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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

ARCHIVES AMENDMENT BILL 2006

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator the Hon. Rod Kemp,
Minister for the Arts and Sport)

ARCHIVES AMENDMENT BILL 2006

OUTLINE

The Archives Amendment Bill amends the *Archives Act 1983* to implement some of the Government's responses to the Australian Law Reform Commission Report No. 85, Australia's Federal Record: A Review of the *Archives Act 1983*. A significant number of those recommendations have already been implemented or can be achieved through non-legislative measures.

The proposed minor amendments to the Act improve good record-keeping across the Commonwealth. They also add an objects clause to Part 1 of the Act. The objects clause acknowledges the advisory role that the Archives plays in record-keeping across the Commonwealth and that archival resources of the Commonwealth will be preserved, promoted and made publicly available.

FINANCIAL IMPACT STATEMENT

The Bill is not expected to have any financial impact on Commonwealth expenditure or revenue.

NOTES ON CLAUSES

Part 1 - Preliminary

Clause 1 - Short title

Clause 1 is a formal provision specifying the short title of the Bill.

Clause 2 - Commencement

The Act commences on the day after it receives the Royal Assent. Commencement on the day after the Act receives the Royal Assent will avoid any issue of retrospectivity (however short the actual period of time) that could occur if the Act commenced on the day of Royal Assent.

Clause 3 - Schedule(s)

This is a machinery provision which explains the effect of the one Schedule to the Bill. The Schedule contains the amendments to the *Archives Act 1983* (Archives Act) and consequential amendments to other Acts.

Schedule 1 - Amendments

Archives Act 1983

Item 1 - After section 2

This item inserts an objects clause as new proposed section 2A. The objects clause confirms the role of the National Archives of Australia (NAA) as identifying and preserving records comprising the archival resources of the Commonwealth and promoting their public availability. It acknowledges the role of the NAA as the Commonwealth's authority on record-keeping and acknowledges its function of determining standards and providing advice to Commonwealth institutions.

Item 2 - Subsection 3(1)

This item inserts an explanation of the meaning of a record being 'in the care of the Archives'. This is one of the key concepts of the new amendments. A record is 'in the care of the Archives' whether it is in the custody of the NAA or in the custody of a person under an arrangement made with the NAA under section 64 of the Archives Act.

Central to the concept is the recognition that the NAA may not always be the best repository for particular archival resources. For example, some types of scientific data may require specialist hardware to allow the software or media in which the data is stored to be read. The NAA may not have access to the appropriate hardware or, where it does have access, the hardware may not be in an environment which is conducive to the storage or security requirements for the data. In other cases, NAA

staff may not have sufficient knowledge or training to interpret, retrieve or manage the data.

Even where arrangements are made with a person to have custody of a record, the NAA must still be able to meet its obligations under the Archives Act, for example, to make records available to Commonwealth institutions under subsection 30(1) and to make records publicly available under subsection 31(1).

Item 3 - Subsection 3(1) (definition of *material of the Archives*)

This item repeals the current definition of ‘material of the Archives’ and inserts a new concise definition relying on the concept of records being ‘in the care of the Archives’. The new proposed definition is not different in substance from the current definition. As was the case with the current definition, the new proposed definition excludes from ‘material of the Archives’, current Commonwealth records that relate to the administration of the NAA.

Item 4 - Subsection 3(1) (definition of *record*)

This item repeals the current definition of ‘record’ which is format specific. To conform to the Australian and International Standard AS ISO 15489-2002 *Records Management*, this item inserts a new proposed definition which is not format specific. Both documents and objects can be records. The definition clarifies that a record does not have to be in a concrete form – it can be in any form, including an electronic form. A record can include a photograph, film, map, plan, model or painting. It can also include a sound recording, coded storage device, magnetic tape or disc, microform, and more modern technologies such as digital video discs and compact discs. Other examples of records in electronic form are emails, internet sites, case management systems, financial accounting systems, inventory management and procurement systems, personnel management and HR systems, building management and access control systems and geographical systems.

The new proposed definition gives legislative authority to the policy direction issued by the NAA in 1995 that provided for electronic records to have the same status as paper records.

Item 5 - After section 3B

This item inserts a new proposed section 3C into the Archives Act. The provision gives the Director-General a discretion to determine in writing that specified Commonwealth records are part of the archival resources of the Commonwealth. The determination will replace the former disposal authorities. Exercise of the power will provide certainty for agencies about what must be retained and what can be destroyed.

Proposed subsection 3C(2) prevents the exercise of the power unless the Director-General is satisfied that the Commonwealth record is part of the archival resources of the Commonwealth, as defined in subsection 3(2).

Proposed subsection 3C(3) makes it clear that a determination made under section 3C may be set out in the same document as a permission given by the NAA under

paragraph 24(2)(b) or the approval by the NAA of a practice or procedure given under that paragraph or as a notification of disapproval of a practice given under paragraph 24(2)(c). (The effect of permissions and approvals given under paragraph 24(2)(b) is that practices or procedures which would otherwise constitute offences in relation to Commonwealth records under subsection 24(1) are not offences under the Archives Act. The effect of paragraph 24(2)(c) is that an act that is a normal administrative practice is not an offence under subsection 24(1), unless the NAA has notified that authority or Department that it disapproves of the particular act.)

Proposed subsection 3C(4) is included to make it clear to readers that the determination under subsection 3C(1) is not a legislative instrument because it does not fall within the meaning of that term in section 5 of the *Legislative Instruments Act 2003*.

Item 6 Transitional - section 3C of the Archives Act 1983

This transitional provision clarifies how particular arrangements, which related to the disposal or custody of Commonwealth records, made by the Director-General prior to the commencement of the Archives Amendment Act and still in operation before the commencement of item 6, are to operate. The particular arrangements are those which classified records as 'Retain as National Archives'. Such records are to be considered to have been determined to be part of the archival resources of the Commonwealth under section 3C of the Archives Act at the commencement of this item. However, the Director-General has the power to determine in writing that the provision does not apply to a particular instrument. If the Director-General makes such a determination, it is not a legislative instrument because it does not fall within the meaning of that term in section 5 of the *Legislative Instruments Act 2003*.

Item 7 - Subsection 5(1)

The NAA was originally established within the Department but on 28 February 2001, was established as an Executive Agency by order of the Governor-General made under the *Public Service Act 1999* on 22 February 2001.

The proposed amendment omits the words, 'within the Department' from subsection 5(1) of the Archives Act to reflect the NAA's status as an Executive Agency. In so doing it implements advice which counselled that there was no need to amend the Act prior to the establishment of an Executive Agency having the name, National Archives of Australia, but that consideration should be given to making appropriate amendments to the Archives Act, should that Act need to be amended for other reasons in the future. It is considered appropriate and convenient to make the amendment at this point in time.

The order establishing the NAA as an executive agency gave it the functions specified in the Archives Act, as in force from time to time. This means that the NAA will have as its functions those functions as amended by the proposed amendments to subsection 5(2).

Item 8 - At the end of paragraphs 5(2)(a) and (b)

Item 10 - At the end of paragraph 5(2)(c)

Item 12 - At the end of paragraph 5(2)(d)Item 18 - At the end of paragraph 5(2)(f)

Item 20 - At the end of paragraphs 5(2)(g),(h), (j) and (k)

The purpose of these amendments is to clarify that the provision following each of the provisions listed against an item above are to be read cumulatively and not in the alternative.

Item 9 - Paragraph 5(2)(c)

This amendment makes clear the scope of the NAA's functions in relation to promoting the keeping of current Commonwealth records i.e. the NAA has the function of providing advice and other assistance to Commonwealth institutions about creating and managing those records, as well as 'keeping' or holding records.

Item 11 - Paragraph 5(2)(d)

Item 15 - Subparagraph 5(2)(e)(ii)

These amendments introduce terminology which better reflects the actual administrative functions of the NAA.

Item 13 - Paragraph 5(2)(e)

Item 17 - Paragraph 5(2)(f)

Item 19 - Paragraph 5(2)(g)

Item 22 - Subsections 6(2) and (3)

These amendments reflect the new concept of the NAA having care of records even where another body has custody of the records because such an arrangement is more appropriate or convenient.

Item 14 - At the end of subparagraph 5(2)(e)(i)

This amendment makes it clear that subparagraph 5(2)(e)(i) and subparagraph 5(2)(e)(ii) are in the alternative and that it is a function of the NAA to care for and manage Commonwealth records, other than current Commonwealth records, that are part of the archival resources of the Commonwealth or ought to be examined to determine if they are.

Item 16 - Subparagraph 5(2)(e)(iii)

This amendment makes it clear that it is a function of the NAA to preserve records which are required to be preserved on a temporary basis even where they are not part of the archival resources of the Commonwealth. Preservation on a temporary basis can require preservation for 100 years or more.

Item 21 - Subsection 5(3)

This amendment removes the reference to a body, the Public Service Board, which no longer exists.

Item 23 - At the end of Part II

This item inserts a new proposed section 6A into the Archives Act. It is not intended that the NAA hold all Commonwealth records. Records which have not been determined to be archival resources of the Commonwealth and records of long-term but temporary value are not intended to be held by the NAA. This provision will allow the NAA to return such records to the institution which transferred them to the NAA or to the institution which has succeeded to the functions of the transferor institution. However, the NAA will only be able to return records in accordance with arrangements agreed to by the institution to which the records are to be transferred.

Item 24 - Application - subsection 6A(2) of the *Archives Act 1983*

This provision makes it clear that new proposed subsection 6A(2) applies to Commonwealth records transferred to the care of the NAA, whether before or after the commencement of proposed subsection 6A(2). This means that records transferred to the NAA before the commencement of proposed new subsection 6A(2) will also be able to be returned to the institution which transferred them to the NAA or to the institution which has succeeded to the functions of the transferor institution in accordance with agreed arrangements.

Item 25 - Subsection 22(3)

The effect of this amendment is that, if the Minister directs that records of a Royal Commission which are no longer required for the purposes of the Commission are to be transferred to the NAA, they are transferred to the 'care' of the NAA. Because of the new proposed definition of 'care' in subsection 3(1), such records will be able to be transferred to the custody of another person in accordance with an arrangement under section 64 of the Archives Act.

Item 26 - Subsection 24(4)

This amendment reflects the new concept of the NAA having care of records even where another body has custody of the records because such an arrangement is more appropriate or convenient.

Item 27 - Section 27

The proposed new section imposes an obligation on Commonwealth institutions that have in their custody Commonwealth records that have been determined to be archival resources of the Commonwealth to transfer those records to the care of the NAA, in accordance with arrangements approved by the NAA, as soon as practicable after the records cease to be current Commonwealth records but in any case within 25 years of their coming into existence. (A Commonwealth institution or Minister is able to exempt records from these requirements).

Under the new proposed section records that are archival resources of the Commonwealth will also be able to be transferred directly into the custody of bodies other than the NAA itself, in accordance with arrangements agreed under section 64

of the Act with the NAA. The requirement to transfer as soon as practicable will allow the NAA to determine the particular conservation requirements for the records before records begin to deteriorate. In particular, it is important that electronic records are transferred to the NAA promptly so that preservation measures can be taken before changes in software and data formats render them inaccessible.

Item 28 - At the end of section 28

This amendment inserts a note referring to the power of a Commonwealth institution or a Minister to exempt a record from the requirement under section 27 to transfer records that form part of the archival resources of the Commonwealth to the care of the NAA.

Item 29 - Paragraphs 29(1)(a) and (2)(a)

Item 30 - Subsection 29(3)

Item 32 - Paragraph 29(4)(a)

Item 33 - Subsection 30(1)

These amendments reflect the new concept of the NAA having care of records even where another body has custody of the records because such an arrangement is more appropriate or convenient.

Item 31 - At the end of subsection 29(3)

This amendment inserts a note alerting the reader to the fact that arrangements made under section 64 for a person other than the NAA to have custody of a Commonwealth record must enable the NAA to meet its obligations under subsection 29(3). Such obligations may arise in relation to any agreement between the NAA and a Commonwealth institution about the conditions on which the records are accepted from the Commonwealth institution into the care of the NAA.

Item 34 - At the end of subsection 30(1)

This amendment inserts a note alerting the reader to the fact that arrangements made under section 64 for a person other than the NAA to have custody of a Commonwealth record must enable the NAA to meet its obligations under subsection 30(1) to make the record available for use by, or at the direction of, the Commonwealth institution that transferred the records to the care of the NAA or the institution that succeeded to the relevant functions of that institution.

Item 35 - Subsection 30(2)

This amendment repeals the current subsection 30(2) and inserts new provisions to accommodate the concept of the NAA having care of records even where another body has custody of the records. It provides that, where a record has been in existence for more than 25 years, it must not be made available to a Commonwealth institution under subsection 30(1) in a manner that requires it to leave the custody of the person who has custody of the record, except where it is necessary for the proper conduct of the business of the Commonwealth institution. For example, new papers

should not ordinarily be added to files subject to this section but, in some cases, such as the amendment of property titles, the action has to take place on the record itself.

Item 36 - Subsection 31(1)

These amendments reflect the new concept of the NAA having care of records even where another body has custody of the records because such an arrangement is more appropriate or convenient.

Item 37 - At the end of subsection 31(1)

This amendment inserts a note alerting the reader to the fact that arrangements made under section 64 for a person other than the NAA to have custody of a Commonwealth record must enable the NAA to meet its obligations under section 31(1) to make records available for public access.

Item 38 - Subsection 31(2)

This proposed amendment does two things. It removes any doubt that the requirement imposed by subsection 31(2) on a Commonwealth institution that has custody of a Commonwealth record or material of the NAA in the open access period is obligatory. (The requirement imposed by subsection 31(2) is to make arrangements with the NAA to enable the NAA to make certain records available for public access).

The amendment also provides that the requirement imposed by subsection 31(2) on Commonwealth institutions applies to material of the Archives, as well as Commonwealth records.

Item 39 - Subsection 35(2)

This amendment reflects the new concept of the NAA having care of records even where another body has custody of the records because such an arrangement is more appropriate or convenient.

Item 40 - Part V1 (heading)

Item 41 - Section 61

The heading, Objects of archival significance, is no longer relevant because section 61, which provided for declarations of objects of archival significance has been repealed. As the new definition of 'record' provides that both documents and objects can be records and proposed section 3C allows the Director-General of the NAA to determine that a Commonwealth record or other material is part of the archival resources of the Commonwealth, it is unnecessary to make special provision for declaring objects to be of archival significance.

The new heading reflects the fact that Part V1 is concerned only with the provision of samples of archival material, such as legal tender, coins and postage stamps.

Item 42 - Subsections 62(2), (3), (4) and (5)

These amendments reflect the new concept of the NAA having care of records even where another body has custody of the records because such an arrangement is more appropriate or convenient.

Item 43 - Subsections 64(1) and (2)

This provision repeals the current subsections 64(1) and (2) and inserts new proposed subsections 64(1) and (2). Subsection 64(1) encapsulates the second arm of the explanation of what is meant by a record being ‘in the care of the Archives’ and is the provision which gives the NAA the discretion to make arrangements with persons for records required to be transferred to the NAA or for material of the Archives to be kept in the custody of the person. The discretion to make such arrangements can be exercised if the Director-General of the NAA considers it appropriate to do so. The Director-General might consider it appropriate where, for example, the records in question can be more effectively preserved or exhibited by another institution, or they have particular relevance to a region or locality served by the institution or person receiving custody of them.

Subsection 64(2) sets out what must be contained in such arrangements. They must:

- provide for the care of the material to which the arrangements relate;
- provide for regular inspection of the material by the NAA;
- enable the NAA to comply with any conditions agreed between the NAA and the Commonwealth institution as being the conditions on which the records are to be held (refer to subsection 29(3));
- enable the NAA to comply with its obligations under subsection 30(1) to ensure that all Commonwealth records transferred to its care by a Commonwealth institution are made available as reasonably required for use by, or at the direction of, the institution;
- enable the NAA to comply with its obligations under subsection 31(1) to make the records available for public access; and,
- require the person with the custody of the records to transfer the custody of the records back to the NAA, if the Director-General so directs.

Item 44 - Subsection 69(1)

This amendment reflects the new concept of the NAA having care of records even where another body has custody of the records because such an arrangement is more appropriate or convenient.

Copyright Act 1968**Item 45 - Subsection 10(1) (subparagraph (a)(i) of the definition of *archives*)**

This provision includes the current title of the National Archives of Australia within the meaning of ‘archives’.

Item 46 - Subsection 10(1) (at the end of subparagraph (a)(ii) of the definition of *archives*)

This amendment clarifies that the subparagraphs in paragraph (a) of the definition of ‘archives’ are to be read in the alternative.

Item 47 - Subsection 10(1) (after paragraph (a) of the definition of *archives*)

This provision clarifies that ‘archives’ includes archival material held by a person under an arrangement made under section 64 of the Archives Act.

Item 48 - At the end of paragraph 10(3)(a)

Item 50 - At the end of paragraphs 10(3)(c) to (m)

These amendments clarify that certain provisions are to be read conjunctively.

Item 49 - Paragraph 10(3)(b)

This provision inserts a new explanation of how a reference to ‘the body administering a library or archives’ is to be understood. Where the archives is archival material held in the custody of a person other than the NAA, in accordance with an arrangement under section 64 of the Archives Act, the body administering the library or archives refers to the person having custody of the archives in accordance with the section 64 arrangement – this will not be the Director-General of the NAA. In other cases, the body administering the library or archives refers to the body or person (including the Crown) who has ultimate responsibility for the library or archives.

Similarly, in section 195A(1) of the Copyright Act the officer in charge of an archives which is archival material held in the custody of a person under a section 64 arrangement will not be the Director-General of the NAA – it will be the person having direct responsibility for the collection comprising the archives. Because of new proposed subsection 10(3A) the collection comprising an archives that is a section 64 arrangement is taken not to be held in, or form part of, the collection of the NAA.

Item 51 - At the end of subparagraph 10(3)(ma)(i)

This amendment clarifies that subparagraphs 10(3)(ma)(i) and (ii) are to be read in the alternative.

Item 52 - After subsection 10(3)

Proposed new subsection 10(3A) provides that, for the purposes of the Copyright Act, something held in or forming part of the collection of archival material held by a person under a section 64 arrangement with the NAA is taken not to be held in, or form part of the collection of, the NAA. This amendment underpins the amendments which extend some of the protections against infringement of copyright which are available to ‘the officer in charge of the NAA’ to ‘the officer in charge of a person’ holding a record under a section 64 arrangement. For example, currently under

subsection 51AA(1) of the Copyright Act the copyright in a work kept in the collection of the NAA (where it is open to the public) is not infringed by the making, by or on behalf of the officer in charge of the NAA, of a single working copy of the work. Proposed new subsection 10(3A) will support the interpretation that the same protection from infringement will be extended to the officer in charge of the person holding records under a section 64 arrangement with the NAA.

Similarly, in subsection 195A(1) of the Copyright Act proposed new subsection 10(3A) will have the effect of clarifying that the person having ‘direct responsibility for the maintenance of, and the provision of services in relation to, the collection comprising the archives’ is, under a section 64 arrangement, the officer in charge of the ‘person’.

Item 53 - Subsection 47(5)

Item 54 - Subsection 47(6)

Item 62 - Subsection 70(5)

Item 63 - Subsection 70(6)

Item 64 - Subsection 107(5)

Item 65 - Subsection 107(6)

Item 67 - Paragraph 248H(3)(b)

Item 68 - Subsection 248H(4)

These amendments are made so that the National Archives of Australia is referred to by its correct title and to reflect the new concept of the NAA having care of records even where another body has custody of the records because such an arrangement is more appropriate.

Item 55 - Subsection 51AA(1)

Item 56 - Subsection 51AA(1)

Item 57 - Paragraph 51AA(1)(b)

Item 58 - Paragraphs 51AA(1)(c) and (d)

Item 59 - Paragraph 51AA(1)(e)

These items amend provisions dealing with reproducing and communicating works kept in the NAA or held by a person under a section 64 arrangement. They effectively extend the application of the various copyright exceptions that apply to libraries and archives to archival material in bodies with whom the NAA has an arrangement for retention of the records. Specifically, the copyright in a work which is in the collection of the NAA or held by a person under a section 64 arrangement and open to public inspection will not be infringed by the making or communicating by the officer in charge of the NAA or of the person, of a single working copy of the work or of a single reference copy of the work for the central office of the NAA. Nor will copyright be infringed in the following situations:

- by the making of a single reference copy of a work, where an officer of the NAA in a regional office of the NAA requests a reference copy of the work, if the officer is satisfied that a reference copy of the work has not been previously supplied to that regional office;
- by the making of a single replacement copy of the work for supply to a regional office of the NAA, where the officer in charge is satisfied that a reference copy of the work supplied to a regional office of the NAA is lost,

- damaged or destroyed and an officer of the NAA in that regional office makes a request for a replacement copy of the work;
- by the making of a single replacement copy of a work for supply to the central office of the NAA, where the officer in charge is satisfied that a reference copy of the work supplied to a central office of the NAA is lost, damaged or destroyed.

These proposed amendments allow copies to be made for the central and regional offices of the NAA but not for the central and regional offices of the person holding records under a section 64 arrangement. As the provisions are complex and impose record-keeping obligations, the NAA will advise persons with whom it has a section 64 arrangement in place about the copyright obligations they will be subject to as a result of these amendments.

Item 60 - Subsection 51AA(2) (definition of *reference copy*)

Item 61 - Subsection 51AA(2) (definition of *working copy*)

These items provide for the correct title of the National Archives of Australia.

Item 66 - After paragraph 132(5EA)(b)

This amendment ensures that a person holding archival material under a section 64 arrangement has the benefit of protection from the offences contained in subsections 132(5C) and 132(5DB).

Freedom of Information Act 1982

Item 69 - Paragraph 4(6)(c)

This provision of the *Freedom of Information Act 1982* (the FOI Act) deals with what happens when an agency is abolished. The amendments correct the title of the NAA and ensure that persons holding archival material under section 64 arrangements have the benefit of the provision.

Item 70 - Paragraph 13(1)(d)

Item 71 - Subsection 13(2)

Item 72 - Subsection 13(3)

Item 73 - Subsection 13(4)

Section 13 of the FOI Act deals with documents which are not to be deemed to be documents of particular agencies because those agencies hold certain documents. These amendments refer to the correct title of the National Archives of Australia and ensure that persons holding archival material under section 64 arrangements have the benefit of the provisions.

Privacy Act 1988

Item 74 - Subsection 6(1) (paragraph (fa) of the definition of *record*)

Item 75 - Subsections 6A(3) and 6B(3)

Item 77 - Subsection 10(4)

These amendments reflect the new concept of the NAA having care of records even where another body has custody of the records because such an arrangement is more appropriate.

Item 76 - Paragraph 10(4)(a)

This amendment is made so that the National Archives of Australia is referred to by its correct title and to reflect the new concept of the NAA having care of records even where another body has custody of the records because such an arrangement is more appropriate.