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From the Office of the Director-General

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Business and Information Law Branch
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Dear Dr Hawke

Review of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010*

The Attorney-General issued Terms of Reference for this Review on 29 October 2012.

The Terms of Reference were issued under the authority of section 93B of the Freedom of Information Act and section 33 of the Australian Information Commissioner Act.

Each of those sections requires the Minister to cause a review of the operation of the Act to be undertaken which starts two years after the commencement of the section and is to be completed within six months.

However, the Terms of Reference are expressed in broader terms. The Review is directed to consider *the extent to which those Acts and related laws continue to provide an effective framework for access to government information.*

The most obvious *related law* dealing with public access to government information is the Archives Act 1983.

Under the Archives Act, the functions of the National Archives of Australia (the Archives) include:

- Promoting the creation, keeping and management of Commonwealth records in an efficient and economical manner and in a manner that will facilitate their use as part of the archival resources of the Commonwealth; and
- Making those archival resources publicly available at the end of the closed period which is being reduced progressively from 30 to 20 years in accordance with changes introduced to the Archives Act by the *Freedom of Information Amendment (Reform) Act 2010*.

This submission

The National Archives of Australia makes this submission to ensure that its important, independent role in regard to overseeing Commonwealth record-keeping, identifying the Commonwealth's archival resources and preserving and making those archival resources publicly available is:

- taken into account by the Review; and
- not affected inadvertently by the Review's recommendations.

The importance of the Archives was highlighted by Senator the Hon John Faulkner when he was Special Minister of State:

- *The National Archives ensures the accountability of Government to current and future generations through its critical role in identifying, managing and preserving information of enduring national significance¹*
- *... the Government sees the National Archives as part of a holistic approach to information management and access, an approach that includes Freedom of Information and privacy reforms. Last week the Government introduced a Bill to modernize the Archives Act 1983, a modernization that the Australian Law Reform Commission recommended ten years ago. The new Bill will amend the Act to reflect modern archival standards and up to date administrative practice, and takes account of changing technology and electronic records management²; and*
- *No one wants to control the past, Senator, but obviously I think I could ... put a strong case that the National Archives of Australia are the ultimate accountability function and agency of government³.*

The history of the National Archives of Australia

The Government showed concern about preservation of its war records of historical value in 1920 and in 1927 an Archives Bill was drafted but never reached Parliament.

Some of the key developments over the last ninety years in the preservation of our historical records for the benefit of future generations include:

- The appointment of the first Archives Officer in 1944, heralding the beginning of the National Archives;
- In 1952, the Archives Division of the National Library took over the archival responsibilities of the War Memorial;
- The Archives Division gained independence from the Library in 1961 when it became the Commonwealth Archives Office in the Prime Minister's Department;
- In 1966 Cabinet introduced the 50 year access rule for archival records;
- The first purpose-built archival repository opened in Sydney in 1972;

¹ Address at the Launch of Information Awareness Month, National Archives of Australia, 5 May 2009

² Address entitled *Your Place in History: The National Archives at Parliament* delivered at Parliament House on 23 September 2008, referring to the Freedom of Information Amendment (Reform) Bill which was subsequently passed in 2010

³ Exchange with Senator Fifield at a meeting of the Standing Committee on Finance and Public Administration on 26 May 2008

- The *Archives Act 1983* came into effect on 6 June 1984;
- The name of the Australian Archives was changed to the National Archives of Australia in 1998; and
- 2010 legislative reforms provided that the access period for most of the Archives' records commences after 20 years (down from 30 years) and for Cabinet notebooks after 30 years (down from 50 years).

This short overview of the history of Australia's National Archives indicates that:

- The Archives has been responsible for Commonwealth record-keeping, which encompasses information and records management, for many years (and with legislative authority since 1984);
- The Archives has been preserving and providing public access to the Commonwealth's archival resources of national archival significance or public interest for many years; and
- The Archives Act and the Archives' procedures have been reviewed⁴, amended and updated from time to time as required (the most recent legislative amendments being in 2010).

The Archives Act 1983

The objects of the Archives Act are twofold⁵. It establishes the National Archives of Australia and vests in it the authority for overseeing the creation and management of Australian Government information.

Section 2A of the Act provides for a National Archives of Australia, whose functions include:

- Identifying the archival resources of the Commonwealth;
- Preserving and making publicly available the archival resources of the Commonwealth; and
- Overseeing Commonwealth record-keeping, by determining standards and providing advice to Commonwealth institutions.

The second objective set out in section 2A is to impose record-keeping obligations in respect of Commonwealth records. A *Commonwealth record* is defined broadly and simply in section 3 of the Archives Act as a *record that is the property of the Commonwealth or of a Commonwealth institution*.

Since 2007, the Archives has used the term *information management* rather than *record keeping* to address the complexity of technological change and the integrated nature of records in a digital environment.

It is not necessary for the purposes of this submission to go into the detailed provisions of the Archives Act other than to make the following three points.

First, in exercise of its statutory authority, the Archives reaches agreement with individual departments and agencies about which of the department's or agency's records:

⁴ See, for example, Australian Law Reform Commission 1988 Report No 85, *Australia's Federal Record: A Review of the Archives Act 1983*

⁵ See section 2A, Archives Act, 1983

- should be retained as national archives;
- should be retained under agreed records authorities as significant Commonwealth records for a specified length of time before sentencing and destruction; or
- are of lesser significance and can be destroyed in accordance with an agreed normal administrative practice or other appropriate authorities.

Secondly, it is an offence to engage in conduct that results in the destruction, disposal, transfer, damage to or alteration of a Commonwealth record otherwise than in accordance with section 24 of the Archives Act.

Thirdly, archival resources held by the Archives are not accessed by the public under the Freedom of Information Act. The Archives makes its resources available to the public in the open access period in accordance with the access, exemption and appeal provisions and privacy obligations set out in the Archives Act.

The Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010

While the Archives Act and the Freedom of Information Act both have an objective of providing public access to government information, they do so in different ways.

The Archives determines the status of all Commonwealth records (or, more broadly in the digital age, information) and prescribes conditions for their management, retention, destruction at an appropriate time or preservation as archival resources of the Commonwealth.

However, the government information which the Archives makes publicly available is limited to the archival resources of the Commonwealth in the appropriate open access period.

Those archival resources include Commonwealth records such as Cabinet notebooks and national security, census and royal commission records that would not otherwise be accessible to the public.

The objects of the Freedom of Information Act (set out in section 3 of that Act) are far more immediate.

The FOI Act allows members of the public to seek access now to all government information, subject to the provisions regulating access, exemption and appeals and the privacy obligations set out in that Act.

It is important to note that none of the functions and powers of the Information Commissioner, the Freedom of Information Commissioner or the Privacy Commissioner set out in sections 7, 8 and 12 of the Australian Information Commissioner Act override, limit or detract from the powers and authorities of the Archives and its Director-General under the Archives Act.

Preserving the essential difference between those Acts

It is important to preserve the essential difference in the statutory roles and responsibilities of the Archives and the Australian Information Commissioner.

The Archives *determines* the information management obligations of Australian government departments and agencies in accordance with its powers and responsibilities under the Archives Act. The Archives has the ultimate responsibility for ensuring government accountability through good information management and thereby safeguarding the national

interest and the rights and entitlements of individuals to access government information in the long term.

The Information Commissioner function set out in section 7 of the Australian Information Commissioner Act is limited to *reporting* to the Minister about the Government's policy and practice with respect to the collection, use, disclosure, management, administration or storage of, or accessibility to, information held by the Government.

Six additional points

In the course of preparing this submission, the Archives carefully considered the Terms of Reference and also had regard to other published submissions, including in particular the submission made by the Australian Information Commissioner.

Following that consideration, the Archives wishes to comment on the following matters relevant to the Review:

- Applying a time limit to the operation of some exemptions;
- Management and storage of information;
- Amendment of records under the Freedom of Information Act;
- The definitions of records and information;
- Establishing a national action plan; and
- The application of the Freedom of Information Act to intelligence agencies.

1. *Applying a time limit to the operation of some exemptions*

The Office of the Australian Information Commissioner suggests in its submission that:

... certain types of exempt documents should be subject to a time-limited exemption. This would promote a 'disclosure by design' approach to document creation. Without such a time limit, documents are restricted from release until the open access period in the Archives Act 1983⁶.

The rationale for this suggestion is that there are some documents that do not require exemption for the full period before open access under the Archives Act.

The OAIC suggests:

- Documents which could be included in its proposal include Parliamentary Budget Office documents, incoming government briefs and parliamentary question time briefs; and
- Provision for their earlier disclosure under FOI could be incorporated into section 12 of the Freedom of Information Act.

The Archives notes:

- The Commissioner's proposal would, if adopted, significantly alter the balance Parliament has struck between the preservation and public disclosure of the Commonwealth's archival resources under the Archives Act and access to government documents under the Freedom of Information Act;

⁶ Submission dated December 2012, paragraph 152

- Parliament recently considered the appropriate duration of the closed period when it passed amendments to the Archives Act in 2010 to reduce progressively the closed period for most archival documents from 30 to 20 years. It would be appropriate to allow this new provision to take effect before further changes to the commencement of the open period are considered; and
- The OAIC proposition would require very careful consideration of issues such as the precise definition of the types of documents to be released early, any possible inadvertent consequences which could arise from the change and the administrative costs involved in earlier release of particular categories of documents.

The Archives submits that such a major proposal affecting the management of the Commonwealth's archival resources should not be accepted without a thorough and careful examination of its implications under the Archives Act.

2. *Management and storage of information*

As previously noted, the Information Commissioner's functions include *reporting to the Minister on any matter that relates to the Commonwealth Government's policy and practice with respect to ... the collection, use, disclosure, management, administration or storage of ... information held by the Government.*

In other words, the Information Commissioner is empowered to report on information policy but does not have legislative responsibility for information management.

The Archives has statutory responsibility for overseeing records and information management by Commonwealth departments and agencies and storage of Commonwealth records.

Any proposals for changes to information management and storage policy or practice which fall within the Archives' authority under the Archives Act that may be put forward to this Review are outside its Terms of Reference.

3. *Amendment of records under the Freedom of Information Act*

Concern about privacy and the protection of personal information has led to proposals that departments and agencies should take reasonable steps to destroy or render non-identifiable personal information if it is no longer needed for any permitted purpose.

One example can be found in Proposal 25-4 of the Australian Law Reform Commission's *Review of Australian Privacy Law, Discussion Paper 72, September 2007.*

It is important to note that destruction of a Commonwealth record without appropriate authority is an offence under section 24 of the Archives Act.

As a result, the Freedom of Information Act allows an agency to amend a record when the information in it is incomplete, incorrect, out of date or misleading, but the agency is obliged, *to the extent that it is practicable to do so ... to ensure that the record of information is amended in a way that does not obliterate the text of the record as it existed prior to the amendment*⁷.

The Archives believes that the use of the words *to the extent that it is practicable to do so*:

- has the result that section 50 of the FOI Act does not fully reflect the requirements of section 24 of the Archives Act; and

⁷ See section 50, Freedom of Information Act

- introduces an unacceptable risk that important evidence could be deleted and thereby avoid accountability.

The Archives submits that section 50 of the Freedom of Information Act should be strengthened so that it only allows departments and agencies to amend their records in such a manner that ensures there is no loss of the original record.

4. *The definitions of records, documents and information*

Advances in modern technology mean that government information is now created and stored in different formats (including electronic records). As a result, the expressions *records*, *documents* and *information* are used in various Acts to indicate the scope of government material available for public access.

Sometimes those terms are given a defined meaning for a particular Act and in other cases they are used without specific definition.

For example, while the Archives Act does not contain a definition of *information*, the Act provides in section 6:

- A *Commonwealth record* is defined as a record that is the property of the Commonwealth or of a Commonwealth institution (as previously noted) without any limitation on the form of that record; and
- The archival resources of the Commonwealth consist of such Commonwealth records and other material as are of national significance or public interest.

Senator Faulkner recognised the scope of the Archives interest in government information in his address on 5 May 2009 at the Launch of Information Awareness Month when he said:

The challenge for the National Archives and other key agencies is to work towards some whole-of-government consistency on information collection and storage, to allow smoother information sharing between agencies, and for better access by the public, by business and by researchers. This would promote both accountability and transparency, and enhance the digital economy.

Key government agencies ... are already working together to address these challenges ... The National Archives is clearly one of these agencies, reflecting its work in the information management area over a number of years.

5. *Establishing a national action plan*

The first recommendation in the submission made by the Office of the Australian Information Commissioner is to:

Establish a national action plan to further develop and embed the open government agenda and the Government's commitment to cultural change, and to explain the role and relationship of Australian Government agencies with responsibility for information policy and practice.

The Archives believes that the separate roles and responsibilities of the Archives, the Australian Information Commissioner and other statutory officers with an interest in making government information available to the public have been carefully designed by the Parliament so they are complementary and do not overlap.

Nonetheless, the Archives agrees that there appears to be some confusion or uncertainty among Australian Government departments and agencies about those various roles and responsibilities.

The Archives agrees it would be appropriate to ensure that the inter-related roles, powers and responsibilities of the Archives, the Information Commissioner, the Freedom of Information Commissioner, the Privacy Commissioner and the Australian Government Information Management Office are clearly understood.

The Archives will be pleased to take part in discussions directed to addressing that confusion and uncertainty.

6. *The application of the Freedom of Information Act to intelligence agencies*

The Office of the Australian Information Commissioner suggests in its submission that *the continuing exemption of intelligence agencies from the operation of the FOI Act should be reconsidered*⁸.

Mr Rick Snell puts forward a similar proposal in his submission to the Review dated 4 December 2012.

The OAIC suggests *exemptions applied on a document-by-document basis allow a more nuanced approach to managing appropriate information disclosure*⁹.

The OAIC then points to the following sections of the FOI Act which it suggests *would provide appropriate protections for information held by intelligence agencies*:

- Section 33 which exempts documents affecting national security, defence or international relations;
- Section 37 which exempts documents affecting enforcement of law and protection of public safety; and
- Section 45 which exempts documents containing material obtained in confidence.

The Archives notes that documents held by intelligence agencies are, for the most part, made publicly available by the Archives in the open access period which will commence at the expiration of 20 years when the 2010 amendments to the Archives Act take full effect.

The Archives submits that such a major proposal departing from long-standing policy should not be accepted without:

- a thorough and careful examination of all of its implications; and
- detailed consultation on that specific proposal with all of the departments and agencies having an interest in the matter.

Effective working relationship

The Archives wishes to record that it has worked closely with the Office of the Australian Information Commissioner since its inception.

However, both agencies need to continue to develop a clear and consistent understanding and implementation of their complementary statutory roles and responsibilities.

The Archives suggests that this cooperative relationship could be enhanced if a senior Archives officer was appointed by the Minister to the Information Advisory Committee under section 27 (2) (b) of the Australian Information Commissioner Act.

⁸ Submission, paragraph 159

⁹ Submission, paragraph 160

The Archives notes that the Chair of the Archives, the Hon Dr John Bannon AO, is a member of that Committee but he was appointed in his own right and therefore does not directly represent the Archives in the Committee's considerations.

Concluding submission

The provisions of the Archives Act on the one hand and the Freedom of Information Act and the Australian Information Commissioner Act on the other are complementary. The two systems provide separate regimes for public access to government information in accordance with their own statutory objects.

The Archives has a specific role in relation to the management, retention and destruction of Commonwealth records and the storage of and public access to the Commonwealth's archival resources. It is performing that role effectively and efficiently.

The Archives submits that the Review should acknowledge and not seek to disturb the separation of roles and responsibilities under the Archives Act and the two Acts under consideration by the Review.

The Archives also notes:

- The Archives is committed to public access to the government's archival resources during the open access periods specified by the Parliament in the Archives Act;
- The Archives promotes government accountability and transparency through good records management and safeguards the national interest by identifying and preserving records of national significance; and
- The closed period before open access begins has recently been significantly reduced by the Parliament in the 2010 amendments to the Archives Act.

Your review of the Freedom of Information Act and the Australian Information Commissioner Act should take into account the Archives' activities in support of the open government agenda and the Government's commitment to cultural change in relation to freedom of information.

Yours sincerely



David Fricker

4 February 2013