so.
- 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 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

Clause 5:
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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 material, 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 such records. Records received from non-Government sources 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 and facilitate the use of records which are of administrative, legal, community, research or educational value. By means of publication, instruction, training and other appropriate techniques and in accordance with its functions, the Archives will provide the necessary guidance, advice, information, education and services for officials and the public and will generally

Clause 5:
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encourage the development of sound practices and methods. The Archives will 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 similar 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 31(1) and, in collaboration with other Commonwealth institutions as appropriate, take part in arrangements which regulate other forms of access to Commonwealth records.
- Under sub-clause 5(2)(k), the Archives is to have a general research and advisory role in relation to issues connected with the management and preservation of records and other archival material.
- 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 archival resources of the Commonwealth and of other archival resources relating to Australia.
- 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 resources of the Commonwealth - i.e. sub-clauses 5(2)(a), (d), (f) or (l). 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 or other facilities 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 or persons (e.g. State Archives in State capitals or regional centres where both the State and the Commonwealth require repositories or other facilities);
- Under sub-clause 6(1)(b), survey records for the purpose of acquiring management information concerning their administrative context, identity, quantity, physical format, growth rate, age, whereabouts, value, frequency of usage, physical condition and content and for the purpose of ascertaining the material which constitutes the archival resources of the Commonwealth (in accordance with clause 5(2)(d)), appraise records for the purposes of clause 24, accession records into the custody of the Archives, and index, arrange and describe Commonwealth records so as to facilitate their use by officials 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), gather information concerning the structure, inter-relationships and functioning of Commonwealth institutions and the related workings of the machinery of Government, in order to facilitate the management of the material of the Archives and of records in the custody of Commonwealth institutions and to assist the public in identifying the records and the Commonwealth institutions relevant to their inquiries. Gather information on other records-related issues including those of an administrative, legal, social, technological and managerial nature. 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 for reasons of preservation or facility of use and for sale to users;
- 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 other forms of guides and reference aids based upon information acquired in accordance with sub-clauses 6(1)(b) and 6(1)(d) for use by officials and members of the public (c.f. clause 66);
- Under sub-clause 6(1)(h), authorise, in accordance with clause 24, the disposal or destruction of Commonwealth records, in order that the processes of disposal or destruction will follow procedures which are recorded and widely known and which are, therefore, accountable and orderly;
- Under sub-clause 6(1)(j), assist, as requested, in training those staff of Commonwealth institutions who are responsible for managing current records in order to improve practices relating to the control, custody, preservation, accessibility, retention, destruction and storage of such records. Such training will also 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 in effective techniques for the management, preservation and use of records;
- Under sub-clause 6(1)(l), obtain and maintain equipment (e.g. microfilm readers, data processing equipment) in order to facilitate the preservation and use of the information contained in records by officials and the public;

Clause 6:
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- Under sub-clause 6(1)(m), provide information required by officials and members of the public proposing to use or actually using the material of the Archives - e.g. information about the records held in the custody of the Archives, about the Commonwealth institutions which created them, about how to use Commonwealth records and about the facilities and services of the Archives - and provide facilities (including equipment) for using the 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 Commonwealth institutions. It is important for the Archives to be able to offer potential 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 records 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), 20 or 21).
- Clause 8: This clause gives the Director-General of the 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 a Senator, a Member of the House of Representatives and eleven others to be appointed by the Minister. The membership of the Council will be representative of the users of the Archives (both Commonwealth institutions - e.g. Government departments and authorities -and the public - e.g. professional researchers, community interest groups and other users) 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 the Archives in respect of matters to which the functions and powers of the Archives relate (c.f. clauses 5 and 6). Special arrangements are made (c.f. clause 25(1) and (2) and clause 56(4) and (5)) for the Council to be provided with information on certain aspects of disposal and destruction practices and on the administration of the special access arrangements permitted under clause 56(2).
- Clause 12: This clause provides for the appointment by the Minister of a member of the Council 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. The Director-General is entitled to be informed of and to attend throughout meetings, but to take part in the proceedings only as the Council approves.
- Clause 18: This clause provides that the provisions of Divisions 2 and 3 do not apply to records in the possession of the Senate, the House of Representatives or a Parliamentary Department but that they may be applied, subject to any appropriate modifications, by means of regulations made under clause 20. Clause 21 provides for the transfer of records referred to in this clause to the custody of the Archives and for the making of arrangements for access to such material.
- Clause 19: This clause provides that the provisions of Divisions 2 and 3 do not apply to records in the possession of a court or of a registry of a court, but that they may be applied, subject to any appropriate modifications, by means of regulations made under clause 20. Clause 21 provides for the transfer of records referred to in this clause to the custody of the Archives and for the making of arrangements for access to such material. Divisions 4 and 5 do not apply to records in the possession of a court or of a registry of a court, other than records that are of an administrative nature.
- Clause 20: This clause allows for the making of regulations covering records referred to in clauses 18 and 19(1) and in sub-clauses (2) and (3) it prescribes the consultative processes which must be followed in the making of such regulations.

Clause 20: The use of regulations arises from the need to ensure that the ways in which the provisions of Divisions 2 and 3 are applied to records of the Parliament and of the Courts are such as properly to give effect to the relationships which exist between the Executive Government and the Parliament and the Courts.

Clause 21: This clause permits arrangements to be made for the transfer of records referred to in clauses 18 and 19(1) to the custody of the Archives and for arrangements to be made regarding access to them by the Archives or other persons in accordance with regulations.

Clause 22: 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 record or matter contained in the records.

Under sub-clause (6), custodial, disposal and access arrangements for the records of Royal Commissions conducted jointly by the Commonwealth and a State are to be determined by agreement between the Commonwealth and the State.

Clause 23: Commonwealth records as defined in clause 3 may include records of authorities or bodies which, although established under a law of the Commonwealth operate also under the law of another Government, including that of one or more States or the Northern Territory or Norfolk Island. An example of such a body is the National Companies and Securities Commission established under the National Companies and Securities Commission Act 1979.

In such cases there is a requirement that the provisions of the Act relating to Commonwealth records do not conflict with any agreement between the participating governments on matters relating to the disposal and custody of, and access to, records of the authority or body.

Clause 23: Clause 23(a) provides for regulations to limit
(contd) or exclude the operation of the provisions of the Act in relation to the records of such bodies so that in each case it will be possible to give effect to any agreement reached between the participating governments.

Clause 23(b) makes similar provisions for inter-governmental bodies established by agreement.

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). The objectives of the clause are

- to prevent the premature destruction of records which should be retained for a limited period to satisfy legal, financial, accountability and other requirements of public administration;
- to ensure the identification and preservation of records which warrant permanent retention for administrative, legal, community, research or educational purposes.

Sub-clause (1) ensures that no Commonwealth record will be disposed of or destroyed without proper practices being followed and that records will not be deposited out of official custody.

Sub-clauses (2) and (3) specify the ways in which 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 the Archives; (Established disposal practices authorise the permanent retention or the destruction of Commonwealth records by means of disposal instruments issued by the Archives with the agreement of the Commonwealth institution controlling the records.)

- Clause 24:
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- done in the normal course of the operations of a Commonwealth institution unless the Archives disapproves of the practice. This permits the destruction, as a normal administrative practice, of 'non-record' material of a facilitative or transitory nature which might be created, acquired or collected by Government officials during the course of day to day business. Such material would include:
 - working papers consisting of rough notes and calculations used in the preparation of other records such as correspondence, reports and statistical tabulations;
 - manuscript drafts, the content of which has been reproduced and incorporated in the Commonwealth institution's record-keeping systems;
 - extra copies of documents and published material preserved solely for convenience of reference.

Destruction under normal administrative practice also covers the modifications and updating of data as part of the running of established ADP programs and routines, where such processes do not result in the loss of permanently valuable data.

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 the 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. machine-readable records, including 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 the disposal must in this case apply to the data itself rather than the medium on which it is recorded. This sub-clause makes it clear that it is the alteration of the data which is to be regulated under clause 24.

Clause 25: This clause is designed to ensure that, at the time of the commencement of Part V, or as soon as practicable after that date, the Advisory Council is to be informed of those practices relating to the destruction or other disposal of Commonwealth records which are currently in force. The Council is also to be advised of the introduction of any new practices or modifications to those already in use.

Clause 26: This clause limits the operation of the provisions of clause 24 in relation to records more than twenty five years old. Records of this age are not to be altered except as required by law or with the consent of the Archives. This is to ensure that records which have been examined under clause 35 for access by the public and described by the Archives are not changed or added to. Unless such a provision is made there would be no way of ensuring that descriptive information provided to users would remain accurate or that decisions about public access to the records taken under clause 35 would remain valid.

Clause 27: 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 twenty five 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 or other inappropriate storage arrangements for unwanted or little used material is kept to a minimum; and
- that the Archives has sufficient opportunity to arrange, describe and organise the examination of records under clause 35.

Certain records can be exempted from the operation of this clause under clause 29.

Clause 28: This clause allows the staff of the Archives to have reasonable access to records in the custody of Commonwealth institutions in order to discharge all the functions and powers conferred on the Archives by the legislation. Certain records can be exempted from the operation of this clause under clause 29.

Clause 29: 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 27) and the clause permitting access to the records by Archives staff (clause 28). 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 arrangements for its own records.

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).

Clause 29: Sub-clauses (6) and (7) ensure that exemptions (contd) under sub-clauses (1) and (2) shall not have the result of preventing staff of the Archives from examining, under clause 35, 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 34.

Sub-clause (8) provides that persons authorised to act on behalf of nominated security and intelligence agencies may exempt records without the consent of the Archives.

Clause 30: 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 twenty five 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 31: 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(1) and 23 apply), other than records which are exempt records, 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), any Commonwealth institution that has in its custody Commonwealth records (other than exempt records) which are in the open access period is required to make such arrangements with the Archives as will enable the Archives to meet its obligations under sub-clause (1).

Under sub-clause (3), the provisions of sub-clause (2) do not apply to records in the possession of the Senate, the House of Representatives, a Parliamentary Department or a court or a registry of that court except as might be provided for by any regulations made under clause 20(2).

Under sub-clause (4), the Archives is able to postpone release of records for a reasonable time pending examination under clause 35. To some extent the Archives will be able to complete the examination of records in advance of their reaching the open access period. Otherwise they will be examined in response to requests for access.

Clause 32: This clause is designed to protect the interests of the Government of a State or of a Territory when giving effect to the provisions of clause 31. Where appropriate, records originating with State or Territory Governments will be exempt from public access under the normal operation of clause 33, although it is expected that relatively few interests will need to be protected at the stage where records are thirty or more years old.

Sub-clause (1) requires the Minister, where appropriate, to consult with the Government of a State or of the Northern Territory before a record is made available.

Sub-clause (2) allows for such consultation to be the subject of arrangements.

Clause 33: 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-clause (1):

- under paragraph (a), that the release of the information or matter would prejudice defence, security or international relations;
- under paragraph (b), that the disclosure of the information or matter, communicated in confidence by or on behalf of a foreign Government, or by or on behalf of an international organisation would be a breach of that confidence;
- under paragraph (c), that the release of the information or matter would adversely affect the Commonwealth's financial or property interests, and would not, on balance, be in the public interest;
- under paragraph (d), that the release of the information or matter would be a breach of confidence;
- under paragraph (e), that the release of information or matter would or could reasonably be expected to prejudice the investigation of a breach of or the administration or enforcement of a law in a particular case or to endanger the life or safety of any person;
- under paragraph (f), that the release of the information or matter would or could reasonably be expected to prejudice the handling of breaches of the law or of the protection of public safety;

Clause 33:
(contd)

- under paragraph (g), that the release of the information or matter would unreasonably disclose information about the private affairs of a person;
- under paragraph (h), that the disclosure of information or matter would or could reasonably be expected to destroy or diminish its commercial value;
- under paragraph (j), that the disclosure of information or matter would or could reasonably be expected unreasonably to have an adverse effect on an individual's lawful business or professional affairs or on the lawful business, commercial or financial affairs of an organisation or undertaking;

Sub-clause (2) enables a record to be withheld from access if in legal proceedings it would be privileged from production on the grounds of legal professional privilege or whose disclosure would be contrary to the public interest.

Sub-clause (3) enables a record to be withheld from access if it contains information or matter relating to the personal or business or professional affairs of any person (including a deceased person) or to the business, commercial or financial affairs of an organisation or undertaking and if there is in force a law relating to taxation that applies specifically to information or matter of that kind and prohibits persons referred to in that law from disclosing information or matter of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

Clause 34:

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 33(1)(a)); or
- a breach of confidence with another Government in respect of information or matter supplied by that Government to the Commonwealth (c.f. clause 33(1)(b))

where it would not be appropriate for the record to be treated in accordance with the Act in the normal way. Subject to the operation of Division 3, a Ministerial certificate will be conclusive evidence in an appeal under clause 43 before the Administrative Appeals Tribunal against a decision not to grant access and for refusing access to staff of the Archives under

Clause 34:
(contd)

clause 29. Under sub-clause (3) where a Minister is satisfied that information as to the existence or non-existence of a record as described in an application for access would, if contained in another record cause that other record to be an exempt record for the reason that it would contain information or matter of a kind referred to in paragraph 33(1)(a) or (b), he may sign a certificate to that effect (specifying that reason). A record to which a certificate applies will not be subject to the examination procedures outlined under clause 35. 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 (6), only until the prescribed period has elapsed. A Minister may delegate his power under sub-clause (8) and the exercise of the delegated power shall be deemed to be an exercise of the power by the Minister.

Clause 35:

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 34.

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 38. Decisions made under this sub-clause will be reviewable under clause 42 and a refusal to grant access based on a decision made under this clause will be subject to a right of appeal under clause 43.

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 29(1) or 29(2), on the premises of the Archives and are to be undertaken in accordance with programs approved by the Director-General of the Archives. The effect of sub-clauses (1), (2) and (3) is to provide for centralised and systematic examination of all Commonwealth records in the open access period, according to uniformly applied and administered criteria of exemption co-ordinated by the Archives.

Clause 35: This will prevent the application of
(contd) 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 31 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 43, the Administrative Appeals Tribunal makes a contrary decision.

Clause 36: 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:

- giving access in the requested form 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 clause 43.

Clause 37: 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 clause 43.

Clause 38: 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 reasonably practicable to do so. Decisions made under this clause are to be made in accordance with arrangements made under sub-clause 35(1) and are subject to appeal under clause 43.

Clause 39: The Archives is not required to confirm or deny the existence of a record if to do so would result in the release of information which, if included in a Commonwealth record would be closed under sub-clauses 33(1)(a), (b) or (e).

If a request for access to such a record is made, the Archives may notify the inquirer in writing that it neither confirms nor denies its existence as a Commonwealth record but that if it did exist it would be an exempt record. Such a notice shall be supported by appropriate information and, for the purposes of clause 43, shall be appealable as if it were a refusal to grant access on the ground that the record is exempt.

Clause 40: This clause deals with applications for access or partial access to Commonwealth records in the open access period.

The Archives is, under sub-clause (2), to assist persons making such application. Sub-clause (3) provides that, when a formal application is made under sub-clause (1), the Archives must give the applicant a decision within ninety days of receipt of the application or within such period as is provided for in regulations under sub-clause (4).

Under sub-clause (5) when a decision to refuse access or partial access is given it must be accompanied by appropriate information about the reasons for the decision and about the applicant's right to request re-consideration of the decision under sub-clause 42(1) and of the procedure to be followed in requesting such a re-consideration.

Under sub-clause (6) section 13 of the Administrative Decisions (Judicial Review) Act 1977 does not apply to a decision of the kind referred in sub-clause (5).

Clause 40: Under sub-clause (7), the information provided in
(contd) accordance with sub-clause (5) is not required to contain any matter that is of such a nature that its inclusion in a record would cause that record to be an exempt record under clause 33.

Under sub-clause (8), when the applicant has not received a decision within the prescribed time, he may appeal to the Administrative Appeals Tribunal under clause 43 as if the Archives had determined that the record was an exempt record. If the Archives gives an adverse decision before the matter is dealt with by the Tribunal, the applicant may under clause (9), request the Tribunal to review the latter decision.

Under sub-clause 5(1)(c) of the Ombudsman Act a person may appeal to the Ombudsman concerning failure by the Archives to make and notify a decision.

Under sub-clause (10) an application to the Administrative Appeals Tribunal may not be made whilst a complaint concerning the failure of the Archives to make and notify to the applicant a decision on the same record is under consideration by the Ombudsman. If such an appeal is made before the expiration of the period during which the Archives is required to notify a decision, the Ombudsman may give the applicant a certificate that in his opinion there has been an unreasonable delay. This will enable the applicant to appeal to the Administrative Appeals Tribunal under clause 43 as if access had been refused.

Under sub-clause (12) where an appeal against a failure by Archives to make a decision has been lodged with the Administrative Appeals Tribunal, the Tribunal may allow Archives an extended period during which to make a decision.

Clause 41: The clause provides that a certificate given under sub-clause 34(3) shall be deemed to be a certificate given in respect of the record so described, even though the certificate does not acknowledge the existence or non-existence of the record so described.

Clause 42: A person who is dissatisfied with a decision made by the Archives on an application for access made in accordance with sub-clause 40(1) may within twenty eight days of receiving the decision and related information or within such period as the Archives allows apply in writing for a reconsideration of that decision.

Clause 42: Sub-clause 42(1) allows a person to request the Archives to reconsider a decision made on an application for access to which clause 40 applies. The Director-General of the Archives or a person authorised by him shall, when such a request is received, reconsider the decision and the Archives shall notify the applicant of the result of the review. If the decision does not grant access as sought by the applicant, the notice shall provide details relevant to the decision and inform the applicant of his right of appeal.

Clause 43: Under sub-clause (1) an application may be made to the Administrative Appeals Tribunal for a review of a decision by the Archives which refuses to grant access as requested or to allow a person more than twenty eight days during which to request reconsideration of a decision. Such an appeal may not be lodged if a person is or has been entitled to apply to the Archives for a reconsideration and had not done so. However, if an application for reconsideration has been made but no decision has been received by the applicant within fourteen days of the application being received by the Archives, an appeal may be made to the Administrative Appeals Tribunal within a reasonable period.

Under sub-clause (4) an application to the Administrative Appeals Tribunal for a review of a decision made by the Archives is to be made within sixty days of the day on which the decision was given to the applicant or was deemed to have been made.

Under sub-clause (6), it is not necessary for the Archives to supply details relevant to the decision against which an appeal is being lodged if this has already been done under sub-clause 40(5).

Sub-clause (7) provides that if the Tribunal considers a notice issued in pursuance of sub-clause 40(5) to contain inadequate particulars, it may, at the request of a person to whom the notice was furnished, make a declaration accordingly, and in such an event, the person responsible for furnishing the notice shall, as soon as practicable but within twenty eight days after the Tribunal makes the declaration, furnish the applicant with an additional notice or notices containing further and better particulars.

Clause 44: Sub-clauses 44(1) and (2) provide that the Tribunal may review any decision made in respect of an application for access to a record and may decide any matter that could have been decided by the Archives, but may not decide to grant access to an exempt record except as provided by sub-clause (4).

Sub-clause (3) provides that, while the Tribunal does not have jurisdiction to review a certificate given under clause 34, it may determine questions relating to the claim of exemption in respect of which a certificate is issued if it is constituted by three presidential members or a single presidential member, in accordance with clause 46.

Sub-clause (4) enables the Tribunal, if the applicant so requests, to determine the question of whether there exists reasonable grounds for a claim to be made that a record is exempt under sub-clauses 33(1)(a) or (b) and in respect of which a certificate is in force under sub-clause 34(1).

Sub-clause (5) enables the Tribunal, if the applicant so requests, to determine the question whether there exists reasonable grounds for the claim that information as to the existence or non-existence of a record described in a request and subject to a certificate under sub-clause 34(3) would, if contained in a record of a Commonwealth institution, cause the last mentioned record to be an exempt record for the reason that it would contain information or matter of a kind referred to in sub-clause 33(1)(a) or (b).

Under sub-clause (6), the Tribunal may direct that, if practicable, access to or to, a copy of a part of, an exempt record may be given.

Clause 45: This clause sets out the consequences attaching to a determination by the Tribunal that there do not exist reasonable grounds for claiming that a record is exempt, or that information about the existence or non-existence of a record should not be disclosed in the exercises of its powers under sub-clause 44(4) or (5). In such a case, the appropriate Minister (as defined in sub-clause 45(9)) is required to decide whether or not to revoke the certificate in issue.

Paragraph 45(2)(a) provides that where the Minister decides to revoke a certificate under sub-clause 34(1), the claim that the record to which the certificate relates is exempt shall be taken to have been withdrawn. Paragraph 45(2)(b) provides that where the Minister decides to revoke a certificate under sub-clause 34(3), he shall inform the applicant of the existence or non-existence of the record to which the certificate relates.

Clause 45: If, however, the Minister decides not to revoke
(contd) the certificate, sub-clause 45(3) will require the Minister to give notice of that decision to the applicant and cause a copy of that notice to be laid before each House of Parliament within five sitting days.

Sub-clauses 45(4), (5) and (6) set out what is required to be included in a notice under sub-clause 45(3). Sub-clause 45(4) requires the Minister to state his findings on any material question of fact, the material on which those findings were based and the reasons for the decision. Sub-clauses 45(5) and (6) provide that the Minister is not required to include in the notice matter that would cause the notice to be exempt under clause 33, or information as to the existence or non-existence of a record or of a state of fact if that information would, if included in a record of a Commonwealth institution, cause that record to be exempt under that clause. This will ensure that the notice to be given does not have to include exempt matter.

The purpose of sub-clause 45(7) is to avoid a double obligation to give a statement of reasons, by excluding section 13 of the Administrative Decisions (Judicial Review) Act 1977.

The purpose of sub-clause (8) is to preserve the power which the person giving a certificate would otherwise have to revoke it, notwithstanding the specific power now to be conferred on the appropriate Minister to override a recommendation of the Tribunal.

Clause 46: This clause provides that where determining a question arising under sub-clause 44(4) or (5), the Tribunal shall be constituted in such a case by either three presidential members or a single presidential member, as provided for in clauses 46(1) and (2). Sub-clause (3) also provides for application to be made to vary the constitution of the Tribunal, from a single presidential member to three presidential members, when it is determining such a question.

Clause 47: This clause relates to the procedures of the Tribunal when exercising its special jurisdiction in cases where a conclusive certificate has been given. These procedures are intended to provide adequate protection for records and evidence relating to sensitive matters and, for that purpose, override discretions which the Tribunal would otherwise have under the Administrative Appeals Tribunal Act to decide on in camera hearings and to restrict or prohibit the publication of records produced or evidence given to the Tribunal.

Clause 47:
(contd)

Sub-clause (2) requires the Tribunal to hear in private any part of a proceeding in its special jurisdiction in which evidence or information is given or a record is produced to the Tribunal by a Commonwealth institution, a Minister or an intelligence organisation. A private hearing is also required to be conducted of submissions made by a Commonwealth institution or a Minister in support of a claim to exemption of a record covered by a conclusive certificate or that information about the existence or non-existence of a record would be exempt matter. Subject to the discretion given by sub-clause (4), the hearing of any other part of a proceedings before the Tribunal in exercising its special jurisdiction is required to be in public.

Sub-clause (3) empowers the Tribunal to direct who may be present at a hearing in private under sub-clause (1) and requires the Tribunal to give directions prohibiting the publication of records produced, evidence given and submissions made to the Tribunal at such a hearing.

Sub-clause (4) substantially repeats the ordinary powers of the Tribunal under the Administrative Appeals Tribunal Act to make orders as to in camera hearings and the prohibition or restriction of publication of evidence given to the Tribunal.

Sub-clause (5) has the effect that an order by the Tribunal does not prevent the disclosure of matter by a person in the course of his duties.

Clause 48:

This clause is consequential upon sub-clause 46(2). The Administrative Appeals Tribunal Act 1975 does not make provision for the manner in which questions of law arising before the Tribunal are to be determined in a case where the Tribunal is comprised by three presidential members, since that Act does not provide for a Tribunal to be so constituted. Clause 48, therefore, modifies the relevant section of the Administrative Appeals Tribunal Act 1975, by providing that -

- (a) where one only of the presidential members constituting the Tribunal is a Judge, a question of law is to be decided in accordance with his opinion; and
- (b) in the case where two or more of the members constituting the Tribunal are Judges, a question of law is to be decided according to the opinion of the majority of the members constituting the Tribunal.

- Clause 49: This clause limits the power of the Tribunal to require the production of a record in respect of which there is in force a certificate under clause 34. In such a case the Tribunal may only require that the record be produced for inspection by the presidential member or members constituting the Tribunal for the purpose of determining the relevant question. Where a record has been so produced, the Tribunal will be required to return the record to the person who produced it without permitting a person other than a member of the Tribunal as constituted in the particular proceeding, or a member of the staff of the Tribunal in the course of his duty, to have access to it.
- Clause 50: This clause provides that for the purposes of this Part and of the application of the Administrative Appeals Tribunal Act 1975 in respect of proceedings under this Part that a decision given by the Archives shall be deemed to have been given by the Director-General and that the "appropriate Minister" as defined in sub-clause 45(1) is made a party to proceedings in which the Tribunal is to determine such a request.
- Clause 51: This clause places on the Archives the onus of establishing that a decision given by the Archives was justified or that the Tribunal should give a decision adverse to the applicant. This is because the applicant does not have access to the record concerned, and so is not necessarily in a position to argue that the decision was wrong. The Tribunal is not restricted by any determination made at any time under clause 35.
- Clause 52: This clause ensures that the prohibition on the Tribunal including exempt matter or information of a kind referred to in sub-clause (1) in its reasons for a decision extends to the decision itself.
- Clause 53: Under sub-clause 53(3), the Tribunal may not require the production of such a record. Under sub-clause (1) however, if the Tribunal is not satisfied that other records claimed by affidavit or otherwise to be exempt are of such a nature, it may require production of the record. Production of the record may also be required to allow the Tribunal to determine whether it is practicable to grant access to part of or to a copy of part of the record. This provision may, under sub-clause (4), be extended to the non-exempt portion of the record otherwise made exempt by a certificate referred to in sub-clause (3). In both instances the record may be inspected only by members of the Tribunal or by the staff of the Tribunal and whenever necessary by a member of the Federal Court of Australia or the staff of that Court.

Clause 54: This clause provides that, in proceedings before the Tribunal under this Division, evidence of a certificate under clause 34, including evidence as to the identity or nature of the record concerned, may be given by affidavit or otherwise and is admissible without the production of the certificate or of the record in question.

Clause 55: The powers of the Ombudsman to investigate matters relating to Archives are not limited by anything in this Act. However the Ombudsman may not, under sub-clause (3) reveal in a report any information by virtue of which under this Act a record would be an exempt record.

Sub-clause (4) provides that, where a person has made a complaint to the Ombudsman about a decision, that person may not make an application to the Tribunal for review of that decision before he has been informed of the result of his complaint.

Sub-clause (5) provides that any report made by the Ombudsman in respect of a complaint must not contain any information as to the existence or non-existence of a record if such information, were it included in a record of a Commonwealth institution, would cause that latter record to be exempt.

Clause 56: Sub-clause (1) provides for the Minister, in accordance with general arrangements approved by the Prime Minister, to make all records in a particular class of Commonwealth records which are less than thirty years old available for public access (accelerated access).

Sub-clauses (2) and (3) enable the Minister, in accordance with general arrangements approved by the Prime Minister, to make available to a person for use for a specified purpose records which would not otherwise be available under this legislation, including records not in the open access period. This means of access, termed special access, may be subject to conditions which the person granted access is required to observe, and which generally regulate the way in which information obtained from the records may be used.

Sub-clause (4) ensures that the Advisory Council is made aware of arrangements approved by the Prime Minister under sub-clause (2) and of the nature of the arrangements which have been entered into.

Sub-clause (5) provides that the Council shall be notified at prescribed intervals of each request for access made under sub-clause (2) and of the decision made in relation to each.

Clause 57: This clause affords the Commonwealth and the staff of the Archives:

- protection against actions for defamation, breach of confidence or infringement of copyright; 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 58: 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 59: This clause provides that records which are made available for public access in accordance with the Archives legislation are automatically de-classified.

Clause 60: 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 clause 35. Decisions so made not to release a record for public access thereby come within the operation of the appeals provisions (Division 4).

Clause 61: 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 administrative, legal, community, research or educational significance and is not to be disposed of except by deposit in the custody of the Archives.

Clause 62: This clause allows the Minister to determine that samples of a specified class of objects as defined in sub-clause 3(1) which are the property of the Commonwealth and are of archival significance shall be deposited, if necessary, in the custody of the Archives for permanent preservation.

Sub-clauses (3), (4) and (5) provide that samples of Commonwealth currency and postage stamps shall be deposited, if necessary, in the custody of the Archives for permanent 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 63: This clause provides for the Director-General to determine the most appropriate location for material in the custody of the Archives, 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 64: This clause allows the Director-General of the Archives to make arrangements for placing material of the Archives in the custody of another person or institution if he considers it to be more effective or efficient or for other reasons appropriate to do so. Under sub-clause (2) any arrangements so made are to include provision for the regular inspection of the material by the Archives in order to ensure that the material is being properly cared for.

Sub-clause (3) makes special provision for the 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 65: This clause obliges the Archives to maintain a National Register of Records. This Register must contain such information about the records in the custody of the Archives as the Director-General considers appropriate. The Register may also contain such information concerning other records as the Director-General considers appropriate. These records comprise:

- current records in the custody of Commonwealth institutions;
- material in the custody of State and other archives, including private archives; and
- other archival resources relating to Australia.

Clause 65:
(contd)

The Register will contain descriptive information about the machinery of Government, its functions and structure, about the records generated by Commonwealth institutions (e.g. whether they exist, where they are, how old they are), and about which Commonwealth institution is or was responsible for which records at any time. It will also include information about the records of the persons who are, or have at any time been, associated with a Commonwealth institution, and who have placed such material in the custody of the Archives. The Australian National Guide to Archival Material and other guides, lists and indexes will be compiled on the basis of this material and will be available to assist officials and members of the public by providing information about records, the use of records or related aspects of the machinery of Government.

Clause 66:

This clause provides for a National Guide to Archival Material which must contain particulars of all records examined under clause 35 (other than records in respect of which a certificate has been issued under clause 34). The Guide may also contain such other information about records and their context drawn from the Australian National Register of Records as may be of assistance to officials and the public in pursuing inquiries. Entry of this information in the Guide will ensure that officials and 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 34 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, 29(3) or 35(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 officials and the public.

Clause 67:

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 officials and the public.

- Clause 68: This clause requires the Archives and the Advisory Council to present annual reports.
- Clause 69: 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 70: 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 71: This clause provides a general power for the making of regulations, including regulations relating to charges for supply of information to the public by the Archives and of storage services in respect of records transferred to the custody of the Archives.

