

# State Records Act 1998 No 17

[1998-17]



New South Wales

## Status Information

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Authorisation

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# 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 Archives and 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** means a CPA direction or OPA direction.

**access provider**—see section 60(1).

**Authority** means the State Records Authority NSW constituted by this Act.

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

**control** has its meaning affected by section 6.

**CPA direction** means a direction that a record is closed to public access under this Act.

**Director** means the person employed in the Public Service as the Executive Director of the Authority.

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

**exercise** a function includes perform a duty.

**function** includes a power, authority and duty.

**OPA direction** means a direction that a record is open to public access under this Act.

**open access period** (see section 50).

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

**public office**—

(a) means each of the following—

- (i) a department, office, commission, board, corporation, agency, service or instrumentality exercising a function of a branch of the Government of the State,
- (ii) a body, whether incorporated or not, established for a public purpose,
- (iii) a council, county council or joint organisation under the [Local Government Act 1993](#),
- (iv) the Cabinet and the Executive Council,
- (v) the office and official establishment of the Governor,
- (vi) a House of Parliament,
- (vii) a court or tribunal,
- (viii) a State collecting institution,
- (ix) a Royal Commission or Commission of Inquiry,
- (x) a State owned corporation,
- (xi) the holder of an office under the Crown,
- (xii) a political office holder, other than the Leader of the Opposition in the Legislative Assembly, within the meaning of the [Members of Parliament Staff Act 2013](#),
- (xiii) a body, office or institution, whether or not it is a public office under another subparagraph of this paragraph, that exercises a public function and is declared by the regulations to be a public office for the purposes of this Act,

(b) but does not include—

- (i) the Workers Compensation Nominal Insurer established under the [Workers Compensation Act 1987](#), or
- (ii) a justice of the peace within the meaning of the [Justices of the Peace Act 2002](#), or

- (iii) another individual or a private sector entity, except to the extent that section 8 applies.

**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 Museums of History NSW 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) Museums of History NSW,
- (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 (a **prescribed State collecting institution**).

**Note—**

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

**State record** means a record made or received by a person, whether before or after the commencement of this section—

- (a) in the course of exercising official functions in a public office, or
- (b) for a purpose of a public office, or
- (c) for the use of a public office.

**Note—**

The [Interpretation Act 1987](#) contains definitions and other provisions that affect the interpretation and application of this Act.



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

#### 4 Aboriginal objects excluded from operation of Act

- (1) This Act does not apply to an Aboriginal object and an Aboriginal object is not a record for the purposes of this Act.
- (2) In this section, **Aboriginal object** has the same meaning as in the [National Parks and Wildlife Act 1974](#).

#### 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.
- (2) A State record that is a private record in the collection of a State collecting institution ceases to be a State record if the institution ceases to exist.
- (3) Subject to subsections (4) and (5), Parts 2, 4 and 6 do not apply to a State record taken into the collection of a State collecting institution, other than a prescribed State collecting institution, before 1 January 1999.
- (4) The Authority may enter into an agreement with a State collecting institution that provides that 1 or more provisions of Part 2 that relate to functions conferred on the Authority apply, with or without modification, to records taken into the institution's collection before 1 January 1999.
- (5) Museums of History NSW may enter into an agreement with a State collecting institution that provides that 1 or more provisions of Part 2, 4 or 6 that relate to functions conferred on Museums of History NSW apply, with or without modification, to records taken into the institution's collection before 1 January 1999.
- (6) If a provision of this Act would otherwise require Museums of History NSW to enter into an agreement with, or obtain the consent of, Museums of History NSW, the agreement is taken to have been entered into, or the consent obtained, without further steps needing to be taken.
- (7) In this section—

**private record** means a record that is only a State record because it was taken into the collection of a State collecting institution in the circumstances set out in section 3(1), definition of **State record**.

#### 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 Museums of History NSW is entitled to control of under this Act) the public office that would be entitled to control of the record if Museums of History NSW 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 or received 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.
- (3A) Subsection (3) does not apply in relation to a political office holder within the meaning of the [Members of Parliament Staff Act 2013](#) to the extent that provision is otherwise made under that Act for the transfer of records relating to the political office holder to another public office.
- (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.
- (4A) However, if the defunct office whose functions have not devolved on another public office is a Royal Commission or Special Commission of Inquiry, the public office entitled to control of the record is the Cabinet Office.
- (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.
- (5) The Authority may issue a notice to a public office requiring the public office to, as directed by the notice—
  - (a) conduct an assessment of its record-keeping processes and records management program, and
  - (b) provide the Authority with a report on the findings arising from the assessment.
- (6) If the Authority is not satisfied with a report, or the findings of a report, referred to in subsection (5), the Authority may include information about this in the Authority's annual reporting information prepared under the [Government Sector Finance Act 2018](#).

## **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 Museums of History NSW.

##### **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. Museums of History NSW 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 Secretary 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 about operation of Act**

- (1) If there is a dispute between a public office and the Authority or Museums of History NSW about the operation of this Act as it relates to a function conferred on the Authority or Museums of History NSW, either party may request a review of the matter by—

- (a) the Ministers responsible for each party, or
  - (b) if the same Minister is responsible for both parties—the Minister responsible for both parties.
- (2) The parties must make a reasonable effort to resolve the dispute before requesting a review.
  - (3) A decision of the Authority to permit or not to permit, or to approve a practice or procedure involving, an act referred to in section 21(1) may not be reviewed.
  - (4) If the dispute is not resolved by the responsible Minister or Ministers, it must be referred to—
    - (a) the Premier, or
    - (b) another Minister designated by the Premier in a particular case.
  - (5) Both parties must comply with a direction given by the Premier or the designated Minister to resolve the dispute.

#### **18 Special agreements with public offices exercising inter-government functions**

- (1) This section applies to public offices that exercise functions (***inter-government functions***) jointly or in cooperation with a public body of the Commonwealth, another State or a Territory, under a law or an agreement or other arrangement between governments.
- (2) The Authority or Museums of History NSW may, as it relates to functions conferred on the Authority or Museums of History NSW, respectively, enter into an agreement with the public office that provides for the rights and obligations of the public office in relation to making, keeping, protecting, controlling or providing access to records relating to the exercise of inter-government functions.
- (3) The agreement may exclude or modify the application of 1 or more provisions of Part 2, 4 or 6 to specified records.
- (4) A term of the agreement prevails over a provision of this Act to the extent of an inconsistency.

#### **19 Records storage facilities and other services**

- (1) Museums of History NSW can provide services (including assistance, advice and training) in all areas of records management, including creation, scheduling, storage and disposal.
- (2) In particular, Museums of History NSW 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 Museums of History NSW—
  - (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), and
  - (d) can be provided within and outside the State, including outside Australia.
- (4) Museums of History NSW 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 annual reporting information prepared for it under the [Government Sector Finance Act 2018](#) 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—100 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,
  - (g) the transfer or disposal, in accordance with the *Members of Parliament Staff Act 2013*, of a record of information created or received by a political office holder (within the meaning of that Act) or the staff of such an office holder.
- (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) The regulations may prescribe guidelines on what constitutes 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**

- (1) Museums of History NSW must not dispose, or permit the disposal, of a State record in the possession of Museums of History NSW, unless the public office responsible for the record has consented to its disposal.
- (2) This section does not apply to a record once it becomes 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 Chief Executive of the Office of Environment and Heritage on the need to preserve the record.
- (2) The Authority and the Chief Executive may enter into arrangements for excluding particular records or classes of records from the operation of this section.

**Part 4 Museums of History NSW 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 Museums of History NSW—
  - (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) Museums of History NSW 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 Museums of History NSW entitled 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 Museums of History NSW 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 Museums of History NSW 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 Museums of History NSW 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 Museums of History NSW 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) Museums of History NSW 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 Museums of History NSW if it is not approved by the Minister within 3 months after the 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 Museums of History NSW**

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

### **30 How Museums of History NSW takes control of a record**

- (1) Museums of History NSW 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 Museums of History NSW 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 Museums of History NSW not required to take control of records**

- (1) Museums of History NSW is not required to take control of a State record just because it is entitled to control of the record.
- (2) The fact that Museums of History NSW does not take control of a State record when it becomes entitled to do so does not prevent Museums of History NSW from subsequently taking control of the record in exercise of its entitlement to do so.

### **32 Museums of History NSW can be required to take control of records in some cases**

- (1) If Museums of History NSW 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 Museums of History NSW to take control of the record.
- (2) Museums of History NSW must comply with the request within a reasonable time after

it is made unless—

- (a) Museums of History NSW and the public office enter into an agreement under which the public office is to keep control of the record, or
  - (b) Museums of History NSW 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 Museums of History NSW, or
  - (d) Museums of History NSW 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.
- (4) Each public office must make arrangements with Museums of History NSW for, and provide information to Museums of History NSW in connection with, the transfer of State records under this section as prescribed by the regulations.

### **33 Entitlement to control does not affect other interests in State records**

The entitlement that Museums of History NSW has to control 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 entitlement that Museums of History NSW has to control a State record under this Part does not operate to confiscate the record and vest ownership of it in Museums of History NSW or the State. It gives Museums of History NSW 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 Museums of History NSW 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 Museums of History NSW 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 Museums of History NSW 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) Museums of History NSW is entitled to charge a public office for the reasonable expenses that Museums of History NSW 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 Museums of History NSW 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.

### **36A Arrangements to copy, publish or give access to State archives**

- (1) Museums of History NSW may enter into an arrangement (an **access arrangement**) with a person, including a person outside the State, under which Museums of History NSW gives the person access to State archives that are open to public access under this Act to enable the person to make, publish or give other persons access to, copies of the State archives.
- (2) The access arrangement may—
  - (a) allow the person to alter copies of the State archives, or
  - (b) provide for the way the person can make, publish or give other persons access to, copies of the State archives, including arrangements for publishing or giving access to copies outside the State, or
  - (c) allow the person to charge a fee for publishing or giving access to copies of the State archives.
- (3) The access arrangement may be a commercial arrangement under which the person is required to pay a fee to Museums of History NSW.

- (4) If the access arrangement allows the person to give other persons access to copies of the State archives, section 62 extends to the giving of access by the person under the arrangement in the same way the section applies to the giving of access to a record under this Act by an access provider.
- (5) This section does not—
  - (a) give Museums of History NSW power to override a right in the nature of copyright, or
  - (b) give a party to an access arrangement power to do something that would be an infringement of copyright.

## 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 Museums of History NSW 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. Museums of History NSW 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) Museums of History NSW may give a direction in writing to a person who has possession or custody of a record that Museums of History NSW believes to be an estray directing the person to produce the record for inspection by Museums of History NSW at any reasonable time and place determined by Museums of History NSW and specified in the direction.
- (2) A person who is given such a direction must comply with it.  
Maximum penalty—50 penalty units.
- (3) Museums of History NSW can make and retain a copy of any record produced to Museums of History NSW 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 Museums of History NSW—
  - (a) Museums of History NSW 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 Museums of History NSW waive (wholly or partly) the restrictions imposed by subsection (3).
- (5) This section does not authorise Museums of History NSW to infringe any copyright.

### **40 Directions for protection of estrays**

- (1) Museums of History NSW may give any person who has possession or custody of a record that Museums of History NSW 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 Museums of History NSW—
  - (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) Museums of History NSW can revoke a direction under this section at any time by notice in writing to the person to whom the direction applies.
- (4) If Museums of History NSW 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 Museums of History NSW.

#### **41 Directions and assistance to public offices for recovery of estrays**

Museums of History NSW may give directions to a public office that Museums of History NSW considers is responsible for a record that is an estray to take such steps as Museums of History NSW 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 Museums of History NSW under this section. Museums of History NSW may assist a public office to recover possession of an estray.

#### **42 Court action to recover estrays**

- (1) Museums of History NSW 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 Museums of History NSW has commenced proceedings to recover possession of an estray, Museums of History NSW may direct any person who has possession of the estray to give possession of the record to Museums of History NSW 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 Museums of History NSW 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**

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



#### **45 Power of Museums of History NSW to obtain State records of archival significance**

- (1) Museums of History NSW can apply to a court of competent jurisdiction for an order for possession of a State record that Museums of History NSW 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 Museums of History NSW 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 Museums of History NSW 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 Museums of History NSW for the value of that loss.
- (5) The amount of that compensation is to be determined by Museums of History NSW 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 Museums of History NSW.
- (6) This section applies to a State record whether or not it is an estray. No limitation period operates to bar the rights of Museums of History NSW under this section.

#### **46 Directions to protect State records of archival significance**

- (1) Museums of History NSW 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 Museums of History NSW.
- (3) When an application under section 45 is pending in respect of a record, Museums of History NSW 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 Museums of

History NSW 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) Museums of History NSW may revoke a direction under this section at any time by notice in writing.

#### **47 Museums of History NSW can acquire State records**

- (1) Museums of History NSW can acquire by purchase on behalf of the State any State record that Museums of History NSW considers to be of archival significance.
- (2) Museums of History NSW 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 Museums of History NSW 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. Museums of History NSW 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) Museums of History NSW 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 Museums of History NSW, exercise on behalf of Museums of History NSW in that body's jurisdiction any function conferred on Museums of History NSW 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 20 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 Museums of History NSW—
  - (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) Museums of History NSW 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 20 years old. A record is taken to be 20 years old when 20 years have elapsed since it came into existence or since the original record of which it is a copy came into existence.

### 51 Access directions for records in open access period

- (1) A State record is deemed to be the subject of an OPA direction on the commencement of the record's open access period, unless the record is already the subject of a CPA direction.
- (2) A public office may give a CPA direction for a State record that it is responsible for, whether before or after the commencement of the record's open access period.
- (3) A CPA direction—
  - (a) does not affect other entitlements to access that arise independently of this Act, and
  - (b) does not prevent access to the record from being given voluntarily.

- (4) Any person is entitled to be given access to a record that is open to public access as provided by this Part.
- (5) This Part does not prevent the giving of access to a State record independently of this Act, whether or not the record is in the open access period.

## **52 Deciding whether to open or close records to public access**

- (1A) When making an assessment as to whether records should be open or closed to public access under this Act, a public office must have regard to the presumption that State records in the open access period should be open to public access under this Act.
- (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 20 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 (Repealed)**

### **55 Procedures for giving and revoking access directions**

- (1) An access direction is to be given to Museums of History NSW in writing in a form approved by Museums of History NSW.
- (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),
  - (b) by giving a CPA direction (to revoke an OPA direction),
  - (c) in compliance with a direction of the responsible Minister under section 55A (3) (b).
- (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).

- (6) A public office that gives a CPA direction for a State record must provide its reasons for giving the direction to Museums of History NSW if requested.

#### **55A Review of access directions by responsible Minister**

- (1) Museums of History NSW may request the public office responsible for a State record that is the subject of an access direction to have the direction reviewed by the Minister responsible for the public office (***the responsible Minister***).
- (2) Such a review is to be finalised within 3 months after the request is made by Museums of History NSW and may be carried out in consultation with Museums of History NSW.
- (3) The responsible Minister finalises the review by—
- (a) confirming the access direction, or
  - (b) directing the public office to revoke the access direction and replace it with another access direction specified in the direction.

#### **Note—**

For example, the responsible Minister's direction could require that a CPA direction be replaced with an OPA direction, or with another CPA direction of a different duration.

- (4) A public office must comply with a direction of the responsible Minister within 14 days. An access direction given in compliance with such a direction cannot be revoked except with the permission of the responsible Minister or Museums of History NSW.

#### **Note—**

OPA directions remain in force until revoked. CPA directions remain in force for the period specified in the direction unless revoked or renewed sooner. The prohibition on revocation in subsection (4) does not prevent a CPA direction being renewed, or being given again after it has lapsed.

- (5) If the review is not finalised within 3 months after the review was requested, or the responsible public office does not comply with a direction of the responsible Minister within 14 days after it is given, the access direction under review is revoked (with the result that there is no access direction for the records concerned). An access direction of the same kind as the revoked access direction cannot be given again for the records concerned without the permission of Museums of History NSW.

#### **Note—**

The 2 ***kinds*** of access direction are an OPA direction and a CPA direction.

#### **56 Access still available under [Government Information \(Public Access\) Act 2009](#)**

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

entitlement to obtain access to information contained in the record under the *Government Information (Public Access) Act 2009*.

**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 *Government Information (Public Access) Act 2009*.

**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 early public access to the record under this Act and notifying Museums of History NSW that it has authorised that 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 Museums of History NSW.
- (2A) In assessing whether to authorise early public access to State records under this Act, a public office is to apply the principles established by section 52 for an assessment under that section. The power conferred by subsection (1) is exercisable at the absolute discretion of the public office concerned and this subsection does not limit the exercise of that discretion.
- (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) Museums of History NSW 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) (Repealed)
- (3) Museums of History NSW is to provide a copy of a record that is not open to public access under this section if the Museums of History NSW 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 [Government Information \(Public Access\) Act 2009](#).
- (4) Museums of History NSW is entitled to charge a fee determined by Museums of History NSW for providing a copy of a record under this section.
- (5) A person aggrieved by a direction of Museums of History NSW 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. Museums of History NSW 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 (the **access provider**) is—
  - (a) if the record is under the control of Museums of History NSW—Museums of History NSW, or
  - (b) otherwise—the public office that has control of the record.
- (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**

Museums of History NSW 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, including under an access arrangement—
  - (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 Museums of History NSW 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.
- (3) In this section—

***access arrangement*** has the same meaning as in section 36A.

## **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 State Records Authority NSW.
- (2) The Authority is, for the purposes of any Act, a statutory body representing the Crown.
- (3) (Repealed)

### **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 oversee record-keeping by public offices of the State, including by determining standards and providing advice,
  - (b) to identify State records that have enduring value and should be retained as State archives,
  - (c) other functions conferred on it by this Act or another Act or law.
- (2) The Authority has power to do all things that are supplemental or incidental to the exercise of the Authority's functions.
- (3) The Authority has power to charge and receive fees for a service provided by the Authority 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 member of staff of the Authority, or
  - (b) a person of a class prescribed by the regulations.

#### **68 Staff**

Persons may be employed in the Public Service under the [Government Sector Employment Act 2013](#) to enable the Authority to exercise its functions.

**Note—**

Section 59 of the [Government Sector Employment Act 2013](#) provides that the persons so employed (or whose services the Authority makes use of) may be referred to as officers or employees, or members of staff, of the

Authority. Section 47A of the *Constitution Act 1902* precludes the Authority from employing staff.

## **69 Establishment of Board**

- (1) There is a Board of the Authority.
- (2) The Board consists of 9 members, including—
  - (a) the Chief Executive Officer of Museums of History NSW, or a delegate of the Chief Executive Officer, and
  - (b) the following members appointed by the Governor—
    - (a) 3 persons nominated by the Minister who administers this Act,
    - (b) 2 persons nominated by the Minister who administers the *Government Sector Employment Act 2013*, to represent Public Service agencies,
    - (c) 1 person nominated by the Minister who administers the *State Owned Corporations Act 1989*, to represent State owned corporations,
    - (d) 1 member or officer of either House of Parliament nominated jointly by the President of the Legislative Council and the Speaker of the Legislative Assembly,
    - (e) 1 judge of a court of the State nominated by the Chief Justice of New South Wales.
- (3) In relation to the persons nominated by the Minister who administers this Act—
  - (a) 1 must have knowledge of, or experience in, the use of State records, and
  - (b) 1 must have knowledge of, or experience in, history, and
  - (c) 1 must have knowledge of, or experience in, First Nations cultures.
- (4) (Repealed)
- (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 relating to contravention of Act**

- (1) The Supreme Court may, on the application of the following, grant an injunction relating to the contravention or possible contravention of a provision of this Act—
  - (a) for a provision relating to functions conferred on the Authority—the Authority,
  - (b) for a provision relating to functions conferred on Museums of History NSW—Museums of History NSW.
- (2) The terms of the injunction may—
  - (a) restrain a person from engaging in conduct that would contravene a provision of this Act, or
  - (b) require a person to do an act or thing to remedy conduct that contravenes a provision of this Act.
- (3) The Supreme Court may grant an interim injunction pending determination of an application made under this section.
- (4) The Supreme Court may discharge or vary an injunction or interim injunction granted under this section.
- (5) The Supreme Court may not require an undertaking as to damages or costs in relation to an application made under this section.

#### **73 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 20 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**

- (1) A protected person is not personally subject to liability for anything done or omitted to be done—
  - (a) in good faith, and
  - (b) for the purpose of exercising a function under this Act.
- (2) The liability attaches to the Crown instead.
- (3) In this section—

**liability—**

  - (a) means civil liability, and

(b) includes an action, claim or demand.

**protected person** means—

(a) a member of the Board, or

(b) the Director, or

(c) a person acting under the direction of the Authority, the Board or the Director.

## **75 Copying and publishing of State archives**

(1) Museums of History NSW may make copies of, or publish, a State archive.

(2) Museums of History NSW may certify a copy it has made of a State archive as a true copy.

(3) A certified true copy—

(a) has the same validity and effect as the original State archive, and

(b) is admissible in evidence in legal proceedings as if the copy were the original.

(4) This section does not give Museums of History NSW power to—

(a) override a right in the nature of copyright, or

(b) do something that would be an infringement of copyright.

## **76 Copyright in State archives**

Museums of History NSW 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 or Museums of History NSW to the effect that a specified State record has been lost or destroyed is conclusive evidence of the matter certified.

## **78 Proceedings for offences**

(1) Proceedings for an offence against this Act or the regulations are to be taken before the Local Court.

(2) Despite anything in the [Criminal Procedure Act 1986](#), proceedings for an offence against section 21 may be commenced not later than 3 years from when the offence was alleged to have been committed.

**Note—**

Section 179 of the *Criminal Procedure Act 1986* has the effect that proceedings for an offence against a section of this Act other than section 21, or for an offence against the regulations, may be commenced not later than 6 months from when the offence was alleged to have been committed.

### **78A Transferred provision—Olympic Environmental Legacy Archive**

- (1) The Authority is to maintain the documents deposited under section 22 of the *Sydney 2000 Games Administration Act 2000* (as in force immediately before its repeal) as a discrete part of the State archives, under the name of “The Olympic Environmental Legacy Archive”.
- (2) This Act applies to and in respect of the documents deposited under that section as if those documents were State records no longer in use for official purposes within the meaning of this Act.
- (3) Subsections (1) and (2) re-enact (with minor modifications) section 23 of the *Sydney 2000 Games Administration Act 2000*. Subsections (1) and (2) are transferred provisions to which section 30A of the *Interpretation Act 1987* applies.

### **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 (Repealed)**

## **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 6 of the [Government Sector Employment Act 2013](#), 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) The provisions of the *Government Sector Employment Act 2013* relating to the employment of Public Service employees do not apply to 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)

### Part 1 Savings and transitional regulations

#### 1A Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as—
  - (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.

### Part 2 Provisions consequent on enactment of this Act

#### 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 (Repealed)**

# **Part 3 Provisions consequent on enactment of [State Records Amendment Act 2005](#)**

## **11 Meaning of “amending Act”**

In this Part, **amending Act** means the [State Records Amendment Act 2005](#).

## **12 Operation of amendment concerning provision of services**

The amendment of section 19 (3) by the amending Act is for the avoidance of doubt and accordingly is taken to have had effect from the commencement of section 19.

## **13 Application of amendment to existing applications to open records to public access**

The amendment of section 54 (3) by the amending Act does not apply to an application made under section 54 before the commencement of that amendment.

## **14 Validation concerning corporate name of Authority**

The use of the corporate name State Records NSW before the commencement of the amendment of section 63 made by the amending Act is as valid and effectual as it would have been had the amendment been in force at the time of use.

## **15 Limitation period for existing offences not affected**

Section 78 (2), as inserted by the amending Act, does not apply in relation to an offence that was committed or is alleged to have been committed before the commencement of that subsection.

# **Part 4 Provisions consequent on enactment of [Statute Law](#)**



## (Miscellaneous Provisions) Act (No 2) 2016

### 16 Change of name of the Authority

The amendment of section 63 (1) by the *Statute Law (Miscellaneous Provisions) Act (No 2) 2016* effects the alteration of the name of the Authority in terms of section 53 of the *Interpretation Act 1987* and accordingly that section applies.

## Part 5 Provision consequent on repeal of Occupational Licensing National Law Repeal Act 2015 by Statute Law (Miscellaneous Provisions) Act 2018

### 17 Transferred provision—records of dissolved entities in custody of NSW Treasury

- (1) This Act and other laws of New South Wales apply to the transferred records, and so apply as if they were the records of NSW Treasury.
- (2) In this clause, **transferred records** means the records of an entity dissolved by the *Occupational Licensing National Law Repeal Act 2015* (as in force immediately before its repeal) that were transferred by the operation of section 8 of that Act to the custody of NSW Treasury.
- (3) Subclause (1) re-enacts (with minor modifications) section 8 (2) of the *Occupational Licensing National Law Repeal Act 2015* and is a transferred provision to which section 30A of the *Interpretation Act 1987* applies.

## Part 6 Provisions consequent on enactment of Museums of History NSW Act 2022

### 18 Definitions

In this Part—

**amending Act** means the *Museums of History NSW Act 2022*.

**commencement day** means the day on which the amending Act, Schedule 3 commences, in whole or in part.

**transferred function** means a function of Museums of History NSW under this Act, section 19, Parts 4–6 or section 76 that was a function of the Authority before the commencement day.

### 19 Alteration of name of Authority

The *Interpretation Act 1987*, section 53(1) applies to the alteration of the name of the Authority effected by the amendment of section 63(1) by the amending Act.

## **20 Alteration of constitution of Authority**

The *Interpretation Act 1987*, section 53(2) applies to the alteration of the constitution of the Authority effected by the amendment of section 69 by the amending Act.

## **21 Transfer of certain functions of Authority to Museums of History NSW**

- (1) On and from the commencement day—
- (a) all State archives, State records and other assets controlled or held by the Authority in connection with the exercise of a transferred function are transferred to the control and management of Museums of History NSW, and
  - (b) the liabilities and rights of the Authority relating to a transferred function become the liabilities and rights of Museums of History NSW, and
  - (c) all proceedings relating to a transferred function commenced by or against the Authority and pending before the commencement day are taken to be proceedings pending by or against Museums of History NSW, and
  - (d) all contracts, agreements, arrangements and undertakings entered into with the Authority in connection with a transferred function and in force immediately before the commencement day are deemed to be entered into with Museums of History NSW, and
  - (e) an act, matter or thing done or not done in connection with a transferred function by or on behalf of the Authority before the commencement day is, to the extent that the act, matter or thing has force or effect, taken to have been done or not done by or on behalf of Museums of History NSW, and
  - (f) Museums of History NSW has the entitlements and obligations, whether actual or potential, of the Authority in relation to a transferred function.
- (2) The operation of this clause is not to be regarded as—
- (a) a breach of contract or confidence or otherwise as a civil wrong, or
  - (b) a breach of a contractual provision prohibiting, restricting or regulating the assignment or transfer of an asset, liability or right, or
  - (c) an event of default under a contract or other instrument, or
  - (d) giving rise to a remedy by a party to an instrument, or as causing or permitting the termination of an instrument, because of a change in the beneficial or legal ownership of an asset, liability or right.

## **Schedule 4 (Repealed)**