State Records Act 1998 No 17

[1998-17]

New South Wales

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- **Does not include amendments by**
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State Records Act 1998 No 17

New South Wales

Contents

Long title 6

Part 1 Preliminary 6

1 Name of Act 6
2 Commencement 6
3 Definitions 6
4 Aboriginal relics excluded from operation of Act 8
5 Application of Act to State collecting institutions 8
6 Meaning of “control” of a record 9
7 Meaning of public office “responsible” for a record 9
8 State records transferred to private successor of public office 10

Part 2 Records management responsibilities of public offices 10

9 Application of Part to Governor, Parliament and courts 10
10 Chief executives to ensure compliance with Act 11
11 Obligation to protect records 11
12 Records management obligations 11
13 Standards and codes of best practice for records management 11
14 Obligation to maintain accessibility to equipment/technology dependent records 12
15 Authority entitled to access to records 12
16 Chief executive in special cases 12
17 Disputes between Authority and public offices 13
18 Special arrangements for public offices exercising inter-government functions 13
19 Records storage facilities and other services 13

20 Reports by Authority about compliance 14

Part 3 Protection of State records 14

21 Protection measures 14

22 Normal administrative practice 15

23 Permission for sale of privately owned records cannot be refused unless Authority has offered to buy 16

24 Consent of public office required before records can be disposed of 16

25 Special provision for records concerning Aboriginal heritage 16

Part 4 Authority entitled to control of State records not currently in use 16

26 Application of Part to Governor, Parliament and courts 16

27 Authority's entitlement to State records no longer in use 17

28 Records more than 25 years old presumed not in use 17

29 Records required to be made available to Authority 18

30 How the Authority takes control of a record 18

31 Authority not required to take control of records 18

32 Authority can be required to take control of records in some cases 18

33 Authority's entitlement to control does not affect other interests in State records 19

34 Secrecy and other duties do not prevent compliance with this Part 19

35 Public office entitled to return of records if needed 19

36 Arrangements for other persons to have possession/custody of State archives 20

Part 5 Recovery of estrays and other State records 20

37 Meaning of "estray" 20

38 Presumption that State records are owned by the State 20

39 Power to inspect records believed to be estrays 21

40 Directions for protection of estrays 21

41 Directions and assistance to public offices for recovery of estrays 22

42 Court action to recover estrays 22

43 No limitation period on action to recover estrays 22

44 Arrangements for protecting estrays in private hands 22

45 Power of Authority to obtain State records of archival significance 23

46 Directions to protect State records of archival significance 23

47 Authority can acquire State records 24
48 Application of estray law in and of other jurisdictions 24

Part 6 Public access to State records after 30 years 25

49 Application of Part to Governor, Parliament and courts 25
50 Open access period for records 25
51 Access direction must be given for records in the open access period 25
52 Deciding whether to open or close records to public access 26
53 Secrecy provisions do not apply after 30 years 27
54 Application to open records to public access 27
55 Procedures for giving and revoking access directions 27
56 Access still available under FOI Act 28
57 Public office may authorise earlier public access 28
58 Arrangements for special access 29
59 Withholding access to ensure proper care of records 29
60 The giving of access 30
61 Register of access directions 31
62 Protection from liability when access given 31

Part 7 The Authority and the Board 31

63 Establishment of the Authority 31
64 Ministerial control 32
65 Director to manage and control affairs of the Authority 32
66 Principal functions of the Authority 32
67 Delegation of functions 32
68 Staff of the Authority 33
69 Establishment of Board 33
70 Functions of the Board 34
71 Director may attend meetings of Board 34

Part 8 Miscellaneous 34

72 Injunctions to prevent contravention of Act 34
73 Authority’s duty of confidentiality 35
74 Personal liability 35
75 Copying and publishing of State archives 36

76 Copyright in State archives 36
77 Certificate as to loss or destruction of State record 36
78 Proceedings for offences 36
79 Savings and transitional provisions 36
80 (Repealed) 36
81 Regulations 36
82 Review of Act 37

Schedule 1 Guidelines on some aspects of normal administrative practice

..... 37

Schedule 2 Provisions relating to constitution and procedure of the Board

..... 43

Schedule 3 Savings and transitional provisions 48

Schedule 4 (Repealed) 50

State Records Act 1998 No 17

New South Wales

An Act to make provision for the creation, management and protection of the records of public offices of the State and to provide for public access to those records, to establish the State Records Authority; and for other purposes.

Part 1 Preliminary

1 Name of Act

This Act is the *State Records Act 1998*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

(1) In this Act:

access direction (see section 51).

Authority means the State Records Authority constituted by this Act.

Board means the Board of the Authority established by this Act.

control has its meaning affected by section 6.

Director means the person holding office as Director of the Authority under Part 2 of the *Public Sector Management Act 1988*.

dispose of means dispose of by destruction or by any other means.

exercise a function includes perform a duty.

FOI Act means the *Freedom of Information Act 1989*.

function includes a power, authority and duty.

open access period (see section 50).

person includes a public office and a body (whether or not incorporated).

public office means each of the following:

(a) a department, office, commission, board, corporation, agency, service or instrumentality, exercising any function of any branch of the Government of the State,

(b) a body (whether or not incorporated) established for a public purpose,

(c) a council or county council under the *Local Government Act 1993*,

(d) the Cabinet and the Executive Council,

(e) the office and official establishment of the Governor,

(f) a House of Parliament,

(g) a court or tribunal,

(h) a State collecting institution,

(i) a Royal Commission or Commission of Inquiry,

(j) a State owned corporation,

(k) the holder of any office under the Crown,

(l) any body, office or institution that exercises any public functions and that is declared by the regulations to be a public office for the purposes of this Act (whether or not the body, office or institution is a public office under some other paragraph of this definition),

but does not include the Workers Compensation Nominal Insurer established under the *Workers Compensation Act 1987*.

Note—

In some cases, a private organisation can be a public office in respect of records that were formerly the records of a public office. See section 8.

record means any document or other source of information compiled, recorded or stored in written form or on film, or by electronic process, or in any other manner or by any other means.

State archive means a State record that the Authority has control of under this Act.

State collecting institution means each of the following:

(a) Art Gallery of New South Wales Trust,

(b) Australian Museum Trust,

(c) Historic Houses Trust of New South Wales,

(d) Trustees of the Museum of Applied Arts and Sciences,

(e) National Parks and Wildlife Service,

(f) Royal Botanic Gardens and Domain Trust,

(g) Library Council of New South Wales (in respect of the State Library of New South Wales),

(h) Sydney Opera House Trust,

(i) Zoological Parks Board,

(j) any public office that is prescribed by the regulations as a State collecting institution.

Note—

See section 5 for how this Act applies to State collecting institutions.

State record means any record made and kept, or received and kept, by any person in the course of the exercise of official functions in a public office, or for any purpose of a public office, or for the use of a public office, whether before or after the commencement of this section.

(2) Notes included in this Act do not form part of this Act.

4 Aboriginal relics excluded from operation of Act

(1) This Act does not apply to an Aboriginal relic and an Aboriginal relic is not a record for the purposes of this Act.

(2) An ***Aboriginal relic*** is something that is a relic for the purposes of the *National Parks and Wildlife Act 1974* as a result of being made or used by indigenous inhabitants of New South Wales but does not include something that was first used by a person who was not an indigenous inhabitant of New South Wales.

5 Application of Act to State collecting institutions

(1) This Act does not apply to a State record that is a private record in the collection of a State collecting institution. A ***private record*** is a record that would not be a State record had it not been taken into the collection of a State collecting institution.

Note—

A record can become a State record as a result of being taken into the collection of a State collecting institution. This is so because it is a record that is “received and kept (in the collection) … in the course of the exercise of official functions in a public office”, it being an official function of a State collecting institution to take things into its collection (see the definition of ***State record***). There will therefore be 2 kinds of State records in a collection, namely (1) private records that became State records as a result of being taken into the collection (and that would otherwise not be State records), and (2) records that are already State records before being taken into the collection. The purpose of subsection (1) is to exempt all

the records in category (1) from the operation of this Act.

(2) The provisions of the following Parts do not apply to a State record in the collection of a State collecting institution if the record was taken into that collection before the commencement of this section, except to the extent (if any) that the Authority and the State collecting institution may otherwise agree:

- Part 2 (Records management responsibilities of public offices)
- Part 4 (Authority entitled to control of State records not currently in use)
- Part 6 (Public access to State records after 30 years).

(3) The Authority may enter into agreements for the purposes of subsection (2) providing for the application (with or without specified modifications) of any of the provisions of Parts 2, 4 and 6 to records taken into the collection of a State collecting institution before the commencement of this section.

Note—

These agreements cannot apply to private records in the collection of a State collecting institution because private records are exempt from the operation of the Act under subsection (1).

(4) A State record that is a private record in the collection of a State collecting institution ceases to be a State record if the State collecting institution ceases to exist.

6 Meaning of “control” of a record

(1) For the purposes of this Act, a person is taken to have control of a record if the person has possession or custody of the record or has the record in the possession or custody of some other person.

(2) For the purposes of this Act, an entitlement to control of a record is an entitlement to possession and custody of the record (including by having it in the possession or custody of some other person).

Note—

For example, a public office is taken to have control of records that are held by the public office in storage with a commercial storage provider.

7 Meaning of public office “responsible” for a record

(1) The public office responsible for a State record for the purposes of this Act is the public office that is entitled to control of the record or (in the case of a record that the Authority is entitled to control of under this Act) the public office that would be entitled to control of the record if the Authority were not entitled to control of it.

(2) In the absence of evidence to the contrary, the public office in which a record was made and kept or received and kept as a State record is the public office that is entitled to control of the record.

(3) If that public office has ceased to exist, the public office entitled to control of the record is:

(a) the public office on which the functions of the defunct office have devolved, or

(b) if the defunct office's functions have devolved on more than one public office—the public office on which have devolved the functions to which the record most closely relates.

(4) If the defunct office's functions have not devolved on another public office, the public office entitled to control of the record is such public office as the Minister may designate after consulting with the person in charge of the public office proposed to be designated.

(5) If there is a dispute or uncertainty as to which public office is entitled to control of a record, the Minister can resolve the dispute or uncertainty by designating a particular public office as the public office entitled to control of the record. The public office so designated is conclusively presumed to be the public office entitled to control of the record.

8 State records transferred to private successor of public office

A person who is not a public office but who has State records under the person's control as a result of the transfer to the person of the functions or undertaking of the public office previously responsible for the records is for the purposes of this Act taken to be a public office in respect of those records.

Part 2 Records management responsibilities of public offices

9 Application of Part to Governor, Parliament and courts

(1) This Part does not apply to the following persons, or to the State records for which they are responsible, except as may be provided by agreement between the person and the Authority:

(a) the Governor acting in the Governor's vice-regal capacity,

(b) the Houses of Parliament,

(c) a court or tribunal, in respect of the court's or tribunal's judicial functions.

(2) The Authority may enter into agreements for the purposes of this section providing for the application (with or without specified modifications) of any of the provisions of this Part to those persons and their records.

Note—

Section 5 should be referred to to understand how this Part applies to State collecting institutions.

10 Chief executives to ensure compliance with Act

The chief executive of each public office has a duty to ensure that the public office complies with the requirements of this Act and the regulations and that the requirements of this Act and the regulations with respect to State records that the public office is responsible for are complied with.

11 Obligation to protect records

(1) Each public office must ensure the safe custody and proper preservation of the State records that it has control of.

(2) A public office must ensure that arrangements under which a State record that it has control of but that is in the possession or custody of some other person include arrangements for the safe keeping, proper preservation and due return of the record.

(3) A public office must take all reasonable steps to recover a State record for which the public office is responsible and that the public office does not have control of, unless the record is under the control of the Authority or of some other person with lawful authority.

12 Records management obligations

(1) Each public office must make and keep full and accurate records of the activities of the office.

(2) Each public office must establish and maintain a records management program for the public office in conformity with standards and codes of best practice from time to time approved under section 13.

(3) The Authority may permit such departures from the requirements of the standards and codes as it considers necessary or desirable to accommodate the particular needs of a public office or class of public offices.

(4) Each public office must make arrangements with the Authority for the monitoring by the Authority of the public office’s records management program and must report to the Authority, in accordance with arrangements made with the Authority, on the implementation of the public office’s records management program.

13 Standards and codes of best practice for records management

(1) The Authority may from time to time approve standards and codes of best practice for records management by public offices. Records management extends to include all aspects of the making, keeping and disposal of records.

(2) The Authority is not to approve of a standard or code of best practice unless the Board has approved of the standard or code.

(3) The Authority is to consult with public offices on any proposed standards or codes under this section. It is sufficient consultation if the Authority gives notice in the Gazette of the availability of any proposed standards and codes and invites submissions on them.

(4) The Authority is to keep under review the standards and codes for the time being approved under this section.

(5) The Authority is to notify its approval of a standard or code by notice published in the Gazette.

14 Obligation to maintain accessibility to equipment/technology dependent records

(1) If a record is in such a form that information can only be produced or made available from it by means of the use of particular equipment or information technology (such as computer software), the public office responsible for the record must take such action as may be necessary to ensure that the information remains able to be produced or made available.

(2) This section applies only while the public office has control of the record or has the record in its custody or possession under an agreement with the Authority.

Note—

A public office can comply with this section in a number of ways, such as by “migration” of existing records into new technology, creating records or copies of records using technology that outlasts technological change, or by retaining existing technology. The Authority can provide guidance on how to comply with this section.

15 Authority entitled to access to records

A public office must give the Authority and the Authority’s officers such access to State records that the public office has control of as may be reasonably necessary for the purpose of enabling the Authority to monitor compliance by the public office with the requirements of this Act and the regulations.

16 Chief executive in special cases

(1) The Director-General of The Cabinet Office is the chief executive of the following public offices for the purposes of this Act:

(a) the Cabinet,

(b) the Executive Council,

(c) a Royal Commission or Special Commission of Inquiry.

(2) The regulations may provide that the holder of a specified office is the chief executive of a specified public office for the purposes of this Act.

17 Disputes between Authority and public offices

(1) If there is a dispute between the Authority and a public office concerning the operation of this Act and the parties have after reasonable efforts been unable to resolve the dispute themselves, either party may request a review of the matter by the responsible Ministers (namely, the Minister responsible for the Authority and the Minister responsible for the public office concerned).

(2) If the same Minister is responsible for both the Authority and the public office concerned, the review is to be by that Minister.

(3) There is to be no review under this section of a decision of the Authority to give or withhold permission for, or to approve of a practice or procedure involving, the taking of any action referred to in section 21 (Protection measures).

(4) If the dispute is not resolved by the responsible Ministers or Minister, the dispute is to be referred to the Premier or to such other Minister as the Premier may designate in a particular case.

(5) The Authority and the public office are to give effect to any direction given by a Minister or the Premier in resolution of the dispute.

18 Special arrangements for public offices exercising inter-government functions

(1) If a public office has inter-government functions, the Authority may enter into an agreement with the public office making provision for the rights and obligations of the public office with respect to the making, keeping, protection and control of and access to such of its records as relates to those functions.

(2) Any such agreement may, for the purpose of enabling the agreement to be given effect to, exclude or modify the operation of any of the provisions of Parts 2, 4 and 6 in their application to records to which the agreement applies, and this Act has effect in respect of any such records in accordance with the agreement.

(3) In this section:

inter-government functions means functions exercised by a public office under a law, or under an agreement or other arrangement between governments, that provides for the exercise of functions by the public office jointly or in co-operation with a public body of another State, a Territory or the Commonwealth.

19 Records storage facilities and other services

(1) The Authority can provide services (including assistance, advice and training) in all areas of records management, including creation, scheduling, storage and disposal.

(2) In particular, the Authority can establish and maintain (either alone or jointly with others) repositories and other facilities for the care, management, use and servicing of

State archives and other State records.

(3) The services provided by the Authority:

(a) can be provided on a commercial basis, and

(b) can be provided in respect of records of any kind (whether or not they are State records), and

(c) can be provided to any person (whether or not a public office).

(4) The Authority can accredit repositories and other facilities provided by other persons (including any public office) for the purpose of their use for the care, management and servicing of State archives and other State records.

20 Reports by Authority about compliance

(1) The Authority may report to the Minister responsible for a public office any failure by the public office to comply with the requirements of this Act or the regulations or any other matter of concern to the Authority with regard to the public office's obligations under this Act or the regulations.

(2) The Authority can include in its annual report under the *Annual Reports (Statutory Bodies) Act 1984* a report of any incidences of failure by public offices to comply with the requirements of this Act or the regulations.

Part 3 Protection of State records

21 Protection measures

(1) A person must not:

(a) abandon or dispose of a State record, or

(b) transfer or offer to transfer, or be a party to arrangements for the transfer of, the possession or ownership of a State record, or

(c) take or send a State record out of New South Wales, or

(d) damage or alter a State record, or

(e) neglect a State record in a way that causes or is likely to cause damage to the State record.

Maximum penalty: 50 penalty units.

(2) None of the following is a contravention of this section:

(a) anything done in accordance with normal administrative practice in a public office (as provided by section 22),

(b) anything that is authorised or required to be done by or under this Act, or by or under a provision of any other Act that is prescribed by the regulations as being an exception to this Part,

(c) anything done by or with the permission of the Authority or in accordance with any practice or procedure approved by the Authority either generally or in a particular case or class of cases (including any practice or procedure approved of under any standards and codes of best practice for records management formulated by the Authority),

(d) anything done pursuant to an order or determination of a court or tribunal,

(e) the disposal, in accordance with a resolution of a House of Parliament, of a State record for which the House is the responsible public office,

(f) anything done for the purpose of placing a record under the control of a public office.

(3) The Authority must not do, or give permission or approval for or with respect to the doing of, anything referred to in subsection (1) except with the approval of the Board given either generally or in a particular case or class of cases.

(4) Anything done by a person (***the employee***) at the direction of some other person given in the course of the employee's employment is taken for the purposes of this section not to have been done by the employee and instead to have been done by that other person.

(5) It is a defence to a prosecution for an offence under this section for the defendant to establish that he or she did not know and had no reasonable cause to suspect that the record was a State record.

(6) This section prevails over a provision of any other Act enacted before the commencement of this section.

(7) An Act enacted after the commencement of this section is not to be interpreted as prevailing over or otherwise altering the effect or operation of this section except in so far as that Act provides expressly for that Act to have effect despite this section.

22 Normal administrative practice

(1) Something is considered to be done in accordance with normal administrative practice in a public office if it is done in accordance with the normal practices and procedures for the exercise of functions in the public office.

(2) However, something is not considered to be done in accordance with normal administrative practice if:

(a) it is done corruptly or fraudulently, or is done for the purpose of concealing

evidence of wrongdoing, or is done for any other improper purpose, or

(b) it is conduct or conduct of a kind declared by the regulations to be unacceptable for the purposes of this Part, or

(c) it is done in accordance with a practice or procedure declared by the regulations to be unacceptable for the purposes of this Part, or

(d) it is done in accordance with a practice or procedure that the Authority has notified the public office in writing is unacceptable for the purposes of this Part.

(3) Schedule 1 contains guidelines on some aspects of normal administrative practice. The guidelines do not limit what constitutes normal administrative practice and do not affect the operation of subsection (2).

23 Permission for sale of privately owned records cannot be refused unless Authority has offered to buy

The Authority cannot refuse permission for the sale of a State record that is in private ownership unless the Authority has offered to buy the record at market value and the offer has been refused. The market value of a State record is the amount that would be paid for the record by a willing but not anxious buyer. A State record is taken to be in private ownership if it is not owned by the State or an agency of the State.

24 Consent of public office required before records can be disposed of

The Authority must not dispose of or give permission for the disposal of a State record in the possession of the Authority unless the public office responsible for the record has consented to its disposal. This section does not apply to a record once it has become a State archive.

25 Special provision for records concerning Aboriginal heritage

(1) The Authority must not dispose of or give permission for the disposal of a State record that contains information with respect to the State’s Aboriginal heritage unless the Authority has first consulted with the Director-General of National Parks and Wildlife on the need to preserve the record.

(2) The Authority and the Director-General may enter into arrangements for excluding particular records or classes of records from the operation of this section.

Part 4 Authority entitled to control of State records not currently in use

26 Application of Part to Governor, Parliament and courts

(1) This Part does not apply to the following persons, or to the State records for which they are responsible, except as may be provided by agreement between the person

and the Authority:

(a) the Governor acting in the Governor's vice-regal capacity,

(b) the Houses of Parliament,

(c) a court or tribunal, in respect of the court's or tribunal's judicial functions.

(2) The Authority may enter into agreements for the purposes of this section providing for the application (with or without specified modifications) of any of the provisions of this Part to those persons and their records.

Note—

Section 5 should be referred to to understand how this Part applies to State collecting institutions.

27 Authority's entitlement to State records no longer in use

Once a State record is no longer in use for official purposes in the public office responsible for the record, the Authority is entitled to control of the record and the public office ceases to be entitled to control of it.

28 Records more than 25 years old presumed not in use

(1) A State record is to be regarded as no longer in use for official purposes in a public office if the record is more than 25 years old, unless the public office has made a determination (a ***still in use determination***) that the record is still in use for official purposes in the public office. A record may be no longer in use even if it is less than 25 years old. This section is not intended to create a presumption that a record is in use just because it is less than 25 years old.

(2) A still in use determination need not be specific to a particular record and can instead be made so as to relate to a series, group or class of records. A public office must consult with the Authority before making a still in use determination. A still in use determination is to be in writing and a copy of it is to be given to the Authority as soon as practicable after it is made.

(3) A still in use determination remains in force for the period (up to 5 years) specified in the determination unless it is revoked sooner by the public office responsible for the records concerned. The determination can be revoked by giving notice of revocation in writing to the Authority and can be remade before it expires, or a new determination can be made. There is no limit on the number of times a still in use determination can be made or remade.

(4) The Authority may in a particular case request a public office to have a still in use determination made by it reviewed and approved by the Minister responsible for the public office. The determination lapses and cannot be remade without the permission of the Authority if it is not approved by the Minister within 3 months after the

Authority's request is made.

(5) A still in use determination can be made before any record to which it applies is 25 years old.

29 Records required to be made available to Authority

A public office that has control of a record that the Authority is entitled to control of under this Act is required to make the record available to the Authority (to enable the Authority to take control of the record). The Authority may issue guidelines to public offices from time to time as to how State records are to be made available to the Authority and public offices are to comply with those guidelines.

30 How the Authority takes control of a record

(1) The Authority takes control of a State record by taking the record into its possession or custody or by entering into an agreement, understanding or other arrangement whereby some other person (which can include the public office that is responsible for the record) is to have possession or custody of the record.

(2) Any such agreement, understanding or other arrangement must include provision for facilitating the giving of access to records in accordance with this Act.

Note—

An agreement under this section with a public office could provide for the payment by the Authority of the reasonable costs to be incurred by the public office in complying with section 14 (Obligation to maintain accessibility to equipment/technology dependent records) in respect of a record to which the agreement applies.

31 Authority not required to take control of records

(1) The Authority is not required to take control of a State record just because it is entitled to control of the record.

(2) The fact that the Authority does not take control of a State record when it becomes entitled to do so does not prevent the Authority from subsequently taking control of the record in exercise of its entitlement to do so.

32 Authority can be required to take control of records in some cases

(1) If the Authority is entitled to control of a State record and the record is more than 25 years old, the public office that has control of the record can request the Authority to take control of the record.

(2) The Authority must comply with the request within a reasonable time after it is made unless:

(a) the Authority and the public office enter into an agreement under which the public office is to keep control of the record, or

(b) the Authority undertakes to pay the reasonable costs to be incurred by the public office in keeping control of the record and of fulfilling its obligations under section 14 (Obligation to maintain accessibility to equipment/technology dependent records) with respect to the record, or

(c) the public office is, in respect of the record, in breach of guidelines issued under section 29 as to how State records are to be made available to the Authority, or

(d) the Authority gives the public office permission to dispose of the record.

(3) A request under this section can be made so as to relate to a series, group or class of records instead of being made in relation to an individual record.

33 Authority's entitlement to control does not affect other interests in State records

The Authority's entitlement to control of a State record under this Part does not extinguish, limit or otherwise affect any right or interest of any other person in the State record.

Note—

The Authority's entitlement to control of a State record under this Part does not operate to confiscate the record and vest ownership of it in the Authority or the State. It gives the Authority control over records that would otherwise be under the control of public offices. If a private person owns a State record that is under the control of a public office, this Part does not prevent the person asserting that ownership (even after the Authority has taken control of the record).

34 Secrecy and other duties do not prevent compliance with this Part

(1) No duty of confidence, secrecy or non-disclosure (whether or not the duty arises under an Act) operates to prevent the giving of control of a State record to the Authority in compliance with this Part.

(2) This section overrides a provision of any other Act that is inconsistent with it, except a provision that states specifically that it applies despite this section.

35 Public office entitled to return of records if needed

(1) If a record that is a State archive is required for use for official purposes in the public office responsible for the record, the public office is entitled to temporary custody of it while it is required for use.

(2) The public office is not entitled to custody of the original record (unless the Authority is satisfied that custody of the original is needed) and the giving of custody of a copy of the record is sufficient to satisfy this section.

(3) If custody of the original is needed it can be given subject to conditions designed to ensure the safe keeping and proper preservation of the original.

(4) The Authority is entitled to charge a public office for the reasonable expenses that the

Authority incurs in giving the public office temporary custody of a record under this section.

36 Arrangements for other persons to have possession/custody of State archives

When the Authority enters into an agreement, understanding or other arrangement with any person (including a public office) under which the person is to have possession or custody of a State archive, the agreement, understanding or other arrangement is to include provision that will ensure that arrangements are in place for:

(a) enabling public access to the record to be provided in accordance with this Act, and

(b) facilitating return of the record if it is required for use for official purposes in the public office responsible for the record, and

(c) ensuring the safe keeping and proper preservation of the record.

Part 5 Recovery of estrays and other State records

37 Meaning of “estray”

A State record is an estray for the purposes of this Act if it is owned by the State or an agency of the State but is not under the control of the public office responsible for the record (except as a result of being under the control of the Authority or of some other person with lawful authority).

Note—

Examples of estrays are State records owned by the State that have been abandoned or that have been removed from or transferred out of the control of the responsible public office without lawful authority. A State record that has been transferred with lawful authority can become an estray if that authority is subsequently revoked and the record is not returned. The Authority can give permission under section 21 to the transfer of a State record.

38 Presumption that State records are owned by the State

(1) In any proceedings for the recovery of possession of a State record by or on behalf of the State or an agency of the State it is to be presumed that the record is owned by the State or agency of the State. The presumption is rebuttable by evidence to the contrary.

(2) The presumption does not apply to a record created before the commencement of this section unless it is established that the record was in the ownership of the State or an agency of the State on some occasion after that commencement.

(3) The presumption is rebutted if it is established that the person who has possession of the record (***the holder***) obtained possession of the record as a result of the distribution of the estate of a deceased person, or as a purchaser in good faith and for value without notice of any defect in title of the person who transferred the record to the holder or that the person who transferred the record to the holder had no title to

it. This subsection does not limit the ways in which the presumption can be rebutted.

Note—

The effect of this presumption is not to make the State the owner of a record when there is evidence that the State is not the owner. The presumption operates to put the onus of establishing ownership on the person who is disputing the State's claim to the record, ie the State is regarded as the owner until someone establishes to the contrary. Rebuttal of the presumption does not of itself mean that the State is not the owner of the record. The State can still establish ownership of the record in the same way as any person would establish ownership of property. The fact that a person has obtained possession of the record as a purchaser in good faith and for value without notice that the State was the owner of the record, or obtained possession under a will or intestacy, does not of itself mean that the person is the owner of the record. Questions of ownership and entitlement to possession of a State record are to be determined as for any other item of personal property.

39 Power to inspect records believed to be estrays

(1) The Authority may give a direction in writing to a person who has possession or custody of a record that the Authority believes to be an estray directing the person to produce the record for inspection by the Authority at any reasonable time and place determined by the Authority and specified in the direction.

(2) A person who is given such a direction must comply with it.

Maximum penalty: 50 penalty units.

(3) The Authority can make and retain a copy of any record produced to the Authority under this section but the following restrictions apply to such a copy (and any further copy made from it) for 10 years after the record is produced to the Authority:

(a) the Authority must not publish or otherwise publicly release the copy,

(b) the copy is not open to public access under this Act.

(4) The owner of a record can by agreement with the Authority waive (wholly or partly) the restrictions imposed by subsection (3).

(5) This section does not authorise the Authority to infringe any copyright.

40 Directions for protection of estrays

(1) The Authority may give any person who has possession or custody of a record that the Authority believes to be an estray a direction in writing that for a period specified in the direction (not exceeding 90 days) the person must not do any of the following things except with the written permission of the Authority:

(a) sell the record or offer it for sale,

(b) dispose of the record or part with possession of it,

(c) remove the record from New South Wales.

(2) A person must not contravene a direction given to the person under this section.

Maximum penalty: 50 penalty units.

(3) The Authority can revoke a direction under this section at any time by notice in writing to the person to whom the direction applies.

(4) If the Authority takes action in a court of competent jurisdiction on behalf of the State or any public office to recover possession of an estray while the estray is the subject of a direction under this section, the direction remains in force until the action is determined, unless the court otherwise orders or the direction is revoked by the Authority.

41 Directions and assistance to public offices for recovery of estrays

The Authority may give directions to a public office that the Authority considers is responsible for a record that is an estray to take such steps as the Authority considers necessary or desirable to effect recovery by the public office of possession of the record. A public office must comply with any reasonable directions of the Authority under this section. The Authority may assist a public office to recover possession of an estray.

42 Court action to recover estrays

(1) The Authority can take action in a court of competent jurisdiction on behalf of the State or any public office to recover possession of an estray.

(2) When the Authority has commenced proceedings to recover possession of an estray, the Authority may direct any person who has possession of the estray to give possession of the record to the Authority pending the determination of the proceedings. A person who is given such a direction must comply with it unless the court before which the proceedings are pending otherwise orders.

Maximum penalty: 50 penalty units.

43 No limitation period on action to recover estrays

No limitation period operates to bar the rights of the State or a public office (or the Authority on behalf of the State or a public office) in relation to an action for the recovery of possession of a record that is an estray.

44 Arrangements for protecting estrays in private hands

The Authority may enter into an agreement or other arrangement with any person who has possession of a record that the Authority believes to be an estray to make such provision as the Authority considers appropriate for or with respect to the preservation, security and confidentiality of and public access to the record.

45 Power of Authority to obtain State records of archival significance

(1) The Authority can apply to a court of competent jurisdiction for an order for possession of a State record that the Authority considers to be of archival significance and that is in private hands. A State record is taken to be in private hands whenever it is not under the control of a public office. An application can be made whether or not the person who has possession of the record is the owner of the record.

(2) The court is to grant the application if satisfied that the record is a State record, and otherwise is to refuse to grant the application.

(3) When the Authority obtains possession of a record pursuant to an order under this section, ownership of the record vests in the State freed and discharged from all other estates and interests in the record and the Authority is entitled to control of the record.

(4) Any person who suffers loss as a result of the extinguishment of any estate or interest in a record by this section is entitled to be paid compensation by the Authority for the value of that loss.

(5) The amount of that compensation is to be determined by the Authority but if the person entitled to the compensation is dissatisfied with the Authority's determination the person can apply to a court of competent jurisdiction for a review of the Authority's determination. The court's decision on the review is to be given effect to by the Authority.

(6) This section applies to a State record whether or not it is an estray. No limitation period operates to bar the rights of the Authority under this section.

46 Directions to protect State records of archival significance

(1) The Authority may give a person who has possession or custody of a record a protection direction for the record if the record is or is proposed to be the subject of an application under section 45. The direction remains in force while the application is pending (unless revoked sooner) but a protection direction given before the application is made lapses if the application is not made within 30 days after the direction is given.

(2) A protection direction for a record is a direction in writing that a person must not sell the record or offer it for sale, must not dispose of the record or part with possession of it and must not remove the record from New South Wales, except with the written permission of the Authority.

(3) When an application under section 45 is pending in respect of a record, the Authority may give a person who has possession or custody of the record a direction in writing requiring the person to give custody of the record to the Authority pending the determination of the application.

(4) A person given a direction under this section must not contravene it unless the court before which the relevant application is pending orders otherwise.

Maximum penalty: 50 penalty units.

(5) The Authority may revoke a direction under this section at any time by notice in writing.

47 Authority can acquire State records

(1) The Authority can acquire by purchase on behalf of the State any State record that the Authority considers to be of archival significance.

(2) The Authority can acquire by gift or bequest any State record and can agree to carry out the conditions of any such gift or bequest. The rule of law against remoteness of vesting does not apply to or in respect of any condition of a gift or bequest to which the Authority has agreed.

48 Application of estray law in and of other jurisdictions

(1) The recognised estray provisions of the laws of another Australian jurisdiction apply in this State to a record located in this State (other than a State record) in the same way as they apply in that other jurisdiction to a record located in that jurisdiction.

(2) Recognised estray provisions applying under this section apply subject to such modifications as may be prescribed by the regulations under this Act.

(3) This Part extends to a State record that is located outside the State. The Authority is authorised to exercise its functions under this Part in any Australian jurisdiction in respect of any State record that is located in that jurisdiction.

(4) The Authority may, in accordance with a request of an interstate archives body, exercise on behalf of the body in New South Wales any function conferred on the body by or under recognised estray provisions in respect of a record located in New South Wales.

(5) An interstate archives body may, in accordance with a request by the Authority, exercise on behalf of the Authority in that body’s jurisdiction any function conferred on the Authority under this Part in respect of a State record located in that jurisdiction.

(6) In this section:

interstate archives body means a body established under the law of another Australian jurisdiction and declared by the Minister by order published in the Gazette to be the interstate archives body for the purposes of this section.

recognised estray provisions means such of the provisions of the law of another Australian jurisdiction as may be declared for the time being by the Minister by order

published in the Gazette to be recognised estray provisions for the purposes of this section.

Part 6 Public access to State records after 30 years

49 Application of Part to Governor, Parliament and courts

(1) This Part does not apply to the following persons, or to the State records for which they are responsible, except as may be provided by agreement between the person and the Authority:

(a) the Governor acting in the Governor's vice-regal capacity,

(b) the Houses of Parliament,

(c) a court or tribunal, in respect of the court's or tribunal's judicial functions.

(2) The Authority may enter into agreements for the purposes of this section providing for the application (with or without specified modifications) of any of the provisions of this Part to those persons and their records.

Note—

Section 5 should be referred to to understand how this Part applies to State collecting institutions.

50 Open access period for records

For the purposes of this Act, a State record is ***in the open access period*** if the record is at least 30 years old. A record is taken to be 30 years old when 30 years have elapsed since it came into existence or since the original record of which it is a copy came into existence.

Note—

The fact that a record is in the open access period does not automatically mean that it is open to public access under this Act. Generally the record must be the subject of an open to public access direction (given by the public office responsible for the record) before it is open to public access.

51 Access direction must be given for records in the open access period

(1) Each public office must ensure that the State records for which it is responsible that are in the open access period are the subject of an access direction. Only the public office responsible for a record can give an access direction for the record.

(2) An access direction must be either:

(a) a direction that records are open to public access under this Act (referred to in this Act as an ***OPA direction***), or

(b) a direction that records are closed to public access under this Act (referred to in this Act as a ***CPA direction***).

(3) A State record that is the subject of an OPA direction is open to public access under this Act. A State record that is the subject of a CPA direction is not open to public access under this Act. When a record is open to public access under this Act, any person is entitled to be given access to the record as provided by this Part.

(4) This Part does not prevent the giving of access independently of this Act to a State record (whether or not the record is in the open access period).

Note—

A CPA direction operates solely for the purposes of this Act. Its effect is that the entitlements to access conferred by this Act do not apply to the record, and it has no other effect. In particular, a CPA direction does not affect any other entitlement to access that arises outside this Act and does not prevent the giving of access voluntarily.

52 Deciding whether to open or close records to public access

(1) An assessment by a public office as to whether records should be open or closed to public access under this Act should be made on the basis of the known or likely contents of series, groups or classes of records. The assessment should not be made on the basis of the contents of individual records unless the public office considers that such an assessment is warranted.

Note—

Assessment of records on an individual (record-by-record) basis is generally considered to be unworkable because of the volume of records involved. Assessment by series, group or class offers a workable “risk-managed” assessment procedure.

It is intended that existing Cabinet documents are to continue to be examined to determine whether they contain sensitive personal or commercial-in-confidence information, and that Cabinet documents that may contain any sensitive personal or commercial-in-confidence information will be marked to be returned to The Cabinet Office for assessment under this section.

(2) Within the constraints of an assessment by series, group or class, the assessment should be cautious.

Note—

The need for risk management is recognised, so the assessment should not be overly cautious.

(3) The Attorney General is to issue guidelines to public offices with respect to the matters to be taken into account when considering whether records should be open or closed to public access. The Attorney General is to review the guidelines under this section from time to time.

(4) Public offices must have regard to the guidelines under this section but the guidelines do not limit the grounds on which a public office can open or close records to public access under this Act.

Note—

The guidelines can only relate to the types of matters that indicate a need to open or close records to public access, not to the means of assessing record content. That is, the guidelines must not interfere with the general

requirement that records be assessed by series, group or class.

53 Secrecy provisions do not apply after 30 years

(1) A provision of an Act that prohibits the disclosure or divulging of information or matter does not apply to the disclosure or divulging of that information or matter by means of the giving of access under this Act to a State record that:

(a) is in the open access period, and

(b) is the subject of an OPA direction, and

(c) contains that information or matter.

(2) This section does not apply to a provision of an Act if the Act provides specifically to the effect that the prohibition concerned applies despite this Act.

(3) The regulations can exempt a specified provision of an Act from the operation of this section, either generally or in respect of specified records or a specified class of records.

54 Application to open records to public access

(1) If a State record is in the open access period and is not the subject of an access direction, any person can apply to the public office responsible for the record for an OPA direction for the record. An application can relate to a particular record or to series, groups or classes of records.

(2) The application is to be made in a form approved by the Authority. No fee is payable for the application.

(3) A public office is to deal with an application expeditiously. If an application has not been dealt with within 1 month after it was made, the public office is taken to have given the OPA direction applied for.

(4) An application is dealt with by giving an access direction for the records that are the subject of the application.

Note—

The same kind of access direction need not be given for all the records concerned (that is, an OPA direction can be given for some of them and a CPA direction given for the others). A public office can, in the course of dealing with an application under this section, decide to give an access direction that covers other records as well (not just the records that are the subject of the application).

(5) A public office must notify its decision on an application under this section to the applicant in writing.

55 Procedures for giving and revoking access directions

(1) An access direction is to be given to the Authority in writing in a form approved by the

Authority.

(2) An OPA direction remains in force until it is revoked.

(3) A CPA direction remains in force for the period (up to 5 years) specified in the direction unless it is revoked or renewed sooner. There is no limit on the number of times a CPA direction can be given or renewed.

Note—

The fact that a CPA direction can only remain in force for 5 years (subject to renewal) does not prevent the giving of a CPA direction that operates by reference to a longer period. For example, a CPA direction could be given that was expressed to remain in force for 5 years and that required adoption records to be closed for 100 years. The direction would remain in force for 5 years and would operate during that time to prevent public access to adoption records aged less than 100 years. At the end of the 5 years, the direction could be renewed.

(4) An access direction can be revoked by the public office responsible for the record concerned in one of the following ways (and not otherwise):

(a) by giving an OPA direction (to revoke a CPA direction), or

(b) by giving a CPA direction (to revoke an OPA direction).

(5) An access direction can be selectively revoked or renewed, that is, it can be revoked or renewed in respect of some of the records to which it applies (with the effect that the original access direction continues to apply to the other records concerned).

56 Access still available under FOI Act

The fact that a record is not open to public access under this Act does not affect any entitlement to access to the record under the FOI Act.

Note—

If a record is not open to public access because it is not the subject of an access direction, an application under this Part for an OPA direction should be made before an application is made under the FOI Act.

57 Public office may authorise earlier public access

(1) The public office responsible for a State record that is not in the open access period can permit public access to the record under this Act by authorising the Authority to make the record available for public access. The record is then open to public access under this Act while the authorisation remains in force and accordingly any person is entitled to be given access to the record as provided by this Part.

(2) Such an authorisation may be revoked at any time by the public office for the time being responsible for the record. The authorisation is revoked by giving notice of revocation in writing to the Authority.

(3) This section applies to part of a record in the same way as it applies to the whole record, so that authorisation can be given for part of a record and that part of the

record is then open to public access while the authorisation is in force (without conferring any entitlement to public access to the rest of the record).

(4) This section does not authorise a public office to permit public access to a State record in breach of any duty or obligation (such as a duty of confidentiality) that the public office may have with respect to the record.

(5) Once a record is in the open access period, an authorisation under this section in respect of it is taken to be an OPA direction in respect of the record (and can be revoked accordingly).

(6) This section does not limit the power of a public office to permit access to a State record independently of this Act.

58 Arrangements for special access

(1) The Premier may from time to time approve arrangements (***special access arrangements***) for allowing special access to State records that are not open to public access under this Act. Special access is access that is limited to a particular person or persons or classes of persons. The regulations can specify the circumstances in which and the conditions subject to which special access can be given under the special access arrangements.

(2) The appropriate Minister or a person authorised by the appropriate Minister may, in accordance with the special access arrangements and the regulations, by written authorisation authorise special access to State records. The appropriate Minister is the Minister who is responsible for the public office that is responsible for the records concerned.

(3) Such an authorisation can be given subject to conditions and entitles any person to whom the authorisation applies (on presentation of the authorisation to the access provider) to be given access to the records concerned in accordance with the terms and conditions of the authorisation and as provided by this Part.

(4) A person must not contravene any conditions of an authorisation under which the person is given access to a State record.

Maximum penalty: 50 penalty units.

(5) This section does not authorise the giving of access to a State record that is not in the open access period in breach of any duty or obligation (such as a duty of confidentiality) that may apply to the record.

59 Withholding access to ensure proper care of records

(1) The Authority can direct that a State archive be withheld from public access if of the opinion that it is necessary to do so for the purpose of ensuring the safe custody and proper preservation of the record. The record is not open to public access under this

Act while the direction is in force.

(2) The FOI Act does not apply to a record that is the subject of such a direction.

(3) The Authority is to provide a copy of a record that is not open to public access under this section if the Authority thinks it is practicable to do so without detriment to the proper preservation and safe custody of the record. The copy is then open to public access under this Act (unless it is not open to public access under another provision of this Part) and is available for access under and in accordance with the FOI Act.

(4) The Authority is entitled to charge a fee determined by the Authority for providing a copy of a record under this section.

(5) A person aggrieved by a direction of the Authority under this section may apply to the Minister for a review of the decision. The Minister's decision on the review is final and not subject to further review or appeal. The Authority is to give effect to the Minister's decision.

60 The giving of access

(1) The person required to give access to a State record under this Act is the Authority if the record is under the Authority's control or the public office that has the record under its control. That person is referred to in this Part as the ***access provider***.

(2) A person who is entitled to be given access to a State record under this Act is entitled to be given that access in any of the following ways:

(a) by being given a reasonable opportunity to inspect the record,

(b) by being provided with a copy of the record,

(c) in the case of a record from which information can be produced or made available by means of equipment (such as a computer or projector), by being provided with access to that information by the use of that equipment,

(d) in the case of a record of words in the form of a sound recording or in the form of a record in shorthand or other encoded material, by being provided with a written transcript of the words recorded.

(3) A person is entitled to choose the way in which the person is to be given access but the access provider may decide to give access in some other way if of the opinion that access in the way chosen by the person:

(a) is not reasonably practicable because the access provider cannot readily access any equipment necessary to give access in the way chosen, or

(b) would interfere unreasonably with the operations of the access provider, or

(c) would not be appropriate, having regard to the physical nature of the record, or

(d) would be detrimental to the proper preservation of the record, or

(e) would involve an infringement of copyright, other than copyright owned by the State, the Commonwealth, another State or a Territory.

(4) The access provider may determine reasonable conditions to which access to a record is to be subject for the purpose of ensuring the safe custody and proper preservation of the record.

(5) The access provider is entitled to charge a fee for giving access to a record under this Part.

61 Register of access directions

The Authority is to keep a register of the access directions in force under this Act. The register is to be available for inspection by any person free of charge.

62 Protection from liability when access given

(1) When access is given to a record under this Act:

(a) no action for defamation or breach of confidence lies against the State or an agency of the State, the access provider or an officer of or other person acting by or under the authority of the access provider, by reason of the giving of access, and

(b) no action for defamation or breach of confidence in respect of any publication involved in, or resulting from, the giving of access lies against the author of the record or any other person by reason of the author or other person having supplied the record to the Authority or a public office, and

(c) the giving of access does not constitute, for the purposes of the law relating to defamation or breach of confidence, an authorisation or approval of the publication of the record or its contents by the person to whom access is given, and

(d) a person concerned in the giving of access is not guilty of an offence by reason only of the giving of access.

(2) This section does not apply to access given independently of this Act.

Part 7 The Authority and the Board

63 Establishment of the Authority

(1) There is constituted by this Act a body corporate with the corporate name of the State Records Authority of New South Wales.

(2) The Authority is, for the purposes of any Act, a statutory body representing the Crown.

(3) The Authority may also be called State Records and the use of that name has the same effect for all purposes as the use of its corporate name.

64 Ministerial control

The Authority is in the exercise of its functions subject to the direction and control of the Minister, except the Authority's functions in relation to the giving or refusing of permission for, or approval of a practice or procedure involving, the taking of any action referred to in section 21 (Protection measures).

65 Director to manage and control affairs of the Authority

(1) The affairs of the Authority are to be managed and controlled by the Director in accordance with the policies determined by the Board.

(2) Any act, matter or thing done in the name of, or on behalf of, the Authority by or with the authority of the Director is taken to have been done by the Authority.

66 Principal functions of the Authority

(1) The Authority has the following functions:

(a) to develop and promote efficient and effective methods, procedures and systems for the creation, management, storage, disposal, preservation and use of State records,

(b) to provide for the storage, preservation, management and provision of access to any records in the Authority's possession under this Act,

(c) to advise on and foster the preservation of the archival resources of the State, whether public or private,

(d) to document and describe State archives in their functional and administrative context,

(e) such other functions as are conferred or imposed on the Authority by or under this Act or any other law.

(2) The Authority may do all such things as are supplemental or incidental to, or consequential on, the exercise of its functions.

(3) The Authority is entitled to charge for any services it provides under this Act.

67 Delegation of functions

(1) The Authority may delegate to an authorised person any of its functions, other than this power of delegation.

(2) A delegate may sub-delegate to an authorised person any function delegated by the

Authority if the delegate is authorised in writing to do so by the Authority.

(3) In this section, ***authorised person*** means:

(a) a public servant engaged in the administration of this Act, or

(b) a person of a class prescribed by the regulations.

68 Staff of the Authority

A Director of the Authority and such other staff as may be necessary for the purposes of this Act may be employed under Part 2 of the *Public Sector Management Act 1988*.

69 Establishment of Board

(1) There is to be a Board of the Authority consisting of 9 members appointed by the Governor.

(2) Of the members:

(a) 4 are to be persons nominated by the Minister who administers this Act, and

(b) 2 are to be persons nominated by the Minister who administers the *Public Sector Management Act 1988*, and

(c) one is to be a person nominated by the Minister who administers the *State Owned Corporations Act 1989*, to represent State owned corporations, and

(d) one is to be a member or officer of either House of Parliament nominated jointly by the President of the Legislative Council and the Speaker of the Legislative Assembly, and

(e) one is to be a judge of a court of the State nominated by the Chief Justice of New South Wales.

(3) Of the 4 persons nominated by the Minister who administers this Act:

(a) one is to be nominated to represent State law enforcement agencies and is to be nominated after consultation with the Ministers responsible for those agencies, and

(b) one is to be nominated to represent local government, and

(c) one is to be nominated to represent the private sector, and

(d) one is to be nominated to represent the history profession.

(4) Of the 2 persons nominated by the Minister who administers the *Public Sector Management Act 1988*:

(a) one is to be nominated to represent departments, and

(b) one is to be nominated to represent declared authorities.

(5) One of the members is to be appointed Chairperson of the Board, whether in and by the relevant instrument of appointment as a member or in and by some other instrument executed by the Governor.

(6) The members of the Board are to elect a person from among their number to be the Deputy Chairperson of the Board. The person may be elected for the duration of the person's term of office as a member or for a shorter term.

(7) Schedule 2 has effect with respect to the constitution and procedure of the Board.

70 Functions of the Board

The Board has the following functions:

(a) the function of determining the policies and strategic plans of the Authority,

(b) the function of granting approvals for the purposes of sections 13 (Standards and codes of best practice for records management) and 21 (Protection measures).

71 Director may attend meetings of Board

(1) The Director is entitled to attend and to participate in discussions at meetings of the Board but is not entitled to vote at any such meeting.

(2) The Director must not, without the consent of the Board, be present at a meeting of the Board during the discussion and determination of a matter relating to the Director or the office of the Director.

Part 8 Miscellaneous

72 Injunctions to prevent contravention of Act

(1) If a person has contravened, is contravening or is proposing to contravene a provision of this Act, the Supreme Court may, on the application of the Authority, grant an injunction restraining the person from doing so or requiring the person to do any act or thing necessary to avoid or remedy the contravention.

(2) The Court may, before considering the application, grant an interim injunction restraining the person from engaging in conduct pending the determination of the application.

(3) The Court may rescind or vary such an injunction or interim injunction.

(4) The Authority is not to be required to give any undertaking as to damages or costs in respect of an application under this section.

73 Authority's duty of confidentiality

(1) A person who acquires information in the exercise of functions under this Act must not directly or indirectly make a record of the information or divulge it to another person except in the exercise of functions under this Act.

Maximum penalty: 50 penalty units.

(2) It is not an offence under subsection (1) if, in legal proceedings, a person:

(a) discloses information in answer to a question that the person is compellable to answer, or

(b) produces a document or other thing that the person is compellable to produce.

(3) The provisions of any other Act imposing restrictions or obligations on a person as to secrecy or disclosure of information acquired in the course of the administration of that Act extend to apply to a person who, in the exercise of functions under this Act, gains access to that information as a result of the information having been acquired in the course of the administration of the other Act. For that purpose the person who gains access to the information in the course of the administration of this Act is taken to be a person engaged in the administration of the other Act.

(4) This section does not prevent or otherwise affect:

(a) the giving of access to records under Part 6 (Public access to State records after 30 years), or

(b) the preparation and dissemination of guides and finding aids.

(5) This section does not apply to the divulging of information to, or to the production of any document or other thing to, any of the following:

(a) the Independent Commission Against Corruption,

(b) the Australian Crime Commission,

(c) the New South Wales Crime Commission,

(d) the Ombudsman,

(e) any other person prescribed for the purposes of this section.

74 Personal liability

A matter or thing done by the Authority, the Director, the Board or a member of the Board or any person acting under the direction of the Authority, the Director or the Board, does not, if the matter or thing was done in good faith for the purpose of executing this Act, subject the Director, a member or a person so acting personally to any action, liability, claim or demand.

75 Copying and publishing of State archives

(1) The Authority has power to make copies of any State archive and to publish any State archive. This power does not override any right in the nature of copyright and does not give the Authority power to do anything that would be an infringement of copyright.

(2) The Authority may cause a true copy that it has made of a State archive to be certified by the Authority as a true copy and a copy so certified has, for all purposes the same validity and effect as the record of which it is a copy. In particular, a copy so made and certified is admissible in evidence in any legal proceedings as if the copy were the original.

76 Copyright in State archives

The Authority may, with the approval of the Attorney General given either generally or in a particular case or class of cases, exercise on behalf of the Crown any right of the Crown as the owner of copyright subsisting in a State archive.

77 Certificate as to loss or destruction of State record

A certificate given by the Authority to the effect that a specified State record has been lost or destroyed is conclusive evidence of the matter certified.

78 Proceedings for offences

Proceedings for an offence against this Act or the regulations are to be taken before a Local Court constituted by a Magistrate sitting alone.

79 Savings and transitional provisions

Schedule 3 has effect.

80 (Repealed)

81 Regulations

(1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Without limiting subsection (1), the Governor may make regulations for or with respect to any one or more of the following:

(a) exempting a specified public office or class of public offices from the operation of all or specified provisions of Parts 2, 4 and 6 of this Act,

(b) exempting specified records or records of a specified class or description from the operation of all or specified provisions of Parts 2, 4 and 6 of this Act,

(c) modifying the operation of specified provisions of Parts 2, 4 and 6 of this Act in their application to specified records or records of a specified class or to a specified public office or specified class of public offices.

82 Review of Act

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

(3) A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

Schedule 1 Guidelines on some aspects of normal administrative practice

(Section 22)

Part 1 Preliminary

1 General

These guidelines give guidance as to what is normal administrative practice in a public office.

2 Definitions

In this Schedule:

ephemeral records means records of little value that only need to be kept for a limited or short period of time. Ephemeral records have no continuing value to the organisation and, generally, are only needed for a few hours or a few days.

facilitative records means records of little value and of a routine instructional nature that are used to further some activity. Most facilitative records have no continuing value to the organisation and, generally, are only needed for a few hours or a few days.

record of continuing value means any record that has administrative, fiscal, legal, evidential or historic value to the organisation.

Part 2 Drafts

3 Meaning

Drafting is the activity associated with preparing preliminary drafts or outlines of addresses, speeches, reports, correspondence, tables, statistics, file notes, plans, and

sketches, etc, prior to production of a final version or the final form of the record. Drafting records can be in paper form or electronic form.

4 Drafts that must not be disposed of

Drafts that must not be disposed of are those for which there is an identified recordkeeping requirement to retain them because they document significant decisions, reasons and actions and contain significant information that is not contained in the final form of the record. Examples of such drafts are:

(a) drafts containing significant or substantial changes or annotations,

(b) drafts relating to the formulation of legislation, legislative proposals and amendments,

(c) drafts relating to the formulation of policy and procedures, where the draft provides evidence of the processes involved or contains significantly more information than the final version of the record,

(d) drafts of legal documents (contracts, tenders etc).

5 Drafts that can be disposed of

Drafts that can be disposed of are draft documents and working papers of a routine nature used for the preparation of such documents as:

(a) budget documents,

(b) charts,

(c) correspondence,

(d) file notes,

(e) minutes,

(f) reports,

(g) spreadsheets,

(h) tabulations.

Part 3 Working papers/records

6 Meaning

Working papers/records are papers, background notes and reference materials that are used to prepare or complete other documents.

7 Working papers/records that must not be disposed of

Working papers/records that must not be disposed of are those for which there is an

identified recordkeeping requirement to retain because they document significant decisions, reasons and actions or contain significant information that is not contained in the final form of the record.

Examples are:

(a) working papers/records of a project officer or investigative officer where they are the substantive record of the project or investigation (that is, they contain substantial and valuable information not found elsewhere),

(b) papers in an unofficial filing system where a registered file has not been created or kept within an agency's recordkeeping system, for example, within small business units, or within the office of the Chief Executive Officer.

8 Working papers/records that can be disposed of

Working papers/records can be disposed of when they are primarily facilitative and when the retention of the final version of a document is sufficient to meet the recordkeeping requirements of an agency, so long as they are not required to be retained in order to account for policies, decisions, reasons and actions or not required to function as evidence.

Examples are:

(a) audio recordings of dictated correspondence, conferences and meetings used to prepare correspondence, papers, minutes and transcripts,

(b) calculations,

(c) rough notes (including rough notes of meetings and telephone conversations where a formal record has been made),

(d) statistics/figures.

Part 4 Duplicates of records

9 Meaning

Duplicates are reproductions of records where the original or authorised copy of the record is contained within an agency recordkeeping system.

10 Duplicates that must not be disposed of

Duplicates that must not be disposed of are:

(a) duplicates of documents sourced from outside the agency that should properly be placed on file or captured in an appropriate way within the recordkeeping system of the agency (electronic records will need to be maintained electronically),

(b) duplicates of internal agency documents that in themselves may form part of a

record, for example an authorised copy of a document sent from a central office to a regional area where that copy should be captured in the recordkeeping system of the regional area.

11 Duplicates that can be disposed of

Duplicates that can be disposed of are:

(a) information copies or duplicates of records that have already been captured within a recordkeeping system elsewhere in the agency, and that are generally kept for reference purposes by individuals (for example, information copies of correspondence, reports and memos),

(b) duplicates of internal publications held for informational purposes (for example, annual reports, brochures and leaflets),

(c) duplicates of external documents and publications (for example, external annual reports, price lists, trade journals and catalogues).

Part 5 Computer support records

12 Computer support records that must not be disposed of

Computer support records that must not be disposed of are those that support significant functions of the agency and that may be needed as evidence of particular activities (for example, records that provide audit trails).

13 Computer records that can be disposed of

The following computer records can be disposed of once they have been acted upon or superseded and are not required for ongoing business requirements:

(a) input/output formats from mechanical and electronic records systems, such as:

(i) error or control reports,

(ii) input forms for data entry,

(iii) output used for checking/verifying,

(iv) regular batch reports,

(v) system reports,

(vi) transaction reports used for checking and control purposes,

(b) reference copies of user manuals etc,

(c) superseded computer logs,

(d) superseded or obsolete computing software,

(e) systems back-ups,

(f) test data.

Part 6 Facilitating instructions

14 Meaning

Facilitating instructions are records that contain routine or facilitative instructions to officers (for example, keyboard operators and records staff) in the form of “post-it” or sticky notes, forms etc.

15 Facilitating instructions that must not be disposed of

The following facilitating instructions must not be disposed of:

(a) those that are identified as having continuing value (for example, are part of an actual business transaction itself),

(b) those that have policy/procedural implications,

(c) those that are identified as important to the agency.

16 Facilitating instructions that can be disposed of

Facilitating instructions that can be disposed of are those that are ephemeral and have short term value. They may relate to such activities as:

(a) correcting typing errors,

(b) file creation or retrieval,

(c) filing a letter,

(d) formatting documents,

(e) internal distribution lists for informational purposes,

(f) running off duplicates.

Part 7 Messages

17 Meaning

Messages may be in the form of e-mail, voice mail, facsimiles, ‘post-it’ or sticky notes, slips of paper, telephone messages, transmission reports, etc.

18 Messages that must not be disposed of

Messages that are not to be disposed of are those that are identified as having continuing value.

19 Messages that can be disposed of

Messages that can be disposed of are those that:

(a) are ephemeral and are only of short term value,

(b) have had a copy placed on the relevant file or captured in an appropriate way within an agency recordkeeping system.

Part 8 Facsimiles

20 Preservation of facsimiles

As thermal paper deteriorates, it is vital that facsimiles that have been printed on thermal paper be photocopied onto appropriate paper to ensure long-term preservation.

21 Facsimiles that must not be disposed of

Facsimiles that must not be disposed of are those that are identified as having continuing value.

22 Facsimiles that can be disposed of

Facsimiles that can be disposed of are those that:

(a) are ephemeral and are only of short term value,

(b) have an authorised copy captured in an appropriate way within an agency recordkeeping system.

Part 9 Stationery

23 Stationery that can be disposed of

The following items can be disposed of:

(a) unused numbered volumes/pads,

(b) unused printed forms,

(c) unused stationery,

(d) unused letterhead.

Part 10 Solicited and unsolicited advertising material

24 Meaning

This refers particularly to advertising and other material generally known as “junk mail”. It includes (but is not limited to) the following:

(a) advertising “flyers”,

(b) brochures,

(c) catalogues,

(d) price lists.

25 Disposal

Solicited and unsolicited advertising material can be disposed of. Some catalogues may need to be placed on the appropriate equipment or purchase files.

Schedule 2 Provisions relating to constitution and procedure of the Board

(Section 69)

Part 1 Constitution

1 Definition

In this Schedule:

member means a member of the Board.

2 Terms of office of members

(1) Subject to this Schedule, a member holds office for such period (not exceeding 3 years) as is specified in the member’s instrument of appointment, but is eligible (if otherwise qualified) for re-appointment. A person is not eligible to be appointed as a member for more than 2 consecutive terms of office, except as the regulations may otherwise permit in a particular case.

(2) For the purposes of the calculation of a member’s consecutive terms of office only, if:

(a) a person is appointed under clause 6 to fill the office of a member that has become vacant otherwise than by the expiration of the member’s term of office, and

(b) the person is appointed for the balance of his or her predecessor’s term of office,

the appointment does not constitute (and is taken never to have constituted) an

appointment for a term of office.

3 Remuneration of members

A member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the member.

4 Deputies for members

(1) The Minister may, from time to time, appoint a person to be the deputy of a member, and the Minister may revoke any such appointment.

(2) In the absence of a member, the member's deputy:

(a) may, if available, act in the place of the member, and

(b) while so acting, has all the functions of the member and is taken to be a member.

(3) The deputy of a member who is Chairperson or Deputy Chairperson of the Board does not have the member's functions as Chairperson or Deputy Chairperson.

(4) A person while acting in the place of a member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the person.

5 Vacancy in office of member

(1) The office of a member becomes vacant if the member:

(a) dies, or

(b) completes a term of office and is not re-appointed, or

(c) resigns the office by instrument in writing addressed to the Minister, or

(d) is removed from office by the Minister under this clause or by the Governor under Part 8 of the *Public Sector Management Act 1988*, or

(e) is absent from 4 consecutive meetings of the Board of which reasonable notice has been given to the member personally or in the ordinary course of post, except on leave granted by the Board or unless, before the expiration of 4 weeks after the last of those meetings, the member is excused by the Board for having been absent from those meetings, or

(f) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or

(g) becomes a mentally incapacitated person, or

(h) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable.

(2) The Minister may remove a member from office at any time.

6 Filling of vacancy in office of member

If the office of any member becomes vacant, a person must be appointed, subject to this Act, to fill the vacancy.

7 Chairperson and Deputy Chairperson

A person who is a member and Chairperson or Deputy Chairperson of the Board vacates office as Chairperson or Deputy Chairperson if the person ceases to be a member.

8 Disclosure of pecuniary interests by members

(1) If:

(a) a member has a direct or indirect pecuniary interest in a matter being considered or about to be considered at a meeting of the Board, and

(b) the interest appears to raise a conflict with the proper performance of the member’s duties in relation to the consideration of the matter,

the member must, as soon as possible after the relevant facts have come to the member’s knowledge, disclose the nature of the interest at a meeting of the Board.

(2) A disclosure by a member at a meeting of the Board that the member:

(a) is a member, or is in the employment, of a specified company or other body, or

(b) is a partner, or is in the employment, of a specified person, or

(c) has some other specified interest relating to a specified company or other body or to a specified person,

is a sufficient disclosure of the nature of the interest in any matter relating to that company or other body or to that person which may arise after the date of the disclosure and which is required to be disclosed under subclause (1).

(3) Particulars of any disclosure made under this clause must be recorded by the Board in a book kept for the purpose and that book must be open at all reasonable hours to inspection by any person on payment of the fee determined by the Board.

(4) After a member has disclosed the nature of an interest in any matter, the member must not, unless the Minister or the Board otherwise determines:

(a) be present during any deliberation of the Board with respect to the matter, or

(b) take part in any decision of the Board with respect to the matter.

(5) For the purpose of the making of a determination by the Board under subclause (4), a member who has a direct or indirect pecuniary interest in a matter to which the disclosure relates must not:

(a) be present during any deliberation of the Board for the purpose of making the determination, or

(b) take part in the making by the Board of the determination.

(6) A contravention of this clause does not invalidate any decision of the Board.

9 Committees

(1) The Board may establish committees to assist it in connection with the exercise of any of its functions.

(2) A person may be appointed to be a member of such a committee whether or not the person is a member.

(3) The procedure for the calling of meetings of a committee and for the conduct of business at those meetings is, subject to the regulations, to be as determined by the Board or (subject to any determination of the Board) by the committee.

10 Effect of certain other Acts

(1) Part 2 of the *Public Sector Management Act 1988* does not apply to or in respect of the appointment of a member.

(2) If by or under any Act provision is made:

(a) requiring a person who is the holder of a specified office to devote the whole of his or her time to the duties of that office, or

(b) prohibiting the person from engaging in employment outside the duties of that office,

the provision does not operate to disqualify the person from holding that office and also the office of a member or from accepting and retaining any remuneration payable to the person under this Act as a member.

(3) The office of a member is not, for the purposes of any Act, an office or place of profit under the Crown.

Part 2 Procedure

11 General procedure

The procedure for the calling of meetings of the Board and for the conduct of business at

those meetings is, subject to this Act and the regulations, to be as determined by the Board.

12 Quorum

The quorum for a meeting of the Board is 5 members.

13 Presiding member

(1) The Chairperson of the Board (or, in the absence of the Chairperson, the Deputy Chairperson) is to preside at a meeting of the Board. In the absence of both the Chairperson and Deputy Chairperson at a meeting of the Board, another member elected to chair the meeting by the members present is to preside.

(2) The person presiding at any meeting of the Board has a deliberative vote and, in the event of an equality of votes, has a second or casting vote.

14 Voting

A decision supported by a majority of the votes cast at a meeting of the Board at which a quorum is present is the decision of the Board.

15 Transaction of business outside meetings or by telephone

(1) The Board may, if it thinks fit, transact any of its business by the circulation of papers among all the members of the Board, and a resolution in writing approved in writing by a majority of the members is taken to be a decision of the Board.

(2) The Board may, if it thinks fit, transact any of its business at a meeting at which members (or some members) participate by telephone, closed-circuit television or other means, but only if a member who speaks on a matter at the meeting can be heard by the other members.

(3) For the purposes of:

(a) the approval of a resolution under subclause (1), or

(b) a meeting held in accordance with subclause (2),

the Chairperson and each other member have the same voting rights as they have at an ordinary meeting of the Board.

(4) A resolution approved under subclause (1) is, subject to the regulations, to be recorded in the minutes of the meetings of the Board.

(5) Papers may be circulated among members for the purposes of subclause (1) by facsimile or other transmission of the information in the papers concerned.

16 First meeting

The Minister may call the first meeting of the Board in such manner as the Minister thinks fit.

Schedule 3 Savings and transitional provisions

(Section 79)

1 Definitions

In this Schedule:

Archives Office means the Archives Office and its branches established under the repealed Act.

former Authority means the Authority constituted by the repealed Act.

new Authority means the Authority constituted by this Act.

repealed Act means the *Archives Act 1960*.

2 New Authority is continuation of former Authority

The new Authority is a continuation of and the same legal entity as the former Authority.

3 Actions of the former Authority and Archives Office

Anything done by or on behalf of the former Authority or the Archives Office that had any force or effect immediately before the repeal of the repealed Act is taken to have been done by or on behalf of the new Authority.

4 Archives deposited in Archives Office

The public archives deposited and preserved under the repealed Act as State archives in the Archives Office are transferred to the control of the new Authority and become State archives for the purposes of this Act.

5 Arrangements with public offices to keep records

Any agreement, understanding or other arrangement in force immediately before the commencement of this clause between the Archives Office or the former Authority and any person under which the person has possession or custody of a State record that the new Authority is entitled to control of under this Act continues to have effect as an agreement, understanding or other arrangement between the new Authority and that person.

6 Arrangements for custody, control or care of records

Any agreement, understanding or other arrangement in force immediately before the

commencement of this clause whereby the former Authority or the Archives Office has possession, custody, control or care of any records (whether or not they are archives referred to in clause 4) continues to have effect as an agreement, understanding or other arrangement with the new Authority. Possession, custody, control or care (as appropriate) of the records concerned accordingly passes to the new Authority.

7 Public access to current archives

The State records transferred to the control of the new Authority by clause 4 are taken to be the subject of access directions under Part 6 (Public access to State records after 30 years) of this Act, as follows:

(a) all the records so transferred are taken to be the subject of an OPA direction, except those to which paragraph (b) applies, and

(b) the records that were, immediately before the repeal of the repealed Act, the subject of a notice under section 14 (6) (a) (ii) of that Act are taken to be the subject of CPA directions given on that repeal and expressed to remain in force for 5 years from that repeal.

8 Current members of the Authority

(1) The persons who are the members of the former Authority immediately before the repeal of the repealed Act are taken to have been appointed as the members of the Board of the new Authority (***the initial members***) for a term that equals the unexpired term of their appointment as members of the former Authority, as specified in their instruments of appointment as members.

(2) It does not matter that as a result of this clause the initial membership of the Board does not satisfy the requirements of section 69.

(3) When the office of an initial member of the Board becomes vacant (whether because of the completion of a term of office or otherwise), the appointment of a person to fill the vacancy is to be made on the basis that it is an appointment to the category of member that the Minister determines is the category that most closely approximates the category and qualifications of the member whose office becomes vacant.

(4) For the purposes of this clause, section 4 (4) (a) of the repealed Act is taken to have provided at all relevant times that the members of the former Authority hold office for such period not exceeding 3 years as is specified in their instruments of appointment as members.

9 Current Chairperson

The person who was the Chairperson of the former Authority immediately before the repeal of the repealed Act is taken to have been appointed as Chairperson of the Board of the new Authority.

10 Savings and transitional regulations

(1) The regulations may include provisions of a savings or transitional nature consequent on the enactment of this Act.

(2) In particular, the regulations may include any of the following provisions:

(a) provision delaying or deferring the application of this Act, or specified provisions of this Act, in relation to the records or specified kinds of records of specified public offices or of a specified class of public offices,

(b) provision continuing the operation of specified provisions of the repealed Act (as if those provisions had not been repealed) either generally or with respect to the records or specified kinds of records of specified public offices or of a specified class of public offices.

(3) A provision of a regulation authorised by this clause may, if the regulations so provide, take effect from the date of assent or from a later date.

(4) To the extent to which a provision of a regulation authorised by this clause takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate:

(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

(b) to impose liabilities on any person (other than the State or an authority of the State), in respect of anything done or omitted to be done before the date of its publication.

Schedule 4 (Repealed)