

Recordkeeping, Document Destruction, and the Law (Heiner, Enron, and McCabe)

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Precis : Documents are routinely destroyed for legitimate purposes as part of routine housekeeping. In several notable cases, it has been found that the step from document destruction to obstruction of justice may be all too brief. This article explains the distinction between archival law on disposal and the requirements of the law in relation to document retention and destruction in cases where legal action/ investigations might be pending, and explores the implications for the role of the recordkeeper of the findings of the recent cases. It concludes by addressing the question "What should the recordkeeper do?" in light of these findings.

*"Surprisingly, wrongdoing in high places sometimes generates a considerable amount of documentation One of the ways of exposing corruption is to obtain such documents. Unfortunately many records are short-lived ..."*¹

In June, 2002, an American court found the accounting firm, Arthur Andersen, guilty on charges of unlawfully destroying documents relating to the firm's relationship with the collapsed energy giant, Enron. Charges of document destruction by Enron had yet to be heard. On television, an Andersen training video was played many times. In it, Andersen employees were instructed on what they were told was the "law" regarding shredding. Anything, they were advised, could be lawfully destroyed up to the point when proceedings are "filed".

More than a decade earlier, the newly elected Queensland Government of Wayne Goss was anxious to shred all of the records accumulated by retired magistrate, Noel Heiner, who had been appointed by the outgoing Cooper Government to investigate alleged inmate abuse at the John Oxley Youth Centre (JOYC). We now know that Noel Heiner was beginning to uncover testimony concerning serious abuses and inappropriate responses by staff of the JOYC. Several years later, the Forde Royal Commission revealed such abuses to have been endemic in the Queensland system, but this was not publicly known when the Goss Government closed the Heiner Inquiry down. One case, which is only now coming to light, involved the pack rape of an Aboriginal girl. The Heiner Inquiry was set up before the election, following allegations by then Labor candidate, Ann Warner. Now Minister responsible for John Oxley, in early 1990 Warner was a member of the Cabinet trying to destroy the evidence gathered by Heiner when investigating her own allegations.

The problem for Warner, Goss and their colleagues was that the manager of JOYC, Peter Coyne, was taking legal action for defamation and lack of process. His lawyers said he was being denied natural justice (Coyne was

not told what allegations were being made or who his accusers were). Coyne's lawyers had written requesting access to the records and saying they would be taking action. Knowing this, the Goss Cabinet ordered the destruction of the records. They acted on the advice of the Crown Solicitor that they could lawfully do so because Coyne had yet to formally institute proceedings in a court. On the later evidence of a spokesman for the Queensland Criminal Justice Commission (QCJC) which looked the matter, the Goss Cabinet was motivated, at least in part, by a desire to deny Coyne and his lawyers access to the documents they wanted to make their case.

On 22 March, 2002, Judge Geoffrey Eames ruled in the Victorian State Supreme Court in favour of a lung cancer victim (Rolah Ann McCabe) against British American Tobacco (BAT) on the grounds that the plaintiff had been denied a fair trial as a result of "document retention" practices undertaken by BAT in consultation with their legal firm, Clayton Utz. These practices involved shredding material the plaintiff needed to make her case. In the *Weekend Australian* for 13 April, 2002, a spokesman for BAT, Scott Hailstone, confirmed that documents had been destroyed, but said this was in line with the company policy of document retention. It had occurred before litigation was filed by Mrs McCabe : "We didn't know anything was going to be filed against us so we've acted perfectly within the law," he said. The Judge's response was that the plaintiff could not obtain justice because the defendant had, through their disposal procedures, deprived her of the evidence she needed to make her case, that her need for them was reasonably foreseeable, and that defendant's action was undertaken not for innocent housekeeping purposes but with the intention of preventing litigants from obtaining justice.

Judgements against tobacco in Australian courts were not unheard of, but they were rare. The case was unusual because of the directed verdict and because it went against tobacco. Coming within months of similar behaviour in the Enron collapse, this made the judgement big news in the Australian media. Coming more than a decade after Heiner, the defence in all three was uncannily similar : documents can be lawfully destroyed right up to the moment proceedings are formally commenced.

Document Destruction and the Course of Justice

Is this true? The principle involved is of some significance to recordkeepers. When does it become unlawful to shred documents which might be relevant to legal or quasi-legal proceedings? This is different from the issue which arises under archives laws. Under archives laws, there is a general prohibition on destruction unless approval is given by the archives authority whereas under laws dealing with obstruction of justice, destruction is generally allowed unless legal proceedings are "pending". The three cases in point are not about the principle that destruction of evidence is unlawful, but rather about when legal proceedings are pending.

A connection exists, however, between these two approaches. Specifically, it relates to the role of the archives authority, when deciding whether or not to

approve a destruction, in ensuring that permission is not given for actions which result in destruction of documents required in pending legal proceedings.

In the Heiner Case, the Queensland Crown Solicitor (Kenneth O'Shea) advised the Goss Government that the records could be destroyed because proceedings were not pending, and would not be pending until Coyne's solicitors "filed". Whether O'Shea's view was correct in law was the subject of subsequent debate. In a recent radio interview, Alastair McAdam, Senior Law Lecturer at the Queensland University of Technology, described this view as one which "if it had been written ... in a first year law assignment ... would have resulted in a clear failing grade"². O'Shea went on to advise that, since Heiner's records were subject to public archives law, the records could not be destroyed without the permission of the State Archivist. Lee McGregor. This was sought and promptly given.

The point here is that the two regimes (the law on obstruction and the law on archives) operate (as indicated above) in a separate, but inter-related fashion. The State Archivist's permission to destroy the Heiner documents would not have relieved the Queensland Government of accusations of obstruction of justice unless it was also lawful to destroy them, on the argument provided by O'Shea, that proceedings were not yet pending. The Archivist's permission did not void any prohibition on document destruction in legal proceedings. The further question that arose in the Heiner case is whether, that being so, the Archivist should make decisions without any regard whatsoever for contemporary uses to which records may be put and consider only their value for historical research. If the Archivist should make decisions with regard to potential contemporary uses outside of the archives, more questions arise relating to the implications of recent interpretations of the law relating to obstruction of justice.

The Queensland Criminal Justice Commission (QCJC) thought that the Archivist had no role beyond assessing historical value. The Heiner Affair became the subject of inquiry by successive Select Committees of the Australian Senate, largely because of the determination of Kevin Lindeberg (a union official who was sacked for not going along with the shredding). The Queensland Government supplied documents to the Senate Inquiries, but refused otherwise to take part. The QCJC, which had investigated Heiner Case and found no wrong-doing on the Government's part, testified before these Committees in defence of its own findings. In doing so, its spokesman, Michael Robert Barnes, made a now infamous assertion :

... we have to look at the archivist, because Mr Lindeberg is concerned that her actions in authorising the destruction were inappropriate ... The Archivist's duty is to preserve public records which may be of historical public interest; her duty is not to preserve documents which other people may want to access for some personal or private reason. She has a duty to protect documents that will reflect the history of the State.

... In my submission, the fact that people may have been wanting to see these documents - and there is no doubt the Government knew that Coyne wanted to see the documents - does not bear on the Archivist's decision about whether

these are documents that the public should have a right to access forevermore ... That is the nature of the discretion she exercises. The question about whether people have a right to access these documents is properly to be determined between the department, the owner of the document and the people who say they have got that right. That is nothing to do with the Archivist, so I suggest to you that the fact that was not conveyed to the Archivist is neither here nor there. That has no bearing on the exercise of her discretion.³

At one level, this statement is correct. It is clearly not the role of the archives authority to enforce the law against obstruction of justice. This is the work of investigators, police, courts, and other enforcement agencies. The Archivist's opinion was not sought on whether the documents could be destroyed in view of pending legal proceedings. The Government, quite properly, sought the opinion of its law officer on that issue. In that sense, it was no business of the archivist to advise Government on its legal obligations.

The Queensland Government's obligation to obtain the State Archivist's permission before destroying any records and its obligation to comply with the law preventing obstruction of justice in relation to these records are different, but not unrelated. The Goss Government had obtained legal advice that proceedings were not pending in the Heiner case, so they (apparently) did not inform the State Archivist of the fact that Coyne's lawyers had indicated that proceedings were being contemplated and that Coyne wished to see the records as part of that process. That was "none of her business". The Archivist proceeded, so far as we know, in ignorance of the true purpose for which the records were being destroyed. The procedures established under Queensland archives law were regarded as a thing apart from the Government's concern with destroying documents before an intending litigant could get hold of them.

This separation of disposal practices from obstruction of justice issues lay at the heart of the BAT and Andersen judgements. In both these later cases, courts have ruled (and both rulings may still be appealed) that a separation of the kind argued by Queensland and Barnes in the Heiner Case cannot be made.

Interestingly, the retention of documents also bears on the ability of those enforcing the law to be able to do their job. The 1998/99 Report of the Commonwealth Director of Public Prosecutions illustrates the significance courts give to documentary evidence :

The defendant in this matter was charged with offences under the Social Security Act of knowingly obtaining a benefit that was not payable. It was alleged that he obtained \$17 000 in excess of entitlements over a two year period by working part-time and not declaring his income. Over that period the defendant filed 70 income statement forms. It was alleged that, on each occasion, the form contained a false statement about income earned.

The prosecution was not able to produce the original forms. They had been destroyed under normal document destruction arrangements. The case relied on secondary evidence to show that benefits were paid to the defendant over the relevant period and that they would not have been paid if the forms had told the truth. When the matter came on for hearing the defence applied for a stay of the

prosecution on the basis that it would be an abuse of process to proceed in the absence of the forms. The magistrate upheld the application.

The DPP appealed. The DPP argued that, in all the circumstances of this case, the secondary evidence of what was on the forms was reliable and that there was nothing unjust or oppressive with prosecuting on the basis of that evidence. The SA Supreme Court dismissed the appeal. The court found that Bourke was entitled to run a defence to the effect that he had filled in his forms correctly and that the Department may have made a mistake, or 70 separate mistakes, in paying money to him that he was not entitled to receive. The court found that the forms were the only evidence which had the potential to support that defence and that it would be abuse of process for the case to proceed without them.

The decision turned on the facts of the case. Nonetheless, the case shows the value to the prosecution of being able to produce original documentary evidence and signposts the problems the DPP may run into as agencies move away from paper records to electronic recording systems.⁴

The DPP is obviously chagrined. The case illustrates, however, another application of a principle referred to by Judge Eames :

If anyone by a deliberate act destroys a document which, according to what its contents may have been, would have told strongly either for him or against him, the strongest possible presumption arises that if it had been produced it would have told against him; and even if the document is destroyed by his own act, but under circumstances in which the intention to destroy evidence may be fairly considered rebutted, still he has to suffer.⁵

The consequences of illegal document destruction may not only be criminal. It may also lead to an adverse inference against the interests of the destroyer in civil proceedings. In the BAT Case, lack of evidence to support the plaintiff's claim was the result of the destruction, but judgement was awarded against them, partly on the doctrine of adverse inference.

Retention of Records in Legal Proceedings

The Judge's ruling in McCabe (which may or may not survive appeal) was based on the fact that an absence of records held by BAT made it impossible for the plaintiff to make her case using documents which supported her claims disclosed in pre-trial discovery. Discovery is the process whereby a litigant may require the other party to hand over documents which may assist the litigant to make his or her case.

Obviously, only documents still in existence can be discovered. If the respondent has already lawfully disposed of a document then the plaintiff cannot discover or use it. The process of discovery is itself surrounded by complex rules of law and procedure. One aspect of discovery is the rule against destruction of documents relating to current legal proceedings. The question is : when are legal proceedings current?

Every jurisdiction in Australia makes it a crime to destroy evidence needed in legal proceedings. In Queensland, the relevant statutory provision at the time of the Heiner shredding was section 129 of the Queensland Criminal Code –

129. Any person who, knowing that any book, document, or other thing of any kind, is or may be required in evidence in a judicial proceeding, wilfully destroys it or renders it illegible or undecipherable or incapable of identification, with the intent thereby to prevent it from being used in evidence, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years.

Even in civil proceedings, destruction of evidence is still criminal. In the BAT Case, the judgement was delivered in the civil issue under consideration. This points to an important distinction between civil and criminal liability. The burden of proof in a criminal case is on the prosecutor and the test of guilt is “beyond reasonable doubt”. Civil cases are determined on the balance of probabilities. The consequences of document destruction may be criminal or civil. Generally, it opens up the possibility of criminal prosecution (of an individual or a corporation as in the Andersen Case). This is, however, difficult to prove and does not necessarily benefit an intending litigant.

The penalty in the BAT Case lay in the directed verdict against the wrong-doer. This was not a criminal finding – only a separate trial would have established that. This was a court which concluded that deliberate wrongdoing had been done with the intention of obstructing justice in the civil case under consideration and which had accordingly made a judgement in the plaintiffs favour and, in effect, punished the wrong-doer by finding against BAT and awarding damages to their opponent.

The BAT finding was punitive. The judge did not rule for the plaintiff on the grounds that she had made her case. The ruling in her favour was because she had been denied the opportunity to make her case by the actions of the defendant. The defendant was, in effect, punished for the consequences of their “document retention” practices which had, in the court’s view, denied justice to the plaintiff. In American law, this doctrine takes the even more explicit form of raising the possibility that a negative inference may be drawn by the court where document destruction results in evidence being unavailable – no matter what the destroyed document may or may not have said, the court will assume it said something to the detriment of the entity shown to have unlawfully destroyed it. Judge Eames drew on Australian and British precedent to canvass a similar principle in the McCabe Case (see below).

The law applies only to documents which exist. Reviewing the BAT Record Managers’ Training and Education Workbook, Judge Eames noted that there “is nothing improper in advising a client against creating new documents which would be embarrassing to disclose in proceedings”⁶. The mere fact that documents are subsequently sought does not make their destruction unlawful. It is the state or likelihood of impending legal proceedings which is at issue. About this, there remains some uncertainty. The significance of these and other cases is that they assist in clarifying the issue.

What Are Legal Proceedings and When Do They Become Pending?

Lawyers for the Queensland Government, the QCJC, BAT, and Andersen all argued that their actions were not prohibited by the law relating to obstruction

of justice. Both the Queensland Crown Solicitor and the Andersen staff training video argued that documents can be destroyed right up to the moment when papers are filed in court.

These arguments deal with the rule against document destruction in court actions. The Andersen/Enron Case, however, involved investigations (which might have led to court action) not pending court action per se. In America, an investigation in which court action is merely a possible result invokes the rule against document destruction. The law in Australia is not altogether clear, but in America, the role of Congress and government investigative bodies generally is much more likely to be deemed to be on a par with court proceedings. Even in Australia, it is likely that document destruction for the purpose of denying a Parliamentary Committee access to evidence would come within some kind of prohibition, though it might have to do with contempt of Parliament rather than the Criminal Code.

Recently, the Australian ACCC mounted highly publicised raids on petrol companies to seize documents in its investigation of possible price collusion. Whether the law effectively prevents document destruction for the purpose of thwarting the investigations of such governmental watch-dogs in Australia remains unclear. In America, the law treats investigations as coming within the ambit of "proceedings". This is an area of the law in which those interested in corporate regulation (both public and private) need to keep vigilant.

However proceedings are viewed, there is good authority that they can be viewed as pending before the formal "filing" of documents in court or the formal commencement of investigative hearings. That was certainly the view of Judge Eames in the McCabe Case. He found that BAT and its lawyers sought to take advantage of a window of opportunity between the termination of one case and the commencement of another to destroy documents which had been found detrimental in the first case, so that they could not be used in another.

BAT argued that so long as no case was pending, they were entitled to destroy documents. Eames replied that, in the case of the tobacco industry, the likelihood of other cases coming along which would need to discover and use the same documents was so great that it was unreasonable for the company to argue that it could not foresee that the documents would be needed for litigation. Accordingly, he ruled against BAT because they had deliberately deprived future litigants of a fair hearing.

Once proceedings have commenced, it is a serious matter for one litigant to destroy documents which have been subpoenaed by the other party. When Crown Solicitor O'Shea advised the Goss Government in January 1990 on the status of the Heiner Inquiry, he recommended (January 23) that the documents gathered by Heiner should be destroyed if it was decided to terminate the process, possibly believing them at that stage to be Heiner's private property. He noted, however, that :

This advice is predicated on the fact that no legal action has been commenced which requires the production of those files.⁷

When the Archivist's approval for destruction was subsequently sought, proceedings had not yet commenced in the very narrow sense meant by O'Shea and no proceedings (in that sense) were begun before the records were eventually destroyed. It is also apparent that Coyne's wish to see the records and his intention to take legal action was known. In evidence before a Senate Committee, QCJC spokesman, Michael Robert Barnes confirmed that this was the QCJC's finding of fact (and QCJC was an investigative body, established by statute, and competent to make such a finding) :

Mr Barnes: "There is no doubt that the documents were destroyed at a time when cabinet well knew that Coyne wanted access to them. There is no doubt about that at all."

Senator Abetz: "Is there no doubt in your mind that cabinet knew that Coyne wanted the documents?"

Mr Barnes: "I am confident that is the case."⁸

The Queensland Government's defence (based on the Crown Solicitor's advice) was that there was no legal obstacle to destruction and that the Queensland Government was within its rights in proceeding with the destruction. In a Ministerial Statement to Parliament, the Queensland Attorney-General objected to criticism that the records were subject to "pending" legal proceedings - arguing (rightly) that, since proceedings had not yet commenced, a distinction could be drawn between legal proceedings which had been commenced or instituted and could thus be described as pending and those which were "intended", "foreshadowed" or "threatened"⁹. In the words of Crown Solicitor O'Shea:

There is an abundance of authority to show that a civil action or proceeding is not pending until the originating proceeding (Writ, Summons or Motion) has been filed in the Court ... All the threats in the world to commence a Civil proceeding (or a Criminal one) do not make it pending, for the purposes of Section 129 of the Criminal Code.¹⁰

Counsel acting for Kevin Lindeberg, the union official sacked for trying to uphold Coyne's rights, I. D. F. Callinan, Q.C., and R. D. Peterson, argued that O'Shea's interpretation was too narrow. They drew attention to a High Court decision in *R. v Rogerson and Ors* (1992) 66 ALJR 500:

... it is enough that an act has a tendency to deflect or frustrate a prosecution or disciplinary proceedings before a judicial tribunal which the accused contemplates may possibly be implemented ... Mason CJ at p.502.

A conspiracy to pervert the course of justice may be entered into though no proceedings before a court or before any other competent judicial authority are pending ... Brennan and Toohey JJ at p.503.

The U.S. courts have taken an equally strong line in condemning the destruction of records as an "obstruction of justice" and the whole issue appears to have received greater consideration there than in Australian courts. The question was reviewed at some length in *The Notre Dame Lawyer* in 1980:

Whether a company has an ad hoc search and destroy operation or a regular records retention program, management and counsel must consider a federal criminal statutory scheme which renders the destruction of documents illegal if it interferes with judicial, administrative or legislative investigations or proceedings ... If a party to a civil proceeding has destroyed records, a negative inference may be drawn from that fact and exploited for its prejudicial value at trial.¹¹

Federal statutes in the U.S. restrain destruction of documents (or any evidence) in judicial proceedings and American courts also have had to consider at what stage in proceedings a criminal liability arises:

... the courts ... have concluded that only ongoing or pending judicial proceedings ... fall within the section's ... language ... The courts reason that a person unaware of the pendency of a proceeding could not have the requisite intent to obstruct justice ... The courts justify their literal interpretation ... with the maxim that criminal statutes should be strictly construed.

Although the substantive offense of obstruction of justice requires a pending proceeding, otherwise punishable conduct which precedes pendency is not immune from prosecution. In *United States v. Perlstein* the Third Circuit affirmed convictions for conspiracy to obstruct justice even though the conspirators were not found guilty of the substantive crime ... The court stated : "... there is nothing to prevent a conspiracy to obstruct the due administration of justice in a proceeding which becomes pending in the future from being cognizable under section 37 [antecedent of present conspiracy statute, 18 USC #371].¹²

The same principle is applied even more widely to obstruction of proceedings undertaken by departments, agencies, and committees:

Courts have expressed various views as to the time at which an agency's activity first qualifies as a "proceeding" ... when the agency is notified of potential violations; when pre-investigation begins; when an informal inquiry begins; or when a formal order is issued directing investigation to begin ... As one court explained : "[T]he growth and expansion of agency activities have resulted in a meaning being given to "proceeding" which is much more inclusive and which no longer limits itself to formal activities in a court of law. Rather, the investigation or search for the true facts ... is not ruled as a non-proceeding simply because it is preliminary to indictment and trial".¹³

Similar issues lie at the heart of the BAT case, where Judge Eames concluded :

289. ... The 1985 Document Retention Policy was created ... in anticipation that there would be litigation ... with respect to smoking and health issues. The primary purpose of the policy ... was to ensure the destruction of material which would be harmful to the defence of any such litigation ... words were inserted into the written policy document to which reference could be made in order to assert innocent intention and to disguise the true purpose of the policy ... At all times since 1985 ... litigation was either on foot or the defendant considered that future litigation was inevitable ... The defendant intended that by the destruction of documents any plaintiff in the position of the present plaintiff would be prejudiced in the conduct of their action, both generally and, in particular, in the ability to lead relevant evidence or to cross examine witnesses. It was intended by the defendant that any such plaintiff would be denied a fair trial.

362. The extension of the court's regulatory power to contemplated litigation is well recognised in the United States of America, and pre-dates the tort of spoliation which has applied in many States since 1984. That tort is said to impose a duty of care not to intentionally and in bad faith thwart a person's right

of access to the court ... Although that tort does not exist in this country the underlying rationale for the principle applied by the American courts could as readily be applied with respect to the rules relating to discovery in this country, in my opinion. Counsel for the defendant reject that suggestion and submit that if there is to be such a remedy then it must be brought about by legislative reform.¹⁴

Counsel for BAT argued, in a manner similar to the Queensland Government, that the present law in Australia cannot operate to penalise a litigant who destroys documents before proceedings have formally commenced. This contention was rejected by Judge Eames in words which have yet to withstand the test of appeal but which (whatever their fate) can only be admired :

367. As I have said, counsel for the defendant contend, in effect, that only legislative reform will deny a company in the position of the defendant the right to engage in what Wigmore might have deprecated as being "the sport of high quality" of the destruction of documents in anticipation of litigation. In my opinion, the rules relating to discovery which I have cited, above, are not so inadequate, and the inherent powers of the Court are not so deficient, that, in the event that no alternative course is reasonably open to remove the unfairness, the court must require a plaintiff to participate in an unfair trial and seek to obtain a verdict, in those circumstances, against a defendant whose actions rendered the trial unfair.¹⁵

It is the intention of the document destroyer which is material. This issue was at the heart also of the Heiner Case. The QCJC, again as a finding on a matter of fact which it was entitled to make, gave evidence to the Senate Committee that the Goss Government's intention was to prevent Coyne getting access to the Heiner records :

Senator Abetz: "I am trying to get a handle on this. What seems to have occurred is that, with the potential threat of a defamation suit, Cabinet decided to shred the documents because they were of no historical value, knowing full well that it may be the material evidence on which a potential litigant would rely to pursue or prosecute his case."

Mr Barnes: "I think that probably is a fair summary. As a result of the actions, the correspondence and the communications, I think they believed that Coyne was considering suing the people who gave evidence before Heiner for defamation. As you say, the Crown Solicitor's advice seems quite clear that that was a potential and, consistent with that advice, cabinet decided that they would prevent that from happening."¹⁶

It has been argued that the Queensland Government should have behaved as a "model litigant" and, knowing that proceedings were contemplated (or "threatened"), it should have held its hand. In the words of one submission to a Senate Committee :

The simple fact is that, by seeking to destroy these documents, the Crown has removed a prospective litigant of his rights. This cannot in any true sense of the word be in accordance with our democratic principles.¹⁷

One of the Senators also found the difference between destroying documents after legal proceedings are under way and destroying them in order to prevent proceedings from commencing hard to fathom :

Senator Charmarette: "I am then saying that to me, from a lay point of view, to actually destroy the documents to prevent litigation being on foot seems very

similar. Are you now saying that to actually use as your rationale for the destruction to prevent litigation being on foot is somehow different from litigation being on foot?"

Mr Barnes: "Yes. With respect, I say it is a lot different. What you do with your own property before litigation is commenced, I suggest, is quite different from what you do with it after it is commenced."¹⁸

If Crown Solicitor O'Shea was wrong in law and the motives of the Queensland Government were darker than a desire to protect employees of JOYC from prosecution, then the necessary ingredients of criminal intent may be present – though the likely defence of Crown Privilege might well succeed.

At the time, and subsequently, the possibility has been canvassed that the Goss Government had other motives for destroying the Heiner records beyond what was always claimed. The Government, and its present-day successor, have always tried to make out that Cabinet wished to destroy the records out of consideration for the interests of JOYC staff who had spoken to Heiner. The Government wished to prevent successful action for defamation being taken against them – presumably by Coyne. So, the Government destroyed the evidence Coyne might use to take action against their employees. This defence does not withstand scrutiny because of the defence of privilege that was available and because the Government had, in any case, accepted liability on behalf of those employees who had spoken with Heiner. If any pecuniary interest was being protected by the shredding, therefore, it was the pecuniary interest of the Crown in preventing Coyne from successfully suing employees of the Crown and obtaining damages which the Crown was now pledged to pay.

An even darker view may be taken (though not proven). The subsequent revelations of the Forde Royal Commission demonstrated that inmate abuse was widespread in Queensland institutions. Even though knowledge of these abuses came to light in the years following the Heiner shredding, successive Queensland Governments have been especially careful to prevent any effective investigation of particular allegations or into the responsibility of politicians and officials for these abuses¹⁹.

The suggestion is that staff revelations made to Labor candidate Warner were used in the lead up to an election to cause trouble for the outgoing Cooper Government. The consequent Inquiry, having done its work in getting good publicity for the Opposition during the campaign, then became an embarrassment for the incoming Labor Government. Inheriting a policy of cover-up, it is suggested, the new government, like its predecessors, decided to protect JOYC staff represented by their union allies and their departmental officials from the fallout when Heiner began to uncover instances of inmate abuse.

The question is whether the Queensland Government wanted to protect staff who had given Warner her tip-off from legal action by Coyne or from disclosures of inmate abuse being uncovered by Heiner. We now know that very serious matters indeed, including pack-rape of an Aboriginal girl, had been raised with Heiner. Before the Forde Royal Commission uncovered the

extent of the corruption some five years later, it appears that governments, bureaucrats, and unions may all have been involved in covering it up. Even when the abuses were exposed in later years, no attempt was made to have individuals involved take responsibility.

Was the Goss Government, now that the allegations had served their political purpose, in pursuit of this policy, conspiring with the unions, anxious that their members should not be accused, and the culpable bureaucracy they had inherited from their predecessors, to bury what Heiner was uncovering?

What Should the Recordkeeper Do?

It is reasonably clear, that whatever the precise nature of the law, and that may change from time to time, questions of discovery and obstruction of justice can arise whenever document destruction is undertaken within the prospect of impending, likely, or possible legal action. The motives and purposes of those undertaking it can then come into question

All these cases revolve around the issue of whether routine document disposal procedures were but a disguise for more sinister intentions. At the very least, therefore, recordkeepers need to be aware that ordinary disposal (whether under a government archives law or in respect of non-statutory housekeeping in a private corporation) can give rise to these issues.

One way or another, the lawyers, the businessmen, and the accountants have had to confront the flaws in their own behaviour highlighted by recent cases and start to work out ways of preventing such things happening again. In respect of Heiner, archivists have never done this adequately. For years, archivists have denied or obfuscated over whether the State Archivist should bear any of the blame. Admittedly, the Heiner story emerged much more slowly than Enron or McCabe. At no time, however, has the profession as a whole faced up to the implications of Heiner and years were wasted in futile argument over whether or not there was any fault to be found in us. Admitting that fault is the first step towards learning the lessons and figuring out how to prevent a repetition.

Eventually, after refusing to comment or act at all for several years, the Australian Society of Archivists (ASA) spoke out in 1997²⁰. They blamed the Queensland Government for deceiving the State Archivist and they blamed the QCJC for misrepresenting her role before the Senate. In short, they blamed a bad appraisal on everyone except the person who carried it out.

Far from holding the archivist accountable for her actions, the profession praised and exonerated her. Following the Morris/Howard Report (1996)²¹, the Council of Federal, State, and Territory Archives (COFSTA) "passed a unanimous motion of support for the actions of the Queensland State Archivist in the matter of the Heiner Inquiry records" and "expressed its support for the State Archivist and for the findings of the Morris Report that the State Archivist acted in accordance with the Libraries and Archives Act 1988"²². COFSTA equated legal liability with professional accountability.

Then, in 1999, the Council of the ASA finally acknowledged that “the appraisal of the documents [in Heiner] did not conform to ... standards of best practice and, hence, was not conducive to a more satisfactory outcome”²³ and drew two lessons from the Affair, that :

1. Government archivists are key agents of accountability, and
2. appraisal must be conducted according to professional standards.

Incredibly, COFSTA then publicly repudiated “crucial parts” of the 1999 Statement “despite your most recent revisions”²⁴. As recently as 2002, the ASA Council has declared that it will “take no further action on Heiner” unless further evidence comes to light or in the (very unlikely) event that a Royal Commission is established²⁵.

To some extent, therefore, we have, in denying the evil, denied ourselves the opportunity to learn from it. Outlined below are some of the issues which might have been considered in the context of a more professionally mature response to the Heiner Case.

In the discussion which follows, it may seem that government recordkeeping alone is involved. This view would assume that government is regulated but the private sector is self-regulating. So far as the law of destroying evidence is concerned, this is clearly not so. Even in the arena of recordkeeping practice, however, it is a misconception.

Government recordkeeping is self-regulating too. The fact that intra-governmental recordkeeping is subject to regulation by law-makers makes it appear to be different. But this is done simply because Governments are in the habit of regulating themselves using legislation. Archives laws belong to a special sub-species of statute – applying not to society at large but primarily to agencies of government. The financial affairs of government, administrative appeals, and ombudsmen’s powers of investigation are similarly provided for – through Acts of Parliament which regulate the affairs of government agencies rather than the citizenry at large. An archives law, regulating the internal activities of Government is no different, conceptually, from a directive of the Board or the CEO of a private sector organisation.

Conceptually, the business units of the private corporation stand in exactly the same relationship to such directives as government departments and agencies do to archives laws. The State may, indeed, interfere and control the standards of corporate behaviour. The catastrophic results in world financial markets of the Enron collapse and the subsequent rush to re-regulate corporate activity is an indication that private sector self-regulation may (for the immediate future, at any rate) need to be as rigorous as public sector self-regulation is, at least on paper, under the archives laws.

The converse is also true. Post-Enron, the private sector has become vociferously self-conscious of corporate governance as an issue. Business

has been reminded that integrity is as important to consumer and investor confidence as it is alleged to be to voter confidence. For some time prior to this, the public sector has been held up to be more accountable under its archives regimes than a “self-regulating” private sector. The standards to which business now aspires – if achieved - may soon call into question the efficacy of the results governmental archives regimes, good on paper but bad in practice, are in fact delivering by way of corporate governance outcomes in the public sector.

Here, then, are some suggestions about what the recordkeeper can do :

a. Know the Law

It is not within the competence of the average recordkeeper to come to a view the technicalities of the law on these matters. The kind of familiarity with the issues outlined in this article can be expected and taking care not to aid and abet others in breaking the law would be both professionally ethical and prudent. But there are clearly limits upon how far a professional recordkeeper (whether government archives authority or corporate employee) can inquire into the circumstances of every document destruction or be expected to enforce the laws on discovery within the organisation for which he works.

It is outside the archivist’s competence to establish the likelihood of legal proceedings case by case. General schedules do not provide an answer either. Knowing the law, what the recordkeeper can do is to require information be disclosed before granting authority to destroy or make continuing disposal approval subject to a caveat which voids the authority until such likelihood ceases. In short, the archivist can warn, demand to be informed, and qualify approvals.

b. Ask Questions

To begin with, the recordkeeper can ask questions. A proposal to destroy records can be met by a question : are you aware of possible legal proceedings in which these might be relevant? So far as we know, the Queensland Archivist was not told and Barnes’ outburst about the role of the Archivist before the Senate Committee may have been prompted by the need to defend the Queensland Government for not telling her. We just do not know.

If the Archivist asks for relevant information and it is not provided, she can refuse to agree to destruction. If false information is provided, then the responsibility for thwarting her attempt to inform herself of relevant considerations is placed clearly where it belongs - on the agency which trades in untruth - and the propriety of the agency's action can be judged by appropriate authority (e.g. the CJC or the Ombudsman). If the Archivist doesn't even try to find out what needs the records may serve before she agrees to their destruction, the question becomes whether this manner of exercising the discretion is proper - regardless of any strict obligations which may or may not be imposed by legal/legislative provisions.

c. Impose Conditions on Disposal

Government archivists can go further and enter a caveat on all disposal authorities making the statutory authority to destroy records under the authority void if they are likely to be wanted in legal proceedings. The caveat could state what kind of circumstances these are, based on the increasing body of judgements in this area. This would deprive a corporation of the defence that discoverable documents were destroyed lawfully according to routine procedures. Routine procedures would have already contemplated the possibility of legal proceedings and provided for that eventuality by voiding the authority in those circumstances.

d. Establish Recordkeeping Rules & Procedures

Above all, the Heiner Case is a warning against what is sometimes called “ad hoc” disposal. The Queensland Government came to the Archivist and requested authority to destroy the Heiner records. They were destroyed in a decision which applied only to the Heiner records. This kind of ad hoc decision is very dangerous. What is needed is routine procedures and rules which determine in advance of any particular case the outcome for the type of records under consideration.

In the Heiner Case, the Queensland State Archivist had to deal with a request to dispose of records of a lapsed inquiry. If, instead of dealing with that request as it was received, the Archives had a policy on all such records, it could have replied by telling the Goss Government that it was customary to retain such records in accordance with that policy before destroying them. It would have been much harder for the Goss Government to have insisted on destruction in contravention of a procedure applying to all records of similar type. In the BAT case, a document disposal policy seems, according to the judgement, to have been manufactured for the purpose of getting rid of dangerous documents under the guise of a routine procedure.

e. Ensure That Records of Disposal Are Kept

Archives legislation in this part of the world is increasingly adopting the lead of the 1973 Public Records Act (Victoria) and including a provision requiring that full and accurate records are made and kept of the business of an agency or department. This principle must also apply to appraisal and disposal. Appraisal and disposal are themselves the business of the organisations concerned and full and accurate records of that should also be made and kept. The existence of such records would make it harder, in review, to disguise actions which are undertaken in extraordinary ways (rather than in routine manner) and for dishonourable reasons which go beyond the legitimate desire for good housekeeping.

f. Monitor Compliance Through Reporting and Audit

Standards, procedures, and requirements under the archives law can be specified for general application. Some compliance regimes stop short at demonstrating that compliant units are aware of external standards, have

implemented required methodologies, and incorporated them into policies and procedures. This gives no guarantee that requirements have been implemented. Examination of full and accurate records of disposal are one way of determining whether requirements are being complied with and routinely applied. In addition to modifying policies and procedures, departments and agencies should report back – responding to specific demands from the monitoring authority for information using templates developed by the monitoring organisation for that purpose.

The monitor and the setter of standards and requirements cannot be the auditor. Audit must be undertaken by a third party. An effective audit requires that performance be measured against generic standards and procedures in two ways – by examining an auditable record of implementation and by testing the veracity of that record. It is necessary, therefore, that the reporting system creates a record of recordkeeping and that the system documents implementation, not simply a modification of policies and procedures.

The specific requirements of the reporting system and the documented responses of the units who comply achieve two things : an account of performance on which conclusions can be reached by the auditor as to the extent of compliance against specific bench-marks and a record which the auditor can check against the actual situation (to discover whether the return accurately reflects the situation). This is the reason why generic standards, procedures and methodologies cannot, of themselves, provide an effective basis for auditing recordkeeping. An audit which discloses no more than the extent to which procedures and methodologies have been modified is of little practical use. The question is whether the modification has achieved measurable results against a bench-mark upon which the unit was required to report ahead of the audit being undertaken. An effective audit will measure compliance with precise requirements laid down in a monitoring or reporting system and be based on an examination of the veracity of what is being reported on.

Conclusion

These cases illustrate recordkeeping practices violating the principle that records should be kept for as long as they are needed. The remedies suggested in the final part illustrate how an organisation which desires to conform to that principle can do so more effectively. Those remedies are useless, however, if the organisation is determined to violate that principle in any case. Moreover, this analysis does not canvass the position of the recordkeeping professional who finds himself in the position of having to conform to such a corporate policy or else behave in a manner contrary to his employer's wishes.

Two kinds of dilemma can arise : when an organisation's behaviour contravenes the law and when it is lawful but ethically wrong. In the first instance, cases such as the ones under discussion here can provide elucidation and guidance as to the true state of the law. The legal position is

then reasonably clear. A person cannot be legally obliged by contract of employment to break the law.

In case of unethical behaviour, it becomes a question of both personal values and professional values to what extent the recordkeeper can (or should) operate in defiance of organisational preferences. Some professions indicate areas of professional activity in which professionals may, and even must, disobey and violate their obligations under contracts of employment when professional standards would otherwise be breached. Since no one can be contracted to commit an illegal act, it becomes relevant to ask when professional codes of ethics may be held to have the force of law.

Could such a conflict prevent an employer (regardless of any term of the contract of employment) from contracting a professional to undertake an action which would violate the professional's code of ethics? It could be argued that when an employer contracts with a professional, knowing him to be bound by such a code, the contract of employment must be read as being subject to the code's provisions – i.e. that the employer cannot contractually oblige a professional to break the code of ethics by which he is bound and that any term of a contract of employment which purports to do so is consequently void. The legal position of professionals who conduct themselves accordingly is, however, far from clear.

One answer to this dilemma may lie in strengthening the independence of the recordkeeper in controlling disposal, setting standards, and monitoring performance. This can be done, both in the public and private sectors, by according the recordkeeper customary, legal, or even constitutional protections of the kind given to auditors, ombudsmen, and the like. This is a large question. It will first be necessary to decide whether the whole role of the recordkeeper needs such protection. Do preservation and access require it, or only disposal, bench-marking, and monitoring? Does this mean that recordkeeping authorities should be split into two regimes?

We have seen how the traditionally respected and independent role of the auditor has been devalued in cases such as Enron with the erosion of accounting standards. We have seen how, more recently, new rules have been made in an attempt to re-establish that independence. Has there developed within the recordkeeping community a sufficiently robust, well articulated, and agreed upon set of standards against which to measure the performance of a constitutionally protected recordkeeping authority? It is not enough to put recordkeeping forward as a candidate for such protection on the basis that our professional judgement can be trusted. It must be possible to tell, as recent history has shown in the case of auditors, whether or not we have betrayed the trust reposed in us. It is far from clear, in those terms, that we are yet worthy of protection.

The account given above of the professional response to the Heiner Affair reveals a profession in Australia which was not itself accountable for its own actions. This judgement is possible regardless of the stand one takes on what ASA and COFSTA have actually said and done. There has been much

dispute over this and no clear outcome. The point is that for the profession to be trusted with the kind of constitutional “independence” that auditors, courts, and ombudsmen claim, its behaviour would have to be made subject to bench-marking in the same way – not simply to processes of self congratulation and recrimination. In the debate over Heiner, there were no bench-marks to which anyone could appeal as an independent point of reference to determine whether or not, in the case of the Heiner appraisal, the Queensland Archivist got it right or got it wrong.

The Australian archival community still needs such a point of reference by which to measure, evaluate, bench-mark and criticise (in the intellectual sense) the actions of the next Australian archivist who botches an appraisal. The Code of Ethics adopted by the Australian Society of Archivists, including a flawed provision apparently excusing archivists from conducting themselves ethically if this would place them in conflict with their employers :

As employees archivists are bound to conform to employer expectations of, standards for or directions about, matters like demeanour and obedience, handling of confidentiality or privacy issues, resourcing levels, and these may conflict with professional standards²⁶

provides scant assistance in this matter.

Postscript

The Eames judgement in McCabe was subsequently overturned on appeal to the Victorian Supreme Court. Mrs McCabe subsequently died. In October 2003, the High Court of Australia denied the McCabe family leave to appeal the Victorian Court’s ruling. In brief, the Victorian Court decided that a judge was limited to determining whether or not a perversion of the course of justice had occurred, that the standard of proof was civil (on the balance of probabilities), and that the plaintiff (McCabe) had to prove that. They concluded that Judge Eames had therefore decided the issue on the wrong point of law.

Regardless of the final outcome, after the Eames decision was handed down, Commonwealth and State Attorneys-General soon met and issued new, stricter guidelines for lawyers advising clients on document “retention” practices²⁷.

ENDNOTES

¹ Phil Dickie, *The Road to Fitzgerald* (Brisbane, University of Queensland Press, 1988), p. 1.

² Transcript of Interview, ABC Brisbane, 20 May 2002, between Steve Austin and Alastair McAdam.

³ Australia, Senate Select Committee on Unresolved Whistleblower Cases, *Transcript of Evidence*, Brisbane, 23 February 1995, p. 108.

⁴ Australia. Commonwealth Director of Public Prosecutions. *Annual Report 1998-1999*. Ch. 7 Significant Cases – Bourke. <http://law.gov.au/cdpp/anrep99/index.htm>

⁵ Judicial Committee of the Privy Council. *The Ophelia*, 54

⁶ *McCab vs British Tobacco* [2002] VSC 73, par.80

⁷ Australia, Senate Select Committee on Unresolved Whistleblower Cases, *Submissions ...* Vol. 1 (Queensland Government), Attachment : copy of letter from K M O'Shea to Acting Director-General, Department of Family Services and Aboriginal and Islander Affairs dated 23 January 1990.

⁸ Australia, Senate Select Committee on Unresolved Whistleblower Cases, *Transcript of Evidence*, Canberra, 29 May 1995, p. 682.

⁹ Australia, Senate Select Committee on Unresolved Whistleblower Cases, *Submissions ...* Vol. 1 (Queensland Government), Attachment : copy of letter from Premier of Queensland dated 21 February 1995 – being a copy of a Ministerial Statement by the Queensland Attorney-General, p.7.

¹⁰ *Ibid.*, Attachment : copy of letter to the Committee from the Premier of Queensland dated 31 March 1995 – being a Memorandum dated 21 March 1995 from Crown Solicitor K M O'Shea to the Attorney-General, p. 2.

¹¹ John M Fedders and Lauryn H Guttenplan, "Document retention and destruction : practical, legal and ethical considerations" *The Notre Dame Lawyer* Vol. 56, No. 1 (October 1980), pp 7-8.

¹² *Ibid.*, pp. 23-24.

¹³ *Ibid.*, p. 24.

¹⁴ *McCabe vs British American Tobacco* [2002] VSC 73

¹⁵ *Ibid.*

¹⁶ Australia, Senate Select Committee on Unresolved Whistleblower Cases, *Transcript of Evidence*, Canberra, 29 May 1995, p. 696.

¹⁷ Australia, Senate Select Committee on Unresolved Whistleblower Cases, *Submissions ...* Vol. 3 (Shredding of the Heiner Documents), R D Peterson, p. 2.

¹⁸ Australia, Senate Select Committee on Unresolved Whistleblower Cases, *Transcript of Evidence*, Brisbane, 23 February 1995, p. 103.

¹⁹ Bob Bottom, "Something Rotten in the State of Queensland" *The Bulletin* (23 September, 2003), pp. 20-22.

²⁰ Australian Society of Archivists Inc, "The 'Heiner Affair' – A Position Statement, 18 March 1999", *ASA Bulletin* (April, 1999), pp. 49-51.

²¹ Anthony J H Morris Q.C. and Edward J C Howard, Report to the Honourable the Premier of Queensland ... An Investigation into Allegations by Mr Kevin Lindeberg ... (1996). These two lawyers were appointed to investigate the Heiner Affair. Their report recommended further action and the conduct of further investigations on possible unlawful behaviour. They did not recommend further investigation of that kind into the role of the State Archivist.

²² Australian Society of Archivists, *Bulletin* (April, 1997), p. 36.

²³ Australian Society of Archivists Inc, "The 'Heiner Affair' – A Position Statement, 18 March 1999", *ASA Bulletin* (April, 1999), pp. 43-49.

²⁴ Letter from COFSTA to ASA dated 18 March 1999 published in Australian Society of Archivists Inc, *ASA Bulletin* (April, 1999), pp. 52-53. What revisions had already been made before the statement was issued remains unclear. COFSTA took issue with the idea that appraisal should be based on precedent rules rather than on particular cases. Their letter suggested (in my view, wrongly) that this was an issue about whether or not all appraisal should be done using disposal schedules. They also took issue with criticism of the speed at which the Queensland Archivist appraised the Heiner records.

²⁵ Stephen Yorke, "The Heiner Affair" on archive of the aus-archivists Listserv, 13 December 2001, at <http://www.asap.unimelb.edu.au/asa/aus-archivists/maillist.htm> .

²⁶ The full text of the Code of Ethics may be found at the ASA website
<http://www.archivists.org.au/about/ethics.html>

²⁷ "Crackdown on document shredding" *Australian Financial Review* (2 August, 2002).