

Chapter 2

Concluded matters

This chapter sets out matters which have been concluded following the receipt of additional information from ministers.

Correspondence relating to these matters is available on the committee's website.¹

Instrument	Archives Regulations 2018 [F2018L00343]
Purpose	Provides for procedural and technical matters in support of the legislative framework for the management of Commonwealth records by the National Archives of Australia
Authorising legislation	<i>Archives Act 1983</i>
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled Senate 26 March 2018) Notice of motion to disallow must be given by 14 August 2018 ²
Previously reported in	<i>Delegated legislation monitor No 5 of 2018</i>

Unclear basis for determining fees³

Committee's initial comment:

Section 15 of the instrument contains a table specifying amounts or rates of charges for the provision of various discretionary services by the National Archives of Australia (Archives) to persons other than Commonwealth institutions. These relate to services such as the transport, storage, searching and destruction of records, and provision of training.

The committee's usual expectation in cases where an instrument carries financial implications via the imposition of or change to a charge, fee, levy, scale or rate of costs or payment is that the explanatory statement (ES) will make clear the specific basis on which an individual imposition or change has been calculated: for example, on the basis of cost recovery, or based on other factors. This is, in particular,

1 See www.aph.gov.au/regords_monitor.

2 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

3 Scrutiny principle: Senate Standing Order 23(3)(a).

to assess whether such fees are more properly regarded as taxes, which require specific legislative authority.

The committee notes that subsection 71(e) of the *Archives Act 1983* (Archives Act) provides that regulations made under the Act may make provision for charges in respect of the provision of prescribed discretionary services for persons other than Commonwealth institutions. However, the ES to the instrument does not specify the basis on which any of the fees in section 15 have been calculated. It merely states that section 15 of the instrument has the same effect as equivalent provisions in the previous regulations.

The committee requests the minister's advice as to the basis on which each of the fees in section 15 of the instrument has been calculated.

Minister's response

The Attorney-General advised:

In remaking the Regulations, section 15 prescribes the charges payable for discretionary services for persons other than Commonwealth institutions in accordance with the charges prescribed in regulations 10 and 11 and Schedule 1 of the former Regulations.

The National Archives of Australia (the Archives) has advised that the charges for discretionary services were calculated on a partial cost-recovery basis in accordance with the Department of Finance's guidelines in 1990 when the charges were first introduced, in the *Archives Regulations (Amendment) 1990 No. 393*. There were adjustments made to the charges in 1991, 1995, and 1998 in accordance with relevant government financial guidelines, in the *Archives Regulations (Amendment) 1991 No. 159*, *Archives Regulations (Amendment) 1995 No. 260*, and *Archives Regulations (Amendment) 1998 No. 273*. There have been no further increases to the charges since 1998. As such, the fees continue to reflect a partial cost-recovery of the costs actually incurred by the Archives in providing the services.

Committee's response

The committee thanks the Attorney-General for his response. The committee notes the Attorney-General's advice that the fees prescribed by section 15 of the instrument reflect partial recovery of the costs incurred by the Archives in providing discretionary services.

The committee considers that it would be appropriate for this information to be included in the ES, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

In this regard, the committee also emphasises that the fact that provisions replicate those in a previous instrument, or in similar instruments, will not of itself address the committee's scrutiny concerns.

The committee has concluded its examination of this matter.

Broad delegation of administrative powers⁴

Committee's initial comment:

Section 10 of the instrument makes provision for giving written notices of approval for the disposal, destruction, transfer or alteration of Commonwealth records under sections 24 and 26 of the Archives Act. Subsection 10(3) provides that the Director-General of the Archives may authorise, in writing, 'a person' to give such approvals.

The committee's expectations in relation to broad delegation of administrative powers accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegation to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee considers that a limit should be set in legislation on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices, to those who possess appropriate qualifications or attributes, or to members of the senior executive service.

The ES notes the significance of the powers able to be conferred under subsection 10(3) of the instrument:

An authorised person would be able to authorise the destruction of Commonwealth records. Given the significance of this power, it is important for a person authorised by the Director-General to hold subject matter expertise, or other appropriate skills and qualifications and attributes required of an authorised person.

...Under current arrangements, the Director-General has authorised the Assistant Director-General, Access and Communication Branch and the Director of Commonwealth Information Policy. The persons occupying these positions have the seniority and subject matter expertise necessary to approve the giving of the permission, notification or authorisation.

While the committee acknowledges that appropriate care appears to be being exercised in relation to authorisation as a matter of policy, the committee remains concerned that there is no legislative requirement that a person to whom these powers are delegated possess appropriate qualifications or attributes to ensure the proper exercise of the powers. Moreover, it is not clear to the committee whether

4 Scrutiny principle: Senate Standing Order 23(3)(a).

the 'person' authorised under subsection 10(3) need be an Archives or APS employee, or whether any member of the public could legally be authorised to approve the disposal, destruction, transfer or alteration of Commonwealth records.

The committee's expectation is not necessarily that details of the qualifications and attributes for authorised persons be specified in the instrument; rather, that it should include a requirement that the Director-General be satisfied that the person has the relevant qualifications and attributes to properly exercise the powers delegated.

The committee seeks the minister's advice as to:

- whether there are any legislative limits on who may be authorised by the Director-General under subsection 10(3) of the instrument;
- if not, why it is necessary or appropriate that a person who is not a public servant may be able to be authorised to exercise powers under the subsection; and
- the appropriateness of amending the instrument to require that the Director-General be satisfied that persons authorised have the expertise appropriate to the power delegated.

Minister's response

The Attorney-General advised:

Section 10 of the Regulations prescribes the manner in which the Archives may give permission for dealings with Commonwealth records for the purposes of sections 24 and 26 of the Archives Act. It provides that this must be by written notice signed by the Director-General of the Archives or by a person authorised by the Director-General. Section 10 adopts the provisions for dealings with Commonwealth records, without substantive change, from the provisions in regulation 4 of the former Regulations.

Under section 8 of the Archives Act, the Director-General may delegate all or any of his powers to any person. The Director-General has authorised two members of staff of the Archives to give written notices of approval for the disposal, destruction, transfer and alteration of Commonwealth records under sections 24 and 26 of the Archives Act.

The staff members are the Assistant Director-General, Collection Management and the Director, Commonwealth Information Policy (who are both persons engaged under the *Public Service Act 1999* as staff members of the Archives). These individuals are the only persons who hold delegations from the Director-General to exercise the powers in sections 24(2)(b), 24(2)(c) and 26(2)(b) of the Archives Act in respect of Commonwealth records. In practice, the authorisation under section 10 of the Regulations enables the delegate to give effect to his or her exercise of these powers, by giving a written notice. A copy of the delegation

instrument is enclosed for reference, with the relevant delegations listed from page 2 onwards.

However, responding to the Committee's concern in this matter, I propose to amend the Regulations at the next available opportunity in accordance with the Committee's suggestion to require that the Director-General be satisfied that persons authorised have the expertise appropriate to the power delegated.

Committee's response

The committee thanks the Attorney-General for his response. The committee notes the Attorney-General's advice that the authorisation power under subsection 10(3) of the instrument is consistent with the Director-General's power to delegate all or any of his or her powers to 'any person' under section 8 of the Archives Act. The committee further notes the advice that while this is a very broad power of delegation, only two persons—both senior officers of the Archives—are currently authorised under subsection 10(3) of the instrument to give notices of approval for the disposal, destruction, transfer and alteration of records under sections 24 and 26 of the Act.

The committee considers that further legislative safeguarding of these powers is important, given the breadth of the authorisation power and the significance of the functions concerned. The committee therefore welcomes the Attorney-General's undertaking to amend the instrument to require that the Director-General be satisfied that persons authorised have the expertise appropriate to the power delegated.

The committee has concluded its examination of the instrument.