

# The Nature of the Nexus Between Recordkeeping and the Law

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*The way we view the relationship of recordkeeping and the law will depend on our understanding of these terms and the constructs we build from these understandings. This article explores the recordkeeping/law nexus from the perspective of the role of records and recordkeeping in social systems and the application of this approach to the Australian regulatory context. The subject classification of Australian law and its major legal principles are an essential link to understanding their relevance to recordkeeping activities, and how the law has viewed records and recordkeeping, provides another dimension to the recordkeeping/law nexus.*

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## Introduction

In recent years the rediscovery of the core knowledge of archivists and records managers, now more commonly referred to by the umbrella term 'the recordkeeping profession', has largely centred on the nature and purpose of records and recordkeeping.<sup>1</sup> This special focus has provided a particularly pertinent framework for understanding the relationship of recordkeeping with law. In fact the nature of both recordkeeping and law can be considered to be *intrinsically* linked, namely:

- records form an integral part of the governance of legal and social relationships;
- records support legal rights and obligations within the legal system;
- records are required to regulate business and social activity;
- records provide evidence or proof of a particular activity; and
- records contribute to personal, organisational and democratic accountability which underpins the legal system.

This article does not directly analyse each of the above statements. However the statements both as universal principles and within one culturally-relativist context, namely Australia, provide the underlying rationale behind the recordkeeping/law nexus presented in this paper.

Given the importance of the linkages of records and recordkeeping to the effective operations of legal systems, we also need to consider how the law views records and recordkeeping systems. The law can thus be harnessed to establish a greater awareness of the relevance of recordkeeping to a range of professional and disciplinary legal obligations.

## Conceptual frameworks

### *Discourses*

Any interpretation of the relationship of recordkeeping and the law will

depend on the framework in which the discourse takes place. Sociological positivism, economic rationalism, empirical or interpretive social science, historicism or postmodernism all provide frameworks for understanding law and/or recordkeeping from both a disciplinary and/or an interdisciplinary perspective.<sup>2</sup> Writings in legal theory on the relationship of law with other disciplines focus primarily on economics, sociology, politics, history and philosophy. Recordkeeping and archival theory are not directly addressed by legal theorists but lie at the heart of some of the fundamental assumptions of how and why legal systems develop and how recordkeeping supports and is supported by the law.<sup>3</sup>

There are a number of legal theories that we can adopt as frameworks for understanding the recordkeeping/law nexus. In legal theory there is often a question as to the relationship of law and morality, and whether 'institutions' or 'norms', or both, pre-exist the creation of a legal system. There is also debate about what characteristics define an institution.<sup>4</sup> The recordkeeping perspectives will be influenced by the legal theory that is adopted.

### *Contexts and the recordkeeping/law nexus*

Recordkeeping, like law, cannot be understood in a social, cultural, economic or political vacuum. Both the legal and archival 'enterprise' have operated to entrench the powerful and marginalise other groups. An awareness of the external influences on law and recordkeeping do not prevent us from taking a pragmatic approach to their relationship, so long as we remain aware of these contextual dependencies, in particular legal theories that link societal mandates for the keeping of records within a juridical system. Other approaches which are relevant to our understanding of the relationship include how existing principles of Australian law relate to recordkeeping concepts and practices, and how the law itself perceives records and recordkeeping. Lastly the nexus is clearly applicable as a means of providing a methodology for establishing recordkeeping regimes that are cognizant of the attributes of our legal system and which identify legal recordkeeping requirements in specific organisational and professional contexts.<sup>5</sup>

## Recordkeeping and socio-legal systems

Why do communities and professions place importance on recordkeeping? Which regulations and ethical concerns play a part in ensuring that records are created and maintained that document communities over time? Where do societies and organisations receive their mandates for recordkeeping?

It can be argued that all societies manifest similar recordkeeping requirements at various stages of their economic, political and social development.<sup>6</sup> Within this evolutionary perspective the origin of recordkeeping in any organised society arises from practical needs to maintain a collective memory of the actions of members of that society. These human actions operate within a socio-legal system, referred to in this article as a juridical system, that is a system that provides laws or rules of acceptable behaviour that are enforceable by social groups in a given society at a particular place and time. Records provide evidence of the obligations and rights of members within that juridical system. The juridical system circumscribes the boundaries in which these records have authority, and endows records with trustworthiness and authenticity.

### *Juridical systems and the recordkeeping nexus*

The concept of a juridical system is a European one based on a particular theory of law, which provides a useful way of bringing together many ideas about records, recordkeeping, legal systems, social systems, and the mandates for recordkeeping activities.<sup>7</sup>

The juridical model provides:

- a conceptual framework for understanding the socio-legal context of recordkeeping;
- a means of exploring legal issues and their relationship with records;
- a methodology which can be applied to an industry/organisational context in terms of how it is regulated;
- a particular theory of law that includes all the rules which are recognised as binding within a given socio-legal system;

- a framework for the relationship of law and recordkeeping in societies that have oral laws and oral recordkeeping; and
- a role for ethics and self-regulation 'rediscovered' in modern business practices.

'Juridical' is a term widely used in civil law countries in which the concept of the juridical system refers to the system of rules that binds social groups and regulates the legal facts dealing with social and legal relationships.<sup>8</sup>

In its origins, however, juridical thought developed in ways which were entwined with recordkeeping issues. Juridical systems as defined by Luciana Duranti are very much part of the Romance tradition which emphasises codes of behaviour. This is shown in the following passage:

a social group founded on an organisational principle which gives its institution(s) the capacity of making compulsory rules. Thus a *juridical system* is a collectivity organised on the basis of a system of rules. The system of rules is called a *legal system*. A legal system is a complex paradigm containing many divisions and subdivisions. It can be broken down into *positive law* (as set out in the various legal sources - legislation, judicial precedent, custom - and literary sources - either authoritative, consisting of statutes, law reports, and books of authority, or non-authoritative, such as medieval chronicles, periodicals, other books) and all the other *conceptions and notions of binding law* (natural law, morality, orthodox religious beliefs, mercantile custom, Roman/Canon law). ***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.***<sup>9</sup>

This all encompassing notion of the juridical system provides a view of the law that is more than just its authoritative legal sources.

If we apply these ideas to social systems, the characteristics of a juridical system are:

- a conceptual model in which a formalised legal system operates;
- accommodation of any legal system within its framework;

- acceptance of the existence of other legal systems (a pluralist model of legal systems); and
- the recognition of rules as binding on the social group within the domain of the juridical system.

For example, Australian Aboriginal communities manifest elements recognisable in any juridical system; they have the prerequisites of being organised groups that have the power to enact and interpret law, as well as to impose sanctions when the law is broken.<sup>10</sup>

Within the juridical concept as defined by Duranti, a 'legal system' consists of rules, laws or practices a given society's institutions sanctions and enforces. It includes rules and codes which may not always be strictly part of 'positive law'. (See **Table 1 overleaf.**)

#### *The juridical system as a jurisdictional boundary*

Particular industries, professions, institutions, communities, church groups, the family or private social associations (e.g. social clubs) issue rules, codes of ethics or conduct, or standards that provide an important means of ensuring the conformity of its members. They often provide their own sanctions to enforce conformity, e.g. expulsion from the group or profession. This boundary also forms the parameter of the legal obligations of organisations and persons within the domain or jurisdiction of the juridical system. It provides for an understanding of what is sometimes called 'organisational culture' as the domain or jurisdiction in which a juridical system has authority to operate.

#### *The juridical approach as a methodology*

All legal systems have the elements of a juridical system. The juridical idea is universal, but its practical application will vary from one legal system to another. It provides a methodology for establishing the legal obligations of organisations and individuals within their respective jurisdictions. (See **Figure 1 overleaf.**)

### DURANTI'S LEGAL SYSTEM

A system of rules enforceable and binding on a collectivity = a legal system

Function: rules regulate the juridically acceptable behaviour of natural\* and juridical persons within the boundaries of a juridical system. A legal system as part of a juridical system could include any of the following rules.

\*A natural person is a human being as opposed to a corporate legal person.

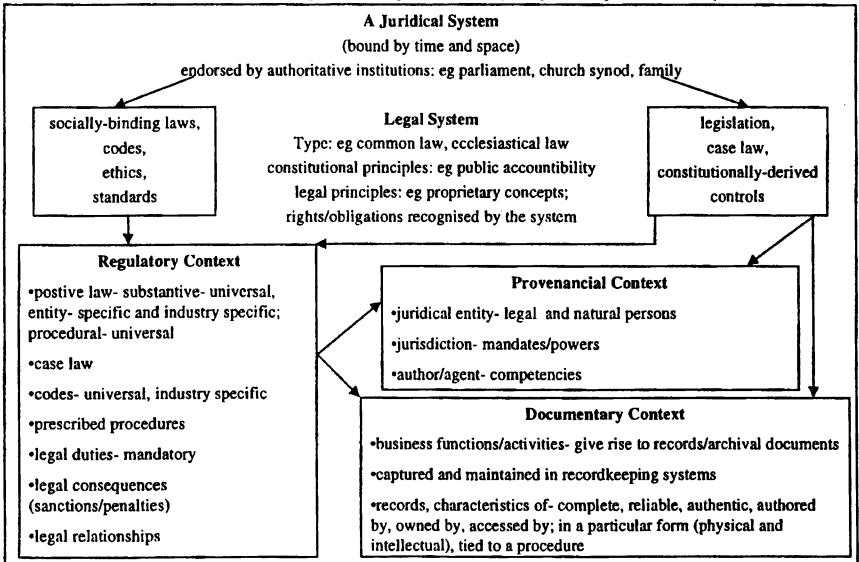
Positive Law		Other Binding Law
• Legislation/Statute Law	)	• Natural Law
• Case Law/Common Law	) Primary	• Morals/Ethics/Codes of Behaviour
• Delegated legislation	) Sources	
		• Religious Beliefs
		• Ecclesiastical Law
• Reports on Law	)	• Customs
• Government Publications	)Secondary Sources	• Conventions (unenacted rules of constitutional practice)

**Table 1**

**Source:** Livia Iacovino, *'Things in Action': Teaching Law to Recordkeeping Professionals*, Ancora Press, Monash University, Melbourne, 1998, p.70, Figure 2.2. This summary is derived from Luciana Duranti, 'Diplomatics: New Uses for an Old Science (Part II)'. *Archivaria*, Vol. 29, Winter 1989-90, p.5.

**THE JURIDICAL CONTEXT OF RECORDKEEPING**  
**Ambience**

The Juridical System through time and space - continuity; corporate or personal memory



**Figure 1**

**Source:** Livia Iacovino, *‘Things in Action’: Teaching Law to Recordkeeping Professionals*, Ancora Press, Monash University, Melbourne, 1998, p.136, Figure 4.



The juridical system reflects a society's norms and values codified in law or other forms of regulation (voluntary or obligatory) at a particular time. From a juridical view statute and case law cannot be understood in isolation from the social context in which they are created and developed, and the interpretation that they currently carry.

The juridical system provides an understanding of the organisational cultures in which recordkeeping arises, including the most critical legal issues in a given society or in a specific organisation. These issues are useful when considering recordkeeping strategies for individual organisations. These include:

- Is legal compliance (obeying the law and enforcement) the most effective way of enforcing recordkeeping requirements in a particular organisation?
- Is privacy important?
- What is the legal system's definition of the relationship between ownership and access to records?
- Is litigation one of the major ways the laws are enforced within that organisational setting?

In summary the juridical model builds on the concept that all legal systems exist to enforce and protect the rights and obligations of individuals and groups in the system, and that records participate in actions that are recognised as binding within that system. Mainstream Australian legal literature provides an understanding of law and of legal systems that deal almost exclusively with codified laws, and thereby excludes other codes of behaviour which regulate a society or a group. A definition of law and legal systems must reflect the unique role that records play in regulating legal relationships through an understanding of the juridical model.

### *Legal relationships*

'The notion of a legal relationship is a shorthand way of saying two persons are related by some act, event or dealing'.<sup>11</sup> Legal relationships provide a way of exploring the recordkeeping/law nexus that draw from concepts

found in both archival science and in jurisprudence.

The civil and common law systems recognise a range of legal relationships, such as commercial and professional relationships, the nature of which determine the rights and obligations of the parties concerned. The legal system gives a legal 'personality' to individuals and to organisations (as natural or legal persons) in order to recognise them as holders of rights and obligations, and to regulate them, for example as an incorporated company. Legal relationships imply a duty to another individual or legal entity which in turn creates a right in the other party (e.g. the debtor/creditor relationship: the bank provides a person credit, it has a right to be paid back; the debtor has a duty to pay the money back). The authority of these persons to act is assigned by the legal system.

Legal relationships form part of the legal concepts of duties and obligations. Duties and obligations are also terms found in ethics and can therefore be extended to include social relationships. The transactional nature of recordkeeping effectively alters the relationship between two or more parties and creates rights and obligations between them each time that a transaction takes place.<sup>12</sup> The duties and obligations of parties include rights and obligations as owners, or rights of access as data subjects or third parties, which in turn are evidenced by records providing proof of the existence of the rights or obligations. These rights and obligations are supported by recordkeeping systems that are reliable and maintain the integrity of the records over time. The legal relationship model focuses on the actors involved in the recordkeeping processes and the legal and ethical responsibilities that arise from those processes.<sup>13</sup>

### **The Australian legal system and the juridical model**

Applying the juridical model to the Australian legal context we can define the regulatory environment in terms of the sources required to establish and locate legal requirements for recordkeeping. It includes positive law and its authoritative sources: statute (legislation) and case law (common law). It also includes professional, personal and corporate ethics; and industry codes of conduct and practice as regulatory controls.

In a formalised legal system such as Australia's we recognise legal rules that are binding in the Acts of Parliament, and the institutions that make and enforce them. The courts (the judiciary) are there to resolve disputes and to interpret the laws. The principles that bind the legal system affect the way the law is viewed and how it applies to recordkeeping.

In order to comprehend the meaning behind the rules, whether it is positive law or other accepted rules or codes of behaviour, there is a need to understand the characteristics of the legal system in which these rules and the actions from them arise. The formalised legal system will be central to this understanding, in particular the legal and social responsibilities of the parties or actors (physical persons or corporate entities) involved in the action recorded. Both the regulatory environment in which recordkeeping links social relationships, and specific areas of the law that impact directly on recordkeeping requirements, need to be ascertained and applied.

### **The Australian legal system**

The Australian legal system is described as a common law system. The most important characteristic of the common law system is *the doctrine of precedent*.<sup>14</sup> The main body of English law developed through precedent, that is the decisions of the courts in particular cases, have built up as *case law* which is considered binding authority. Case law is relevant to how the courts interpret statutes.

#### *The Australian legal system as a system of rules*

The Australian legal texts concentrate on 'positive law' (black letter law). Among lawyers the positivists are those that believe that the rules are how the law functions.<sup>15</sup> In the juridical approach the legal system as a set of rules in statutes and case law is only a part of the juridical system. However law as rules provides the way into finding and interpreting positive law.

Australian legal texts define the legal system as:

- rules as legal rules;
- principles, standards and concepts which make up the normative

content of a legal system (distinguished from morality);

- the whole legal system itself including physical and human institutions, i.e. the courts, lawyers, judges, parliament, police.<sup>16</sup>

The legal system has the primary function of establishing and enforcing legal rules, the positivist approach.

From a legal positivist's view Australian law consists of:

- statutes or Acts made by parliaments;
- delegated legislation made by persons to whom a parliament has by statute delegated law making authority; and
- common law made by the courts in the course of adjudicating disputes, also called *case law* or *judge-made law* or *judicial law*.

The distinctive features of the common law system and the Australian legal system, the powers and prohibitions as found in the Australian Constitution, provide a broad framework in which organisations and persons are regulated in Australia.

#### *The authoritative sources of law: statute and case law*

It is useful to distinguish the differences between how the courts interpret legislation and 'make law' and how and why parliaments 'make law'. It is important to establish the stages through which an Act must pass in order to know which stages provide the most useful information about the purpose of the Act needed for interpreting legislation, as well as when it actually comes into operation and has legal force, where to find legislation, particularly amendments, and which version of an Act is operative. For establishing recordkeeping requirements there is a need to find relevant legislation and case law in order to ensure it is current before an assessment its impact on recordkeeping in specific organisational contexts can be evaluated.

#### *Statutory interpretation*

Interpreting legislation, in order to establish the relevant recordkeeping

requirements, involves using legal research methodology for purposes that differ from that of solving a legal problem. The methodology assists us in understanding the law in order to comply (i.e. doing what the law expects of us) with a range of legislative requirements relevant to recordkeeping. We need to know the purpose of legislation, i.e. what is an Act trying to achieve? Which sections of the Act are discretionary, which sections are mandatory? What legislative responsibilities might it impose on recordkeepers and recordkeeping professionals?

For recordkeeping purposes there are concerns with ensuring that there is a minimal risk of a breach (i.e. breaking) of the law, and knowing what the consequences are if there is a failure to comply (i.e. what happens if the law is not obeyed). Unless an Act has been tested (i.e. judicially considered) in the courts its meaning will be uncertain. Once it has been tested the interpretation by the courts becomes as important as the Act itself. Until there is testing in the courts there has to be a narrow reading of the meaning of an Act, that is, it is interpreted literally. However the judge's decisions may also add to the ambiguity of the Act's interpretation. To reduce a long judgement to a single proposition can also lead to misunderstanding. In addition each decision must be compared with other decisions on similar issues.<sup>17</sup> For those without formal legal training it may be safer to rely on secondary sources of interpretation of cases, for example legal digests and commentaries.

### *Professional and organisational ethics, codes of practice or conduct*

Professional and corporate ethics, and codes of conduct and practice, are a different kind of regulatory control on individuals and organisations; they are only 'legal' in a broad understanding of their place in a juridical system. They are a means of avoiding the complexities of regulation found in the legal system but they are also essential to providing a proper balance with 'black letter' regulation.<sup>18</sup> Organisational and professional culture is largely determined by standards of acceptable behaviour which in turn determine the nature of recordkeeping within specific environments. The concepts of reasonable behaviour and duty of care which form part of the common law system are re-enforced through professional ethics and professional practice, e.g. confidentiality which forms part of every transaction between a patient

and a doctor is an important part of medical ethics.

These additional sources of regulatory controls, together with the positive law, provide the justification for records and recordkeeping as a means of compliance with the law.

### **The classification of Australian law and the recordkeeping nexus**

The classification of law is an artificial construct which reflects the way that the common law has developed. It is a 'view' of the law based on a particular understanding of its normative role and function in society. The classification terms themselves contract or expand in meaning to reflect changing specialisations. Many new terms have emerged in recent years, e.g. media law, technology law, legal informatics, and environmental law. Many principles cut across these divisions, e.g. rights and obligations, but they may have specific interpretations in different areas of law.

There are a number of reasons why law needs to be classified. The most obvious reason is to carry out legal research. Lawyers need to classify a legal problem and ascertain which branch of law applies to the problem. Often several branches apply. For recordkeeping purposes there is a need to understand legal terminology used in legal literature and to ascertain the relevance of legal principles found within branches of law in order to make links to recordkeeping activities.

Legal classification assists in:

- introducing legal terminology;
- utilising legal research tools; and
- understanding legal principles and their linkages with recordkeeping.

The way the law has been classified does not in itself provide a methodology for establishing legal requirements for recordkeeping in different organisational and social contexts.<sup>19</sup> It does however provide the legal research tools that must be mastered within any methodology adopted for the purpose of establishing those requirements.

The major classifications are: public and private law; criminal and civil law; substantive and procedural law; common law and equity; international and domestic law; legal subject; legal source; and primary and secondary source.<sup>20</sup>

### *Public and private law*

In the recordkeeping field there has been a reliance on this division for classifying the provenance of records and for understanding which areas of law impinge on records of public as opposed to private business organisations. Although the public/private sector divide has blurred as a result of corporatisation and privatisation, this division still identifies areas of law that are only applicable to some legal entity types, e.g. government bodies.

### *Criminal and civil law*

In a recordkeeping context there is certainly a need to know if a breach of a law has civil or criminal consequences.

Neither public law nor private law, nor criminal nor civil, observe clear boundaries. They are divisions used to ascertain which rule of law is applicable, which courts are involved and the legal consequences and penalties at stake.

### *Substantive and procedural law*

Another useful division is between substantive law, which is the law which regulates rights, duties and liabilities among citizens and government and therefore includes all branches of law, and procedural law which is how the substantive law is enforced in the courts and consists of procedure, pleading and evidence.

The relationship of this classification with recordkeeping is further discussed under the heading *Legal principles and the recordkeeping nexus* below.

### *Common law and equity*

This distinction is made to differentiate the common law created by the

courts as opposed to equity (the body of rules originating from the Court of Chancery). It is a useful classification for identifying a legal rule by its origins. There are specific equitable principles that are relevant to recordkeeping, e.g. breach of confidence. Both common law and equity are judge-made.

### *International and domestic law*

International law (not to be confused with 'the conflict of laws' where different legal systems conflict) is a body of rules of law which regulates the conduct of independent states among themselves. It is an area of increasing importance when data and records cross jurisdictional boundaries. Domestic law applies within a sovereign state. What is becoming evident in legal reforms is that international trends are affecting the Australian law. These include privacy law, commercial law, as well as human rights law, standards of fair dealing and consumer protection law. International law and international legal instruments will become more important as internet technologies are used for recordkeeping activities beyond national borders.

### *Legal subject*

This classification is still used in Australian university courses for teaching purposes, e.g. criminal law, torts, contract, real property, commercial law, industrial law, company law, taxation, constitutional law and administrative law; and for finding the law, e.g. legal texts, digests and indexes.

### *Legal source*

Another way to classify the law is by statute, common law, and delegated legislation, that is the three principle types of law that operate in Australia. For recordkeeping purposes all three of these sources are relevant.

### *Primary and secondary source*

Classification of law into primary and secondary sources is of particular importance when searching for statutes. It is more useful to first use secondary sources to ascertain the appropriate primary sources, and to gain



some understanding of the legal topic in question. The need to maintain the distinction between primary and secondary sources is based on understanding the nature of the material. Primary sources are the *authoritative* sources of the law: statutes, delegated legislation and common law. Secondary sources analyse the law and are only opinions; they include books, journals, and encyclopaedias.

### **Legal principles and the recordkeeping nexus**

By adopting the subject classification scheme used in law courses, and drawing from the other classification schemes above, the following legal principles have been identified as relevant to the recordkeeping/law nexus in Australia.<sup>21</sup>

#### *Legal rights and obligations*

One of the most important legal concepts is that of *rights and duties*, based on a society choosing to protect some interests and not others. Rights and obligations relate to all records as evidence of transactions that must involve at least two parties. All areas of law can be interpreted in the light of rights and duties.

#### Law subject relevant to legal rights and obligations

*Constitutional Law* provides an understanding of the Australian system of government and the division of powers in relevant jurisdictions. It is an important area of law affecting the jurisdictional competencies of organisations.

#### *Access rights and obligations*

Public access rights to records are tied to legal and political notions of the sovereignty of the people. Another 'right' that has emerged is that of *privacy*. It can be argued that a recordkeeping system, if secure, time bound and linked to an access policy, should provide adequate privacy protection for the data subject, while at the same time ensuring that rights of the data

subject are protected without the need to delete the personal information once it has served its purpose.

### Law subjects relevant to access rights and obligations

*Administrative Law* is the field from which *public rights of access* to government records have emerged in Australia. Administrative law is concerned with the rules and procedures which have developed for controlling the decisions and actions of administrative officials and agencies, and for giving members of the public effective rights of challenge and redress.

Privacy in common law is covered by *Liability for Tortious Communications* which includes: (1) statements, essentially false, which lower a person's character in the estimation of reasonable people or which cause the person about whom the statement is made to be hated or shunned; (2) statements, true or false, which invade true privacy interest; and (3) the liability of a person who having been entrusted with confidential information wrongfully uses the information or discloses it to a third party. Also *Torts* provides compensation to persons who suffer physical injury to their person or to their property, as well as economic loss which might be suffered without personal injury or property loss. ('Tort' is a French word meaning 'wrong'). Trespass and breach of confidence in torts have also been used to protect personal privacy.

### *Ownership and property rights*

Exclusive ownership and property rights which may be given away, sold or assigned are basic to most legal systems. The concept of the sanctity of private property as it has evolved in Western legal systems is explained by some jurists as historical stages, commencing with *custody*, then *possession*, and finally, full *ownership*. In relation to intellectual property and copyright in particular, recordkeeping systems need to be designed to document ownership, including transfer of ownership of copyright, protect copyright through system controls and provide access to records protected by copyright. The level of control required over the ownership of data and records will vary in different organisations.

*Breach of confidence* action in contract or tort or as an equitable action is

designed to protect confidential information and is only enforced through the courts. Appropriate recordkeeping standards should be adopted to avoid a breach of confidence which requires protecting ideas, including corporate secrets and creative concepts, and the protection of personal privacy. These standards should ensure protection from unauthorised access to confidential records and personal data, and the maintenance of records that clearly state the contractual relationship between employer and employee.

*Law subjects relevant to ownership rights*

*Property Law* is the general study of creation, enforcement, transfer, mortgage and termination of proprietary interests in land (real property), and chattels and intangibles (personal property). The major area of relevance to recordkeeping is that of personal property.

*Copyright and Designs* covers the justification for protection, materials in which copyright can subsist, duration of protection, infringement, ownership, with particular attention to new technologies. Copyright in relation to the ownership of the intellectual content of a record is relevant to recordkeeping.

*Breach of confidence in Equity or Tort or Contract* (see below under *Law subjects relevant to judicial evidence*)

*Duty of care and negligence principles*

Recordkeeping systems that provide evidence of consistent and routine procedures may protect a party in a negligence claim. The lack of an appropriate recordkeeping system may be used against the party concerned. It may be legal for a company to destroy records that are beyond their statutory retention period but liability risks could ensue from not being able to prove that a particular procedure was followed.

*Law subject relevant to negligence*

The duty to act with due care is a general duty to all the community within the area of torts. *Torts* provides a system of compensation for persons who suffer personal injury or economic loss as a result of a wrongful act, or in appropriate cases a court order to restrain a

threatened harm or cessation of a continuing one. The most important evolution in torts has been rules imposing liability upon persons who negligently cause physical injury, in particular compensation, caused through carelessness. Many Acts have originated from torts, e.g. manufacturers' liability and workers' compensation. Professional liability includes establishing whether there was a duty of care towards the injured party and whether it was breached. (See also legislation governing specific professions, and relevant sections of the *Trade Practices Act 1974*.) *Contract law* (see below) is also relevant.

### *Principles of evidence and contract*

Records are not created for the express purpose of being used in potential legal proceedings. However the reliability and authenticity of records *generated from business processes support* and are *supported by* the laws of evidence and also aid litigation requirements. The rules of evidence do not set out to tell us what is good evidence, but provide one of the strongest general legal mandates for recordkeeping because the reliability of the recordkeeping processes that arise in the course of, or for the purposes of, a business are underpinned by evidence laws. The 1980 case *Albrighton v Royal Prince Alfred Hospital*, demonstrated that the business records provisions in evidence laws are based on the notion that since businesses must keep reasonably accurate records if they are to stay in business, these records are likely to be sources of sufficiently accurate information to be acceptable as judicial evidence.<sup>22</sup>

#### *Law subjects relevant to judicial evidence*

##### *Contract*

A contract is an agreement intended to create legal relations between the parties. Contracts establish the rights of the parties involved. Records perform an important task, not only in establishing that a contract was made but that it has been fulfilled. Contractual relations involve continuing transactions between the parties concerned.

##### *Procedural law*

Procedural law provides rules for the way a controversy is to be litigated and for the way in which facts in a dispute are to be established by

proof. *Evidence* involves the rules and principles which govern the proof of the facts in issue in a civil or criminal trial. Every system of law develops its own evidentiary rules. 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. The courts have dealt with documentary evidence as *a special category*.

### *Equity*

*Equity* refers to a body of law that consists of a miscellany of doctrines, institutions and remedies which originated in a distinct English court, the Court of Chancery. There are several equitable doctrines which affect legal relations, and are relevant to businesses, employers and to professionals in relation to their client relationships. For example, unconscionable conduct may include fraud, misrepresentation, mistake, undue influence and breach of fiduciary duty. Records provide an important means of verifying that equitable duties have been discharged.

### *Criminal law*

*Criminal Law* is less commonly considered in the context of recordkeeping issues, except in terms of criminal sanctions for non-compliance with legislative provisions. Records may indicate that compliance had or had not taken place. In terms of proving a crime has been committed, records may be used to prove an intention to commit a criminal act.

## **How does the law itself view records and recordkeeping?**

In the preceding section we have identified the major subject areas of law relevant to records and recordkeeping. But how does the law itself view recordkeeping concepts and activities?<sup>23</sup> Generally the law has focused on documents and records as tangible objects. However as the law begins to grapple with defining electronic data and records, it is being forced to consider the processes that bring the record into existence and to re-assess some fundamental legal principles in the light of that knowledge.<sup>24</sup>

*Definitions of documents, archives and records in statute and case law*

Normally, Australian statutes do not define 'archives' but rather 'documents' or 'records'. One exception is the *Copyright Act 1968* (Cth). It defines 'archives' as a place in which there is 'a collection of documents or other material' and which is 'of historical significance'.<sup>25</sup> It treats archives as having the same requirements as library materials and contributes to perpetuating a circumscribed historical value to records in archival institutions.

Statutory definitions have centred on the physical characteristics of documents and records rather than their function.<sup>26</sup> The definitions of documents in Australian evidence laws and Acts Interpretation Acts indicate a total lack of consistency. For example in the former NSW *Evidence Act 1898*, s 14A a 'document' is defined as 'books, maps, plans drawings and photographs', while in the same Act, in relation to business records, s 14CD(1) defines a 'document' as 'any record of information'. This latter definition of document has been adopted in the Commonwealth and New South Wales 1995 Evidence Acts. The *Acts Interpretation Act 1901* (Cth), s 25 c includes in its definition of a document, 'any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device'. The definition of writing is also related to being perceptible in a visible form.

Professor R. A. Brown, in *Documentary Evidence in Australia*, deals with statutory and case law definitions of 'document', 'record' and 'writing', as well as 'originals' and 'copies' of documents.<sup>27</sup> According to Brown, rather than case law providing a general definition of a document, it provides a meaning for each specific case which is largely context-dependent. Case and statute law do not provide definitive interpretations of either documents or records, but Professor Brown has derived their fundamental characteristics from case law. He distinguishes between data and information, perceiving information as the interpretation of the data in the document. This is not a distinction made in statute or case law, but he believes there is an implicit understanding of these differences in meaning amongst lawyers.

While a document is only data which is stored and retrievable, it is not a record. Like 'document' a 'record' is also context-dependent in meaning. Brown refers to English cases in which the term 'record' appears, in the context of documents, all of which include hints of its nature:

- a record of events in some form which is not evanescent;
- items which contain information deliberately entered, such as a cash book; and
- documents which give effect to a transaction itself or contain a contemporaneous register of information supplied by those with direct knowledge of the facts.<sup>28</sup>

Thus according to Brown the record may be a document and hence a subset of a type of document, or a document as a record is a subset of records.<sup>29</sup> In evidence statutes where documents are 'any record of information', documents are a subset of recorded information. Each class can be seen to be a subset of the other, since the very act of recording is a form of memorialisation.

#### *Recordkeeping in statute and case law*

The admissibility of particular document types has been predicated on such aspects as the accuracy and tamper-proof features of the document, as well as the competence of the person creating it. The physical form of the document has given rise to the need to have different provisions for admittance, many of which are now superseded by the 1995 Commonwealth and New South Wales Evidence Acts or are covered by the business records provisions in evidence legislation.<sup>30</sup>

Evidence laws and case law have supported the importance of records as part of a system.<sup>31</sup> For example, the business records provisions in evidence legislation define records in terms which relate to their existence as part of recordkeeping systems. These provisions no longer define documents in terms of their physical attributes. Case law referenced by Brown reveals that records that are part of a system of recordkeeping, in possession or control of a business which has a responsible recordkeeper, are likely to be

admissible under business records rules. This indicates that when ascertaining recordkeeping requirements for judicial evidence it is important that not only statutory definitions of documents and records are considered, but also how the courts have adduced records as judicial evidence. Basically the courts are looking for *reliability and authenticity*, concepts that are found in diplomatics, recordkeeping theory and the law.

*Archival and records legislation: records as property*

The three aspects of property which have developed in the physical world - custody, possession and ownership - have been the traditional legal means of control over records as property. When records were kept in a physical tangible medium they could be defined as 'chattels' and be bought and sold as assets or personal property. Ownership provided a legal title to documents. Access rights have also been tied to property rights except where statute or common law have provided alternative avenues. Archival legislation, Privacy and Freedom of Information are the best known statutory examples that provide public access rights to records and documents.<sup>32</sup>

Generally archives and records legislation has defined a public record either via a process test or a property test.<sup>33</sup> Australian archivists, and the National Archives of Australia in particular, have placed a great emphasis on changing the perception of the role of archival bodies from simple custodians of historical records to that of standard setters for all recordkeeping activities within a defined jurisdiction. This standard setting role is being extended in recent archival legislation. Whether property law provides the best way for archival authorities to gain control over records, rather than placing greater legal obligations onto the record creating bodies to maintain and make records accessible to the public, remains to be seen.<sup>34</sup>

Property concepts have provided a micro-level view of records, concentrating on the role of documents as 'trace' rather than records as evidence maintained within a system. Property law has generally been applied to a record as a 'corporeal thing' but this excludes the record's nature as a representation of an act which may be incorporeal. A less commonly applied view of property law is that it can interpret a record



both as property and as evidence of an obligation.<sup>35</sup> Once we centre on the transactional nature of recordkeeping, property law's traditional focus on records as material objects appears less appropriate to ascertaining the obligations of parties that arise from those transactions.

## Conclusion

The recordkeeping/law nexus is an interrelationship that is mutually supportive. It can be viewed from a number of perspectives. The juridical concept is one theoretical construct for understanding why records are required by legal systems and participants in that system. However the legal landscape is also changing. Privatisation of government functions in both Commonwealth and State sectors has diminished the ambit of administrative law. Electronic commerce is highlighting the inadequacy of existing legal definitions of 'documents', 'writing', 'signature' and 'original'. Electronic business via the Internet also complicates territorial jurisdiction and which concepts of law should govern an Internet transaction. The law will have to come to terms with a world in which the record as an artefact is arcane. It is therefore an opportune time for the recordkeeping professions to clearly define the relevance of records and recordkeeping systems to the effective operation of any legal system.

## Endnotes

- <sup>1</sup> Recordkeeping is defined as 'making and maintaining complete, accurate and reliable evidence of business transactions in the form of recorded information'. (From Standards Australia, *Australian Standard AS 4390 Records Management*, Part 1, General, 4 Definitions, 4.19.) It is concerned with the routines and processes involved in keeping records. The records are the by-products of the recordkeeping processes. They can be conceived as objects or things that represent actions and transactions. In this article I use recordkeeping to encompass its products – the records. However I do make a distinction between the terms recordkeeping and record when the record is viewed independently of the contextual data that is captured as part of the record.
- <sup>2</sup> Disciplinary boundaries are to some extent artificial. They have their own 'histories'. The questioning of the inevitability of a disciplinary boundary and the institutionalisation of its knowledge is an important postmodernist perspective. See Alan Hunt and Gary

Wickham, *Foucault and Law, Towards a Sociology of Law and Governance*, Pluto Press, London, and Boulder Colorado, 1994, Part 1.

- <sup>3</sup> In Chapter 12 'What then is Law', from P.L. Waller, *An Introduction to Law*, 7th edition, North Ryde, NSW, LBC Information Services, 1995. The late Professor David Derham has written an approach to law which provides the basis for understanding the legal system as one in which the evolution of recordkeeping goes hand in hand with the evolution of codified laws. In his view, it is preferable to refer to legal systems than to 'law' as this latter term can refer to a number of things, from legal rules, principles, standards and concepts which make up the system, to the whole legal system including the institutions functioning as a part of the legal system. In a legal system there are the 'rules of recognition', that is how to recognise valid legal rules, e.g. the constitution and the recognition of Acts of Parliament as law, the institutions that make and enforce the laws, and 'system made rules', that is procedural rules for judicial proceedings. Although many legal writers exclude morals and ethics, Derham believes that the legal system derives from them also.

For an analysis of some of the recordkeeping and archival theories that address how legal systems develop and how records support the law, see Chapters 2 and 4 in Livia Iacovino, *Things in Action: Teaching Law to Recordkeeping Professionals*, Ancora Press, Monash University, Melbourne, 1998. These chapters cover the close relationship of jurisprudential and archival concepts. See also Oddo Bucci, 'The Evolution of Archival Science and its Teaching at the University of Macerata', in *Archival Science on the Threshold of the Year 2000, Proceedings of the International Conference, Macerata, 3-8 September 1990*, edited by Oddo Bucci, Università degli Studi di Macerata, Italy, 1992, pp. 15-43.

Australia adopted the British registry tradition in the public sector which provided for the continued application of such practices as registration, receipt and dispatch dates for correspondence. This tradition has been very important to the Australian understanding of the evidential qualities of recordkeeping systems. The theme of accountability and recordkeeping has also provided a strong nexus with the law. See *Archival Documents: Providing Accountability Through Recordkeeping*, edited by Sue McKemmish and Frank Upward, Ancora Press, Melbourne, 1993.

- <sup>4</sup> C. G. Weeramantry, *An Invitation to the Law*, Butterworths, Sydney, 1982 provides a historical, philosophical, conceptual and universal study of legal systems, and the common law system in particular, see Chapters 1-2, 4, 7, 9-10. Weeramantry's definition of a legal system includes the origin of laws in which religion and morality are included, while most of the other general texts focus on a narrower definition of a legal system, and see the legal system as a collection of rules only. His approach is similar to the juridical view.

See also G. Leroy Certoma, *The Italian Legal System*, Butterworths, Sydney, 1985, pp. 12-16.

- <sup>5</sup> This aspect of the recordkeeping/law nexus is the theme of another article under development.

<sup>6</sup> Organised societies from early times needed to keep a record of business activities to operate a business. The Sumerian clay tablets were inscribed by a wooden or reed stylus using signs or a wedged-shaped script called cuneiform. C.B.F. Walker, explains the origin of writing using these stylised pictographs for the purpose of making records. He says: 'Writing was invented in order to record business activities in the early Near East. With the growth of centralised economies the officials of palaces and temples needed to be able to keep track of the amounts of grain and numbers of sheep and cattle which were entering their stores and farms. It was impossible to rely on a man's memory for every detail, and a new method was needed to keep reliable records'.

From C.B.F. Walker, *Cuneiform*, Trustees of the British Museum, British Museum Press, 1993, p. 7.

<sup>7</sup> 'Juridical' is a term less commonly used in the English language. Luciana Duranti in endnote 22 in 'Diplomatics, New Uses for an Old Science (Part I)', *Archivaria*, Vol. 28, Summer 1989, uses the term 'juridical' as a means of understanding the nature of abstract legal concepts, that is as part of legal theory. It is therefore one way of looking at legal systems. Juridical thinking developed as part of medieval thought in Europe when Roman law became the common law of Europe. Recordkeeping theory on the reliability and authenticity of records is part of medieval juridical doctrine. Duranti says that 'Juridical thinking is not universal other than as philosophy of the law. Jurisprudence, being the study of a specific juridical thinking, is necessarily conditioned by time and space'. See Luciana Duranti, 'Medieval Universities and Archives', *Archivaria*, Vol. 38, Fall 1994, p. 40.

<sup>8</sup> The term 'juridical system' and many associated concepts are found in *Diplomatics*. Diplomatics is 'the analysis of genesis, inner constitution and transmission of documents, and of their relationship with the facts represented in them and with their creators'. From Duranti, 'Diplomatics: New Uses for an Old Science (Part I)', *op. cit.*, p. 7. However as it is used here it does not maintain all the consequential links with other features of Diplomatics. Like many archival principles it can be applied in new ways to recordkeeping concepts.

<sup>9</sup> Duranti, 'Diplomatics: New Uses for an Old Science (Part II)', *Archivaria*, Vol. 29, Winter 1989-90, p. 5. [bold italics are my emphasis]

<sup>10</sup> The famous Australian High Court decision *Mabo v Queensland [No 2]* (1992) 66 ALJR 408, gave judicial recognition to the continuing existence of Aboriginal law as the legal basis of traditional rights and interests. See K.E. Mulqueeny, 'Folk-law or Folklore: When a Law is Not a Law. Or Is It?' 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 of Queensland Press, 1993, p. 166.

See also B.A. Keon-Cohen, 'Some Problems of Proof: The Admissibility of Traditional Evidence', in *ibid*, pp. 185-205.

<sup>11</sup> Simon Fisher (ed.), *The Law of Commercial and Professional Relationships*, FT Law & Tax, South Melbourne, 1996, p. 17.

<sup>12</sup> There are a number of definitions of transaction. Luciana Duranti defines a transaction as 'an act capable of *changing the relationships between two or more persons*'. See <http://www.slais.ubc.ca/users/duranti/tem1.htm> as at November 1998. For David Bearman 'transactions (trans-actions) by definition are *actions communicated* from one person to another, from a person to a store of information (such as a filing cabinet or computer database) and thereby available to another person at a later time, or communications from a store of information to a person or another computer'. From David Bearman, 'Electronic Records Management Guidelines: A Manual for Development and Implementation' in *United Nations, Administrative Coordinating Committee for Information Systems, Management of Electronic Records: Issues and Guidelines*, New York, UN, 1990 reprinted in *Electronic Evidence: Strategies for Managing Records in Contemporary Organizations*, Pittsburgh, Archives & Museum Informatics, 1994.

Legal definitions include 'a legal act directed to *a defined legal effect*', in G. Leroy Certoma, *The Italian Legal System*, Butterworths, Sydney, 1985, p. 31 and *Butterworths Business and Law Dictionary*, Butterworths, Sydney, 1997, p. 446 'carrying out negotiations, dealings or affairs usually in the context of business'. It can also be defined in terms that combine elements of all these definitions. (Note: the bold italics in the definitions represent my own emphases).

<sup>13</sup> This model is part of the author's current research. For the application of the legal relationship model to the Internet environment, see Livia Iacovino 'Regulating Net Transactions: the Legal Implications for Recordkeeping in Australia', a conference paper presented at *Place, Interface, and Cyberspace: Archives at the Edge*, Conference of the Australian Society of Archivists Inc., Fremantle, August, 1998 at: <http://www.sims.monash.edu.au/rcrg/research/> as at November 1998.

<sup>14</sup> From Christopher Enright, *Studying Law*, 5th edition, Federation Press, Leichhardt NSW, 1995, p. 239.

<sup>15</sup> The transmission of information about legal rules is regarded as the core of legal education and legal reasoning. It is presented as the chief skill a law student should develop. Morality and politics are seen as belonging to 'non-legal' issues. See 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. 106.

<sup>16</sup> Waller, *op. cit.*, p. 187.

<sup>17</sup> *Ibid*, p. 129.

<sup>18</sup> Following the corporate excesses of the 1980s the Australian federal government's initial reaction was to increase regulation over businesses, particularly in relation to the responsibilities and personal liabilities of directors of companies, as well as increasing its control over a number of professions. Businesses and the professions have sought to counter

this trend by attempting to improve their public image through self-regulation partly to avoid the 'big stick' approach, but also to improve their overall ethical standards which have been demonstrated to contribute to better legal behaviour. Genuine self-regulation challenges the view that legislation is the only means capable of solving all social and business wrongdoings.

<sup>19</sup> One way of identifying and classifying legal requirements for recordkeeping is found in the *Australian Standard AS 4390, op. cit.*, Part 2: Responsibilities, Regulatory requirements. The functional approach to recordkeeping also provides a way of ascertaining which business activities support the law or in some cases drive the law itself. For example, a bank loan requires a contract between the bank as the lender and the borrower in order to comply with contract law, but the lending activity itself gives rise to the need to create records of the loan regardless of the legal requirements.

<sup>20</sup> The classification schemes are drawn from a number of sources including Christopher Enright, *Legal Research and Interpretation*, The College of Law, Sydney, 1988 pp. 4-5 and Waller, *op. cit.*, Chapters 4-6, Chapter 12, and Richard Chisholm and Garth Nettheim, *Understanding Law: An Introduction to Australia's Legal System*, 4th edition, Butterworths, Sydney, 1992, Chapter 3.

<sup>21</sup> This section is based on Chapter 5 of *'Things in Action'*, *op. cit.*, which provides a range of legal principles that are relevant to recordkeeping in the Australian context. It has drawn ideas from legal texts and from law subjects taught in Monash University's Bachelor of Law degree. In the process of identifying these linkages an oversimplification of complex legal principles has been an unavoidable consequence. There is a need to extend this research further.

<sup>22</sup> A very important judgement of the New South Wales Court of Appeal, *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542 provides an exposition of the operation of the business records provisions Part 11C of the *NSW Evidence Act 1898* (now superseded by the *Evidence Act 1995* (NSW)).

<sup>23</sup> The articles in this theme issue of *Archives and Manuscripts* provide a number of relevant perspectives on how the law views records and recordkeeping.

<sup>24</sup> 'Business records provisions' in Australian evidence laws have been drivers in creating a perceptible shift in the legal understanding of a record as a medium-based physical entity to a purpose view, which is much more in keeping with the understanding of a record from a recordkeeping tradition.

<sup>25</sup> *Copyright Act 1968* (Cth) ss 10 (1) and 4.

<sup>26</sup> For example the current *Archives Act 1983* (Cth) s 3 (1) defines a record as: a document (including any written or printed material) or object (including a sound recording, coded storage device, magnetic tape or disc, microform, photograph, film, map, plan or model or a painting or other pictorial or graphic work) that is, or has been,

kept by reason of any information or matter that it contains or can be obtained from it or by reason of its connection with any event, person, circumstance or thing.

<sup>27</sup> R.A. Brown, *Documentary Evidence in Australia*, 2nd edition, LBC Information Services, North Ryde, NSW, 1996, Chapter 2.

<sup>28</sup> *Ibid*, p. 35.

<sup>29</sup> The records continuum view is based on the notion that the data in the document has been formalised in ways which strengthen the capacity of that document to serve as a memorial of actions.

<sup>30</sup> Brown, *op. cit.*, Chapters 9 and 10.

<sup>31</sup> The 1995 Commonwealth and New South Wales Evidence Acts and the various business records provisions found in the Evidence Acts in all Australian jurisdictions include the idea of records as part of a system which contributes to their reliability and likely admissibility. See also National Archives of Australia in cooperation with the Attorney General's Department, the Office of Government Information Technology and the Tasmanian Department of Premier and Cabinet, Information Strategy Unit, *Records in Evidence*, at <http://www.naa.gov.au/index.htm> as at November 1998.

An example of case law in which the reliability of a record was enhanced by the fact that it formed part of a recordkeeping system is found in *Tubby Trout Pty. Ltd v Sailbay Pty. Ltd* ACLR, 1993 195FC. *ACLR 1993*, 195FC1 - Evidence - Federal Court, *Tubby Trout Pty. Ltd v Sailbay Pty. Ltd*. This is a particularly interesting judgement in terms of whether a letter formed part of the records of a particular business, the opinion being that it had to form part of a record system kept by the business to meet requirements of reliability. S 1305 of the Corporations Law was considered in conjunction with the *Evidence Act 1905* (Cth), ss 7B, 7H.

<sup>32</sup> Under common law access to private records is generally only available by commencing proceedings against a party or pre-discovery procedures. A contractual obligation or a proprietary right of access to particular data or information may provide alternative avenues of access. Case law generally indicates how difficult it can be to gain access to private records. In the *Breen v Williams Case*, (1996), 186 CLR 71, the High Court of Australia maintained that the records of a patient treated in a private clinic remained the property of the doctor, and the patient had no right of access to his/her clinical records. This is an example of a proprietary right being used to prevent access to information about the data subject by the data subject. The use of copyright law to restrict access to information is mainly used in the realm of private or corporate records, usually to protect confidential secrets.

<sup>33</sup> The Australian Law Reform Commission, Report No. 85, *Australia's Federal Record, A Review of the Archives Act 1983*, May 1998, recommendation 24, p. 98 opts for a provenance definition of a record. It defines a record as follows:

the term 'record' should be defined as 'recorded information, in any form, including data in computer systems, created or received or maintained by an organisation or person in the transaction of business or the conduct of affairs and kept as evidence of such activity'. This definition is found in *Australian Standard AS 4390, op. cit.*, Part 1, 4.21.

<sup>34</sup> See *State Records Act 1998* (NSW) in particular section 6 'meaning of "control"' and section 30 'how the Authority takes control of a record'.

<sup>35</sup> The law also covers intangibles in property law; 'things in action', such as a share which exists only through proof of the right to the share, e.g. a record of the share certificate is not the property itself, but evidence of a right to property. 'Things in action' are both obligations as well as items of property. See Fisher, *op. cit.*, pp. 18-20.