Recordkeeping and the Law: General Introduction

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It is by now trite to say that archival theory and practice has undergone a massive conceptual shift. Like most fields of knowledge it has been subject to 'deconstruction' of one kind or another. The notion of records as 'impartial' participants in business and social activity and the 'objective nature' of archival functions from appraisal to documentation have been questioned.1 The impact of communications technology and with it the advent of 'virtual communities' explodes the myth of recordkeeping as an activity taking place in stable social systems. Recordkeeping professionals are being challenged by a world of shifting boundaries in which records need to be captured and understood within and beyond their boundary.

Equally law has had to contend with a number of recent critical theories. 2 These theories question dominant liberal thinking which has considered law as neutral and based on shared social values. 3 Lawyers have begun to ask: if the law is not rational how can it function as an authoritative control system? As viewed from current legal interpretation, the shift is visible in the less 'formalised' interpretation of statutory and non-statutory law, to understanding the purpose behind the law. Technology is forcing lawyers to return to reconceptualising the basis of legal principles, such as evidence, signatures and writing. Concepts grounded in a paper world now appear unworkable.

It is within these new paradigms that are shaping the directions of recordkeeping and the law that we should read the articles in this theme issue. However the intellectual discourses of law and recordkeeping have generally not cross-fertilised each other. Thus the legal fraternity may be locked into a particular view of what recordkeeping professionals do and why they do it. This theme issue has aimed to provide a forum for the cross-fertilisation of issues of common interest to both the recordkeeping and legal professions.

The focus of the articles

The main focus of the articles is the recordkeeping/law nexus centred on the role of records in legal systems within the Australian legal context with some international overtones. In addition by adopting a framework for the articles that centres on a particular theory of law that includes all the rules which are recognised as binding within a given socio-legal system, it has been possible to examine the relationship of law and recordkeeping in societies that have oral laws and oral recordkeeping practices.

> Because a legal system includes all the rules that are perceived as binding at any time and/or place, no aspect of human life and affairs remains outside a legal system. 4

The legal system determines which records are necessary for a legally valid action, from the purchase of a house, to a binding contract, to hospital admission. The legal requirements can only be fulfilled by recording the action. In addition it may be necessary to prove that the action took place. The best way to illustrate how recordkeeping supports the law is to consider examples. For example, recording the date and time a person is admitted into hospital, the treatment received and by whom, the date of discharge are all very basic recordkeeping practices but essential to establishing when the treatment took place, whether it was part of normal medical practice for the medical condition being treated, who can see the information resulting from treatment and for what purposes, and who owns the data and the records once the treatment has ended. Thus the records may also support a legal fact by providing evidence that particular procedures were followed and that the events took place.

There is therefore an intrinsic connection between the law and the role of records as the evidence of the action and of those involved in the action. Records involve a number of actors/agents/players who participate in acts within a defined legal system which provides them with the authority and the identity that they have to act. The legal system recognises organisations as legal persons, and over time the principle of their potential liability for their acts has emerged. This is an important reason for businesses to maintain records.

How does the law itself view recordkeeping concepts and activities? Our guest authors in the articles in this issue provide us with some invaluable insights.

The journal commences with my own contribution as an overview article that focuses on a particular conceptual model for the recordkeeping/law nexus. It does not seek to provide a definitive answer to the nexus but rather to provide a framework for the perspectives presented by the articles that follow, all of which address important areas of law that are relevant to recordkeeping.

What is and has been the role of records and recordkeeping in legal systems? In England, until the late nineteenth century, oral testimony heard by a reliable witness, often including a gesture and an action, was as important in providing evidence as the written record. The 'record' was the deed itself and the legal meaning of 'to record' was to bear oral witness. Often the courts would make a written record (called a 'memorial') of the deed. 5

Understanding the development of recordkeeping systems avoids a discourse on oral traditions as oral evidence (not used here in its judicial sense – see below) in terms of its lesser status than written records. Although literate societies give primacy to written records, in most cases they also have a place for oral evidence. Collective memory valued by oral societies is important to the cultural continuity of any group, although there are times when it is suppressed because of its association with collective guilt. 6

In accepting oral traditions as a form of recordkeeping it may be useful to think of why any society creates records and what gives them meaning. 'Oral records' of actions and events are captured, transmitted and retained as oral traditions over time by successive members of a group. Oral traditions have been defined as, '..the intergenerational *process* of creating, transmitting, and preserving essential cultural knowledge…' 7 The contextual data which gives meaning to any record, and includes the law and customs of the group, that is its juridical context, are all part of the record. It is not its 'materiality' or 'immateriality' that is relevant to its nature as a record; it is the juridical system in which the records are created and used that gives them their reliability. 8 Oral records are no more 'fixed' in time than any other record. Like all records they need to be re-interpreted over time if they are to have meaning to later cultures. In the case of our indigenous people we need to understand that their legal systems and culture are evolving like ours.

In our second article, 'Saying It Like It Is: Oral Traditions, Legal Systems, and Records', Justice Peter Gray examines how Australia has always been a legally pluralist society. However this was not officially recognized until the 1992 Australian High Court judgment in *Mabo v Queensland [No 2]*.9 Gray considers the extent to which the Australian legal system can accommodate proof or evidence of indigenous legal rights through indigenous oral evidence. 10 He explains how Australian indigenous people have had to establish the validity of their legal system particularly in relation to native title and other land rights claims within the Anglo-Australian judicial system which is overwhelmingly 'literate' in its procedures. Gray examines a number of obstacles they have faced, and continue to face, in providing the standard of proof required by our legal system due to the oral nature of their knowledge of events, its secret and sacred nature, its controlled access and its selective ownership by senior people in their community.

What should be preserved and how to provide access to the oral evidence once it has been disclosed to the courts and captured in some more permanent form by the judicial processes are others of Gray's themes. For example the Reports of the Aboriginal Land Commissioner to the relevant Minister are public documents. However they contain personal information that identifies the traditional aboriginal owners of a land claim. The power balance within communities is altered by the revelation of this once-secret knowledge. Once they are captured in fixed form, the oral traditions take on apparent 'truthfulness' and authority that differ from their evolving oral counterparts. Importantly Gray's own preparedness to consult on appropriate access arrangements with those who may be most affected has assisted in maintaining the trust of indigenous groups making land claims and ensuring that they will speak truthfully in future cases. Of particular concern is the decision to reintroduce the rules of evidence in the hearing of applications for determination of native title under the amendments to the *Native Title Act* 1994. This effectively gives priority to non-indigenous legal procedures.

In most legal systems the authority of evidence is increased where the witness is closest to the event, in time and place, and this should hold regardless of the physical 'container' on which the evidence is recorded and transmitted. The common law legal system has given less weight to oral traditions due to their 'distance' in time from the event that is being conveyed. However oral testimony is central to the common law system, and has been preferred over documentary evidence, which until recent changes to evidence law, was admitted only as exceptions to the hearsay rule.

The Australian legal system in fact distinguishes between '*documentary evidence*' which refers to written documents used to prove or establish something to the satisfaction of the court and 'oral evidence' which is testimony given in person in court by witnesses. As documents could not be cross-examined the courts developed various tests to make sure they were authentic and trustworthy. Major legislative reform of evidence law in Australia has displaced much of the pre-existing common law on documentary evidence. The changes have been particularly important in relation to easing the admissibility requirements of documentary evidence, in particular electronic evidence. These changes are found in the *Evidence Acts* 1995 (Cth and NSW), and the addition of business or computer-generated records provisions in most Australian state evidence legislation. Other state jurisdictions are considering adopting the Commonwealth evidence law model. 11 The Australian legal system has come to accept the need to distinguish different forms of evidence on the basis of their reliability judged by

criteria other than their material form.

Ian Freckelton's article, 'Records As Reliable Evidence: Medico-legal Litigation', illustrates how documentary evidence for the purpose of litigation is central to reconstructing 'what happened'. He argues that the courts increasingly 'adduce evidence' from documentation largely on the basis of its quality, and the integrity of the processes that are used to create it in the first place. He illustrates this in the context of a number of medical malpractice cases. In a number of the recent cases that Freckelton analyses the existence and the quality of the healthcare practitioner records have been central to the fact-finding process of the courts. However as he points out an individual's recollection of an event varies and in the case of a medical patient worried about the state of his/her health, the memory of what happened could be particularly vivid. Where no corresponding reliable medical records have been created and maintained the patient's memory may be accepted over the doctor's.

Freckelton observes that the courts have to verify the accuracy of the content found in patient medical records from external sources because the medical history is supplied to the medical practitioner by the patient. In other instances the paucity of the information in a medical practitioner's records may render them inadequate as proof of the procedures carried out. Essentially we can conclude that the records need be 'transactional'; they need to reflect the interaction between the doctor and patient, and to be maintained systematically, that is, they need to be 'full and accurate' records. 12

With the intensifying use of electronic means of creating medical records the courts will need to guard against tampering of records for self-serving purposes. Apart from litigation, Freckelton also evinces good reasons for quality recordkeeping as a means of enhancing the patient/healthcare practitioner relationship. This relationship has become particularly relevant with the increasing demand by patients for access to information in their records. The article provides a digest of the current legal rights of, and limitations to access to one's medical record in Australia. It deals with recent legislative activity grounded on the extension of the information privacy principles found in the *Privacy Act 1988* (Cth) to medical records. Freckelton concludes that 'defensive medicine' has resulted from the increasing legal actions brought against healthcare practitioners. The threat of litigation, together with inadequate insurance coverage will act to improve medical recordkeeping. It should be noted that the trend for consumers to expect greater accountability for professional services is relevant not only to medical records, but records that are by-products of other professional activities.

What about accountability and access to records in the public sector? How are they affected by the overall context of the Australian political, social, economic and technological climate, which is chararcterised by trends found in most Western democracies today, and in some instances globally? 13

Australian government policy has encouraged an economy which is based on maximisation of profit and measurable outcomes as 'best practice'. The national policy of 'competitive neutrality', that is that the net competitive advantages (or disadvantages) that publicly owned or funded entities enjoy should be eliminated, has affected the operations of all public sector entities, from governments, to public universities to hospitals. We have seen a move away from the public provision of services towards the private provision of those same services based on 'value for money' via outsourcing. 'Outsourcing' of government services is essentially based on a premise that the private sector can work more cheaply and efficiently than government or that the government has no need to duplicate services that private enterprise already provides. 14 What happens to the records generated by outsourced functions? Who owns them and how does one obtain access to them? Does the administrative law regime apply in relation to outsourced functions and to which entities - the government or the provider? In the context of commercialisation and contractualisation of government functions, can the diminishing ambit of administrative law based on principles of fairness and openness be replaced by remedies under contract law? To what extent should government contracting be subject to private laws when the mechanism of contract involves areas of public service obligations? 15 Will a return to access through the courts and the high costs be inevitable? Government has not fully resolved any of these questions. 16 All are central to public accountability.

The *public's right to know* within our political and legal system is proclaimed as 'self-evident' in Peter Gray's article. Has this fundamental right been insidiously undermined? It has been said that 'the single most important way in which individuals can access government information is by federal and State freedom of information ("FOI") legislation.' 17 Importantly, despite the increased costs in FOI applications, it is still the relatively cheapest method of obtaining access to government records. Is this still the case if, for example, we want to access records dealing with outsourcing arrangements, including tenders and contracts? It appears that records of the actual operation of the outsourced service have increasingly been denied under the cloak of 'commercial confidentiality'. 18 There have been repeated calls for the extension of privacy legislation nationally to the private sector of particular relevance in an outsourced environment where service providers handle large amounts of personal information under government contracts. 19

Madeline Campbell's article, 'Government Accountability and Access to Information from Contracted-out Services', focuses on outsourcing in the Commonwealth sector and the difficulties in gaining access to records held by the providers of the service from the perspective of a range of stakeholders in the community. This, she believes should not occur, in an era when the technological means of access should provide every citizen with a right to information to enable him/her to participate fully in society. Apart from its highly topical content, her article has a strong sense of urgency of action needed by the Australian community to clarify their legal rights of access to the records arising from outsourced activities, in particular where client interaction with the provider is high. She points to our principles of government which have been underwritten by case law, and the High Court in particular which has clearly demonstrated the *public's right to know* the dealings of government as in the 'public interest'. She uses a very effective hypothetical 'real life' scenario to illustrate the emerging legal impediments to access to records in the outsourced environment as opposed to cases where a legally enforceable right of access still operates in government agencies, in particular the difficulties of applying FOI, privacy and archives legislation to contractors of government services.

Campbell uses evidence that has come from the Commonwealth Ombudsman's Reports in recent years based on complaints from both suppliers of contracted services as well as consumers of that service. It has been too recent for case law on the matter. She points to the importance of parliamentary committees in bringing government departments that administer outsourced programs to account. Campbell also points to the National Archives of Australia's (NAA) guidelines on disposal of Commonwealth records arising from contracted services. Will contractors abide by them? Will NAA enforce these guidelines? How will NAA provide for continued accessibility to electronic records from outsourced functions when contractors move on and may have no particular commitment to the function? Again these are questions that remain unresolved.

If we are moving to redefine government in terms of its commercial dealings, other private sector accountability regimes will have to be established that work across government and business on an equal footing. 20 The narrowing of the public law domain is a sub-theme in Simon Fisher's article, 'The Archival Enterprise, Public Archival Institutions and the Impact of Private Law'. He argues that property law has always been a 'privatising' element in archives law and practice. Fisher provides a legal analysis of the archival enterprise, largely defined in relation to public archival institutions and the impact of two private law phenomena, the law of obligations and the law of property. He examines the utility of using traditional property-based concepts in the public arena and the primacy of the law of obligations, which transcends the private-public law divide. Fisher writes with a historical-comparative perspective, as well as taking into account archival concepts found in archival literature, rare amongst his legal peers. He also draws from legal concepts that cut across the common and civil law legal systems.

Fisher provides an expose of the property term 'possession' as interpreted via case law. It has two dimensions: 'intent' (legal possession) and 'control' (actual/de facto possession) which are used to identify *who* has possession and *how* it is realised in practice. These understandings of possession are concepts that archival authorities may need to think through, in particular in relation to 'control' over electronic records. However he also points to the fact that possession and ownership do not change between entities that are the same legal person. An archival authority cannot gain possession, only custody of a government agency's records, unless possession is split along the lines of 'intent' and 'control without immediate physical possession'. An archival authority may need to gain possession of records of outsourced functions. If the outsourced body is considered a separate legal entity from government, bailment and contract law may provide a preferable means of enforcing obligations in relation to control over the records. On the other hand constructive possession may be relevant if the outsourced function is carried out by a legal entity that is not separate from government. Given the problems of property law and its entrenchment in material and immaterial distinctions, Fisher proposes that the *law of obligations* rather than property concepts will assume greater significance in an era of electronic recordkeeping systems.

What happens to legal concepts of property, evidence, ownership and access in the Internet environment? 21 Are we really moving into a 'borderless world' where these concepts can only be understood across jurisdictional boundaries? Human communities have bonded together on the basis of mutual political, economic and social interests over the millennia. Are we more likely to see the emergence of existing communities of mutual interest that are simply using internet technologies for business and social interaction? The renewed interest in trusted communities of interest, differing in the level of requisite trust by that community, has implications in terms of the standard of recordkeeping that will be required by new 'bounded' communities. 22

The need to think globally and beyond the narrow confines of national legal systems may be forced upon us. Melissa De Zwart's article provides an invaluable insight into the emerging legal issues in the Internet environment found in case law. She provides us with contextual information with which to extend our professional understanding of the legal frameworks being worked out in cyberspace. Her theme is captured in her title, 'Information Wants to Be Free: How Cyberspace Challenges Traditional Legal Concepts of Information Use and

Ownership', which centres on how the Internet's history has encouraged a culture of freedom to disseminate information to the widest possible audience. That this is a social good has been one of the arguments for keeping the Internet free of regulation. For example, the US 'hands off' regulatory approach aims at minimal regulation to encourage the commercial aspects of the Net. De Zwart considers how the traditional approach to regulating different forms of information has been based on controlling the transmission of the physical containers of information. Once these physical 'containers' are removed other means of control must be introduced. 23 De Zwart, through a series of cases that have arisen in Australia and overseas, examines the extent to which current legal principles are appropriate for the Internet, focussing on issues arising from defamation, copyright, hypertext linking and content regulation. These cases include the liability of the service providers and the difficulties with enforcement. She touches on the emerging electronic commerce developments utilising internet technologies which are bringing to the forefront recordkeeping issues of authenticity, integrity, confidentiality and non-repudiation of electronic transactions, and it appears with them, statutory regulation. 24

The importance of the electronic commerce developments for recordkeeping purposes is that commercial transactions will not be legally satisfied by electronic information systems that do not keep records. It will require standardised recordkeeping systems that are part of the normal course of business in order to prove that a contract took place, who were the parties to a contract and so forth. These standards can then be used for all recordkeeping on the Internet.

Changes in evidence law have been supportive of recordkeeping concepts and these are being endorsed in the electronic commerce frameworks. Again the full potential on the Internet is only possible if we trust it to protect ownership of our creations and protect our privacy.

Recordkeeping implications resulting from the use of the Internet need to be understood in the context of the its development. 'Free-floating information' on the Internet is likely to be looked back on as a first generation use of the Net. Librarians, archivists and records managers are involved in many international and national projects concerned with ensuring that the bibliographical and recordkeeping metadata are captured for information and records disseminated via the Internet. 25

In recent years, and in recent months in particular, there has been much activity on the archives and records legislative scene. Adding to the ranks of new legislation since the South Australian *State Records Act 1997*, are the New South Wales *State Records Act 1998* and the Western Australian *State Records Bill 1998*. These Acts and Bill need to be considered in the context of Commonwealth and State activity in the area of related legislation, e.g. the New South Wales and Victorian privacy bills and existing FOI legislation. 26 They are particularly relevant to the New South Wales Act which has not legislated detailed access provisions and requires guidelines on access under Part 6 of its Act. Proposed Electronic Commerce Bills and Evidence Acts are also relevant to how records and documents are defined for evidential purposes. 27 The Acts and Bill should also be considered in the context of overall government policy, in particular the 'privatising' of government functions.

In our review article entitled 'From Dust Bins to Disk-drives and Now to Dispersal: the State Records Act 1998 (New South Wales)', Chris Hurley has written an expose of the New South Wales records legislation in terms of its place within a 'generational' framework he had devised a few years earlier for archives/records legislation in Australia. 28 As a consultant and an 'insider' to the development of the New South Wales records legislation, Hurley can afford to be provocative, particularly in putting forward the view of the archival authority as a necessary evil for ensuring appropriate recordkeeping standards, at least until a more suitable corporate governance regime replaces it. Essentially he is concerned that legislation is put into place that controls, regulates and enforces recordkeeping standards; records legislation has this purpose but other legislation or other means could be used to achieve these ends. Hurley believes that the setting of recordkeeping standards should be separated out from how they are implemented. He also refers to obligations arising from the imposition of recordkeeping standards that will dominate recordkeeping by whoever and wherever it is carried out. This is phrased in terms of the duties that agencies have to meet recordkeeping standards.

Hurley points out that control of the 'State archive' will not be dependent on physical location. This is because recordkeeping responsibilities have always been dispersed. There is a need to come to terms with this, not on the basis of the life cycle model of records management but on the basis of the legal, social and business rules that give rise to recordkeeping in the first place. The New South Wales Act demonstrates this move away from recordkeeping boundaries reflected in previous records/archives legislation. In a sense this boundary did not change the property of the records, but rather imposed on the archives authority duties to the records in its custody rather than on the record creators whose only duty was not to destroy the records without authorisation. Enforcement, which he distinguishes from compliance, still remains an issue given the past failure to prosecute for breaches of records legislation. The New South Wales Act proposes the use of prerogative writs, which can result in court injunctions to stop or to prevent further possible breaches of the Act. 29

Appraisal continues to be the thorn in the archivist's side. Hurley argues for *external validation (legal and social) for recordkeeping* rather than the archivist's discretion about which records are or are not of enduring value. This, he admits, may appear in conflict with his professed belief over many years that all disposal should be authorised by the archives authority. This is simply the best existing mechanism.

It is also worth looking back at Simon Fisher's perspective on the Act particularly in terms of the question as to when is 'control' of a record 'constructive possession' or when is it 'bailment'? The complexities of the term 'possession' and the problems that arise with the continuing use of terms from personal property law are still evident in the New South Wales Act.

The questions that arise from Hurley's review of the New South Wales Act are relevant to records legislation in general and include: Do we need an archives authority at all? Why has the New South Wales Act retained a demarcation of 'archives' from the totality of government records? Is this a forward or a retrograde step? What are the best methods for enforcing compliance with the Act? Should legislation adopt tougher penalties for breaches of the Act (not just for destruction but for inadequate recordkeeping)? Who and how are breaches to be reported? Should there be separate access regimes for older records, or should FOI be used for access to records regardless of age? Do we need to revisit the role of records legislation within a public access regime? How independent should the authority be? Who has control over records created by outsourced functions? To what extent should the archival authority be both a policy maker and a manager of a core of archival records (see the Western Australia Bill)? The need for disposal to operate in relation to the totality of government records to ensure that records that underpin one's rights are retained to enforce one's rights, is another issue that has re-emerged in relation to records legislation and is central to accountability. 30

Lastly we conclude with a review commentary by Colin Smith, 'Saving our Census and Preserving our History: Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs'. This inquiry dealt with a long-standing debate on whether name-identified census data should be retained, and by whom. In Australia census forms have been destroyed once their administrative purpose has been fulfilled. The Australian Bureau of Statistics (ABS) has been reluctant to change the status quo. The Committee recommended that name-identified data be retained, and general access to that data be denied for 99 years. Smith sets forth the issues for both sides of the debate in the context of the recommendations of the Report. He also makes some suggestions for a programme of staged implementation of changes.

The argument against the retention of the name-identified census forms has centred on the future integrity of the data if the public knows the forms will be retained, and the handling and use of the data, in particular linkages with other name-identified records. The proposed independent statutory status for NAA should provide some confidence in its ability to ensure that if the census records are retained, they are not used by governments for nefarious purposes. The census issue also revisits the appraisal debate in relation to the need to argue for retention, not only on 'research' grounds, but also within a range of frameworks that includes the records initial, as well as its long term use.

Threads and themes that arise which interlink the articles

The articles in this theme issue provide evidence of the legal fraternity's common interests with recordkeeping professionals. Some of the ideas that weave themselves in out of the articles include:

- The links between *recordkeeping, memory and evidence* in legal systems, regardless of the physical containers which store the records. This arises in Gray's, Frekelton's and De Zwart's articles in particular. The need for *external validation (legal and social) for recordkeeping* expressed in the juridical concept, in Hurley's article, and equally relevant to the retention of records (refer to Smith's review).
- *The materiality/immateriality dichotomy*. It can be argued that electronic recordkeeping will eliminate the apparent distinction between oral and written evidence. We will no longer think of records as physical objects. This theme occurs in De Zwart and Fisher's articles.

Evidence laws, in particular the 1995 Commonwealth and New South Wales Evidence Acts, have come up with a resolution to a definition of records that eliminates the materiality/immateriality distinction which is very amenable with recordkeeping thinking. De Zwart's article also reinforces the point that property concepts have developed in a world of tangible movable objects in which records and information had recognisable containers. These 'containers' were attributed separate rights by the law. Once the physical containers cannot be controlled new rules for intellectual property need to emerge.

Property law could be powerful if it could divest itself of the materiality/immateriality dichotomy. The disappearance of recordkeeping containers which stem from a physical sense of objects, is not the way object-oriented approaches sense their objects anymore. For example, Fisher's interpretation of possession could be extended to understanding 'intent to possess' as in the logical system design, and 'control' through the physical system design. Materiality remains within the physical implementation tasks, but 'control' resides with the 'intent' taken account of in the systems design. 31

- The relationship of recordkeeping and ownership alters if we move away from the record as a material artefact, (but equally do not assume that records disappear and become 'information' which is not physical) and concentrate on its *transactional nature*. We can link the *law of obligations* to the relationships between parties in the transaction and their duties and obligations, and how recordkeeping supports consideration of whether the obligations have been met. This obviates the need to define electronic recordkeeping obligations as material and immaterial things.
- The *emergent relevance of private law* as part of the enforcement of public law is another important thread throughout the articles. In fact it is argued that there is 'the contemporary convergence of public law and private law in some areas to form what might be termed a hybrid body of law applicable to modern government.' 32 For example, the private law mechanism of contract is used for a system of agreements to control records held by legal persons in the New South Wales records legislation.
- The ability to *disseminate information and records widely* challenges existing mechanisms to protect privacy and copyright. On the other hand it is the technology itself that can be designed to provide legal protection for copyright, for example by the use of encryption.

One of the most important themes that emerges from the articles is that legal systems are not all 'closed systems'. The principles of international law (in particular customary international law) are part of the Australian legal landscape, particularly in relation to civil and political rights. The Mabo decision, abandoning the *terra nullius* doctrine, took account of law outside of the Australian common law in the context of universal human rights expressed in international law. The need to draw legal concepts from *international and transnational legal systems* is a theme found in current legal literature. It is seen as a worldwide movement and is also linked to the globalising of both culture and the economy. 33 Gray's article indicates the recognition of pluralist legal systems in Australia and Fisher clearly shows that lawyers take account of concepts from other legal systems. In Fisher's view the law needs a common international lexicon, such as the law of obligations. The law of obligations provides an area of common concern to two major legal system types, that is the common law and the civil law legal systems. The Internet is proving a further catalyst in finding cross-jurisdictional understandings of legal concepts and enforcement models. Recordkeeping professionals need to be aware of the legal context in which recordkeeping takes place if we are to ensure that we have records that will provide evidence and memory of all social and business activities, both in the short term and over time.

Endnotes 1 Frank Upward's and Terry Cook's writings in particular. See Terry Cook, `Electronic Records, Paper Minds: The Revolution in Information Management and Archives in the Post-custodial and Post-modernist Era', *Archives and Manuscripts*, Vol. 22, No. 2, Nov. 1994, pp. 300-328. Frank Upward, 'Structuring the Records Continuum, Part One: Postcustodial Principles and Properties', *Archives and Manuscripts*, Vol. 24, No. 2, Nov. 1996, pp.268-285. Frank Upward, 'Structuring the Records Continuum, Part Two: Structuration Theory and the Records Continuum', *Archives and Manuscripts*, Vol. 25, No.1, May 1997, pp.10-35.
2 '…the legal order is a system of beliefs and choices, ultimately developed in the same ways that ethical and political positions are. … the law's contingency and controversiality and, at the same time the ways in which it operates as a real constraint in decision making – how its rules are made to appear necessary and natural.' From Gerry J. Simpson and Hilary Charlesworth, 'Objecting to Objectivity: the Radical Challenge to Legal Liberalism' in *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law*, edited by Rosemary Hunter, Richard Ingleby and Richard Johnstone, Allen and Unwin, St. Leonards, NSW, 1995, p. 107. Law is also described as 'a lens that allows us to focus on the dominant cultural values and interests of a society', from Kathy Laster, *Law as Culture*, The Federation Press, Sydney NSW, 1997, p. 1.
3 Simpson and Charlesworth, 'Objecting to Objectivity: the Radical Challenge to Legal Liberalism' in *Thinking About Law: op.cit.*, p. 88. In the Anglo-Australian and American legal scholarship law has been a 'closed system'. Intellectual thought outside of law schools takes a long time to be considered within.
4 Luciana Duranti, 'Diplomatics: New Uses for an Old Science (Part II)', *Archivaria*, Vol. 29, Winter 1989-90, p. 5.
5 The written record documented the action *after* the event rather than at the time of the event. In this context individual memory carried more weight than the 'memory-retaining objects' such as swords, seals and documents that held only a symbolic rather than a practical evidential function. See in particular, Hugh Taylor, '"My Very Act and Deed": Some Reflections on the Role of Textual Records in the Conduct of Affairs', *American Archivist*, Vol. 51, No. 4, Fall 1988, pp. 456-469.
6 'The stolen generation' which deals with Australian indigenous children who were forcibly removed from their families in the 1950s and 1960s is a good recent example close to home of collective amnesia.
7 Shauna McRanor, 'Maintaining the Reliability of Aboriginal Oral Records and their Material Manifestations: Implications for Archival Practice', *Archivaria*, Vol. 43, Spring, 1997, p. 65.
8 *Ibid*, pp. 66-67.
9 *Mabo v Queensland [No 2]* (1992) 66 ALJR 408.
10 Unlike Canada, some South African States and Papua New Guinea, in *Mabo* the technical question of whether and how oral statements should be admitted as evidence was never argued by the High Court. At trial the concept of traditional evidence was one of

the arguments advanced to support admissibility. See B.A Keon-Cohen, `Some Problems of Proof: The Admissibility of Traditional Evidence', in *Mabo: A Judicial Revolution*, The Aboriginal Land Rights Decision and its Impact on Australian Law, edited by M.A. Stephenson and Suri Ratnapala, University off Queensland Press, 1993, p. 192-193. See also Mary Ann Pylypchuk, `The Value of Aboriginal Records as Legal Evidence in Canada: An Examination of Sources', *Archivaria*, Vol. 32, Summer 1991, pp. 51-77.
11 Victoria will be moving to the Commonwealth model. See State of Victoria, Scrutiny of Acts and Regulations Committee, *Report: Review of the Evidence Act 1958 (VIC) and Review of the Role and Appointment of Public Notaries*, October 1996. The Queensland Law Reform Commission has published an issues paper, WP No. 52 *The Receipt of Evidence by Queensland Courts: Electronic Records*. The Commission is concerned with the capacity of Queensland's judicial system (both criminal and civil) to receive into evidence information stored and conveyed in electronic form.
12 The terms 'full and accurate records' are found in the Records Management Office of New South Wales, *Standard on Full and Accurate Recordkeeping*, revised Draft, December 1997 at http://www.records.nsw.gov.au/rk/fullacc/httoc.htm. This standard is given effect in the NSW *State Records Act* 1998 Part 2, s 12 (1). It draws on other standards and best practice, notably the Australian Standard AS 4390 *Records Management* and the work of the University of Pittsburgh's Recordkeeping Functional Requirements. In this context it is worth noting a recent case of falsification of public hospital patient records in a number of Victorian hospitals. Patients had been discharged and then re-admitted (although they had not left their hospital beds) so that patient charges could made earlier to improve the hospital's cash flow. From *The Age*, 17/7/98, as pointed out by Chris Hurley on the Aus-archivists listserv on the 17 July 1998. Under the *Public Records Act 1973* (Vic) all public offices (including public hospitals) have a statutory obligation to 'keep full and accurate records', but as Hurley points out in his article in this journal, records legislation is rarely enforced.
13 It should be noted that some of the emerging socialist governments in Western Europe, e.g. Germany, have expressed protectionist policies that are opposed to globalisation.
14 Outsourcing is the contracting out of government services to the private sector. In Australia it is a policy followed by federal and state jurisdictions. It is no longer confined to administrative functions but now extends to 'core' functions, such as operation of prisons and the delivery of welfare services. The application of FOI for example is unclear. It is not to be confused with 'privatisation' which describes a situation where government transfers total responsibility to the private sector by selling both the delivery of the services as well as the assets of the government body which originally provided the service. See W.B. Lane and Nicolee Dixon, 'Government Decision Making-Freedom of Information and Judicial Review' in *Government Law and Policy, Commercial Aspects*, ed. Bryan Horrigan, The Federation Press, 1998, p. 121.
15 Dan Young, 'Current Issues in Government Tendering and Contracting Practice', in *Ibid.*, p. 71.
16 Lane and Dixon, 'Government Decision Making-Freedom of Information and Judicial Review' in *Government Law and Policy op.cit.*, 1998, pp. 104-123. The legal liability of government is expanding (its legal immunity is contracting) with its increased commercialisation. Recordkeeping implications in relation to evidence of negligence and a range of torts liability, as well as trade practices liability may provide avenues of redress for consumers (i.e. citizens) of government services. See Bryan Horrigan, 'Contemporary Sources and Limits of Crown Immunity, Governmental Liability and Legislative Invalidity', in *Government Law, op. cit.*, pp. 276-339.
17 Lane and Dixon, 'Government Decision Making-Freedom of Information and Judicial Review' in *Government Law and Policy, op. cit.*, 1998, p. 105.
18 'If our governments have unpalatable truths to hide, or there's a bit of dodgy accounting going on, or you don't want the buck to stop with you, then the best ruse in town is a "commercial in confidence" clause. It's become so serious a problem, even Auditors-General talk of threats not only to "the public interest", but to democracy itself.' From 'Shrinking Democracy ', Producer: Tom Morton, *Background Briefing*, ABC Radio National, November 1, and November 3 1998.
19 The Law Council in its submission to the Senate Legal and Constitutional References Committee in August this year stated that 'the absence of privacy legislation covering the private sector… poses a threat to the community which will only be afforded limited protection in circumstances where contractual or voluntary obligations exist and …are enforced'. Quoted in *Australian Lawyer, Newsletter of the Law Council of Australia*, Sept. 1998. The Australian Law Reform Commission Report on Freedom of Information (FOI) did not favour the extension of FOI to the private sector. The Report argued that FOI was too closely linked with public sector accountability mechanisms and democratic ideals to apply to the business world. It did suggest extending the *Privacy Act 1988* (Cth) to the private sector. See Australian Law Reform Commission, *Open Government: A Review of the Federal Freedom of Information Act 1982*, AGPS, Canberra, 1995.
20 Private sector accountability mechanisms include industry ombudsmen, consumer protection laws, including Trade Practices legislation, and tort liability.
21 See Livia Iacovino, 'Regulating Net Transactions: the Legal Implications for Recordkeeping in Australia', in *Place, Interface, and Cyberspace: Archives at the Edge*, Conference of the Australian Society of Archivists Inc, Freemantle, August, 1998.
22 Adrian McCullagh, 'The Establishment of 'TRUST' in the Electronic Commerce Environment' in *Electronic Commerce: Net Benefit for Australia? Proceedings of the 1998 Information Industry Outlook Conference*, the Australian Computer Society, Canberra Branch, 7 November 1998, ed. Tom Worthington, Canberra, Australia, 1998, pp. 15-29.
23 Consider Fisher's article and the materiality focus of property law.
24 The Attorney General's opening address at the Annual Australian Society of Archivists Inc. Conference in Perth in August 1998 touched on the legal issues relevant to archivists from ecommerce, copyright and privacy developments in the Internet environment. 'OECD Ministers concluded that international cooperation is an important aspect of policy development for the digital age and that "whether the action is domestic or regional, private or public sector, all electronic commerce policies and activities will have limited impact unless they facilitate a global approach."' From Senator Richard Alston, Minister for Communications, Information Technology and the Arts, 'Foreword', in 'Electronic Commerce: Legal Issues for the Information Age', thematic issue, *The University of New South Wales Law Journal*, Volume 21, Number 3, 1998.
25 See for example *Preserving & Accessing Networked Documentary Resources of Australia (PANDORA) Project*. PANDORA is a project initiated by the National Library of Australia to investigate strategies for the storage, preservation and access to digital data in the context of the creation of an electronic archive of library materials. The Australian Government Locator Service (AGLS) metadata standard is a set of seventeen descriptive elements which government departments and agencies can use to improve the visibility and accessibility of their services and information over the Internet. The AGLS standard is based upon the leading international online resource discovery metadata standard, the Dublin Core standard. The AGLS standard was developed in late 1997/early 1998 in response to a recommendation in the report of the Information Management Steering Committee, The Management of Government Information as a National Strategic Resource. The National Archives of Australia is the maintenance agency for the Manual. A recordkeeping project is: *Recordkeeping Metadata Standards for Managing and Accessing Information Resources in Networked Environments Over Time for Government, Social and Cultural purposes*. This project is a 1998 Strategic Partnership with Industry – Research & Training (SPIRT) Support Grant of the School of Information Management and Systems, Monash University. It is jointly

funded by the Australian Research Council and industry partners - National Archives of Australia-led Records and Archives Coalition involving Archives Authority of NSW, Queensland State Archives, Records Management Association of Australia, and the Australian Council of Archives.

26 NSW has a Privacy and Personal Protection Information Bill 1998. At this stage only the Victorian Privacy Bill proposes to cover the private sector, see State of Victoria, Department of State Development, Multimedia Victoria 21, *Discussion Paper, Information Privacy in Victoria: Data Protection Bill, Discussion Paper*, July 1998. The issues regarding access regimes for government records under archives legislation is addressed in Simon Fisher's article.

27 Attorney-General's Electronic Commerce Expert Group, Report of the Electronic Commerce Expert Group to the Attorney General, *Electronic Commerce: Building the Legal Framework*, 31 March 1998 http://law.gov.au/aghome/advisory/eceg/single.htm accessed October 1998. See also State of Victoria, Department of State Development, Multimedia Victoria 21, *Discussion Paper, Promoting Electronic Business: Electronic Commerce Framework Bill*, July 1998. See the Review of this Report in this journal.

28 Where archives/records legislation 'fits' in relation to the broader legislative and political framework, in particular accountability for government actions and public access, is addressed in Madeline Campbell's article.

29 The use of prerogative writs may be particularly relevant as the administrative law regime struggles in some jurisdictions with 'stacked' and politicised tribunals, as well as providing legal remedies in outsourced environments where FOI does not apply.

30 Concern has arisen in relation to the meaning of 'archival value' as adopted by Australian Law Reform Commission's Report No. 85, *Australia's Federal Record, A Review of Archives Act 1983*, AGPS, Canberra, May 1998.

31 These ideas grew out of discussion on the materiality/immateriality dichotomy with my Monash colleague Frank Upward, an expert on the application of postmodernist thought to recordkeeping concepts and practices. These ideas have potential for further development. Upwards argument is that the physical recordkeeping containers now need to be viewed logically and that the operational sites for recordkeeping are the new physicality. The immateriality/materiality division has been reshuffled. In his postmodern form of phrasing, the old duality is replaced by a variable dualism.

32 Horrigan, 'Contemporary Sources and Limits of Crown Immunity, Governmental Liability and Legislative Invalidity', in *Government Law, op. cit.*, p. 277.

33 Horrigan, 'International and Transnational Influences on Law and Policy affecting Government', in *Government Law, op.cit.*, pp. 2-54.

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