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HOUSE OF REPRESENTATIVES

**FREEDOM OF INFORMATION AMENDMENT (REFORM) BILL 2009**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Cabinet Secretary,  
Senator the Hon Joe Ludwig)

## **FREEDOM OF INFORMATION AMENDMENT (REFORM) BILL 2009**

### **General Outline**

The primary purpose of the Bill is to make major reforms to the *Freedom of Information Act 1982* (FOI Act) to promote a pro-disclosure culture across government and to build a stronger foundation for more openness in government.

These reforms arise from the Government's 2007 election commitments on reform to the FOI Act set out in the policy statement *Government information: restoring trust and integrity*. The reforms implement a number of the recommendations from the 1995 joint Australian Law Reform Commission and Administrative Review Council *Open government report* on the FOI Act, as well as other initiatives.

This Bill complements the proposed structural reforms to be implemented by the Information Commissioner Bill 2009. Those measures comprise the establishment of the Office of the Information Commissioner and the new independent statutory positions of Information Commissioner (as head of the Office) and FOI Commissioner. The existing statutory position of Privacy Commissioner will also be established within the Office of the Information Commissioner. In relation to FOI, the Information Commissioner, supported by the FOI Commissioner, will act as an independent monitor for FOI and will be entrusted with a range of functions designed to make the Office of the Information Commissioner both a clearing house for FOI matters and a centre for the promotion of the objects of the FOI Act.

The Freedom of Information Amendment (Reform) Bill contains amendments:

- directed at ensuring that the right of access to documents under the FOI Act is as comprehensive as it can be, limited only where a stronger public interest lies in withholding access to documents;
- to give greater weight to the role that the FOI Act serves in pro-active publication of government information; and
- to improve the request process under the FOI Act.

Schedule 1 of the Bill substitutes a new objects clause into the FOI Act which emphasises the reasons underlying the objects in giving the Australian community access to information held by the Government.

Schedule 2 overhauls Part II of the FOI Act and introduces a new information publication scheme for Commonwealth agencies that are subject to the FOI Act. The new scheme provides a statutory framework for pro-active publication of information by agencies. The purpose of the scheme is to allow the FOI Act to evolve as a legislative framework for giving access to information through agency driven disclosure rather than as a scheme that is primarily reactive to requests for documents.

Schedule 3 implements major changes for access to records under the *Archives Act 1983*. The open access period is to be brought forward from 30 years to 20 years for most Commonwealth records (other than a Cabinet notebook or a record containing Census information). The open access period for Cabinet notebooks is to be brought forward from 50 to 30 years. This Schedule also implements amendments to the exemption provisions in the FOI Act. A new, single form of public interest test is proposed which is weighted towards disclosure, and this new test is to be applied to

additional exemption provisions. Some exemption provisions will be repealed. Part IV of the FOI Act, which contains the exemption provisions, is to be reorganised to group together those provisions which are subject to the proposed public interest test (public interest conditional exemptions) and those which are not (exemptions).

Schedule 4 makes provision for certain key FOI functions of the Information Commissioner (which will also be performed by the FOI Commissioner). The Information Commissioner is to have a function of reviewing FOI decisions made by agencies and Ministers. FOI applicants will be able to apply for Information Commissioner review either directly from a decision at first instance or from an agency decision upon internal review. Both an applicant and an agency or Minister will have a right to apply to the Administrative Appeal Tribunal for review of a decision made by the Information Commissioner.

The Information Commissioner is also to have a function of investigating action taken by agencies under the FOI Act. The Commissioner may investigate action upon complaint or at the Commissioner's own motion. While the Ombudsman may still investigate complaints concerning action under the FOI Act, it is intended that the Information Commissioner will deal with most complaints of this kind. The merits review function and the investigation function provide different remedies. If a person is concerned with the correctness of a decision, the mechanism for remedy lies in an application for review. If a person is concerned with delay, or a failure to receive assistance, the mechanism for remedy lies in an investigation upon complaint.

A further measure in Schedule 4 gives the Information Commissioner the power to declare a person to be a vexatious applicant for the purposes of the FOI Act. The Information Commissioner may exercise that power if satisfied that a person's conduct involves an abuse of process (in connection with making applications under the Act) or if a particular request or application is manifestly unreasonable.

Schedule 5 contains proposed amendments that are consequential on the establishment of the Office of the Information Commissioner under the Information Commissioner Bill. These amendments primarily substitute references to the 'Privacy Commissioner' in other legislation with 'Information Commissioner'. All privacy and FOI functions are principally vested in the Information Commissioner under the Information Commissioner Bill. Amendments are also made to the Privacy Act as a consequence of the proposal to bring the Office of the Privacy Commissioner into the Office of the Information Commissioner.

Schedule 6 contains a number of other amendment proposals to improve the operation of the Act. This includes repealing provisions in the Act relating to the imposition of fees, empowering the Information Commissioner to extend time periods for processing requests in certain cases, and enhancing the consultation provision in connection with a provision addressing onerous requests.

A measure is included to extend the scope of the FOI Act to contracted service providers who are delivering services to the community for and on behalf of the Commonwealth. Other amendment proposals will introduce some limitations on access, including for intelligence agency information and a limited exclusion for certain documents of the Department of Defence.

Schedule 7 contains amendment proposals to address transitional issues for the new Office of the Information Commissioner, including for bringing the Office of the Privacy Commissioner into the new Office.

**Financial Impact Statement**

The amendments in this Bill will have minimal financial impact on Government revenue. While the requirement for FOI application fees is proposed to be removed, the total amount of application fees collected (only \$150,771 in 2007-2008) represents a very small fraction of the total cost of administering the FOI Act (approximately 0.5% in 2007-008).

There will be compliance and resource implications for agencies, such as revising training manuals, providing training for FOI decision makers and making necessary adjustments to comply with the new Information Publication Scheme (see Schedule 2), the level of which will vary from agency to agency. In relation to the proposal to bring forward the open access period for most Commonwealth records from 30 years to 20 years, the greater volume of records which will need to be examined over the transition period will have resource implications for some agencies, especially the National Archives of Australia.

**Regulation Impact Statement**

No regulation impact statement is required for the measures contained in this Bill.

## Notes on Clauses

### List of abbreviations used

AAT	Administrative Appeals Tribunal
AAT Act	<i>Administrative Appeals Tribunal Act 1975</i>
Archives	National Archives of Australia
Archives Act	<i>Archives Act 1983</i>
FOI	Freedom of Information
FOI Act	<i>Freedom of Information Act 1982</i>
IGIS	Inspector-General of Intelligence and Security
IGIS Act	<i>Inspector-General of Intelligence and Security Act 1986</i>
Ombudsman Act	<i>Ombudsman Act 1976</i>
<i>Open government report</i>	Joint Australian Law Reform Commission and Administrative Review Council <i>Open government report on the FOI Act (1995)</i>
Privacy Act	<i>Privacy Act 1988</i>

### **Clause 1: Short title**

Clause 1 is a formal clause which provides the citation of the Bill.

### **Clause 2: Commencement**

Clause 2 (table item 1) provides that sections 1 to 3 of the Bill (and anything not covered in the table) will commence on the day the Bill receives Royal Assent. Most other measures in the Bill are dependent on the establishment of the new statutory position of Information Commissioner and the Office of the Information Commissioner as proposed in the Information Commissioner Bill. Schedules 1, 3 (excluding item 15), 4, 5, 6 and 7 will therefore commence immediately after the commencement of section 3 of the Information Commissioner Act.

The commencement of Schedule 2, which introduces a new Information Publication Scheme for agencies subject to the FOI Act, has a deferred commencement of six months from the commencement of section 3 of the Information Commissioner Act. This deferred commencement is to allow agencies sufficient time to prepare for the introduction of the publication requirements, including the requirement to develop a plan under the Information Publication Scheme.

The commencement of item 15 of Schedule 3, which requires agencies to publish information disclosed in response to an access request, is also deferred by six months from the commencement of section 3 of the Information Commissioner Act. This is to allow agencies sufficient time to prepare for this requirement, such as ensuring agency websites are properly configured (it is intended that information published under this requirement will predominately be published on agency websites).

### **Clause 3: Schedules**

This clause provides for each Act specified in a Schedule to the Bill to be amended in accordance with the items set out in the relevant Schedule.

## **Schedule 1 – Objects**

### *Freedom of Information Act 1982*

#### *Item 1- section 3*

This item repeals the existing objects provision of the FOI Act and substitutes a new objects provision. The new objects explain the underlying rationale of the FOI Act, which is concerned with strengthening Australia’s representative democracy through increasing participation in government processes and increasing the accountability of government.

Proposed subsection 3(1) provides that the objects of the FOI Act are to give the Australian community access to government information by requiring agencies to publish information (this is related to the new pro-active publication requirements established under Schedule 2 of the Bill) and by providing for a right of access to documents (this is related to the existing right of access in Part III of the FOI Act).

Proposed subsection 3(2) explains the underlying rationale for the Act and its significance for the proper working of Australia’s representative democracy.

Proposed subsection 3(3) responds to recommendation 4 of the *Open government report* that the object clause should acknowledge that the information collected and created by public officials is a national resource.

Proposed subsection 3(4) reflects existing subsection 3(2) of the FOI Act.

Proposed section 3A confirms an existing policy position that the FOI Act is not intended to codify the law relating to the disclosure of government information. This policy position is currently reflected in section 14 of the FOI Act (which is repealed by item 2). An agency may disclose information without a request under the FOI Act, including information which would be exempt under the Act. An agency may also disclose exempt information pursuant to a request under the Act. However, restrictions such as secrecy provisions may prohibit disclosure of certain information so that there is no discretion to release information of that kind. Restating this policy in the objects provision is intended to place greater emphasis on the discretion to release documents outside the FOI Act. The provision makes clear that a document, including an exempt document, may be disclosed whether or not access has been requested under the FOI Act.

To complement this measure, items 50 (proposed section 90) and 56 of Schedule 4 propose to extend existing protections in the FOI Act for Ministers and officials from certain civil and criminal proceedings so that these protections cover disclosures of documents made in good faith in circumstances where the documents may be exempt or where disclosure is made outside the FOI Act.

#### *Item 2 – section 14*

This item is consequential to the amendment proposed at item 1. The effect of section 14 is preserved in proposed new section 3A.

## **Schedule 2 – Publication of information**

### *Freedom of Information Act 1982*

#### *Item 1 – subsection 4(1)*

This item inserts a definition that is related to the amendment proposed at item 3 (proposed section 8A).

#### *Item 2 – subsection 4(9)*

Item 2 is a minor amendment that is consequential to the amendments proposed at item 3.

#### *Item 3 – Part II*

Item 3 repeals Part II of the FOI Act (publication of certain documents and information) and establishes a new information publication scheme for Commonwealth agencies subject to the FOI Act. The publication scheme will not apply to Ministers.

The new scheme provides a statutory framework for pro-active publication of information by agencies. The purpose of the scheme is to allow the FOI Act to evolve as a legislative framework for giving access to information through agency driven publication, rather than as a scheme that is only reactive to requests for documents.

Proposed subsection 7A provides a guide to assist understanding the elements of the information publication scheme.

Under proposed subsection 8(1), an agency must prepare a plan showing how it proposes to implement the publication requirement. The plan must be published by the agency (under proposed paragraph 8(2)(a)), such as by making it available on the agency's website.

Proposed section 8(2) sets out information that must be published. The classes of information substantially reflect classes of information that must be published under existing paragraph 8(1)(a) and subsection 9(1) of the FOI Act. For example, an agency will continue to be required to publish information about its operations and on the rules and guidelines that are used to make decisions affecting members of the public. Additional classes of information must also be published. Under proposed paragraph 8(2)(d), for example, agencies will be required to publish details of statutory appointments. Details might include the name of the person appointed, the position to which they are appointed (and particulars of the position), the provision under which they are appointed and the length of the appointment.

Proposed paragraph 8(2)(g) requires agencies to publish information in documents to which access is routinely (regularly) given in response to access requests under Part III of the FOI Act. The intention is that information in which there has been a demonstrated level of interest from the community by way of access requests should be pro-actively made available to the public (without requiring – or at least limiting the need for – applications to be made). There are some exceptions to this requirement which recognise that not all types of information routinely disclosed in response to FOI access requests are appropriate for public disclosure. For example,

an agency might regularly grant access to documents in connection with case-related files, but access might only be given to a relatively small portion of total files held by the agency. The resource implications of pro-actively publishing this information on the agency's website may be high. To address situations such as this, proposed subparagraph 8(2)(g)(iii) empowers the Information Commissioner to relieve an agency from the requirement to publish certain classes of information by making a determination.

Around 85-90 per cent of FOI requests annually are for personal information. Proposed subparagraphs 8(2)(g)(i) and (ii) qualify the publication requirement so that it does not apply to personal and business information (of any person) if it would be unreasonable to publish the information. In most cases it would be unreasonable, for example, to publish personal or business information where access is routinely given to the person or business to whom the information relates. It would also be unreasonable to publish the information if it is personal or business information about a third party in circumstances where the third party consents to disclosure to a particular applicant (but would not give consent if the information was to become publicly available). It would *generally* not be unreasonable to publish the names of officials from Commonwealth agencies in connection with their duties.

Proposed subsection 8(3) allows the Information Commissioner to make a determination for the purposes of proposed subparagraph 2(g)(iii). A determination of this kind is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Proposed subsection 8(4) establishes that an agency may publish other information it holds. The intention is that an agency, in addition to publishing the information that must be published under proposed subsection 8(2), will publish other classes of information that it holds, having regard to the objects of the FOI Act and guidelines issued by the Information Commissioner (see proposed section 9A in this Schedule). Agencies are generally best placed to identify information they hold which should be published taking into account the objects of the FOI Act.

Proposed subsection 8(5) clarifies that section 8 applies to a function or power even if the agency does not have that function or power under an enactment.

Proposed section 8A defines 'operational information' for the purposes of paragraph 8(2)(j) (which is information that must be published by an agency). This section is intended to capture a substantial part of the existing requirement to publish information under existing subsection 9(1) of the FOI Act. Proposed subsection 8A(2) reflects an existing qualification to the requirement under subsection 9(1) of the FOI Act. For example, law reports published by a private publishing company would not be operational information of an agency.

Proposed section 8B requires agencies to ensure that the information published under the information publication scheme is accurate, up-to-date and complete. If members of the public are to use or rely on published information it is important that the information is accurate or that an assessment can be made as to its currency.



Proposed section 8C establishes two restrictions on the requirement for information to be published under the scheme. Proposed subsection 8C(1) makes it clear that an agency is not *required* to publish information that would be exempt under the FOI Act. However, this does not prevent an agency from publishing matter that might otherwise be exempt and that can properly be published. Proposed subsection 8C(2) makes it clear that an agency is not required to publish information which is restricted or prohibited from publication under other legislation (for example by application of a secrecy provision).

Proposed section 8D provides for how and to whom information is to be published. In general, it is anticipated that the bulk of information will be published to members of the public by making the information available on the agency's website. Proposed paragraph 8D(2)(b) is intended to facilitate access where only certain classes of persons may have a legitimate interest in the information. In this case, it may not be appropriate for wider disclosure. For example, access could be arranged by issuing passwords to access a separate part of the agency's website.

Proposed paragraph 8D(3)(c) is intended to address instances where it is not possible or reasonably practicable to publish information on a website. This could be due to information being contained in a format that cannot readily be uploaded to a website. In all cases, details of how the information may be obtained must be published on the agency website, such as the name and telephone number of an officer to contact to arrange access to the information.

Proposed subsections 8D(4) and (5) provide for charges to be imposed. These charges are separate from charges imposed for processing an access request under regulations. Proposed subsection 8D(4) makes it clear that an agency cannot charge a person for simply accessing information from the website. Charges may be imposed if the agency incurs a specific reproduction or incidental cost in providing access. This would include a situation where, for example, the information was contained in a recording that could not be readily converted to electronic format.

Proposed section 8E permits the Information Commissioner to assist an agency in meeting some of its obligations under the scheme. This is consistent with the objective of the Information Commissioner being a resource for agencies (as well as for members of the public). The Information Commissioner could, for example, assist an agency to identify the types of information that should be published under the permissive part of the publication scheme (beyond the mandatory classes in proposed subsection 8(2)).

Proposed section 8F vests the Information Commissioner with functions relating to monitoring compliance by agencies with the publication scheme. The Information Commissioner may undertake a general review, a formal investigation under proposed Part VIIB, or a less formal monitoring process. Under Part VIIB, the Information Commissioner has certain powers to obtain access to information and may report to the Minister if not satisfied that an agency has taken appropriate action to implement an investigation recommendation.

Proposed section 9 requires agencies to review their publication schemes from time to time and at least within 5 years of each completed review. The review must be

completed in conjunction with the Information Commissioner. This may involve reporting to the Commissioner on the review. The first review must be completed within 5 years of commencement of the provision.

Proposed section 9A requires agencies to have regard to the objects of the Act and to guidelines issued by the Information Commissioner in meeting the obligations to publish information. It is not intended that under the information publication scheme agencies should publish all of the information they hold. The decision on what to publish is to be guided by the objects of the Act (for example, information that could assist in increasing scrutiny of the government's activity or could increase public participation in government processes). The Information Commissioner's guidelines may address classes of information appropriate for publication (beyond the mandatory classes of information in proposed subsection 8(2)), how long information should remain published, as well as the manner in which information should be published.

Proposed section 10 is intended to replicate the effect of existing section 10 of the FOI Act.

Proposed section 10A provides for who may perform functions or exercise powers under new Part II. The authority is consistent with existing section 23 of the FOI Act that is applicable to Part III access requests.

*Item 4 – saving – unpublished information*

This item preserves the protection afforded by existing section 10 of the FOI Act in certain circumstances so that no disadvantage arises from repeal.

## **Schedule 3 – Exemptions**

### **Part 1 – Amendments to the Archives Act, open access period amendments**

#### *Item 1- subsection 3(1)*

This item inserts a definition for ‘open access period’ which is essentially a signpost to the other provisions in the Act which separately define periods for a Cabinet notebook, a record containing Census information and any other record. The effect of the open access period is that upon reaching a defined age, access to records is regulated under the Archives Act instead of the FOI Act. When a record is in the open access period the Archives must cause the records to be made available for public access, upon request, unless an exemption applies (see section 31 of the Archives Act). Agencies are not excluded from the operation of the Archives Act (as they can be under the FOI Act) and the exemption rules are different to those under the FOI Act to reflect that the need for confidentiality reduces over time.

#### *Item 2 – subsection 3(7)*

This item repeals subsection 3(7) and substitutes a new definition for when a record is in the open access period. The purpose of the amendment is to bring forward the open access period from 30 years to 20 years for most Commonwealth records after a 10 year transition period commencing from 1 January 2011 and ending 31 December 2020. Different open access periods apply to a Cabinet notebook and a record containing Census information. As illustrated by the table, the effect of the transition is that the open access period is gradually brought forward so that on and from 1 January 2021 the system returns to a single year release to which the proposed 20 year rule will apply. For example, a record that came into existence in the year ending 31 December 2000 will be in the open access period from 1 January 2021.

As a result of this amendment, the FOI Act will govern access to most documents up until 20 years after the year the documents come into existence and after that time access will be governed by the Archives Act (see paragraph 12(1)(a) of the FOI Act).

#### *Item 3 – subsection 22A(1)*

Item 3 repeals subsection 22A(1) and substitutes a new definition for when a record that is a Cabinet notebook is in the open access period. The purpose of this amendment is to bring forward the open access period for Cabinet notebooks from 50 years to 30 years after a 10 year transition period commencing from 1 January 2011 and ending 31 December 2020. As illustrated by the table, the effect of the transition is that the open access period is gradually brought forward so that on and from 1 January 2021 the system returns to a single year release to which the proposed 30 year rule will apply. For example, a Cabinet notebook that came into existence in the year ending 31 December 1990 will be in the open access period from 1 January 2021.

#### *Item 4 – paragraph 26(1)(a)*

Item 4 is consequential to the proposal at item 2 to bring forward the open access period for most records from 30 years to 20 years. Under section 26 of the Archives Act, subject to certain exceptions, a person is guilty of an offence if the person engages in conduct which results in addition to, or alteration of, a Commonwealth record that has been in existence for more than a certain period. This item amends

paragraph 26(1)(a) so that the offence will apply to a Commonwealth record that has been in existence for more than 15 years (instead of 25 years). The reduction by 10 years is consistent with the proposal to bring forward the open access period by 10 years at item 2.

*Item 5 – paragraph 27(3)(b)*

This item is consequential to the proposal at item 2 to bring forward the open access period for most records from 30 years to 20 years. Under section 27 of the Archives Act a Commonwealth record that has been determined to be part of the archival resources of the Commonwealth, and is not in the custody of the Archives, must be transferred to the Archives by a Commonwealth institution within a certain period of coming into existence if it ceases to be a current record. The purpose of this amendment is to amend the time of compulsory transfer so that a record of this kind must be transferred to the Archives within 15 years of coming into existence (instead of 25 years) if it has not already been transferred to the Archives. The reduction by 10 years is consistent with the proposal to bring forward the open access period by 10 years for most records at item 2.

*Item 6 – subsection 30(2)*

Item 6 is consequential to the proposal at item 2 to bring forward the open access period for most records from 30 years to 20 years. Under section 30 of the Archives Act, the Archives must ensure that all Commonwealth records transferred to its care are made available, as reasonably required, for use by Commonwealth institutions. Records that have been in existence for more than a certain period must not be made available to a Commonwealth institution in a manner that involves the records leaving the custody of the responsible person except as necessary for the proper conduct of the business of the Commonwealth institution. The purpose of this amendment is to amend the time at which the custodial qualification applies to a record so that it applies to a record that has been in existence for more than 15 years (instead of 25 years). The reduction by 10 years is consistent with the proposal to bring forward the open access period by 10 years for most records at item 2.

## **Part 2 – Main exemption amendments to the FOI Act**

*Item 7 – subsection 4(1)*

Item 7 inserts a definition into the interpretation section in the FOI Act which defines Cabinet to include a committee of the Cabinet. The definition has application in connection with the Cabinet exemption (see item 26 section 34), but does not change the scope of the Cabinet exemption as it replicates an existing definition in the current FOI Act (see subsection 34(6)). It is a minor drafting change to improve readability.

*Item 8 – subsection 4(1) (definition of Cabinet notebook)*

This item is a minor amendment that is consequential to the amendment proposed at item 7. The reference to a committee of the Cabinet is not required in light of the definition at item 7.

*Item 9 – subsection 4(1)*

Item 9 inserts a new term ‘conditionally exempt’ into the interpretation section of the FOI Act which means a document to which Division 3 of Part IV (public interest conditional exemptions) applies (see item 33).

*Item 10 – subsection 4(1) (definition of edited copy)*

This item amends the existing definition of ‘edited copy’ to have the meaning given by section 22 (see item 17).

*Item 11 – subsection 4(1) (paragraph (a) of the definition of exempt document)*

Item 11 amends the existing definition of ‘exempt document’ to have the meaning given by proposed section 31B which defines when a document is exempt for the purposes of Part IV (see item 22).

*Item 12 – subsection 4(1)*

This item inserts a definition of ‘run out’ which is a term used in connection with review rights given to certain third parties whom an agency or Minister is obliged to consult upon considering requests for access to documents containing information concerning the third party (see item 21, proposed subsections 26A(4), 27(7) and 27A(6)).

*Item 13 – at the end of section 4*

The purpose of this proposed amendment is to clarify that information communicated in confidence pursuant to any treaty or formal instrument on the reciprocal protection of classified information between the Commonwealth Government or an authority of the Commonwealth and a foreign government, an authority of a foreign government or an international organisation is information that meets the criteria for exemption in paragraph 33(b).

*Item 14 – after section 11*

The purpose of proposed section 11A is to establish the basic rule that where a valid request for a document has been made (that is, a request that complies with subsection 15(2)), and any required charges have been paid, an agency or Minister must give access to the document except if the document is an exempt document. Proposed subsections 11A(1), (2) and (3) essentially restate the requirement in existing subsection 18(1) of the Act (which is proposed for repeal at item 16).

To improve the narrative flow of the Act, the requirement *to give access* to a document is proposed to be inserted after section 11 which gives every person a legally enforceable *right of access* to a document of an agency or an official document of a Minister (other than an exempt document).

Proposed subsection 11A(4) essentially restates the rule in existing subsection 18(2) that an agency or Minister is not required to give access to a document at a particular time, if at that time, the document is an exempt document. The document must be exempt at the time the access request is determined. The reason for maintaining confidentiality in a document may not be on-going (in other words, just because a document is exempt at one point in time it may not be exempt at a later time due to changed circumstances or passage of time).

Proposed subsection 11A(5) introduces a single form of public interest test that applies to those exemptions (called public interest conditional exemptions) in proposed Division 3 of Part IV. The proposed test is weighted in favour of giving access to documents so that the public interest in disclosure remains at the forefront of

decision making. It is not enough to withhold access to a document if it meets the criteria for an exemption in Division 3 of Part IV. Where a document meets the initial threshold of being conditionally exempt (see item 9, subsection 4(1)), it is then necessary for a decision maker to apply the public interest test proposed in subsection 11A(5). The starting point is that access must be given to conditionally exempt documents unless, to do so, would be contrary to the public interest.

It is intended that application of the public interest test will involve weighing up factors for and against disclosure for the purpose of determining whether access would, on balance, be contrary to the public interest. In this process a decision maker needs to identify factors favouring disclosure and factors not favouring disclosure in the circumstances and to determine the comparative importance to be given to these factors. Under item 20 (proposed paragraph 26(1)(aa)) if access to a conditionally exempt document is to be refused the written notice of the decision must include the public interest factors taken into account in making the decision to refuse access.

In a similar vein to proposed subsection 11A(4), a decision to refuse access to a document because it would be contrary to the public interest for the purposes of proposed subsection 11A(5) depends on the circumstances relevant at the time of the decision. A document that is exempt at one point in time may not be exempt at a later time.

Proposed subsection 11A(6) establishes a rule when a document satisfies grounds for exemption under both proposed Division 2 of Part IV (exemptions) and Division 3 of Part IV (public interest conditional exemptions). In that case, the rule is that an agency or Minister is not required to give access to the document.

Proposed subsection 11B deals with factors for the purposes of working out whether access to a conditionally exempt document would on balance be contrary to the public interest. Proposed subsection 11B(2) clarifies that factors, other than those factors addressed in subsection 11B, may be relevant for the purpose of applying the public interest test in subsection 11A(5).

Proposed subsection 11B(3) lists factors that favour disclosure of documents. The list is non-exhaustive and other factors favouring access may be taken into account if relevant to the question of giving access to a document in the circumstances.

Proposed subsection 11B(4) lists factors that must not be taken into account in deciding whether access to a document would, on balance, be contrary to the public interest. The factors are ordinarily identified as arguments against giving access to a document. The effect of this provision is that decision makers may not rely on the listed factors for the purposes of weighing up whether a greater public interest lies in maintaining confidentiality in a document than in giving access to the document.

Proposed subsection 11B(5) provides that an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of applying the public interest test. The Information Commissioner will have power to issue guidelines under proposed section 93A (item 57 Schedule 4). The Bill does not list factors which would favour not giving access for the purposes of the public interest test. Some public interest conditional exemptions include criteria which require a

finding of harm, such as disclosure would, or could reasonably be expected to, cause damage to certain interests, or would have a substantial adverse effect on certain interests, or would, or could reasonably be expected to, prejudice certain interests. Where a decision maker is satisfied that an initial harm threshold is met that finding will be a factor against giving access to a document.

*Item 15 – before section 12*

Proposed subsection 11C introduces a requirement for an agency or Minister to publish information which has been disclosed in response to an access request, within 10 working days after the day on which a person is given access to the document. The requirement is intended to reinforce the active publication rationale which underlies the proposed information publication scheme in Schedule 2. The requirement does not apply when the information that is given to a person is:

- personal information about any person if it would be unreasonable to publish the information;
- information about the business, commercial, financial or professional affairs of any person if it would be unreasonable to publish the information;
- other information of a kind determined by the Information Commissioner if it would be unreasonable to publish the information; or
- any information if it is not reasonably practicable to publish the information because of the extent of modifications that need to be made to delete information of the kind mentioned above.

The latter case (paragraph 11C(1)(d)) is intended to address the circumstance where access is given to a document that contains a mixture of information some of which should not be published (for example, because it is the applicant's personal information). It will not always be reasonable to publish the information because of the work involved in undertaking deletions or because the redacted copy may hold limited value in its publication or both.

Proposed subsection 11C(2) gives the Information Commissioner a discretionary power to exclude other categories of information from the publication requirement. A determination made for this purpose is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. An example may be where the requirement to publish the information serves to inhibit access being given to information because access is dependent on a third party consenting to disclosure of information about the third party. The third party may agree to give access to a particular applicant, but may not agree if the information is to be published to the world. The Information Commissioner will be able to inquire whether particular circumstances warrant exclusion.

Like the proposed publication scheme in Schedule 2, proposed subsection 11C(3) provides that the information is to be published to the public generally on a website. If the information cannot readily be published on a website, the website should give details of how the information may be obtained.

Proposed subsections 11C(4) and 11C(5) permit an agency to impose a charge for accessing information. These charges are separate from processing charges imposed for processing an access request under Part III of the FOI Act and set out in

regulations. Proposed subsection 11C(4) makes it clear that an agency cannot charge a person for simply accessing information from the website. Charges may be imposed if the agency incurs a specific reproduction or incidental cost in providing access. This would include a situation where, for example, the information was contained in a recording that could not be readily converted to electronic format for uploading to the website, and the agency incurred costs in having that recording transcribed. Another example would be where a hard copy of a report is requested when the report is also available online.

The provision does not specify how long an agency or Minister should keep information posted on a website. Some information will have more enduring interest than other information. Rather than specifying a minimum period for publication, it is intended that the posting period should be flexible. The Information Commissioner may issue guidance to agencies in respect of this matter (the Information Commissioner has power to issue guidelines under proposed section 93A item 57 Schedule 4).

*Item 16 – section 18*

This item repeals section 18. The effect of section 18 (general rule for mandatory access) is replicated in proposed section 11A.

*Item 17 – section 22*

This item redrafts an existing provision in the FOI Act to improve readability. It is not intended to change the scope of this provision. Section 22 requires that access be given to an edited copy of a document if it is reasonably practicable to delete exempt matter (that falls within the scope of the applicant's request) or irrelevant matter (that falls outside the scope of the applicant's request), unless it is apparent that the applicant would not wish to have access to the edited copy.

*Item 18 – subsections 25(1) and (2)*

This item amends section 25 so that the right to neither confirm nor deny the existence or non-existence of certain exempt documents does not apply to the exemption for documents affecting relations with states (section 33A in the existing Act and proposed section 47B in the Bill). This item implements recommendation 42 of the *Open government report*.

*Items 19 and 20 – paragraph 26(1)(a)*

These items insert a new requirement into the content of the notice that must be given to an applicant when a decision is made to refuse access to a document. The effect of proposed paragraph 26(1)(aa) is that the reasons must include the public interest factors taken into account if access has been refused for a public interest conditional exemption. (Under the existing Act, a requirement to state the public interest grounds on which access has been refused only applies under the internal working documents exemption at section 36.) These items implement recommendation 39 of the *Open government report*.

*Item 21 – sections 26A, 27, 27A and 28*

Section 26A (consultation requirement in respect of documents likely to affect Commonwealth-State relations) has been redrafted to improve readability and to insert terminology that is consistent with the application of the proposed single public



interest test to the Commonwealth-State relations exemption (section 33A in the existing Act and proposed section 47B in the Bill).

Under existing section 27, where a request is received for a document containing information concerning another person's business or professional affairs, or the business, commercial or financial affairs of an organisation or undertaking, a decision to grant access to the document must not be made unless, where it is reasonably practicable to do so, the agency or Minister gives the third party a reasonable opportunity to make submissions that the document is exempt under the business affairs exemption. Proposed section 27 qualifies that requirement so that consultation is only necessary where it appears to the agency or Minister that the business *might reasonably wish to make a contention that the document is exempt* under the business affairs exemption. Under the existing provision consultation is necessary even for a decision to give access to simple payment receipts, such as taxi receipts. The proposed qualification currently exists in relation to the consultation requirement for documents containing personal information about third parties (section 27A).

Like existing section 27A, proposed subsection 27(3) lists certain matters that must be taken into account by an agency or Minister in determining whether a person or organisation might reasonably wish to contend that a document is exempt under the business affairs exemption. The effect of proposed paragraph 27A(3)(d) is that the list of matters relevant to making this determination is not exhaustive.

Section 27A (consultation requirement with third parties about their personal information) is redrafted to improve readability and to insert terminology that is consistent with the application of the proposed single public interest test to the personal privacy exemption (section 41 in the existing Act and proposed section 47F in the Bill). Existing section 27A is also re-drafted to improve readability.

This item also repeals section 28 which deals with Information Access Offices (which are the regional offices of the National Archives of Australia). Under subsection 9(2), an agency is required to make certain operational information available for inspection (and purchase) at Information Access Offices. Under the proposals to amend Part II of the FOI Act (see Schedule 2), operational information is to be published on websites (or details given of how access may be obtained). Particularly with new technologies, access to documents will normally be able to be facilitated by means that do not require physical inspection, which renders provision for Information Access Offices otiose.

#### *Item 22 – before section 32*

The table in proposed section 31A that is inserted by this item provides a guide on how the Act applies to documents that are exempt, conditionally exempt or contain exempt matter under the Act. It is intended to serve as an aid to applying the Act.

A document is made exempt under the Act if it is exempt for the purposes of Part IV (which sets out the exemption provisions), if it is excluded from the operation of the Act by virtue of section 7, or is an official document of a Minister that contains matter not relating to the affairs of an agency. Proposed section 31B defines when a document is exempt for the purposes of Part IV of the Act. Part IV is re-organised so that exemptions not subject to the proposed single public interest test are grouped

together into Division 2 exemptions, and exemptions that are subject to the test are grouped together into Division 3 public interest conditional exemptions.

*Item 23 – section 32*

An amendment is made to section 32 (interpretation provision) to insert terminology that is consistent with the application of the proposed single public interest test to exemptions subject to that test.

*Item 24 – after section 32*

This item inserts a heading as part of the restructuring of the exemption provisions in Part IV.

*Item 25 – at the end of section 33*

Item 25 inserts a note for section 33 which makes a cross reference to proposed subsection 4(10) (inserted by item 13 of this Schedule).

*Item 26 – sections 33A to 36*

Commonwealth-State relations exemption

Section 33A (documents affecting relations with States) is repealed by this item as a consequence of the restructuring of exemption provisions into exemptions and public interest conditional exemptions. It is inserted as section 47B (a public interest conditional exemption) under item 33.

Cabinet exemption

Proposed section 34 preserves the Cabinet exemption but introduces some amendments to its scope. The Cabinet exemption is concerned with protecting information central to the Cabinet process and ensuring that the principle of collective ministerial responsibility (central to the Cabinet system) is not undermined. Subject to a dominant purpose qualification, proposed section 34 will apply the exemption to:

- Cabinet submissions that are proposed for submission to Cabinet but are never submitted ('was proposed' in subparagraph 34(1)(a)(i));
- a document that is a briefing prepared for a Minister on a Cabinet submission (proposed paragraph 34(1)(c)); and
- a document that is a draft of a Cabinet submission, official record of the Cabinet or a briefing prepared for a Minister on a Cabinet submission (proposed paragraph 34(1)(d)).

A Cabinet submission will only be exempt if it was brought into existence for the dominant purpose of submission to the Cabinet for its consideration. A briefing will only be exempt if it was brought into existence for the dominant purpose of briefing a Minister on a Cabinet submission. Proposed subsection 34(4) introduces a further limit on the Cabinet exemption by making it clear that a document is not exempt only because it is attached to a Cabinet submission, briefing or a document containing information that would reveal a Cabinet deliberation or decision. If, at the time a report is brought into existence it is intended for public release and Cabinet's consideration is incidental to that main purpose, the report will not be covered by the Cabinet exemption because it will not have been brought into existence for the dominant purpose of submission to the Cabinet. Attaching the document to a Cabinet submission will not make the report exempt under the Cabinet exemption.

Proposed subsection 34(2) exempts a document to the extent that it is a copy or part of, or contains an extract from, a document that is exempt under proposed subsection 34(1). Similar provision is made in existing paragraph 34(1)(c).

Proposed subsection 34(3) exempts a document to the extent it contains information which would reveal a Cabinet deliberation or decision except if the deliberation or decision has been officially disclosed. It is intended that the exemption would still be available to any part of the document that contains a deliberation or decision that has not been publicly announced.

Proposed subsection 34(5) confirms that a document by which a decision of the Cabinet is officially published (for example a media release) is not an exempt document. This reflects an existing qualification in section 34(1)(d).

Proposed subsection 34(6) preserves the effect of existing subsection 34(1A).

#### Executive Council documents exemption

The Executive Council documents exemption is repealed (section 35) and it is not replaced in the Bill. The repeal of this exemption implements recommendation 50 of the *Open government report*. The report's justification for repeal was that Executive Council documents that warrant exemption can be withheld under other exemption provisions such as the exemption for personal privacy or the exemption for international relations.

#### Internal working documents exemption

Section 36 (internal working documents exemption) is repealed by this item as a consequence of the restructuring of exemption provisions into exemptions and public interest conditional exemptions. It is inserted as proposed section 47C (a public interest conditional exemption) under item 33.

#### *Item 27 – sections 39, 40 and 41*

The exemptions addressed in section 39 (documents affecting financial or property interests of the Commonwealth), section 40 (documents concerning certain operations of agencies) and section 41 (documents affecting personal privacy) are repealed by this item as a consequence of the restructuring of exemption provisions into exemptions and public interest conditional exemptions. All these exemptions are inserted as public interest conditional exemptions under item 33. Section 39 is inserted as proposed section 47D, section 40 is inserted as proposed section 47E and section 41 is inserted as proposed section 47F.

#### *Item 28 – subsection 42(2)*

Proposed subsection 42(2) introduces a new qualification to the legal professional privilege exemption and has the effect of confirming that the exemption is not available if privilege has been waived. This proposed amendment implements recommendation 67 of the *Open government report*.

Proposed subsection 42(3) ensures that operational information that is used by agencies in making decisions or recommendations affecting members of the public (within the meaning of proposed section 8A at item 3 Schedule 2) cannot be exempt on grounds of legal professional privilege under subsection 42(1) (because it contains

information that would otherwise be exempt under subsection 42(1)). The provision is intended to replicate the effect of existing subsection 42(2).

*Item 29 – sections 43, 43A and 44*

The exemptions addressed in section 43 (documents relating to business affairs), section 43A (documents relating to research) and section 44 (documents affecting national economy) are repealed by this item as a consequence of the restructuring of exemption provisions into exemptions and public interest conditional exemptions. All these exemptions are inserted as public interest conditional exemptions under item 33. Section 43A is inserted as proposed section 47H, section 44 is inserted as proposed section 47J and section 43 is inserted as proposed section 47G (other than that part of the exemption applicable to documents disclosing trade secrets or commercially valuable information which is not subject to a public interest test and inserted as new section 47).

*Items 30 and 31 – subsection 45(2)*

These items are consequential as a result of restructuring the exemption provisions into exemptions and public interest conditional exemptions. They are not intended to make any change in substance.

*Item 32 – section 47*

Documents arising out of companies and securities legislation

This item repeals the exemption for documents arising out of companies and security legislation, which implements recommendation 72 of the *Open government report*.

Documents disclosing trade secrets or commercially valuable information

Proposed section 47 replicates the exemption that applies to documents that would disclose trade secrets under existing paragraph 43(1)(a) or would disclose any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if disclosed under existing paragraph 43(1)(b). These grounds for exemption are not proposed to be subject to the public interest test. Information of this type has very high commercial value and includes information that gives a business an advantage over its competitors. The remaining grounds for exemption under existing section 43 (business affairs exemption) are proposed to be made subject to the public interest test (see proposed section 47G).

Proposed subsection 47(2) replicates an existing provision in subsection 43(2) and makes clear that the exemption does not apply where access is sought by the person or organisation to whom the information concerns.

Proposed subsection 47(3) replicates an existing provision in subsection 43(3).

*Item 33 – at the end of Part IV*

Division 3 of Part IV contains the public interest conditional exemptions. A document is ‘conditionally exempt’ if it meets the criteria in any of these exemptions. Such a document is only exempt if access to the document would, on balance, be contrary to the public interest for the purposes of the proposed public interest test in subsection 11A(5). Some public interest conditional exemptions include criteria which require a finding of harm. Where a decision maker is satisfied that an initial

harm threshold is met that finding will be a factor against giving access to a document for the purposes of the public interest test.

#### Commonwealth-State relations exemption

Proposed section 47B preserves the Commonwealth-State relations exemption under existing section 33A. This exemption is currently subject to a public interest test.

#### Deliberative processes exemption

Proposed section 47C preserves the internal working documents exemption under existing section 36. The title of the provision is changed to deliberative processes which implements recommendation 51 of the *Open government report*. This exemption is currently subject to a public interest test.

#### Financial or property interests of the Commonwealth

Proposed section 47D preserves the exemption under existing section 39. This exemption is currently subject to a public interest test.

#### Certain operations of agencies

Proposed section 47E preserves the exemption under existing section 40, with the exception that one ground for exemption is repealed. The *Open government report* recommended that paragraph 40(1)(e) be repealed on the basis that other exemptions were available if protection from disclosure was needed. That paragraph provides that a document is exempt where disclosure would, or could reasonably be expected to have a substantial adverse effect on the conduct by or on behalf of the Commonwealth or an agency of industrial relations. Exemption grounds that may be relevant to protecting information relating to industrial relations matters include paragraph 40(1)(d) (where disclosure would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency (proposed paragraph 47E(d)), and section 41 (documents affecting personal privacy (proposed section 47F)). This exemption is currently subject to a public interest test.

#### Personal privacy exemption

Proposed section 47F preserves the exemption under existing section 41, but makes some changes. The personal privacy exemption is to be made subject to the public interest test (it is not currently subject to a public interest test). The effect of the application of the public interest test is to ensure that the public interest in disclosure remains at the forefront of decision making.

Proposed subsection 41(2) identifies matters that must be taken into account by an agency or Minister in determining whether disclosure of a document would involve unreasonable disclosure of personal information. It also makes clear that a decision maker may have regard to any other matter considered relevant to that question. Paragraph 47F(2)(d) clarifies that the list of matters relevant to making this determination is not exhaustive. The matters are similar to those matters that must be taken into account for the purposes of consulting an affected third party under existing subsection 27A(1A).

Under existing subsection 41(4), an agency or Minister is required to notify a qualified person, if reasonably practicable, if access has been given to a document

containing personal information of a medical or psychiatric nature about an applicant that has originated from the qualified person. That procedural requirement is repealed which implements recommendation 64 of the *Open government report*. The justification for repeal was that there is no need for the requirement. An agency may be required to consult the qualified person before disclosing the document under section 27A (documents affecting personal privacy).

The definition of ‘qualified persons’ is also amended to replace ‘marriage guidance counsellor’ with the broader term of ‘counsellor’.

#### Business exemption

Proposed section 47G preserves the exemption under existing subsection 43(1)(c), but makes this exemption subject to the public interest test. The effect of the application of the public interest test is to ensure that the public interest in disclosure remains at the forefront of decision making. The other exemption grounds under the existing business affairs exemption are not proposed to be made subject to the public interest test (see item 32 proposed section 47).

#### Research exemption

Proposed section 47H preserves the exemption for documents relating to research under existing section 43A, but makes this exemption subject to the public interest test. The effect of the application of the public interest test is to ensure that the public interest in disclosure remains at the forefront of decision making. The exemption can only be claimed by an agency specified in Schedule 4 of the FOI Act. The only agencies prescribed for that purpose are the Commonwealth Scientific and Industrial Research Organisation and the Australian National University.

#### The economy exemption

Proposed section 47J replaces the economy exemption under existing section 44. Proposed section 47J better reflects the modern economic policy responsibilities of the Government, by focusing on those areas of the economy which the Government controls and better reflecting the nature of the Government’s role in developing and implementing policy action on matters affecting the Australian economy. The existing section 44 is not currently subject to a public interest test. The section 47J exemption is conditional as it is subject to the public interest test, to ensure that the public interest in disclosure remains at the forefront of decision making.

The economy exemption in proposed section 47J reflects the need for the Government to be able to maintain the confidentiality of certain information if it is to carry out its economic policy responsibilities, including the development and implementation of economic policy in a timely and effective manner. Proposed section 47J requires a decision maker to focus on the consequences of disclosure, being the expected effect on Australia’s economy. Paragraphs 47J(1)(a) and 1(b) describe circumstances where a substantial adverse effect would, or could reasonably be expected to, result from disclosure. It is anticipated that these may include the following:

- where the possible premature disclosure of information about Government proposals, policy development and decision-making processes could compromise the ability of the Australian Government to obtain access to information;

- where the disclosure of information, including estimates and modelling, may adversely affect the performance of the Australian economy by undermining confidence in markets, financial frameworks or institutions; or
- where the disclosure of advice on the performance of a particular market might reveal information about its performance that could distort the Australian economy by influencing investment decisions or giving particular individuals or businesses a competitive advantage.

Proposed subsection 47J(2) makes it clear that an adverse impact on Australia's economy is not limited to considerations of the economy as a whole; rather, it includes potential adverse impacts on a particular sector or region within Australia. For example, the disclosure of the results of information regarding the impacts of economic conditions or policies on particular sectors of the market may distort investment decisions within that sector and, in turn, impact adversely on the Government's ability to develop and implement economic policies more generally.

*Item 34 – Schedule 4*

This item is a consequential amendment arising from item 33 (amendment proposed to the research exemption).

**Part 3 – Other exemption amendments**

*Item 35 – paragraph 33(1)(b) of the Archives Act*

Under existing paragraph 33(1)(b) of the Archives Act a document is exempt if it contains information communicated in confidence by a foreign government, authority or international organisation to the Commonwealth Government and disclosure of the information *would* constitute a breach of that confidence. Tension arises where a foreign government objects to disclosure of records, and apart from the objection no other evidence is available to support maintaining confidentiality of the records. Under proposed paragraph 33(1)(b), where a foreign entity advises that the document is still confidential, the decision maker (the Archives) must be satisfied that a reasonable basis exists for maintaining the confidence of the information in order to invoke the exemption. (Under item 2 of this Schedule the open access period for the purposes of the Archives Act is proposed to be brought forward from 30 years to 20 years.)

*Items 36 and 37 – paragraphs 50A(2)(b) and 50A(3)(b) of the Archives Act*

*The Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* inserted new section 50A into the Archives Act which requires the AAT to request the Inspector-General of Intelligence and Security to give evidence in certain proceedings. Items 36 and 37 (being amendments to paragraph 50A(2)(b)) are consequential to the proposed amendment at item 35.

*Item 38 – subsection 34(1) of the Privacy Act*

Item 38 is a consequential amendment arising from the proposed amendment at item 18 (amendment to section 25 of the FOI Act so that the right to neither confirm nor deny the existence or non-existence of certain exempt documents does not apply to the existing exemption for documents affecting relations with states).

#### **Part 4 – Application provisions**

##### *Item 39 – application – Part 2*

The effect of this application provision is that an amendment made by an item in Part 2 of Schedule 3 applies to requests for access (made under section 15 of the FOI Act) that are received at or after the commencement of that item.

##### *Item 40 – application – items 35, 36 and 37*

The effect of this application provision is that the amendments made by items 35, 36 and 37 will apply to requests for access (made in accordance with section 40 of the Archives Act) that are received by the Archives at or after the commencement of those items.



## **Schedule 4 – Information Commissioner amendments**

### **Part 1 – Main amendments, FOI Act**

#### *Items 1 to 20 – subsection 4(1)*

These items amend the interpretation provision of the FOI Act to insert definitions in connection with proposals relating to the review of FOI decisions and investigation of complaints relating to the handling of FOI requests. The proposed amendments are substantially signposts to other provisions which define the various proposed terms.

#### *Items 21 and 22 – section 12*

Subsections 12(2) to (4) are repealed because they are transitional in nature and their operation is spent. Subsection 12(2) provides that there is no right to access a document that became a document of an agency or an official document of a Minister more than 5 years before 1 December 1982 (commencement of the FOI Act). Documents of this age would now be in the open access period under the Archives Act.

#### *Item 23 – subsection 21(3)*

The repeal of this provision arises as a consequence of the proposal to introduce Information Commissioner review. The effect of subsection 21(3) is that a decision to defer access to a document on the ground in paragraph 21(1)(d) is not subject to review by the AAT. If paragraph 21(1)(d) applies it is because a Minister considers the document is of such general public interest that the Parliament should first be informed of its contents, in which case the document must be tabled in Parliament within 5 sitting days of either House of the Parliament. The effect of subsection 21(3) is preserved by proposed paragraph 53A(d) (item 34).

#### *Item 24 – subparagraph 26(1)(c)(ii)*

This is a consequential amendment arising from the proposal to give the Information Commissioner the function of investigating complaints concerning the handling of FOI requests under proposed Part VIIB (item 49).

#### *Item 25 – paragraph 26(1)(c)*

This provision clarifies that the notice of a decision to refuse access to a document must include information concerning the applicant's rights with respect to internal review and Information Commissioner review.

#### *Item 26 – paragraph 29(9)(b)*

This is a consequential amendment arising from the proposal to give the Information Commissioner the function of investigating complaints concerning the handling of FOI requests under proposed Part VIIB (item 49).

#### *Item 27 – subsection 29(9)*

This provision clarifies that the notice of a decision to reject a contention from the applicant that a charge should be reduced or not imposed must include information concerning the applicant's rights with respect to internal review and Information Commissioner review.

*Item 28 – section 31*

Section 31 is amended as a consequence of the proposal to give the Information Commissioner a function of undertaking review of FOI decisions. Section 31 has also been redrafted to improve readability. The purpose of section 31 is to suspend the period for making a decision on an access request pending payment of a charge that has been notified to the applicant (or an outcome on any review of the decision to impose a charge).

*Item 29 – after section 51D*

The effect of proposed section 51DA is that an agency or Minister is deemed to have refused to amend or annotate a record of personal information if the agency or Minister has not given notice of a decision on an application for amendment or annotation (made under section 48) within 30 days of receiving the request.

Under proposed subsection 51DA(2), the deemed refusal is taken to be a decision made personally by the principal officer of the agency or the Minister on the last day of the decision period and notice is taken to have been given to the applicant on that same day. A consequence of a deemed refusal decision is that an applicant may directly make an application for Information Commissioner review (as an access refusal decision under proposed paragraph 54L(2)(a) – an ‘access refusal decision’ is defined in proposed section 53A to include a decision to refuse to annotate or amend a record). This provision is similar to the effect of existing subsection 56(1A) of the FOI Act.

The effect of proposed subsections 51DA(3)-(5) is that the Information Commissioner is given a discretionary power to extend the period for making an initial decision on an application. The rationale underlying this provision is that the extension may avoid the need for an applicant to lodge an application for Information Commissioner review. The Information Commissioner may extend the period for such a period considered to be appropriate and may also impose conditions. A condition may be that the agency or Minister must give notice of the extended time to the applicant.

If the Information Commissioner allows an extension, the effect of proposed subsection 51DA(6) is that a decision is not deemed to have been refused (providing the agency or Minister makes a decision within the extended time period and complies with any condition). However, if the agency or Minister does not comply, then the effect of proposed subsection 51DA(7) is that a deemed refusal decision is taken to apply. Additionally, under proposed subsection 51DA(8), the Information Commissioner does not have the power to allow a further extension of time to make an initial decision. In this case, it would be open to the applicant to make an application for Information Commissioner review.

*Item 30 – Part VI (heading)*

The provisions dealing with internal review of decisions on an access request made by an agency or Minister will be dealt with in a separate Part VI. (Under the existing Act Part VI covers both internal review and review by the AAT.)

*Item 31 – before section 53*

This item inserts a guide to proposed Part VI (internal review of decisions) which is intended to aid readability. The guide notes that a decision made personally by a principal officer of an agency or by a Minister is not subject to internal review. This is the case under existing section 54 of the FOI Act.

*Item 32 – section 53*

Item 32 is a consequential amendment arising from the proposal to separate the different forms of review into individual Parts under the Act. It ensures that the interpretation provision applies to all forms of review.

*Item 33 – section 53*

This item is a consequential amendment arising from the proposal to limit the operation of section 25 of the FOI Act so that it does not apply to a document that is exempt under the Commonwealth-State relations exemption (existing section 33A and proposed section 47B under the Bill) (see item 18 Schedule 3). The reference to the existing Executive Council exemption (section 35) is removed as a consequence of the proposal to repeal that exemption (see item 26 Schedule 3).

*Item 34 – sections 54 to 57*

This item addresses the main (new) provisions for internal review and inserts Part VII which gives the Information Commissioner the function of undertaking external merits review of FOI decisions.

Section 54 (internal review) is repealed but its effect is preserved by the provisions inserted in this item. The requirement to pay an application fee for internal review is not preserved as it is a proposal in the Bill to repeal all application fees (other than for AAT review).

Section 55 (applications to the AAT) is repealed as a consequence of the proposal to introduce Information Commissioner review. The right of application to the AAT is retained in new section 57A.

Section 56 (applications to Tribunal where decision delayed) is repealed as a consequence of the proposal to introduce Information Commissioner review. Subsection 56(2) has the effect that if an applicant makes a complaint to the Ombudsman concerning a failure to make a decision within the required decision period, an applicant cannot make an application for review to the AAT (on the basis that it is a deemed refusal) until the Ombudsman has informed the applicant of the result of the investigation. This provision is not preserved in the Bill. Under measures in the Bill, the Information Commissioner is to be given the function of investigating complaints about the handling of FOI requests and the function of undertaking review of FOI decisions. These functions provide different remedies. A complaint about handling, such as delay, could be investigated concurrently with an IC review of a decision on a request (including a deemed refusal decision).

The provisions in subsections 56(3) and (4), which essentially permit the Ombudsman to give a certificate that has the effect of deeming a decision to have been made refusing access to a document, are not preserved in the Bill on the basis that they have limited or no utility. The power is dependent on a person making a complaint *before*

the expiration of the period for making an initial decision and a finding by the Ombudsman of unreasonable delay notwithstanding that the initial period for making a decision has not expired.

Section 57 (complaints to Ombudsman) is repealed as a consequence of the proposal to give the Information Commissioner a function of investigating complaints about the handling of FOI requests (item 49).

#### Part VI - Internal review provisions

Proposed section 53A defines an 'access refusal decision'. Proposed section 53B defines an 'access grant decision'. The former is concerned with the review rights for applicants. The latter is concerned with the review rights of certain third parties affected by a decision to give access to a document. These terms are also used in connection with Information Commissioner review and AAT review. Decisions of this kind are amenable to internal review by virtue of proposed section 54 (internal review access refusal decision) and proposed section 54A (internal review access grant decision). These provisions establish the right for an applicant to apply for internal review of those decisions. The Bill does not change the existing rule that no internal review application can be made for a decision made by a Minister or made personally by a principal officer of an agency.

An applicant does not have to apply for internal review before applying for external review by the Information Commissioner (proposed paragraphs 54L(2)(a) and 54M(2)(a) provide that an access refusal decision and an access grant decision (respectively) are decisions that may be reviewed by the Information Commissioner). Under the existing Act, while internal review is optional where a third party seeks to challenge a decision to give access to a document, it is not optional where access has been refused to a document. In the latter case, under the existing Act, an applicant is required to apply for internal review in respect of a decision of an agency (other than a decision made personally by a principal officer of an agency) before applying to the AAT. By making internal review optional, agencies should be encouraged to make the best decision at first instance.

The 'access refusal decisions' in proposed section 53A replicate the decisions which are subject to internal review in existing subsection 54(1). Existing paragraph 54(1)(e) (a decision under section 30A relating to remission of an application fee) is not repeated in proposed section 53A as a consequence of the proposal in the Bill to repeal all application fees (other than for AAT review).

The 'access grant decisions' in proposed section 53B replicate the decisions which are subject to internal review under existing subsections 54(1C) (right of review to a State concerning a decision to give access to State related information), 54(1D) (right of review to a person or organisation concerning a decision to give access to business information) and 54(1E) (right of review to a person concerning a decision to give access to personal information). Proposed section 53C defines who is an affected third party for the purposes of making a request for internal review on an access grant decision under proposed section 54A.

Proposed section 54B preserves the effect of existing subsections 54(1A), 54(1B) and 54(1G).

Proposed subsection 54C(2) preserves the requirement under existing subsection 54(2) that a decision maker who is not the original decision must undertake an internal review.

Proposed subsection 54C(3) requires a decision on an internal review to be made within 30 days after the application was received by an agency. The existing provision does not express a time period for making an internal review decision. However, a 30 day period is implied by existing subsection 55(3) which permits an applicant to make an application to the AAT if a decision on internal review is not made within 30 days.

The effect of proposed section 54D is that an agency is deemed to have affirmed the original decision if the agency has not given notice of a decision on an internal review application (made under proposed section 54B) within 30 days of receiving the application.

Under proposed subsection 54D(2), the deemed affirmation of the original decision is taken to be a decision made personally by the principal officer of the agency on the last day of the decision period, and notice is taken to have been given to the applicant on that same day. A consequence of a deemed affirmation decision is that an applicant may directly make an application for Information Commissioner review (as an access refusal decision under proposed paragraph 54L(2)(a) or as an access grant decision under proposed paragraph 54M(2)(a)). This provision is similar to the effect of existing subsection 55(3) of the FOI Act.

The effect of proposed subsections 54D(3) to (5) is that the Information Commissioner is given discretionary power to extend the period for making an internal review decision, upon application from an agency. The rationale underlying this provision is that the extension may avoid the need for an applicant to lodge an application for Information Commissioner review. The Information Commissioner may extend the period for such a period considered to be appropriate and may also impose conditions. A condition may be that the agency or Minister must give notice of the extended time to the applicant.

If the Information Commissioner allows an extension, the effect of proposed subsection 54D(6) is that a decision is not deemed to have been affirmed (providing the agency makes a decision within the extended time period and complies with any condition). However, if the agency does not comply, then the effect of proposed subsection 54D(7) is that a deemed affirmation decision is taken to apply. Additionally, under proposed subsection 54D(8), the Information Commissioner does not have the power to allow a further extension of time to make an internal review decision. In this case, it would be open to the applicant to make an application for Information Commissioner review.

Proposed section 54E preserves the effect of existing subsection 54(3).

## Part VII – Review by Information Commissioner

Proposed section 54F is a guide to proposed Part VII (review by Information Commissioner) which is intended to aid readability.

Proposed sections 54G to 54K define key concepts and terms for the purposes of Part VII.

Proposed section 54L establishes the right for an applicant (who has requested access to a document) to apply for Information Commissioner review in respect of those decisions listed in proposed subsection 54L(2) (access refusal decisions). All the decisions which are amenable to AAT review under existing subsection 55(1) of the FOI Act, with the exception of paragraph 55(1)(e), are made amenable to Information Commissioner review. Existing paragraph 55(1)(e) (a decision under section 30A relating to remission of an application fee) is not preserved as a consequence of the proposal in the Bill to repeal all application fees (other than for AAT review).

In variation to the existing Act, an applicant is not required to apply to an agency for internal review before making an application for review by the Information Commissioner. The effect of paragraph 54L(2)(a) is that an applicant may apply for Information Commissioner review in respect of an access refusal decision without applying for internal review.

Proposed section 54M establishes the right for certain third parties (who are affected by a decision to give access to a document) to apply for Information Commissioner review in respect of those decisions listed in proposed subsection 54M(2). The access grant decisions which are amenable to Information Commissioner review are the same decisions that are presently subject to AAT review (existing sections 58F, 59 and 59A which are proposed for repeal by item 40). Proposed paragraph 54M(2)(a) makes an 'access grant decision' (a decision of the kind in proposed section 53B) directly subject to Information Commissioner review. This preserves the existing policy that internal review is not a pre-requisite to AAT review for an access grant decision.

Proposed section 54N deals with the requirements for making an application for Information Commissioner review. Under subsection 54N(1), an application must include a copy of the decision (made by the agency or Minister) which is the subject of the review application. This will enable the Information Commissioner to readily identify the agency or Minister who is the respondent party and the matters in dispute. If a person does not receive a copy of a decision but proposed section 15AC (item 30 of Schedule 6) deems notice of a decision to have been given, a person making an application for Information Commissioner review may do so without including a copy of the decision. Under proposed subsection 54N(2), an applicant may also add particulars of the basis on which the applicant disputes the decision.

The purpose of subsection 54N(3) is to require the Office of the Information Commissioner to provide assistance to an applicant to prepare a valid application.

Proposed section 54P (which requires an agency or Minister to notify affected third parties if an FOI applicant seeks review of a decision to refuse access to the third party information) preserves a notice requirement under existing subsections 58F(3) (State documents), 59(3) (business affairs documents) and 59A(3) (personal

information documents). The notice is important because the third party may not have been aware of the request for access, particularly if the agency or Minister did not contemplate disclosing the document. (The requirement for third party consultation only arises if an agency or Minister is considering giving access to a document containing information relevant to the third party.)

Under proposed subsection 54P(3), an agency or Minister is required to give a copy of the notice given to the third party to the Information Commissioner. An affected third party becomes a party to the review application under proposed section 55A.

Proposed section 54Q qualifies the obligation to give notice to an affected third party under proposed section 54P (and replicates the same qualifying effect under existing subsections 59(3), 59(4), 59A(3) and 59A(4) of the FOI Act). The Information Commissioner is given a discretionary power to order that an agency or Minister does not need to give notice to an affected third party of an Information Commissioner review application if it would not be appropriate to do so in the circumstances. An example of when it may not be appropriate to give notice would be when a document includes information about a person under criminal investigation. An agency or Minister will need to apply to the Information Commissioner for an order to be excused from the requirement to give notice under proposed subsection 54Q(2). Proposed subsection 54Q(3) sets out the matters that the Information Commissioner must have regard to for the purposes of determining whether to make an order to excuse the requirement to give notice.

Proposed section 54R permits an applicant to withdraw an application for review at any time before the Information Commissioner makes a decision. A withdrawn application is taken never to have been made.

Proposed section 54S deals with the time periods within which an application must be made for Information Commissioner review. Under subsection 54S(1), an applicant who is seeking review of a decision to refuse access to a document must make the application within 60 days of receiving notice of a decision of the kind listed in subsection 54L(2). (An 'access refusal decision' applies to the decisions listed in proposed section 53A.) This time period is the same period that an FOI applicant has to make an application for AAT review under existing subsection 55(4) of the FOI Act.

Under proposed subsection 54S(2), an applicant who is an affected third party must make an application for Information Commissioner review within 30 days of receiving notice of a decision on an internal review application, or if the applicant has not applied for internal review, within 30 days of receiving notice (that an agency or Minister proposes to give access to a document containing information related to the third party) under sections 26A, 27 or 27A. This time period is the same period that an affected third party has to make an application for AAT review under existing subsections 58F(2A) (State documents), 59(2A) (business affairs documents) and 59A(2A) (personal information documents).

Proposed section 54T gives the Information Commissioner discretionary power to extend the time for making an application for Information Commissioner review if the Commissioner is satisfied that it is reasonable in all the circumstances to do so. This

provision is similar to the provisions made in subsections 29(7) to 29(10) of the AAT Act.

Proposed section 54U clarifies that the provisions in Division 5 have application to part of an Information Commissioner review application (as well as a whole application).

Proposed section 54V gives the Information Commissioner discretionary power to make preliminary inquiries for the purpose of determining whether or not to undertake a review. This power could be used, for example, to clarify that the decision in question is a decision which the Information Commissioner has power to review.

Proposed section 54W gives the Information Commissioner discretion not to undertake a review, or not to continue a review, in certain limited circumstances. The matters listed in paragraphs 54W(a) and 54W(c) are concerned with circumstances where the review applicant is uncooperative or cannot be contacted or the application is misconceived or vexatious. Under proposed paragraph 54W(b), the Information Commissioner may decide not to undertake a review if satisfied that the interests of the administration of the FOI Act make it desirable that the decision be reviewed by the AAT. One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT. It is intended that the Information Commissioner would undertake most review applications.

If the Information Commissioner determines not to undertake a review under section 54W, the applicant cannot make an application to the AAT for review of the decision not to undertake, or not to continue, the review. (Proposed section 57A sets out those decisions which are reviewable by the AAT.)

Under proposed 54X, if the Information Commissioner decides not to undertake a review, the Commissioner must give the review parties written notice of the decision. In the case of a decision under paragraph 54W(b) that it would be desirable for the AAT to undertake the review, the notice must state that the applicant may make an application to the AAT for review.

When an agency or Minister does not make a decision in the required time, the effect of the deeming provisions under proposed sections 15AC and 51DA (deemed refusal for initial requests) and proposed section 54D (deemed affirmation of original decision for purposes of an internal review) is that an application may be made for Information Commissioner review. The effect of proposed section 54Y is that the Information Commissioner is required to review an actual decision made by an agency or Minister which has been made after an application has been lodged for Information Commissioner review.

The notice requirement in proposed section 54Z ensures that the agency or Minister who made the decision is given notice that an application has been made for review by the Information Commissioner. In a case where a third party is seeking review of a decision to grant access to a document containing information concerning them, this



notice requirement ensures that the FOI applicant (the person seeking access) is notified of the review application.

Proposed section 55 establishes the general procedural provisions that will apply in an Information Commissioner review. It is intended that Information Commissioner review will provide a simple, expedient and cost efficient system for external merits review. To achieve this, the Information Commissioner is authorised to conduct a review in whatever way considered appropriate (proposed subsection 55(2)) and to use as little formality and technicality as possible (subsection 55(4)).

It is intended that most applications will be determined on the papers (without a hearing), which is effected through proposed subsection 55(1).

To enhance the Information Commissioner's ability to quickly resolve applications, under proposed paragraph 55(2)(b), the Information Commissioner will be able to use any technique that is appropriate to facilitate resolution, including techniques used in alternative dispute resolution processes. The ability to make preliminary inquiries, particularly to agencies concerning a decision made by the agency, may enhance the prospect of resolution through agreement without the need for formal decision by the Information Commissioner.

Proposed paragraph 55(2)(c) allows a person to participate in a review by any means of communication. This is consistent with the intention that Information Commissioner review be conducted with as little formality as possible. If a hearing is held, it will allow a person to participate by telephone, thereby assisting accessibility.

Proposed paragraph 55(2)(d) allows the Information Commissioner to obtain any information from any person, and to make any inquiries, that he or she considers appropriate. This is also consistent with the intention that Information Commissioner review be conducted with as little formality as possible. For example, it would allow the Information Commissioner to make early inquiries to an agency and to request information about the agency's decision. Such inquiries may facilitate the Information Commissioner forming a preliminary view about the merit of a decision. The Information Commissioner also has compulsory information gathering powers under proposed section 55R.

Proposed paragraph 55(2)(e) allows the Information Commissioner to give written directions (like orders) relating to the conduct of review proceedings both in relation to reviews generally and particular reviews. For example, in the context of a particular review, a direction could be made to prohibit or restrict the publication of certain evidence if the Information Commissioner is satisfied that the evidence should be kept confidential. In the context of reviews generally, the Information Commissioner could require a decision maker to lodge certain information for the purpose of the review proceedings.

Proposed subsection 55(3) clarifies that a direction given under paragraph 55(2)(e) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. The provision is merely declaratory of the law (to assist readers) and is not an exemption from the *Legislative Instruments Act 2003*.

The effect of subsection 55(5) is that hearings, if held, must be conducted in public unless the Information Commissioner is satisfied reasons exist to hold the hearing, or part of a hearing, in private. A similar rule applies in AAT proceedings under section 35 of the AAT Act (hearings to be in public except in special circumstances).

Proposed section 55A defines the review parties for the purposes of an Information Commissioner review. In general, for a decision that is a decision to refuse access to a document the review parties will be the FOI applicant (an 'IC review applicant' under paragraph (a)) and the principal officer of the agency or the Minister who makes the decision. If the documents in contention contain information relating to an affected third party, that third party will also be a party to the review application.

For a decision that is a decision to grant access to a document, the review parties will be the affected third party who is opposing disclosure of the document (an 'IC review applicant' under paragraph (a)) and the principal officer of the agency or the Minister to whom the request was made.

The effect of proposed paragraph 55A(1)(d) and subsections 55A(2) and 55A(3) is that the Information Commissioner has a discretionary power to join a person whose interests are affected as a party to a review application, upon that person's application to the Commissioner. An example would be the FOI applicant who is seeking to be a party to an application made by a third party who is contesting an access grant decision. Another example would be a person who is not given notice of a review application because of the operation of proposed section 54Q (with the consequence that the person is not made a party under paragraph 55A(1)(c)) and, upon inquiring into the application, the Information Commissioner is subsequently not satisfied that the information concerning that person is exempt.

Proposed section 55B enables a party to apply to the Information Commissioner at any time (before a decision is made under proposed section 55K) for a hearing. The Information Commissioner has discretion to allow the application. The intention is that hearings would not be commonplace as they can increase contestability and prolong resolution.

Proposed section 55C clarifies that a party may be represented by another person at a hearing. This would include a legal representative.

Proposed section 55D reproduces the effect of existing section 61 of the FOI Act.

Proposed section 55E empowers the Information Commissioner to request reasons for a decision from an agency or Minister who made a decision if the Commissioner believes the reasons given are inadequate or if no reasons have been provided (contrary to the requirement under existing section 26).

The effect of proposed section 55F is that the Information Commissioner has discretion to make a decision to resolve an application, in whole or in part, by giving effect to terms reached in agreement between the parties. Before making the decision, the Information Commissioner needs to be satisfied that the terms of the agreement would be within the powers of the Information Commissioner and that all parties have agreed to the terms.

The effect of proposed section 55G is that the Information Commissioner must deal with a decision that has been varied by an agency or Minister after an application has been made for Information Commissioner review as though it is the decision for review. The provision only applies to decisions that essentially benefit the applicant. Because of the intervention of the Information Commissioner, upon a review application being made, an agency or Minister may decide to vary their decision in a manner that favours the applicant. This decision may not necessarily be with the agreement of the applicant for the purposes of proposed section 55F, and may arise because of the intervention of the Information Commissioner.

Under proposed section 55H the Information Commissioner may refer a question of law at any time during a review to the Federal Court for determination. The effect of proposed subsection 55H(5) is that the Information Commissioner is bound to act consistently with the Federal Court's decision on the referred question. The power is intended to ensure that the Information Commissioner makes decisions which are correct in law and can make a decision to finally resolve a matter. The AAT has a similar power under section 45 of the AAT Act.

Proposed section 55J is a complementary provision for the purposes of proposed section 55H.

Proposed section 55K establishes the power for the Information Commissioner to determine review applications. This power would be exercised in a case where there has been no consensual agreement under proposed section 55F. The effect of proposed subsections 55K(1) to 55K(3) is that the Information Commissioner can make a fresh decision which replaces the decision of the agency or Minister, affirms the decision of the agency or Minister, or varies the decision of the agency or Minister. These are full merits review powers and are similar to the powers of the AAT under subsection 43(1) of the AAT Act. The Information Commissioner must give written reasons of the decision to all the parties to the review and must publish the decision in a manner that makes it publicly available. Proposed subsection 55K(5) ensures that the decision does not include any matter that has been found to be exempt.

The effect of proposed subsection 55L is that, upon finding a document to be exempt, the Information Commissioner has no power to order that access be given to the exempt material. This includes a document which has been found to be exempt because an exemption under proposed Division 2 of Part IV applies, or it is conditionally exempt under a provision in proposed Division 3 of Part IV and access to the document is contrary to the public interest, or it is a document to which existing section 7 applies. The underlying premise for this provision is that it would defeat the purpose of the exemption rules if the Information Commissioner could order that access be given notwithstanding that a document is found to be exempt. A similar restriction is placed on the AAT under existing subsection 58(2) of the FOI Act.

Proposed section 55M imposes a limitation on the power of the Information Commissioner to require amendment to be made to certain records. The provision is related to the right established in Part V of the FOI Act for a person to apply for amendment or annotation of a record of personal information that is incorrect and that

is used by an agency for administrative purposes. This provision is intended to replicate the effect of existing subsection 55(6) of the FOI Act which imposes a similar limitation on the AAT (which is being replaced by proposed section 58AA at item 36).

Proposed sections 55N and 55P provide for the enforcement of a decision by the Information Commissioner. Section 55N requires an agency or Minister to comply with a decision made under proposed section 55K. If an agency or Minister fails to comply with a decision, under proposed section 55P, the Information Commissioner or review applicant may make an application to the Federal Court for an order directing the principal officer of the agency or the Minister to comply. Such an application can only be made after the time for making a review application to the AAT (which may be made by an agency or Minister) has expired. (The time for making an application for AAT review is 28 days under subsection 29(2) of the AAT Act.) A similar enforcement regime is made to enforce determinations of the Privacy Commissioner under section 58 and section 62 of the Privacy Act.

Proposed section 55Q gives the Information Commissioner a discretionary power to correct obvious errors in a decision at the Commissioner's own initiative or upon application by a review party.

Proposed section 55R gives the Information Commissioner the power to compulsorily require production of information and documents. It is an offence to fail to comply with a production notice issued by the Information Commissioner. The power is necessary to ensure that the Information Commissioner can obtain the material necessary for resolving a review application. It is similarly an offence to fail to comply with a summons to produce issued by the AAT (see sections 40 and 61 of the AAT Act).

Proposed section 55S is a complementary provision to the power given under proposed section 55R.

Proposed section 55T gives the Information Commissioner a discretionary power to require the principal officer of an agency or a Minister to produce a document claimed to be exempt. That power does not apply to documents subject to a national security or Cabinet exemption claim which are covered by proposed section 55U. As the Information Commissioner is to have full merits review powers, it is necessary for the Commissioner to examine the documents to determine whether the correct decision has been made. Upon being satisfied that the document is exempt, the Information Commissioner must return the documents to the agency or Minister. The effect of proposed subsection 55T(5) is that no person other than the Information Commissioner or a member of the staff of the Office of the Information Commissioner may have access to a document that is exempt. (Under proposed section 89P the Information Commissioner must take all reasonable steps to ensure members of staff are given appropriate security clearances.) A similar production power applies to AAT proceedings under existing section 64 of the AAT Act.

Proposed section 55U gives the Information Commissioner a discretionary power to require the principal officer of an agency or a Minister to produce a document claimed to be exempt under the national security exemption (existing section 33) or Cabinet

section (section 34), but only if the Commissioner is first not satisfied on affidavit or other evidence that the document is exempt. This provision replicates the effect of section 58E of the FOI Act which applies to AAT review proceedings. The measure is intended to protect against the unnecessary disclosure of sensitive information.

The power given to the Information Commissioner under proposed section 55V to order an agency or Minister to undertake further searches of documents, replicates the effect of the powers given to the AAT under existing subsections 55(5) and 55(5A) of the FOI Act (to become section 58A at item 36 of this Schedule).

Proposed section 55W gives the Information Commissioner the power to compulsorily require a person to attend to answer questions for the purposes of a review. It is an offence to fail to comply with a notice issued by the Information Commissioner for this purpose. The power is necessary to ensure that the Information Commissioner can obtain the information necessary for resolving a review application. It is similarly an offence to fail to comply with a summons to appear to give evidence in AAT proceedings (see sections 40 and 61 of the AAT Act).

Proposed section 55X empowers the Information Commissioner to require a person who appears before the Commissioner, pursuant to a notice under section 55W, to take an oath or affirmation that the answer the person will give will be true. It is intended that the offence would apply if the person refuses to take the oath or affirmation or if the person knowingly gives false answers.

Proposed section 55Y preserves a claim for legal professional privilege in respect of information or a document produced to the Information Commissioner in connection with a review by the Information Commissioner.

Proposed section 55Z provides immunity to a person from civil proceedings and criminal or civil penalty if the person gives information, produces a document or answers a question in good faith for the purposes of an Information Commissioner review. The immunity applies even if the person has not provided the material pursuant to a compulsory process. The Information Commissioner may obtain information under proposed paragraph 55(2)(d) which would depend on a person agreeing to give the information without a compulsory notice.

Proposed sections 55ZA to 55ZD replicate the effect of section 60A of the FOI Act which applies to AAT review proceedings. The purpose of this proposed amendment is to assist the Information Commissioner through the provision of expert advice from the Inspector-General of Intelligence and Security (which would be independent to agency evidence) to determine the damage that could result from disclosure of a document which is claimed to be exempt under the national security exemption (existing section 33).

Proposed section 56 gives a review party a right to appeal to the Federal Court on a question of law from a decision of the Information Commissioner. A similar right is given to a party to an AAT proceeding under section 44 of the AAT Act. A party may make an application to the Federal Court instead of making an application to the AAT (which involves a full reconsideration of the decision by the Information Commissioner in a merits review) because, for example, the party believes the

Information Commissioner interpreted and applied the provisions of the FOI Act incorrectly. If the Federal Court remits a decision to the Information Commissioner for reconsideration, it would be open to a party to apply to the AAT for review of the decision made by the Information Commissioner (on consideration of the remitted matter).

Proposed section 56A is a complementary provision to proposed section 56. Similar provision is made in respect of Federal Court proceedings arising from an appeal from an AAT decision under section 44 of the AAT Act.

Proposed section 57 is a guide to review by the AAT and is intended to assist readability.

Proposed section 57A establishes a right of review to the AAT from an Information Commissioner decision made under proposed section 55K or as a result of a decision made by the Information Commissioner under proposed paragraph 54W(b) not to undertake a review on the basis that it is desirable that the AAT undertakes the review. The effect of this provision is that the AAT may review any decision that is amenable to review by the Information Commissioner. Under subsection 29(2) of the AAT Act, an application to the AAT must be made within 28 days of the Information Commissioner making the decision.

*Item 35 – subsection 58(7)*

Item 35 repeals subsection 58(7). The effect of that provision is not repeated in the Bill as its operation is spent. This item is consequential to the amendment proposed at item 22 of this Schedule.

*Item 36 – after section 58*

Proposed section 58A replicates the effect of existing subsections 55(5) and 55(5A) of the FOI Act. (Section 55 is repealed by item 34 of this Schedule.)

Proposed section 58AA replicates the effect of existing subsection 55(6) of the FOI Act. (Section 55 is repealed by item 34 of this Schedule.) The provision is related to the right established in Part V of the FOI Act for a person to apply for amendment or annotation of a record of personal information that is incorrect and has been or is being used by an agency for administrative purposes. Provision for similar IC powers are at item 34, proposed new section 55M.

*Item 37 – before section 58B*

Item 37 inserts a title and is an aid to readability.

*Item 38 – subsection 58B(1)*

This item amends subsection 58B(1) of the FOI Act. It is a minor drafting change.

*Item 39 – section 58D*

Item 39 is concerned with the special constitution requirements for the purposes of subsection 58B(1) of the FOI Act. The special constitution requirement applies when an exemption is claimed under existing section 33 (national security related documents) or (new) section 34 (Cabinet documents). The item addresses an existing

gap in the different types of membership that may arise in a three presidential member panel.

*Item 40 – sections 58F, 59 and 59A*

These provisions are repealed but the effect of these provisions is preserved by proposed section 54M which provides a right of review for an affected third party to the Information Commissioner on an ‘access grant decision’ (item 34 of this Schedule).

*Item 41 – section 60*

An application to the AAT is an application for review of the decision made by the Information Commissioner (unless the Information Commissioner decides under proposed paragraph 54W(b) not to undertake a review on the basis that it is desirable for the AAT to undertake external merits review at first instance). The applicant has the onus of establishing that the Information Commissioner did not make the correct decision. The Information Commissioner will not defend his or her decision and is not a party to the proceedings in the AAT. The parties to an AAT review application are:

- proposed paragraph 60(3)(a) – the person who applies to the AAT from an Information Commissioner decision made under proposed section 55K because they were a party to that review application (or as a consequence of a decision by the Information Commissioner not to undertake a review under proposed paragraph 54W(b));
- proposed paragraph 60(3)(b) – the person who made the request under section 15 (for access to documents) or section 48 (for amendment or annotation of a personal record). If the agency or the Minister is the applicant for review under paragraph (a), this provision ensures the original FOI applicant is a party to the AAT proceedings;
- proposed paragraph 60(3)(c) – the principal officer of the agency or the Minister to whom the request was made. If the original FOI applicant is the applicant for review under paragraph (a), this provision ensures the agency or Minister is a party to the AAT proceedings;
- proposed paragraph 60(3)(d) – any other person who is made a party to the proceeding by the AAT under subsection 30(1A) of the AAT Act. Under that provision the AAT has a discretionary power to join a person whose interests are affected by the decision.

Proposed section 60AA requires an agency or Minister to notify affected third parties if an FOI applicant seeks AAT review of a decision to refuse access to the third party information. This replicates the notice requirement under proposed section 54P (which applies if an application is made for Information Commissioner review). The provision preserves the notice requirement under existing subsections 58F(3) (State documents), 59(3) (business affairs documents) and 59A(3) (personal information documents). An affected third party may apply to become a party to the AAT review application under proposed paragraph 60(3)(d).

Proposed section 60AB preserves the effect of subsections 59(3), 59(4), 59A(3) and 59A(4). The effect of proposed section 60AB is that the AAT has discretion to order that an agency or Minister does not need to give notice to an affected third party of an AAT review application if it would not be appropriate to do so in the circumstances.

An example of when it may not be appropriate to give notice would be when a document includes information about a person under criminal investigation. An agency or Minister will need to apply to the AAT for an order to be excused from the requirement to give notice under proposed subsection 60AB(2). Proposed subsection 60AB(3) sets out the matters that the AAT must have regard to for the purposes of determining whether to make an order to excuse the requirement to give notice.

*Item 42 – section 61*

Item 42 is an amendment arising from the proposal to interpose Information Commissioner review before AAT review. The effect of subsection 61(1) is that the person who applies for review of an access refusal decision (from a decision of the Information Commissioner) has the onus of establishing that the Information Commissioner made the wrong decision. The person who applies for review may be an applicant or it may be the agency or the Minister.

Proposed subsection 61(2) preserves the effect of existing subsection 61(2).

Proposed section 61A modifies various provisions in the AAT Act as a consequence of the proposal to interpose Information Commissioner review before AAT review.

*Item 43 – before section 63*

Item 43 inserts a title and is an aid to readability.

*Item 44 – before section 66*

Item 44 inserts a title and is an aid to readability.

*Item 45 – paragraph 66(1)(a)*

This item updates a reference and is consequential in nature.

*Item 46 – subsections 66(1) and (3)*

Existing section 66 of the FOI Act permits the AAT to make a recommendation to the Attorney-General that the costs of an applicant be paid by the Commonwealth. To reflect changes that have occurred to the provision of Commonwealth legal services, the effect of this proposed amendment is that the AAT may make a recommendation to the Minister responsible for an agency instead of to the Attorney-General.

*Item 47 – before section 67*

Item 47 inserts a title and is an aid to readability.

*Item 48 – paragraph 67(1)(a)*

Item 48 updates a reference and is consequential in nature.

*Item 49*

Item 49 inserts Part VIIB into the FOI Act which gives the Information Commissioner a function of investigating actions by an agency relating to the handling of FOI matters under the Act.

Proposed section 68 is a guide to the investigation function of the Information Commissioner and is intended to assist with readability.



The effect of proposed sections 69 and 70 is to give the Information Commissioner the function of investigating complaints about an action taken by an agency in the performance of functions, or the exercise of powers, under the FOI Act. A complainant is required to make a complaint in writing and to identify the agency against whom the complaint is made. The Information Commissioner is required to investigate a complaint that is made, subject to other provisions in Division 2. Proposed section 73 gives the Information Commissioner a discretionary power not to investigate a complaint in certain circumstances. Proposed section 74 permits the Information Commissioner to transfer a complaint to the Ombudsman in certain circumstances.

Under proposed subsection 69(2), the Information Commissioner has discretion to undertake an own motion investigation into action undertaken by an agency in the performance of functions, or the exercise of powers, under the FOI Act.

Like the investigation function of the Ombudsman, the Information Commissioner is not authorised to investigate action taken by a Minister.

Proposed section 71 clarifies that the provisions in Subdivision C of Division 2, Part VIIB have application to part of a complaint (as well as the whole complaint).

Proposed section 72 gives the Information Commissioner discretionary power to make preliminary inquiries for the purpose of determining whether or not to investigate a complaint. This power could be used, for example, to determine if the complaint relates to an action under the FOI Act.

Proposed section 73 gives the Information Commissioner discretion not to investigate, or not to continue to investigate, a complaint in certain circumstances. Proposed paragraph 73(b) recognises that the Information Commissioner's function of undertaking a review offers a discrete remedy for grievances relating to reviewable FOI decisions. If the proper remedy is for a person to seek review of the merits of an FOI decision, it is intended that the Information Commissioner would not investigate the matter under Part VIIB. The investigation of actions under Part VIIB is intended to deal with the manner in which FOI requests are handled and procedural compliance matters. Paragraph 73(c) applies a similar principle to paragraph 73(b). Similar to the Ombudsman, the Information Commissioner may decide not to investigate a complaint until an agency has had the opportunity to address a complaint or, if the Commissioner is satisfied that the agency has adequately addressed the complaint (proposed paragraph 73(d)). Other grounds listed in proposed section 73 are similar to the discretionary grounds applicable to the Ombudsman (see section 6 of the Ombudsman Act). If the Information Commissioner decides not to investigate a complaint, the Commissioner is required to give a written notice (with reasons) to the applicant and agency (proposed section 75).

Proposed section 74 deals with the relationship between the Information Commissioner's investigation function and the Ombudsman's investigation function. While the Ombudsman may still investigate complaints concerning action under the FOI Act, it is intended that the Information Commissioner will deal with most complaints of this kind. The Ombudsman will have capacity to investigate FOI complaints where the Ombudsman could more effectively or appropriately deal with a

complaint. An example of where it may be more effective for the Ombudsman to handle an FOI complaint is where the complaint forms one aspect of a wider grievance concerning agency action. An example of where it may be more appropriate for the Ombudsman to handle an FOI complaint is where the complaint relates to action by the Information Commissioner in dealing with an FOI request. Proposed subsection 74(2) provides for the Information Commissioner to consult with the Ombudsman to ensure no overlap arises. Proposed subsection 74(3) requires the Information Commissioner to transfer a complaint to the Ombudsman upon deciding not to investigate a complaint following consultation with the Ombudsman. A complementary provision is made for the purposes of the Ombudsman Act (item 60, proposed section 6C of the Ombudsman Act).

Proposed subsection 75(1) is a procedural measure requiring the Information Commissioner to notify the respondent agency where it proposes to investigate a complaint. Similarly, under proposed subsections 75(2) to 75(4), the Commissioner is required to give written notice (with reasons) to the complainant or respondent agency if deciding not to investigate (or continue to investigate) a complaint.

Proposed subsection 76(1) establishes a general rule applying to the conduct of an investigation. The requirement for an investigation to be conducted in private (subject to other provisions in the Act) is consistent with the manner in which the Ombudsman is required to undertake investigations (see subsection 8(2) of the Ombudsman Act).

Proposed subsection 76(2) gives the Information Commissioner discretionary power to obtain information from an agency officer, and make any inquiry, relevant to an investigation. This provision is supplemented by compulsory powers under proposed sections 79 (production of information and documents) and 82 (notice to appear to answer questions).

Proposed section 77 empowers persons authorised by the Information Commissioner to enter premises occupied by an agency (or a contracted service provider in certain circumstances) for the purposes of an investigation. In some cases it may be necessary for the Information Commissioner to be satisfied that proper searches have been conducted for the purposes of answering an access request, or it may simply be more convenient for an inspection of documents to occur on agency premises. The power is conditional upon the principal officer of an agency consenting to entry or, in the case of a contracted service provider, the person in charge consenting.

For the purposes of proposed section 77, ministerial approval is required before entering a place identified under proposed subsection 78(1). That requirement is consistent with a rule that applies for entry to premises by the Ombudsman in connection with the Ombudsman's investigation function (see subsection 14(2) of the Ombudsman Act). Similarly, the power under proposed subsections 78(3) and 78(4) for the Attorney-General to prohibit entry to a place by declaration (if satisfied an investigation may prejudice the security or defence of the Commonwealth) is consistent with a provision that applies in connection with the Ombudsman's investigation function (see subsection 14(3) of the Ombudsman Act).

Proposed section 79 gives the Information Commissioner the power to compulsorily require production of information and documents in connection with an investigation. It is an offence to fail to comply with a production notice issued by the Information Commissioner. The power is necessary to ensure that the Information Commissioner can obtain the material relevant to an investigation. It is similarly an offence to fail to comply with a notice to produce issued by the Ombudsman (see section 36 of the Ombudsman Act).

Proposed section 80 is a complementary provision to the power given under proposed section 79.

The effect of proposed section 81 is to give the Information Commissioner the same power to require production of exempt documents as applies under the Commissioner's review function. The same limitations that apply in the exercise of this power under the review function, including in relation to national security and cabinet documents, will also apply to the investigation function. For example, returning exempt documents and ensuring that they are not disclosed other than to staff of the Office of the Information Commissioner in the course of performing their duties.

Proposed section 82 gives the Information Commissioner the power to compulsorily require a person to attend to answer questions for the purposes of an investigation. It is an offence to fail to comply with a notice issued by the Information Commissioner for this purpose. The power is necessary to ensure that the Information Commissioner can obtain the information necessary to conduct an investigation. It is similarly an offence to fail to comply with a notice to appear issued by the Ombudsman (see section 36 of the Ombudsman Act).

Proposed section 83 empowers the Information Commissioner to require a person who appears before the Commissioner, pursuant to a notice under section 82, to take an oath or affirmation that the answer the person will give will be true. It is an offence to fail to comply with this requirement. It is intended that the offence would apply if the person refuses to take the oath or affirmation or if the person knowingly gives false answers.

Proposed section 84 preserves a claim for legal professional privilege in respect of information or a document produced to the Information Commissioner in connection with an investigation by the Information Commissioner.

Proposed section 85 provides immunity to a person from civil proceedings and from criminal or civil penalty if the person gives information, produces a document or answers a question in good faith for the purposes of an investigation. The protection applies even if the person has not provided the material pursuant to a compulsory process. The Information Commissioner may obtain information under proposed subsection 76(2) which would depend on a person agreeing to give the information without a compulsory notice.

Upon completing an investigation, the Information Commissioner is required by proposed section 86 to notify the agency of the outcome of the investigation, and the complainant. (There will be no complainant if the Information Commissioner is

undertaking an own motion investigation.) The agency is authorised to make any comments back to the Information Commissioner about the notice. However, under proposed section 89C, the notice must not include exempt matter. Similarly to the Ombudsman, the Information Commissioner has recommendatory powers in respect of his or her investigation function. The investigation may not lead in all cases to the Information Commissioner making formal recommendations. In this case, the notice would address the matters in proposed section 87 (the investigation results). In some cases, intervention by the Information Commissioner may lead to action by the agency that satisfactorily removes the reason for the complaint. In other cases, a suggestion or opinion by the Information Commissioner may be the appropriate outcome.

If the Information Commissioner makes an investigation recommendation (within the meaning of proposed section 88), the Commissioner may subsequently report to the Minister responsible for the agency, and to the Minister responsible for the FOI Act, if the Commissioner is not satisfied that the agency has taken action that is adequate and appropriate in the circumstances to implement the recommendation (proposed section 89A). The Minister responsible for the FOI Act is required to table a report of this kind before each House of the Parliament (under proposed subsection 89A(5)).

As a pre-condition to taking action to table a report for the purposes of section 89A, under proposed section 89, the Information Commissioner is required to issue a notice to the respondent agency requesting particulars of any action proposed to address an investigation recommendation. It is intended that the Information Commissioner would only take action to report to Ministers if the Commissioner considers the agency has not taken action that is adequate and appropriate to implement a recommendation.

Proposed section 89B prescribes the matters that must be addressed in a report to Ministers for the purposes of section 89A. Under proposed section 89C, a report must not include exempt matter.

Proposed section 89D imposes a limitation on the power of the Information Commissioner to recommend that amendment be made to certain records. The provision is related to the right established in Part V of the FOI Act for a person to apply for amendment or annotation of a record of personal information that is incorrect and that is used by an agency for administrative purposes. This provision is intended to replicate an existing limitation that applies to the Ombudsman in connection with an investigation related to action under the FOI Act (see existing section 57(6) of the FOI Act which is to be replaced by proposed section 89J in this item).

Proposed section 89E provides immunity to a complainant from civil proceedings, provided that the person has made the complaint under proposed section 70 in good faith.

The purpose of proposed section 89F is to preserve the jurisdiction of the Ombudsman to undertake investigations related to the FOI Act. It is intended that most complaints about handling requests under the FOI Act will be dealt with by the Information Commissioner (see proposed section 74 above).

Proposed section 89G introduces the same restriction to a report prepared by the Ombudsman in connection with an investigation relating to action by an agency under the FOI Act (that the report must not contain exempt matter) as is proposed to apply to a report (and notice) prepared by the Information Commissioner (see proposed section 89C).

Proposed section 89H preserves the effect of existing subsection 57(5) of the FOI Act.

Proposed section 89J preserves the effect of existing subsection 57(6) of the FOI Act. (Existing section 57 is repealed by item 34 of this Schedule.) The provision is related to the right established in Part V of the FOI Act for a person to apply for amendment or annotation of a record of personal information that is incorrect and that is used by an agency for administrative purposes. The same limitation is proposed to apply to an investigation by the Information Commissioner under proposed 89D in this item.

*Item 50 – before section 91*

Proposed section 89K gives the Information Commissioner discretionary power to declare a person to be a vexatious applicant, upon the Commissioner's own motion or upon application by an agency or Minister. One of the reasons that the *Open government report* made no recommendation to amend the FOI Act to include a power for a person to be declared a vexatious applicant was a potential for agencies to invoke the power merely because the person was perceived as a nuisance (at paragraph 7.18). Under this measure, the power is exercised by the Information Commissioner who is an independent statutory office holder. If an agency or Minister makes an application to the Information Commissioner the effect of proposed subsection 89K(3) is that the agency or Minister bears the onus of establishing that the Commissioner should make the declaration.

Proposed section 89L establishes the grounds upon which the Information Commissioner needs to be satisfied in order to declare a person to be a vexatious applicant. The power is exercisable in relation to an 'access action' by the applicant. An access action relates to rights provided under the Act to make a request or an application for review (other than an application for review to the AAT). Before making a declaration, the Information Commissioner is required to give the person an opportunity to make submissions.

Under proposed section 89M, the Information Commissioner may make a declaration subject to terms and conditions. Under proposed subsection 89M(2), a declaration may have the effect that an agency or Minister may refuse to deal with an access request or an application from the person declared vexatious unless the request or application is made with the permission of the Information Commissioner.

Under proposed section 89N, a person who is declared vexatious may apply to the AAT for review of that decision. The Information Commissioner would be the respondent party to the application.

Proposed section 89P requires the Information Commissioner to ensure that staff of the Office hold appropriate security clearances (in accordance with the Australian

Government Protective Security Manual). This measure recognises that staff may handle classified material in the course of performing duties under the FOI Act.

Proposed section 90 extends the immunity given to officers, Ministers, agencies and the Commonwealth from certain civil actions in existing section 91 of the FOI Act. That provision provides protection where access is 'required' to be given under the Act. It does not cover discretionary disclosure outside the FOI Act or disclosure of exempt documents. Proposed section 90 extends the scope of the immunity to disclosures of that kind made in good faith (in addition to disclosures required to be made under the Act). The provision is also amended to cover the proposed publication requirements under the Act (namely, the information publication scheme in Part II and under proposed section 11C (Part III)), in addition to access requests. This proposal implements a recommendation of the *Open government report*.

*Item 51 – subsection 91(1)*

This item is a consequential amendment to the proposal to insert section 90 in item 50.

*Item 52 – subsection 91(1A)*

This item is a consequential amendment to the proposal to insert section 90 in item 50.

*Item 53 – paragraph 91(1C)(a)*

This item is consequential to item 21 in Schedule 3 (section 26A has been redrafted to improve readability).

*Item 54 – paragraph 91(1C)(b)*

This item is consequential to item 21 in Schedule 3 (and takes account of the redrafting of section 27).

*Item 55 – paragraph 91(1C)(c)*

This item is consequential to item 21 in Schedule 3 (and takes account of the redrafting of section 27A).

*Item 56 – section 92*

Item 56 repeals existing section 92 and substitutes a new provision that extends the immunity given to officers and Ministers from criminal offences. Existing section 92 provides protection where access is 'required' to be given under the Act. It does not cover discretionary disclosure outside the FOI Act or disclosure of exempt documents. Proposed section 92 extends the scope of the immunity to disclosures of that kind made in good faith (in addition to disclosures required to be made under the Act). The provision is also amended to cover the proposed publication requirements under the Act (namely, the information publication scheme in Part II and under proposed section 11C (Part III)), in addition to access requests.

*Item 57 – section 93*

Existing section 93 of the Act is proposed for repeal because the preparation of an annual report on the operation of the FOI Act is proposed as a function of the Information Commissioner under clause 30 of the Information Commissioner Bill.

Proposed section 93, which requires agencies and Ministers to furnish information for the purposes of the annual report under clause 30 of the Information Commissioner Bill, is intended to replicate the obligation under existing subsection 93(2) of the FOI Act. The information that must be provided is set out in clause 31 of the Information Commissioner Bill.

Proposed section 93A gives the Information Commissioner a discretionary power of issuing guidelines for the purposes of the FOI Act. The reference to guidelines addressing certain matters under proposed subsection 93A(2) is not intended to limit the power of the Information Commissioner to issue guidelines on other aspects of the operation or administration of the FOI Act. An agency or Minister must have regard to any guidelines issued by the Information Commissioner (that is to consider the guidelines). It is not intended that the guidelines have binding effect.

Proposed subsection 93A(3) provides that guidelines are not legislative instruments. The provision is merely declaratory of the law (to assist readers) and is not an exemption from the *Legislative Instruments Act 2003*.

Proposed section 93B requires the Minister responsible for the FOI Act to cause a Government review to be undertaken of the operation of the Act two years after the commencement of this provision. The period of two years should allow sufficient time for the effectiveness of the Act (as changed by the reform bills) to be assessed. The report must be completed within six months and a copy of the report is to be tabled in the Parliament. Provision is also made in the Information Commissioner Bill at clause 33 for review of that legislation when enacted. It is the Government's intention for both reviews to be undertaken at the same time.

## **Part 2 – Other amendments – *Ombudsman Act 1976***

### *Item 58 – subsection 3(1)*

Item 58 inserts a definition and is related to the proposal at item 60.

### *Item 59 – subsections 6(4A) to (4C)*

Item 59, which repeals subsections 6(4A) to 6(4C), is a consequential amendment arising from the amendment at item 60.

### *Item 60 – after section 6B*

The amendments to the Ombudsman Act relate to the proposal to give the Information Commissioner a function of investigating action taken by agencies under the FOI Act. While the Ombudsman may still investigate complaints concerning action under the FOI Act, it is intended that the Information Commissioner will deal with most complaints of this kind. The Ombudsman will have capacity to investigate FOI complaints where the Ombudsman could more effectively or appropriately deal with a complaint (for example, where the FOI complaint forms one aspect of a wider grievance concerning agency action or relates to action by the Information Commissioner in dealing with an FOI request). Proposed subsection 6C(2) provides for the Ombudsman to consult with the Information Commissioner to ensure no duplicity arises. Proposed subsection 6C(3) requires the Ombudsman to transfer a complaint to the Information Commissioner upon deciding not to investigate a complaint following consultation with the Information Commissioner.

Complementary provision is made in relation to the Information Commissioner (item 49, proposed section 74 of the FOI Act).

*Item 61 – subsection 19(4)*

This item addresses a reference error in subsection 19(4) of the Ombudsman Act.

*Item 62 – subparagraph 19R(3)(b)(iii)*

Item 62 is a consequential amendment arising from item 59.

*Item 63 – subsection 19R(4) (table item 4, column 2)*

Item 63 is a consequential amendment arising from item 59.

*Item 64 – subsection 35(6A)*

This item is a consequential amendment arising from item 59.

### **Part 3 – Application and transitional provisions**

*Item 65 – application Part 1*

Subitem (1) of item 65 provides that the amendments made in Part 1 of Schedule 4 apply in relation to requests for access made under section 15 of the FOI Act and applications made under section 48 of the FOI Act that are received at or after the commencement of those items.

Subitem (2) of item 65 provides that the amendments proposed to section 66 of the FOI Act (power for the AAT to make a recommendation that costs be paid) apply to applications to the AAT made at or after the commencement of items 44 and 46.

Subitem (3) of item 65 relates to the proposed investigation function and means that the Information Commissioner may investigate action taken by an agency for the purposes of the FOI Act whether the action occurred before, at or after the commencement of the amendments made by item 49.

The effect of subitem (4) is that the proposed amendments to extend the immunity to officers and Ministers for certain civil proceedings and for criminal liability apply to actions involving the publication of a document, or giving access to a document, at or after the commencement of those items.

*Item 66 – application Part 2*

The amendments to the Ombudsman Act made by Part 2 of Schedule 4 apply to a complaint made to the Ombudsman (in relation to action by an agency for the purposes of the FOI Act) at or after the commencement of those amendments.

*Item 67 – savings – complaints on foot continue under old law*

This item establishes that a complaint made to the Ombudsman before the commencement of the amendments in Part 2 is to continue to be dealt with under the Ombudsman Act if the Ombudsman had not informed the complainant of the result of the investigation under section 12 of the Ombudsman Act.



## **Schedule 5 – Amendments consequential on the establishment of the Office of the Information Commissioner**

Most of the items in this Schedule are amendments consequential on the establishment of the Office of the Information Commissioner and, in particular, the proposal to bring the Privacy Commissioner and the Office of the Privacy Commissioner into the Office of the Information Commissioner. The Information Commissioner, as head of the Office, is to be principally vested with all the functions of the Office including the privacy functions (within the meaning of the Information Commissioner Bill). For that reason, references to the Privacy Commissioner in all legislation are to be substituted with references to the Information Commissioner. This affects items 3, 4, 5, 6, 7, 8, 9, 17, 18, 20, 21, 22, 23, 24, 25, 26, 30, 34, 39, 42, 44, 46, 47, 48, 49, 50, 51, 52, 53, 55, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 69, 71, 73, 74, 75.

The Information Commissioner will have the privacy functions, the FOI functions and the information commissioner functions (within the meaning of the Information Commissioner Bill). A number of amendments proposed to legislation addressed in this Schedule make specific reference to the Information Commissioner's privacy functions or to the Privacy Act in order to clarify, where needed, that the relevant function is related to the Information Commissioner's responsibilities for privacy (and not the FOI or information commissioner functions). This affects items 1, 11, 15, 16, 19, 27, 29, 32, 35, 37, 41, 66, 70, 76, 77.

Some of the amendments proposed to legislation addressed in this Schedule amend secrecy provisions and have the effect of making a disclosure of information to the Information Commissioner for the purposes of the Commissioner's investigation functions a permitted disclosure. These amendments will apply to the Information Commissioner's investigation functions under the Privacy Act and under proposed Part VIIB of the FOI Act. This affects items 2, 12, 13, 14, 33, 36, 38, 78.

### *Item 10*

This item proposes repeal of that part of subsection 4(4) of the *Aviation Legislation Amendment (2008 Measures No.2) Act 2009* that authorises the Privacy Commissioner to delegate his or her powers to a member of staff for the purposes of preparing the report under section 4. The Information Commissioner will similarly have the power to make a delegation for that purpose under the Information Commissioner Bill (proposed clauses 9 and 25). The amendment is consequential to the repeal of the Privacy Commissioner's delegation power effected by item 56 of this Schedule.

### *Items 28 and 31*

These items repeal provisions in the *Data-matching Program (Assistance and Tax) Act 1990* ('DP(AT) Act') which are now spent in operation. Under section 12 of the DP(AT) Act, the Privacy Commissioner has the function of issuing guidelines. The DP(AT) Act incorporates interim guidelines in a schedule which were to have effect up until the Privacy Commissioner issued guidelines relating to the matching of data. The Privacy Commissioner issued guidelines before 30 September 1991 as required under the Act. As the effect of the interim guidelines provision is now spent, that provision (and related provisions about the interim guidelines) are proposed for

repeal. Subsection 12(2A) of the DP(AT) Act, which required certain reports to be tabled in the Parliament within certain periods, is also proposed for repeal as its operation is spent.

*Items 40, 43 and 45*

These items make minor amendments to the *National Health Act 1953* to update provisions that are inconsistent with concepts in the *Legislative Instruments Act 2003*.

*Item 54*

This item repeals Division 1 of Part IV of the Privacy Act, which establishes the Office of the Privacy Commissioner. This Division will become redundant in light of the proposal to bring the Office of the Privacy Commissioner into the Office of the Information Commissioner and to appoint the Privacy Commissioner under the Information Commissioner Bill.

*Item 56*

This item repeals sections from the Privacy Act dealing with the non-disclosure of private information, preparation of an annual report and a delegation power. These sections are related to the operation of the Office of the Privacy Commissioner. They will become redundant in light of the proposal to bring the Office of the Privacy Commissioner into the Office of the Information Commissioner and to appoint the Privacy Commissioner under the Information Commissioner Bill.

*Item 72*

Item 72 repeals subsection 309(5) of the *Telecommunications Act 1997*, which is consequential to the proposal to repeal section 99 of the Privacy Act in item 56 of this Schedule.

## **Schedule 6 – Other amendments**

### **Part 1 – amendments to the FOI Act**

#### *Item 1 – subsection 4(1) (definition of agency)*

The term ‘eligible case manager’ no longer has relevance for the purposes of the FOI Act and this item removes a reference to this term.

#### *Item 2 – subsection 4(1)*

This item inserts a definition for ‘Commonwealth contract’ and is related to item 19. A Commonwealth contract for the purposes of this definition is intended to cover contracts for the delivery of services to the community by another party for or on behalf of an agency. It is not intended to cover contracts for the procurement of services for use by the Commonwealth.

#### *Item 3 – subsection 4(1)*

This item inserts a definition for ‘contracted service provider’ and is related to item 19.

#### *Item 4 – subsection 4(1)*

This item is related to the amendment proposed at item 21 (new subsections 7(2C) and 7(2D)).

#### *Item 5 – subsection 4(1) (definition of Department)*

This item omits words from the definition of ‘Department’ which were transitional in nature and are now redundant.

#### *Item 6 – subsection 4(1) (paragraph (d) of the definition of document)*

The existing definition of ‘document’ is defined not to mean *library material maintained for reference purposes*. Agencies no longer maintain ‘libraries’ in the traditional sense and this item proposes to update the definition of document to exclude material that is maintained for reference purposes and is otherwise publicly available.

#### *Item 7 – subsection 4(1) (definition of document of an agency)*

This item repeals an existing definition and replaces it with a new definition that takes into account the amendment proposed in item 19 (proposed section 6C).

#### *Item 8 – subsection 4(1)*

This item is related to the amendment proposed in items 24 and 25. It facilitates the making of applications and giving of notices for purposes under the Act by electronic communication. Applications may still be submitted in person or by post.

#### *Item 9 – subsection 4(1) (definition of eligible case manager)*

The term ‘eligible case manager’ no longer has relevance for the purposes of the FOI Act and this item removes the definition for this term.

#### *Item 10 – subsection 4(1)*

This item is related to the amendment proposed in items 20 and 21 (proposed subsection 7(2B)).

*Item 11 – subsection 4(1)*

This item is related to the amendment proposed at item 32 (proposed section 24AA).

*Item 12 – subsection 4(1) (paragraphs (b) and (c) of the definition of principal officer)*

The concept of ‘principal officer’ is used in connection with several aspects of the FOI Act. This item would replace existing paragraph (b) of the definition of ‘principal officer’ to reduce the need for the *Freedom of Information (Miscellaneous Provisions) Regulations* to prescribe principal offices in respect of authorities, as authorities can frequently change names or merge. The intention is that proposed subparagraphs (ii) – (v) would apply to most authorities subject to the FOI Act, but if this was not the case (or to avoid ambiguity in some instances) proposed subparagraph (i) allows for the Regulations to declare an office to be the principal office of the authority. In the case of subparagraph (iii), the ‘person responsible for the day-to-day management of the authority’ would in many cases be the Chief Executive Officer or equivalent position which manages the authority on a day-to-day basis. It is anticipated that the Regulations will be reviewed in conjunction with this amendment.

This item also removes that part of the definition that relates to an ‘eligible case manager’ (existing paragraph (c)) as this term no longer has relevance for the purposes of the FOI Act.

*Item 13 – subsection 4(1)*

This item is related to the amendment proposed at item 32 (proposed section 24AB).

*Item 14 – subsection 4(1) (paragraph (d) of the definition of responsible Minister)*

This item is a minor editorial change that arises as a consequence of item 15.

*Item 15 – subsection 4(1) (paragraph (e) of the definition of responsible Minister)*

The item is related to the removal of the term ‘eligible case manager’ from the FOI Act, which no longer has relevance for the purposes of the FOI Act.

*Item 16 – subsection 4(1)*

This item inserts a definition of ‘subcontractor’ in respect of a Commonwealth contract (see item 2), which is related to the amendment proposed at item 19 (proposed section 6C – requirement for Commonwealth contracts).

*Item 17 – subsection 4(8)*

This item repeals a provision dealing with application fees. It is part of these reforms that no application fee will apply in relation to access requests made under Part III of the Act (other than an application fee to the AAT).

*Item 18 – section 6B*

The item repeals a provision related to an ‘eligible case manager’, which no longer has relevance for the purposes of the FOI Act.

*Item 19 – before section 7*

Item 19 inserts proposed section 6C. The measure is intended to extend the scope of the FOI Act so that requests for access may be made for documents held by contracted service providers (and subcontractors) delivering services for or on behalf of an agency to persons in the community. The proposal is tied to recommendation 99 of the *Open government report* which was concerned with ‘the trend towards government contracting with private sector bodies to provide services to the community’ on the basis that it ‘poses a potential threat to the government accountability and openness’. Under this measure, an agency is required to take contractual measures so that it receives a document held by a contracted services provider (or subcontractor) relating to the performance of the contract when the agency receives an FOI request. The contractual term will be a requirement that the contracted services provider must give a copy of a relevant document to the agency upon request by the agency. A document that is provided under this measure may still be exempt from access if an exemption properly applies.

A related amendment proposal is made at item 33 (new section 24A) to enable an agency or Minister to refuse a request if all reasonable steps have been taken to obtain a relevant document in exercise of the contractual right and the document has not been provided by the contracted services provider (or subcontractor).

*Item 20 – subsection 7(2A)*

This item repeals existing subsection 7(2A) in the FOI Act and substitutes proposed subsection 7(2A). The proposed subsection replicates existing subsection 7(2A) of the FOI Act (which is redrafted to improve clarity) but extends the operation of the exclusion to a document that contains a summary of, or an extract or information from, an intelligence agency document. For example, a briefing prepared by an agency to a Minister that extracted information from an intelligence agency document would be excluded by this amendment, but only to the extent of that information. Intelligence agencies are wholly excluded from the operation of the FOI Act (under existing subsections 7(1) and (1A)). The proposed exclusion of summaries and extracts of intelligence agency documents held by agencies and ministers ensures an even approach to documents derived from intelligence agencies which are agencies now excluded from the operation of the FOI Act.

This new provision would apply to any document whether or not created before or after commencement of the provision.

*Item 21 – subsection 7(2B)*

This item repeals existing subsection 7(2B) and substitutes proposed subsection 7(2B). Similar to item 20, under this measure a document that contains a summary of, or extract or information from, an intelligence agency document will be excluded in the hands of a Minister. It is anomalous to treat intelligence agency documents differently when they are held by a Minister rather than an agency.

This new provision would apply to any document whether or not created before or after commencement of the provision.

Proposed subsections 7(2C) and 7(2D) are related to item 38 of this schedule (proposed exclusion for the Department of Defence in respect of particular

documents). Proposed subsection 7(2C) is intended to exclude an agency from the operation of the FOI Act when it is holding a document that has originated with, or been received from, the Department of Defence and it is a document of the kind that Department of Defence is excluded under the proposal at item 38 (called a 'defence intelligence document' in new paragraph 7(2C)(a)). Examples of these documents are given at item 38 below. Proposed paragraph 7(2C)(b) excludes an agency in respect of a document that contains a summary of, or extract or information from, a defence intelligence document. Under proposed subsection 7(2D), Ministers would similarly be excluded in relation to a 'defence intelligence document' held by them, or a summary of, or extract from, a defence intelligence document.

*Item 22 – after paragraph 13(1)(d)*

Under existing subsection 13(1) of the FOI Act, a document is not subject to the Act if a person (including a Minister or former Minister) *other than an agency* placed it in the collection of the Australian War Memorial, National Library of Australia, National Museum of Australia or the National Archives of Australia. It is a purpose of that provision that the FOI Act does not inhibit voluntary deposits to these institutions. The National Film and Sound Archive receives material similar to that held by the other collecting agencies listed in subsection 13(1) and will be added as an institution for the purposes of subsection 13(1) under this item.

*Item 23 – after paragraph 15(2)(a)*

This item requires a person making an FOI request to state in their request that it is an application for the purposes of the FOI Act (or similar words). This is necessary as a result of the proposed removal of the requirement for applicants to pay an application fee. As there is no standard form for FOI requests, the payment of an application fee often signifies that a person's request is a request under the FOI Act and not merely an information-related inquiry. This amendment is intended to remove any possible ambiguity for an agency as to whether a request is made under the FOI Act.

*Item 24 – paragraphs 15(2)(c) to (e)*

This item repeals some procedural requirements for making a request for access to a document under the FOI Act and also substitutes a new requirement for a request to give details of how notices may be sent to the applicant.

Proposed paragraph 15(2)(c) allows notices to be sent by electronic communication if the applicant nominates an electronic address to receive notices under the Act, such as an email address or a fax number. As a result of this amendment, the existing requirement for an address 'in Australia' cannot practicably be preserved.

The requirement for the request to be accompanied by an application fee in existing paragraph 15(2)(e) is removed as a result of the proposed abolition of application fees for FOI requests.

*Item 25 – after subsection 15(2)*

This item, which inserts proposed subsection 15(2A), establishes that a request for access to a document may be sent by electronic communication, for example by an email or fax number that has been specified by an agency or Minister. The new subsection also retains the existing rules that a request may alternatively sent by delivery in person or by post to an office of an agency or Minister.

*Item 26 – at the end of subsection 15(3)*

This item adds a note at the end of existing subsection 15(3) that is related to the amendment proposed at item 32 (new section 24).

*Item 27 – after subsection 15(5)*

Under this proposed amendment, agencies and Ministers are required to take into account any guidelines issued by the Information Commissioner for the purposes of Part III of the FOI Act (access to documents). Proposed section 93A, which permits the Information Commissioner to issue guidelines for the purposes of the FOI Act, is inserted by item 57 of Schedule 4. It is not intended that the guidelines have binding effect. It is intended that agencies and Ministers take any guidelines into account in making a decision on a request.

*Item 28 – paragraph 15(6)(a)*

This item is a minor editorial amendment which removes unnecessary words from the provision. The item also inserts headings into the section to assist with readability.

*Item 29 – at the end of section 15*

Item 29 inserts proposed subsections 15(7) and 15(8) to allow for an extension of the processing period for an FOI request if consultation with a foreign entity is required. The FOI Act currently allows a time extension to consult with a State, an individual or a business in respect of information concerning them. This new provision permits an agency or Minister to extend the 30 day decision period on an initial application by a further 30 days so that the agency or Minister can consult a foreign government, an authority of a foreign government or an international organisation in order to determine whether a document is exempt under existing subparagraph 33(a)(iii) or paragraph 33(b) of the FOI Act.

*Item 30 – after section 15*

Item 30 inserts new provisions related to extensions of processing periods.

Proposed section 15AA permits an agency or Minister to extend the initial time period for making a decision by 30 days if the written agreement of the applicant is obtained. The extension period must be no more than 30 days. The agency or Minister must give notice of an extension of this kind to the Information Commissioner. For large or complex requests, an agency may instead elect to seek an extension of time from the Information Commissioner under proposed new section 15AB. Under that provision, the Information Commissioner may extend the decision making period beyond an additional 30 days. The policy approach is that for extensions beyond 30 days, these applications should be under the supervision of the Information Commissioner.

For the purposes of proposed section 15AB, a complex request may include a request that requires extensive consultation. For requests that involve extensive examination of documents with a substantial resource impact, an agency or Minister may instead seek to consult with the applicant to narrow the scope of a request under new section 24 (item 32 of this Schedule).

The effect of proposed section 15AC is that an agency or Minister is deemed to have refused access to a document if the agency or Minister has not given notice of a decision on a request for access (made under section 15) within 30 days of receiving the request (or that period as extended, otherwise than under section 15AC, for example under proposed section 15AA (extension with agreement) or subsection 15(6) (extension upon third party consultation)).

Under proposed subsection 15AC(3), the deemed refusal is taken to be a decision made personally by the principal officer of the agency or the Minister on the last day of the decision period and notice is taken to have been given to the applicant on that same day. A consequence of a deemed refusal decision is that an applicant may directly make an application for Information Commissioner review (as an access refusal decision under proposed paragraph 54L(2)(a)). This provision is similar to the effect of existing subsection 56(1) of the FOI Act.

The effect of proposed subsections 15AC(4)-(6) is that the Information Commissioner is given a discretionary power to extend the period for making an initial decision on an access request, upon application from an agency or Minister. The rationale underlying this provision is that the extension may avoid the need for an applicant to lodge an application for Information Commissioner review. The Information Commissioner may extend the period for such period considered to be appropriate and may also impose conditions. A condition may be that the agency or Minister must give notice of the extended time to the applicant.

If the Information Commissioner allows an extension, the effect of proposed subsection 15AC(7) is that the application for access is not deemed to be refused (providing the agency or Minister makes a decision within the extended time period and complies with any condition). However, if the agency or Minister does not comply, then the effect of proposed subsection 15AC(8) is that a deemed refusal decision is taken to apply. Additionally, under proposed subsection 15AC(9), the Information Commissioner does not have the power to allow a further extension of time to make an initial decision. In this case, it would be open to the applicant to make an application for Information Commissioner review.

*Item 31 – paragraph 17(1)(a)*

Item 31 is a minor amendment that is consequential to the amendment proposed at Item 32.

*Item 32 – section 24*

Existing section 24 of the FOI Act permits an access request to be refused if the work involved in processing the request would substantially and unreasonably divert the resources of an agency, or would substantially and unreasonably interfere with the performance of a Minister's functions. This item repeals existing section 24 of the FOI Act and substitutes new sections 24, 24AA and 24AB. The new provisions are intended to have the same scope as existing section 24, with the qualification that new section 24 may be invoked for the purposes of two or more applications seeking access to the same documents or to documents where the subject matter is substantially the same. In the latter case, this provision is intended to address circumstances where applicants make several separate applications over short periods for related documents (for example, request A may be for documents on file for



January in a specific matter and requests B and C may be for documents on file for February and March in the same matter).

New section 24 is also amended to enhance the consultation scheme so that onerous requests may be narrowed. That measure implements recommendation 32 of the *Open government* report.

*Item 33 – section 24A*

Item 33 repeals existing section 24A of the FOI Act and substitutes proposed section 24A. Proposed section 24A reflects the scope of existing section 24A. However, it is extended to permit an agency to refuse an access request after having made reasonable endeavours to request documents from a contractor or subcontractor pursuant to a contractual right to request the documents for the purposes of responding to an FOI request. This measure is related to the amendment proposed at item 19 to apply the FOI Act to documents held by contracted service providers in connection with a contract to provide services to the community on behalf of an agency. A ground where it may be necessary to refuse a request under proposed new subsection 24A(2) is if the contractor is in liquidation or has been uncooperative.

*Item 34 – subsection 29(1)*

This item omits words related to application fees. Application fees are proposed to be abolished for all applications under the FOI Act (other than for applications to the AAT).

*Item 35 – section 30A*

This item repeals existing section 30A of the FOI Act, which deals with the remission of application fees. Application fees are proposed to be abolished for all applications under the FOI Act (other than for applications to the AAT).

*Item 36 – section 92A*

This item is an amendment consequential to the amendment proposed at items 24 and 25.

*Item 37 – Paragraph 94(2)(a)*

This item removes words from existing section 94 of the FOI Act (the regulation making power) which limit the ability for regulations to be made that vary charges according to whether the applicant is in a particular class. Upon releasing the exposure draft of this Bill, the Government announced that the first five hours of decision-making time for journalists and not-for-profit community groups would be free of charge. The amendment proposed in this item is necessary to implement that measure.

*Item 38 – Division 1 of Part II of Schedule 2 (after the item relating to the Commonwealth Scientific and Industrial Research Organisation)*

The Department of Defence is proposed to be excluded for documents in respect of its collection, reporting or analysis of operational intelligence, and special access programs under which a foreign government provides restricted access to technologies. The purpose is to exempt documents in respect of intelligence collection operations conducted by Defence personnel or platforms (such as submarines and aircraft) which are not part of the exempted intelligence agencies. It

is also intended to exempt the information collected in those operations and resulting analysis or reports. As with other intelligence documents, due to their extremely high sensitivity the vast majority, if not all, of these documents would be exempt from disclosure.

This item will also exempt documents in respect of special access programs under which a foreign government provides access to highly classified technologies or capabilities, or highly classified Defence applications for technologies or capabilities. Examples of potential Special Access Programs (SAPS) include, but are not limited to the following:

- a specific technology with potential for weaponisation that provides a significant technical lead or tactical advantage over potential adversaries;
- a sensitive technology or unique capability especially vulnerable to foreign intelligence exploitation without special protections; or
- an emerging technology, proposed operation, or intelligence activity risking the compromise of other SAPS.

Access to these programs is provided under an international agreement or arrangement and on the basis that the foreign government requires enhanced security protections because of the threat and/or vulnerability of the information to be protected. Such programs are highly classified (at least at the SECRET level) with tightly controlled access and stringent security measures. The exemption is intended to cover the classified technologies, classified applications, their use and related information. All of these documents would be exempt from disclosure.

A related measure at item 21 of this schedule (new subsections 7(2C) and 7(2D)) applies the exclusion to a Minister and an agency holding documents of this kind.

*Item 39 – Division 1 of Part II of Schedule 2 (the item relating to the Federal Airports Corporation)*

This item repeals the existing exclusion for the Federal Airports Corporation as this body no longer exists.

## **Part 2 – application provisions**

*Item 40 – application – items 2, 3, 7, 16, 19 and 33*

This item has the effect that the amendments relating to Commonwealth contracts apply only to those contracts entered into at or after the commencement of the relevant items.

*Item 41 – items 4, 6, 8, 10 to 13, 17, 20 to 32 and 34 to 39*

This item has the effect that the relevant amendments do not apply to FOI requests on hand, and apply only to those requests for access under section 15 of the FOI Act or applications under section 48 of the Act that are received at or after the commencement of the relevant items.

### **Part 3 – Amendment of other Acts**

#### *Australian Crime Commission Act 2002*

##### *Item 42 – Schedule 1*

Under section 20 of the Australian Crime Commission Act, an examiner for the purposes of that Act has power to require the production of information from agencies relevant to an investigation. It is an offence to fail to comply with a notice unless production is prohibited under certain prescribed secrecy provisions. Section 58 of the FOI Act is a prescribed provision for that purpose. However, that section deals with powers of the Administrative Appeals Tribunal in respect of an application for merits review of an FOI decision. Section 58 of the FOI Act does not prohibit publication of information, and its prescription as a provision for the purposes of section 20 of the Australian Crime Commission Act appears to be an error. For that reason, the reference to section 58 of the FOI Act in section 20 of the Australian Crime Commission Act is proposed for repeal.

#### *Environmental Protection and Biodiversity Conservation Act 1999*

##### *Items 43 – 48*

These proposed amendments are to improve clarity in so far as a number of provisions in the *Environmental Protection and Biodiversity Conservation Act 1999* restrict the publication of documents and information (related to certain reports and instruments under the Act) by reference to grounds of exemption under the FOI Act. The references are by description of exemptions grounds and do not refer to provision numbers in the FOI Act. The amendments proposed in the Bill seek to align the descriptive references to actual grounds for exemption under the FOI Act as amended by the Bill as follows:

- reference to the ground of ‘the security of the Commonwealth’ will be replaced by ‘an exempt document under subparagraph 33(a)(i)’ of the FOI Act, which is that part of the national security related exemption that refers to the ‘security’ of the Commonwealth;
- reference to the ground of ‘providing advice to the Minister’ will be replaced by reference to the deliberative documents exemption (proposed section 47C in Schedule 3); and
- reference to the ground of ‘commercial confidence’ will be replaced by reference to the trade secrets exemption (proposed section 47 in Schedule 3) and to the business exemption (proposed section 47G in Schedule 3).

#### *Inspector-General of Intelligence and Security Act 1986*

##### *Items 49 – 52*

These items are consequential amendments to the secrecy provision in the IGIS Act that arise as a result of the proposal to require the IGIS to give evidence in an Information Commissioner review in certain circumstances (see Division 9 of proposed Part VII in item 34 of Schedule 4 to this Bill).

## **Schedule 7 – Privacy Commissioner transition**

### **Part 1 – Preliminary**

#### *Item 1 – Definitions*

Item 1 defines a number of terms used throughout Schedule 7. The term **commencement day** is defined to mean the day on which the proposed Information Commissioner Act commences.

### **Part 2 – Office holders, staff and consultants**

#### *Item 2 – Privacy Commissioner*

The effect of this is to preserve the appointment of the Privacy Commissioner for the remainder of the Commissioner's term. It provides for the person holding the office as Privacy Commissioner at the time of the commencement day to become the Privacy Commissioner within the new Office of the Information Commissioner, for the balance of the term of that person's appointment.

#### *Item 3 – Staff*

The effect of item 3 is to deem existing staff agreements to have been made with the Information Commissioner, thereby preserving the existing terms of employment for staff of the Office of the Privacy Commissioner.

#### *Item 4 – Consultants*

This item provides for a consultant engaged by the Privacy Commissioner before the commencement day to continue to be engaged by the Information Commissioner under the proposed Information Commissioner Act.

### **Part 3 – Things done by, or in relation to, the Privacy Commissioner**

#### *Item 5*

This item deems anything done by, or in relation to, the Privacy Commissioner to have been done by the Information Commissioner (with additional provision permitting the Minister to make a determination that exempts certain things from this provision if needed). Subitem 5(4) provides that such a determination is not a legislative instrument. The provision is merely declaratory of the law (to assist readers) and is not an exemption from the *Legislative Instruments Act 2003*.

#### *Items 6 to 10*

These items ensure that things being undertaken at commencement can be continued on by the Information Commissioner (in practice this will mean that any of the information officers can continue relevant things).

### **Part 4 – Investigations**

#### *Items 11 to 15*

These items relate to the transition of investigations started by the Privacy Commissioner before the commencement day.

## **Part 5 – Written instruments and reporting requirements**

### *Item 16 – References in instruments*

This item provides for instruments in force before the commencement day that refer to the Privacy Commissioner to, after the commencement day, have effect as if the reference was to the Information Commissioner. Additional provision is made to permit the Minister to make a determination to preserve a reference to the Privacy Commissioner in an instrument if needed. Subitem 16(4) provides that such a determination is not a legislative instrument. The provision is merely declaratory of the law (to assist readers) and is not an exemption from the *Legislative Instruments Act 2003*.

### *Item 17 – Reporting requirements*

The effect of this item is that the annual report on the operation of the Privacy Act will be completed by the Information Commissioner for that much of the relevant period that occurred before commencement (and that any outstanding reporting requirements will be fulfilled by the Information Commissioner).

## **Part 6 – Legal and other proceedings**

### *Items 18 to 22*

These items provide for transitional matters relating to legal and other types of proceedings involving the Privacy Commissioner, including proceedings in which the Privacy Commissioner was a party, and reviews and examinations that were being undertaken by the Privacy Commissioner. The items provide for appropriate transitions to the Information Commissioner.

## **Part 7 – Miscellaneous**

### *Items 23 to 27*

These items provide for various transitional matters related to the Privacy Commissioner or the Privacy Act, and also allow for regulations to be made on matters of a transitional nature relating to the Bill.