

ARCHIVES (DISCRETIONARY SERVICE CHARGES) DETERMINATION 2023

EXPLANATORY STATEMENT

Issued by authority of the National Archives of Australia

in compliance with section 15J of the *Legislation Act 2003*

PURPOSE AND OPERATION OF THE INSTRUMENT

The purpose of the *Archives (Discretionary Service Charges) Determination 2023* (the **Determination**) is to determine an amount or rate of charge for a discretionary service provided to an Australian Government agency – as a Commonwealth institution – by the National Archives of Australia (the **National Archives**).

Section 69A of the *Archives Act 1983* (the **Act**) enables the Director-General of the National Archives to make a charge for discretionary services that are provided to a Commonwealth institution.

‘Discretionary services’ are defined in subsection 3(3A) of the Act as the doing of an act by the National Archives, being an act that the National Archives has power to do and that it does at the person’s request, other than an act that:

- (a) the Act requires the National Archives to do; or
- (b) it is necessary for the National Archives to do for the proper performance of its functions.

The Determination is a disallowable legislative instrument within the meaning of the *Legislation Act 2003* (the **LA**).

CONSULTATION

Under subsection 17(1) of the **LA** consultation was not appropriate or reasonably practicable to undertake.

The Determination is of a minor or machinery nature and only applies to Commonwealth institutions. It is also not considered reasonably practicable to consult Commonwealth institutions on these charges. These charges will apply to all Commonwealth institutions. While these institutions have been informed that the National Archives was undertaking a review of its fees and charges and that existing fees and charges will be increased in line with the Consumer Price Index, undertaking consultation with all Commonwealth institutions on these changes is not reasonably practicable within the meaning of subsection 17(1) of the **LA** given time and complexity considerations. Further,

receiving and reviewing comments from all Commonwealth institutions would likely have little impact to the changes themselves.

The Determination updates the amount or rate the National Archives can charge Commonwealth institutions for a range of discretionary services. A new costing model applies to charging, broadening the scope of discretionary services that can now be charged for beyond services related to storage and records management. Charges can now be applied for the provision to Commonwealth institutions of certification and copying services; materials testing; professional services such as training; and for a range of access-related services.

The revised charges are necessary to:

- reflect the breadth of discretionary services provided by the National Archives to Commonwealth institutions
- preserve original archival records by reducing the impact of handling
- protect nationally significant records from loss or alteration
- support the Australian Government's digital transformation agenda by providing digital copies which can be shared and re-used
- ensure access to archival material can be provided in an efficient and timely manner
- meet the rapidly increasing costs for the National Archives in providing these services

REGULATION IMPACT STATEMENT

Following submission of a Regulation Impact Statement Preliminary Assessment, the Office of Impact Analysis has advised that the proposal is unlikely to have a regulatory impact on business, individuals or community organisations. Therefore, the preparation of a Regulation Impact Statement is not required.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

A Statement of Compatibility under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* is at **Attachment B**.

NOTES ON SECTIONS

Section 1 – Name of Determination

This section provides for the Determination to be cited as the *Archives (Discretionary Service Charges) Determination 2023* (the **Determination**).

Section 2 – Commencement

This section provides for the Determination to commence on 11 September 2023.

Section 3 – Authority

This section identifies the provision of the *Archives Act 1983* (the **Act**) that authorises the making of the Determination, namely section 69A of the Act.

Section 4 – Definitions

This section sets out the definitions for various terms used in the Determination. These definitions are relevant to the rates of charge that apply in Section 6.

Section 5 – Schedules

This section describes the effect of Schedule 1 to the Determination, which is to repeal the existing determinations which set out the current amount or rate of charge that can be applied by the National Archives for discretionary services provided to Commonwealth institutions. This includes the repeal of the *Archives (Discretionary Service Charges) Determination 2021* (which sets out existing rates for charging for storage services) and the *Archives (Discretionary Service Charges – Agency Digitisation) Determination 2021* (which sets out existing rates for charging for digitisation services)

Section 6 – Charges for discretionary services

This section sets out the amount or rate of charge the National Archives may charge Commonwealth institutions for the provision of a range of discretionary services.

SCHEDULE 1 – Repeal of previous Determination

Schedule 1 repeals both the *Archives (Discretionary Service Charges) Determination 2021* and the *Archives (Discretionary Service Charges – Agency Digitisation) Determination 2021*.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Archives (Discretionary Service Charges) Determination 2023

This Determination is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Determination

The Determination repeals and replaces both the *Archives (Discretionary Service Charges) Determination 2021* and the *Archives (Discretionary Service Charges – Agency Digitisation) Determination 2021* to set updated charges for discretionary services provided by the National Archives to Commonwealth institutions.

The purpose of the Determination is to determine an amount or rate of charge for a discretionary service provided to an Australian Government agency – as a Commonwealth institution – by the National Archives.

Section 69A of the Act enables the Director-General of the National Archives to make a charge for discretionary services that are provided to a Commonwealth institution. ‘Discretionary services’ are defined in subsection 3(3A) of the Act as the doing of an act by the National Archives, being an act that the National Archives has power to do and that it does at the person’s request, other than an act that:

- (a) the Act requires the National Archives to do; or
- (b) it is necessary for the National Archives to do for the proper performance of its functions.

The Determination is a legislative instrument within the meaning of the *Legislation Act 2003*.

The new Determination would ensure that updates to existing discretionary services charges, as well as charges for new types of discretionary services to Commonwealth institutions, are made by the most efficient regulatory means. It ensures these discretionary services can be provided and will be adequately resourced. The revised approach to charging is consistent with the current means by which charges for discretionary services are made by the National Archives to Commonwealth institutions.

Human rights implications

The new Determination engages the right to freedom of opinion and expression, in Article 19(2) of the *International Covenant on Civil and Political Rights*, which includes the right to receive information. The right to freedom of opinion and expression is not absolute. Relevantly, Article 19(2) provides:

‘Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.’

In General Comment No. 34 on Article 19 (CCPR/C/GC/34) the Human Rights Committee states at paragraph 19 that fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. The new Determination is consistent with these requirements, as the fees apply to Commonwealth institutions only, rather than the general public. The National Archives considers that any limitation on the right to information is a reasonable, necessary and proportionate means to fund discretionary services provided to Commonwealth institutions adequately, and by extension to provide manageable and sustainable access to Commonwealth records into the future.

These measures are not intended to prevent or limit access to Commonwealth records or be intrusive and do not disproportionately affect any particular group.

Conclusion

This Determination is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.