Archives Amendment Act 2008

No. 113, 2008

An Act to amend the *Archives Act 1983*, and for related purposes

Note: An electronic version of this Act is available in ComLaw (http://www.comlaw.gov.au/)

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No. 113, 2008

An Act to amend the *Archives Act 1983*, and for related purposes

[*Assented to 31 October 2008*]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Archives Amendment Act 2008.*

2 Commencement

This Act commences on the day after it receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Archives Act 1983

1 After section 2

Insert:

2A Objects of this Act

The objects of this Act are:

(a) to provide for a National Archives of Australia, whose functions include:

(i) identifying the archival resources of the Commonwealth; and

(ii) preserving and making publicly available the archival resources of the Commonwealth; and

(iii) overseeing Commonwealth record-keeping, by determining standards and providing advice to Commonwealth institutions; and

(b) to impose record-keeping obligations in respect of Commonwealth records.

2 Subsection 3(1)

Insert:

care: a record is in the ***care*** of the Archives if:

(a) the record is in the custody of the Archives; or

(b) the record is in the custody of a person in accordance with arrangements referred to in section 64.

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

Repeal the definition, substitute:

material of the Archives means records in the care of the Archives (other than current Commonwealth records relating to the administration of the Archives).

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

Repeal the definition, substitute:

record means a document, or an object, in any form (including any electronic form) that is, or has been, kept by reason of:

(a) any information or matter that it contains or that can be obtained from it; or

(b) its connection with any event, person, circumstance or thing.

Note: For the definition of ***document***, see section 25 of the *Acts Interpretation Act 1901*.

5 After section 3B

Insert:

3C Director-General may determine archival resources of the Commonwealth

(1) The Director-General may, in writing, determine that a specified Commonwealth record or other material is part of the archival resources of the Commonwealth.

Note: The Director-General may specify a record by reference to a class of records (see subsection 46(3) of the *Acts Interpretation Act 1901*).

(2) The Director-General must not make a determination under this section unless he or she is satisfied that the specified Commonwealth record or other material is part of the archival resources of the Commonwealth (within the meaning of subsection 3(2)).

(3) A determination under this section may be set out in the same document as a permission or approval given under paragraph 24(2)(b) or a notice of disapproval given under paragraph 24(2)(c).

(4) A determination under this section is not a legislative instrument.

6 Transitional—section 3C of the *Archives Act 1983*

(1) This item applies to a Commonwealth record if:

(a) an arrangement by the Director-General relating to the disposal or custody of Commonwealth records is in operation immediately before the commencement of this item; and

(b) the arrangement classified the record as “Retain as National Archives”; and

(c) the record is not covered by a determination made under subitem (3).

(2) The record is, at the commencement of this item, taken to be determined to be part of the archival resources of the Commonwealth under section 3C of the *Archives Act 1983*.

(3) The Director-General may, by writing, determine that this item does not apply to a record.

(4) A determination made under subitem (3) is not a legislative instrument.

7 Subsection 5(1)

Omit “, within the Department,”.

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

Add “and”.

9 Paragraph 5(2)(c)

Omit “keeping”, substitute “creation, keeping and management”.

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

Add “and”.

11 Paragraph 5(2)(d)

Omit “ascertain”, substitute “determine”.

12 At the end of paragraph 5(2)(d)

Add “and”.

13 Paragraph 5(2)(e)

Omit “custody”, substitute “care”.

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

Add “or”.

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

Omit “ascertain”, substitute “determine”.

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

Repeal the subparagraph, substitute:

(iii) are required to be preserved (other than permanently preserved); and

17 Paragraph 5(2)(f)

Omit “custody” (first and third occurring), substitute “care”.

18 At the end of paragraph 5(2)(f)

Add “and”.

19 Paragraph 5(2)(g)

Omit “custody” (wherever occurring), substitute “care”.

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

Add “and”.

21 Subsection 5(3)

Omit “the Public Service Board or”.

22 Subsections 6(2) and (3)

Omit “custody”, substitute “care”.

23 At the end of Part II

Add:

6A Records that are not part of the archival resources of the Commonwealth

(1) Nothing in this Act requires the Archives to accept the care of a Commonwealth record that has not been determined to be part of the archival resources of the Commonwealth under section 3C.

(2) If:

(a) a Commonwealth institution has transferred a Commonwealth record to the care of the Archives; and

(b) the record has not been determined to be part of the archival resources of the Commonwealth under section 3C;

the Archives may:

(c) if another Commonwealth institution has succeeded to the relevant functions of the institution—cause the record to be transferred to the custody of that successor institution, but only in accordance with arrangements agreed to by that successor institution; or

(d) otherwise—cause the record to be transferred to the custody of the institution, but only in accordance with arrangements agreed to by the institution.

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

Subsection 6A(2) of the *Archives Act 1983*, as inserted by this Schedule, applies to Commonwealth records transferred to the care of the Archives before or after the commencement of this item.

25 Subsection 22(3)

Omit "custody" (second occurring), substitute "care".

26 Subsection 24(4)

Omit "received into the custody of the Archives from", substitute "transferred to the care of the Archives by".

27 Section 27

Repeal the section, substitute:

27 Transfer of certain Commonwealth records to care of Archives

(1) This section applies to a Commonwealth record that:

(a) is in the custody of a Commonwealth institution other than the Archives; and

(b) has been determined to be part of the archival resources of the Commonwealth under section 3C.

Note: In certain circumstances a Commonwealth institution or Minister can exempt a record from this section (see section 29).

(2) The person responsible for the custody of the record must cause the record to be transferred to the care of the Archives in accordance with arrangements approved by the Archives.

(3) The record must be transferred:

(a) if the record ceases to be a current Commonwealth record—as soon as practicable after the record ceases to be a current Commonwealth record; and

(b) in any event—within 25 years of the record coming into existence.

28 At the end of section 28

Add:

Note: In certain circumstances a Commonwealth institution or Minister can exempt a record from this section (see section 29).

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

Omit "custody", substitute "care".

30 Subsection 29(3)

Omit "custody", substitute "care".

31 At the end of subsection 29(3)

Add:

Note: Arrangements under section 64 for a person (other than the Archives) to have custody of a Commonwealth record must enable the Archives to meet its obligations under this subsection.

32 Paragraph 29(4)(a)

Omit "custody", substitute "care".

33 Section 30

Repeal the section, substitute:

30 Commonwealth records to be available to Commonwealth institutions

(1) The Archives must ensure that all Commonwealth records transferred to its care from a Commonwealth institution are made available, as reasonably required, for use by, or at the direction of:

(a) that institution; or

(b) a Commonwealth institution that has succeeded to the relevant functions of that institution.

Note: Arrangements under section 64 for a person (other than the Archives) to have custody of a Commonwealth record must enable the Archives to meet its obligations under this subsection.

(2) A record that has been in existence for more than 25 years must not be made available to a Commonwealth institution under subsection (1) in a manner that involves its leaving the custody of the person who has the custody of the record, except as necessary for the proper conduct of the business of the Commonwealth institution.

34 Subsections 31(1) and (2)

Repeal the subsections, substitute:

(1A) This section applies to a Commonwealth record that:

(a) is in the open access period; and

(b) is in the care of the Archives or in the custody of a Commonwealth institution; and

(c) is not an exempt record.

(1) Subject to this Part, the Archives must cause the record to be made available for public access.

Note: Arrangements under section 64 for a person (other than the Archives) to have custody of a Commonwealth record must enable the Archives to meet its obligations under this subsection.

(2) If the record is in the custody of a Commonwealth institution, the institution must make such arrangements with the Archives as will enable the Archives to meet its obligations under subsection (1) in relation to the record.

Note: If the record is material of the Archives, the arrangements referred to in subsection (2) must be included in the arrangements under section 64 for the Commonwealth institution to have custody of the record.

35 Subsection 35(2)

Omit “custody of”, substitute “care of the”.

36 Part VI (heading)

Repeal the heading, substitute:

Part VI—Samples of material for the Archives

37 Section 61

Repeal the section.

38 Subsections 62(2), (3), (4) and (5)

Omit “delivered to the custody”, substitute “transferred to the care”.

39 Subsections 64(1) and (2)

Repeal the subsections, substitute:

(1) Subject to any other law of the Commonwealth and to the rights of Commonwealth institutions, the Archives may, if the Director-General considers it appropriate to do so, make arrangements with a person for records required to be transferred to the care of the Archives, or for material of the Archives, to be kept in the custody of the person.

(2) Such arrangements must:

(a) provide for the care of the material to which the arrangements relate; and

(b) provide for the regular inspection of that material by the Archives; and

(c) enable the Archives to meet its obligations under subsections 29(3), 30(1) and 31(1) in respect of that material; and

(d) require the person with the custody of the records to transfer the custody of the records to the Archives if the Director-General so directs.

Note: Subsections 29(3), 30(1) and 31(1) deal with the availability of records.

40 Subsection 69(1)

Omit “custody”, substitute “care”.

Copyright Act 1968

41 Subsection 10(1) (subparagraph (a)(i) of the definition of *archives*)

Repeal the subparagraph, substitute:

(i) the National Archives of Australia; or

42 Subsection 10(1) (at the end of subparagraph (a)(ii) of the definition of *archives*)

Add “or”.

43 Subsection 10(1) (after paragraph (a) of the definition of *archives*)

Insert:

(aa) archival material in the custody of a person (other than the National Archives of Australia) in accordance with an arrangement referred to in section 64 of the *Archives Act 1983*; or

44 At the end of paragraph 10(3)(a)

Add “and”.

45 Paragraph 10(3)(b)

Repeal the paragraph, substitute:

(b) a reference to the body administering a library or archives is to be read:

(i) in the case of archives covered by paragraph (aa) of the definition of ***archives*** in subsection (1)—as a reference to the person having the custody of the archives in accordance with the relevant arrangement referred to in that paragraph; or

(ii) otherwise—as a reference to the body (whether incorporated or not), or the person (including the Crown), having ultimate responsibility for the administration of the library or archives; and

46 At the end of paragraphs 10(3)(c) to (m)

Add “and”.

47 At the end of subparagraph 10(3)(ma)(i)

Add “or”.

48 After subsection 10(3)

Insert:

(3A) For the purposes of this Act, something held in, or forming part of, the collection of any archives covered by paragraph (aa) of the definition of ***archives*** in subsection (1) is taken not to be held in, and not to form part of, the collection of the National Archives of Australia.

Note: Paragraph (aa) of the definition of ***archives*** covers archival material in the custody of a person other than the National Archives of Australia under an arrangement referred to in section 64 of the *Archives Act 1983*.

49 Subsection 47(5)

Omit "delivered, with the consent of the Director-General of the Australian Archives, to the Australian Archives", substitute "transferred, with the consent of the Director-General of the National Archives of Australia, to the care (within the meaning of the *Archives Act 1983*) of the National Archives of Australia".

50 Subsection 47(6)

Omit "Australian Archives shall not consent to the delivery to the Australian Archives", substitute "National Archives of Australia must not consent to the transfer to the care of the National Archives of Australia".

51 Subsection 51AA(1)

Omit "the Australian Archives", substitute "an archives covered by subparagraph (a)(i) or paragraph (aa) of the definition of ***archives*** in subsection 10(1)".

Note: The heading to section 51AA is altered by omitting "**Australian Archives**" and substituting "**care of National Archives of Australia**".

52 Subsection 51AA(1)

Omit "Archives" (second occurring), substitute "archives".

53 At the end of paragraph 51AA(1)(a)

Add "or".

54 Paragraph 51AA(1)(b)

Omit "Archives;", substitute "National Archives of Australia; or".

55 Paragraph 51AA(1)(c)

Omit “Archives” (first occurring), substitute “National Archives of Australia”.

56 At the end of paragraph 51AA(1)(c)

Add “or”.

57 Paragraph 51AA(1)(d)

Omit “Archives” (first occurring), substitute “National Archives of Australia”.

58 Paragraph 51AA(1)(e)

Omit “Archives”, substitute “National Archives of Australia”.

59 Subsection 51AA(2) (definition of *reference copy*)

Omit “Australian Archives”, substitute “National Archives of Australia”.

60 Subsection 51AA(2) (definition of *working copy*)

Omit “Australian Archives”, substitute “National Archives of Australia”.

61 Subsection 70(5)

Omit “delivered, with the consent of the Director-General of the Australian Archives, to the Australian Archives”, substitute “transferred, with the consent of the Director-General of the National Archives of Australia, to the care (within the meaning of the *Archives Act 1983*) of the National Archives of Australia”.

62 Subsection 70(6)

Omit “Australian Archives shall not consent to the delivery to the Australian Archives”, substitute “National Archives of Australia must not consent to the transfer to the care of the National Archives of Australia”.

63 Subsection 107(5)

Omit “delivered, with the consent of the Director-General of the Australian Archives, to the Australian Archives”, substitute “transferred, with the consent of the Director-General of the National Archives of Australia, to the care (within the meaning of the *Archives Act 1983*) of the National Archives of Australia”.

64 Subsection 107(6)

Omit "Australian Archives shall not consent to the delivery to the Australian Archives", substitute "National Archives of Australia must not consent to the transfer to the care of the National Archives of Australia".

65 At the end of section 132AC

Add:

(8) This section does not apply in respect of anything lawfully done by a person in connection with a work or other subject-matter if:

(a) the person has custody of the work or other subject-matter under an arrangement referred to in section 64 of the *Archives Act 1983*; and

(b) under subsection (7), it would be lawful for the National Archives of Australia to do that thing.

Note: A defendant bears an evidential burden in relation to the matter in subsection (8) (see subsection 13.3(3) of the *Criminal Code*).

66 After subsection 132APC(8)

Insert:

(8A) This section does not apply in respect of anything lawfully done by a person in connection with a work or other subject-matter if:

(a) the person has custody of the work or other subject-matter under an arrangement referred to in section 64 of the *Archives Act 1983*; and

(b) under subsection (8), it would be lawful for the National Archives of Australia to do that thing.

Note: A defendant bears an evidential burden in relation to the matter in subsection (8A) (see subsection 13.3(3) of the *Criminal Code*).

67 At the end of section 132APD

Add:

(8) This section does not apply in respect of anything lawfully done by a person in connection with a work or other subject-matter if:

(a) the person has custody of the work or other subject-matter under an arrangement referred to in section 64 of the *Archives Act 1983*; and

(b) under subsection (7), it would be lawful for the National Archives of Australia to do that thing.

Note: A defendant bears an evidential burden in relation to the matter in subsection (8) (see subsection 13.3(3) of the *Criminal Code*).

68 At the end of section 132APE

Add:

(8) This section does not apply in respect of anything lawfully done by a person in connection with a work or other subject-matter if:

(a) the person has custody of the work or other subject-matter under an arrangement referred to in section 64 of the *Archives Act 1983*; and

(b) under subsection (7), it would be lawful for the National Archives of Australia to do that thing.

Note: A defendant bears an evidential burden in relation to the matter in subsection (8) (see subsection 13.3(3) of the *Criminal Code*).

69 At the end of section 132AT

Add:

(3) This Subdivision does not apply in respect of anything lawfully done by a person in connection with a work or other subject-matter if:

(a) the person has custody of the work or other subject-matter under an arrangement referred to in section 64 of the *Archives Act 1983*; and

(b) under subsection (2), it would be lawful for the National Archives of Australia to do that thing.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

70 Paragraph 248H(3)(b)

Repeal the paragraph, substitute:

(b) transferred, with the consent of the Director-General of the National Archives of Australia, to the care (within the meaning of the *Archives Act 1983*) of the National Archives of Australia;

71 Subsection 248H(4)

Omit “Australian Archives shall not consent to the delivery of a copy of a sound recording to the Australian Archives”, substitute “National Archives of Australia must not consent to the transfer of the care of a copy of a sound recording to the National Archives of Australia”.

Freedom of Information Act 1982

72 At the end of paragraph 4(6)(a)

Add “and”.

73 Paragraph 4(6)(c)

Omit “deposited with the Australian Archives”, substitute “transferred to the care (within the meaning of the *Archives Act 1983*) of the National Archives of Australia”.

74 At the end of paragraphs 13(1)(a) and (b)

Add “or”.

75 Paragraph 13(1)(d)

Repeal the paragraph, substitute:

(d) in the care (within the meaning of the *Archives Act 1983*) of the National Archives of Australia (otherwise than as a document relating to the administration of the National Archives of Australia);

76 Subsection 13(2)

Omit “placed in the custody of the Australian Archives, or”, substitute “transferred to the care (within the meaning of the *Archives Act 1983*) of the National Archives of Australia, or otherwise placed”.

77 Paragraphs 13(3)(a) and (b)

Omit “custody of the Australian Archives”, substitute “care (within the meaning of the *Archives Act 1983*) of the National Archives of Australia”.

78 Subsection 13(4)

Omit “Australian Archives”, substitute “National Archives of Australia”.

Privacy Act 1988

79 Subsection 6(1) (paragraph (fa) of the definition of *record*)

Omit "custody of the Archives (as defined in that Act)", substitute "care (as defined in that Act) of the National Archives of Australia".

80 Subsections 6A(3) and 6B(3)

Omit "Archives (as defined in that Act) to decide whether to accept, or to arrange, custody", substitute "National Archives of Australia to decide whether to accept, or to arrange, care (as defined in that Act)".

Note 1: The heading to subsection 6A(3) is altered by omitting "*Archives*" and substituting "*National Archives of Australia*".

Note 2: The heading to subsection 6B(3) is altered by omitting "*Archives*" and substituting "*National Archives of Australia*".

81 Paragraph 10(4)(a)

Omit "Australian Archives) is in the custody of the Australian Archives", substitute "National Archives of Australia) is in the care (within the meaning of the *Archives Act 1983*) of the National Archives of Australia".

82 Subsection 10(4)

Omit "that custody", substitute "that care or custody".

[*Minister's second reading speech made in—*
Senate on 17 September 2008
House of Representatives on 22 October 2008]

(173/08)