The Archival Enterprise, Public Archival Institutions and the Impact of Private Law

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The thesis of this paper is that the law of obligations provides the primary legal framework within which to understand the legal dimensions of the archival enterprise, particularly as the records continuum assumes overarching importance in modern archival science. There is an important change to the private law concept of an obligation, and that is the sub-set of the law of obligations known as involuntary obligations is harnessed for the purpose of imposing duties on legal actors to facilitate the operation of the archival enterprise. There is a reconceptualisation of obligations that draws them out of remaining a purely private law phenomenon into a public

law setting. At the same time, an inherently private legal phenomenon, property, is a vehicle that can be used by archival institutions to bolster the effectiveness of their functions. Both the law of obligations and the law of property work in tandem to explain the operation of the archival enterprise.

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Introduction

Object and definitions of key terms

The object of this paper is to present, within a moderate compass, a survey of how private law, in particular the law of obligations and the law of property, has impacted public archival institutions.[2] This involves taking the components of each body of law and tracing their presence and diffusion within the statements of positive law as they relate to public archival institutions. In the balance of this section we define the key terms and concepts that are the subject matter of this enquiry.[3] These definitions provide the backdrop for the main parts of this paper which explore just how the laws of property and of obligations have impacted the archival enterprise. Some of the issues that will be considered include the use of property concepts within archives legislation, the adaptation of current legal concepts (such as ownership, possession and bailment) to the emerging area of electronic information storage and electronic recordkeeping and the use of the concepts of the law of obligations to regulate and provide content to the legal apparatus underpinning the archival enterprise.

The archival enterprise

The term 'archival enterprise' (to be defined below) in this paper expresses as shorthand not a legal concept so much as a construct developed to summarise the complex and interrelated processes (both legal and non-legal) which are associated with the activities of archival institutions. What is proposed is to make a definition of 'archival enterprise' which is a functional definition, and it goes something along the lines of the following:

> The archival enterprise is the matrix of legal and non-legal relationships underpinning archival institutions (and connecting them to their stakeholders including agencies and users of records). It provides advice, has responsibility to promulgate standards and norms and has responsibilities in relation to historical records or records of public interest. The archival institution is maintained on a not-for-profit basis and where it is intended that its records are to be accessed by the public.

The archival enterprise is a human-based activity which seeks to assemble, manage, systematise and collate information in record-form (including information going beyond traditional paper-based media and, now, increasingly electronic information).[4] It is because legal persons record and use information that reaches out into time and space that the archival enterprise is significant. In other words, without legal persons having an interest and involvement in the archival enterprise, there is no point to the existence and use of archival records. So then, it is necessary to define 'legal person', which we do next.

Legal person

A legal person is 'an entity on which a legal system confers rights and imposes duties'.[5] This definition, it will be noted, is closely tied to the concept of an 'obligation' discussed below. That is, this definition of 'legal person' positively connects the idea of legal personality to whether or not the supposed legal person is capable of assuming obligations (that is, a composite right-and-duty thing).[6]

Obligations

The term 'obligation' has its genesis, at least in a formal sense, in Roman law. In the seminal Roman legal text *Justinian's Institutes* an obligation has been defined as follows: 'An obligation is a legal tie which binds us to the necessity of making some performance in accordance with the laws of our state'.[7] Birks and McLeod write:

> What is an obligation? An obligation reduces your freedom. The metaphor of tying is inescapable. It is implicit in the word itself. '*Ligare*,

to tie' gives us 'ligament', 'ligature', also 'liable'. In Justinian's definition the metaphor recurs several times. 'An obligation is a legal tie which binds us to the necessity of making some performance in accordance with the laws of our state.' Without the metaphor one would have to say something like: 'An obligation supposes a relationship between two people such that one is under a duty to make a performance to the other and that other has a corresponding right to claim the performance.' The addition of words such as 'according to the laws of our state' serves to distinguish legal from merely moral obligations.[8]

Property and ownership

In keeping with Roman law, the concept of the law of property is a category concerned with relations between people and things. The same can also be said of the Australian law of property. It is futile to speak of 'property' as a legal object (or *thing*) unless one can simultaneously point to those legal persons who are said to have an interest in property.[9] The most important interest in property is 'ownership'. The concepts of 'property' and 'ownership' are an important part of the legal matrix underpinning the archival enterprise because a record[10] (that is, a document produced in the course of practical activity[11]) is itself a 'thing' with which legal persons (whether natural or juridical) have a relationship.[12] It is necessary to probe further and to identify what 'ownership' is. The South African Law Commission in its *Report on the Giving of Security by Means of Movable Property* said that 'Ownership indicates the relationship between a person and a corporeal or incorporeal legal object.'[13] How does one recognise an owner of property, given that ownership is an abstract, non-concrete relationship between a legal subject and legal object? A rough and ready rule of thumb is that an owner has a residuary right in the thing owned: see *Campbells Hardware & Timber Pty Ltd v CSD (Queensland)* (1996) 96 ATC 4348 at 4352. Such a residuary right or interest exists once one subtracts from the totality of the rights in the property concerned the rights asserted, claimed or enjoyed by others. Ownership is an important element in the archival enterprise because the Australian legal system presupposes that records are owned by someone (unless those records have been abandoned, which is unlikely).[14] Hurley points out that 'archives laws seldom confer ownership on the archives authority.'[15] An explanation for this phenomenon is that

records are usually owned by the Crown in right of the polity which created them or which received them in the course of official duties, and there is no legal reason why it is necessary to distribute ownership of records as between different governmental agencies. Although there may be sound administrative reasons why records management responsibilities are vested in archival institutions, these do not alter the incidence of ownership of records unless the owner of the records is a separate legal person to the archival institution.

Record

The *subject matter* of ownership, for the purposes of this paper, is the 'record'. The meaning of record has varied in accordance with the evolution of archival best practice and the attempts of Parliaments to reflect such practices in statements of positive or black-letter law. The current generation of archives legislation is best typified by the *State Records Act 1998* (NSW) and the *State Records Act 1997* (SA). In the *State Records Act 1998* (NSW), s 3(1), record means 'any document or other source of information compiled, recorded or stored in written form or on film, or by electronic process, or in any other manner or by any other means'. As well, by 3(1) of the same Act, a 'State record' means any 'record made and kept, by any person in the course of the exercise of official functions in a public office, or for any purpose of a public office, or for the use of a public office, whether before or after the commencement of this section'. The definition in the *State Records Act 1997* (SA), s 3(1) is similar to that in the *State Records Act 1998* (NSW) except that it is probably more technologically neutral than the New South Wales version.[16] Whatever the form of the 'record' (whether materialised or immaterialised, paper-based or electronic),[17] the access regime affecting records draws in part on the language of ownership and of property law (as well as the law of obligations) to facilitate its operation.[18]

Possession

Another important legal concept with impacts on the archival enterprise is the concept of 'possession'. Possession is a complex and ductile legal concept.[19] Possession has been divided into possession *in fact* and possession

in law. As possession in fact, 'possession' means the situation where the possessor of something (usually mobile property such as 'goods' but in this paper, materialised or paper-based records) has the use and occupation of which the subject matter of the possessory relationship is capable: see *Gray v Official Trust in Bankruptcy* (1991) 29 FCR 166 at 171. By comparison, legal possession is the state of being in possession in the contemplation of the law: *Gray v Official Trustee in Bankruptcy* (1991) 29 FCR 166 at 171. Legal possession is that degree of possession which is recognised and protected by law: *Horsley v Phillips Fine Art Auctioneers Pty Ltd* (1996) 7 BPR [97557] at 14,371 per Santow J. Legal possession is also known as *possession in law.* See *Horsley* at 14,371. Two evidentiary propositions support the general utility of legal possession. These are: (1) possession in fact is prima facie evidence of possession in law; (2) possession in fact, with the manifest intent of sole and exclusive dominion, always imports possession in law: *Gray v Official Trustee in Bankruptcy* (1991) 29 FCR 166 at 171. Once again, the concept of possession is important to the archival enterprise and that it is particularly so when records are loaned or used by people. The term used for the transfer of possession is *delivery.* The test the legal system in Australia uses for deciding whether possession has passed is whether the person in possession has the requisite mix of *intention* and *control* over the thing.

Bailment

One commentor, Welling, has defined bailment in these terms:

> Bailment is a transaction whereby possession of a thing is transferred upon agreement that possession of the same thing, perhaps in an altered state, will be transferred back to the transferor or on to someone else as agreed.[20]

The relevance of bailment law to the archival enterprise exists where an owner of records deposits these in an archive on a temporary basis, or even on a long term basis, but without the intention of transferring ownership of the records to the archivist. Admittedly, this may be rare in archival practice, but the possibility remains that a bailment can be created of archival documents.[21] Another application of the law of bailment is where archival documents are deposited or loaned by the institution to another person.

Public archival institutions

The main type of legal actor that is investigated in this paper is the public archival institution.[22] This is the generic term to describe all of those archival institutions that are established by governments in Australia. Some of these archival institutions are established under specific legislation[23] while others are established only by executive fiat without enabling legislation, that is, as an administrative entities falling within the executive arm of government and which lack separate legal status from the executive.[24] It would be relatively uncontroversial for the claim to be made that public archival institutions such as those bodies established by the enactments fall within the rubric of public law. What it interesting, however, is the extent to which the institutions of private law (such as property and obligations) are harnessed to facilitate the operation of the public archival institutions. This will be a sub-theme which we will revisit throughout this paper.

Private law

Private law is the body of law that governs legal relations between person and person or sometimes, the activities of public bodies that involve private legal elements. Private law is all law besides public law. The content of private law is determined by identifying first all the components of public law (which spans constitutional law, administrative law, criminal law and taxation and revenue law). The main components of private law are contract law, the law of wrongs (torts or delict) (with contract and wrongs being companion sub-sets of the law of obligations), equity and trusts, property law and business and corporate law. In Australia (and in most other common law jurisdictions), private law is mostly uncodified while in civilian legal systems or those legal systems with a hybrid civilian – common law legal base much of private law is codified with the best known examples being the French and German Civil Codes. For the purpose of the activities of archival institutions (whether public or private), the phenomena of private law are quite important because these institutions are engaged in records management, and records are 'private property'. Private law phenomena of *property* and *obligations* intersect strongly and visibly with the records management responsibilities of public archival institutions.

The legal nature of obligations

The source of the law of obligations

The law of obligations can be traced back to Roman law.[25] Roman law has been the inspiration of many legal systems, including the civilian legal system.[26] One of the central elements of the Roman legal system was its highly systematic and structured approach to private law.[27] As part of this highly systematised approach, Roman private law was divided into a trichotomy of *persons*, *things* and *actions*.[28] In turn, the law of 'things' subdivided further into the law of *property* and the law of *obligations*.[29] So the inspiration for the recognition of 'obligations' as a discrete or stand-alone legal category is the ordering and systemisation which Roman law imprinted on the very concept. If we uplift this idea into the subject of this paper, namely the impact of private law (including the law of obligations) on public archival institutions, to speak meaningfully of 'obligations' we must trace the very concept of 'obligations' back to first principles, including its Roman legal origins (which, as an aside, would have been influential in the formation of diplomatics).[30] The law of obligations is enjoying a modern renaissance, including within the common law legal system and its proponents are going back to its Roman legal roots for inspiration and exegesis of the taxonomy of the law of obligations even in common law legal systems.[31] The accent on the law of obligations here is intended to create a legal superstructure to understand just how that law has impacted on public archival institutions, which is the thesis of this paper.

The framework and elements of the law of obligations

If we portray an obligation and its elements in diagrammatic form, than it may be depicted as set out in Figure 1 below:

Figure 1: Obligations[32]

Metaphorically, an obligation is a bond, *vinculum iuris*[33], that unites two people in some kind of legally recognised relationship. The 'bond' which is at the heart of the legal conception of an obligation is the link between the person who owes the duty (that is, debtor) and the person to whom the duty is owed (that is, the creditor) with the creditor enjoying a right against the debtor. Under the framework of the law of obligations, and as exemplified by Figure 1 above, an obligation is a composite *right-and-duty thing*. In legal terms, an obligation is vacuous if the person who claims a right cannot simultaneously point to the existence of someone who owes a duty corresponding to that right. This symbiotic relationship between duties and rights was reinforced by Gaudron J in the leading High Court decision on professional negligence, namely *Hawkins v Clayton* (1988) 164 CLR 539 at 592. The relevance of this material on the provenance and nature of 'obligations' is that all legal actors (including archival institutions) interact with the legal system at some point and it is the construct of 'obligations' which provides one point of contact between Australian law and those legal actors.

If we draw on the philosophical distinction between *being* and *nature*[34], then an obligation *is* fundamentally a relationship between a person who owes a duty to do something or not to do something[35] and a person (or class of persons) who correspondingly enjoy the right corresponding to that duty. In terms of its *nature*, an obligation is incorporeal.[36] A thing which is incorporeal cannot be touched.[37] By contrast, something which is corporeal can actually be touched.[38] If obligations are incorporeal, then it also follows that they are abstract. For any abstraction to have a legal significance, it must fall within, or be captured by, legal rules of recognition which are prepared to supply meaning and content to the abstract legal thing. So then the elements of an obligation are relatively easy to state: they comprise a composite *right-and-duty thing*, and it is an invisible or intangible thing. If we examine the historical roots of the concept of an obligation, this would lead us to Roman private law. As a matter of history, this is both correct and undeniable but it is necessary to be Janus-like, that is to look both backward and forward at the same time. If we project forward, then one of the paths plotted by the law of obligations is that it has transcended the boundary between public and private law in the sense that the very concept of an obligation has been channelled into public law, an

area in which it previously did not trespass. This is significant when one locates records as a public resource yet couples it with the private law notion of obligations.[39] This phenomenon of uplifting a private law concept of obligations and transferring it to the public dimension is not unique to archival science, for there are many other parallels in the Australian legal system. What is interesting about the cross-pollination of the private law of obligations with public law (part of which is archival law) and the way it has been harnessed in archival law is that even the third generation of archives legislation (represented by the *State Records Acts 1998* (NSW) and the *State Records Act 1997* (SA)) use the concepts and constructs of private law to secure their operation. One example will illustrate this point. Under the *State Records Acts 1998* (NSW), ss 12(1) and 12(2), all public offices are under *duties* to make and keep full and accurate records of the activities of that office and to establish and maintain a records management program in conformity with standards and codes of practice established under s 13. This task is not undertaken in a vacuum and so it is under s 13(1), the State Records Authority of New South Wales is empowered to approve standards and codes of best practice for records management by public offices. It is the construct of an obligation which is embedded within both ss 12 and 13 that illustrates how the private law of obligations has been translated across into public law. The explanation one could offer is that the archival enterprise depends on harnessing private law constructs if it is to operate successfully. The point to all this is to reinforce the thesis of this paper that obligations have been reconceptualised in public law to provide the fulcrum for public archival institutions to have the apparatus to enforce duties of records management and so engage in the archival enterprise more fully and effectively.

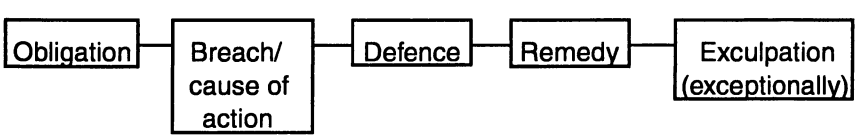
At this point, it is necessary to reveal another layer beneath the superstructure of a law of obligations. That underlying layer differentiates between voluntary and involuntary obligations.[40] Voluntary obligations are easily recognised: they are the obligations which persons readily assume, and a classic example is the entry into a contract between two people. Each of the contracting parties will promise to do something for the benefit of the other and it is settled dogma that the parties to a contract must consent to enter into that contract.[41] By contrast, with involuntary obligations, the law requires people to act in certain ways or to refrain from acting in certain

ways, and so imposes duties on legal persons irrespective of their consent or assent. It is partly within the law of involuntary obligations that one can locate aspects of the archival enterprise.[42] So, in the end, the framework of the law of obligations consists of the legal apparatus the Australian legal system harnesses to allow or require people to act or to refrain from acting, and so regulate human conduct.

The pathology of an obligation

The definition of 'obligation' from *Justinian's Institutes*[43] contains the kernel of the concept that somehow the state has an interest in the recognition and enforcement of obligations. This state interest in the very concept of the obligation appears at several levels. Firstly, it delineates the types of obligations which the law is prepared to recognise. Secondly, the state's interest in recognising and enforcing obligations also emerges through the principle of autonomy, that is so far as voluntarily assumed obligations are concerned, there sits beneath the concept of an obligation the fundamental right of self-determination. The exercise of the right enjoyed by a right-holder (the creditor) against the duty-holder (that is, the debtor) is left to the initiative and the free choice of the parties.[44] The principle of autonomy provides legal persons with the freedom to decide whether or not they wish to enter into legal relations with one another, and it resonates particularly within the sphere of voluntary obligations. Thirdly, the state's interest in the recognition and enforcement of an obligation emerges also through the provision by the state of apparatus to facilitate the enforcement by right-holders of duties owed to them. This emerges from Figure 2 below:

Figure 2: Pathology of an Obligation



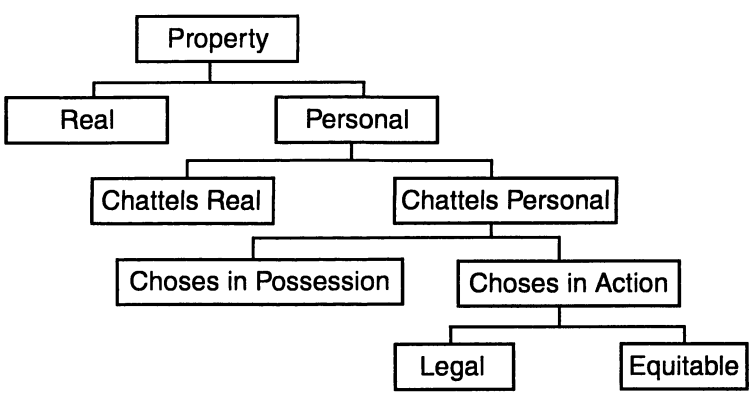
This scheme can be applied to both voluntary obligations and involuntary obligations. The reason why this scheme is significant is because it demarcates the steps which must be followed if a person who complains of

a breach of their rights (that is, the duties which are owed to that person) is to receive, in a juridical sense, justice for that breach of obligation. And, in the context of the present paper, it is necessary to locate the secondary or remedial dimensions to a breach of rights when dealing with the legal obligations associated with the archival enterprise. Some of the ramifications of the pathology of an obligation are explored below.[45] All that is necessary to state at this juncture is that the pathology of an obligation can be divided into primary and secondary tiers. The primary tier is the obligation itself, the legal bond that exists between a right-holder and a duty-holder. The secondary tier consists of the remedial steps and remedial machinery which the Australian legal system requires an aggrieved right-holder to activate should that right-holder seek justice according to law.[46]

The nexus between the law of obligations and the law of property

In the framework and elements of the law of obligations (see above), the law of obligations and the law of property were identified as sibling-categories of the law of 'things'. According to the Roman legal framework, property and obligations are mutually exclusive.[47] In the Australian legal system, however, the distinction between property and obligations is not quite as rigid as it was in Roman law. In Australian law, the institution of 'property' can be depicted as follows in Figure 3 below.

Figure 3: Property - An Overview



Where 'property' and 'obligations' crossover under the common law conception of property is in the category of 'choses in action'. A chose in action is a legal right enforceable by legal action: *Loxton v Moir* (1914) 18 CLR 360 at 379 per Rich J. A chose in action is both 'property' as well as an 'obligation' because it is, on the one hand, the 'right' end of an obligation and, on the other hand, it is a right that is transferable and so qualifies as an item of property. [48]

Records as property

The locus of records within the Australian legal system

In this section, we examine the extent to which records are property and the use of the tools of property law on the activities of archival institutions. Preliminary attention must also focus on the owner or custodian of records, namely archival institutions. Archival institutions are established under a mixture of legislation and administrative practice.[49] In terms of the tripartite division of Government into the executive, legislative and judicial branches, archival institutions may be located within the executive branch of government. Records in documentary form in legal terms can be characterised as choses in possession, that is tangible, corporeal movable property.[50] As a legal object, records represent individual things that form the very basic building blocks of the records continuum. According to existing legal principles, records in electronic form are not 'property' in the legal sense as they lack materiality or substance.[51]

Interests in records

In legal discourse, 'interest' means, in a collective sense, the rights, advantages, duties, titles and liabilities with respect to a specific thing.[52] As a legal phenomenon, an 'interest' functions as a bridge between a legal person and a legal thing or object. It is the interest that connects a person to a legal object. The content of any particular interest is very much case-specific and it can variously span rights, advantages, duties, titles and liabilities. Within the archival enterprise, the two main types of interests that are encountered are the interests of ownership and possession. Each

term was defined earlier.[53] Particularly in the case of property law, legal discourse also attaches significance to the incidence of any interest, that is person or persons in whom the interest is vested. In terms of Australian property law, the ownership of public records is vested in the State.[54] As an example of this, under section 73 of the *Libraries and Archives Act 1988* (Qld), where a person publishes in Queensland to the general public 'material' to which Part 8 of that Act applies, the material required to be delivered[55] to the Library Board of Queensland becomes the property of the Crown. So, in Queensland at least, it is by legislative fiat that ownership of archival material is vested in the Crown. Consequently, it can therefore be said that the Crown's interest in records is an interest in the nature of ownership. One of the reasons why ownership is such an important interest in the context of archival law is the ability of the State to recover estrays, premised on the State having ownership of estrays.[56]

Possession is a much more ductile legal phenomenon than ownership. Possession can be grounded as a factual matter as well as a legal matter, depending upon the frame of reference that is selected.[57] Possession of a thing (which must be tangible, corporeal or movable) can be traced back to ownership. This emerges from *Knapp v Knapp* [1944] SASR 257 at 261 where Mayo J said:

> The general right of ownership embraces subsidiary rights, such as exclusive enjoyment, to destroy, to alienate or to alter, and, of course, the right to maintain, and to resume and recover possession from other persons.

If an atomistic approach is taken to the concept of possession as a legal phenomenon, then the enquiry centres on what are the elements or integers of possession.[58] We may quote from the judgment of Mayo J in *Button v Cooper* [1947] SASR 286 at 292:

> For there to be possession there must be an intent to possess by the possessor, the *animus possidendi*, and it must be effectively realised, the *corpus possessionis*. There must be physical control with an intent to exercise that control on his own behalf, or there must have been such control, and the intention and means of control retained, no

> other person having intervened in some way and acquired possession, or a right to reduce the article into possession. It is regarded as possession where the possessor has the right against any other claimant to obtain immediate physical control, and no other person is in possession.

The *corpus possessionis* may be paraphrased as the *control* element (or the physical element). The *animus possidendi* (or the intent to possess) may be paraphrased as the *mental* element. This mental element may be inferred from knowledge of the custody or control of goods: *R v Boyesen* [1982] 2 All ER 161 at 163 per Lord Scarman (HL). In terms of the incidence of possession of materialised records, for there to be a delivery of that material, there must be prerequisite transfer of control of archival material from the archival authority coupled with the intention of that authority to transfer possession of the archival material to another person. A delivery of materialised records so as to transfer possession of those records from the archival institution to another person can only take place if the recipient of the records is legally distinct from the person who makes delivery. So if a government department or agency seeks access to records, and the archival institution delivers those records to the requesting department or agency, then if the archival institution and the receiving department or agency are both departments of the same executive arm of government, then it cannot be said that there has been a delivery in the legal sense because giving and receiving departments or agencies are, in legal terms, sub-components of the same legal person namely the executive branch of government. In this case, it may be more accurate to speak of there being a transfer of *custody* of the records from the archival institution to the agency.[59] In this example, possession of the records has not changed unless the archival institution and the agency are separate legal persons.

Suppose, however, that a member of the public seeks access to records. In such a case, if the person seeking access can be said to have both the intention to control and the means of control, then that person will have 'possession' in the sense discussed above, so long as the archival institution cedes effective control of the records to the user. If it is the policy and practice of the archival authority not to allow persons accessing records to exercise both control and the intention to control over so as to possess the records, then

the member of the public who has access to the records has a lesser interest which does not amount to legal possession (or possession in law). In such a scenario, the person seeking access will have either *custody* (which means physical control: see *FCT v Australian and New Zealand Banking Group Limited* (1979) 143 CLR 499 at 505 per Stephen J) or *actual* (or *de facto*) *possession* (which is the use and occupation of which the subject matter of the supposedly possessory relationship is capable: see *Grey v Official Trustee in Bankruptcy* (1991) 29 FCR 166 at 171).[60] In this hypothetical, the custodian does not have possession in law of the records. Constructive possession takes place when legal possession (the state of being in possession in contemplation of the law proved by an appropriate mix of intention and control) is separated from actual possession. This occurs in archival practice if an archival institution that owns records or is in possession of particular records places custody (in the narrow legal sense) of those records in the hands of an employed archivist. Here, the archival institution possesses constructively through the 'agency' of the archivist. If the archival institution outsources the custody of records to a third party who is legally distinct from the institution and not subject to the control of the institution, then the outcome, legally speaking, is not constructive possession but a bailment because legal possession has passed to the third party custodian.[61]

One legislative approach in meshing property law and the archival enterprise has been to invoke the concept of 'control' of a record to encapsulate the relationship between the record owner (say the State) and the person in possession of the record: see s 6 of the *State Records Act 1998* (NSW). In a paraphrase, that provision enacts that a person has 'control' of a record if they have possession or custody of it, whether directly or personally, or indirectly or remotely through another person. This provision gives as an example (in a note to s 6(2)) of the indirect or remote 'control' the situation where a commercial storage provider holds records for a public office.[62] The use of 'control' here is as a summation of the tools and elements of the law of possession, but its meaning is not very clear once it is read in context and in light of fundamental notions of property law. What is not stated or implied very clearly is that if legal possession has passed to a commercial record storer, then the result is bailment, not constructive possession, and the law is that bailees have an interest in goods (including records) that is held and used for themselves and not for another. In fact

'control' of the storer of records would be weaker and not stronger. The only way to assign the note to s 6 of the *State Records Act 1998* a sensible operation is to confine its operation to the situation where someone has *de facto* possession (or *actual* possession) of records and not a separate interest that can be characterised as legal possession. The example of a commercial records storer being subject to the control of the public office that appears in the note to s 6(2) is only correct and consistent with fundamental concepts of the law of possession if (1) legal possession has not passed to the storer (in which case there is no bailment) or (2) if the very meaning of 'possession' was intended to be altered (which appears unlikely) [63] or (3) the storer is otherwise subject to the control of the public office (say through an agency relationship). The consequences of the different meanings of 'possession' are not simply a matter of academic interest. If there is a bailment of records, then control is weaker from the perspective of the public office; if there is constructive possession, then control is stronger because the storer is subject to the direction of the archival institution because possession is distributed between one who has legal possession (the archival institution) and another who is subordinate to that institution (the commercial storer), having only actual possession. Even in this legislative example from a third-generation archival statute, the use of 'control' is inherently property-based and it is not technologically neutral. It is tempting to conclude from provisions such as s6 of the *State Records Act 1998* (NSW) that property law concepts such as 'possession' and 'custody' are being strained beyond their natural range of uses. As well, one could question the 'fit' of s6 with the law of bailment.

The law of property has lagged behind technological developments.[64] The same is no less true in archival law where there is a heavy dependency on property-based concepts such as ownership and possession even in recent Acts such as the *State Records Act 1998* (NSW) and the *State Records Act 1997* (SA). This is unavoidable so long as records are materialised. Where records are immaterialised, then the concepts of ownership and possession have much less utility.[65] From the perspective of the user of immaterialised records, the crucial element is having means to access such records using appropriate technology.[66] Where there is a right to have access to records, then this is a cross-over into the law of obligations because the user seeks to take advantage of a duty owed to the user to obtain access.[67] Another tool is to use 'control' of electronic records although

this depends on control being divorced from property-based concepts if it is be effective in practice. There are existing examples on the statute books of control being used in a sense divorced from property law.[68] Control could be used from the perspective of the archival institution where it has the right to allow or refuse access to records, including those in electronic form. Another gap in the synchronicity of law and the records continuum concerns the very place of the 'record' in that continuum. Property law operates at a micro level (that is, with the record as an object in its own right); there is no evident concern of property law (even within the archival enterprise) with recordkeeping systems or with their provenance.[69]

Mayo J's judgments in *Knapp v Knapp* [1944] SASR 257 at 261 and in *Button v Cooper* [1947] SASR 286 at 292 draw on the settled taxonomy of possession into the elements of intention and control. Might not these concepts be re-ordered in the archival enterprise?[70] 'Intent' in possession corresponds with logical design of a recordkeeping system. 'Control' may flow through into physical design (or implementation) of such a system. If the archival enterprise harnesses the tools of possession in its own way, then there is nothing to constrain that enterprise from using those tools in whatever manner it selects, and that can be in accordance with or in dissonance with the legal usage of those conceptual tools. Law depends to a large extent on the device of analogy, and so it is tempting to draw on the concepts of intention and control as the records continuum moves into the realm of electronic recordkeeping. Read as strictly property law phenomena, intention and control may not be capable of being pressed into service in the era of electronic recordkeeping unless their meaning is changed to accommodate the transition to a new environment. So if we speak of possession of records in an electronic environment, we may need to invent a construct such as 'electronic possession' or 'quasi-possession' to embrace possession that is as close to legal possession without having this type of possession.[71] Intention might correspond to a user purposefully accessing electronic records (say by means of using a password supplied by the institution) and control might correspond to using technological facilities provided by the archival institution (whether a terminal supplied by or operated by the institution or a dedicated or shared data carrying line or medium) or accessing the data available via electronic media.

So from a law of property perspective, records can be classified as containing or generating two main types of interests. The first is ownership and the second is possession.

The nexus between property law and the archival enterprise

'Property' is not simply a legal phenomenon. Property is a phenomenon or institution that other disciplines besides law deal with and respond to. Thus there are philosophical, sociological, political, economic, cultural, theological and social justice conceptions of 'property' just as it is possible to have a 'legal' conception of property. Even if a purely 'legal' perspective is taken concerning property, it does not necessarily mean that all lawyers approach 'property' with a similar outlook or even a similar set of underlying assumptions with which to view the legal institution of property. Commentators Tay and Kamenka stated some eleven theses on property in an attempt to describe the concept of property. The thesis that is of particular interest for the purpose of this paper is no 4, 'all ownership, and therefore all property, is in an important sense private or privatising.'[72] This provides a convenient springboard to understanding the interaction between the law of property and the archival enterprise. From a legal perspective, it is certainly true to say that property, the subject of ownership, is in an important sense private or privatising. It is the capacity of a property owner to 'privatise' the property owned which flows from the general right of ownership. This is borne out by the dictum from *Knapp v Knapp* [1944] SASR 257 at 261 cited earlier which places a boundary around the subject matter of ownership, namely property, and it is that boundary which seeks to restrict public rights of access. This pinpoints one of the tensions between the privatising tendencies of the law of property and one of the key principles which informs an effective archival system, namely a right of public access. This has been expressed by the Australian Law Reform Commission (ALRC) in its Report No 85, *Australia's Federal Record: a Review of* Archives Act 1983,[73] where the ALRC recommended that:

> **Recommendation 97.** The access regime, including a right of access to Commonwealth records, clearly defined exceptions to that right, and effective review mechanisms, should continue to be legislatively based.[74]

The tension between property as a 'private' thing and the archival enterprise as a 'public' enterprise remains even though the access principle has a normative application. It is the interest of ownership that provides the legal substratum for the operation of an archival regime underpinned by access rights. Even though property is private (even records owned by the government), it is possible, even desirable, for access to public records to take place for the purposes of facilitating communications in a representative democracy such as Australia.[75]

Records and the law of bailment

Earlier 'bailment' was defined as the relationship between two people where one person has ownership of a tangible, corporeal thing and transfers possession of it to another person. Thus, for legal purposes, the fundamental thread that runs through the law of bailment is the differentiation between ownership of something and having possession of it. With bailment, the owner and the possessor are two separate legal persons (or subjects). Bailment law affects the archival enterprise in two ways. First, where archival institutions deposit records with outsiders and secondly, when outsiders deposit records with the archival institution, and in each case ownership does not pass. We will deal with each scenario in turn, after noting first it is really in an instrumentalist sense that archives legislation deals with property concepts rather than those property concepts being ends in their own right.

The first scenario we examine is where someone besides the archival institution has possession or custody of archival material. Legislative examples of this are s 64 of the *Archives Act 1983* (Cth) and s 36 of the *State Records Act* (NSW).[76] Each provision is concerned with institutional-third party custodial arrangements of archival material. The law of bailment does not, on first impression, provide much of the impetus or the rationale for this provision. This much may be accepted. But this is far from saying the law of bailment has absolutely no connection with or relevance to such institutional - third party custodial arrangements. In fact, bailment law operates just beneath the surface of the provision. For example, section 64(2) of the *Archives Act* provides that the arrangements for third party custody must provide for the 'care' of the material of the Australian Archives and for the regular inspection by the Australian Archives of that material.[77]

It is not section 64(2) which imposes any duties of care upon the third party custodian, at least directly, but it does provide the framework under which specific duties may be imposed on the third party custodian, so long as that custodian takes possession of records from the Australian Archives. Within the framework and the terminology of the law of bailment, the Australian Archives is the 'bailor' and the third party custodian is the 'bailee' and the subject matter of the bailment is the delivery of the records (being 'goods'). Under Australian common law, the duties which the bailee owes to the bailor can be grouped under five categories. These categories are:

1. The duty to take care of the goods.

2. The duty to retain possession.

3. The duty not to use or misuse the goods.[78]

4. The duty to return the goods or to deal with them as the bailor directs.

5. The duty not to dispute the bailor's title.[79]

Public archival institutions may have a quite legitimate concern that the 'privatisation' or 'outsourcing' of public functions may lead to invasions of the State's 'interest' in maintaining good public administration. Perhaps ironically from the perspectives of public law and public administration, an institution of private law (namely bailment) can be harnessed to provide a public institution such as the Australian Archives (now the National Archives of Australia) with legally enforceable measures of both comfort and security to prevent a third party custodian from misusing records. The scheme of the five duties of the bailee set out above implies, among other things, that the bailee does not have the liberty to use bailed 'goods' (including materialised records) as it pleases. Any bailee of official or public records (including a third party custodian operating under the umbrella of section 64 of the *Archives Act 1983* or s 36 of the *State Records Act 1998* (NSW)) must perform and honour the mandate imposed upon that third party custodian when it takes possession of records, and this type duty flows from the assumption of possession of those records, which is the juridical phenomenon which explains the operation of the law of bailment.[80] In practice, third party custodians of Commonwealth records may be paid for

the custodial services they provide, or they may gain access to information not readily accessible by others so there is every commercial incentive for the third party custodian to honour that mandate. Clearly, the overall scheme and also the interstices of the law of bailment must be taken into account and appropriately accommodated when (if at all) an agency such as the Australian Archives is negotiating the transfer of possession of Commonwealth records to a third party custodian under the powers conferred on the Australian Archives under section 64 of the *Archives Act*. So then, it is possible to read into the framework of section 64 the imposition of clearly defined duties of a bailee from the private law of bailment.[81] Perhaps ironically, the interaction of private law and public law may allay any fears about the misuse of official or public records in private custody (whether temporary or more long-term).[82]

Section 64 of the *Archives Act 1983* is an example of a custodial arrangement where a third party custodian (not necessarily a public entity) acquires possession of archival material and hold these for the benefit of the Australian Archives. A transaction occurring in the opposite direction is where an owner of a record deposits that record with an archival institution. An example of this is section 15(2) of the *Public Records Act 1973* (Victoria), which reads:

> 15(2) The owner of any record worthy of preservation may, with the consent of the Minister and subject to any terms and conditions agreed upon by the owner and the Minister, transfer the record to the custody of the Keeper of Public Records for safe-keeping.[83]

Some aspects about this provision should be noted at this point. First, although the *Public Record Act 1973* (Vic) does not define the phrase 'any record worthy of preservation', this does not provide 'private' owners of documents with the facility to deliver these up to the Keeper of Public Records for safe-keeping as some kind of free public recordkeeping service. The provision is conditioned upon the Minister consenting to the Keeper of Public Records taking custody of that record for safe keeping. Secondly, the phrase 'any record worthy of preservation' is not defined in the *Public Record Act 1973*. The phrase does not appear to have been the subject of judicial consideration,[84] and so the question becomes how is such

'worthiness' to be determined? Although not expressly articulated within the provision itself, it seems to contemplate those records which are of interest to the public or a section of the public, or which would be useful subjects of research or study or which record events of significance in the history of Victoria. Thirdly, the deposition of any records worthy of preservation with the Keeper of Public Records is subject to any terms and conditions agreed upon by the owner and the Minister. From a public law perspective, this involves meshing public law with private law concepts. For example, the Minister might agree to allow the Keeper of Public Records to take custody of a significant record. The Minister could, however, restrict, qualify or even abrogate the duties that the Keeper (as bailee) might owe to the owner (as bailor).[85] If the agreement between the owner and the Keeper involves diminution in the scope, breadth or depth of any of the duties which any bailee owes a bailor at general law, then this brings in train the subsidiary question of how, and to what extent, the general law of bailment accommodates such duty-shifting provisions (whether or not contained in a contract as the law defines a contract). In terms of the convergence or collision (depending upon one's frame of reference) between the law of contract (the body of law which regulates most 'agreements') and the law of bailment, a Victorian case, *Parastatidis v Kotaridis* [1978] VR 499 stands for the proposition that where a bailment is created under contract, the courts will regulate the bailment relationship by means of that contract and not by having regard to common law principles of bailment unless, of course, the contract provides that those legal principles are to supply some of the content of that relationship. So where contract and bailment converge, the result is that the contract shapes the obligations of the bailor and the bailee: see also *China Pacific SA v Food Corporation of India (The Winson)* [1982] AC 939 at 959. Besides the application or exclusion of the general law of bailment, section 15(2) of the *Public Records Act 1973* empowers the owner and the Minister to also agree upon the extent to which and the purposes for which the record deposited with the Keeper is to be accessed by the public. This is perhaps the most significant matter to note about section 15(2) of the *Public Records Act 1973*. It provides a mechanism by which 'private' records of archival significance can be made available to the public by the Keeper of Public Records having custody of them and allowing others to have access to them.

A provision in the *State Records Act 1998* (NSW) is of interest. Section 19(3) empowers the State Records Authority to provide records storage and records management services to anyone, including anyone besides a public office. The law of bailment will apply wherever that Authority accepts possession of records from an outsider, so that the Authority is a bailee and the record owner the bailor. The Authority will owe the record owner the duties of a bailee (see above) unless these are shifted or even abrogated by contract.[86]

There is one aspect of modern recordkeeping and records management which the law of bailment cannot effectively respond to and that is electronic (or immaterialised) records. Bailment law centres upon tangible movable property, namely 'goods'. Electronic records lack materiality and so bailment law cannot (at least in terms of current legal concepts) govern the obligations (rights-and-duties) of custodians or users of such records.[87] So if there is to be a legal regime to govern access and use of such records, it must be supplied from the law of obligations; it cannot emerge via the law of property.[88] Even if s 36 of the *State Records Act 1998* is based on a premise of technological neutrality, it uses the language of possession to underscore the duty of safe keeping imposed on anyone who is a possessor or custodian of a State record.[89]

The archival enterprise and the law of obligations

General aspects

To recapitulate from the definition of obligations above, the law of obligations was anchored firmly within the sphere of private law. The review undertaken there of the significant legal literature and the legal concepts discussed within that body of literature revealed an obligation is a composite right-and-duty thing which provides a legal bond or tie between two people. When we probe obligations further, we see that they subdivide into what are termed voluntary and involuntary obligations. It is principally (but not exclusively) within the sphere of involuntary obligations that one can locate specific duties that comprise part of the legal fabric of the archival enterprise. One of the formal sources of duties in the archival enterprise is legislation.

In succeeding sections, we will consider some aspects of the archival legislation in so far as they touch on the matters of (1) access to records held by an public archival institution, (2) deposit obligations, and (3) the duty of non-violability of records. Another regime that imposes duties on archivists (as participants in the archival enterprise) is the professional mores of archivists as professionals.[90] Space does not allow for any treatment of that regime. The purpose of this survey is to identify and highlight the use of the concepts of the law of obligations as it affects the archival enterprise.

Access to records

Within the context of public archival institutions, 'access' has been defined as 'the process by which the clients of archival institutions are able to make use of the records'.[91] Access to archival records can be controlled using a number of tools. One is ownership, and it is open for the owner of the record whether the archival institution, a related entity (particularly within government circles) or an outsider to stipulate the extent to which (if at all) access will be given to records. Another control device is the law of copyright, which inhibits the copying or reproduction of records. In the sense of the archival use of the term 'access', copyright law does not inhibit access to archival records, rather it prevents their copying or duplication (whether using manual, electronic or other copying or reproduction formats). What copyright law achieves in the context of the archival enterprise is to inhibit multiple copying of records (particularly materialised records although copyright law protects electronic records as well). From a law of bailment perspective, access to records by users or clients can be controlled by inhibiting the extent to which records can be used or misused. Under the umbrella of the law of confidential information, if a record contains confidential information, the person whose confidentiality ought to be respected can control the extent to which access is to be given to that record. Once access is given to a confidential record to someone outside of the archival institution or the executive government, the record ceases (as a rule) to have the necessary quality of confidence which is the hallmark of the law of confidentiality.

The meaning of 'access' can be refined further beyond that definition given earlier. The ALRC has said in the context of the *Archives Act 1983* that

the term refers in particular to the process by which records are either released for public use or exempted on the ground that they contain information unsuitable for release.[92] At a federal level, the entire process of access is being revisited under the ALRC's review of the *Archives Act 1983*.[93] The access regime bifurcates according to whether access to records may be granted or refused. What is significant about access from a legal perspective is that it is a *right-and-duty* thing, that is, a member of the genus of obligations. To explain, access is only a *right* because the archival institution is under a *duty* to grant access according to law (leaving aside exceptions mandated by law). For example, under the *State Records Act 1998* (NSW), a record is in the open access period if the record is at least 30 years old (see s 50). Based on this age rule, then access is either allowed or denied according to the open or closed access directions that may be given under s 51. A record owner can, under the guise of property law, restrict or grant access at will because it is of the stuff of property law that the owner of property can grant or withhold third party access to that property. Under the law of obligations as reflected in archival legislation, access is elevated into a right (even if that the exercise of that right is restricted or qualified). This illustrates the important shift from notions of property to obligations that characterises modern archival law and practice.

Deposit and recovery obligations

The operation of any public archival institution, and hence of the archival enterprise as a whole, would be difficult if not impossible without there being duties imposed upon record holders to deposit these or to make them available to public archival institutions. The apparatus of the legal system provides several tools by which deposit and recovery obligations can be enforced. Firstly, there is the interest of ownership. Ownership functions as a fulcrum around which pivots the ability of the owner of the archival material to recover it from someone into whose possession or custody the material has been transferred. As such, ownership does not require any legislative support under the archives legislation for it to be used as a tool in the recovery process.[94] Apart from recovery powers or mechanisms, public archival institutions also enjoy the ability to compel the deposit of some records of archival value. Various legislative provisions provide a legal framework for such depository obligations.[95] The recovery process affecting

records centres upon duties imposed on government entities to transfer possession of records to the archival institution.[96] Where it is someone such as a third party who is in possession of public records, then stronger, more coercive powers are needed if an archival institution is to recover possession of the records in that person's possession, custody or control. Some archives legislation contains quite extensive and a broad-ranging recovery powers backed by criminal and civil sanctions.[97] If we take one example, section 62 of the *Libraries and Archives Act 1988* (Qld) provides that if the State archivist has reason to believe that public records are in the possession of a person otherwise than in that person's official capacity, the State archivist is empowered by notice in writing to direct the person to deposit the public records within the State archives in accordance with the directions given in and stated in that notice. It will be noted that this provision is tied very much to traditional property concepts such as possession.[98] The use of property-based concepts such as possession, custody and control is well and good when the record is in materialised form but these type of concepts do not operate efficiently or effectively in an era of electronic recordkeeping. Part of the problem is that under the current legal framework, 'information' is not 'property'.[99] To make the archives legislation more efficient in an era of electronic recordkeeping, it will be necessary for parliaments to consider harnessing alternative phenomena (such as 'access' or 'use'[100]) of records in electronic form as a basis for archival institutions exercising recovery powers and functions where records in electronic form are in the 'hands' of third party 'custodians'.[101]

The second element of a deposit regime is where people come under a legal duty to deposit material of archival value with an archival institution. There is some legislative support for the imposition of such a measure.[102] The proprietary consequences of such compulsory acquisition are not stated uniformly across these regimes. For example, in the case of Queensland, upon delivery of material which must be deposited with the State Archivist, the material deposited becomes the property of the Crown: see s 73 of the *Libraries and Archives Act 1988* (Qld). In the case of the *Public Records Act 1973* (Vic), s 15A does not advert to the fact that property in any material deposited with the Keeper of Public Records becomes the property of the Crown, although this result follows by necessary implication. A point of divergence between the Queensland and Victorian regimes is that under

the Victorian regime, the Minister has a discretion whether or not to pay the person depositing the material of archival significance compensation. By contrast, under the Queensland regime, in particular s 68 of the *Libraries and Archives Act 1988* (Qld), the person who deposits the specified material does so at their expense and is not entitled to receive any compensation for the material 'given' or handed over.[103] In the case of New South Wales, the compulsory acquisition of records is coupled with the payment of compensation to the record owner or possessor, either as agreed between the State Records Authority and the record owner or as determined by a court (in default of agreement): see s 45 of the *State Records Act 1998* (NSW). Whatever the justification for provisions that compulsorily acquire property in records of archival value not in the ownership of the archival institution, it is clear that those persons must obey the law and comply with any requirement to deposit such material with the archival institution. Once again, it may be observed that property concepts drawn from private law inform this deposit regime, although they are coupled with the concepts of the law of obligations.

The duty of non-violability of records

A duty of non-violability of records is embedded within archival legislation. It finds expression in the *Archives Act 1983* (Cth), s 26 which provides that a person must not add to or alter a record that has been in existence for more than 25 years, unless this is required by law or in accordance with the permission of Australian Archives. In New South Wales, s 21(1)(d) of the *State Records Act 1998* prohibits a person from damaging or altering a State record regardless of its age unless any of the exceptions laid out in s 21(2) are met. This type of conduct is an offence. In South Australia, s 17(1)(b) of the *State Records Act 1997* creates the offence of intentionally and without proper authority damaging or altering an official record. Related to the duty of non-violability of records just described is the duty of non-disposal of records which s 21 of the *State Records Act 1998* (NSW) and s 17 of the *State Records Act 1997* (SA) creates. All of these duties apply to archivists and non-archivists alike. Besides the fact that these duties are contained within statute law, the same duties also resonate within the law of bailment where any bailee of any records is under a duty not to use or misuse the records except if this is required by the terms or nature of the bailment.

Conclusions

The objective of this paper has been to survey how private law has impacted on public archival institutions. The survey undertaken reveals first that an obligation is a legal concept of great antiquity that resonates fully within private law, including modern Australian law. Although obligations (as a legal category) have their genesis within private law, public law has taken the concept of an obligation and pressed it into service within public law with the aim, for this paper, of bolstering the purpose of the archival enterprise, namely to record and preserve the collective memory of a polity. The law of obligations provides the conceptual framework within which to approach and understand the legal dimensions of the archival enterprise. The same body of law also provides the bonds between participants and stakeholders in the archival enterprise. At the same time as acknowledging the presence and strength of the law of obligations within the archival enterprise, the very fact that records are items of 'property' invokes the law of property as a construct that also informs and animates much of that enterprise. In tandem with the law of obligations, the law of property also functions as a force of attraction of specific legal rules designed to preserve and promote the interests of property owners, including owners of records. It is the operation and intersection of the law of property and the law of obligations (as reconceptualised within public law) which explains the archival enterprise. If we project forward, the phenomenon of electronic recordkeeping will strain the use of property law concepts and probably shift the emphasis back to the law of obligations as a tool for establishing, shaping and enforcing legal relations within the archival enterprise. The challenge for law as a social construct as it interacts with the archival enterprise will be to formulate workable rules which facilitate the operation and effectiveness of the archival enterprise as it evolves from a passive custodial regime to a more active records regime across the records continuum.

Endnotes

[1] I thank the Editor of the Theme Issue of this journal in which this paper is published, Livia Iacovino, for her helpful comments and guidance on earlier drafts, as well for

pointing me in the direction of literature from archival science, and also the two anonymous referees for their input. The usual caveat applies.

2 The law is stated as at 1 August 1998. This paper takes no account of any specific legislative reform measure relating to the *Archives Act 1983* (Cth) that is not available as at the date of currency. The primary method of this enquiry is, in accordance with the conventions of doctrinal legal writing, the identification, statement and analysis of the normative legal rules contained in authoritative legal materials (that is, primary and secondary legal materials) so that it is possible reach conclusions about the effect of private law on public archival institutions. This paper also adopts historical and comparative approaches to the issues and topics it examines based on the premise that they have much valuable light to throw onto the concerns of this paper.

3 It is important to have a shared meaning concerning legal concepts, particularly in a journal such as this whose readers are not lawyers.

4 For resources on the Internet dealing with research projects associated with electronic records, see namely University of British Columbia, School of Library, Archival and Information Studies, *The Preservation of the Integrity of Electronic Records*, at http://www.slais.ubc.ca/users/duranti/index.htm and the University of Pittsburgh, School of Information Science, *The Recordkeeping Functional Requirements Project* at http://www.lis.pitt.edu/~nhprc

5 See *Butterworths Concise Australian Legal Dictionary*, Butterworths, Sydney, 1997, p. 238 (under the entry 'legal person'). This is a first-order definition even though it requires 'entity' to be defined.

6 'Personality' is much wider than the legal conception. N. Rescher, *A System of Pragmatic Idealism: Volume II: The Validity of Values*, Princeton University Press, Princeton, New Jersey, 1993, pp. 113-4 identifies seven attributes of personality: intelligence, affectivity, agency, rationality, self-understanding, self-esteem and mutual-recognisance.

7 *Justinian's Institutes* 3.13pr see translation of P. Birks and G. McLeod, *Justinian's Institutes: A Parallel Text and Translation*, Duckworth, London, 1987, p.105. Conventionally, *Justinian's Institutes* are cited as 'J' (followed by the book, chapter and preamble (pr) or, more usually, section numbers). In *Brett v Barr Smith* (1919) 26 CLR 87 at 97, Higgins J said '"obligation" involves binding'.

8 Birks & McLeod, *op. cit.*, p. 14.

9 For an inter-disciplinary treatment of 'property', see E. Paul, F. Miller & J. Paul (eds), *Property Rights*, CUP, New York, 1994.

10 In Australian Law Reform Commission (ALRC), *Australia's Federal Record: a Review of Archives Act 1983*, Report No 85, ALRC, Sydney, 1998, Recommendation 24, the ALRC recommended that the Standards Australia definition of record be adopted as the basis

for any definition of 'record' in proposed Federal legislation to replace the current *Archives Act 1983* (Cth). That definition is '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'.

11 See http://www.slais.ubc.ca/users/duranti/tem1.htm, *op.cit.*

12 This is not to posit the absurdity of a person having a relationship *with* an inanimate object. Rather, what is posited is the legal bond, tie or nexus *between* a person and a thing.

13 South African Law Commission, *The Giving of Security by Means of Movable Property*, Project 46, Pretoria, February 1991, para. 2.21.

14 On the abandonment of personal property (which covers also records), see S. Fisher, *Commercial and Personal Property Law*, Butterworths, Sydney, 1997, paras 4.58-4.75, (cited hereafter as 'Fisher, *Commercial and Personal Property Law*').

15 C. Hurley, 'From Dustbins to Disk-Drives: a Survey of Archives Legislation in Australia', in *The Records Continuum: Ian Maclean and Australian Archives First Fifty Years*, edited by S. McKemmish and M. Piggott, Ancora Press in association with the Australian Archives, 1994, Appendix 2, p. 224.

16 Technological neutrality is important for the operation of the Australian legal system in that modern laws (particularly business laws) must reflect technological neutrality if they are to keep abreast with changes in technology particularly in the regulatory phase of business laws. See further Electronic Commerce Expert Group to the Attorney General, *Electronic Commerce; Building the Legal Framework*, Report of the Electronic Commerce Expert Group to the Attorney General, Canberra, 31 March 1998 at http//law.gov.au/aghome/advisory/eceg/single.html, paras. 4.5.3 – 4.5.12 for a discussion of the importance of technological neutrality to electronic commerce.

17 'Materiality' is a vital component of a law of property, particularly as it relates to corporeal property such as paper-based records. Modern archival practice has moved well beyond the material form of the record although the law of property is closely wedded to concepts such as 'possession' (see below) which depend on the materiality of the thing possessed.

18 See below on the access regime.

19 See Fisher, *Commercial and Personal Property Law*, Chapter 3 for a survey of the legal concept of possession.

20 B. Welling, *Property in Things in the Common Law System*, Scribblers Publishing, Gold Coast, 1996, p. 283.

21 The use of 'document' instead of 'record' (see 'record' above) is deliberate because a document has a material form and is a sub-set of 'records'. If a bailment is created, the

owner of the archived material is called the 'bailor' and the archivist the 'bailee'. Even if there is no bailment between an owner of documents and the archivist, there can be one between the archivist (as the *owner* of documents) and the *user* of archived material, so long as possession of that material is transferred to the user. On bailment, see 'Records and the law of bailment' below.

22 This is not to assert that private archival institutions have no relevance to this paper but that they do not depend on public law for their existence or operation. Similarly, university archives are administrative divisions of the universities that establish those archives and it is the legislation establishing those universities (whether public or private) that provides the legal context in which those archives operate. Each of these types of archival institutions also draw on private law for part of the legal framework in which they operate.

23 See the *Archives Act 1983* (Cth); *State Records Act 1998* (NSW); *Libraries and Archives Act 1988* (Qld); *State Records Act 1997* (SA); *Archives Act 1983* (Tas); *Public Records Act 1973* (Vic); *Library Board of Western Australia Act 1951* (WA).

24 The archives institutions of the ACT and the NT.

25 See 'Obligations' above.

26 See R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Juta & Co Ltd, Cape Town, 1990, *passim*; Samuel & Rinkes *Law of Obligations and Legal Remedies*, Cavendish Publishing Limited, London, 1996, pp. 183-4.

27 This feature is imprinted upon *Justinian's Institutes* and also on modern civilian codes, particularly the German Civil Code.

28 See Zimmermann, *op cit*, p. 27. See also P. Stein 'The Development of the Institutional System' in *Studies in Justinian's Institutes in Memory of JAC Thomas*, edited by P. Stein & A. Lewis, Sweet & Maxwell, London, 1983, pp. 151-163, p. 154.

29 B. Nicholas, *An Introduction to Roman Law*, 3rd ed, Clarendon Press, 1969, 1988 impression, p. 99. The original institutional scheme divided the law of 'things' into property, obligations and succession: see Stein, *op. cit.*, p. 154 (commenting on the ordering of Gaius (110-180 AD), the originator of the institutional scheme).

30 Diplomatics has been defined as 'the analysis of genesis, inner constitution and transmission of documents, and of their relationship with the facts represented in them and with their creators' in Luciana Duranti, 'Diplomatics: New Uses for an Old Science (Part 1)', *Archivaria*, Vol. 28, Summer 1989, p. 7.

31 S. Fisher, 'General Principles of Obligations', Chapter 2 in S. Fisher, *The Law of Commercial and Professional Relationships*, FT Law & Tax, Melbourne, 1996 para. 2.2. This facilitates the cross-border flow of legal information and concepts as lawyers strive to speak a common lexicon or at least draw upon terms familiar to readers in foreign legal systems.

32 Adapted from Fisher, *Commercial and Personal Property Law*, p. 38.

[33] J.3:13 pr.

[34] 'Being' - what a thing *is*; 'nature' - what a thing is *like*. See G. Bray, *Creeds, Councils and Christ*. IVP, Leicester, 1984, pp. 146-7.

[35] The object of an obligation, the 'thing' which the debtor must perform or refrain from doing, is known as the *prestation*. See for example, G. Certoma, *The Italian Legal System*, Butterworths, Sydney, 1985, p. 345 and the *Civil Code of Quebec*, Article 1373.

[36] J.2.2.2.

[37] *Ibid.*

[38] J.2.2.1.

[39] See below, 'The archival enterprise and the law of obligations'.

[40] A fuller treatment is that by S. Fisher, 'General Principles of Obligations', Chapter 2 in Fisher, *The Law of Commercial and Professional Relationships, op.cit.*, para. 2.2.

[41] Authorities supporting this proposition include *Film Bars Pty Ltd v Pacific Film Laboratories Pty Ltd* (1979) 1 BPR 9251 at 9254-5 and *Taylor v Johnson* (1983) 151 CLR 422 at 428, 429 per Mason ACJ, Murphy and Deane JJ.

[42] See 'Access to records' below.

[43] J.3.13pr.

[44] Samuel & Rinkes, *op. cit.*, p. 203, (citing A. Von Mehren 'The Formation of Contracts', *International Encyclopedia of Comparative Law*, Vol. VII, Chapter 2, para. 6, 31).

[45] See 'Access to records' below.

[46] The steps that the right-holder must pursue come within the province of 'adjectival law' or 'procedural law'. This material on the primary and secondary levels of obligations is of vital importance to understanding obligations as a legal phenomenon because it facilitates the operation of the archival enterprise. For example, the operation of the estray provisions of the *State Records Act 1998* (NSW), ss 37-48 depend, in part on recognising first that the record has gone out of the control of the State and it is this secondary or remedial dimension to the law of obligations that is applicable when estray machinery is invoked.

[47] Recently an English Court of Appeal judge remarked 'The distinction between property and obligation lies at the heart of our jurisprudence': *Re Bank of Credit and Commerce International SA (No 8)* [1996] 2 All ER 121 at 131 per Rose LJ (for the Court). The same dictum holds good under Australian law (subject to comments in the following text). See Fisher, *Commercial and Personal Property Law*, para. 8.5.

[48] For a more detailed treatment, see Fisher, *Commercial and Personal Property Law*, para. 2.12. Australian law is not alone in having a legal institution such as a chose in action straddle two legal categories (property and obligations). A similar situation applies under the law of South Africa where there is debate whether 'cession' (the transfer of a claim

to performance of a duty from the right-holder to another person) is part of the law of property or whether it is also an institution of the law of obligations: see S. Scott, *Cession for Students*, Juta & Co Ltd, Cape Town, 1997, p. 3.

49 See 'Public archival institutions' above.

50 See Figure 3 above. Records will only fall under the umbrella of choses in action to the extent that they contain obligations in the sense described earlier in 'Public archival institutions'. Not all acts contained within a record will amount to choses in action unless they create or evidence *rights-and-duties* although the record itself (if materialised) will be a chose in possession. Records are evidence of transactions (in the wide sense of the term) although not always of legally significant transactions. In part, this dichotomy can be explained by the tension between law as an autonomous structure of concern and law being subordinate to other concerns. For a study of this tension, see S. Fish, 'The Law Wishes to Have a Formal Existence', in *The Fate of Law*, edited by A. Sarat & T. Kearns, The University of Michigan Press, Ann Arbor, 1993, pp. 159-207 at p. 159.

51 This may indeed be a controversial claim to make but it is made not to deny meaning or significance to electronic records but to point out that existing legal concepts based on the law of property are not adequate to systematise electronic records or electronic information. It should be pointed out that under conventional or settled notions of property law, 'information' is not property *per se* (see Fisher, *Commercial and Personal Property Law*, para. 1.11) but there is a growing body of opinion which asserts it is or can become property. For an exponent of that view, see Hon. B.H. McPherson, 'Information as Property in Equity', in *Equity: Issues and Trends*, edited by M. Cope, The Federation Press, Sydney, 1995, pp. 234-42.

52 *Butterworths Concise Australian Legal Dictionary, op.cit.*, p. 212.

53 See 'Property and ownership' and 'Possession' above.

54 Any transition from a constitutional monarchy to a republic should not affect the ownership or possession of archival material.

55 'Delivery' is the voluntary transfer of possession of a movable, tangible thing from one person to another.

56 See, for example, the *State Records Act 1998* (NSW), ss. 37 and 38. Such provisions from the perspective of adjectival law comprise a *right of pursuit*. In the argot of archival science, they are part of the record recovery phase: see Australian Law Reform Commission (ALRC), *Australia's Federal Record: a Review of* Archives Act 1983 , Report No 85, ALRC, Sydney, 1998, Chapter 11.

57 This masks a jurisprudential debate (not yet settled) about whether possession is a factual state of affairs or a legal state. For a survey of the main streams of thought, see A. Kocourek, *Jural Relations*, 2nd ed., The Bobbs-Merrill Company, Indianopolis, 1929,

Chapter 20; D. Kleyn & A. Boraine (eds), *Silberberg & Schoeman's The Law of Property*, 3rd ed., Butterworths, Durban, 1992, pp. 111-13 and C. van der Merwe, 'The Law of Things' in C. van der Merwe & M. de Waal, *The Law of Things and Servitudes* Butterworths, Durban, 1993, para. 53.

58 By 'atomistic' it is meant that the concept is broken down (or atomised) into smaller parts.

59 'Custody' is used here is its legal sense, which is narrower than the use of the term in archival practice as evidenced, for example, by the Australian Law Reform Commission (ALRC), *Australia's Federal Record: a Review of Archives Act 1983*, Report No 85 ALRC, Sydney, 1998, Chapters 12 and 13.

60 For a fuller treatment of 'custody' and 'actual possession', see Fisher, *Commercial and Personal Property Law*, paras. 3.22 - 3.25.

61 See below on the law of bailment.

62 This is a strange use of the concept of constructive possession (if indeed this is what s 6 is striving to accomplish) because it hinges on the unexpressed assumption that something gives the public office the right to control the record in the first place. This in turn requires an interest and it is the interest of ownership that justifies the exercise of control of records by the public office. It overlooks also the concept of bailment of records.

63 This involves reading down the note to s 6(2). This is supported, indirectly at least, by s 3(2) which provides that notes do not form part of the Act.

64 Which is not an uncommon occurrence: see the comments of Kirby P in *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd* (1992) 25 NSWLR 699 at 701.

65 An alternative explanation might be that new meanings (or denotations) of 'ownership' are needed if it is to be useful and normative in the archival enterprise. This issue cannot be explored in this paper, but it is envisaged that it or they will need to accommodate technological advances if they are to be useful.

66 See for example, *State Records Act 1998* (NSW), s 60(2) which contemplates access by using a computer. The technology (the hardware) itself is a physical thing (although not a physical entity) and can be understood in property law terms as choses in possession (or goods). Any software used to run the hardware is intellectual property (on one generally accepted view, a sub-set of 'choses in action') and is captured for legal recognition purposes mostly by the law of copyright. See generally M. Calvert, *Technology Contracts: a Handbook for Law and Business in Australia*, Butterworths, Sydney, 1994.

67 See 'The duty of non-violability of records' below.

68 See s60(1) of the *Corporations Law* where the acts of directing or instructing are used to mean controlling.

69 The issue of provenance of records does arise in the context of disputes about the

admissibility of records and of documents generally. The concern of the legal system at this point is with what evidence is the court (or other tribunal of fact or of law) going to use in order to resolve that dispute. The prime concern of the legal system is not with institutional design of recordkeeping systems.

70 This is a suggestion made by one of the referees of this paper. I am responding to this suggestion.

71 This idea is not quite so far-fetched as it might appear on the surface. In an English case dealing with the assignment of a chose in action (a debt which has no physical existence to speak of), one judge coined the phrase 'equitable possession' to obtain some equivalence between legal possession of a tangible movable thing and the idea of getting close to possession of that debt: see *Dearle v Hall* (1828) 3 Russ 1 at 58; 38 ER 475 at 494-5 per Lord Lyndhurst LC. By itself, the coined term 'equitable possession' is an example of a category mistake in the legal taxonomy because it mixes concepts from two different systems of jurisprudence, namely common law and equity. See the discussion in Fisher, *Commercial and Personal Property Law*, para. 15.10.

72 See A. Tay & E. Kamenka ,'Introduction: Some Theses on Property' (1988) 11 *UNSWLJ* 1 at 2.

73 Australian Law Reform Commission (ALRC), *Australia's Federal Record: a Review of* Archives Act 1983 , Report No 85 ALRC, Sydney, 1998.

74 *Ibid*, para. 15.9.

75 See Australian Law Reform Commission Report No 77/ Administrative Review Council Report No 40, *Open Government: a Review of the Federal Freedom of Information Act 1982*, ALRC77/ARC 40, Sydney, 1995, paras. 2.3 and 4.9. What is interesting about this is the use of public trust language.

76 It should be noted that this provision gives *legislative* warrant for a bailment. In theory, and supposing there is no legislative or other effective legal restriction, the ownership or even possession of archival material by an archival institution can become the basis for a bailment. The juridical basis for such a bailment would be *administrative* policies and practices involving a dealing in property (or ownership) or possession (a 'dealing' is a transaction affecting an *interest* in something, such as delivery of records or their disposal).

77 Section 36(c) of the *State Records Act 1998* (NSW) is similar in that it provides for the outsourcer to ensure the safe keeping and proper preservation of the records deposited with that person.

78 See further 'The duty of non-violability of records' below.

79 For a fuller treatment of the bailee's duties, see Fisher, *Commercial and Personal Property Law*, paras. 5.41 - 5.63.

[80] See the decision of the Privy Council in the modern leading bailment case *The Pioneer Container* [1994] 2 All ER 250 at 262.

[81] The same comment applies with equal force to the *State Records Act 1998* (NSW).

[82] If the records contain confidential information and a decision is made to allow access by a third party custodian, then the law governing the sanctity and protection of confidential information may be invoked. For a short survey, see S. Fisher, 'Government and Rights Protection in Commercial Contexts', Chapter 5 in *Government Law and Policy: Commercial Aspects,* edited by B. Horrigan,The Federation Press, Sydney, 1998.

[83] Apart from this provision and s 19 of the *State Records Act 1998* (NSW), there do not appear to be any other legislative enactments which empower an archival institution to act as a custodian of archivally significant material. This is not to say that other archival institutions may not do so under administrative arrangements since the acceptance of custodial responsibilities by an archival institution does not depend on an underlying legislative warrant.

[84] It is not defined in or by means of subordinate legislation either.

[85] This overlooks the possible application of risk-management or loss-shifting devices such as insurance and exclusion or limitation of liability clauses. For a review of the law governing the limitation of liability, see C. Gilbert 'Limitation of Liability', Chapter 3 in *The Law of Commercial and Professional Relationships* , edited by S. Fisher, *op. cit.*.

[86] Section 19 of *the State Records Act 1998* is silent about the role of contract to diminish or enlarge the duties of the Authority as a bailee of records. This should be contrasted with s15(2) of the *Public Records Act 1973* (Vic).

[87] Even the term 'custody' is not apt for legal purposes in this context. Corporate law (drawing on obligations law) has devised some innovative solutions to persons giving and taking securities over uncertificated (or immaterialised) corporate securities that could be adapted analogically for archival practice as regards the imposition of duties in respect of electronic records.

[88] This theme is taken up in 'The archival enterprise and the law of obligations' below.

[89] See also the comments made above concerning 'electronic possession'. Will the trajectory of the law be to constructing 'electronic bailments' of 'electronic goods' (including electronic records)?

[90] Who is a 'professional' and what is a 'profession' is a topic of lively debate within sociological discourse. For a précis of both terms within an ethical framework drawing on sociological constructs, see S. Longstaff 'The Role of Ethics in Commercial and Professional Relationships', Chapter 4 in *The Law of Commercial and Professional Relationships,* edited by S. Fisher,*op. cit.,* para. 4.6. Whatever the outcome of the sociological debate about professions and professionals, it seems that the notion of a professional

has shifted quite far from its original meaning as a person who professes faith in God. For a personal reflection of an archival professional, see A. Cunningham 'Beyond the Pale: a 'Flinty' Relationship Between Archivists who Collect the Private Records of Individuals and the Rest of the Archival Profession' *Archives and Manuscripts*, Vol. 24, No. 1, May 1996, pp. 20-26.

91 See Australian Law Reform Commission, *ALRC Issues Paper 19*, AGPS, Canberra, 1996, (cited as '*ALRC IP 19*').

92 *Ibid.*

93 See ALRC Report No 85, *op.cit*, Chapters 15-19 for a discussion of access under the Federal regime and for reform of the existing access regime.

94 'Recovery' is used in the same sense as used by the ARLC, namely to mean the recovery of records by an archival institution from a person who has possession or custody of them. See *ALRC DRP 4*, Chapter 11. Recovery is one element of a deposit regime, which encompasses also the acquisition of records. Another recovery tool is the estray regime: for a modern and recent legislative restatement, see the *State Records Act 1998* (NSW), ss 37-48.

95 See *Archives Act 1983* (Cth), ss27, 28; *State Records Act 1998* (NSW), s45; *Libraries and Archives Act 1988* (Qld), ss 60,62,68; *State Records Act 1997* (SA), ss 19-21; *Archives Act 1983* (Tas), ss 11,12; *Public Records Act 1973* (Vic), ss8A,15-16; *Library Board of Western Australia Act 1951* (WA), ss 26,29,31.

96 See *Archives Act 1983* (Cth), s27; *State Records Act 1998* (NSW), ss 26-35; *Libraries and Archives Act 1988* (Qld), s 60; *State Records Act 1997* (SA), ss 19-21; *Archives Act 1983* (Tas), ss 11,12; *Public Records Act 1973* (Vic), s8A; *Library Board of Western Australia Act 1951* (WA), s31.

97 *State Records Act 1998* (NSW), ss 37-48; *Libraries and Archives Act 1988* (Qld), s 62; *State Records Act 1997* (SA), s 21; *Archives Act 1983* (Tas), s14; *Public Records Act 1973* (Vic), s15A. The ALRC recommended that the Australian Archives should be given specific recovery powers exercisable against persons besides the Commonwealth and its related entities: see *ALRC Report No 85*, Chapter 11.

98 See above on possession.

99 See Fisher, *Commercial and Personal Property Law*, para. 1.5 for a discussion of this vexed topic.

100 Even in the current legal setting, 'use' of property is a tool or activity seen as an alternative to the transfer of possession or ownership of goods (eg, see s17 of the *Sales Tax Assessment Act 1992* (Cth)).

101 Even so, the concept of electronic custody is problematic and no firm solution emerges from the legal system to account for this, at least in terms of conventional property law concepts.

[102] *State Records Act 1998* (NSW), s 45; *Libraries and Archives Act 1988* (Qld), ss 68-73; *State Records Act 1997* (SA), s19; *Archives Act 1983* (Tas), s17; *Public Records Act 1973* (Vic), s15A. The detail of each of these provisions is quite divergent.

[103] The reference in s68 to the verb 'give' is a misnomer because at general law, a gift (the object given) is a voluntary, consensual transaction animated by the virtue of benefaction while s68 imposes a *duty* to give: see further Fisher, *Commercial and Personal Property Law*, paras 4.21 and 11.4, 11.5, 11.8, 11.9 and 11.47.