Digitisation

How much will survive? Who will control it & be able to access it? How much will it cost?

Sovereignty

Who owns and controls the records? Who determines access?

FOI Failings

The woeful story of how a noble idea has floundered.

ACCESS & SECRECY

"Palace Letters"

Jenny Hocking's battle to gain access to records of the Whitlam dismissal.

Secrecy and Government Suppression

The sorry tale of governments' wrongdoing and their efforts to stop it coming out.

Privacy

Curious interplay with archival access.

My Health Record

A benign aid to medicine or a surveillance tool?

Digitisation

2015, June 4: … NAA's digitise and dispose policy

> NAA is seeking comment on a draft policy re disposal of records in the Archives' custody following digitisation: to allow the digitisation and disposal of some records in the "collection". This is said to be a practical extension of the existing authorisation for agencies to dispose of both short-term and ongoing records after they have been digitised. The policy will primarily target paper records which were created after 1995 on a computer, and printed out. The policy excludes records which would lose some of their value if the content were transferred to another medium, such as those which have artistic or iconic value. Quality assurance will be a major part of the project, ensuring that digitised records retain all the information in the original version. Following digitisation, the digital record will become the "archival record" (whatever that means), and those in the open period will be available online via the Archives' database RecordSearch. The original paper records may be returned to the responsible agency, transferred to another organisation, or destroyed.

Some interesting conceptual issues arise out of this that go back at least as far as microfilming (and arguably to the mediaeval cartularies and to the migration of data on clay tablets). Ideas about originality have always been fraught and can most easily be thrown into relief by consideration of film archiving (in which the image, not the film stock, is the object of archival attention) to say nothing of the migration of born-digital objects and of data. A clear-headed distinction is needed (in my view) between a rendering, a copy/duplicate, and a transformation. Whether a particular instance falls into one category or another depends on what one regards as the essence of the record that is being preserved. The underlying principle in this draft seems to be that the physical manifestation of a record that can be digitised in the way proposed is not the essence of the record. A digitised rendering becomes the archival record "following digitisation" (p. 5) and the "source record" can then be disposed of in accordance with a disposal authority.

KANSALLISARKISTO

Digitise and dispose policy 1

Australian National Archives: *Disposal of records in the Archives' custody following digitization* –politics (version 1.0 November 2015).
Marburg archive school: *The Intrinsic Value of Archive and Library Material*
USA *National Archives:* *Intrinsic Value In Archival Material* –report
National Archives of Norway: Digitalisering for kassasjon – en utredning – og en utfordring
National Archives of Sweden: Riksarkivets digitaliseringsstrategi
National Archives of Sweden: Beslut angående vårdpolicy för Riksarkivets handlingar på papper (Conservation policy for documents stored on paper)

But is it possible for both the archival record and the source record to be THE record - simultaneously - or must one cease be THE record once it is superseded by the other? This is a question that applies to much more than the contents of NAA's repositories. The essence of the record must be preserved by on-going support and management frameworks so, unless two parallel frameworks (arguably unless the same framework) continues to be applied to both one must cease to be THE record once that framework is withdrawn. I don't think the term "source record" is helpful (but in general I don't care much about terminology so what the hell). But it seems to imply an idea that is at odds with the underlying principle. A source record, to my mind, is a record (as distinct from another kind of information source) from which data is derived as part of a process that does not involve it

being superseded - for incorporation into another record, for example. Whatever term is applied, there must be room for that concept. Where that occurs, you end up with two records, not one. Transformation is a classic instance of this and a data warehouse is an actual example. In this transformative process, the essence of the record is not being preserved as a result of the transformation and the original record remains the source of truth because the transformed record does not provide the same evidential qualities that are the essence of the original record (generally because it is created for a different purpose). This is to be contrasted with a migration that preserves the essence of the record where the new rendering replaces the original record. The logic of this is that both artefacts (viz. the one containing transformed data and the one containing source data) must each be appraised, independently of each other because they serve two different purposes. The emphasis in the draft discussion paper on content (intrinsic or otherwise) rather than purpose is unfortunate. The vexed question of duplication can be left for another time.

The logic of the policy being articulated here and the general disposal authorisation that lies behind it seems to be that a properly formed digital rendering replaces the original but the rhetoric implies otherwise – viz. that appraisal authority is necessary for both the "source record" and the digital rendering.

> General Records Authority 31 ('For source (including original) records after they have been copied, converted or migrated') which is issued under section 24 of the *Archives Act 1983,* authorises Commonwealth agencies to dispose of source records (including those of archival value) created after 1 January 19951 following digitisation. (p.6)

Why? No one (I hope) suggests that each and every rendering of a digital record needs to be separately appraised. And so, the digital rendering of a paper record should be governed by the same principle. Provided each rendering preserves the essence of the record then only the latest rendering is THE record and previous renderings are superseded by the recordkeeping process of migration : they cease thereby to be subject to appraisal regulation. A general statement to that effect is desirable and presumably the general disposal authority is intended to do that but it is an error to regard the discarding of superseded renderings as still requiring appraisal and authorisation (as if they were still records). Superseded renderings ceased to be THE record once they were replaced.

What this draft is about, therefore, or should be about, is the policy to be applied to the treatment of superseded renderings of records in NAA's custody once they have been properly digitised. I don't this this draft actually contradicts that but the suggestion that disposition authorisation is needed for such treatment (as if they were still records) is I think a bit muddle-headed and seems to go back to a deeper misunderstanding embedded in GRA 31. Of course, since it appears that for some reason best known to themselves they want to limit the application of such a policy to post-1995 material, the implications of the argument I am making here would be terrifying and it is possibly doubtful if any archives law (not just Australian federal archives law) empowers the archives authority to regulate the treatment of superseded renderings of any age or in any format (under the disposal provisions anyway).

<<Andrew Waugh: ... Many points there, but I'll just respond quickly to a couple.

Some of the ideas in the NAA's policy paper echo those in PROV's digitisation policy from five or six years ago. I do not know if NAA based any of their thinking on our work (and even if they did, whether they have the same ideas that we had then). But I certainly know PROV's thinking at the time.

The whole purpose of PROV's digitisation policy was to allow agencies to migrate (digitise) and dispose of source records. This was not because of any ideas about the superiority of migrated (digital) versions of records. It was, instead, a reflection of the reality that agencies were doing this for their own business needs. We wanted to institute some control over this process.

The term 'source record' was chosen because we didn't want to use the term 'original record'. This was partly because we envisaged that you could have multiple migrations (where was the original then?). 'Source' was used because it was the input into a migration process. It was also to get away from the privileging of the 'original' record - it's somehow better than the migrated record. In particular, the term 'original' also tapped into obsolete, but still potent, legal jargon - the 'original is the best evidence'.

We certainly believed that there was only one record, and that you were simply migrating its physical form. So there should be no need of any authority to dispose of a source record. But we came up against our Act which made it an offence to dispose of records without the authority of the Keeper. We didn't think there was a problem (the record wasn't being disposed of), but consultation showed that people were anxious. We could see that without formal authority, the recordkeepers (or the lawyers) would be conservative and not dispose of the paper just in case. We also realised that PROV could say what it wanted (and get all the legal advice it wished), but who knows what would be actually decided if this actually went to court. It was simpler, in the end, to simply draft a general disposal authority that formally authorised disposal of the source records once they'd been appropriately migrated. Pragmatic, if bending our theoretical understanding.

As to which manifestation of a record is the 'real' record, pragmatism won again. Of course, the whole purpose of the policy was to allow migration (to digital) with subsequent disposal of the source. If this is followed then, when the process is completed, there is only one manifestation of the record.

However, we could envisage situations where it is not desirable to dispose of the source record even after migration. This occurred where the form of the source record had intrinsic value - an extreme example was a file of someone removed from their family that contained a letter from their mother. A digitised copy would contain all the information, of course, but I don't think it would have a fraction of the emotional power. Less emotive examples were artworks (including plans and sketches), etc... For these records we simply accepted that the source records should not be disposed of (or at least destroyed).

We did, however, say that the source records should be removed from business use after migration. That is, the real 'record' becomes the migrated version.>>

When offering guidance, I'm all for pragmatism and keeping it simple. And we can hardly expect those being guided to be aware of or care too much about the conceptual niceties. My point was that WE need to be aware of them and care a lot about them. This is one of the reasons I don't fuss much about the terminology, only the ideas that lie behind the terms. And we need to take care that our pragmatic advice doesn't take us into lethal dead ends. This is presented as a policy paper by NAA for NAA and its stakeholders, so a bit of candour about the thin ice we are all on should be allowed. There are times, however, when a dollop of sophistication is unavoidable even in the "real" world. We, and the data governance people, have a continual job explaining why the data warehouse doesn't obviate the need to apply corporate disposition rules to the systems of record. If you can suggest a way of doing that w/o saying something about the difference between migration, copying and transformation, I'm all ears.

Advice which is focussed (as this NAA draft is and, from what you say, in PROV's digitisation policy from five or six years ago) on the digitisation of hard copy records and the subsequent treatment of the superseded rendition may well be expressed in layman's terms of source records vs digital rendition. If I fussed about terminology, I would certainly prefer source record to original. And so that they're not unduly confused, it may be desirable (at a pragmatic level) to make the advice that superseded renditions may be got rid of only by authority and to put it in the form of a disposal authority. When all that is conceded, however, I think it is unavoidable that ad hoc advice focussed on the digitisation of hard copy records and ruling (for whatever reason) that both renditions have to be appraised is

- wrong in principle and concept and
- storing up grief for the future.

The position can only be based on a view that both renditions are records. That view could be sustained (as I think you are suggesting) by regarding it as a duplication or copying process rather than a migration process – and the archives laws are shaky (at best) on the rules applying to disposition of copies. Even if that view could be sustained, however, in relation to digitisation of hard copy, what are the implications for digital r/keeping? Why wouldn't every rendition in a purely electronic process also be a copy? How would that work? If the archival authority wants to control which rendition is kept as the "archival record" (whatever that means) then that is not really a disposal issue, it is about controlling the r/making process. I can see why an authority might want to do that using the disposal power (which it indisputably has) rather than asserting a power (which it probably hasn't got) to dictate how an agency makes and keeps records, but those are the issues raised by this and the thinking needs to be clear even if the implementation isn't.

I have every sympathy for the poor sods who have to give this advice. I'm one of them. But we need to be aware of the risk of boxing ourselves in conceptually – if only to be alert to the danger of things going to custard later on and being surprised when they do. Long established practices can be demolished in a flash if the conceptual underpinning is successfully challenged. Just ask ICAC NSW about that.

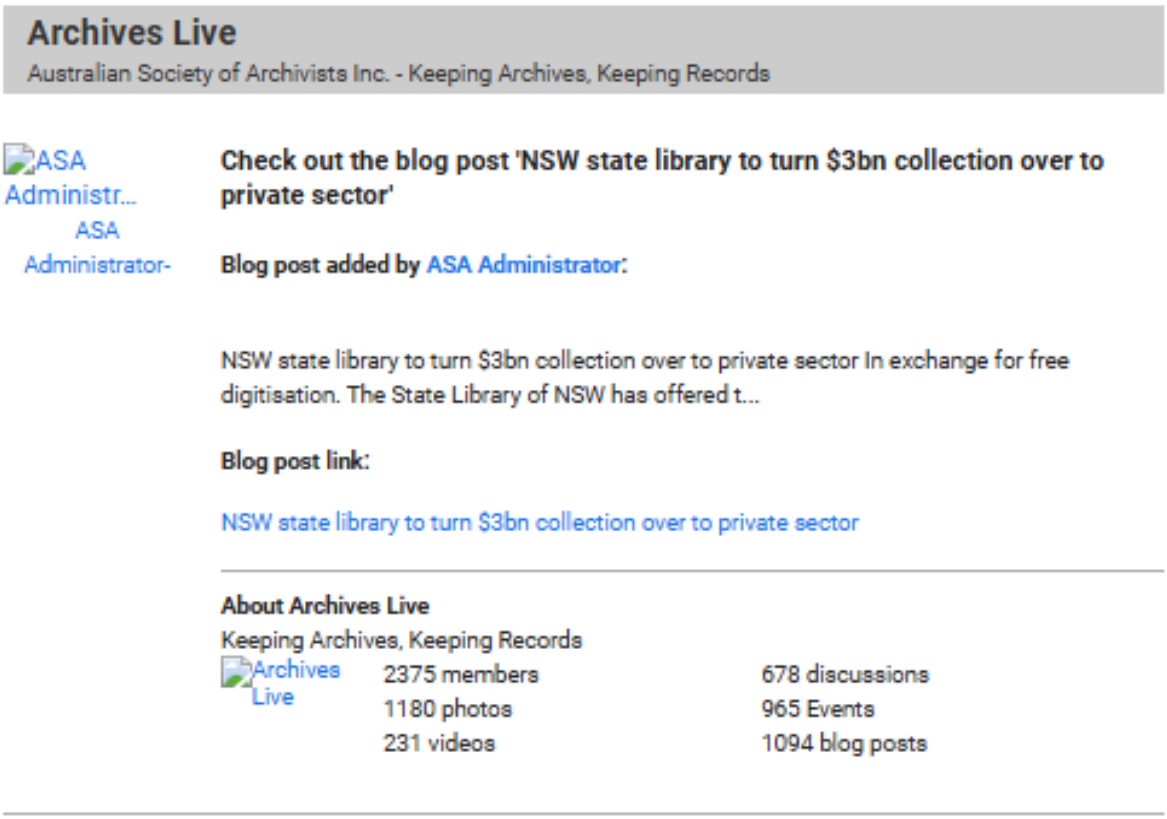
2016, April 14: NSWSL to turn $3bn collection over to private sector

FW: Check out "NSW state library to turn $3bn collection over to private sector" on Archives Live

Extract from the story in itnews :

> The State Library of NSW has offered the private sector access ... in the hope that digital operators might find a way to turn a buck from the resources online ... the State Library has still only managed to electronically preserve less than 1 percent of its total collection ... It is in a hurry to get the most fragile and vulnerable pieces captured electronically to preserve them ... and hopes there is a business model for making these resources searchable online

... Digital partners will be expected to provide all the staff, equipment and other resources required ... and to prove to the library that they can be trusted to care for highly valuable historical artefacts ... will not be able to claim any new copyright over the electronic versions of the resources, and ... any records created must remain in the public domain in accordance with public library policy.



1. This does not <u>in essence</u> appear to be different from PP arrangements already in place with Ancestry.com, etc. Each contract may vary <u>in detail</u>, however, re copyright, other rights (including access rights), royalties, redaction of access restricted material (where appropriate), duration of the contract and of elements within it, and for succession rights when the private partner fails, liquidates, or is taken over. In the light of recent history, it would be as well to make provision also in case the custodial partner fails, is liquidated, or is merged with someone else. Query: when is the "release" of dusty old resources from custodial dungeons onto the Internet going to start raising questions of copyright, privacy, and cultural sensitivity in records that we would prefer not be asked?

2. Such arrangements appear to be made one-government-institution at a time, with different partners (of each individual institution's choice), and in accordance with contractual arrangements that are not standardised within a single jurisdiction, let alone across the whole Federal/State/Territory cultural sector.

a) Does this not mean an accumulation of arrangements over the documentary cultural heritage with a range of suppliers that are diverse, non-standardised, and potentially erratic?

b) It may be commercially advantageous but is this wise policy from a national (as distinct from a jurisdictional or institutional) point of view?

c) Are there even standardised contracts (or statements of minimum requirements) when these deals are entered into, or is each institution sovereign and free to make its own arrangements?

d) Who is over-seeing them? I'm not talking about Treasury oversight of the contracts but oversight of the heritage policy and public interest aspects.

e) What limits (if any) should be placed on sovereign cultural institutions in regard

to the digital exploitation of the resources they are entrusted with?
f) Most of them were set up in the pre-digital era? Does their mandate cover this or is it now time to re-examine their mandates? Is this a case of function-shift?
g) Should the assumptions behind their establishment as custodial bodies to remain unscrutinised as they move towards digital processes designed to "turn a buck"?

3. The existing PP arrangements are for low-hanging-fruit : viz. low-volume + high-use materials. How likely is it that the entirety (or even very much more than 1%) of our existing paper-based national cultural resources will ever be digitised (especially those at the low-use + high-volume end)? How is the "hope" that fragile valuable artefacts will be saved to be reconciled with "turning a buck". How to resolve the conflict that culturally valuable artefacts may not be the ones that are most attractive commercially? Should the commercial exploitation of the resources be taken out of the hands of cultural institutions and given to another body within government (unencumbered by custodial responsibilities) to co-ordinate these activities across the sector?

4. What descriptive standards and requirements are being laid down for "making these resources searchable online"? Is a false assumption being made that institutions are responsible only for preservation and not for searchability? What integration will there be with the institutions' own online portals? What is being done to use the potential of the technology to provide integrated searching beyond the custodial/contractual boundary established by each separate custodial institution and digital supplier? What thought has been given to integrating access to born-digital resources with "making [digitised paper-based] resources searchable online"?

There lots of questions around this process at SLNSW and elsewhere. These are just some of them (it seems to me).

2016, April 15:

<<Mark Brogan: There are two parameters of SLNSW's proposal to provide private access that are likely to be a fly in the ointment as far as private sector collaboration is concerned. Firstly, if a profit making firm were to embark on digitisation as part of a partnership, apparently it will have no copyright over the digital source created and, secondly, it will not have the right to exclude others from the resource it creates (if this is the meaning of "any records created must remain in the public domain in accordance with public library policy"). The positions taken are familiar from like agreements elsewhere and basically protect custodial institutions from back door privatisation of holdings.

Perhaps as with Ancestry, the secret to making this fly from a commercial standpoint is aggregation and value added services behind a portal gateway. Ancestry has been very clever with this and quite entrepreneurial. But it will be a hard sell for SLNSW and as you have suggested, the value proposition of some digitisation targets will be greater than others, leading to the best assets being prioritised and most ignored.>>

2016, April 14: digitisation vs description

Further to my post this morning re the itnews item on SLNSW proposing to contract out its digitisation programme, I have two further questions on a somewhat different tack (viz. the benefits of digitisation programmes that are not contracted out but continue to be paid for by the taxpayer). The story includes the following paragraph:

> Despite nearing the end of a 10-year, $72 million digitisation journey, the State Library has still only managed to electronically preserve less than 1 percent of its total collection, which is made up of 6.3 million items like monographs, sheet music, newspaper collections, microfilm, videos, stamps, photographs and architectural blueprints.

1. Does SLNSW regard digitisation as an access or a preservation measure? Is preservation being mixed into the message to defend the indefensible (viz. a massive taxpayer spend on a boutique resource for the benefit of a favoured few)? The story speaks of "electronically preserv[ing] … its total collection." Is electronic preservation of resources that are not in any danger of loss and could be preserved physically for centuries cost-effective and/or justified? How much would it have costed to preserve physically the less than 1% that we have spent $72m digitising? In any case is digital preservation a saving? It won't be unless SLNSW now discards the resources it has already digitised so the taxpayer does not pay twice – for digital and physical preservation of the same resource. Should government-funded heritage institutions abandon expenditure on digitisation for access, concentrate on digitisation for preservation only, and leave it to society to find a way of funding digital access without it being a burden on the taxpayer? Does spending $72m to make less than 1% of SLNSW resources available to (probably) less than 1% of the population pass the "pub test". What would the Sydney Institute say? Should we care what they say? What would be the total taxpayer spend if the approach taken by SLNSW over the last 10 years had been adopted for all our heritage institutions? Would the battlers on struggle-street (as they say) think it a justifiable expense when the money could go to pay for education, health, disability, etc. etc.?

2. After the low-hanging fruit and resources in immediate danger of physical decay, what priority should be given to digitisation over other possible avenues of expenditure of taxpayer money on cultural assets? On the basis of the figures quoted in the story, are we entitled to ask whether the balance between digitisation and description is right? If $72m buys you digital access to less than 1% of your holdings, would it be better to spend a fraction of that amount to improve online access to better descriptions of un-digitised resources? I would just love it if this question initiated a debate over how a fraction of that amount could be used to improve online access to better descriptions of un-digitised resources.

PS I trust it is not necessary for me to say that I take the role of Devil's Advocate in some of my postings.

<<Andrew Waugh: Without going into whether $72 million is good value for digitising less than 630,000 items, I'd make a couple of points.

The primary purpose of most digitisation is for access. But most GLAM organisations would digitise at 'preservation' quality. This is because most of the cost of digitisation is in the handling of the material (getting it out of storage, preparing it, putting it away), generation of metadata, and quality assurance. The marginal additional cost of digitising at 'preservation' quality over 'access' quality is relatively small, and has a number of advantages. These include additional uses of the digitised material (e.g. publication), future proofing access (i.e. higher bandwidth driving demand for higher resolution in access copies), and insurance against loss of the physical original.

Don't underestimate the value of the increased access provided by digitisation. I don't believe that it is a 'boutique resource for the benefit of a favoured few.' Digitisation means that people all around Australia can access material that previously could only be accessed by the favoured few who were relatively close and had the time to physically visit the GLAM. And Trove shows that they, do, indeed, access the material. The use of OCR of printed material has changed the game in historical research - One of the side effects of Tim Sherratt's recent '#fundTrove' twitter campaign was a view on the amazing ways Trove was being mined by people. It really was an eye-opener.

And Trove is the best answer to your question as to the relative value of digitisation/OCR/indexing versus description. The Trove approach is a far more cost effective and powerful method of providing access to the information in newspapers than the 100 years of desultory manual indexing that preceded it. For an archive, the

question is more balanced. So many of the records are handwritten, which can be digitised but not OCRed or indexed. These digitised records need to be described to be accessible - expensive and not very effective unless the description matches the researcher's questions. But perhaps we need to spend more time (and money) digitising 20th century records (more likely to be typewritten) than 19th century records.

Finally, digitisation is a very effective preservation mechanism for the physical originals. To reverse Rothenberg: "Paper lasts for 400 years, or until someone unfolds it to read'. The great contradiction of physical collections is that they survive best if no one, or at least very very few, actually use them. As soon as they become popular they start to fall to pieces. I can remember the condition of the books in the State Library, and I frequently see the circle of loose paper around researchers reading fragile records.

Yours, also, playing the devil's advocate :-)>>

2016, April 16:

Does digitisation for access serve a marginal "boutique" market?

Andrew says -

<<...I don't believe that it is a 'boutique resource for the benefit of a favoured few.'... Trove is the best answer to your question as to the relative value of digitisation/OCR/indexing versus description. The Trove approach is a far more cost effective and powerful method of providing access to the information in newspapers than the 100 years of desultory manual indexing that preceded it.>>

No one can doubt the popularity of digitising heritage resources. Football is also popular and, although we have yet to see the rise of heritage hooligans, it is legitimate to ask whether taxpayer money should be applied to supporting either $multi-million mass entertainment or $multi-million mass heritage. But popularity and mass usage are not really the point. What challenges your value proposition and makes it boutique is the lack of penetration. If all our cultural resources were being digitised, your value proposition might hold but on the figures provided in this story it has cost $72million to digitise "less than" 1% of SLNSW's holdings. I have no way of knowing if these figures are correct and whether the holdings in question are the entirety of what is held at SLNSW or only a heritage portion of it, but either way we are dealing with big numbers. Assuming it is less than 1% of what (in someone's estimation) should be digitised, it would therefore cost $7.2billion to do the lot. Assuming SLNSW itself holds (let's be generous) 2.5% of the nation's documentary heritage that should also be digitised, then the bill for digitising everything would be $288billion. I could build a Very Fast Train system for less.

It is a boutique resource not because few people use it but because, at this rate and at this cost, so little of it will ever be available digitally. Preferring digital access to less than 1% over access to descriptions of more than 99% is, I say, a boutique solution for a favoured few. Hence my question: could we get bigger bang for our buck with better descriptions? If you concede that question, you can't avoid the follow-on: could we do online description better with the application of better brains and more resources? No prizes for guessing my answer.

Compared to traditional search room statistics, the numbers using digital resources are mind-blowing. They are a favoured few in relative terms, however, because (regardless of their absolute numbers) they are a minority group of hobbyists and researchers within the community whose claims on taxpayer funding have to be measured against competing needs and priorities in the total population. Some competing expenditure – on disability services, for example – also involves a minority of beneficiaries but the social imperative there is high. Education and health services affect almost all of us. What makes this comparison a fair one is twofold :

1. Heritage spending is usually so relatively insignificant that there is no point of comparison with big-ticket items but that is not so when $288 billion is at stake.
2. Digital access to heritage resources is lower on my significance index (social significance, that is, not "cultural significance") because access by alternative means, though clunky and less convenient, is still possible.

Is it possible to have two motives for digitising resources?

Andrew says

<<...The primary purpose of most digitisation is for access. But most GLAM organisations would digitise at 'preservation' quality...digitisation is a very effective preservation mechanism for the physical originals...physical collections...survive best if no one, or at least very very few, actually use them...>>

Yes, librarians and archivists can whittle and chew gum at the same time but they can't have their cake and eat it too.

If $288billion is too much to pay for digitising the nation's heritage, choices will have to be made. The smaller the pot, the more likely it is that access and preservation will be in conflict: the low-hanging fruit that is digitised first won't necessarily be the stuff most urgently in need of preservation. Since this is also the stuff least likely to be intensively used, and therefore less likely to fall to pieces in the researchers' hands, the conflict of purpose may go some way to resolving itself. Some preservation advantage will undoubtedly come from access-based digitisation and this will relieve pressure on conservation programmes, but there remain two issues you will need to deal with if your argument holds :

1. Do we stop preserving resources that have been digitised and move conservation spending onto those which haven't?
2. Do we stop spending money on physical preservation altogether, close down the conservation facilities, sack the conservators, and move all our spending into digital preservation?

<<Lise Summers: These questions are phrased in a way that suggests that good digitisation does not require conservation of the physical resources involved, when the opposite is true. For good quality images to be made, the originals need to be in good condition. This was true for best practice microfilming and photography and remains true with digitisation. The cameras have changed, but not the process. Materials need to be cleaned, flattened and repaired to ensure the images can stand in for the original for most purposes. As part of an imaging or reformatting process, the originals can be rehoused effectively and efficiently, and stored away in case they are required or a new imaging project is required.

According to the SLNSW annual report 2014 -2015, they "digitised 53,000 pages of First World War soldiers' diaries, 5464 hours of oral history and 1.5 million pages of NSW newspapers, bringing the total number of 'turned digital objects' to 6.7 million." It's a little trickier working out what that actually means, because the same report says that they only created 160,000 digital images inhouse. Finding $72million is even harder.

The same report also says

The Electronic Records Project (creation of an electronic collection catalogue) was first capitalised in 2013/2014as an intangible asset.

The E-records project was completed in April 2014, of which $21.5 million were capitalised as intangible assets. The intangible asset is the outcome of a project to create an online collection catalogue available to Library clients and improvement to collection retrieval and management processes.

The catalogue, built on knowledge and skills, is regularly updated for acquisitions and disposals. It therefore has an ongoing useful life. Hardware and software platforms may be upgraded due to technological obsolescence; however, the information created by the project has an indefinite useful life and is therefore not amortised.

The Digitization of Collection Project commenced in 2012/13. It will result in digital images of all collection items being created. The availability of these images will allow research to be carried out externally and increase access to information. As they become available to the public these digital images are capitalised. As at 30th June 2015 $14.2 million has been capitalised as intangible assets. These digital assets have an existence and utility separate from the actual physical collection assets.

I'm guessing 'all collection items' is a bit of hyperbole, and actually means those items in the State Reference Library, Mitchell and Dixson collections for which copyright and other restrictions do not apply, and which are in a good condition or suitable format for digitisation.

At the moment, archives and libraries are digitising microfilm because the film is easy to copy and we have users who will accept black and white copies. This is changing rapidly, and I am aware of a project where original materials, that have been microfilmed and that microfilm digitised, are now being digitised in colour to meet new expectations. I suspect that, as the tools and techniques for viewing and working with images evolves, we will be seeing another push for digitisation at higher resolutions than we currently accept, and these materials will be dragged out again 5, 10, 20 years from now.

I am concerned that digitisation projects are being driven by 'niche' interests, and that the pool of potential digital content is shrinking rather than expanding. I agree that the way to make these resources more generally available is to provide good quality descriptions in the first instance, and then work towards making digital copies of those resources available. Given the costs of describing, conserving, copying, saving, migrating, redacting, republishing and preserving the digital copies, we know that full and complete digitisation is not possible. We need to think strategically about what is digitised and about how we get the message out that if it's not on the internet, it's part of the iceberg of archives and other resources available physically.>>

2016, April 17:

Lise says

<<These questions are phrased in a way that suggests that good digitisation does not require conservation of the physical resources involved, when the opposite is true. For good quality images to be made, the originals need to be in good condition.>>

The phrasing may bear that interpretation but that was not the intention. I was trying to probe the strategic thinking behind mass-digitisation for preservation by taking up Andrew's argument that digitisation may be a preferable way (economically and/or technically) to achieve preservation outcomes as distinct from access outcomes. As we know, cost is a significant component in digitisation for either purpose. Accepting that conservation is needed before digitisation occurs, the question remains: why should the taxpayer be asked to pay twice for the same result after it has occurred? Are they going to be persuaded to pay to preserve the originals in case they are needed for a new imaging project?

1. Pre-digitisation conservation is one thing; on-going preservation of the digitised "originals" is another. If digitisation is the preferred preservation strategy, should conservation work be limited to preparing material most desperately in need

of digitisation? Should other preservation work be abandoned in favour of facilitating the preferred strategy of first digitising materials most at risk?.

2. After digitisation (once pre-digitisation conservation has occurred) what do we do with the digitised "originals"? Why spend any more on their preservation? Why not discard them? A bonfire in Macquarie St, perhaps? Or, would that simply compound the problem of global warming?
3. Is a digital rendition a version or a transformation? Does the "original" have intrinsic value that must be preserved? What is it and why? The Mona Lisa, maybe. A record that may be needed for forensic examination, OK. But run-of-the-mill heritage materials? Doesn't preserving an "original" for its intrinsic value and digitising to preserve the content simply double the preservation costs? How do we sell that to the taxpayer?

At the micro-level, these questions are not new. As Lise suggests, they arose already with microfilming. Digitisation requires a re-think because the order of cost if anything other than a niche result is proposed means looking at offsets. $72million is enough to raise these questions; more so when it gets into the $billions. When did we last have a $72million microfilm project on our hands? This thread is about the preservation justification for digitisation (as distinct from the other one I tried to start about digitisation for access, which hasn't taken off apart from Mark Brogan's sage remarks).

Nothing so far has persuaded me that preservation can be argued as a justification for mass-digitisation until these logistical questions are answered. You couldn't sign off on a $multi-million (?billion) business case until such obvious cost offsets had been dealt with. Preservation as an incidental by-product of a digitisation programme undertaken for access purposes, sure. But you don't sell a $multi-million (multi-billion?) strategy on incidental by-products. I accept that, politically, destruction of digitised originals would raise the fury of the heritage-mafia and may drown out logical analysis; but that is a different matter.

2016, April 21:

<<Andrew Waugh: ... Chris asked... "Hence my question: could we get bigger bang for our buck with better descriptions [than digitisation]?" No.

What Trove has shown us is that digitisation of a large corpus (even at low quality) coupled with OCR/searching completely change the scope of what is possible. It dramatically improves the ability to find resources. It dramatically reduces access costs for researchers. And researchers respond to this.

The question is more tricky for archives. So much of our collections are handwritten. This cannot (yet) be OCRd, and so some description is necessary for to allow researchers to find things. So digitisation by itself not useful for an archive (but see below). This is why archival digitisation projects always include work to improve the description of the objects. This, of course, increases the cost of digitisation projects - what is portrayed as a 'digitisation' project is usually as 'digitisation and description' project. (And is often a 'conservation, digitisation, description, and rehousing' project at even greater cost. But I digress.)

But description by itself is almost as useless. Yes, it improves the ability to identify resources. But it does nothing to improve access. That's really a boutique resource - the benefit of the expenditure can only be realised by the very small number of researchers that can actually attend the archive concerned. This essentially means (some) locals, very well heeled researchers, and academics with a travel budget.

Actually, I think it's even worse than this as I don't think archives have fully processed the lessons of Trove.

I've said that so much of our collections are handwritten. So they are, but the proportion of handwritten vs typed records changes dramatically over time. In my

experience (with a very limited range of materials), nineteenth century records are handwritten. By WWI, however, a substantial percentage of records are typed. Some series are almost completely typed, while others are a mixture of handwritten and typewritten material. Yet others remain completely handwritten.

I think we are missing a bet in our focus on digitising 19th century material. It would be interesting to experiment with digitising early 20th century material with a fair proportion of typewritten material. The typewritten material can then be OCR'd and used as a search access point into the files. You don't need to find every document in a search, what you need to find is the relevant files. And for that, you may only need some of the documents in the file to be OCRable.>>

2016, April 22:

Andrew's reply rather misses my point, demonstrated by his use of square brackets. My question was not whether description delivers a better access result than digitisation. If my question is going to be re-phrased, let me be the one to do it: could we get better bang for our buck with better descriptions [of the vast quantity of records that will never be digitised]?

I can argue that the comparison between digitisation and description is not as one-sided as Andrew suggests but that is nothing to the point and can be reserved for another day. If you read my posts you will find nothing that suggests that description delivers a better access result than OCR/search. My question was not about the technological advantages of digitisation but its economic feasibility. Assuming no one is ever going to hand over or find a commercially viable way of supplying the money needed to digitise the lot, much of the nation's non-digital documentary heritage is NEVER going to be digitised – regardless of whatever benefits it would confer if it could be paid for. It's not enough for Andrew to argue that OCR/searching produces a better access result than description; he has to explain how to pay for it.

Why digitise?

The answers to this question might seem obvious to a historian: to make collections accessible to remote audiences; to enable text searching, and to allow for new types of research. Yet how often do you pose the question of a resource you are using: why has this been digitised?

> Archival digitisation projects started in earnest around 2000 … The subsequent decade saw a move towards a presumption in favour of digitisation as a means of opening up archives … ***Faced with an online interface of millions of images, it is easy for researchers to assume that the proportion of digitised material is much higher than it actually is***. Researchers accessing digitised archives in 2023 are … increasingly approaching them as the norm. Yet the material they are using was often digitised — and importantly selected for digitisation — at a time when digital access was viewed as an added bonus rather than as the primary means of access …the priority has always been to digitise popular material … This was unproblematic when researchers expected archives to only have a small proportion of their collections available digitally and there was a tacit understanding about what would be available. As new generations of researchers approach the archive without the experience of using digitised records pre-pandemic, we can no longer assume that this tacit understanding is in place. There is a danger that researchers will see the selection of material for digitisation as a form of secondary appraisal, after the initial selection for preservation in the archive, and indicative of the records' perceived research value rather than simply a popularity contest. **Anna McNally**

I repeat, therefore, do we get better bang-for-buck by diverting some of the resources used to digitise a tiny fraction of the nation's documentary heritage into better descriptions of the

larger proportion that never will be. You have to have descriptions in order to access the un-digitised proportion because that's all you have with which to find them. The relative merits of OCR and description are simply irrelevant to that question. The question(s) I want answered, therefore, are these. In light of the numbers cited in the article that kicked all this off -

1. How realistic is it to suppose that anything more than a tiny fraction of the nation's documentary heritage is EVER going to be digitised?
2. Should all our resources be directed towards mass digitisation projects that will never capture more than a tiny fraction?
3. Should some of that money be spent instead on better descriptions of the much larger volume that will never be accessible any other way?

There may be answers. Maybe mass digitisation is a realistic possibility and I'm incapable of understanding how. If so, educate me.

PS. I'm waiting for someone (more daring than I) to suggest that what isn't worth digitising isn't worth keeping or a line of argument that leads to that conclusion.

2016, June 4:

<<Andrew Waugh: ... Ahh, my mistake. When you asked about the better 'bang for buck' of description, I interpreted that as asking about a comparison.

In thinking about description, I eventually realised that 'bang for buck' (or return-on-investment) is exactly the issue. ROI is the ratio of the benefits to the costs. From the point of view of ROI, it matters not if a course of action is cheaper if the benefits are reduced in proportion. It is easy to focus on the headline cost, and much more tricky to calculate the value of the benefits.

As I argued in my previous email, I believe the benefits of digitisation are significant. This is due to 1) massively improved access, and 2) reduced cost in preserving, providing access, and (potentially) storage of the physical original. It's very hard to quantify some of these benefits, of course.

On the other side, description is a many and varied thing, and the costs and benefits of description must vary enormously. The cost and benefit of understanding and producing a description of a complex set of record systems would be different to producing an individual Series text which would be different again to item level listings.

It is clear to me that the case for description, like digitisation, would be on a series by series basis. I certainly do not see that description would automatically be a useful technique for those series that aren't valuable enough to digitise. From an ROI point of view, it's quite possible that the records would not be worth describing either...

(As an aside, my view of the value of descriptions is coloured by the fact that the quality of the descriptions varies enormously. On the day I started writing this response, the NAA tweeted:

#FlashBackFriday Digital#infomanagement circa 1945 – the humble computer control room NAA B4498 128D6 pic.twitter.com/voPjyN5EUO

Now this is complete nonsense. It's not the control panel of a computer - in fact I would suggest it controls the flows of material in an industrial process. But the date is nonsense as well. A colour photo in 1945 - possible but unlikely. The style screams the '60s or '70s - florescent light, wood veneer cabinets, the style of instrumentation, even the telephone handsets.

A quick look at the referenced description in the NAA () indicates that I shouldn't blame NAA public relations too much. They were just regurgitating what the item description said it was. Who knows where that came from; probably the agency.

The series description says that this came from the Trade Publicity Branch - Film and Photographic Library which existed under various names from 1951 to

1986. It further claims that the series contents date from 1945 - which suggests where the purported photo date came from.

All this is a roundabout way of saying that descriptions can be nonsense. And, worse, that people uncritically believe the descriptions.)>>

I think we are closer now to a meeting of minds but still at cross purposes.

First, as a critic of archival descriptive practices for more than 30 years, I yield to no one on the proposition that "*descriptions can be nonsense*". But even digitised assets bear descriptions and where they are inadequate it is a problem for the digitisers also - ameliorated to be sure when coupled with text searching - but would that apply to a photograph as in your example? That leaves us agreeing that item and series level descriptions could be a lot better. In fact, if I were arguing that resources should be diverted from digitization and put into better item/series descriptions (which I am not – see below) your example rather tells against your own argument since the image in question obviously needs to be better described for its full value as a digitised asset to be realised.

Second, I am not in fact making that argument. I don't say that it is better to spend money on describing resources discoverable online instead of spending that money on digitising them. At any rate, not on describing them at the item/series level. Description, as you say, "*is a many and a varied thing*". I am perhaps at fault for not making myself clear. The descriptive endeavour into which I would argue resources should be diverted (the proposed calculation is purely hypothetical since the funding just isn't set up that way, this is about prioritisation) is of two kinds:

- **at the contextual level**, where I believe the kind of framework needed to support global access arrangements of the kind I have alluded to in the intervening postings in this thread can be developed; and
- **at the structural level** (relationships essentially), where I believe the implications of online discovery, both within and across descriptive programs, have not been properly understood and dealt with.

Exactly how is something I have some ideas on (indeed I have written on little else for many years) but I don't want to talk about that just yet in this context because that is implementation and my theme for now is that we must first settle on some functional requirements before moving on to the implementation. But one thing you can be sure of: simply presenting boring old series descriptions and interminable item inventories is not what I had in mind. My case for description is emphatically not "on a series by series basis".

So, we are still at cross purposes if you think I want to argue the merits of item or series level description as against digitisation. The idea that heritage assets not worth digitising aren't worth describing either is a profoundly interesting one. I think I alluded to it (or something very much like it) in an earlier post as a courageous proposition. If the stuff isn't worth digitizing or describing, is it even worth keeping? My assumption throughout has been that the assets held by archives and libraries need to be made accessible and are worth the effort to do so and that the debate is about how best to do that. It follows that some kind of descriptive solution is necessary for the vast bulk of undigitised material alongside the digitisation effort directed at the smaller component of the national asset. Not describing (or not even keeping) what isn't worth digitising is a completely different strategic proposition and that would involve a completely different set of calculations to the ones we have been discussing.

2016, May 6: Data on digitisation

A few weeks ago I initiated a discussion on digitisation. The postings ended up pursuing a number of threads including -

1. The rationale (access; preservation; both; other?)
2. The pros/cons (better access; OCR vs description; toxic effect on the latter; de-contextualisation?)
3. The strategic implications (proportions digitised; feasibility; boutique audience; priorities; resource allocation?)

I was especially interested in (3). In that respect, I used reported figures about the state of digitisation at SLNSW and extrapolated from there. Does better information exist about the kind of sector-wide quantities involved? Most online material is about pros & cons at the micro level. But question (3) needs to be explored (if at all) by reference to data relating to the sector overall about what proportion of analogue material has been digitised and what proportion still needs doing. I can't believe this data hasn't been collected and analysed by someone.

The article on which I based my initial posting spoke of <1% of SLNSW holdings having already been digitised. I have since come across a European report that gives more optimistic figures (see table 4.17 below), suggesting that European archives & libraries have already digitised 11-12% as against a perceived requirement of 47-48% yet to be done. This table is based on a 2014 survey. I wouldn't take these results at face value without looking into them more closely than I have been able to so far. I would want to know, for example, how comprehensive the coverage of the survey is and whether truly large holdings were surveyed at all. I am suspicious of the similarity between the figures for libraries and archives which is unexpected if truly large records repositories were surveyed. Is the quantum of "analogue…collections" finite or is it still rising? Adding together percentages from such diverse areas of activity to produce a "Total" without reference to the absolute quantities involved looks a bit dodgy. Size is measured by budget and staff numbers but a question on actual volume is "optional"! Another table from the Survey not cited in the Report (Figure 4.20) gives less optimistic figures of 6-8% for digitisation progress in archives. And I haven't figured out the implications of the remaining 40-42% that they say don't need digitising, but I see that figure for libraries & archives is more than double that for museums and others (which is curious). All this may be dealt with in the Survey when I get around to reading it closely.

In the meantime, it's really good to have any figures at all to work on. Is anyone aware of other sources for such data (especially for Australia and NZ)?

2016, May 17: Digitisation and researchers

<<Andrew Waugh: Slightly tangential to the questions that Chris has raised, this is an interesting take on the impact of digitisation on professional historians, one of our user groups. The author's argument is that digitisation and OCR are a sea change in historical researcher (for both well and woe), the more remarkable precisely because the historians have not marked it. The focus has been on the impact of 'big data' on history.>>

So far from being tangential, I think the issues raised in the article that Andrew cites are very relevant to a parallel set of issues for archivists, as well as historians. If anything, my original questions were tangential to them.

The author says, inter alia

<<…we can now find information without knowing where to look … Web-based full-text search decouples data from place. In doing so, it dissolves the structural constraints that kept history bound to political-territorial units long after the intellectual liabilities of that bond were well known… Digital search offers disintermediated discovery…>>

My original point was that, so long as digitised resources amount to no more than a fraction of what is available online, we must look to improve the way undigitised resources are described online because descriptions are the only way they can be accessed. I am opposed to the idea that text searching replaces descriptive effort for this and for other reasons. Content searching alone misses the contextual knowledge unless that knowledge is captured in the metadata and lazy digitisation won't do that. In the case of undigitised records, searching can only be based on description, not content. It follows (in my view) for that reason alone that we must pay more attention to better description so that online searching for undigitised materials (for now, the majority of the resources we manage) is as good as it can be. Tim Sherratt repeatedly shows us how to mine and access descriptions of undigitised materials in ways not thought of by those who prepared the descriptions but those descriptions are only to be found on the web sites of custodians who have done little more (in my estimation) than place descriptions online based on practices meant for display in an undigitised world. I say we need to do more and reimagine how we describe undigitised resources for online access.

Pre-digital descriptions follow what the ICA standards call the "multi-level rule" which requires that descriptive data is pushed as far up as possible in an (assumed) hierarchy of descriptive levels. In practical terms, descriptive data that can be recorded at series level (for example) should not be repeated at item level. When such item descriptions are "decoupled" (as explained by the author of the article) the assumptions that underlay the description are fundamentally eroded. We have to deal with that and it is entertaining to watch how different custodians handle it on their web sites. But the consequences are more profound still. I have written elsewhere that our real treasure is not the materials we hold but the knowledge we possess about structure and context - knowledge about the resource, in other words, rather than knowledge contained in the resource itself. This is descriptive data that is most remote from item level descriptions and the most vulnerable to decoupling. The challenge is to improve descriptive practice so that our real treasure is displayed and available in online searching for all our materials (digital, digitised, and undigitised) alongside the tools that facilitate content searching.

The ultimate challenge is to ensure that online access is not only "across borders" but also across delivery channels, so that the same search hits all three. This relates to my original concern: that relying solely on the benefits of content searching of digitised materials is as remiss as simply uploading descriptions into an online home for which they were not designed.

2016, May 24: Digitisation: more on rationale and metrics

The article (below) offers a further insight into the rationale and the metrics of digitisation. It contains some very naïve misconceptions (confusing format and medium, for example, and supposing that the sum of a record is merely its information content) and it seems unlikely that Finland, Hungary, and Sweden are really digitising their entire non-digital archives and throwing away the hard copy, but, even if that were true, the numbers are startling. According to the article, NAFin has over 100Km of shelves now and expects another 130Km of hard copy records over the next 35 years. According to the article, the "prime motivation" for digitisation is cost-efficiency with improved access as a beneficial side effect. The policy questions I still don't seem able to find answers for include these :

- What is the total quantum of national heritage material that could or should be digitised (here or anywhere else)? For NAFin the answer seems to be 230Km by 2050.
- What proportion of that has so far been digitised, over what time, at what rate, and at what cost?
- At what rate is it currently being digitised? At what cost?

- What is the cost/benefit calculation for digitisation & migration vs hard copy storage & preservation over time?
- Does digitisation really eliminate the cost of hard copy records or do custodians wimp out and go on keeping hard copy after digitisation?
- What is the rate of un-digitised intake and does that growth rate fall behind, match or exceed the digitisation rate?
- What is the projected rate of un-digitised intake and for how much longer will it go on?
- When is it expected that the intake of born-digital material will bring the non-digitised growth rate into balance (at least) with the digitisation rate?
- What kind of integration is there between metadata schemes for digital/digitised resources and online descriptions of non-digitised materials?

Why archives want to destroy their reams of papers and risk a digital dark age

> **The costs of storing tons of documents on miles of shelves means they're being banished from state archives. But is it too risky Tom Jeffreys investigates**
> … "The National Archives are not about paper, but the data that the papers are covered with," says Deputy Director General Markku Nenonen. While the National Archives do contain a number of rare and beautiful objects, its bread and butter is information … The National Archives of Finland currently has documents covering over 100km of shelf space. Documents requiring a further 130km are expected to come in over the next 35 years … The prime motivation behind digitisation is therefore cost-efficiency, especially with Finland is in its fifth year of recession … However, digitisation is not just about efficiency. "Ultimately, this will be beneficial for citizens," says Juha Haataja, Counsellor of Education at the Ministry of Education and Culture. "They will be able to access information much more easily." For researchers, digitisation opens up new methods of searching, collating, and exploring information …
> *This article originally appeared in The Long + Short, the free online magazine of ideas published by Nesta, the UK's innovation foundation.*

This just in. There is an excellent article in the latest *Archivaria* (Spring 2016, No.81) entitled "Digitizing Archival Records: Benefits and Challenges for a Large Professional Accounting Association". It doesn't actually bear on the metrics issue I have been raising but it does have some sensible things to say about the rationale and other follow-on matters, pointing out, inter alia, that the necessarily selective nature of digitisation means that it complicates (enhances if you like) but does not replace existing archival management regimes. This is my point exactly – viz. that whatever we do with digitisation we'll still have a lot of stuff that we have to manage and make accessible and, further, that there can't be two access regimes. The authors recognise that digitised resources must be integrated with the non-digital to enhance accessibility overall and be linked with other resources across custodial boundaries. That last statement must also be true, surely, for online descriptions of non-digital resources. While acknowledging the benefits of text searching as an enhancement to accessibility, the authors do not fall for the hype that it replaces structure and context.

> … Digitization adds another layer to the already inherent complexity associated with managing a physical archive … Just as it is rarely feasible to retain every physical record generated by an organization … it will be equally rare to digitize every record in the collection … and the selection of items for digitization becomes a key variable in shaping the accessibility of the existing archival collection … Enhanced access to archival records via digitization changes both the temporal and spatial relationships between researchers and records … A reliance on a traditional records management (custodial) approach would have missed the opportunity to identify contextual and functional aspects of the resource and its place within the broader network … Digitization improves access, but that access is only as

good as the finding aids developed to support the process ... A further implication of the spread of digital archives is the scope for cross-repository linkages ...

2016, May 25: "...not about paper, but the data ..."

**"The National Archives are not about paper,
but the data that the papers are covered with"**

<<Michael Piggott: ... Further to Chris' and others' recent contributions on digitization, see below. I seem to recall a version of this ruthless approach was practised in Singapore when copy+shred was via microfilm. As for the quote above, whether it is debind+digitize+repackage/store flat, or debind+digitize+discard, am I the only one who believes there is also "data" embodied in the material culture of the physical record worth preserving if the physical record itself is judged worth preserving?>>

One must assume they mean what they say. The Finns are quoted as arguing that the chief reason for digitising 230Km of records is to save costs on storage, with access and preservation as beneficial side effects. They may. of course, be misquoted. If saving on storage costs is the rationale it follows that they must discard the hard copies, otherwise it's crazy. You would go on paying to store and preserve the hard copy (the avoidance of which costs is your chief reason for doing it) while incurring new costs to digitise and migrate the copies. Respect the Finns for saying that (however much you may disagree with them, Michael) instead of blurring their rationale by giving all three reasons equal weight - as one sometimes sees in statements emanating from the woolly headed who don't confront the issue.

If you don't adopt the Finnish rationale, i.e. if you keep the hard copy, a three-pronged argument doesn't work anyway. If you keep the hard copy, there is no saving on storage so that leg of the rationale is voided. The second leg (saving preservation costs on the hard copy) is similarly voided since it makes no sense to keep the hard copy if you don't then preserve it. The reductio, therefore, is that (absent destruction of the hard copy) the only possible argument in favour of digitisation is better access (plus, in some cases at least, better preservation on top of what you have go on paying for preserving the duplicated hard copy). I'm not for a moment saying that better access through digitisation isn't a perfectly legitimate argument to make. But those promoting digitisation are seldom (so far as I can see) as clear-headed about their rationale as the Finns.

What I'm trying to get at is a coherent rationale for mass-digitisation. That must be the starting point for any sensible discussion of the implications. If you're talking about digitisation as a boutique added extra, costing relatively little, a coherent rationale may not matter. But when your talking about 230Km or the astronomical costs for SLNSW that started this thread off, I don't see how it can be avoided. And, the more you argue the benefits of the digitisation component of a heritage programme (however small it is, if not in cost, then as a proportion of your stuff) the more urgent it is to say how your digitised/digital content is being integrated with online descriptions of your non-digitised stuff.

<<Tim Robinson: "If saving on storage costs is the rationale it follows that they must discard the hard copies, otherwise it's crazy." True. I have a memory of David Bearman saying (and my apologies if I am misrepresenting David) that if one goal is to preserve the information in records then scanning them and selling the originals is an option. The objects have a value, some quite high, that could be realised to pay for the preservation of the information.>>

2016, May 26:

<<Andrew Waugh: On 25 May 2016 at 15:35, Chris Hurley ... wrote:

> "If you don't adopt the Finnish rationale, i.e. if you keep the hard copy, a three-pronged argument doesn't work anyway. If you keep the hard copy, there is no saving on storage so that leg of the rationale is voided. The second leg (saving preservation costs on the hard copy) is similarly voided since it makes no sense to keep the hard copy if you don't then preserve it. The reductio, therefore, is that (absent destruction of the hard copy) the only possible argument in favour of digitisation is better access (plus, in some cases at least, better preservation on top of what you have go on paying for preserving the duplicated hard copy)."

This is not completely true, although digitisation/destruction would yield the greatest benefits of digitisation.

It's not true because physical storage does not have a uniform cost. Physical storage costs depend on the capital and running costs of the storage building. These, in turn, depend on where the building is located and how densely you can pack the stored objects. Both of these depend heavily on how often you expect to access the stored objects. Libraries have been thinking about this for about 15 or 20 years, and it's common to have off-site, high density, storage for items with little access requirements.

At one extreme is the typical archival building. It's located in a major city on land that is worth quite a bit. The storage density is reasonably low because staff have to be able to easily access any record. It's necessary to provide a reading room - with the consequent need for service facilities (toilets, entry areas, staff areas for the reading room staff...) Often the building itself is of quite high quality.

At the other extreme is a storage archive where access is expected to be rare. It's located in regional areas where land is cheap because the records are rarely accessed. Density is high because access is very rare. No service facilities are provided beyond staff facilities - and these need only be those required to secure and manage the facility. A small digitisation facility would be useful (as re-digitisation would be the main access requirement), and somewhere where access to the Internet at a reasonable bandwidth was available. While building quality should be high (no leaking containers), it doesn't need the architectural quality commonly found in main archival access points

Incidentally, I think you are over estimating the 'preservation' costs. One of the (correctly) lauded positive characteristics of paper records is that paper *generally* deteriorates slowly. The major preservation challenge for most (but not all) paper records is the damage caused by handling during access. (I've said before, to deliberately misquote Rothenberg, "Paper lasts for 400 years, or until it's handled.") So the only preservation action often required for paper is simply to stop handling it.

I've occasionally thought about where I'd locate such a facility in Victoria. I worked out my main criteria would be risk of natural disasters. This would rule out anywhere with forest (even thin, poor forest) - too high a risk of bushfire. I'd avoid anywhere near a river or the sea (storms and flooding). The grain belts north of the Great Divide would be ruled out due to the risk of mouse plague. I reckon an area on the plains south/south west of Ballarat might be a goer, or in the rain shadow plains between Melbourne and Geelong west of the Princes Hwy.>>

Archives NZ (Wellington) stores records below sea level, on land resumed from the harbour, in a multi-level building that is on the fault line running down the country from north to south (along the Ring of Fire). The building violates about 90% of Ted Ling's criteria. When I was there I used to say to them that the only safe place for NZ's archival heritage was in Australia. That didn't go down at all well. But I suppose the Christchurch 'quake demonstrated that their records can survive even in the most hostile environment.

Some form of dormant storage could (as you say) reduce the cost of keeping discarded hard copy. You could, as Michael Piggott says, flat-pack the residue of the digitisation process and stack in it a virtually inaccessible place (the Finns are looking for storage 150Km or something like that from Helsinki). But why would you do that? Except for selected items with iconic, totemic, or intrinsic value or merit, why keep them at all? However remote and dormant, the site costs are only part of the story and here, I think, you are underestimating

the cost of keeping physical records alive (if only on life support). If the records are to be kept at all usable, you have to pay for retrieval and delivery systems as well as site costs, wherever you put them, to say nothing of the cost of duplicating reference and access systems for both your digital and physical holdings. I repeat, why would you do that?

If, however, you strip the digitised physical records of access and retrieval, description, and availability you might as well bury them and be done with it. You may disarm criticisms such as that sounded by Michael when trying to justify mass digitisation but by only reducing (rather than eliminating) costs of physical storage then for every $dollar spent on deep storage you reduce the cost-offsets of mass digitisation. You would have to be able to explain to the funding authorities why (on earth) you want to keep the physical stuff after it has been digitised. I am accustomed to likening archival repositories to morgues (places where you send dead records). Deep storage, where you house the unused and unusable detritus of a digitisation process in the hope that one day improved technology or funding will enable you to bring them to life again, would give me a new metaphor – repositories as cryogenic chambers.

I love the idea that archives could sell off the physical detritus of a digitisation process to help pay for the cost. Thank you Tim Robinson or David Bearman. After the sell-off, the dismembered "collections" would then reform elsewhere as re-incarnated Frankenstein monsters composed of fragmented bits from many repositories. In due course these new "collections" might themselves be digitised on the same principle and the whole process begin again. Delicious.

But seriously, folks, what I am obviously trying to do in this thread is frame the question. I think, if I keep probing, it will get to the point that we can agree (am I dreaming?) that digitisation is going to have a big impact on what I have called the low-hanging fruit (viz. at the low volume & high usage end of the spectrum) and that vast quantities of the national heritage (towards the high volume and low use end) will remain undigitised – at least for a very long time. Thus framed, I would like the discussion to address what I regard as a central issue (an issue I tried to begin grappling with in my *Modest Proposal* by starting to set out the functional requirements for online global access). This involves stepping back (intellectually) from the technological wizardry available when dealing with accessing digitised/digital resources and integrating (in our thinking) access to both digital and non-digital resources and across custodial boundaries. I don't regard it as a satisfactory response to say that we -

- will go on providing online access to the non-digital as we have always done using descriptive practices developed for physical records and simply layer access to digital materials on top of that;
- will rely on content-searching at the expense of context and structure;

- have successfully integrated privacy, access, and redaction management regimes with global online searching.

While we're at it, we can also look for sensible ways of reducing the costs of physical storage (as we have always done). When we were bedazzled by electronic recordkeeping we thought of it as a special thing (we even had a SIG devoted to it). We have now sensibly refocussed and we regard electronic records as simply one more part of the suite of issues we have to deal with. That is how we should now be regarding digitisation.

2016, May 27:

<<Cassie Findlay: ... Of course there is a great deal of digitisation going on in govt agencies, both with destruction of originals and without, including for records identified as archives. There are (admittedly glacial) moves to do more proactive records release as well as FOI stuff being published online (and not just by the responsible agency, also by 3rd parties) and open data policies, along with (tentative) moves to harmonise archives/records laws & practices with these frameworks. So I'm definitely keen to make sure our discussion on maximising the opportunities for access & rich context for digitised and born digital records online is inclusive of these needs - across custody and control boundaries - as Chris suggests, if I understand correctly. Yay for an extension to Modest Proposal!>>

2016, May 26: Targeted digitization

I've been going on a bit lately about mass digitisation. Just to remind ourselves of the benefits of targeted digitisation is this (very uplifting) article that's come up on Archives Professionals :

From invisible to digital: digitising endangered historical documents in Brazil by Courtenay J Campbell.

2016, June 2: The value of digitization

<<Andrew Waugh: An interesting view of the value of digitisation.

Essentially the author's argument is that valuable as digitisation is to research, it comes at a cost. This cost is the promotion of those stories that are made available by digitisation and the effective silencing of those stories that aren't. He goes further and states that the promoted stories are primarily about the west, white, and/or males, and that this normalises those specific histories.

I'd certainly agree that this is a major problem, I'm not necessarily convinced that this is a universal truth. Bulk digitisation has the ability to make available the hidden (previously unavailable) stories. Tim Sherratt's and Kate Bagnall's work springs to mind. As does the work on digitising gay and lesbian archives. But I'm not sure if these examples are notable precisely because they are (rare) counter examples to the dominant themes.

But the argument does highlight the logical outcome of Chris' question about the cost of digitisation and the consequent selection of what to digitise.>>

2016, June 3:

Strong stuff this :

> ... This is a remarkable thing – and as a historian it changes what I do in remarkable ways; but if you were to stand back and create a national, or even a global policy that selected what should be digitised and what should be available, it would look very different. In digitising this particular history we have inadvertently made it more exclusive and more conservative – ever more dead white western men – to the exclusion of the rest of the world ... in the last twenty years as part of 'digitising' the past we have both privatised our inherited culture and given a new hyper-availability to a subset of that culture – to the leavings of the same old rich dead white, men ... In the analogue world, archives and libraries were run ... as components of a national system of knowledge and memory. But in the rush to create a digital version of

> this we have simply handed the stuff … to major corporations … we have ensured that the objects read and desired by a western, educated elite – with money to spend in response to all those adverts – will be the kinds of objects that will be most easily available … etc. etc.

I'm not sure I would say that libraries and archives were run in the analogue world as a "system" or that in pre-digitisation times resources were made available impartially and without privilege. But I would agree that some sort of underlying assumptions once existed about what libraries and archives were for, how access should be provided, to whom, and on what basis. These assumptions were, I believe, largely shared by those running them and working in them. There were always gaps between aspiration, rhetoric, and execution and the professions were sometimes even aware of those gaps and tried to close them. They were talked about in the schools and discussed at conferences (not enough, perhaps, but there was a self-conscious awareness that these were relevant matters for consideration, action, and improvement). It's depressing how much our self-awareness has shrunk to a narrower focus on how rather than on why.

Mass digitisation could be said to have changed nothing – just a better how to satisfy the enduring why. But, in the rush to digitise, those same underlying assumptions - concerning what we are about – are being unselfconsciously eroded without sufficient consideration. We were once guardians of the documentary heritage and promoters of shared values as to its management and use. When digital assets are available for commercial exploitation or harvesting by third parties, not part of that fellowship, it is unrealistic for the guardians (even assuming they had the nous to understand the issue, the will to reach a shared conclusion, and the guts to carry it through) to expect to control consequences which are being driven by forces largely outside their power. What is emerging is an online gallimaufry of selected digital assets uncoupled from their source and available globally, utilising generic internet search capabilities. Those assets are largely beyond the reach of the source providers as to how they are managed, portrayed, and accessed. Some would argue that this decentralisation is a virtue (cf. Peter van Garderen's post cited by Lise) because it liberates the assets from the dead hand of the source providers, implicitly denying the need for anything to replace a "national system of knowledge and memory". Alongside all that, custodians with adequate technical and resource capability are deploying the digital assets they hold (some of which aren't in sufficient demand to be commercially exploited or opportunistically decentralised) together with online descriptions of their own un-digitised assets but without comparable online search and discovery tools for their own descriptions, let alone in support of global discovery. Beyond that again, some of the third party providers with aspirations to being a one-stop-shop are harvesting online descriptions of un-digitised materials as well as high-value digital assets. That's not to say that all this undirected digital activity is a bad thing (and the fact that it is undirected might, as Andrew suggests, mitigate some of the "exclusivity").

What is a bad thing is making "digitisation" the answer to every question including the question "what are we doing and why are we doing it?" I'm sorry to keep harping on this but it really does come back to asking some fundamental questions, such as those set out in the *Modest Proposal*. What are our functional requirements for global access? What do we want to achieve? What are we doing it for? And, once we've agreed what we should be doing, how does what we are in fact doing measure up? This is not about hoarding our assets and withholding them from commercial and third party exploitation, or about disallowing decentralisation initiatives, it is about asking whether those efforts (however meritorious) meet our requirements and, if not, what to do about it. Add to this an aspiration to do more than provide access to the gathered heritage resources we hold and the need for clarity of purpose becomes pressing because there's lots for us to disagree about in all this.

As to the "selection of what to digitise", that is a question that only occurs when digitisation is always the answer. I would like that question reframed as "what do we want to make available digitally?" Some suggestions:

- There must be seamless global access to all resources (both digital and non-digital).
- Inclusivity: Access must be available to material in the hands of barefoot archivists as well as rich, technologically endowed sources of content.
- Access must be provided for ungathered records as well as resources that have been gathered into an archival programme (the wholistic requirement).
- As to how it is done, I would like us to reflect on content vs context search and discovery issues. Some suggestions:
- Search and display must provide for depth of description and display.
- Allowance must be made for the protean character of records (their changeability as to content and context).
- Provision must be made for authenticity (e.g. source vs rendition and transformation) and for differentiation (parallel provenance).
- Provision must be made for differential access and redaction (not just crude closure/release).

What I fear is digitisation coming to be seen as a fulfilment of our shared assumptions about access instead of a challenge to them. In the world of yesteryear, it was sometimes said that the finding aids shouldn't "push" researchers towards a conclusion (sometimes called spoon-feeding). They should have to struggle with the finding aids and find the stuff for themselves. Reference guides must not provide them with "easy" answers that might tempt them away from the struggle to find unfrequented resources unaided by us. That was allied to the view that finding aids should be objective; one of my major disagreements with Sue McKemmish and Marg Burns was over whether or not to introduce the term "patriarchal" into our descriptions of the Victorian Government in the C19th - an argument that could have been resolved with a dash of parallel provenance. Well, those views belong to another time and place, but I think they resonate with the issue raised by Tim Hitchcock. As to the even cruder matter of access to the un-digitised, there could hardly be a greater distortion of the research process than setting up systems that effectively lay down pathways frequented by most of our users by-passing the bulk of our heritage assets.

2016, June 6:

<<Gene Melzack: A similar topic was addressed by Lisa Nakamura in her keynote address to the iPres conference last November, which can be viewed online:

She uses as a case study the 'guerilla' digitisation of a feminist text with access provided through the tumblr social media platform. The talk discusses the legal and social barriers that prevented the formal republication and digitisation of this marginalised text through official channels and the unofficial methods used by the similarly marginalised modern audience of the text to digitise and share the work with one another.

It's interesting both for shedding light on some of the factors that affect selection for digitisation within archives and libraries and for the access model promoted by 'guerilla' community digitisation and archiving, which speaks to Chris' question about the purpose of digitisation. In this case study, digitisation is not simply for the purpose of providing access to an archival object of historical interest, but also of providing new digital life to an object that is of ongoing interest as a living document. In general, physical objects must remain with an archive if they're to continue to exist as an object of study, but digital objects can be reused, repurposed, remixed, and recreated and can thus more easily become an integral part of contemporary culture in their own right. Not to say that there haven't always been

artistic ways of reimagining and reinterpreting archival material, but that further enabling this kind of digital remix culture may well be a factor we want to consider when considering the purpose and value of digitisation.>>

2016, June 15: More on mass digitization

It is reported from NZ that objections are being raised to destruction of service records after digitisation – on operational rather than heritage grounds:

> Submissions closed yesterday on the proposal to move to a fully digitalised record after just one month. Some Vietnam veterans ... say the government has a track-record of getting rid of evidence ... Many veterans already struggled to get their existing medical conditions recognised because of the mysterious holes in their records ... Auckland barrister Charl Hirschfeld ... said they were right to be worried. Some records are always lost in transferring them from one format to another, either due to oversight or policy, he said. Annotations and notes on the reverse of documents are not scanned, odd inserts are discarded. "Past experience shows when files are dealt with to rationalise them in an archive sense, parts of the file never make it onto the new format version ... However, Returned and Services Association chief executive David Moger, says said there were safeguards in place and the way in which they were being digitised meant they could be more "accessible".

This debate underscores some of the points canvassed recently on this list:

- if you don't destroy the hard copy, some of the cost advantages are lost;
- but some, for whatever reason, will want that anyway;
- digitisation makes the data more accessible;
- unless it is done well, evil may befall.

It is unclear from the report:

- whether the digitisation would go ahead in any case if the decision is to keep the hard copy;
- what search and discovery tools would be in place if both hard copy and digitised copies were kept available for use.

How interesting that the phrase "in an archive sense" is being used to connote rationalised management instead of heritage preservation; and depressing that the archivists are seen as possible co-conspirators in getting rid of the evidence.

2016, October 4: Digital signatures in court

From the IDM blog : Decision of the NSW Court of Appeal in the case of *Williams Group Australia Pty Ltd v Crocker* disallowing a digital signature where it was claimed the signature was applied by someone else who did not have authorisation to do so.

> A trading customer made a credit application to its supplier (Williams). The supplier required directors' personal guarantees as part of the credit application process. The credit application (including the personal guarantee document) was returned to Williams with the electronic signatures of the directors attached ... [When] the customer defaulted ... Williams looked to enforce the guarantees. One, Crocker, disputed the claim on the basis that his electronic signature had been added ... without his knowledge or authority by "an unknown person" ... There was no dispute that Crocker had accessed the system ... It was important in this case ... that the list of documents only showed that Mr Crocker's signature was applied to the credit application – there was no mention of the guarantee which accompanied it and which gave rise to his personal liability... It was accepted that Mr Crocker had not given any actual authority to the "unknown person" to add his signature in this case ... the Court found there was no ostensible authority because that would require the "principal" (Mr Crocker) to have made a representation to Williams of his authorisation of that other person to affix his signature and for Williams to have relied on that representation. The Court found there had been no representation here. Williams simply assumed that the affixation of the signature was genuine and authorised. That assumption was aided by the fact that it had been

> apparently witnessed by the office administration manager … On the face of it, this seems a harsh decision from Williams' perspective and (as it submitted) a potentially dangerous precedent in the context of the effective use of electronic signatures to facilitate transactions. The Court elected to leave that as an issue for the legislature to deal with…

2016, October 5:

<<Andrew Waugh: The summary gives an entirely misleading impression of the case. The full judgement can be found [here] …

The key point, glossed over in the summary, is that the application and guarantees were forgeries. The signature of the third director had been applied without his knowledge or authorisation by one or more of the other two directors and/or the office manager. The metadata and logs of the system were used to show that the purported signer did *not* sign the documents.

It's worth noting that the 'electronic signature' in this case appears to be a scanned copy of a hand written signature. In essence, the system here was simply using the computer to send faxes. In effect, this is no more than a modern version of the old fashioned forgery of photocopying a signature, pasting it on a document, and faxing it. I doubt if the old fashioned version would have legally bound the purported signer, there is no reason why the modern version should either.

The plaintiff argued that the third director should be bound anyway, because he explicitly or implicitly authorised the forgery by failing to change his password, or retrospectively authorised it because he had an opportunity to subsequently see that he had purportedly signed the document. These arguments failed.

Yes, this leaves open the question as to how the receiver of an electronically signed document can know that the purported signer actually did so. But this is no different to the old situation where a party receives and acts on a faxed copy of a document. People do accept faxed documents. They take a commercial risk because it is commercially convenient to do so.

The really important bit, to me, of this case is that it shows that the metadata and system logs can show the context of the signing act. And that this context can be used to retrospectively validate (or invalidate) a signature. In this case, they showed that the purported signer didn't sign the document. But they could easily show that the balance of probabilities was that purported signer did sign the document. In which case, the attempt to repudiate the signature would have failed.>>

2017, January 16: Digital Dark Age

Now, here's a topic that comes back around every few years or so (as if it's never been raised before):

> The impending digital dark age could soon be upon us. Are you ready? Is your business ready? I cannot even pretend to have the mind of Vint Cerf, a father of the Internet and Google VP, to suggest that technology is moving so fast that in the future no one will be able to access personal or business information, as it will have become obsolete – or unreadable. Mr. Cerf's solution to the 'digital dark age' of the 21st century is what he calls 'digital vellum'. He says, "The solution is to take an X-ray snapshot of the content and the application and the operating system together, with a description of the machine that it runs on, and preserve that for long periods of time. And that digital snapshot will recreate the past in the future." Source: Google's Vint Cerf Warns of 'Digital Dark Age', BBC News, Pallab Ghosh, February 13th, 2016. Fortunately, or unfortunately, none of us will be around. So, interesting topic but who cares? Well, every organization should care. And care now. The looming problem is in the form of documents and records that are ten years old or more … etc. etc. etc.

Posted on Concept Searching and reposted to IRMS site.

The photographic solution ('digital vellum') is one I keep running into at ICA trade shows in the form of a product called piql. It's stronger on "migration free storage" than findability (an issue of which they seem to be aware when I spoke to them) but it's an intriguing idea :

> This has led to the revival of a rather unexpected storage technique for digital data, namely microfilming ... Provided correct encoding schemas are used, microfilm can store both analogue representations (i.e., images) of objects as well as the digital data stream, offering the additional benefit of easy inspection and redundancy of representation forms, as it basically already includes a kind of 'migrated' analogue representation in addition to the digital object. Furthermore, the technology required to read data from a microfilm is rather simple and stable, promising readability and decodability for very long-time periods. Given the correct encoding scheme, even manual reconstruction of digital data is in principle possible. In a nutshell, binary data is encoded in a printable form, either using a textual encoding such as UUencode, or a barcode image representation. This data is then transformed into an image and stored (exposed) onto microfilm. To recover the binary data, the images one the microfilm are scanned and passed through a de-coding process, e.g., applying Optical Character Recognition (OCR) software and subsequent UUdecode, or by decoding the scanned barcode image. This results in the original binary data stream that can be used for further processing. Schilke, S.W. and Rauber, A. (2010) 'Long-term archiving of digital data on microfilm', *Int. J. Electronic Governance*, Vol. 3, No. 3, pp.237–253.

<<Lise Summers: Many thanks, Chris. You may be interested in a blog post I wrote on this topic a few years ago>>

2017, February 26: Not so confidential

Here's a brave new world I've only just come across, a kind of preview of the attention you may one day receive from Ancestry or the ADB. So far, only in America (thank goodness). It's a site called Checkmate which "compile[s] information from public records databases, social networks, and other sources to build comprehensive reports on someone." Sources searched include: online profiles, sexual offences, birth records, traffic offences, relatives, address information, arrest records, court records, phone numbers, misdemeanors, mugshots, and felonies. They assemble the results into a profile giving (inter alia) your age, location, education, likely net worth and income, and names of possible relatives – to say nothing of your criminal record if you have one. It's confirmation that they who leave the biggest footprint in the public record are those who transgress. Apparently there are other such sites.

2017, October 9: Are we losing sight of our undigitized past?

Posted on the Canadian List a few hours ago. This is one of the questions I raised in Online access to archives (and other records) in the digital age delivered at Parramatta.

- https://www.forbes.com/sites/kalevleetaru/2017/09/29/in-a-digital-world-are-we-losing-sight-of-our-undigitized-past/#6a325676cd01
- [https://specials-images.forbesimg.com/imageserve/589089299/640x434.jpg?fit=scale]<https://www.forbes.com/sites/kalevleetaru/2017/09/29/in-a-digital-world-are-we-losing-sight-of-our-undigitized-past/#6a325676cd01>
- **In A Digital World, Are We Losing Sight Of Our Undigitized Past ...**
  <https://www.forbes.com/sites/kalevleetaru/2017/09/29/in-a-digital-world-are-we-losing-sight-of-our-undigitized-past/#6a325676cd01>
  www.forbes.com

In today's interconnected always-online digital-first world, we tend to think that every piece of information in the world is instantly accessible at our behest.

<<Michael Piggott: Could not agree more with Chris and the Forbes article. Indeed have been guilty in the past of shaping funding bids ostensibly for digitization - who could be against digitization?, knowing that to prepare a collection/series for scanning, about 8 prior physical and intellectual processes were needed, not to forget arrangements for the management of the scans! Back to the bigger point, there's a parallel with what some have called the "streetlight effect", one version of which goes as follows:

A police officer sees a drunken man intently searching the ground near a lamppost and asks him the goal of his quest. The inebriate replies that he is looking for his car keys, and the officer helps for a few minutes without success then he asks whether the man is certain that he dropped the keys near the lamppost. "No," is the reply, "I lost the keys somewhere across the street." "Why look here?" asks the surprised and irritated officer. "The light is much better here," the intoxicated man responds with aplomb.
https://quoteinvestigator.com/2013/04/11/better-light/ >>

2018, January 22: … means of access … and nature of research results

<<Michael Piggott: Can anyone point me to citations recording research which has looked at the relationship between the ease of/nature of discovery and use/usability of archives (e.g. online gateways, digitized documents, rich metadata, "readability" etc) and the nature and quality of research outcomes?…>>

I have come across several papers evaluating the impact of digitization (means of access) on the quality (nature) of research. Indeed, I think I posted a link to one of them about 6 months ago.

- Posted on the Canadian List a few hours ago. This is one of the questions I raised in Online access to archives (and other records) in the digital age delivered at Parramatta.
- https://www.forbes.com/sites/kalevleetaru/2017/09/29/in-a-digital-world-are-we-losing-sight-of-our-undigitized-past/#6a325676cd01 [https://specials-images.forbesimg.com/imageserve/589089299/640x434.jpg?fit=scale]<https://www.forbes.com/sites/kalevleetaru/2017/09/29/in-a-digital-world-are-we-losing-sight-of-our-undigitized-past/#6a325676cd01> In A Digital World, Are We Losing Sight Of Our Undigitized
- …<https://www.forbes.com/sites/kalevleetaru/2017/09/29/in-a-digital-world-are-we-losing-sight-of-our-undigitized-past/#6a325676cd01> www.forbes.com
  In today's interconnected always-online digital-first world, we tend to think that every piece of information in the world is instantly accessible at our …

To which Michael himself responded with a reference to the street light effect.

> Could not agree more with Chris and the Forbes article. Indeed have been guilty in the past of shaping funding bids ostensibly for digitization – who could be against digitization?, knowing that to prepare a collection/series for scanning, about 8 prior physical and intellectual processes were needed, not to forget arrangements for the management of the scans! Back to the bigger point, there's a parallel with what some have called the "streetlight effect", one version of which goes as follows:
>
> *A police officer sees a drunken man intently searching the ground near a lamppost and asks him the goal of his quest. The inebriate replies that he is looking for his car keys, and the officer helps for a few minutes without success then he asks whether the man is certain that he dropped the keys near the lamppost. "No," is the reply, "I lost the keys somewhere across the street." "Why look here?" asks the surprised and irritated officer. "The light is much better here," the intoxicated man responds with aplomb.*
> *https://quoteinvestigator.com/2013/04/11/better-light/*

The ones that catch my attention are jeremiads that point to the danger of unintended consequences – viz. that digitization can impoverish as well as enrich research. A google search just now led me to a 2011 NSLA Report whose themes are summarized on its front cover:

> *"Material that is not digitized risks being neglected as it would not have been in the past, virtually lost to the great majority of potential users." 1 "… [the] arcane and abstract nature of digitization projects makes it difficult to present them in a way that is compelling to a non-specialist…this failure is directly responsible for the relatively poor attention these projects command in the funding world." 2 "There is no formulaic answer or single approach to achieving sustainability." 3 "…digital collections represent significant*

potential economic and social value, provided they are made accessible in the best possible way."

This looks promising but like most of the others I have seen this is opinion rather than research – very little hard data on the effects (dangers) of digitization. I would be grateful if any replies to Michael's query could be posted to the list as I am interested in this topic also.

<<Michael Piggott: Thanks Chris. Definitely would appreciate research evidence rather than gut feel. Two quick additional points ...:

I. The point in the 2011 NSLA report re material not digitized risks being neglected is just a heightened phenomenon of an old truth from the analogue world concerning unprocessed backlogs...

II. ... there's an older and clearer debate in the rare book and textual studies world, championed by such eminent scholars as G Thomas Tanselle ... (see "Not the real thing", *TLS* 24 August 2001).>>

2018, July 13: Who controls your social media footprint?

A court in Germany has ruled the parents of a deceased teenager can access her Facebook account.

> Germany's Federal Court of Justice has ruled the parents of a deceased girl can access her Facebook account, saying they had inherited the right to the social media data just like to her diary or letters ... The parents sued for access to their daughter's Facebook account after the 15-year-old died after being hit by a subway train in Berlin in 2012. They are trying to determine if it was an accident or if she took her own life ... What happens to social media accounts after a user's death is still very much a grey area, with access to the teenager's Facebook account already having been previously granted by one court before being denied by another. Last year, the BBC reported a first court in Berlin had rule in favour of the family, saying a social media account can be inherited just as letters are ... Facebook argued that opening the account would compromise the privacy of the teenager's contacts. Facebook had turned the girl's profile into a so-called "memorial page", where access to the user data is not possible although the content still exists on Facebook servers..

2019, February 13: Liability for on-line comment

The Voller Case is an action for defamation against three media organisations for allegedly defamatory comments made by trolls on a Facebook page maintained by the newspapers. The rule is, apparently, that a publisher may be liable if the offended party complains and the publisher takes no action. The troll may be liable in any case. At issue is liability if the commentary is un-monitored and no complaint is made. The case is closed and judgement is pending, the judge ruefully remarking that it's likely to be appealed however he decides.

The legal question at stake is whether the media organisations are "publishers" of comments made by third parties. The defence argues, in effect, that Facebook (and by extension other social media sites) go beyond traditional letters-to-the-editor, which are incidental to news reporting and that hosting third-party inter-action and commentary are "part and parcel" of their fundamental purpose. Restraint and/or censorship (including national firewalls, content-control, removal, blocking, and filtering) is often urged on the platforms themselves (Google, etc.) on the basis of social responsibility, a supposed obligation to filter hate-speech, "offensive" speech, cyber-bullying, forbidden fruit (sex, drugs, and satire), bomb-making, and so on. This is (supposedly) different from Internet censorship imposed for social control purposes by big brothers of one kind or another including dictatorships like North Korea, China, and too many Middle Eastern countries to name (well, let us say countries displaying a more authoritarian character than western democracies like to acknowledge). Reporters Without Borders et al. define Enemies of the internet as countries that "mark themselves out not just for their capacity to censor news and information online but also for their almost systematic repression of Internet users" and include US and UK on

that list and show Australia as being under surveillance. Curious concept, to be policing the censors.

Legal liability is another thing – in this case the liability in defamation of media users of the platforms rather than the platform owners themselves. Public perceptions on this issue are still forming. According to Wikipedia, 71% are in favour of "[Internet] censorship … in some form" while 83% see Internet access as a "basic human right" and 86% say they believe "freedom of expression should be guaranteed on the Internet"! It is possible to hold contradictory positions on this because the world is divided into two classes (those who believe in free speech and those who believe in free speech but….). Assuming Google is the publisher of this list (is it?) then does it have a liability if I defame one of you in a posting of mine - in addition to any liability I may have personally? What would be the implications of a favourable judgement in Voller for populist outbursts falling within the bounds of forbidden speech (hate/offence, vilification/denial, national security, defamation, #MeToo allegations, etc. etc.). As noted in my post of 25 January, the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 now gives the security folks (and a few more besides) almost total control over Internet surveillance.

PS Actually, the two classes into which the world is divided are: those who divide the world into two classes and those who don't.

2019, May 1: Paying for digital access

Time was, urban dwellers had their morning newspaper delivered to the front door and, in the evening, bought one of two or more "rags" to read on the way home from work. Quality journalism (always at risk) was in the hands of a cadre of professional reporters and editors and at the mercy of newspaper proprietors. News reporting on radio and subsequently on TV broadened, rather than threatened, our sources of information. When the Internet exploded the sources of news it seemed (at first) that we had good things in abundance. The "traditional" channels also went online in addition to their print and broadcast outlets and a whole lot of new players joined in who didn't have the burden of infrastructure and who could specialise their focus. But the traditional channels have struggled. An article on the scoop.co.nz site chronicles the retreat of online news behind the dreaded paywall. A table illustrates the astronomical cost that you and I would bear if we paid for our news from more than a few sources:

Annual paywall prices in Australia and New Zealand

Title	Price in NZ$
NZ Herald (premium)	$199
Newsroom Pro (premium)	$348
The National Business Review	$420
The Sydney Morning Herald & The Age (premium)	$294
The Australian (premium)	$253
The Australian Financial Review	$374
The New York Times (normal)	$271
The Telegraph	$278
Le Monde	$160

The same pressures forcing this change (with the result that sources are diminishing now rather than expanding) are forcing widespread sackings of journalists and a decline in the quality of professional reporting – hence and impoverishment of the quality of news. No, I don't believe the proliferation on non-traditional sources raises the quality of news, but I don't expect everyone to agree. I don't pay for news, so increasingly I'm being forced to go to non-traditional sites. And I bet lots of others are too. As our sources of news change, there is fertile ground for looking at that old perennial – who do I trust?

But this List is about records, not news.

Access to Government Information

Time was FOIA was supposed to guarantee free (almost free) access to almost everything. Those days are gone. We have seen that right dwindle under the assault of restrictions, appeals, delay, and pricing that puts access to anything other information about oneself out of reach for most of us. The only ones who can use it are journalists backed by media outlets and those are the users of FOIA who are most under attack. Nowadays, the media operate in an echo chamber – instead of editorial rigour and fact-checking they just mostly repeat each other's stories and use generic service reports. Meanwhile, Governments spin and distort and mislead – replacing raw information with blended concoctions meant to predigest information in ways that serve political ends. Bottom line: absent the diminishing number of professional reporters to honestly interpret and fearlessly challenge the information being shovelled out, we rely on the proliferation of "non-traditional" sources who aren't that rigorous and aren't that trustworthy. The problem is not that there aren't honest folk amongst them, the problem is that many of them have agendas and there's no easy way to separate the rogues from those who are Valiant for Truth.

Access to Government Records

Now, transpose all this into our world, the world of records and access to them. So far, our archival programmes make access available both on site and on line free. But for how much longer will access to digitised records remain in the hands of the archival institutions who still seem to be focussed on custody as the basis for archival access!. How long will it be before governments avail themselves of a business model that puts a paywall between records not in archives and public use of them? How much longer after that will paywalls for archival institutions be on the agenda? Increasingly public benefit is confronting user-pays in the world of digital access. Will we be immune? The dam will not (I suspect) be broached by the naked introduction of pay walls on the sites of government archives, but I wouldn't be surprised if developments in the library world and in non-government sites and non-traditional channels for accessing records called our commitment to free access into question. And then, just as happens now in the world of news, the role of third-parties re-using the records (or data derived therefrom) either for altruistic or nefarious purposes will come into play. Already the development of third-party re-use raises issues that we haven't even begun to deal with about the authenticity of information derived from records and then made available online (in whole, in part, or re-contextualised) by someone else.

2020, April 24: Who controls the price of admission?

Websites using .org domain names fear they could lose their web addresses as intense backlash over the domain registry's proposed sale continues. The Internet Corporation for Assigned Names and Numbers (Icann), the not-for-profit organization that coordinates the internet's domain name system, is deciding whether control of .org will be sold to a private equity firm about which little is known …

Websites using .org can be registered by anybody, but over the past decade the suffix has become the go-to domain term for not-for-profits and charities. The transfer of control of .org domains has left many concerned that a new owner could raise the price of addresses on the .org registry, making it prohibitively expensive for not-for-profits that have come to rely on its name recognition …

Icann is deciding if it will approve the sale of the domain registry to Ethos Capital, a private firm that emerged recently … Icann abruptly delayed its decision on Monday after receiving a scathing letter from the California attorney general, Xavier Becerra, on 15 April about the potential sale of .org … Because Icann is incorporated in California, Becerra is in charge of ensuring it is "living up to its commitments". It will provide an update on 4 May …

The debate has taken on new life amidst the coronavirus pandemic … In his letter to Icann, Becerra said the $300m in debt will change the relationship .org has with its sites. "If the

sale goes through and PIR's business model fails to meet expectations, it may have to make significant cuts in operations," Becerra said. "Such cuts would undoubtedly affect the stability of the .org registry."

This is of particular concern as not-for-profit sites have become more important than ever during the coronavirus pandemic, said Amy Sample Ward, CEO of the technology not-for-profit NTEN. "Most of the entities leading in data and information aggregation, scientific investigation and developments, community resourcing and response are all non-profits with .org websites," she said. "Those organizations also stand to lose a great deal if this deal proceeds."

2024, August 17: Passenger Lists/Cards

Going digital

> The days of jet-lagged travellers to Australia desperately searching for a pen to fill in an orange card are about to end ... a new pilot program for a digital incoming passenger card was announced on Friday. Tourism & Transport Forum chief executive Margy Osmond said replacing the outdated paper cards with a digital Australia Travel Declaration was a fantastic first step towards more efficient travel across the Tasman ... The pilot program will initially be for Qantas passengers arriving from New Zealand, stating later this year; But Ms Osmond said it was expected to be expanded to other airlines.

End of an era?

> Passenger arrival records can be a treasure trove of family history ... Before 1948, every passenger ship or aircraft captain provided a list of passengers on their vessel when they arrived. From 1948, air travel passengers filled in their own cards. Passenger lists on ships continued until 1965, when cards completely replaced lists for both air and sea travel. You can search these arrival records in our collection.
>
> The National Archives holds detailed passenger records for arrivals and departures at all Australian ports from 1924. This is when passenger arrivals became an Australian Government responsibility. We hold a few passenger records from before 1924, but only for ports in Western Australia, Tasmania and Queensland. Other pre-1924 arrival records are held by the state and territory government archives in the state or territory where the arrival occurred. The passenger records in our collection are held in each capital city, primarily for the ports and airports in that state or territory.

Whys and Wherefores

The cards are raw data capture from which, I imagine, the information is scanned or otherwise processed into digital format for ongoing use by Immigration, Security, and even more sinister agencies. I suspect the cards have been handed over into NAA's "collection" and the processed data eventually discarded (but I don't really know and the description doesn't say). I can vaguely remember discussions about disposal of outgoing passenger cards and arguments being run that they didn't need to be kept because most people departing eventually came back.

Once the whole process is digital, it will be interesting to see what arrangements are made for "treasure-troving" the source data. Privacy issues arise from data mining possibilities, no doubt, but the data might then be used for other third-party uses beyond family history. The Commonwealth used to have qualms about allowing third-party reuse of raw data already processed and publicised for official purposes; maybe not anymore in the era of open-ness (joke).

The information in the NAA entry about records held in State/Territory archives (not many in the ACT I suspect and not in NT either maybe) is good. Time was finding aids weren't very helpful in giving a wholistic picture of records not held. At least there's an acknowledgement of records held elsewhere if not yet about those yet to be transferred. But still very

"collection" focussed: describing what is and not what isn't; saying how the "treasures" came to be rather than the process by which the records are/were formed. Even less (alas) do we expect our archives authorities to document in the finding aids the disposal arrangements for the records they are describing.

PS I looked for "passenger" on the Library and Archives NT site but I couldn't find anything. Not surprising perhaps. They have one of the worst search pages I know. Very flat.

PPS How much better it would be if the occasional reference to other "collections" included enduring links to the relevant descriptions, links that were stable entry points for more volatile descriptive activity. A small step towards the goals of the *Modest Proposal*.

Sovereignty

2015, July 15: TPP

Getup is running an anti-TPP campaign. Aside from the broader implications of a treaty whose provisions are being negotiated without public scrutiny (but with some Wikileaks exposure apparently), the issues that may impinge most on our particular concerns seem to be in the copyright area. Archives have always had problems with copyright because we handle materials that have often been held (for copyright purposes) to be unpublished literary works. As we handle more and more digital materials it is likely (I think) that our stuff will fall more often into the same basket as digital materials handled by non-archivists. That may mean that our position becomes less anomalous (which is good) but new restrictions on use and handling based on the generic properties of digital materials may apply to us also (which could be bad). Based on past experience, we need to keep a watch on "copyright terms" and "fair dealing". Here is an extract from the Wikipedia article:

> In the US, this is likely to further entrench controversial aspects of US copyright law (such as the Digital Millennium Copyright Act) and restrict the ability of Congress to engage in domestic law reform to meet the evolving IP needs of American citizens and the innovative technology sector. Standardization of copyright provisions by other signatories would also require significant changes to other countries' copyright laws. These, according to EFF, include obligations for countries to expand copyright terms, restrict fair use, adopt criminal sanctions for copyright infringement that is done without a commercial motivation (ex. file sharing of copyrighted digital media), place greater liability on Internet intermediaries, escalate protections for digital locks and create new threats for journalists and whistleblowers (due to vague text on the misuse of trade secrets),[102] Both the copyright term expansion and the non-complaint provision previously failed to pass in Japan because they were so controversial.[132] A group of artists, archivists, academics, and activists, have joined forces in Japan to call on their negotiators to oppose requirements in the TPP that would require their country to expand their copyright scope and length to match the United States' of copyright.[132]

There is a piece about it also on the Drum. I know there's a lot to do and few people to do it but this is probably something we (the ASA) should be analysing and letting archivists in Australia know about possible implications, even if it isn't a lobbying-worthy issue for us.

2015, July 15: Data rules – OK?

Further to my TPP post this morning, Alan Kohler has some interesting comments (as always) on who has the power these days. They maybe suggest why intellectual property is such a part of TPP.

> *The 500-year reign of the bankers has come to an end. Who has replaced them? Multinational corporations, especially those that possess data, writes Alan Kohler.* In the third episode of the Wolf Hall TV series, Thomas Cromwell tells Harry Percy ... "...

believe me when I say that my banker friends and I will rip your life apart."... Five hundred years later, it's not so clear anymore who runs the world. It isn't bankers, even though they are called "too big to jail"... So maybe it's central bankers who run the world. After all, they control the price and the volume of money and banks are their puppets ... The money is printed, but it goes nowhere that matters. As Jim Grant puts it: "Central banks may propose, but the market disposes. They have created a bull market but not inflation; wealth but not growth." So the 500-year reign of the bankers has come to an end. Who has replaced them? Not sovereigns and politicians. We were reminded of that last week when an inquiry into the alleged manipulation of Australia's most important price - iron ore - was cancelled at the behest of those to be inquired into. Modern power resides in multinational corporations, especially those that possess data. In Cromwell's day, data was scratched on parchment with a quill and ink. Now it's stored by the zettabyte in the cloud. Data is the new money and vice versa. (Money is nothing but data.) Trade agreements between nations are no longer about the movement of goods and services, but the enforcement of the intellectual property and copyright of multinationals. The Investor State Dispute Settlement provisions that now exist in 3000 so-called trade deals are nothing other than states yielding their sovereignty to corporations. In part, their power comes from their mobility, combined with their roles as tax collectors and employers. Jobs and taxes are the currency of politics. But most of all it comes from the dossiers they are building on everybody. The phrase "knowledge itself is power" was first written by Sir Francis Bacon about 50 years after the death of Henry VIII. Ralph Waldo Emerson took it a step further with: "There is no knowledge that is not power." Google, Facebook, Apple and Amazon are the new age's knowledge utilities, collecting and harvesting its power.

As knowledge workers, I suppose we should take some comfort from this (if true). But somehow I don't.

2015, August 5: Right to be forgotten

Is anyone analysing and reporting back to us on the r/keeping aspects of this issue?

I don't mean just the specifics of the EU rulings and the Google campaign (tho they are important) but also on the principle itself – since there are advocates for it here in Australia and elsewhere. Even free speech advocates are puzzled it seems (those strongly against stay strongly against but those mildly against become don't knows). In order for us (r/keepers) to have a policy framework within which to focus these matters (regardless of whether we are individually pro or con) and possibly develop an advocacy posture, some questions about which I would like to see us wrestling include :

Does/should it:

- apply to records in all formats (viz. a right to have personal information deleted from some second party's electronic or paper records or databases) or only in digital?
- apply to all digital material or only to web sites (on the argument that it is only needed because of increased intrusion made possible by the web-based search engines)?
- be absolute or qualified (any personal information or only if "inaccurate, inadequate, irrelevant, or excessive")?
- apply only to profit-driven sites or also to government and business records if available on-line?
- mandate redaction only or obliteration (an access decision or an appraisal decision)?
- apply only to data we make or to any data about us?
- extend and modify existing custody and control frameworks (based on memory and access) or replace them with a new paradigm (based on privacy)?

- be reactive (a personal "right" in response to a data subject's request) or proactive (an access category governing availability of proscribed kinds of personal data)?
- if based on a privacy right, be enjoyed by corporations (who wish "inadequate" etc reportage of their activities to be forgotten) as well as by individuals?

If one political entity can mandate how data is handled within another jursdiction, doesn't this mean that any access regime accessible via the web must conform to the lowest standard (or the highest, depending on your point of view)?

It is settled that a non-government entity must conform to the laws of any jurisdiction in which it operates not just those of the jurisdiction within which it is incorporated. This enables the EU to control data handling by a US company within Europe (and China to restrict free access to information online). The quarrel that Google is having is about EU control over its operations outside Europe (as defined by domain name). The issue, of course, is whether the jurisdictional boundaries relating to operations actually apply to the Internet. If a site is accessible within the EU (regardless of domain name) the EU position seems to be that it is subject to EU laws. If the EU position is upheld, what kind of sovereign immunity prevents the EU law from applying to a government entity in (say) the US or Australia? If the EU position is not upheld, how could China prevent its citizens from acessing forbidden content?

I will be happy to receive more information from anyone who doesn't want to discuss this publicly but it would be better for us all to benefit from shared knowledge.

Might it not be a good idea for ASA to set up an on-line public issues forum to share linkages and information on this and other public issues in some kind of enduring form - as well as opinion maybe in a less durable form? Has anyone suggested establishing a public issues panel within ASA to manage and monitor such a forum. I'm sure I remember discussing this with someone (Michael Piggott? Mark Brogan? Ian Sutherland? Kylie?)

2015, November 6: Ownership of digital files (in NZ)

Apologies to those who subscribe to IDM Link. What I find interesting in this write-up is the lack of consideration given to "ownership" over the file-content. The argument seems to be that it is the digital file, whatever that means, rather than the content or the storage device that can be owned by someone. Presumably, in the case under consideration, the file was created in its entirety by security cameras at the bar, therefore "owned" by them, and purloined by the bouncer. But this write-up doesn't say if the device was taken or a copy made and seems not to care. If you are going to argue that the digital file itself is property, as distinct from the intellectual content or the device, then it seems to me that you have to consider how the "file" came into being. Suppose a digital file consists of data derived from other digital files? Under this ruling, would not the source files also be owned by someone? Suppose A creates a composite file containing the contents of other digital files (property) that had been taken without permission of the owners – B, C, and D? Would that make A's digital file, into which derived data from digital files owned by B, C, and D was incorporated stolen goods? Assuming some data on A's file was created by A, would A's digital file now be co-owned by all four of them? Would it then even be possible for E to "steal" property that had already been stolen by A in the first place?

There are two types of property : real property and personal property. Personal property can be intangible – hence copyright. It seems unproblematic to say that some kind of property right subsists in a data file. I understand the concept of physical ownership of the device and of intellectual property residing in the content. If some other kind of property right can subsist in a "digital file" and (by extension in the reasoning used by NZ Supreme Court) to a Microsoft Word document, it must be on the basis that a digital file and an MS document are tangible. But if you take an impression of a key and have a copy cut, you aren't

stealing the key. How then can you steal anything tangible if you simply make a copy of a digital file (unless you say the content is tangible)? A digital file seems a very fragile thing to given that kind of tangibility. Data is tough, but I'm not so sure about file structures.

We live in interesting and puzzling times.

> The bouncer who released footage from a Queenstown, New Zealand bar featuring English rugby player Mike Tindall, has had his conviction under the Crimes Act upheld by the Supreme Court. The court's decision is based on its finding that the digital file Mr Dixon removed from the bar constitutes property under the Crimes Act. This represents a departure from the position that has been previously thought to apply in New Zealand, which was that information and software are not property. Implications of this decision could be wide-ranging, as it may make some acts of taking information a crime, where they would not previously have been. It also may in some cases make acts a crime, which previously would only have been copyright infringement...The Court of Appeal pointed to the English criminal case of Oxford v Moss which had held that information, even confidential information, was not 'property' and...in analysing whether digital footage might be distinguished from confidential information, concluded it could not - 'bytes cannot meaningfully be distinguished from pure information'. The Supreme Court disagreed, taking the view that digital files were more than pure information and...noted that the other computer misuse offences referred to software and data and therefore a purposive construction of section 249(1)(a) suggested the reference to 'property' must include digital files.
>
> The Supreme Court also considered it was a fundamental characteristic of property that it was something capable of being owned and transferred. The digital files taken by Mr Dixon were capable of being sold and this was another indicator they constituted 'property'. It noted the Crimes Act definition of 'document' included an electronic file and surely a Microsoft Word document must be property and thus so must other forms of digital files. The Supreme Court preferred to equate digital files with software rather than information, and thus felt the way was clear to adopt those US authorities which had held software to constitute property. It decided that there was no reason not to accord digital files the same status in New Zealand for the purposes of the section 249 of the Crimes Act.
>
> So what does it all mean? The short answer is that this case does change the law in New Zealand. Digital files, and we would suggest software (by logical corollary), is now 'property' that can be 'obtained' in breach of the Crimes Act. This will make some acts a crime, that would not have previously been considered to be one...The NZ Herald has already made a possible link to whether it creates a case against the receiver of hacked information. Where in the past unless information was confidential, the taking of it (for example from an employer) could not be prohibited, this case now opens the door for the taking of non-confidential information that is in the form of a digital file, to be a crime. It also raises the question of whether acts that constitute copyright infringement, could now also be a crime.
>
> *Originally published by AJ Park Law HERE*

PS. If you are interested in this matter, have a look at these American articles (or articles on American cases) re -

- **insurance implications**
- **sales tax**
- **music**
- **problems with tangibility**

2016, May 9: 2016 Census

In my last post to the List I used the Census (Q.60 in 2011) as an example of the power to redact being vested in the data subject (co-creator). The 2016 Census (while retaining the opt-in/opt-out provision) will keep 100% of names and addresses for a longer period than usual. This has led to confused and contradictory reactions. The ABS website has a reassuring explanation -

> In recent Censuses names and addresses have been destroyed at the end of Census data processing, approximately eighteen months after the Census … For the 2016 Census, the ABS will destroy names and addresses when there is no longer any community benefit to their retention or four years after collection (i.e. August 2020), whichever is earliest.

And, in case you haven't heard already –

> The 2016 Census will be Australia's first Census where more than two thirds of Australia's population (more than 15 million people) are expected to complete the Census online … households will receive a letter from the ABS, addressed 'To the Resident', including a unique login and instructions on how to complete the Census online … Paper forms can be requested where needed and must be completed and returned in the Reply Paid envelope provided without delay.

They say the situation with what ABS calls the "Time Capsule Initiative" (what a euphemism that is for the battle to drag ABS, kicking and screaming, up to the opt-in hurdle) remains unchanged –

> Since 2001, more and more Australians have chosen to have their name identified Census information saved for future generations via the Census Time Capsule initiative, where the National Archives of Australia will hold the information securely for 99 years, before publicly releasing the information. In 2011, 60.6 per cent of respondents elected to have their name identified Census information archived for the future. This was up from 56.1 per cent in 2006 and 52.7 per cent in 2001. There are no proposed changes to the Census Time Capsule initiative for the 2016 Census.

Is the Time Capsule already held digitally at NAA or will this be the first mixed format deposit?

The Drum, meanwhile, thinks it is a big threat. The Genealogy & History News thinks it is a good thing, wrongly believing that more name-identified information will ultimately be released via the Time Capsule for research than at present. In fact, so far as I can see, nothing more will be kept for public release than before and, if the public buys the Drum's concerns, it could result in a decline in the opt-in rate for archival retention in future. Some are even arguing (urging, even) that it will lead to widespread disobedience that will affect the integrity of the Census overall.

The ABS assures us the source name-and-address identity data will be destroyed after no more than 4 years at the latest. So far so good. But is it not the case that lawful post-Census use - viz. "combining [names] with other national data sets to better inform government decisions in important areas such as health, education, infrastructure and the economy" - will create new records? What of those? Will name-and-address identity data survive as transformed data in those records? Are they Commonwealth records and will they come to NAA?

2016, May 6: Canadian court orders records destruction

From the Canadian List. Not sure if this has been noticed here.

A Canadian court has ordered the destruction of records relating to the "notorious" residential school system unless the data subjects choose otherwise. The records seem to relate only to the quasi-judicial process whereby victims obtained redress. The majority judgement, giving the victims final say over retention, is not apparently based on the argument that victims own/control the records but on a view that they are not government records (records of a government process) but rather records of an independent process and that their fate is a decision for the court to make irrespective of government policies re public records. The independent arbiter (who would have actually "created" the records in an archival sense) seems to have been one of the parties urging destruction. Confusingly, however, the judgement also says that the victims "never surrendered control of their

stories", so perhaps the court feels able to adjudicate because the records "belong" to the victims. In the particular circumstances of an independent process set up to give redress, the court seems to be arguing that information supplied by victims remains under their control - which would be an assertion of sole provenance on behalf of the data subjects rather than parallel or simultaneous multiple provenance. But surely the records in question would be from sources other than the victims themselves?

Although the review process was initiated by the Canadian Government (to be carried out by an independent authority), the court is treating the Government as an adversary in the dispute over their disposition. A minority opinion asserts that the process was part of government and that the records should be treated like any others. The majority takes refuge in an implausible argument that this is a unique case unlike any other (why would they think that?) I'm not sure of the position in Canada, but if quasi-judicial records are subject to Canadian archives law and a statutory regime exists for determining retention, it seems odd that a court would feel able to issue a ruling contrary to the provisions of statute. There is some suggestion in the reportage that they feel emboldened to do so by splitting hairs over the definition of public record (a definition that invariably invites hair-splitting if ever there was one). In any case, some useful grist here for debate about provenance, ownership, and control. Not only was destruction sought by the victims but also (predictably) by their tormentors. Fascinating.

> Documents of Residential School Abuse can be Destroyed, Court Rules : Survivors of Canada's notorious residential school system have the right to see their stories archived if they wish, but their accounts must otherwise be destroyed in 15 years, Ontario's top court ruled in a split decision Monday...At issue are documents related to compensation claims made by as many as 30,000 survivors of Indian residential schools...Compensation claimants never surrendered control of their stories, the Appeal Court said...The federal government and Truth and Reconciliation Commission fought destruction of the documents...Catholic parties argued for their destruction. "This is a once-and-for-all determination of the rights of all parties relating to these issues," the court said. "There will be no future cases like this one."...The court rejected the idea the documents were "government records" but said the material fell under the court's control. "It is critical to understand that the (independent assessment process) was not a federal government program," the Appeal Court said. "Although Canada's administrative infrastructure was required to carry out the settlement, it was vital to ensure that the court, not Canada, was in control of the process."...In a dissenting opinion, Justice Robert Sharpe said the claims documents Canada has in its possession are indeed "government records" that should not be destroyed but turned over to Library and Archives Canada subject to normal privacy safeguards and rules.

2016, May 8:

<<Joanne Evans: In my opinion the court's decision was the only one that could made in order to demonstrate that the lessons of the TRC were beginning to be learned. The confidentiality assured in the collection of testimony could not be betrayed - the survivors are co-creators of the records not mere subjects of them.

Yes I know the records are important evidence of the size, scale and far reaching impacts of the residential school system, but it is a perhaps a failure of the recordkeeping processes of the Commission that it did not make it clear to survivors at the time of giving their testimony that they would be considered a public record and end up in the government archive and eventually through the fullness of time publicly accessible.An alternate headline could have been 'Residential School survivors finally given a choice in the public archiving of their stories'.

And with that our professional challenge is to design and build recordkeeping and archival systems in which multiple rights in records can be represented and negotiated - systems which earn rather than demand trust.>>

2016, May 9:

<< confidentiality assured in the collection of testimony could not be betrayed >>

You approve of the outcome on the basis of this rationale. It is the same rationale as the opt-in-or-out choice made about Census returns. The rationale only applies if it goes beyond support for the creation/redaction-rights of the survivors and provides reasons for supporting or opposing the creation/redaction-rights of the records-makers. If they are in conflict, the rationale must then go on to explain why one set of rights prevails against the other. In the case of the Census, the records-makers (the Bureau, anyway, whose views are embodied in the Commonwealth's decision about what to do with Census returns) are in favour of redaction because they want to defend the integrity of the stats but, in this case, it appears that the records-owners (the Canadian Government) wanted the records kept. How does the court's rationale apply in other situations where confidentiality is assured for collected testimony? Conferring the power to redact goes beyond the ordinary meaning of confidentiality.

- In what circumstances (if any) does a guarantee of confidentiality not confer a power to redact on the data subject?
- What would the rationale be for distinguishing between one kind of confidentiality (that confers no power of redaction) and another (that does)?
- Is the court here actually honouring an explicit or an implied promise to the survivors?
- Did "confidentiality" mean one thing in the minds of the survivors + TRC and something different in the minds of the authorities that set up the process?
- Was the court case only about resolving muddle rather than upholding a principle?

<< the survivors are co-creators of the records not mere subjects of them.>>

I understand co-creation OK. But it can't stop there. The TRC was the record-maker and on the side of the survivors but the Canadian Government (the ambient owner of the TRA) was asserting yet another kind of co-creation. In the same way, the Commonwealth Government is a co-creator of every fonds of every Commonwealth Agency (record-owning-creation).

- Is co-creation by the survivors the same thing as co-creation by the record-makers and the Canadian Government?
- Is it one kind of relationship ("create") conferring identical rights and privileges on both/all parties in a simultaneous-multiple-provenance relationship with the records?
- Or, are "record-owning-creation" and "record-making-creation" different relationships from "testimony-giving-creation" conferring different rights and privileges on each kind of co-creator?
- What about the tormentors who were also made parties to the case, who also gave testimony to TRC, and were also parties to the reconciliation? Aren't they also testimony-giving-creators? Were they promised confidentiality?
- If so, why don't they too have creation/redaction rights and obligations like the survivors and the records-makers and the Canadian Government?
- Can it be argued that redaction rights are justified to encourage the tormentors (as well as the survivors) to participate in a TRC? If so, why haven't they been given the right to redact when the survivor chooses not to do so?

Lots of grist for the mill here, all right.

<<Joanne Evans: Yes - agree that it doesn't stop at co-creation and in moving to a participatory paradigm need to build frameworks, processes and systems that enable

rights in records to be negotiated in and through time and space. Archival and recordkeeping bureaucracies of the 19/20th centuries seem to be part of the problem in this area - so challenge is to make them part of the solution and be able to share ownership, stewardship, etc. as needed.

On the issue of the court case upholding a principle, alerted to this opinion piece today - - where it highlights that the principle in the 2006 Indian Residential Schools Settlement Agreement that "survivors should control the fate of their own stories" must be upheld.>>

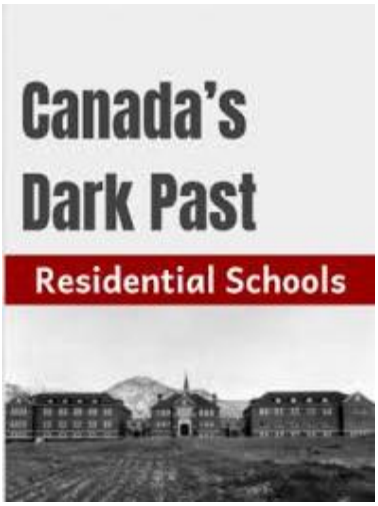
I don't wish to prolong this unnecessarily, but ....

1. I can't see how a principle is to be found in a particular Agreement, with a particular set of individuals, in a particular set of circumstances that would form a basis for redressing "the problem" in other cases. Indeed, the court stressed that in their view this case was unique. On that basis, the judgement is unhelpful in rethinking the paradigm.
2. Arguing that the judgement simply enforces the Agreement begs the question. All my probing about the rationale for the judgement is simply transformed into questions about the rationale for making the Agreement.

2016, August 4: Canadian residential schools records

For years now, Canada has been wrestling with a truth and reconciliation process involving abuses at residential schools for First Nation peoples. Fascinating r/keeping issues have arisen:

- how records of the operation of the system created by government agencies, churches and others have been managed over the years (control, appraisal, access, concealment);
- how records (judicial and administrative) created as part of early attempts at reconciliation and settlement have been handled and what should happen to them now;
- how records of the latest (and final) settlement process, involving formal arrangements for claimants to control the disposition of their own testimony, should now be handled.



Canadian courts are even now considering disputes over whether the testimony of claimants given as part of the latest and earlier settlement processes are (or are not) "government records" and who has the right of final disposition.

- Whose records are they?
- Can claimants decide on whether or not they should be destroyed or kept?

- Can the government be trusted as custodian of the ones that survive?
- Who decides on the disposition of testimony from those who have died before being consulted?
- Should the decision be left to a court?

The Canadian List gives a link to an article on the disposition of the records, focussing on whether the government can rightly destroy records of claimants who have died and can't decide for themselves. Well worth reading.

2017, October 9: Canadian Supreme Court Ruling on IAP testimony records

<<Joanne Evans: Unanimous decision from the Canadian Supreme Court to uphold the ruling that survivors have the say over whether their testimony in the Independent Assessment Process is transferred to an archive or destroyed after 15 years, given the assurances of confidentiality that were part of the process ... On the same day settlement of class action for Sixties Scoop also announced ... Let's hope that getting the recordkeeping right is a priority, with appropriate models for consent to archive designed into the redress processes. Also a challenge for us here in Australia.>>

Interesting parallels with the Boston College case. In that case also recollections after the event were obtained on a promise of confidentiality. In the Canadian case, the survivors were relying on a promise from the Government made as part of a process to repair the damage and the courts are effectively saying that the promise must be kept. The Boston College tapes were obtained by archivist/researchers seeking to fill out the historical record but their promises had no Government or statutory basis and American courts have concluded there is a higher public interest in law enforcement. As Joanne says, getting the r/keeping right is paramount (and not always easy).

2017, November 15: Expungement

ABC News has a story about complications arising from the fact that, until about 20 years ago, Children's Courts charged neglected and abused children under a criminal process with the result that they acquired criminal records. The story refers to calls for these records to be "expunged". This got me thinking about what that actually means in Australia –

- simply nullifying the record of an arrest, prosecution, or conviction ("spent convictions") so that you no longer have "a criminal record" in the technical sense;
- sealing it from some uses so that it can no longer be routinely accessed except in specified extraordinary circumstances; or
- actually destroying the record (tossing it) so that it no longer exists?

Criminal Record Check

Not released "straight away"

Presumably, if you are going to seal a record for all uses in perpetuity, you might as well destroy it (if you really mean what you say); but I suppose maintaining a sealed record

always allows for a subsequent change of heart. Does anyone know what the expungement process is in Australia? Does it provide for data-subject-initiated deletion from the official record? If records are sealed, does that last forever or can they become available for historical research later on? I imagine it varies from jurisdiction to jurisdiction.

An outline of the US situation is given on the Marshall Project site :

> Expungements are a legal process that can clear arrests, charges and minor convictions from someone's record ... Though "expunge" and "seal" are often used interchangeably, expungement means to erase such documents while "sealing" simply means they are no longer public record. The law on who is eligible for either varies state by state, and there is no encompassing federal law on expunging adult crimes ... If your record is approved for expungement, the court agrees to toss out its records. But what about Google? News archives? Mugshots.com? "It's impossible to expunge information in this cyber-age," said James Jacobs, a law professor at New York University and author of "The Eternal Criminal Record." "You can have an official expungement, but to actually erase the events from history, I don't think so."

On the latter point, there is an interesting article in the New York Times from ten years ago which argues, inter alia –

> In 41 states, people accused or convicted of crimes have the legal right to rewrite history. They can have their criminal records expunged, and in theory that means that all traces of their encounters with the justice system will disappear. But enormous commercial databases are fast undoing the societal bargain of expungement, one that used to give people who had committed minor crimes a clean slate and a fresh start...But real expungement is becoming significantly harder to accomplish in the electronic age. Records once held only in paper form by law enforcement agencies, courts and corrections departments are now routinely digitized and sold in bulk to the private sector. Some commercial databases now contain more than 100 million criminal records. They are updated only fitfully, and expunged records now often turn up in criminal background checks ordered by employers and landlords...Lida Rodriguez-Taseff, a lawyer in Miami, tells her clients that expungement is a waste of time. "To tell someone their record is gone is essentially to lie to them," Ms. Rodriguez-Taseff said. "In an electronic age, people should understand that once they have been convicted or arrested that will never go away."...

I wonder if anything has changed over there in the intervening ten years? I can remember being involved in this debate when the expungement/correction provisions of the C'wealth FOI and Archives Bills were being drafted. An argument against providing data subjects with a discretion to have their records actually deleted from the official record (as distinct from a right of correction) was that knowledge of the crime, arrest, prosecution, and/or conviction may still be about in other information sources. Without a controlled official record to state authoritatively what occurred, speculation based on these other sources of information may be more damaging to a data subject than the continued existence of the official record.

2017, November 20:

<<Andrew Waugh: A number of years ago, I was working with a minority community that had been very harshly used by mainstream Australian society ... An older member of the community, who had first hand experience of the harsh treatment and who would have been the subject of some of the records, wanted the records destroyed. A younger member, a future leader of the community if I was any judge, explained to me that the older member felt ashamed by what had happened, and didn't want their children or family to know specifically what had happened to them, or to read the judgments on them in the records. The records still hurt. The younger member said that he wanted the records to be preserved. If they were destroyed how was he, or the community, to know their history? ... We can provide ideas on the issues that could be considered. We might represent the interests of the broader community, such as the need for the broader community to understand its history (although, remember, this

broader community was the one that treated the minority community so badly). I do not believe we should make the final decision.>>

What is "this type of record"?

At its broadest, it could be any record containing information about any data subject – an individual, a group or community, a corporation. Should all data subjects have the final say? If not, in what circumstances –when they've been harshly treated, when they are worthy, when they are unworthy (e.g. criminals) but entitled to be forgotten anyway? If the archivist is excluded when the community is divided, what is the process for resolving the division? Isn't that when an umpire is needed? If the rationale is that the data subject has a better claim than anyone else to decide, then – in Andrew's example – it would seem that the older member's will (the one who was involved in the action) should prevail over the younger member's will (the one who wants a memory preserved).

Whose records are they?

As Andrew indicates, we cannot assume that record subjects, their family, and their community will be of one mind but he seems to be suggesting we should step back and let them fight it out. But if a role is allowed to the younger member who wants to know his/her history, why not (as Andrew suggests) allow for the interest of the broader community in keeping alive a memory of the past? Doesn't mainstream Australia, which treated this community harshly, have a right to regard the records as part of their history also? Aren't the records "about" us as much as they are about the victims of harsh treatment?

Should decisions (whoever makes them) be systematic or ad hoc?

However chaotic and incoherent our appraisal policies/practices are in fact, we archivists like to believe we are following a consistent, well informed approach which produces consistent and defendable outcomes across a variety of record types and situations. This is largely a delusion on our part, because the reality is that god-archivists keep on making ad hoc decisions all the time without submitting ourselves to standards that ensure predictable outcomes or enable our decision-making to be held to account (witness Heiner). But the aspiration to ensure predictable and consistent outcomes (regardless of who has the last word) is a laudable one if this community's records are to be treated like identical records from other communities. Otherwise each outcome will be different – decided solely on the voices, case by case. This is OK if we decide that each affected community's will is paramount but that would, in itself, be a statement of appraisal policy. If competing wishes are in play, however, (as Andrew indicates) and the conflict cannot be resolved by agreement, then some process is needed, involving articulated appraisal standards, policies, and principles. [In fairness, I should say that when I was with N/A Archives NZ, I was astonished at how scrupulous they were about documenting appraisal decisions, appealing to precedent, and filing written justification for their decisions – but, in my experience, that was an exception that proved the rule.]

What is the role of the archivist?

We get away with being god-archivists making ad hoc decisions because most of the time no one cares much and they are happy for us to take that role, until the proverbial hits the you-know-what. We are happy to accept the responsibility because it is a lot less troublesome than undertaking appraisal under a regime which tests the outcome of our decision-making against pre-set requirements and failure standards. If things get rough, we set up consultation mechanisms in which interested parties (who haven't a clue about the process – only a set of vested interests and narrow enthusiasms for records that pique their interest) help us make our ad hoc decisions. In a well-regulated appraisal regime neither the archivist nor an interested party would have the last word. We would all be involved in working through settled policies and procedures – however much they might be contested during their development.

Conclusion

In short, I don't want to see the archivist **or** the interested parties shut out or given unfettered discretion. As I have been arguing for decades, I am nervous when a decision-maker – whoever it may be – simply gives a thumbs up or down without having to justify that decision. Particularly where the outcome is likely to be contentious, what is needed is a process guided by an articulated road-map saying how the decision is made, by whom, and on what basis. Such a road- map, might, of course, determine that "record subjects, their family, and their community … make decisions about these records" - whatever "these records" turn out to be, and defining that would an element of the road-map. I'm told that systematic, well-documented processes are too hard, too time-consuming. All I can say is that, in my experience, ad hoccery – blundering about in the dark – is even harder and more time-consuming in the long run.

2018, May 17: Redaction of birth certificates

<<Joanna Sassoon: An article showing what is going on in the wild west,

> A West Australian bureaucrat has deemed the use of the term "Aboriginal" may be regarded as offensive and exercised a little-known power to redact it from birth, death and marriage certificates.

from the most trustworthy of sources, the West Australian>>

2018, May 18:

If true, the story raises an interesting (over-used word) issue that is too seldom discussed and may (I suspect) become hotter –viz. the bowdlerisation of records to remove "offensive" matter. Two strands-

- Avoid including "*offensive*" material in the first place (a records-making discipline that goes on all the time);
- Remove "*offensive*" matter afterwards (a records-keeping issue that tracks into history wars and the struggle for memory).

I italicize "offensive" because it is ideological and of no fixed meaning – what offends you may not offend me and what offends you today may not tomorrow. In the 19th century, the words "cretin", "moron", and "idiot" were legally defined terms; now they are "offensive" and merely terms of gratuitous abuse.

<<a document which may have historical detail like Aboriginality removed without their knowledge>>

Should redactions take place w/o a trace? Here, apparently, it is the issued copy (not the record itself) that is being redacted of information that remains unaltered on the face of the record itself. If the "offensive" term were removed from the original, there would be a case for leaving behind a trace or stump showing that it had been altered, by whom, when, and for what reason. But here issuing a "true" copy is in effect a fresh transaction, not the registration of a birth (say) but the subsequent release of information based on that registration. It's not altering THE record, it's exercising a discretion about how much of the record to release. No different to any other redaction or limits on how much of the content you can view in the search room. The Registrar couldn't be expected to say in each case that the record had been redacted to remove the word "Aboriginal" – that would defeat the purpose.

<<it was bizarre that the registrar of Births, Deaths and Marriages was determining what people could know about their ancestors>>

This makes it sound like the Registrar is exercising an unfettered discretion. If so, bad idea. Especially with access to information. As we know, there should be an access policy – at least guidelines or standards – which are known, which are binding on the Registrar, and

under which particular decisions can be appealed. At the very least, I would say that the "little-known" power should be made more widely known by

- advising all applicants that the copy they receive may not be a complete copy of the registration; and
- advising those applicants who receive a redacted copy that it has been redacted (w/o saying why).

No reason then for shock, horror, and dismay; though there may still be grounds for opposing that policy and urging it be dropped.

<<the registrar is tampering with history. "He's making, if you like, fake histories">>

I don't like. That's far-fetched. At worst, he's behaving like unreconstructed bureaucrats did before the age of accountability.

<<Andrew Waugh: ... It appears that the WA registrar has got their story a little more together: Essentially, some birth certificates included terms that would be considered offensive today, so the BDM instituted a blanket policy that *all* racially based descriptions would be removed ...

What sort of fool, in 2018, institutes a policy that implies that it is offensive to call someone 'aboriginal'? To answer my rhetorical question: the sort of fool that doesn't think about the implications of their policy, particularly to a group of people that has been subject to state surveillance, control, and violence. Personally, my view is that the person who made this decision is likely to believe, deep down, that it is, indeed, offensive to call someone an 'aboriginal'. In the original ABC report, they reported a claim by the Registrar that district registrars entered such details from "personal observations that had no basis in fact". This is almost certainly a serious distortion of history with the effect of whitewashing the State's treatment of the indigenous people. Indigenous people were very highly regulated in that period, and the underlying acts and regulations would have prescribed precisely when a person was considered 'aboriginal'. The district registrars would have simply been applying these definitions. So the details in the registration would, almost certainly, have been a factual representation of whether the State considered the baby aboriginal. To claim that this was a personal view hides the explicit State framework in which this view was formed.

A birth certificate is a legal document, and it is a fundamental responsibility of the Registrar to certify that a copy of the certificate is accurate. This is the context of the quoted section of the Act - it allows the registrar to state that the copy is accurate, while actually not making an accurate copy. But it's not like the person registering the birth would be scattering random four letter words over the registration. I'd note that while the omitted words may or may not be offensive to the person receiving the copy, it was certainly embarrassing to BDM that their officers once considered the use of these terms appropriate.

The fact that the registrar could redact the birth certificate without any indication on the copy raises the question about the accuracy of all copies. What else could the registrar consider offensive and suppress? From a recordkeeping perspective the *only* valid course, IMHO, is to clearly indicate that information has been redacted, why, and who made the decision. And then to provide a *free* method of obtaining an unredacted copy if necessary.

Reading between the lines it appears that BDM had several attempts to get a legal basis for their actions. It appears that they originally relied on the clause allowing 'offensive' words to be redacted. Perhaps someone thought through the implications of that. They then appear to have gone to the Crown Solicitor who has apparently given a opinion that a 'true and accurate' copy of a register only needs to include information explicitly required by the contemporary Acts or Regulations. In this case, information about race was not required to be entered, so it is ok to remove it from copies (or, indeed, the originals).

In my view, this opinion is alarming. It would appear to give the registrar (and anyone else) carte blanche to redact public records on the grounds that the information redacted was not legally required to be there. FOI anyone?>>

Andrew says

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Report says

In a statement on Thursday, the WA registrar of births, deaths and marriages, Brett Burns … said that there had never been a legal requirement in WA to include a person's race on their birth certificate, because "a government official simply could not tell from looking at someone what nationality they were … That has prompted the removal of all references to race, which were never required to be included in the first place, from the registry's records."

As Andrew points out, not giving access and using, as your rationale, that there was no statutory requirement to collect the information in the first place, while it might be germane to a privacy case, has no place in an access regime.

I don't know what the situation is in the West, but in every other jurisdiction in which I've been involved in drafting Archives and FOI laws, there has been a "problems" basket – e.g. vice-regal records, statistician's records, court records, probate records, intelligence records, parliamentary records, military records, police records, etc. etc. etc.) … always the same .. always predictable. "We're special, we don't fit, we must be exempt." What I came to refer to as the *registration records* (births, deaths, marriages, land title, copyright, patents, trademarks, licencing and vehicles, businesses and providers, products, etc. etc. etc.) is a bundle in that basket. They have a case for some kind of special treatment under access laws, but not necessarily total exemption. Unlike most other agencies recordkeeping doesn't just support their core business, their core business is recordkeeping. But their approach was always the same old whine – "unthinkable, we must be completely excluded, from everything" (see Note below). They just didn't want to think about it, so they didn't – unless forced to. The fight resolved itself in different ways in different jurisdictions. If you exclude them totally from the Archives/FOIA regime then the principles underlying public access (expressed in FOIA and Archives laws) don't apply and they go on doing what they please and exercising unfettered discretions (they don't see it that way, they think they're carrying out their statutory duties). Once granted the immunity they ask for, they become psychologically less likely to consider the possibility of change, even if it isn't forced on them. Again, they will argue that the terms on which the public has access to the information they control is regulated by statute, but we see here what the consequences are – inappropriately technical application of legal quibbles, not an access regime at all, and applied by whim and un-appealable whimsy.

Back in the day, we didn't have Information Commissioners. I would have supposed that one role for such an official should be to identify and sort out such anomalies and anachronisms. The registrars (some of them) were in my experience likable chaps (they were almost all chaps in my time) but very likely to be calcified in devotion to their legislation and likely to institute implacable and inappropriate policies. I had hoped things had changed – for the better.

Note: "*… unthinkable, we must be completely excluded, from everything*": It was around this time that I developed my own private test of intelligence. You're dealing with

intelligence when, if you challenge their assumptions, they recalibrate. If they just become even more abstruse, you're dealing with stupidity.

2019, May 2: Whose data is it?

<<Andrew Waugh: For over a decade the Queensland government funded farm lobby AgForce to undertake programs to improve farm practices to reduce sediment going out to the Great Barrier Reef. Last year the Queensland audit office found that the success of this program could not be evaluated because AgForce refused to hand over any of the data that showed whether farm practices had actually improved. The reason? The privacy of graziers and grain growers. The Queensland government is passing a law on run-off, and it included a clause to force AgForce to hand over the data. AgForce's response has been to destroy the data.>>

Loads of r/keeping issues here. The "immense and far-reaching decision" to destroy the data was prompted, according to AgForce, to forestall impending legislation enabling the Government to get at the data.

- **Is legislation enabling government to obtain access to "private" records outrageous?** It may be, but it is not unprecedented. Tax laws, criminal investigations, sex offences, security legislation and lots more (federal, state, and municipal) enable governments to snoop into your records – to say nothing of your online data and on seized PCs. So, it may not be right but it's not without precedent.
- **Is destruction the way to protect privacy?** Obviously not, they are two different issues but many privacy advocates think it is. And the privacy principles limit use of personal information to the purpose for which it was gathered. So, it might be argued, what is the point of keeping it if it can't be used?
- **Is the data a public record anyway?** That will depend on the nature of the agreement between AgForce and the Qld Government outlining any obligations AgForce must comply with as a condition of receiving the grants. One assumes, from the tone of the article, that the grants were not made conditional upon Govt having access to the data (otherwise why have new legislation?). It would be usual, however, for a body in receipt of Govt funding to be required to keep records for inspection purely as evidence of any investigation (such as the Auditor's) of how taxpayers' money is being spent.
- **What is the Auditor's jurisdiction?** Did he ask AgForce for access as a favour or did he feel that he had jurisdiction over the records? I haven't read the Qld Audit Act but I assume that destroying records for the explicit purpose of denying the Auditor access to material to which he has a statutory entitlement carries severe penalties.
- **Is AgForce a Contractor?** The article states that the "best management practices program" is a "government program" administered by AgForce. That makes AgForce more than an "industry group". Rather, it is a contractor undertaking to carry out a government program (like 51ealized5151 prisons, etc.). The expenditure of funds is not then wholly at the discretion of the contractor and is auditable. We know that the r/keeping provisions of such contractual arrangements are often shaky but, even if we assume that the contract in this case does not explicitly establish government control over the records, at least it illustrates (yet again) that such outsourcing arrangements must be carefully crafted in the first place.

2023, September 7: Special access, privacy, and indigenous records

When we were drafting the Bill for the *Archives Act* (C'wealth), cognate with the Bill for the *Freedom of Information Act*, I tried (with little success) to get others involved in the policy process to understand and accept the defining difference between **FOI access** (given to a single applicant upon request w/o establishing a right of access for

anyone else) and **archival access** ("publicly available" under s.31 to all in advance of any request). The difference wasn't denied, but no one seemed to think it important (certainly not the FOI zealots). The basic principle was that archival access was available in the "open access period" subject to exemptions (knowable and specified) – viz. the "exempt records" (s.33). Pre-privacy, the exemptions mostly aligned with the FOI exemptions because we didn't want to create a possibility that, after thirty years, archival access would be more restrictive than access available under FOI. On the Senate Committee investigating both Bills, Senator Gareth Evans found this highly risible. Since that drafting phase a number exceptions (as distinct from exemptions) such as security and census have been introduced.

The *Archives Bill* also included (s.56) the concepts of

> **accelerated access:** (general release before thirty years), and
>
> **special access**: access to closed records (exempt records) withheld from general release but made available to some but not all at the discretion of the Archives.

Special access was the pet of Thea Exley's (senior Archives staff). It gave Archives a discretion based on special circumstances. I was never convinced of the need for it. The closed period (conceptually) did not preclude the Commonwealth from giving access to persons at any time for any reason it darn well pleased. Special access for an individual could be handled under FOI and special access for a class of persons could be at an agency's discretion. The chief argument for it was to provide privileged access to closed records in the open period but it all became mixed up with the idea that records in Archives' possession (as distinct from those in the open access period regardless of custody) needed different access arrangements. The Commonwealth access regime applies regardless of custody but the diehards had difficulty accepting the implications of this. In the final drafting (after my time, I think) special access became bureaucratised – ministerial discretion, arrangements approved by PM, specified in regulations, in writing, made available to the Council.

> ***56(2)*** *The Minister or a person authorised by the Minister may, in accordance with arrangements approved by the Prime Minister, cause Commonwealth records to be made available to a person in such circumstances as are specified in the regulations notwithstanding that the Commonwealth records concerned are not otherwise available for public access under this Act.*
> ***56(4)*** *An arrangement approved by the Prime Minister under subsection (2) shall be recorded in writing, and the Minister shall cause a copy of the arrangement to be made available to the Council.*

None of it necessary for granting of access apart from the Act (in my view). The crucial point is that in its original conception special access was seen as a privilege outside of public access and not as a restriction.

At the recent ASA Conference, we saw two examples of restricted access:

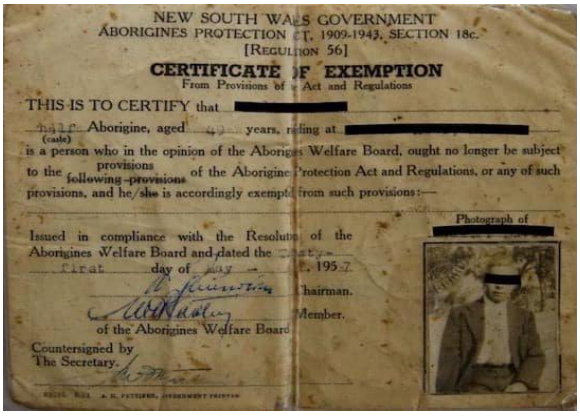
> NFSA's involvement with the Strehlow Collection which is subject to sensitivities around access to material dealing with secret business. These were arguably never public records, and are, in any case, now provided for legislatively so access is determined by the owners – effectively the Research Centre Board.
>
> Records of the NSW Aborigines Protection Board. These were retained under State control after 1967 whereas similar records (e.g. from Victoria) were transferred to C'wealth control and became Commonwealth records. The NSW APB records are presumably State records under the NSW Act, being a case where records did not follow function.

The NSW APB records along with "the Chief Secretary records relating to Aboriginal affairs") spanning the period from 1890 to 1969 appear to be managed under an access

regime administered by a government agency (the Family Records Service) which provides special access rather than public access.

> *Due to the personal and sensitive nature of information contained in these records, many of the records are closed to public access.*

Aboriginal Protection



Certificate of Exemption

The whole purpose of the Family Records Service, it appears, is "to help Aboriginal people in New South Wales to access records pertaining to themselves", people described at the Conference as "survivors and their descendants". This agency's purpose could also be described, derogatively, as hindering access by anyone else. What I couldn't find online was an indication of when these records might be made available for research without restriction under public access rules (i.e. for those who are **not** "survivors [or] their descendants"). It's the same question that arises with privacy. When does privacy expire? Is there a right of privacy for the dead? When do records subject to privacy restrictions become available for public access?

Ask a Librarian

AHWA "manages access"

In this case, however, the issue is complicated by notions of "sovereignty", very much on display at the Conference, which (on one point of view) disrupt - deliberately so - the "colonising" imperium of White access rules. It might (I don't know) be that Aboriginal ideas about access are timeless whereas White ideas are timebound, making something like a thirty year rule meaningless. Ultimately, these notions are a parallel provenance issue. But they go beyond merely attributing multiplicity in creation to the consequent issue of control. Does parallel provenance applied to Aboriginal records (however conceived) imply joint control over access? Or, are the access restrictions based on consideration for Aboriginal sensitivities rather than a recognition of authority. Where is the control located? Are the sensitivities individual, familial, or collective (i.e. racial)? Does it imply joint control over custody or disposal as well? In

NSW, do the same principles apply to records dealing with Aborigines which are **not** those of the APB or the Chief Secretary between 1890 and 1969?

Is Aboriginal sovereignty in fact a denial rather than an affirmation of parallel provenance and an assertion that it annihilates the access, custody, control rights of the White co-creators, temporarily or in perpetuity? The NSW arrangements appear to fit within the apparatus of Crown control over access to its own records but there are hints that some of those involved have wider views on this question and that some even feel there is no issue at all because it is already resolved in favour of Aboriginal sovereignty. But, if so, I can't find it thus openly set down anywhere (it was presented at Conference as an accomplished fact). The rationale may, of course, be set out somewhere that I am just not aware of. Apparently, the next Conference will be about access and it might be useful to have a session on this and the extent to which any principle(s) regarded as settled in one jurisdiction is/are applied in the others.

PS. A frequently heard complaint is that agencies lose interest in records once they are transferred. The archives' ambition to become responsible for administration of access (in my view) exacerbates this. Leaving responsibility for access administration with agencies subject to rules administered by the archives authority (as we tried to do with the NSW Act), including access to historical records inherited by them functionally if not physically, would raise their level of interest considerably. And, yes, someone (probably the archives authority) would have to assume responsibility for administering access over functional orphans but these wouldn't be so very many (What, if anything, is a function? after all). Setting up a system for assigning historical functional responsibility to current agencies would be very appealing to a functions geek like me.

PPS. Happily, as a retiree, I no longer have to deal with these issues. I can simply sit back and ask difficult questions.

<<Andrew Waugh: Just today, the Guardian reports the results of a ground penetration survey at an Aboriginal Protection Board run home in NSW that identifies potential grave sites ... It might be that NSW had good reason not to pass the records of the Protection Board across to the Commonwealth in 1967. Further, I'd note that limiting access to records to survivors and descendents makes it difficult to get an overarching view of Protection Board actions over time, even for the indigenous community. You can only look at the records through the pinhole of your own family, and it would be difficult to determine if what happened to your family was part of a policy (official or unofficial) because you can't easily compare it with what happened to others. But I would think that indigenous sovereignty over indigenous records precisely means indigenous control over access; how can control ultimately be shared?>>

Power without responsibility
– the prerogative of the harlot throughout the Ages

FOI Failings

2015, August 31: FOI use and abuse

Fascinating review of FOI in the *Conversation* :

We got an FOI request from big tobacco

This article outlines objections raised in the UK to providing publicly funded research data to odious applicants with "nefarious" purposes. These reasons include:

- multinationals aren't us (we the people),
- subjects of the research were promised confidentiality,
- the work involved in meeting the request was too onerous,
- the applicants' intentions aren't honourable.

Eventually a public outcry (apparently) shamed the applicants (Phillip Morris) into withdrawing. But any of these reasons could be used against applicants that the author of the article would (I suppose) regard as more worthy. This is pointed out in another article–

Tobacco companies should be free to use freedom of information laws: even if we don't like it

This article deals with a similar case in Victoria involving BAT. It takes a somewhat legalistic view but makes the obvious point that if any discretion is given concerning applicants' motives it opens a door to frustrate the larger purposes of FOIA. It offers countervailing grounds for refusal if the applicants' use could frustrate the work of the data-gatherer but I fail to see how research data of the kind sought in the UK case could not be sanitised to prevent name-identification so that the statistical data (which is presumably what the applicant really wanted) could be released without breaching confidentiality. An argument that research subjects can be given undertakings restricting the use of the statistical compilations extracted from their responses raises more troubling questions. Data subjects might well want for various reasons (cultural, moral, political, etc.) to keep control over the use made of data they provide but should that be given to them?

2015, October 9: Will PM Turnbull's emails be available – like next week?

<<Anne Picot: For those of us who followed/are following the continuing scandal around Hilary Clinton's use of a private email service, have a look at the report of how our allegedly tech-savy PM is managing his "routine" government email communications.

So far there has been no change in the practice or policy of hostility to FOI for which the Abbott government was notable in the new Turnbull government. No funding has been restored to the function, no new Commissioners have been appointed and the A-G has not resiled from the changes on administrative arrangement which put him in charge of various aspects of FOI.

None of this augurs well for public access to the PM's communications nor for accountability in general. Dismayed but not surprised...

> "The Australian reported today that Turnbull's office had confirmed he had been using a private server for his emails during his time as communications minister, and continued to use the server as prime minister. His office said the Prime Minister did not use the private email for classified emails, as that would be in breach of security rules, but most daily non-classified email communication was made using Turnbull's private email address.
>
> Leaving aside the security of having the elected leader of the government running his own email server for government-related emails, Turnbull taking responsibility of managing his email server from the public service presents a greater issue about transparency in government.
>
> The Prime Minister's Office has stated that it believes that all communications or records of a minister related to his or her duties are "potentially" subject to freedom of information laws regardless of whether that communication is using a private service, but this has yet to be tested by a freedom of information request -- which, as Crikey has already reported, the government is currently attempting to make much harder to do."**>>**

<<Adrian Cunningham: Yes indeed Anne - and unlike the US where the Federal Records Act has some clout, the Commonwealth Archives Act is not very helpful here. This is because the Act defines Commonwealth records as records owned by the Commonwealth. For emails, if they sit on a Commonwealth owned server they are Commonwealth records, but if they sit on Gmail (which the Commonwealth does not

own) then legally the NAA has no comeback. Morally and ethically there may be a case for NAA to intervene, but unlike other records laws in the Australian states/territories and NZ there is no legal obligation on officials to make and keep proper records of their official activities.

And as for how FOI has been nobbled by the Federal Govt - that is an even more scandalous story!>>

In the good old days, Ministers conducted official business in four ways (broadly speaking):

- **"Ministerials"**: correspondence referred to his/her Department by the Minister (and/or his/her "private" staff who might be, often were, public servants seconded to the Minister's Office). The Department would draft a reply and send it back for signature. A file copy of the sent reply (which was sometimes but not often changed in the Minister's office) might be kept in the Minister's Office or sent back to the Department. In any case a copy of the draft for signature was kept in official files of the Department. Departments tried to ensure the Departmental file had a copy of what was sent (if altered) but could not always persuade their Minister to conform.
- **"Official Filing held in the Minister's Office"**: This was correspondence and other records made and kept by the Minister and his staff - usually in his Parliamentary Office but also (rarely) in the electorate office of which the Department might be officially unaware – e.g. the "Harris Letter" given out by Treasurer Cairns during the Loans Affair. This stuff might (or might not) be kept separately and some diligent ministers sent it to the Department upon leaving office.
- **"Private"**: This could be anything that the Minister chose to keep in his/her records pertaining to official business (however defined - see previous post re difficulties in doing that). This could include correspondence whose subject matter drifted to and fro between family barbeques and commentary on yesterday's Cabinet meeting. The best one I saw was Billy Hughes inviting S M Bruce to join the Cabinet – scrawled note on PM's notepaper reading "Won't you come into my parlour, said the spider to the fly?"
- **"Electorate"**: Like every parliamentarian, Ministers deal with constituency matters. It can be almost impossible to distinguish sometimes between the two hats (local MP vs Minister) when dealing with some constituents. Your MP happens to be Minister of Defence and Member for the location of a munitions factory. You write to him asking him to use his influence to meet constituency pressure to have the factory relocated. Some Ministers also filed here correspondence with "ordinary citizens" who aren't constituents. Good ministers kept them separate but many didn't.

I think this is akin to the Clinton/Turnbull sagas. It is the nature of the record (the function and purpose behind its creation and use) rather than the location of and control over the registration and filing mechanism that is most important. Of course, I accept that the analogy is not perfect and that the parallel between paper filing systems located for convenience in one physical location and control over email servers which can be anywhere is not a perfect one. There were always rules about how Ministers maintained some records of official business - handling of Cabinet papers, for example. Back then, Cabinet papers apart, a good deal was left to Ministerial discretion but I have no problem with tightening up r/keeping rules for them now. But if you think having rules about who owns which server is the beginning and end of the problem you are mistaken.

PS The *Archives Act* uses a property test (as I've explained before) because of the constitutional requirement to obtain property "on just terms" (cf *The Castle*). Many of the Act's provisions assert what are essentially property rights over records. To assert such

rights over material more broadly than over property of the Crown would, it was argued, have been unconstitutional and invite a High Court challenge.

<<Adrian Cunningham: The property based definition of Commonwealth record may indeed have sound Constitutional foundations – my point was that in the absence of any legal requirement for officials to capture the records of their official activities in ways that grant the Commonwealth ownership of those records, then people cannot look to the Archives Act as a way of getting Malcolm Turnbull to do the right thing. Rules about who owns which server are not the beginning and end of the problem – but they are part of the landscape here that people need to appreciate.>>

Appreciating that, how could ownership of the server assist when enforcing a statutory requirement to make full and accurate records? "*Please sir, I made full and accurate records, here they are in my g-mail account*" (the Hillary defence). "*Oh, I wasn't supposed to use a private account? Where does it say that?*" It is the r/keeping rules around the manner in which official records are made and kept rather than ownership of the system that matters. I've always liked "full and accurate" (full marks to Harry Nunn for that one) but that's not the beginning and the end of it either.

2015, October 10:

<<Adrian Cunningham: Getting back to Malcolm Turnbull, the media is saying that the official emails he sent and received from his private account are subject to FOI. If that is true then ownership is clearly not a barrier from an FOI perspective. It only seems to be an issue for the Archives Act.

And on the Constitutional aspects of that law, I would like to see the legal definition of Commonwealth record changed to be consistent with the Qld Public Records Act definition, which says that a public record is any information created or received on the conduct of official business.

Taking up The Castle analogy, if someone then wanted to challenge that definition in the High Court on an ownership argument, I would love to see them try. Again, using the Castle analogy I think the High Court would pick up on the 'vibe' that any information created using public money and in the name of governing the nation should rightly belong to the nation.

Of course I may be totally wrong about this - I am anything but an expert in Constitutional law - but either way a High Court case would draw useful public attention to the issue and give us some legal clarity in place of all we can do now, which is speculate.>>

<<Andrew Waugh: Interestingly, in Victoria, I am fairly sure that Malcolm Turnball's emails would not be FOI'able. In Victoria, FOI legislation applies to documents in the possession of the organisation. Emails held on a private server could not be said to be in possession of the government. And, of course, FOI legislation doesn't apply to Malcolm Turnball personally, nor to the private organisation hosting the server. I don't know how the Commonwealth legislation defines the documents subject to it, nor why the media thinks documents held on a private server would be subject to FOI.

Chris' comment about the archives act asserting property rights over records made me think. The Victorian Act, like Queensland, defines a public record as anything made or received by a public servant. I hadn't thought about it before, but this definition could allow us to lay claim to letters sent by public servants that are now held by the recipients of the letters. This interpretation would, indeed, conflict with the fact that the letter is now the property of the recipient, and raise exactly the issues that Chris highlighted. Of course, we don't interpret the definition in this way.

Finally, in Victoria, a Ministers' email is not a public record, as Ministers are not employed by a public office. So if the Victorian Premier did the same as the Prime Minister, there would be no problem under the Public Records Act.

The same argument applies to the emails of local government councilors (they are not employed by the council). To get around this, many Victorian councils try and

make the councilors use the council email system for official business. This doesn't make the emails public records, but it does make them subject to FoI. >>

2015, October 12:

The issues raised by the Clinton/Turnbull "problem" are recordkeeping issues, not just government r/keeping issues. They arise across the public/private divide and their "solution" lies inside the R/keeping Matrix :

Policy	Standards
Design	Implementation/Procedures

Archives laws belong in the Policy Quadrant (like Audit Acts and FOIA). They are policies internal to the public sector (regulating the affairs of government agencies, albeit to the public benefit, rather than the affairs of the community at large) and they take the form of laws because making laws is what governments do. Conceptually, they correspond to corporate policies in the private sector. They must not be confused with r/keeping laws having general application (e.g. Evidence Act, Crimes Act, etc.) that belong in all four Quadrants and apply (unless expressly excluded from binding the Crown) across the public/private divide. In the public sector, archives laws are as important (but no more important) than corporate policies in the private sector. We know that is not enough because they :

a. are sector-specific and do not provide a "solution" across the public/private divide;
b. offer only a one-quadrant solution and we know that adequate remedies need to be based more broadly (policy w/o implementation is as useless as procedure w/o policy).

By considering the specifics of public sector aspects of Clinton/Turnbull in the broader context, the correct approach becomes clearer.

Andrew says

<<In Victoria, FOI legislation applies to documents in the possession of the organisation. Emails held on a private server could not be said to be in possession of the government.>>

If the Victorians thought they were simplifying things with a "possession" test, maybe they should think again. Might it not be arguable that an official email on a privately owned server is analogous to "important papers in a bank safety deposit box". This is from The Free [Legal] Dictionary :

- **Possession:** *The ownership, control, or occupancy of a thing, most frequently land or* Personal Property, *by a person*. The U.S. Supreme Court has said that "there is no word more ambiguous in its meaning than possession" ... As a result, possession, or lack of possession, is often the subject of controversy in civil cases involving real and personal property and criminal cases involving drugs and weapons—for example, whether a renter is entitled to possession of an apartment or whether a criminal suspect is in possession of stolen property...
- **Possession versus Ownership:** Although the two terms are often confused, possession is not the same as ownership ... the owner of an object may not always possess the object. For example, an owner of a car could lend it to someone else to drive. That driver would then possess the car. However, the owner does not give up ownership simply by lending the car to someone else ... possession may be actual, adverse, conscious, constructive, exclusive, illegal, joint, legal, physical, sole,

superficial, or any one of several other types … All these different kinds of possession, however, originate from what the law calls "actual possession."

- **Actual Possession:** "Actual possession is what most of us think of as possession—that is, having physical custody or control of an object" … This type of possession, however, is by necessity very limited … courts have broadened the scope of possession beyond actual possession.
- **Constructive Possession:** Constructive possession is a legal theory used to extend possession to situations where a person has no hands-on custody of an object. Most courts say that constructive possession, also sometimes called "possession in law," exists where a person has knowledge of an object plus the ability to control the object, even if the person has no physical contact with it … For example, people often keep important papers and other valuable items in a bank safety deposit box. Although they do not have actual physical custody of these items, they do have knowledge of the items and the ability to exercise control over them…
- etc. etc. etc.

<<Andrew Waugh: I didn't express myself well. My point about FoI and Victoria was in response to the anodyne assertions in various reports that Turnbull's email would be covered by FoI. I was trying to make the point, badly, that this is not obvious without a detailed understanding of the specific FoI legislation. Victoria is an example where Turnbull's email probably would not be covered, because the email is not in possession of the government.>>

<<Kathryn Dan: The concept of 'constructive possession' that Chris has highlighted is certainly one we have to take into account when processing FOI applications in the Victorian jurisdiction.>>

<<Andrew Waugh: Thanks, Kathryn. That puts it much better than I could. The kicker for me is in the final two paragraphs of the linked document. I've added the emphasis.

> **If a document, such as a diary, has been created by a person in their capacity as a councillor or member of council staff, relates to the council's business and activities, *and can be accessed or called for by the council*, it is likely to be accessible under the FOI Act. Similar considerations apply to emails.**
>
> **Having said that, it is always a question of fact in each case. *It will need to be determined at the time a freedom of information request is made whether the council has actual possession, or a right to possess,* the document in the performance of its functions in connection with council's business and activities.**

In Turnbull's case, the government doesn't possess the emails, and has no right to call for the emails. It therefore, to me, cannot have constructive possession.

Furthermore, Ministers (or Councillors, for that matter) cannot be bound by their agencies. The Department cannot require a Minister (nor a Council a Councillor) to sign an agreement to allow them access to the emails. Laws could vary this, but I'll bet they don't.

Incidentally, this could be different for an employee of an agency. This would be (or should be) covered by conditions of employment. Does your employer have the right to access your private email for emails about your employment?>>

You people know FOIA (Vic) better than I do, but why is it that s.13 doesn't apply a right of access to ministerial emails that relate to the affairs of an agency?

> **FREEDOM OF INFORMATION ACT 1982 - SECT 13**
> Right of access
> Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to—
> (a) a document of an agency, other than an exempt document; or
> (b) an official document of a Minister, other than an exempt document.

FREEDOM OF INFORMATION ACT 1982 - SECT 5
Definitions
(1) In this Act, except insofar as the context or subject-matter otherwise indicates or requires—

"exempt document" means—
(a) a document which, by virtue of a provision of Part IV, is an exempt document; or
(b) an official document of a Minister that contains some matter that does not relate to the affairs of an agency or of a department;

"official document of a Minister" or *official document of the Minister* means a document in the possession of a Minister, or in the possession of the Minister concerned, as the case requires, that relates to the affairs of an agency, and, for the purposes of this interpretation, a Minister shall be deemed to be in possession of a document that has passed from his possession if he is entitled to access to the document and the document is not a document of an agency;

I suppose if they routinely used a signature block saying "Love from Ethel and the kids" that might be "matter that does not relate to the affairs of an agency or of a department" and they could go on to argue that because the email contained such matter it was exempt.

2015, October 20: Federal public service review of FOI laws

<<Andrew Waugh: The Australian Public Services Commissioner John Lloyd says that 'the [FOI laws] were "less than ideal" and had gone beyond their original intent which aimed to allow members of the public to access personal records.'
And I always understood FOI laws were designed to support government accountability and transparency (and, yes, allow the public to access records about themselves). If the quote represents the views of the head of the federal public service, then FOI certainly has a problem at the Commonwealth level.
Another gem in the article: "the federal bureaucracy has a culture of "don't put it in writing" caused by harmful freedom of information laws." So management of the public service is failing in their duty to ensure that records are created of the business of government. And not disciplining the staff responsible.>>

This from the website of the (apparently) just-elected Canadian Liberals makes an interesting contrast to grumpy old John Lloyd's remarks:

- We will make government information more accessible.
- Government data and information should be open by default, in formats that are modern and easy to use. We will update the Access to Information Act to meet this standard.
- We will make it easier for Canadians to access information by eliminating all fees, except for the initial $5 filing fee.
- We will expand the role of the Information Commissioner, giving them the power to issue binding orders for disclosure.
- We will ensure that Access to Information applies to the Prime Minister's and Ministers' Offices, as well as administrative institutions that support Parliament and the courts.
- To ensure that the system continues to serve Canadians, we will undertake a full legislative review of the Access to Information Act every five years.

Of course, delivery on promises like this is another matter entirely.

Perhaps, if the C'wealth Archives Act had a provision similar to s.13 in Victoria or s.12 in NSW ("make and keep full and accurate records"), John Lloyd's remarks might open him to a mandamus. He states that bureaucrats are not making full and accurate records. C'wealth public servants operate under a Code of Conduct set out in s.13 of the Public Service Act (C'wealth) :

PUBLIC SERVICE ACT 1999 - SECT 13
The APS Code of Conduct
.....(4) An APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws.

Mr Lloyd has a statutory obligation under that same Act to inquire into and act on breaches of the Code :

PUBLIC SERVICE ACT 1999 - SECT 41
Commissioner's functions
(2) Without limiting subsection (1), the Commissioner's functions include the following: ....
(l) to evaluate the adequacy of systems and procedures in Agencies for ensuring compliance with the Code of Conduct;
(m) to inquire, in accordance with section 41A, into alleged breaches of the Code of Conduct by Agency Heads;
(n) to inquire into and determine, in accordance with section 41B, whether an APS employee, or a former APS employee, has breached the Code of Conduct;

Having admitted to guilty knowledge that C'wealth public servants were failing in a statutory duty to "make and keep..." he would be placing himself in breach of his own statutory duty if he did not inquire into and act upon what must be, on its face, a breach (multiple breaches, in fact) of the Code of Conduct. Or, that would be the case if only the C'wealth Archives Act had such a provision. But it doesn't. If the profession were going to lobby about anything by way of legislative reform of the archives laws I think calling (repeatedly, loudly, and unrelentingly) for uniform "make and keep" provisions in all the Archives Acts would be the right place to start.

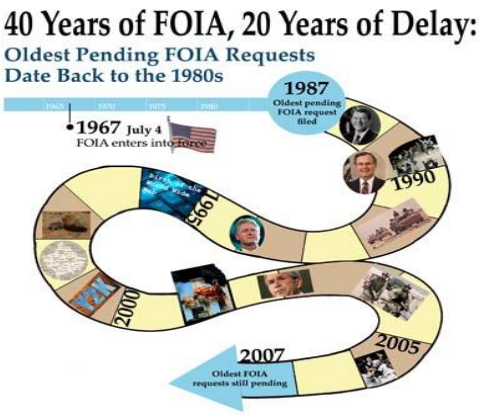
2015, October 22:

<<Andrew Waugh: A great blog calling John Lloyd out on his idiosyncratic view on FOI...>>

2017, November 27: Insolence of office and the law's delay

Once upon a time, Governments introduced FOIA with the intention of extending "*as far as possible the right of the community to access to information in the possession of the Government*" with a promise that "*the provisions of [the legislation] shall be interpreted so as to further th[is] object ... and that any discretions conferred ... shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information*" Victorian FOIA s.3.

Law/Act	Key Violation
Federal Records Act	Failure to preserve government records
Presidential Records Act	Undocumented presidential-level decisions
Espionage Act	Mishandling classified info
Executive Order 13526	Unauthorized communication of national defense info
CIPA	Insecure handling of classified materials
FISMA	Use of unapproved tech for secure info
Sunshine/Open Gov. Laws	Lack of transparency in governance



The ABC reports :

Lawyers for the accused Bourke Street driver have been refused quick access to his medical records as they investigate his mental state, in what a Victorian Supreme Court judge has labelled a ridiculous and absurd situation .... Defence barrister Dr Theo Alexander told the

court he applied to the Department of Justice for his client's medical records in October under a Freedom of Information request (FOI), to allow psychiatrists to form a view on his mental state. But he said the department had responded that due to its current workload it could only process 150 pages per FOI. The document is 11,000 pages long…

2018, January 31: It's in the files!

ABC is reporting the discovery of confidential Cabinet files in a couple of filing cabinets bought second-hand in Canberra. The linked page (which gives access to them apparently) lists other high-level and egregious security breaches of a similar nature. When you consider all the nonsense that goes on when government bends over backwards (and then some) to prevent FOIA disclosures, you have to wonder if the public might not be better informed if we all just scoured the second-hand shops and the rubbish tips more diligently.

<<Michael Piggott: Somewhat related to Chris's post is an interesting item by Tim Sherratt in *Inside Story*, out today. (See "Withheld, pending advice"). It's a commendable and continuing effort of Tim's to try to get a sense of what overall picture emerges as a result of the application of the access rules coordinated by NAA under the 1983 Act. What strikes me is the relatively muted response (as far as one can gather) to the administration of the access regime by relevant stakeholders, including archivists, historians and journalists. The NAA does have an advisory council, which is required by law to received information about disposal and so-called "special access" …. but not all other types of access. So who IS asking the pertinent probing questions? Tim mentions the NAA DG's appointment of a reviewer to look at the access process, and his report is being implemented overseen by a reference group. In that case, clearly all's well.>>

<<Tim Sherratt: Further on this, I was just alerted to the fact that the Civil Law and Justice Legislation Amendment Bill 2017 includes some changes to the Archives Act, specifically relating to the time frames for access examination. I'm still trying to figure out what the changes mean, but I'm wondering if the 'withheld pending advice' category I've been tracking will no longer be used…>>

2019, January 2: News item on Federal FOI processes

<<Andrew Waugh: As might be expected, the news is not good… But nothing that would surprise anyone on this list>>

Why is it so? The article (and a related piece on the same site examining ludicrous refusals to release) suggests to me that what is driving it is not so much a growth in actual secrets but rather a growth in secrecy. Tho' increased involvement by governments with commercial operators since the 1980s is a probably a factor giving rise to greater sensitivity. But what seems to be driving it is the embarrassment factor – unwillingness to expose "what and how" to public scrutiny however unrelated the material is to one or more of the statutory grounds for exemption. Journos and others have become more expert at targeting requests but what has really changed is that what gets released is now sucked into the 24-hour news cycle, which didn't exist in the 1980s. The FOIA era has coincided with the rise of spin, fake news, and Trump-like (in)sensitivities. As is often remarked, instead of debating issues and policies, our politicians now dispute the facts, seek to reframe the issues, go for the simplistic headline, and try to colour perceptions instead of changing opinions.

Perhaps it was ever thus, but I don't remember it being this bad when I was a lad. If your intent is to dispute the facts rather than to debate the issue, the last thing you want is unimpeachable documentary evidence getting loose and used against you. This was well demonstrated by Rowena Orr's deadly phrase: "May I show you a document?".

- **Resources**: The original proposition was that once agencies got used to FOIA, they would become more relaxed about releasing information and fewer resources would therefore be needed. There would be no need for full-time FOIA Officers to

administer requests!!!!! They really said that (I was there when they did). Instead, agencies have sought inventive ways to withhold more and more, which is inevitably more resource intensive.

- **Culture**: The intended bias towards open-ness never took hold. The framers proclaimed that it was not the intention to set up quasi-legal processes that gave rise to precedents and technicalities. The informality was intended to speed things up but the spirit of open-ness never prevailed. The process quickly became adversarial. This had to be expected when the dispute resolution process before the AAT was conducted by lawyers (because a lawyer knows no other way to behave).
- **Scope**: The instinct to withhold flies in the face of the stated intention "to facilitate and promote public access to information, promptly and at the lowest reasonable cost" (s.3 C'wealth FOIA). The gulf between behaviour and the statutory intention has never been dealt with. Instead of narrowing the scope of secrecy, FOIA has enlarged it.

Perhaps the mistake was to make it subject to quasi-legal procedures. Maybe, instead of trying to make it less legalistic, the framers should have made it more so. Making agencies go before a proper court with powers to chastise, condemn, and correct might have produced a different result. It seems fairly clear that the situation will not improve unless one of two things happens: either the system must be overhauled and become less adversarial (returning to the presumption of open-ness and finding ways to limit agencies' discretion to withhold) or more resources must be provided to speed it up (by removing obstacles in the present system or expanding the courts to give them proper judicial over-sight). Then again, maybe the Jeremiahs were correct after all. Perhaps governments need secrecy to operate effectively.

2019, January 9:

The NT Government has refused an FOI request for vision of a disturbance at Don Dale Juvenile Detention Centre on law enforcement and privacy grounds :

> … NT [is] the worst-performing jurisdiction in the country on FOI. The territory government refused about 27% of all FOI requests it received last financial year, a rate seven times higher than Victoria and eight times higher than Western Australia. The NT opposition … attempt[ed] to secure footage of a disturbance in November, when two inmates attacked a guard and released other detainees from their cells … The opposition's FOI request asked for videos or pictures of the incident, including "moving pictures, closed circuit television transmissions, still pictures, photographs, videos, computer files, electronic mail attachments, mobile phone files, and multimedia texts"… The government argued the vision

would "prejudice the maintenance of law and order in the territory" because the vision would interfere with a current police investigation and may be used "as evidence in an upcoming court hearing"... the opposition argues the eight detainees involved in the disturbance have already been charged, and so little impact is likely on the police investigation. The NT government said the footage also "identifies numerous third parties", posing a privacy risk. But the opposition said their identities could have been protected by the blurring of faces, a practice often used when privacy concerns arise... Labor came to power in 2016 pledging to improve accountability and integrity measures. It has acted on numerous fronts, including the setting up of an integrity commission, better disclosure of political donations and the registrable interests of MPs ... The territory's refusal rate has been above 20% for four years running. There are often legitimate reasons for denying an FOI request, including that the documents do not exist or are lawfully exempt from release. *Guardian*

The privacy grounds for exemption indeed seem to be specious for this class of material. If they can redact large portions of text from documents released under FOI, surely blurring and pixelation of images achieves the same result? [Does anyone else remember the movie *Mr Deeds Goes to Town* in which Deeds is described by the Faulkner sisters as "pixelated", meaning not quite right in the head? Later in the movie the sisters are asked who else is pixelated and they reply "Why everyone, but us."]

The law enforcement exemption, in a well ordered world, ought to be of the most transitory kind. Once any possible breaches of the law have been dealt with, the material should be released. Of course, that exemption is open to abuse by authorities simply spinning out the period of "investigation" for as long as they please. Heiner raised the question when do pending legal proceedings begin? Cases like this raise the question when do they end?

2019, January 17:

Queensland's freedom of information watchdog and the state's police service met quietly last year and agreed citizens should be blocked from accessing their personal data held in a controversial police records system ... Justice Martin Daubney, the president of the Queensland Civil and Administrative Tribunal, launched an extraordinary criticism of the process when details about the meeting emerged during a recent hearing. "[The meeting is] starting to sound awfully like the police and the [Office of the Information Commissioner] sat down behind closed doors to set matters of policy," Daubney said ... Queensland has a set of information privacy principles that require agencies holding personal information to grant individuals access unless they are expressly exempted under law. Police previously granted individuals access to their personal data in the QPrime records system. A search indicates regular access was granted to people seeking their own information until June 2016. That month, social justice advocate Renee Eaves was granted access to her QPrime file. It revealed officers had accessed her records 1,400 times over eight years and sparked ongoing concern about the management and protection of data held by police. Several officers have been charged with computer hacking for conducting unauthorised or irrelevant searches. But most complaints do not result in punishment and concerns remain that audits of the system are retroactive and usually only occur when a complaint is made. Since June 2016, police have routinely refused access to people seeking personal information from QPrime on "public interest" grounds.

David Vaile, the chairman of the Australian Privacy Foundation, said the ability for individuals to access their own information was "one of the few antidotes that can act as a restraint to abuse of power". "It may well be this is a policy that's designed to conceal large-scale problematic breaches of data," Vaile said, and noted that the policy could prevent crimes committed by police officers from coming to light ... Police insisted in a statement that freedom-of-information decisions – known as "right to information" in Queensland – were still made on an individual basis and that "there is no blanket refusal"... In the same statement police said they had conducted a review and "formed the view that disclosure of [QPrime activity reports] would likely be contrary to the public interest as it causes significant detriment to the QPS law enforcement activities". In the tribunal hearing, police lawyer Craig Capper said police had met with the information commissioner to discuss four specific right

to information appeals. Capper said police conveyed the view that all QPrime records were "a class of documents that give rise to, and if revealed and if published, would give evidence that could be injurious to the public"... Capper also told the tribunal police "didn't even want to acknowledge the existence of any documents" in some cases ... *Guardian* 17 Jan 20

Justice Martin Daubney

Vickie Chapman

2020, February 25: You can't see that!

The fund of ridiculous reasons for denying us access to information appears to be inexhaustible – royal embarrassment, glorification of racism, being found in Bin Laden's luggage – and now exciting fire-bugs.

> The South Australian Government has been ordered to reveal documents about the fire risk posed by cladding on the Adelaide Convention Centre, with the state's independent umpire rejecting arguments that the release of the information could put the public building at risk of attack ...
>
> Attorney-General Vickie Chapman made an unusual intervention in the process, arguing they contained content that would lead to a "heightened risk of attacks" and have a "significant impact on the safety of the public, the buildings themselves, and the state's economy". But the South Australian Ombudsman Wayne Lines rejected her argument, ordering documents including board reports, minutes and emails be turned over. "The safety of the public is more likely to be assisted by release of information ... secrecy is not the only option available to the Government to ensure the safety of those who use the Adelaide Convention Centre." ... The convention centre is believed by authorities to be clad in the worst type of flammable aluminium panels, known as "black core".
>
> ... In a statement, an SA Government spokesperson maintained the position that disclosing information posed a risk. "There is a risk that persons with criminal or politically motivated intent, could potentially use this information to deliberately target these buildings with the intent to start fires," the spokesperson said.

2021, January 8: FOI heading for a "train smash"?

According to Senator Patrick –

> Australia's freedom of information system is heading for a "train smash" within two years because the office that reviews government decisions to withhold or redact information will soon be swamped by a massive workload, the independent senator Rex Patrick has warned. The FOI system, a crucial limb of government accountability, relies heavily on the Office of the Australian Information Commissioner, an independent umpire that reviews government decisions and hears complaints. The OAIC has repeatedly warned it will struggle to meet its workload without better resourcing ...
>
> Patrick said the resulting backlog would result in a "train smash" in the FOI system ... The loss of an efficient and timely appeals mechanism would allow government departments to deny documents on spurious grounds, knowing challenges would be likely to take years,

> Patrick said. "The government is secretly undermining the entire FOI regime," he said. "It tacitly approves, and perhaps even encourages, officials taking a cavalier approach to denying access to information, which then overloads an underfunded information commissioner." … The senator said the overloading of the regulator was part of a broader trend toward secrecy in Australia.
>
> "We've got a government that has expanded cabinet to broaden secrecy claims over all significant decisions, ignored the funding needs of the auditor general, reducing his performance audit capacity from 48 per annum to under 40, feigned interest in a real Icac and used the AFP to intimidate the media in its oversight role," he said …

In the late 1970s, the A-Gs official responsible for piloting *FOIA* was Lindsay Curtis. Because *FOIA* was at that time cognate with our *Archives Bill,* I got to know him a bit. I remember some titanic struggles on an IDC (Inter-Departmental Committee) between him and Peter Scott. It is common civil service parlance, when you're calling someone else an idiot, to say "*With respect …*" I once witnessed an exchange between them that went from there to "*With great respect …*" and then "*With the greatest respect …*" and finally "*With the very greatest respect …*"

Lindsay was an unusual combination of the hard-bitten and the idealistic. He always said (and I think truly believed) that *FOIA* had to be transformative or it wasn't worth the effort. If a new spirit of open-ness did not accompany its operation, no amount of legalistic drafting and no amount of ritualistic, technical apparatus (regardless of funding) would amount to very much. We've known for years that the system was degrading, or being degraded, and I think Lindsay would have said that the reason for that is not a want of resources (deplorable though that is) but a want of will.

2021, January 15:

> … The Australian Conservation Foundation audited FOI outcomes for environment-related information over five years, and found the system is increasingly opaque, slow and costly. The audit's preliminary findings … show that refusal rates had more than doubled from 12 to 25%, while the proportion of requests that were more than a month overdue stood at 60%. Costs for environment-related FOIs was double the average, and lengthy review processes were being used as "a key tool for denying access to information".
>
> The full ACF report, released on Friday, described the system as "dysfunctional" and called for targeted investigations by the information commissioner of the "negative trends in the outcome of requests for environmental information". The watchdog's investigation should, at the very least, examine the actions of ministers and the prime minister's office, the ACF said. The information commissioner has such powers, the report noted, yet had only used them twice between 2018 and 2020.
>
> …The ACF also called for a parliamentary inquiry into transparency laws in Australia, examining the changing nature of information, WhatsApp and phone use, the suitability of compliance options, and FOI training. As part of its research, the ACF analysed the use of exemptions to withhold FOI documents in part or in full, finding that their use had roughly doubled from 306 in 2015–16 to 593 last financial year…The use of the cabinet deliberations exemption has more than quadrupled in five years, from five cases in 2015–16 to 26 last financial year. The use of the "personal privacy" exemption has also increased from 66 cases in 2015–16 to 164 last financial year. The report also warned of the "aggressive" use of exemptions to withhold entire documents, instead of simply using smaller redactions to hide small portions of information…

2023, March 29: FOI

The Greens, Coalition and crossbench have teamed up to set up an inquiry into the freedom of information commissioner's resignation over dysfunction and delays in the FOI system … In March Guardian Australia revealed almost 600 freedom of information cases have languished before the nation's information commissioner for more than three years, including 42 that are still not resolved after half a decade … [Senator] Shoebridge said

ACCESS & SECRECY

"anyone who has been near the FOI system will tell you it's broken, responses are glacial, costs are obscenely high and too often no documents are released despite compelling public interest" …

2024, May 21: Significant FOI development

<<Andrew Waugh: A loophole in Australia's freedom of information laws allowing governments to block the release of documents after a minister has moved on has now been closed after a "truly transformative" federal court ruling … Owing to a long-standing convention that documents of former ministers no longer fall under the FoI powers once they have left the office, the OAIC ruled against Patrick, saying the portfolio changes meant the documents were no longer in the possession of the attorney general and therefore could not be released…>>

2024, May 22:

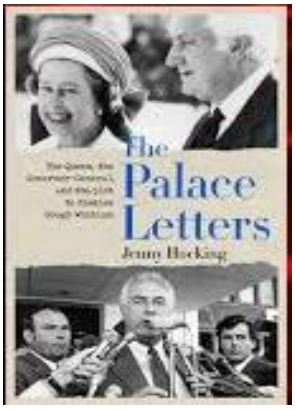
Ooops! Seems like Commonwealth officials weren't familiar with the doctrine of the King's Two Bodies:

> Its theme is the idea that a ruler has two bodies: a natural body that lives and dies, and a symbolic body that endures and is assumed by the ruler's successor.

"Palace Letters"

2015, October 26: Fresh from the Archives

Reports today of a newly released book by Jenny Hocking revealing information about The Dismissal from a "long-embargoed interview" given by Reg Withers d.2014 (Liberal Senate Leader in 1975). The book also refreshes older claims made by Hocking in an earlier book about foreknowledge by HC Judges Barwick and Mason. The only on-line reference I can find to a Withers interview is in the Battye Library - see below. Embargoed till 2028 or after Withers died it may be the source referred to by Hocking. Does anyone know for sure?



Hocking also accuses HM the Queen of having guilty foreknowledge. This claim is based apparently on material in the Kerr "private papers" – presumably those held at NAA.

2015, November 21: Who controls access to records of the GG

<<Andrew Waugh: I'm not sure if Chris is on twitter, but I'm sure he (and others) would be interested in the following analysis of who has the right to control access to the GG. Justinian (Richard Ackland) tweeted

> **Sydney barrister Tom Brennan debunks nonsense from Paul Kelly and Troy Bramston on Queen-Kerr letters …**

Troy Bramston responded @JustinianNews: "He's missed the point. We actually argue letters are 'official' but NAA refuses to release them. NAA say its up to GG/Queen.">>

2015, November 22:

<<Andrew Waugh: Follow up tweets indicate that Bramston and Brennan agree on the legality, but Government House/NAA won't allow access. Brennan last tweet: "Government House lost the argument in 1983 but won't role over without being required to. That's what the courts are for.">>

2015, November 24:

Andrew muses **<<I'm not sure if Chris is on twitter>>**. I'm not, but Cassie is threatening to make me.

<< The first Archives Bill was introduced in 1978. The Bill contained provisions which reflected the administrative practice then in place ... "Special provision has been made for the records of the Governor-General, the Parliament, the Courts, Cabinet, the Federal Executive Council, and Royal Commissions. These records may be transferred to the custody of the archives on terms and conditions agreed on between the archives and those responsible for their custody." >>

That's the one I was involved in drafting.

[**Note (2025):** The purpose of this original drafting was not to take them outside the definition of "Commonwealth record" (which they still remained) or beyond the provisions of the Act dealing with C'wealth records (save for those from which they were explicitly "exempted") - so that the "special arrangements" provided for in the Act itself would be applied to them. This was a drafting into law of existing practice. In other words, if they were C'wealth records under the definition they remained C'wealth records but subject to "special arrangements". The drafting was not (not! not! not!) to declare them private in any sense. For reasons I have repeatedly stated on this List, the drafting proceeded on the basis that a distinction between "official" and "private" would not to be introduced into the archives law because such a distinction is impossible to make or sustain. Regrettably, that clarity was subsequently diluted giving rise to futile argument about the official/private divide.

Ministerial and vice-regal records were being accepted by Commonwealth Archives, as it then was, not on the basis that they were "private" but on the basis that it didn't matter – since access control remained (rightly or wrongly) with the donor as a matter of policy. The basis for this policy was twofold: (1) that such deposits almost invariably included "private" material as well as "official" material and that it was impossible and undesirable to separate it out and (2) that Archives had to be in a position to offer donors the same access control they could get from NLA and other collecting institutions. The only alternative would be a regulatory regime to pursue "official" records that ministers and GGs held on to and regarded as "theirs" to dispose of as they wished. There was no appetite for introducing such a regime.]

<< In 1983 following a change of government ... a further Archives Bill ... was ultimately passed and became the *Archives Act* of 1983. That Act required that all records of the official establishment of the Governor-General be transferred to the archives and be made available through the open access provisions of the *Archives Act*...No special provisions were made for records of the official establishment of the Governor-General. >>

That was the battle lost back in 1978.

<< Brennan last tweet: "Government House lost the argument in 1983 but won't role over without being required to. That's what the courts are for">>

ACCESS & SECRECY

The elephant in the room for all the archives laws is: how are they to be enforced? It would be interesting to know what approach NAA takes nowadays to non-compliance.

2016, November 7: Sir John Kerr's "personal" papers

You may have read about the case being brought against NAA regarding the Personal Papers of Sir John Kerr. Lots of meaty issues here – not least whether undertakings given to donors/interviewees should or can be upheld absolutely. Shades of the Boston College Case? Those interested can follow the Kerr case using Federal Law Search. The first case management hearing is scheduled for 15 November.

File details

Court:	**Federal Court of Australia, New South Wales Registry**
Number:	**NSD1843/2016**
Title:	**Jennifer Hocking v Director-General of the National Archives of Australia**
Filing Date:	**20-Oct-2016**
Finalised Date:	

When we drafted the *Archives Act*, the options for dealing with official estrays were limited. For reasons too arcane to dwell on here, the definition of "Commonwealth record" is based on ownership and the Constitution imposes an obligation to offer just terms when acquiring property (cf. *The Castle*). A replevin provision empowering the C'wealth to seize official estrays would have run into several difficulties :

- not all official records would necessarily be Commonwealth property and vice versa;
- there could be difficulty proving that the C'wealth had not (e.g. by its actions or by neglect) conceded or passed ownership to the possessor of the estray;
- there would, therefore, be a question whether the C'wealth was recovering or acquiring property (necessitating compensation if the latter);
- there could be (and in my personal experience has been) endless dispute over what was (and what was not) "official";
- the political and publicity implications of taking former ministers and senior officials to law were horrendous;
- no one was keen on establishing an estray police force armed with powers of entry and seizure.

Ancillary questions arise as to the application of disposal and access provisions to C'wealth records in private hands but that is a whole other story (briefly, disposal provisions do and access provisions don't). As to custody, it was decided to write into law the long standing practice whereby Archives sought to persuade (rather than compel) those holding official estrays to voluntarily deposit the whole of their papers with Archives w/o regard to whether or not they were official. Archives would, in effect, enter a contest with National Library and other potential custodians on equal terms. To do so on equal terms, NAA had to be able to offer what NLA and other potential custodians were able to offer – specifically allowing the donor to set the conditions of access w/o regard to statutory access regimes. This is what has happened with Kerr's personal papers apparently. This outcome was embodied in S.6

> **6(2)** Where, in the performance of its functions, the Archives enters into arrangements to accept the custody of records from a person other than a Commonwealth institution, those arrangements may provide for the extent (if any) to which the Archives or other persons are to have access to those records and any such arrangements have effect notwithstanding anything contained in Division 3 of Part V.
> **6(3)** Where an arrangement entered into by the Archives to accept the custody of records from a person other than a Commonwealth institution relates to a Commonwealth record,

then, to the extent that that arrangement, in so far as it relates to such a record, is inconsistent with a provision of Part V, that provision shall prevail.

By my recollection, s.6(3) was added to the draft Bill after s.6(2) was crafted to give effect to the policy described above (but I may be mistaken). It looks like an afterthought (one I hope I didn't have a hand in drafting). What's the point of saying private arrangements have effect "notwithstanding" anything in Part V Div.3 (access) and in the next breath saying that Part V (in its entirety, including access) "shall prevail" over inconsistent private arrangements? In any case, as I now read that sub-section, NAA is obliged to apply the access provisions of Part V to any C'wealth records found amongst any deposit of "personal" records, though how they would do so in this case, where the boxes are sealed, is mystifying and how they can defend themselves in a case alleging they aren't abiding by s.6(3) if they aren't in a position to examine the contents of the boxes is puzzling. So the first question the Court may have to consider is whether the records, regardless of whether they are personal or official, actually contain C'wealth records according to the property test. NAA may have adopted a policy that they can't prove C'wealth ownership of any records held in private hands and therefore will proceed on the basis that any official records in a personal deposit are to be deemed private property (or that ownership will not, in any case, be disputed). Don't think that policy (if it exists) would survive scrutiny. But the Court may have to consider whether an arrangement NAA has made under s.6(2) to leave the boxes sealed precludes the operation, or at least the implementation in this case, of s.6(3).

How then is NAA applying s.6(3) to the records of the other 565 donors? NAA's Acquisition Policy on Personal Records describes the personal records it holds as "a mix of private and official records". It is silent as to whether or not the official records, so designated, include C'wealth records but the Policy states that the programme is based on provisions of s.5 that empower NAA to "to seek to obtain, and to have the care and management of, material (including Commonwealth records) not in the custody of a Commonwealth institution, that forms part of the archival resources of the Commonwealth". The implication is that NAA is aware that the 566 deposits of personal papers it holds do contain, or are likely to contain, Commonwealth records. If s.6(3) is being applied, access is available to any Commonwealth records in those 566 deposits notwithstanding any arrangements to the contrary made with the depositors. The scheme set up in s.6(2) facilitates making arrangements that enable donors to prevent access to C'wealth records amongst a "private" deposit if they choose to do so, but s.6(3) seems to be saying that the donor's wishes on access to any C'wealth records amongst their deposit is out of their control and must be ignored.

1. The question is not simply whether access is being incorrectly denied to some records in AA1984/609 in accordance with the statutory access regime administered by NAA. If they are all personal papers (not C'wealth records) they are not subject to that regime. But was NAA correct in accepting them as personal papers in the first place? Are the records, in their entirety, C'wealth records - being records owned by the Commonwealth? This may depend, in part, on who actually effected the transfer and on the circumstances and on whether those persons acted in breach of the law regarding unlawful disposal (a decision to deposit the records with a custodian, including NAA, is a "disposal" under the terms of the Act). If, for example, the papers in question came from the Office of the GG, were by virtue of the circumstances of their creation and use C'wealth property, and were simply described by officials there as being "personal" and privately owned, the question is whether those officials had any lawful power to make such a decision and whether NAA was correct in acquiescing. The date of the transfer appears to be 1984 (though this may simply be the date at which a transfer made years earlier was actually processed), so the transfer may not coincide with Kerr's resignation (1977). Where were the papers lodged between 1977 and 1984? Who handled the transfer – Kerr himself, his

representatives, or officials of the GG's office (possibly acting on his behalf)? If the latter, were the officials who effected the transfer acting at Kerr's behest or on their own initiative? What inquiries did NAA make at the time to ascertain whether these records were being properly designated as "personal"? Given the thrust of the complainant's arguments (in the press) about Royal influence no doubt the question will also be asked if the Palace was involved and, if so, what role they do or should have in determining whether or not certain records created within the ambit of Her Majesty's Australian Government are C'wealth property.

2. Can the Governor-General, in the exercise of his official duties, create any records that are purely private and personal? The "official establishment of the Governor-General" is a Commonwealth institution (s.3). Does this mean that there is an un-official establishment to be taken into account? If so, what is it, how can it be identified, and where is it to be found? The theory of the King's Two Bodies holds that a sovereign entity consists of two beings: the person and the office – hence "the King (the person) is dead; long live the King (the office)". Under this theory, the person may indeed create and hold private records (or any kind of property – e.g. when the G-G is paid a salary, the money is the property of the person not the office) but it may be stretching things to argue that records created while carrying out the duties of the office can be regarded as personal property. Correspondence with the Queen, it might be said, is not the "property" of the G-G's official establishment but the definition of C'wealth record is "property of the Commonwealth or of a Commonwealth institution" (s.3). So, records deemed not to be property of the official establishment may nevertheless be property of the Commonwealth and therefore C'wealth records. The G-G is unquestionably part of the Commonwealth of Australia established by the Constitution. The G-G is a creation of the Constitution and absent the Constitution would not even exist. It might be argued that the Queen of Australia stands outside the Commonwealth (constitutional lawyers would need to decide that one), but the G-G does not occupy the position of Sovereign. The G-G merely exercises the powers and functions of the Sovereign within the framework of the Constitution (which powers and functions, as we discovered in 1975, the Queen personally does not exercise within the Commonwealth of Australia). It is difficult to see how any records produced in that capacity when carrying out the duties of the office, including correspondence on official matters with anyone (including the Queen), could be regarded as anything but the property of the Commonwealth even if they are not the property of the G-G's official establishment. But legal minds far beyond the scope of my feeble powers of understanding will now have to decide these matters.

This is all very tricky. For a number of years I was responsible for the personal papers programme at what is now NAA. Transfers were usually (though not always) arranged at traumatic moments like a change of government or a loss of ministerial office. They often involved a tussle with NLA or other potential custodians which made the orderly negotiation of conditions of deposit even more fraught. They were usually (though not always) arranged with staff, or outgoing staff, of the depositor through whom the depositor's wishes were relayed. In my time, the practice was to regard any records held by the depositor as "personal" if that was how the depositor saw it and to accept their agent's instructions as the depositor's wishes. To have made quibbles about whether or not the depositor had the right to make these arrangements would have been seen, in the climate of the time, as inappropriate and as counter-productive to the objective of making NAA as hospitable a custodian as possible by reassuring them that NAA was able to treat with them on the same terms as alternative custodians – viz. that decisions were theirs alone. I have no idea whether this approach was still being followed a decade later or what NAA's current practice

may be. It is clear, however, that if NAA took on a role as enforcer of procedures regarding the disposition of official records regarded by potential depositors as "theirs" and potential depositors resented that, it could seriously weaken NAA's bargaining position as a potential custodian. If the case succeeds and the whole policy is not to be under-mined by the possibility that good-faith arrangements between NAA and depositors may be over-turned in litigation, unpredictably, and on a case-by-case basis (a process no one, surely, would recommend), then a formal process of some kind would seem to be necessary -

- A "loose" interpretation of the Act, leaving much to NAA's discretion and to the depositor, facilitates the policy goal of wrangling estrays back into custody (albeit at the cost of conceding control over access). But it also facilitates connivance between NAA and agencies using the discretion to thwart the access provisions by improperly conferring "personal" status on records they'd rather not, for any reason, have released – not saying that this has or would occur, only that the possible ramifications of a loose approach must be considered.
- A "tight" interpretation, on the other hand, would necessitate, at the very least, some formal guidelines or bench-marks to restrict the circumstances in which NAA can (and cannot) accept a "personal" deposit - taking the decision, to some extent, out of the realm of unfettered discretion and imposing pre-determined tests that would control decisions being made. But that would also have the deleterious effect of constricting NAA's freedom when negotiating with potential depositors vis a vis competing custodians.

In NZ, where a similar programme existed (and may still do so), there was more of an insistence on procedures to be followed within government, especially by ministers leaving or changing office, but these rules were written down and had the authority of the PM (Archives there was simply the agent whereby the instructions were to be complied with). There were no such rules in place in Canberra in my time (so far as I know) with the exception of rules for handling Cabinet papers – and those rules certainly did not prevent Cabinet papers turning up in personal deposits.

In Record Search, the Kerr personal papers are described as AA1984/609 (two sealed boxes) – see below.

Series number	**AA1984/609**
Title	**Personal papers**
Accumulation dates	**circa01 Jan 1974 - 31 Dec 1977**

Contents dates	**01 Jan 1974 - 31 Dec 1977**
Items in this series on RecordSearch	**No items from the series are on RecordSearch. Please contact the National Reference Service if you need assistance.**
Agency/person recording	• **01 Jan 1974 - 31 Dec 1977** **CP 266, The Rt Hon Sir John Robert KERR AK, GCMG, GCVO, KStJ, QC**
Agency/person controlling	• **01 Jan 1974 -** **CP 266, The Rt Hon Sir John Robert KERR AK, GCMG, GCVO, KStJ, QC**
Quantity and location	• **0.36 metres held in ACT**
System of arrangement/ control	**To be determined**
Range of control symbols	**two sealed boxes**
Predominant physical format	**PAPER FILES AND DOCUMENTS**
Series note	**No public access to AA1984/609The series consists of 2 sealed boxes which contain personal and private correspondence between the Governor-General and the Palace. They are not Commonwealth records and are not subject to the Archives Act 1983. Access to these records is to be authorised by the Official Secretary of the Governor-General and the Sovereign's Private Secretary 50 years after the expiration of the term of the Governor-General. For further information contact our Reference Service.Administrative information The following data was keyed from the paper documentation:** **Form number: NAS 43Date of transfer: 14/12/1984** **Archives file number: A1982/29** **Archives accession number:AA1984/609** **No public access to AA1984/609The series consists of 2 sealed boxes which contain personal and private correspondence between the Governor-General and the Palace. They are not Commonwealth records and are not subject to the Archives Act 1983. Access to these records is to be authorised by the Official Secretary of the Governor-General and the Sovereign's Private Secretary 50 years after the expiration of the term of the Governor-General. For further information contact our .....** **(Less)**
Visibility & availability indicator	• **75 . Detailed access examination required**
Date registered	**14 Dec 1984**

Displaying 2 of 36

2017, July 31: NSD1843/2016 Hocking v NAA [the "Palace Letters"]

It seems the case to force a release of John Kerr's correspondence with HM Queen Elizabeth in the lead up to the 1975 dismissal is set for a hearing today. At issue is the status of the letters. Are they Commonwealth records, subject to the official access policy, or personal papers, subject to access rules agreed with the donor? Their mere presence amongst NAA's holdings determines nothing since NAA is entitled to accept deposits of personal papers (which may include C'wealth records, official documents that are not C'wealth records, or private and personal materials) under conditions set by the donor.

> **s.6 (2)** Where, in the performance of its functions, the Archives enters into arrangements to accept the care of records from a person other than a Commonwealth institution, those arrangements may provide for the extent (if any) to which the Archives or other persons are to have access to those records and any such arrangements have effect notwithstanding anything contained in Division 3 of Part V.
> **s.6 (3)** Where an arrangement entered into by the Archives to accept the care of records from a person other than a Commonwealth institution relates to a Commonwealth record, then, to the extent that that arrangement, in so far as it relates to such a record, is inconsistent with a provision of Part V, that provision shall prevail.

The test is not whether the letters are official, it is whether or not they are owned by the Commonwealth (i.e. Commonwealth records). Unlike most of the States, the Commonwealth has an ownership test. NAA may not, apparently, offer immunity from official access rules to any C'wealth records contained within such a deposit. When these provisions were first being drafted, what is now s.6(3) was not part of the mix. The intention was that NAA should be able to offer potential donors of "personal papers" an absolute assurance over control of access regardless of whether or not their deposit included documents over which the C'wealth could assert ownership. The logic of this was that donors of such material had a choice to place the documents anywhere they pleased and, if they chose to put them somewhere else, they would not be subject to the official access rules anyway. Unless NAA could offer similar terms to those afforded by alternative custodians, potential depositors could be deterred from placing their papers with NAA and nothing would be gained by way of making them accessible under official rules (some people perversely argued that the intention was lock official estrays away from public view).

Obviously, at some stage thereafter, this outcome was regarded as intolerable and hence s.6(3) which appears to prevent NAA from offering donors control over access to material they deposit insofar as that material is found to be C'wealth records (i.e. owned by the C'wealth). It was always a tricky area because if the C'wealth had an ownership claim it could be argued it should be enforcing that claim (replevin) rather than offering s.6(2) immunity from the access rules as an inducement to donate. Of course, it does not follow that documents once owned by the C'wealth are still so owned and it is certainly not the case that all "official documents", whatever that means, are or ever were C'wealth-owned. Another argument for the original drafting was that the pursuit of ownership claims is so fraught that it is best not pursued. I assume the issue now being heard in Federal Court is whether the letters are or ever were owned by the C'wealth. Pity the poor judge who has to decide that.

The article suggests the Monarch has the final say on access release, presumably because this was so stipulated in Kerr's agreement with NAA when making the deposit. If the Court decides the letters are not C'wealth records, I imagine this stipulation would remain unaffected by any future transition to a republic.

<<Andrew Waugh:
"If the Court decides the letters are not C'wealth records, I imagine this stipulation would remain unaffected by any future transition to a republic."
That would depend on the exact reasoning about why the records are not Commonwealth records, and the form of the legislation transitioning to a republic.>>

2017, September 6:

According to Jenny Hocking, the "palace letters" case will conclude this week in Federal Court:

> These letters, between the governor general and the Queen, her private secretary and Prince Charles, in the weeks before the dismissal are held by our National Archives in Canberra … Lead barrister, Antony Whitlam QC, addressed the central question of the nature of "personal" as opposed to "commonwealth" records, arguing that correspondence between the Queen and her representative in Australia could not be considered "personal" … Thomas Howe QC for the National Archives, however, described the letters as Kerr's "personal property" for him to dispose of as he wished. The letters were deposited with the archives by Mr David Smith, the governor general's official secretary, after Kerr left office. However, Howe contended, in doing so Smith was acting as an "agent" of Kerr and on his instructions, "They are the property of Sir John Kerr personally, not the commonwealth or the official establishment."

Whatever the merits or the outcome of the case, Hocking's article is a useful reminder of the distinction under C'wealth law between a "Commonwealth record" and an official record. In earlier reporting:

> Tom Howe, QC, for the National Archives, said the Archives Act drew a sharp distinction between the governor-general "him or herself" and "the official establishment of the Governor-General". The "personal and private records" of the governor-general were "owned by him or her as opposed to being transferred into the records of the official establishment", he said. Mr Howe said previous governors-general had taken correspondence with the Palace with them when they left office. Sir John had acted on the basis of this "decades' long" convention when he corresponded with the Queen. "Now it's said ex post facto … you don't own the records," Mr Howe said. "We say that's a surprising way for the … law to work." The court heard Sir John's official secretary, Sir David Smith, lodged the letters with the director-general of the Commonwealth Archives Office in 1978. Mr Howe said he was "lodging them as agent for Sir John Kerr … on the instructions of Sir John Kerr" and if they had been Commonwealth records they would not be subject to his orders. "It was not a transfer of ownership; it wasn't a gift of ownership of the records," Mr Howe said. "Sir John Kerr had the ultimate constructive custody of the records."

Section 6 of the Archives Act states:

> ***"Commonwealth record "*** means:
> (a) a record that is the property of the Commonwealth or of a Commonwealth institution; or
> (b) a record that is to be deemed to be a Commonwealth record by virtue of a regulation under subsection (6) or by virtue of section 22;
> ***"Commonwealth institution "*** means:
> (a) the official establishment of the Governor-General;

I think this Commonwealth distinction between ownership of the artefact and the official purpose of the record is still unique in Australian archives law. The argument seems to turn on a distinction between activities of the G-G and his staff belonging to the "official establishment" (whatever that means) giving rise to Commonwealth ownership and activities outside the "official establishment" leaving the resulting artefact in private ownership. How they operated and on what conventions is immaterial except insofar as it bears on ownership. Now the Court is being asked to decide whether this Vice-Regal correspondence belongs to the official establishment or not. Are all records created by a GG personal to him/her unless "transferred into the records of the official establishment"? Where has such correspondence produced by the 17 GGs before Kerr and the 7 GGs after him (before the current one) actually ended up? The National Library has some – e.g. Tennyson; Stonehaven; Gowrie; Munro-Ferguson – that appear to contain official materials but nothing like "personal" correspondence with HM.

Can the official secretary plausibly split himself in two and function as head of the official establishment in one moment and an "agent" for the former GG in the next? Previous GGs, previous Ministers, and previous senior bureaucrats may have been in the habit of taking official correspondence with them, and sometimes argue while still in office that papers dealing with official business are personal. Does that make it a decades long convention? Recent controversy over official emails suggests another view – viz. that official business is the test as to whether documents come within the scope of recordkeeping legislation (with the possible exception of the C'wealth Archives Act). But perhaps the GG is in a different category, at least as far as correspondence with the Monarch is concerned. One assumes there are no rule-books, guidelines, or procedures for GGs to follow and that convention, custom, and time-honoured practice are all the go, but there would have to be evidence that there was a decades long convention that correspondence with HM is not part of the official establishment. Was the decades long convention overturned by the 1983 Act? Did that Act operate retrospectively to invalidate an arrangement entered into between NAA and Kerr's estate in 1978? An archives law, by its very nature, reaches back to impose new controls over records already in existence. If Sir John Kerr "had the ultimate constructive custody of the records" in 1978, who has constructive ultimate constructive custody now? Whoever it is why don't they withdraw the records from NAA? Too late now, I suppose while litigation is on foot. So far as I know, FOIA doesn't use a property test; if the dates were right, perhaps that would have been be a better path to use; it wouldn't apply to privately owned records so the same issues would arise, but it might apply to official records. All will soon be made clear by the learned judge.




<<Andrew Waugh: In the bureaucratic speech of the 19th century (with which I am most familiar), the 'Establishment' means the approved/funded roles in an organisation – usually listed by job title, and/or by pay scale. So the 'official establishment of the Governor General' would be the roles that support the GG – the aide-de-camp, for example, and the secretary. It's probable that it's expressed in this way because the staff of the GG are anomalous; in their role they can't be considered members of the public service (i.e. the government), or of parliament. Separation of powers and all that. I wouldn't think the 'establishment' includes the GG themselves. I hardly think the 'establishment' of the office starts off with '1 Governor General, so and so salary'.>>

2017, September 7:

Andrew says **<<... the 'official establishment of the Governor General' would be the roles that support the GG ... I wouldn't think the 'establishment' includes the GG themselves>>.**

Howe's argument, on behalf of NAA, goes beyond that – viz. "*They are the property of Sir John Kerr personally, not the commonwealth or the official establishment*." NAA has to argue that because, even if not part of the GG's establishment, they would still be Commonwealth records because "… a Commonwealth record is a record owned by the Commonwealth…".

On that argument, it would seem the office of GG is not part of the Commonwealth (only the establishment) and, by logical extension, his activities would be beyond the reach of Commonwealth law. But we know this is not the case. The GG's actions are bound by the Constitution and are reviewable by the High Court. He is bound by the law of the land (Australian law) in the exercise of his official activities. He is a creation of the Constitution, part of the Commonwealth, not a separate being. How can it be that documents created in the exercise of those official duties are not the property of the Commonwealth?

Balmoral (Private Property)

Buckingham Palace (Crown Estate)

The only logical way to square that circle would be to argue the doctrine of the King's two bodies. The simplest way to understand it is this: the Queen's property is of two kinds – personal and official.

Some of her wealth is hers personally and disposable by her just like you and me while other property (Buck House I imagine but I don't know) is State property and not hers to do with as she wishes. She has a personal fortune and the Civil List. NAA's argument must be along the lines that an analogous situation applies in the case of the GG ("… *property of Sir John Kerr personally, not the Commonwealth*…"). Some of his official documents are personal and some belong to the State unless they are running a more broad-ranging argument that–

1. official dealings between the GG and HM are different from the GG's official dealings with anyone else (including the Australian Government) and none of them are within the reach of Australian law, or
2. even more breath-takingly, that none of the GG's official records are Commonwealth property (unless filed with the establishment) and are his personal property to dispose of as he wishes.

The latter proposition, if sustained, would of course be analogous to the situation applying in Britain with regard to the Royal Archives. **Note**: the original drafting of the Archives Bill recognised the difficulty and would have allowed NAA to accept deposits of personal papers from persons who had held office (ex-GGs, ex-Ministers, ex-bureaucrats) and apply access in accordance with the donor's wishes irrespective of whether or not they included Commonwealth records but this elegant solution was not allowed to stand.

If it becomes available, the transcript will make fascinating reading.

2017, October 16: … Queen's involvement in the 1975 dismissal uncovered?

From SMH:

> Representatives of the British government flew to Australia in the lead-up to the 1975 dismissal of the Whitlam government to meet with the then governor-general … Historian Jenny Hocking discovered files in the British archives showing Sir Michael Palliser, the newly appointed permanent under-secretary of the Foreign and Commonwealth Office, arrived in Canberra a month before the dismissal and held a joint meeting with Sir John Kerr and the British High Commissioner, Sir Morrice James, just as the Senate was blocking supply. Sir Michael later reported back to London that Sir John "could be relied upon" … Although Sir John's role in updating the Queen and the British government about the events is well known, what remains unclear is how active government and royal players in London were in trying to prevent the 1975 half Senate election from being called … Professor Hocking is also waiting for a Federal Court judgement on her application to have access to what are known as the 'Palace letters', the correspondence between Sir John Kerr and Buckingham Palace which she believes will – finally – reveal just what the Palace knew of Sir John's intentions in the lead-up to the dismissal. The letters are held by the National Archives of Australia which has deemed them "personal" – rather than official – correspondence that will not be released until 2027. They may never be released if Buckingham Palace decides to exercise its power of veto over their release …

If more details on the subject of the joint meeting (whatever it may have been) are not in files on open access at the National Archives (UK), how likely is it that those details will be on record in the Kerr correspondence with Buck House? On the other hand, I doubt very much that if more detail exists on record it would be found on files now available for public access in the National Archives (UK).

2017, October 16: "A Royal Green Light" …

"A Royal Green Light": The Palace, the Governor-General and the Dismissal of the Whitlam Government

<<Michael Piggott: For those following this case and don't normally monitor John Menadue's blog, the latest from Jenny Hocking may be of interest>>

2018, March 21: Hocking v NAA

The Federal Court has finally ruled in NAA's favour in the Kerr/Queen (Dismissal) letters case. The judgement approaches the result via a number of threads and it is unclear (to me) whether any one rationale was used to reach the result and how that rationale might apply to other materials (e.g. ministerial emails and unfiled papers). It is a lawyer's judgement (unsurprisingly) with arguments piled on so that if one prop is taken away the edifice still stands. The records in question were not examined by the court so it unclear also whether –

- some, had they been so examined, would be determined to be Commonwealth property, or
- the decision applies to whole deposit, irrespective of how ownership of some of its contents might be determined in other circumstances.

Threads in the Judge's arguments leading to his conclusion (viz. that '' at all relevant times, the documents comprising AA1984/609 were the personal property of Sir John Kerr and were not the property of the Commonwealth") include –

- What the parties to the agreement thought and how they acted;
- Personal and private vs official;
- What is filed and what is unfiled;
- The implications of the phrase ''official establishment" of the G-G;
- Implications of the legal concept of ownership.

Here is a summary of some of those arguments –

- Sir John considered that he, personally, owned the records.

- Sir John chose to consult The Queen in order to ascertain Her wishes.
- The Queen also appears to have considered that the subject records were owned by Sir John and were amenable to disposition in accordance with his instructions.
- it was Sir John's decision to place the correspondence to and from the Palace in the custody of Australian Archives.
- the caveat in the final paragraph of the letter of deposit regarding consultation even after 60 years had lapsed was added by Mr Smith after he had consulted with Sir Philip Moore, The Queen's Private Secretary at the time. Sir John Kerr was advised of the addition of the caveat in Mr Smith's letter dated 20 May 1980 to him ..... This is not inconsistent with Sir John viewing these papers as his personal property.
- the Commonwealth, through the then Director-General of Archives, 79ealized7979 that the subject records were Sir John's personal property.
- the circumstances surrounding the copying of Sir John's papers by Mr Smith at Sir John's request, and the subsequent provision of those copies to Sir John, are also consistent with Sir John's ownership.
- the records in AA1984/609 were dealt with differently from other forms of correspondence sent to and from Sir John after the events of 11 November 1975 and while he was still Governor-General.
- the passing of ownership of M4513 in accordance with the terms of Sir John's will, the ultimate disposition of those records by the executrix of Lady Kerr's estate (Ms Bashford), and correspondence passing between Ms Bashford and the Archives concerning that disposition (which make repeated reference to Sir John's "personal papers", "Sir John's papers", and "Sir John's material"), reflect a shared recognition of Sir John's original ownership of those records.
- the following material [listed in para 117 of the judgement] supports the view that, conventionally, correspondence between a Governor-General and The Queen has been regarded as unique and does not give rise to a property interest on the part of the Commonwealth.
- it is relevant to note that the construction advanced by Archives produces an outcome which is broadly consistent with the special archival arrangements concerning Royal correspondence in the United Kingdom.

In reaching his conclusion, the Judge also had this to say-

- I do not accept the applicant's core submission to the effect that the correspondence comprising AA1984/609 should be viewed as the property of the Commonwealth simply because its subject matter relates to the performance of the Governor-General's role and function.
- I accept Archives' submission that the personal and private correspondence between a Governor-General and The Queen does not involve the Governor-General exercising the executive power of the Commonwealth within the meaning of s 61 of the *Constitution*.
- I do not consider that resolution of the issues in these proceedings is assisted by reference to authorities in the United States of America.
- nor do I accept Archives' submission that the presumption of regularity has some meaningful operation in these proceedings.
- I do not consider that Archives' construction of the *Act* should be rejected because, on the applicant's submission, this construction means that the documents comprising AA1984/609 remain the property of Sir John Kerr forever and could, for example, be retrieved and then destroyed or otherwise disposed of.
- I do not accept the applicant's submission (as outlined in [59] above) that an inference should be drawn that Sir John considered that he could not withdraw

AA1984/609 from Archives, in contrast with his retrieval of 11 cartons of other papers which he had lodged with Archives.

- it is both unwise and unnecessary to seek in these proceedings to exhaustively define what papers or records of a Governor-General are "Commonwealth records" on the basis that they are Commonwealth property. In light of the assumption that all the records in AA1984/609 comprise correspondence between Sir John Kerr acting in his capacity as Governor-General and The Queen (and/or Her Majesty's Private Secretary).

In paras 135-156 the judgement canvasses the legal arguments around whether the records are C'wealth records because they belong to the Commonwealth rather than to the official establishment of the G-G.

- the word "property" should be given the same meaning when juxtaposed with the concept of "the official establishment of the Governor-General" as it has when juxtaposed with the concept of "the Commonwealth". Accordingly, for the reasons given at [102] to [106] above, the reference to "property of" picks up the concept of ownership as ordinarily understood under the general law.
- It is significant that, in contrast with all the other "Commonwealth institutions" specified in s 3(1), the only one which has a qualification to it is that relating to "the official establishment of the Governor-General".
- I accept Archives' submission that the qualification "official establishment" refers to persons who assist and support the Governor-General's performance of official duties, namely the Official Secretary and his or her staff.
- The effect of this construction is that the Governor-General himself or herself is not relevantly a "Commonwealth institution" or "the Commonwealth" itself
- The first Bill, the *Archives Bill 1977*, proposed that a different approach be taken to the records of a Governor-General and his Office, and records of the executive government. It appears that a different view was taken in the *Archives Bill 1981* **[CH: you bet it was!!!!!]**. The opposition moved an amendment to subject all records of the Governor-General to the open access provisions, but this Bill was never passed
- The *Act* plainly draws a distinction between the records of the official establishment of the Governor-General and the Governor-General himself or herself. In my view, the intention was to have the provisions of the *Act*, dealing with such matters as the open access period, apply to records of the official establishment of the Governor-General, but to leave to any particular Governor-General the option of placing his or her private or personal records with Archives under arrangements pursuant to s 6(2). **[CH 2025: : it was never the purpose of the 1978 drafting to declare the G-G's records were not C'wealth records but to confer on the G-G, as well as certain other arms of Government, special privileges regarding disposition, access, etc. but this sublime clarity was subsequently tampered with in what our draftsman, Charles Comans, described contemptuously as "Ministers' little frolics".]**
- I do not accept the applicant's submission that the *Act* should be construed by reference to what Senator Evans said in his Second Reading Speech, when he referred to the legislation not applying to the Governor-General's "private or personal records" and that this is a very limited category of documents, such as Christmas and birthday cards, bank statements etc. That approach fails to take account of the fact that there has generally been an acute appreciation of the special character of correspondence between the Governor-General and The Queen
- there are clear differences between the *FOI Act* and the *Act* when it comes to dealing with documents or records relating to the Governor-General. Most notably, the Governor-General is not a "prescribed authority" for the purposes of the *FOI Act*.

- it is appropriate to say something briefly concerning the phrase "administrative records" in the context of records of the official establishment of the Governor-General. As noted above, this phrase is not used in the *Act* although a similar phrase appears in the *FOI Act*, as discussed in *Kline*. The phrase does appear, however, in a document titled "Access Examination Manual" which is published by Archives (November 2014) for the guidance of its staff in making access decisions

All of the above just gives a flavour. For those interested, there is much more besides. Republic anyone?

2020, January 24: It's best I file it

An article in the last *Weekend Oz* by Troy Bramston says that Buckingham Palace has "backtracked" on a 1991 agreement to release (after 50 years) Vice-Regal correspondence with the Crown held at NAA. The Agreement apparently stipulates that access is subject to "*a possible veto by the Queen's private secretary and the Governor-General's private secretary*". The Queen's PS , it seems, is usually the Keeper of the Royal Archives but, so far as I can discover, the GG's PS has never been Director-General of NAA. It is unclear whether limits on access after 50 years are in accordance with any knowable criteria or are appealable or are simply a matter of whim without a basis for consistent application and outcomes. According to Bramston, it has now been exercised not simply to identify exceptions but to impose a blanket extension over everything beyond the 50-year period.

Reasons given include "privacy and dignity", fearless advice, and Australia/British relations. All sorts of questions arise, including:

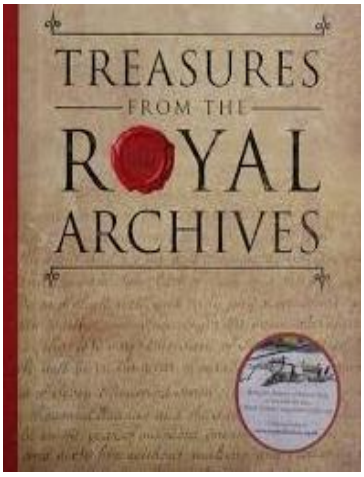
- Why are two middle-ranking public servants making the decisions?
- Are the GG's letters with the Queen of Australia or the Queen of Britain?
- If not the latter, how could they harm Oz/UK relations?
- Is the correspondence part of our governance or dealings with a foreign power?

Apparently the Hocking Case (Kerr's letters re The Dismissal) is proceeding in the High Court next month. The issue there seems to be whether the correspondence in NAA's custody comprises "Commonwealth records" under the Act. But that point is a technicality and trivial in larger policy terms, the kind of petti-fogging detail lawyers fixate on to avoid larger issues. It wouldn't even matter if the letters were somewhere else. Bramston points out that similar material not held by NAA is made available (e.g. McKell papers at SLNSW). Perhaps this class of material would be more freely available if it was not deposited in the official archives-

In an episode of *Yes, Minister* Jim Hacker wants to suppress a document:

Bernard Woolley: Shall I file it?
James Hacker: Shall you file it? Shred it!
Bernard Woolley: Shred it?
James Hacker: Nobody must ever be able to find it again.
Bernard Woolley: In that case, Minister, I think it's best I file it.

No one familiar with the arbitrary nature of access to the Royal Archives in Britain will be surprised by any of this. Irrespective of their status under the *Archives Act*, the question is whether this class of material should be regarded as part of the official record of the way we are governed. The answer is, of course, "Yes". That being so, we are entitled (as citizens of this sovereign Commonwealth) to have consistent rules for their treatment, rules and guidelines with predictable outcomes. I am not here arguing for the release of this class of material only for a more consistent, predictable, transparent way of managing the access to it.



It has always been my view that there should be a clear distinction between official archives and personal papers and that, unless official estrays amongst personal papers are recovered, access to the latter (even when lodged with an official depository) should be at the discretion of the depositor. Thus, personal papers that include official estrays that are not pursued with recovery in view should not be subject to official access policy. If government is worried about confidentiality, the laws dealing with official secrecy, national security, and treason should suffice (and I have seen copyright law employed for this purpose as well). This was the position written into an early draft of the *Archives Act* when it was still under my hand, but it got fudged later on. The rationale for my position is this:

- It is impossible to satisfactorily distinguish official, personal, and private documents (content is another matter)
- There is not much appetite to pursue and recover official estrays, ownership is hard to prove at law, and criminal sanctions are seldom used in document-handling cases
- Official secrets are usually managed (instead) by the application of customary procedures or sub rosa after the event on a case-by-case basis
- Systematically, unless recovery is sought, depositors will be free to lodge them as they wish
- In which case, all custodians (including official archives repositories) should be able to offer their services on an equal footing.

2020, February 4: The Archives Act goes to the High Court

<<Adrian Cunningham: This week … the High Court of Australia will deliberate on the Archives Act's definition of 'Commonwealth Record'. Constitutional lawyer Anne Twomey writes an explainer about the John Kerr Palace letters case in the Conversation. The main issue is the property-based nature of the definition of Commonwealth Record in the Act. The Act says that a Commonwealth Record is a record that is the property of the Commonwealth …>>

It's not quite that simple.

<< Many former Commonwealth officials and office-holders have taken possession of records created or received in the course of carrying out their official duties that they claim to be their private property. Former Governor General, Sir John Kerr, was one of those … he National Archives has for tactical reasons often accepted at face value assertions of private ownership of records that some might regard as Commonwealth records>>

Quite so. NAA's practice has been what we originally intended but without the statutory basis that the draft *Archives Bill* provided. The power to accept "personal papers" is

contained in **s.6**. When that clause was being drafted, all the problems of dealing with such material deposited by former ministers and officials (leaving aside objections from NLA and others that Archives shouldn't be taking in such materials at all) came to be focused on access. There were many options but they boiled down to two:

- Compel ex ministers and officials to return any official records in their custody, leaving them with only personal and private material to do with as they wished, or
- Leave them in possession of their papers which could and usually did include official material and empower Archives to compete on equal terms with other prospective repositories to persuade depositors (in their absolute discretion) to put their papers in their entirety with Archives (or anyone else).

The rationale for Option 2 (as I've explained here before) was that distinguishing official documents from the rest was next to impossible, that it would lead to endless disputation, and that the pursuit of official documents by using archives law would be unedifying and ultimately futile. Instead, we would offer them an opportunity to deposit with Archives on the same terms as every other repository – viz. that the depositor would retain control over access to all the material (official, personal, and private) contained therein. Hence **s.6(2)** –

> **s.6(2)** Where, in the performance of its functions, the Archives enters into arrangements to accept the care of records from a person other than a Commonwealth institution, those arrangements may provide for the extent (if any) to which the Archives or other persons are to have access to those records and any such arrangements have effect notwithstanding anything contained in Division 3 of Part V.

which says that the donor's wishes shall prevail over the access provisions applying to "Commonwealth records" (Division 3 of Part V). Unless my memory is playing me false (which at my age is possible) that was how things stood when I was involved in the drafting and defending the Bill before a Senate Committee. The 1983 Act, however, had an additional provision s.6(3)

> **s.6(3)** Where an arrangement entered into by the Archives to accept the care of records from a person other than a Commonwealth institution relates to a Commonwealth record, then, to the extent that that arrangement, in so far as it relates to such a record, is inconsistent with a provision of Part V, that provision shall prevail.

Clearly nullifying the effect of **6(2)** standing alone (so far as access is concerned) by imposing the access provisions applying to Commonwealth records amongst a deposit of personal papers. In the instant case, the only possible defence against the claim for access to Commonwealth records amongst the Kerr Papers is to argue that the records in question are not owned by the Commonwealth or an agency. That, I understand, is the issue being argued. The original drafting was intended to obviate the need for a court (or anyone else) to make that determination.

The wisdom of the original drafting is thus demonstrated. The provisions of Part V can only conceivably apply because Kerr chose to deposit his Papers with NAA. If he had put them somewhere else the issue wouldn't arise in the first place. And absent **6(3)** that would be the same result for a deposit with NAA. The original thinking was that a depositor should not face access restrictions over their papers by depositing at Archives that they would not incur by depositing them anywhere else. The only possible issue would be whether NAA was empowered by the provisions of **6(2)** to accept a former Governor-General's papers under that provision in the first place.

Had Kerr deposited with another repository (NLA for example) the issue would not arise. But why not? NLA is a Commonwealth institution and the access provisions apply to Commonwealth records in a Commonwealth institution –

> **s.31**(1A) This section applies to a Commonwealth record that:

(p) is in the open access period; and
(b) is in the care of the Archives or in the custody of a Commonwealth institution; and
(c) is not an exempt record.

(p) Subject to this Part, the Archives must cause the record to be made available for public access.

Which means that any Commonwealth records amongst Kerr Papers at NLA would also be subject to the Commonwealth Government's access provisions unless they were deemed to be

- exempt records, or
- not Commonwealth records at all.

"*There's too much of this damned deeming*" (A. P. Herbert). But Kerr's Papers at NLA (hypothetically) would not be exempt records because they would not be Commonwealth records in the first place. The definition of Commonwealth record has certain exclusions including "exempt material"

s.3 ***"exempt material"*** means: ...
(b) material included in the collection of library material maintained by the National Library of Australia; ...

So, under para (b) of the definition of materials which are not Commonwealth records, official records amongst Kerr Papers with NLA would not be subject to Commonwealth access provisions – exactly the same position that would now apply had **s.6(2)** of the original drafting of the *Archives Bill* gone forward without the accompaniment of **s.6(3).**

Now that I am rusticating and in my dotage, my own personal papers are in disarray but somewhere I have the material we presented to the Senate Committees holding hearings into the Archives and FOI Bills including copies if the Bills as they then were and lengthy testimony we gave – during which (I suspect) this issue came up. It's purely of academic interest now, I suppose, but if anyone is interested I will try to dig them out.

2020, February 5:

<<Adrian Cunningham: The solution to the issue that did not make it into the final version of the Archives Act may well have been simpler and cleaner to implement, but would it have been better? Personally, I don't think it is right to let former office holders claim records created in the course of performing their official duties and then do whatever they like with those records - destroy them, sell them, impose unreasonable access restrictions on them, etc.

Pursuing official documents in private hands might be unedifying, but I think it would more unedifying for the former officials refusing to hand over records that rightly belong to the people of Australia - and less unedifying for those institutions trying to do the right thing for the nation. Yes, such efforts may be futile - but if an individual is prima facie guilty of removing official records from public hands then they should be prosecuted. A couple of successful prosecutions would deter others from doing similar things. At present it is difficult, if not impossible, to launch such a prosecution as the definition of ownership is so vague in the Act that people can get away with making tendentious claims.

A clarification of ownership of such records by the High Court would, to my mind, be very welcome - if the Court rules that any record created or received in the course of carrying out Commonwealth business is the property of the Commonwealth.

In any case, as Chris says, the solution he and his colleagues devised in the 1970s did not make it into law - so the matter is academic. The High Court can only rule on the law as it stands, and a definitive interpretation of ownership is desperately needed.

What happens if the Court rules that the Palace letters are indeed Commonwealth records? They are in the open period, so the NAA would be obliged to

consult with the controlling agency (Office of the GG) on any closure of access. The Office of the GG would certainly take the views of the Palace into account in making a recommendation to the NAA. Based on recent history, it seems unlikely that the NAA would reject such a recommendation. So we would end up exactly where we are now, with the only change being that the records are deemed to be Commonwealth records. The NAA access decision could then be appealed to the Administrative Appeals Tribunal, but I cannot imagine that any decision of the AAT would again find its way back to the High Court - so the decision of the AAT in that scenario would probably be the end of the matter. So we would probably be no closer to having access to the Palace letters, but at least we would have clarity over the ownership of records. That, if nothing else, makes the current High Court case very important.

I know from personal experience just how difficult it can be to distinguish official records from non-official (party political, private, family, etc) records. We live in a messy world. But such messiness does not change the simple fact that records created for official purposes should belong to the people of Australia, not to individual office holders. The case of the Palace letters seems very clear to me. There is no way they can be regarded as anything other than records created and received by the GG in the course of carrying out his official duties. There is no way anyone can credibly claim that he had a non-official relationship with the Palace.>>

<<Chris Gousmett: ..."Would this person have created this record if they were not holding this official position?">>

Like Adrian, I spent many years at NAA trying to reach a consensus about what was official and what was not – with officials (up to departmental head level) and even ministers. I collected samples from our deposits of personal papers and laid them out. Everyone came into the room with a formula like this. Many of them left convinced their formula worked. But, you know what? No two people ever (that's never) agreed on how to categorise all the documents on the table. That's what finally convinced me that (absent a court or tribunal ruling on every case) this approach was futile.

<<The High Court can only rule on the law as it stands, and a definitive interpretation of ownership is desperately needed>>

And how will that help? The issue here is official vs personal – not who owns what. The ownership test is unique to C'wealth legislation because of the Constitutional clause re "on just terms" (cf. *The Castle*). Everyone else has made or received. Ownership is a dis-functional basis on which to manage official records but, as Adrian says, we are stuck with it. But it became another reason for the discarded solution. We don't want to manage C'wealth property, for goodness sake, we want to manage C'wealth records.

<<I don't think it is right to let former office holders claim records created in the course of performing their official duties and then do whatever they like with those records – destroy them, sell them, impose unreasonable access restrictions on them, etc.>>

Good on yer. Unless the C'wealth consistently and relentlessly pursues official estrays (and the property test makes this almost impossible) what other mechanism than the one originally proposed is available using archives law? It may gratify pious pleadings about what is right but what would be the practical value? I have no problem with them managing and recovering official documents or with protecting security outside archives law. My problem is with trying to use archives law to do it. Our purpose was not to lay out the whole basis for managing official estrays but to recognise the limitations of the archives law we were drafting as the mechanism for doing so.

<<What happens if the Court rules that the Palace letters are indeed Commonwealth records? They are in the open period, so the NAA would be obliged to consult with the controlling agency (Office of the GG) on any closure of access. >>

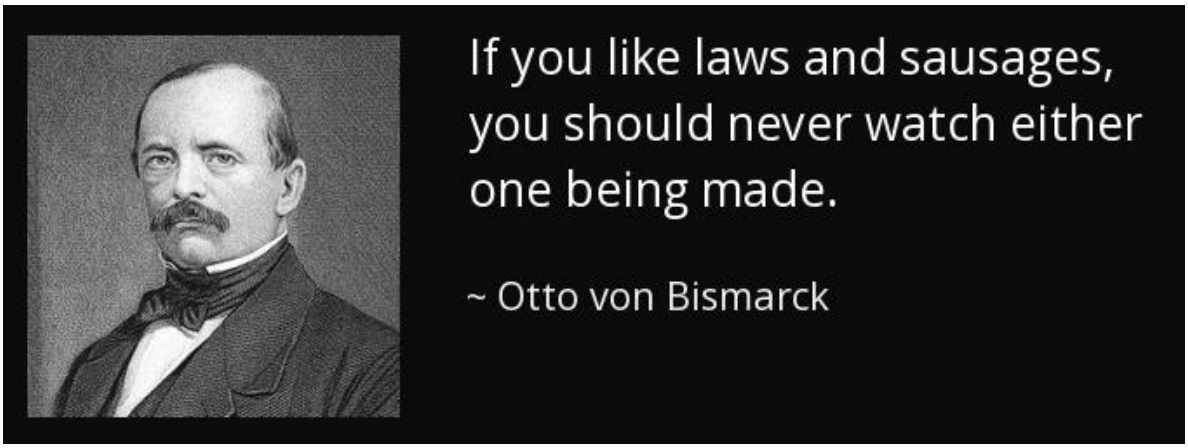
Not so. Under the Act, NAA is the decision-maker, not the controlling agency.

> 35.(1) The Director-General, in consultation with the responsible Minister or a person authorized by the responsible Minister, shall make arrangements for determining the Commonwealth records in the open access period that are to be treated by the Archives as being exempt records and may make arrangements for determining the extent to which access in part to Commonwealth records identified as exempt records may be given without disclosing the information or matter by reason of which the records are exempt records.
> (2) Except in the case of records exempted from transfer to the care of the Archives by virtue of a determination under section 29, an examination of records for the purposes of subsection (1) shall be conducted on premises of the Archives.

Consulting the controlling agency on the merits of the decision (rather than the arrangements for making it) is a practice that has evolved but NAA is under no legal obligation to do so.

<<... if an individual is prima facie guilty of removing official records from public hands then they should be prosecuted. A couple of successful prosecutions would deter others from doing similar things.>>

Does anyone suppose that a string of prosecutions would be launched in support of the integrity of the archival record? Give me a break. If any such action were to be taken it would be selective and for immediate political purposes.



<<We live in a messy world. But such messiness does not change the simple fact that records created for official purposes should belong to the people of Australia, not to individual office holders>>

Good luck with that. The bottom line is this: what is the policy to be followed in dealing with estrays? What sort of a policy outcome is it that compels depositors with NAA to submit to official access rules when (at their absolute discretion) they can avoid that by depositing somewhere else? Crazy.

<<Michael Piggott: ...what I wonder do we think the NAA should have done differently when offered the Kerr papers (incl the infamous letters)? >>

Someone told me that NAA doesn't take personal papers any more. If true, this sort of nonsense is perhaps why they've decided not to. Does anyone know what the current policy is? Of course, and we don't know, he may have put them there on official advice – on the Bernard Woolley principle cited earlier. ("*I think it's best I file it*").

2020, February 13:

I've just come across this in the Forbes Advocate – something I haven't seen before –

> The convention across Commonwealth nations was that communications between the Queen and her representatives were personal, private and not accessible by the executive.

Do they mean "was" (historically and, if so, how recently) or "is" (currently). The job of the High Court is to interpret and apply Australian law but a universal practice across the entire Commonwealth of Nations (all members or just monarchies?) might be persuasive even if it was not conclusive. But then, I'm guessing that no other Commonwealth country has a wretched property test like ours.

<<David Povey: Today, so far as I am aware, the archives of the monarch are entirely separate from the archives of the state – physically, legally and morally. I hope the High Court has sufficient sense to regard the approach of Professor Hocking as impertinent and without basis, regardless of the Archives Act.>>

Interestingly, the doctrine of the King's Two Bodies (the King is dead, long live the King) draws that very distinction between the office and the holder-of-the-office and relates above all to "property". The royal properties in UK are divided between those owned by Elizabeth Windsor (which she can bequeath) and those owned by the State.

<<Andrew Waugh: I doubt the word 'impertinent' is in the High Court's vocabulary. Nor would it be appropriate for the High Court to make a judgement based on a determination that a distinguished Professor was 'impertinent' to ask for the records.

I would also note that the records being asked for are the Governor-General's, not the Queen's. The Governor-General is, of course, a creature of the Australian Constitution and represents the Monarch, but is not the Monarch. Furthermore, the Queen is the Queen of Australia, not the Queen of the United Kingdom of Great Britain (etc).

I once thought the records would be entirely innocuous, but the determined fight to keep them closed does make me wonder. As does the fact that they were kept and deposited in the NAA at all. Not that I think that the Queen is personally implicated - I rather doubt she was corresponding personally with Kerr - but I rather wonder if the Palace might be embarrassed.>>

2020, February 19:

There is a helpful review of The Case online by Clayton Utz

> ... The Archives Act 1983 defines a Commonwealth record as a record that is the property of either "the Commonwealth" or of a "Commonwealth institution" ... The problem is that determining whether a document is a Commonwealth record can be a difficult question of statutory construction ... the Full Federal Court [by a] 2-1 majority ... ruled that the Palace Letters are the property of the person then holding the office of Governor-General – Sir John Kerr – and not the property of the Commonwealth ... The Letters include letters ... from 15 August 1974 and 5 December 1977, covering: the official duties and responsibilities of the Governor-General; personal and confidential correspondence; the events of the day in Australia; and contemporary political happenings in Australia.
>
> ... The Official Secretary to the Governor-General lodged the Palace Letters with the National Archives of Australia, with instructions that the letters were to "remain closed until after 8 December 2037" (later revised to after 8 December 2027). If the letters were Commonwealth records, this direction would have no force ... the majority [of the Full Court] remarked that: "We reject the approach that everything that a person who holds an office does is done by that person officially".

That remark does not address the question whether some of what a person who holds an office is done officially. Does the Court suppose that access must be given to the Palace Letters in their entirety or not at all? Can access, if required, be given selectively (i.e. to that material which is "official") or by means of redactions (viz. line-by-line, phrase-by-phrase)?

> In a strongly worded dissent, Justice Flick considered the Palace Letters to be Commonwealth records because of: the positions occupied by The Queen and the Governor-

> General; the Governor-General's functions; the nature and subject matter of the correspondence; and the importance of that subject matter to Australia's Constitutional system of government.
>
> This case raises fundamental questions of statutory construction and is likely to have an enduring effect on the interpretation of the Archives Act. If Justice Flick's view is upheld, the Palace Letters will be eligible for public access under the Archives Act … If the majority view prevails, public officials will have greater comfort that they are able to influence the conditions and timing of access to their personal papers after depositing them with the National Archives …

If public officials are denied that comfort, absent any systematized and enforceable process to compel them to deposit "official documents" with NAA, they can still "influence the conditions and timing of access to their personal papers" by simply depositing them elsewhere beyond NAA's control (e.g. NLA, SLNSW, National Library of North Korea, etc.) whose collections are exempt from the Act or beyond its scope of operation. As we argued back in the day, such an outcome would become an inducement for them to do so unless they are willing to surrender control.

<<Adrian Cunningham: One question, which may or not be relevant, is whether the letters were deposited with the NAA before or after Archives Act came into force in 1983. Does anyone know?>>

Subject to correction. The Act was expressed to apply to

- material of any date, but
- only to actions taken after commencement of the relevant provision(s) unless those actions bear upon the nature of the material – e.g. a record destruction undertaken w/o permission prior to 1983 would not be illegal but an undertaking of confidentiality to a foreign power might be.

All the commentary seems to be on the basis that this deposit is governed by the relevant provisions of the Act. The only way (so far as I can see) that the date of deposit would be relevant in this case, assuming the letters all came in at the same date, would be whether NAA's undertakings to Kerr (via the PS) were given under prior administrative arrangements for dealing with personal papers or under the relevant provisions of the 1983 Act. Any understanding as to access between the GG and the Palace arrived at prior to 1983 might be relevant if the Letters are C'wealth records but only in administering the exemptions to the access rules under the Act. But the contention here is that there is no need to consider the access exemptions because the Letters are not C'wealth records to begin with.

<<Adrian Cunningham: It seems that, for what it is worth, the letters were deposited at NAA in 1978.>>

2020, May 19: National Archives responds to Jenny Hocking's article …"

<<Michael Piggott: [In] … "Australian Book Review" … the current May 2020 issue's freely available content includes the NAA Director-General David Fricker's response to Professor Jenny Hocking's article in the April issue … It's a masterly marshalling of arguments in my opinion, and as interesting for the areas it does not address as for those it does. He also quotes Jenny Hocking writing that NAA "Appears a broken institution …" and responds introducing five dot points by saying he would "let the facts speak for themselves … aspects of the … issue…remind one of the Cardinal Pell case … The cold technicalities of the law aside, both have/had multiple contexts, deep emotions, agendas, personal experiences etc etc swirling around them. Fixed opinions on both sides are hard to move. Walt Whitman, Song of Myself, Part 30 refers … I also understand that the report of the Tune Review of the Archives went to the Attorney-General in February. Should I hold my breath?>>

2020, May 20:

Important for you to keep breathing, Michael. The on-going NZ Review makes for interesting reading.

<<Mike Jones: I asked the Attorney-General's Department about the Tune Review at the end of March. Here is their response:…"*The report is currently under consideration. Timing for release of the report is a matter for Government.*" I think holding your breath might be a bad idea.>>

2020, May 22:

The D-G's Defence

<<It's a masterly marshalling of arguments in my opinion, and as interesting for the areas it does not address as for those it does. >>

Hmmmmm. I have hesitated before dealing with David Fricker's response to Jenny Hocking's assault on NAA because I think he should prevail. His heart is in the right place and her arguments should be refuted. But not like this (I finally decided).

How we should deal with private papers

The D-G argues, on the basis of legal advice and court rulings, that the Palace Letters are not "Commonwealth records". It follows that NAA is not (as claimed) influenced by a conspiracy to conceal or by ineptitude but is operating scrupulously in accordance with the access rules. It is the D-G's role to administer the law, not to wish it away. Quite correct. But consider where the law (as revised from its original drafting which gave donors an unfettered right to control access regardless of whether the papers contained Commonwealth records) has led us. The question of whether or not personal papers at NAA can be controlled by the wishes of the donor can now only be determined by lengthy court proceedings and no donor could reasonably be assured how the courts might ultimately decide in their case.

In order for the records to be used, they have to survive. The original purpose of the personal papers programme was to ensure that they survived for eventual use. Absent a statutory compulsion to deposit and an administrative will to pursue official estrays (with the result of splitting deposits), it is necessary to persuade depositors to lodge the entirety of their papers (and any C'wealth records amongst them) with NAA. They are free (absent compulsion) to lodge their papers with anyone else able to offer them unfettered control. To persuade them to deposit into official custody, the official custodian has therefore to be able to offer deposit on similar terms – not on the basis of some arcane distinction based on a legal definition of "Commonwealth records" but on the public policy decision to forfeit official access control as the price to be paid to ensure ultimate survival for eventual public release. It's not enough to say "*Your wishes will prevail because of a definition of Commonwealth record in your favour which a court may or may not eventually uphold in your case*". But that is the position that the [ultimate] drafting places NAA in.

Archives are not purely about access

This tracks into the second (more contentious) arm of the D-G's defence – that NAA is committed to accessibility. This is an understandable response to scurrilous accusations to the contrary but it aligns the purpose of an archives (any archives) with libraries, galleries, and other GLAM-orous custodians and it is one of the reasons why that alignment is false. To put it as bluntly as I may, in full appreciation of the odium it will bring down, our first loyalty is to the record, not to the user. Unlike those others, our administration of access involves restriction, redaction, and concealment as well as release. Our understanding of access involves (or should involve) an appreciation of privacy, security, confidentiality, cultural sensitivity, ownership rights, and myriad other legitimate restrictions on use which

our systems are designed to manage as part of the recordkeeping process in which we are involved. Our role is to extend the recordkeeping process not to supplant it.

I have said (jokingly) that it is wrong to describe archives as preservers of the nation's memory – since we destroy most of it. It is equally wrong to think of ourselves merely as access providers like any other memory institution. Out role is different. We manage records and control over the giving and denying of access and that cannot (or should not) be based solely on a predisposition towards open-ness. Ask yourself this: in a society characterized by falsehood and deceit, which is more important – that the evidence should be known or survive? Please God, it doesn't come that – but what if it did? Historically, the development of our archives systems was hampered in this country by just this perception on the part of bureaucracy: viz that glorified librarians could not be entrusted with the management of official records. Our predecessors had to fight against that prejudice to establish that we could administer responsible access rules (including those beyond the ken of mere bureaucrats). **[CH 2025: and beyond the ken of worthy collectors]**. How odd it would be if, having prevailed, we should forget our roots and become what they accused us of.

2020, May 23:

<<Adrian Cunningham: I, for one, believe that Jenny Hocking (notwithstanding her somewhat gratuitous attacks on the motives of the NAA) deserves commendation not disparagement for taking the trouble to contest the claim that records created by senior officials in the course of performing their public duties can be their personal property, rather than the property of the nation whose interests those officials were supposed to be serving … I don't believe that defence of the public record should involve allowing former officials to do whatever they like with the evidence of their official actions – including potentially destroying that evidence if they so wish. Surely a better defence of the record involves having the power, gumption and resources to assert public ownership of public records and to use the forces of the law to pursue anyone who might wish to remove such records from public custody and legitimate public scrutiny? As Chris says, the law at present is equivocal and open to various interpretations…the best we can hope for is some solid case law that gives us all a better basis for interpretation and implementation … If the High Court rules that the Palace Letters are indeed Commonwealth Records then the NAA's claims of being a 'pro-disclosure' organisation will really be put to the test. If they are Commonwealth Records the NAA will have the power to make the letters accessible. Doing so will incur the wrath of both the Office of the Governor-General and Buckingham Palace. Based on recent history I would not be at all confident that the NAA would adopt such a courageous position – but time will tell. Of course, a pro-disclosure decision by the NAA may be appealed and overturned by the AAT – but at least we will have proof that the NAA does indeed have its heart in the right place and is truly pro-disclosure… Cutting to the question of the role and purpose of archives that Chris broaches. He says that 'our first loyalty is to the record, not to the user'. I would argue that our first loyalty is to the people of Australia. That requires protecting the record

and enabling legitimate use of those records. Setting up a false dichotomy between loyalty to records and loyalty to users is in my view unhelpful. Chris wants us to be seen as sound people who can be relied upon by bureaucrats (who may or may not be craven, who may or may not have misdeeds to hide) – not as 'glorified librarians' (oh the shame!)…Whose side are we really on? One person's 'glorified librarian' may be another person's defender of the public interest.>>

- A dichotomy is "a division into two especially mutually exclusive or contradictory groups or entities".
- A contrast is "the difference or degree of difference between things having similar or comparable natures".
- A comparison is "an examination of two or more items to establish similarities and dissimilarities"
- A priority is "something given or meriting attention before competing alternatives".

One cannot accurately be said to be making a dichotomy when arguing that users should not be given the first priority. I do not say that loyalty to the record and loyalty to the user are mutually exclusive. If I did, that would be a dichotomy. I make a comparison to say something about our values ("our first loyalty"). If it were a dichotomy, I would be saying we have no loyalty to our users and if Adrian were serious he would be saying that we have no loyalty to the record. He says it isn't a dichotomy and I agree. But a contrast there needs to be because real choices have to be made.

Adrian accepts that the D-G must follow the law ("*NAA has no choice but to abide by the law*") and so do I. The D-G says this is congruent with NAA's commitment to open-ness. But how if the law commands concealment? That creates a situation in which a choice needs to be made between conflicting principles. On the flip side, Adrian himself argues that a choice will have to be made if the Court upholds Hocking. In that case, "*NAA's claims of being a 'pro-disclosure' organization will really be put to the test*" he says.

A choice has also to be made between high principle and pragmatism. A real choice there is in how we want to be perceived. Nothing false about that and it is vital to our ability to do our job. Adrian would prefer "*that we are seen as people who can be relied on to protect the public good by the wider community … which involves doing everything we can to preserve important public records and to administer access in a balanced and defensible manner.*" How comforting if it were so. But both Hocking and Cunningham are implying that NAA does not (or may not) administer access in a balanced and impartial manner either from incompetence or cowardice. If people (darn them!) assert that the right balance isn't being struck, we have to be able to say what the right balance is.

Of course, in the grubby world of debate, no one actually says that your administration of access is indefensible because of your devotion to protecting the record or that your trustworthiness as a record-keeper is compromised by your devotion to open-ness. There are other things going on and weasel words to camouflage such contrasts. But our answer to the critics must be understood (by ourselves at any rate) within that moral framework. We

don't have to come flat out and say to users or to bureaucrats "*Your interests come second*". But we do have to know that they do. Frank Upward, thinking about how we navigate between our users and our bureaucratic masters, once described this to me as our secret motive.

I do not condemn the D-G for making the arguments he has in the circumstances in which he writes. He is making a case in response to an attack on NAA to an audience that is unlikely to be interested in our professional dilemmas and which would not warm to the suggestion that the integrity of the record should have priority over their needs. Even if the D-G believed that (and I've no reason to suppose he does), no useful purpose would be served by making that argument in that forum. And I could understand why someone in his position would not care to make it in our forum either. He would probably be attacked for making a false dichotomy.

2020, May 27:

<<Andrew Waugh: This ties in nicely with the discussion … *Republicans sense rich pickings in Biden archive – but will it be made public?*>>

2020, May 29:

<<Andrew Waugh: Well, the High Court has ruled, unanimously, in favour of Professor Hocking and against the Commonwealth…The letters are Commonwealth records, not personal papers.>>

<<Andrew Wilson: And to…add insult to injury, NAA was order to pay full costs of the legal case from the first court case to this final appeal.>>

On a trivial note and without wishing to distract from the significance of the decision, I can't help noticing that the accompanying photo in the SMH article shows Gough Whitlam (Prime Minister from Dec. 1972 – Nov. 1975) with this caption: "*Gough Whitlam, pictured in 1972, established the predecessor to the National Archives. Historian Jenny Hocking has long been seeking papers relating to his dismissal from office*". According to Wikipedia

> In March 1961 the Commonwealth Archives Office formally separated from the National Library of Australia and was renamed as the Australian Archives in 1975. The *Archives Act 1983* gave legislative protection to Commonwealth government records for the first time, with the Australian Archives responsible for their preservation. The agency was renamed the National Archives of Australia in February 1998.

As with the idea that it was Gough who took Australian troops out of Vietnam (it was McMahon who pulled out all the troops except for a handful of advisers in the years before Whitlam's election), the legend is always more powerful than the facts –

> The withdrawal of troops and all air units continued throughout 1971 – the last battalion left Nui Dat on 7 November, while a handful of advisers belonging to the Team remained in Vietnam the following year. In December 1972 they became the last Australian troops to come home …

Hardly anyone I have ever spoken to about it doubts that Whitlam withdrew our troops. They often credit him too with dismantling the White Australia Policy-

> After the Second World War, Arthur Calwell … began to relax the policy to allow refugees [and] migrants from other backgrounds in regulated numbers. This was the first of a number of steps that gradually eroded the policy until its basic dismantling by the Holt government in 1966. The Whitlam government completely eliminated it in the 1970s with the introduction of policies like the *Racial Discrimination Act 1975*.

American History's Biggest Fibs is a documentary series currently screening on Pay TV. Lucy Worsley, the series' saucy presenter, cheerfully punctures the fabrications of U.S. past – frequently by contrasting the legend with documentary evidence. She is shown a vial of tea

leaves deposited in a local museum in 1840, purporting have been taken from the cargo thrown into the Harbour during the Boston Tea Party. There ensues the following interesting exchange with Nan Wolverton of the American Antiquarian Society:

> Worsley: *Do you believe it's the tea. I'm doubtful that it's the tea.*
> Wolverton: *Well, you should be doubtful. I think it's possible.*
> Worsley: *The point is that in 1840, when he gave it to this museum, he was wanting to remember this cornerstone of American history ….*
> Wolverton: *Exactly. Whether it's real or not doesn't really matter.*

Wouldn't it be ironic (after all this) if the Palace Letters turn out not to tell us anything we don't already know? In that case it might have been better for them to remain on close hold so we could continue to indulge our fancies. But, like the AWM on Vietnam and the Museum on White Australia, it is our job to uphold authenticity not fantasy, so we are on the side of Truth, albeit conflicted. And what a remarkable instance this has been of the clash (I won't say dichotomy) between preservation and use in that service-

Users' need to know how we are governed
vs
Custodian's need to keep faith with depositors

Lots of juice in this judgement and, as yet, we only have news reports to go on. But …

The C'wealth Act (uniquely) defines Commonwealth records in terms of property

> ***"Commonwealth record"*** means:
> **(p)** a record that is the property of the Commonwealth or of a Commonwealth institution ,,,

In common usage, ownership can be a narrow term and difficult to establish – e.g. having clear legal title to a material thing (land, a house, a document, goods and chattels) or an immaterial thing (copyright, patent, reproduction rights) or, more broadly, the power to control and dispose of.

The Guardian reports that the HC decision has provided a definition of ownership, viz.

> the existence of a relationship in which the commonwealth or a commonwealth institution had a legally endorsed concentration of power to control the custody of a record.

This seems to fall short of making intellectual property rights a benchmark (which is fair enough) but is consistent with the legal distinction between ownership, custody, and possession and I would say that by focusing on control over custody, if it goes on to say or imply that it does not require proof of exclusive title but only of better title than anyone else and that it can subsist alongside "split" proprietary rights, it actually gives clarity and strength to the definition.

> The 'bundle of rights' that property involves, acknowledges that rights in things can be split: for example, between rights recognized at common law ('legal' interests) and those recognized in equity ('equitable' or 'beneficial' interests); and between an owner as lessor and a tenant as lessee. Equitable interests may further be subdivided to include 'mere

> equities'. … 'possession' is a distinct and complex concept. Its most obvious sense is a physical holding (of tangible things), or occupation (of land). An example is when goods are in the custody of another, where things are possessed on account of another … For land and goods, property rights in the sense of ownership must be distinguished from mere possession … The particular right may be regarded as 'proprietary' even though it is subject to certain rights of others in respect of the same property: a tenancy of land, for example, gives the tenant rights that are proprietary in nature as well as possessory. ALRC Report 129

To what extent, for example, would an administrative order requiring that notes be kept of official meetings give rise to "a legally endorsed power to control" notes made by a servant or official of the Commonwealth and kept by them in a "private" diary?

The idea that ownership of a C'wealth record derives from a "relationship" is very pleasing and very much in tune with ideas about r/keeping, isn't it?

The Victorian Act has the curious concept of beneficial ownership

> "public record" … does not include—
> (c) a record which is beneficially owned by a person or body other than the Crown or a public office or a person or body referred to in section 2B …

which, so far as I could discover in my time there, was borrowed from commercial law

> a term in domestic and international commercial law which refers to the natural person or persons "who ultimately own or control a legal entity or arrangement, such as a company, a trust, or a foundation".[1] The legal owner (i.e. the owner on the record) may be described as the "registered owner", and if they are not the beneficial owner they may be described as a "nominee".

And introduced into the Act for reasons which no one could ever satisfactorily explain to me. This seems to jibe with the HC concept of "concentration of power to control" meaning that a person is a beneficial owner of an official record if, and only if, they "ultimately own or control" it - but not necessarily exclusively.

<<Michael Piggott: … we have more than news reports to go on don't we - we have the Court's Reasons for Judgment ("subject to formal revision prior to publication in the Commonwealth Law Reports")?

2020, May 30:

<<Andrew Waugh: Professor Twomey on the decision and its implications. Alone among the commentators I've seen, she identifies that the letters still have to go through the NAA's normal access appraisal process. This may not be the last court case…>>

Perhaps this is what Adrian had in mind when he posted on 23 May –

> If the High Court rules that the Palace Letters are indeed Commonwealth Records then the NAA's claims of being a 'pro-disclosure' organisation will really be put to the test. If they are Commonwealth Records the NAA will have the power to make the letters accessible. Doing so will incur the wrath of both the Office of the Governor-General and Buckingham Palace. Based on recent history I would not be at all confident that the NAA would adopt such a courageous position – but time will tell. Of course, a pro-disclosure decision by the NAA may be appealed and overturned by the AAT – but at least we will have proof that the NAA does indeed have its heart in the right place and is truly pro-disclosure.

<<Andrew Waugh: Indeed. But a no answer can also be appealed through the AAT. And having gone all the way the High Court, the NAA could expect that Professor Hocking would do the same again should access be denied, or large sections redacted. Particularly if the reasons weren't *very* soundly based. I wouldn't want to be David Fricker, or the senior policy people at NAA, in negotiating this one. At least they will

now be able to examine the letters and determine if the letters are clay, dynamite, or nitroglycerin.>>

<<Michael Piggott: … I'd like to offer another speculation by focusing for a moment on the arguments the High Court justices (in a six to one majority) used to explain why they concluded Sir John Kerr's so-called Palace Letters are Commonwealth records. It is a fascinating take on the idea of a property definition of a record …

> "Five Justices in the majority held that in the statutory context of the Archives Act the term 'property' connoted the existence of a relationship in which the Commonwealth or a Commonwealth institution had a legally endorsed concentration of power to control the custody of a record. Their Honours held that the arrangement by which the correspondence was kept by Mr Smith and then deposited with the Archives demonstrated that lawful power to control the custody of the correspondence lay with the Official Secretary, an office within the official establishment of the Governor-General, such that the correspondence was the property of the official establishment. The other Justice in the majority held that the correspondence was, by common law concepts of property employed in the Archives Act, the "property of the Commonwealth" because it had been created or received officially and kept by the official establishment of the Governor-General."

… The fact that the Office of the Official Secretary at Government House had the "capacity to control the physical custody of the record that is conferred and is exercisable as a matter of management or administration" (para 96), meant the correspondence Kerr [and convention, it must be admitted] said was "private and personal" was in fact the property of the Commonwealth and thus a Commonwealth record. On this logic, the supreme irony is that if Kerr had kept the letters in his personal custody in his office or a brief case and walked out of Government House with them the day he resigned in December 1977, they would not have been considered Commonwealth records…if they had never been kept in the custody of the official establishment but always kept, say, in a locked desk draw in his office? A different matter and result entirely.>>

2020, May 31:

<< if they had never been kept in the custody of the official establishment but always kept, say, in a locked desk draw in his office? A different matter and result entirely. >>

I find it difficult to accept that it turns on which room and in whose desk the Letters were kept. If the distinction is between the Vice-Regal office and the "official establishment", why wouldn't the G-Gs desk in the G-Gs office at Yarralumla be part of the official establishment? And his bedroom for that matter.

<<"the correspondence was, by common law concepts of property employed in the Archives Act, the "property of the Commonwealth" because it had been created or received officially and kept by the official establishment of the Governor-General." >>

This suggests that there are two tests

- created or received officially
- kept by the official establishment.

<<the Office of the Official Secretary at Government House had the "capacity to control the physical custody of the record that is conferred and is exercisable as a matter of management or administration" (para 96), >>

If it comes down to a "matter of management or administration", doesn't this mean that it is the recordkeeping process rather than the physical arrangements that are most relevant? To take your hypothetical a step further, Michael, suppose the Letters had been kept by the Official Secretary and that Kerr had ordered Smith to hand them over and then "walked out of Government House with them the day he resigned in December 1977". Would that have been stealing?

I don't know if any of this was canvassed in argument during any of the court hearings leading up to this judgement, but, from what I know of the way administration works, I think it most likely that the Official Secretary managed all the paper work and deferred to the G-G's wishes. In the minds of both men, the "concentration of power to control" would have lain with Kerr. Smith would do what he was told.

But, of course, when you're compelled to contemplate r/keeping through the prism of the common law of property, you might well expect some curious twists and turns.

On another tack, an American report of the case repeats a claim that I have seen elsewhere–

> The convention across British Commonwealth nations is that communications between the queen and her representatives are personal, private and not accessible by the executive government.

I would like to know if this is correct. Professor Twomey has this to say in *The Frontiers of Public Law* at pp.410-411

> As for there being a convention that the correspondence between the Governor-General and the Queen is excluded from government records, this is difficult to substantiate … Commonwealth record keeping was at best haphazard and little regulated until the enactment of the *Archives Act* in 1983. Many vice-regal records appear to have been destroyed or lost. Some have been kept by family members and later handed to institutions such as the National Library. Some remain in private hands. Others remain on Government files in archives. It is therefore very difficult to ascribe a convention in relation to the handling of such records …
>
> It also appears that the Director-General of the National Archives, Professor Neale, was under the misconception that in Britain it was a convention that royal documents were not made available until 60 years from the date of their creation … [but] this does not appear to be the case. While the Royal Archives was excluded altogether from the application of the Public Records Act, there was no exemption from release for royal correspondence held on UK government files under the ordinary 30-year rule until the Freedom of Information Act 2000 was amended in 2010 as a consequence of the black-spider letters controversy …

Even if a convention does exist, the critical question is how it could affect the application of the law …

And elsewhere –

> There was much discussion in the lower courts of the practice of past Governors-General taking such correspondence with them on leaving office. Griffiths J in the Federal Court observed that this was 'redolent of ownership'. But the practice of senior office holders, such as Prime Ministers, Ministers, and Governors-General, taking with them copies of documents that relate to their time in office, is relatively common. It does not necessarily involve a transfer of property from the Commonwealth to the officer concerned. These documents are often later deposited in a governmental institution, such as the National Library, a state library, the NAA, or a university. They usually contain a mix of private and official papers. Access to the papers is generally governed both by conditions imposed by the donor of the documents and conditions imposed by legislation in relation to the release of official documents …
>
> Mere possession of those records by individuals does not cause them to cease being the property of the Commonwealth. Nor does any practice or custom of an officeholder taking such records with him or her on leaving office have that effect. Equally, private lodgement of those documents with the NAA does not cause all the documents lodged to be regarded as non-Commonwealth records that are exclusively controlled by the wishes of the depositor …
>
> It would be a very poor policy choice for the Commonwealth to attribute personal ownership of critical constitutional correspondence of this kind to the Governor-General, so that it could be sold to the highest bidder at any time. Such documents deserve the protection of Commonwealth archives laws for a reasonable period, be it 20 or 30 years, or perhaps even longer. But they should also remain under the control of officials in Australia. To interpret

the Archives Act in a manner that cedes all local control of these documents is contrary to the entire purpose of the Act and would be a perverse and unreasonable interpretation of it.

<< It would be a very poor policy choice for the Commonwealth to attribute personal ownership of critical constitutional correspondence … a perverse and unreasonable interpretation>>

One in the eye for my preferred policy option (cf. my May 22 post). But it remains the case that, absent compulsion and the will to enforce it, vice-regal records, and any other personal papers containing official estrays for that matter, can still be deposited anywhere including the exempted collections of NLA and other Commonwealth institutions, in State Libraries, or overseas. I keep asking myself why the indignation that is visited upon the suggestion that donors with NAA should be able to control access to official records amongst their papers is not extended to deposits including official records that are held elsewhere where access is at the donor's absolute discretion. And, at the risk of dichotomizing, I ask myself which is worse: repression of access or loss of control? Why, at the very least, aren't these people clamouring for the removal of exemption status from NLA and other national institutions in respect of official estrays they hold?

None of this really answers the question about what the practice is elsewhere within the Commonwealth of Nations but it does argue that convention can't prevail over the law. In any case, our bizarre property test must be unusual (if not unique) so any convention arising from what is done in other countries that do not have such a definition might be irrelevant anyway.

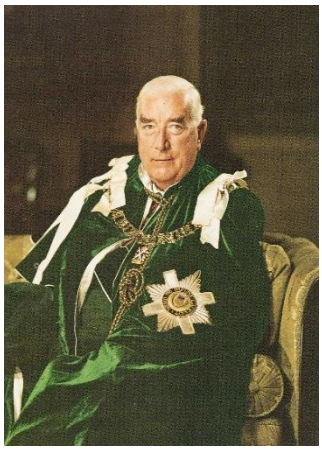
<<Adrian Cunningham: Thanks Chris – your research has highlighted some interesting opinions. An aspect of this case that is great interest to me is the extent to which the Court ruling precedent can be extended beyond the world of Vice-Regal records to other records of official actions and communications. My reading of the summaries suggests that the precedent is not limited to Vice-Regal records…It would be interesting to know about practices in the different States. My experience in Qld was that all the records of the Governors were transferred to QSA and treated as public records…As with other States in Australia, access to the records of the Governor at QSA are determined by the controlling agency – the Office of the Governor in this case. You ask about access and ownership arrangements when former GGs and other officials lodge their 'personal' papers at other institutions like the NLA. I worked at the NLA for 9 years and its Manuscript Collection includes numerous such acquisitions – including records of former GGs such as Bill Hayden and Lord Stonehaven. When I was there (practices may have changed since), it was always recognised that such acquisitions were likely to include Commonwealth Records, and that therefore access to such records was determined under the Archives Act – not by the 'donor'… Personally, I would not insist that all Commonwealth records have to be transferred to the NAA and and the NAA only – other reliable custodians should also be acceptable. But what I would insist on is that any records of official business and communications should be recognised as Commonwealth records and subject to the access laws that apply to such records.>>

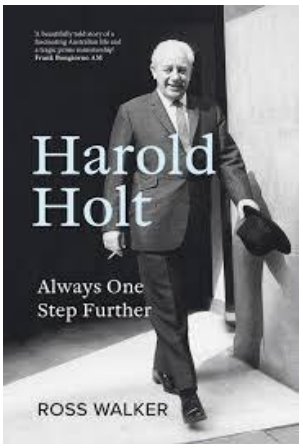
I don't for a moment doubt that it worked "well" and (for all I know) is still working "well". But can the same be said of every collection that donors may wish to endow and "well" simply means NLA is choosing to behave responsibly under a convention that it is not legally obliged to follow. One of the key questions throughout this entire imbroglio is whether access to official estrays should be governed by law or by convention.

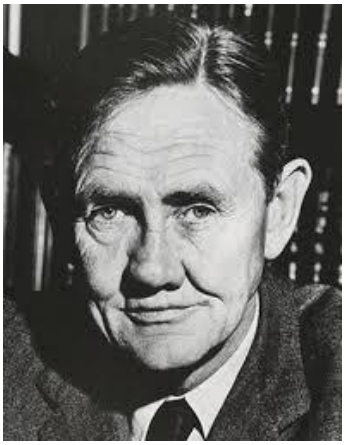
I don't care – never have – whether official estrays policy prevents or allows donors to deposit with NAA or with someone else except insofar as the policy (whatever it is) fails to produce a coherent outcome. Incoherence, as we have seen in this case, results in muddle, uncertainty, and conflict. My point all along has been that, whatever the rules, they should apply equally to NAA and alternative custodians unless the deposit of estrays outside of

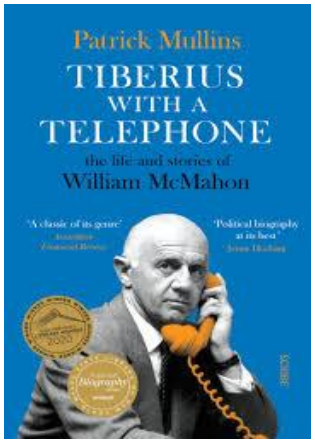
official custody is prohibited and that prohibition is enforced. NAA must (on this view) be able to enforce deposit or compete for donation on equal terms.

Like Adrian, I have form on this question. I was involved in dealing with the consequences when distributed custody didn't work out "well" and donors were not persuaded to be reasonable. The records of a PM's Press Secretary contained files that were seamlessly continuous over four administrations (Menzies, Holt, Gorton, and McMahon). When the surviving principals' wishes were consulted, McMahon and Gorton (who hated each other) wouldn't agree. McMahon insisted that his "portion" be separated and sent to NLA along with his other papers. Neither custodian stood up to him. He was so petty that we had to temporarily relocate the records to NLA premises while the division took place before returning the remainder to NAA. I had the job of sitting at a table at NLA tearing apart file after file to implement this insane decision. I swore to myself that I would never again be party to such destruction. I concede that this dreadful experience probably underpins some of my attitudes on this issue.









<<Adrian Cunningham:... I have now checked the Qld Public Records Act and included within its definition of 'Public authority' is: *'the Governor in his or her official capacity'* So there is no doubt that in that State at least, Vice-Regal records are public records – notwithstanding any convention that might exist elsewhere in the Commonwealth of Nations regarding the treatment of such records. Remembering that Qld, unlike the Commonwealth, does not use property as the basis for its definition of public records.>>

<<Michael Piggott: ..."Convention" has been mentioned ... What I suspect is not sufficiently appreciated in the context of the Palace Letters is that the convention related to access, not ownership ... Referring now to Chris' post ... My point was that ... IF Governor-General Kerr had really believed the Palace correspondence was so extremely "personal and private" that accordingly he did not keep them as "institutional documents" (para 199) but created and kept them in an extremely private way including not going anywhere near the Office of the Official Secretary, maybe the conclusion and conclusions would have been different. There's a related point the four key justices themselves made: (paragraph 84)...>>

2020, June 1:

Wow! Talk about false dichotomies.

Ownership = power to control (access amongst other things).

Possession may not (as Twomey says) be the same as ownership but, if the rights of ownership are uncontested, it makes no practical difference. Some of the States, I know, have powers of replevin and recovery – and use them. So far as I know, the C'wealth never has (but I'm open to correction on that). But as Adrian tells us, many more official records exist in personal papers than are ever pursued.

Adrian's post suggests an approach that, so far as I know, has never been explored in any sophisticated way.

> **Ownership**: *exclusive rights and control over property ...[but] Ownership involves multiple rights, collectively referred to as title, which may be separated and held by different parties.*

Adrian's account of conventional practice at NLA (applying C'wealth access rules to official estrays placed by donors into in their custody) offers a clue. It might be possible for the law (not a convention) to "separate" rights of ownership – leaving the donors with a power to deposit where they please (one right of ownership) but denying them the power to set access rules over official estrays (another right of ownership). But the obsession with physical possession has, I believe, meant this has never been seriously considered – to my knowledge.

2020, June 3:

<<Andrew Waugh: The latest...

The NAA is asserting a standard 90 day access evaluation period - which includes consulting with 'relevant government departments'. However, Professor Hocking is asserting that they must complete the evaluation within 30 days. It would seem that she has grounds for this assertion due to poor wording in the judgement of the High Court. The court ordered that the NAA 'reconsider' its access decision. Under the Act, a 'reconsideration' of access must be completed within 30 days.

Of course, you can see where the NAA is coming from. They would not have 'considered' access (in the normal sense of opening government records) in the first place. So now they have to go through the normal process of opening government records, for which they consider the Act allows them 90 days. The law, however, is the essence of pedantry. The truck coming down the highway is the known tactic of government departments to not engage with the NAA in determining access. We know that this causes indefinite delays in the completion of the process of opening of records. Will this occur in this instance?>>

<<Michael Piggott: Nice spotting Andrew (consider v reconsider); and indeed, which agencies and "stakeholders" will be consulted. And what of the NAA Advisory Council, which in the past has shown real independence of mind (eg re retention of census records and Vet's Affairs repat files). Sad that so many commentators (eg ABC 7.30 last night and Mungo MacCallum in the current "The Monthly") think the High Court directed the Palace Letters be released. Of course there's an expectation they'll be opened, but due process now much be given its due. A more nuanced commentary which also adds interesting human context to the whole saga was offered by Prof Kim Rubenstein in the "Canberra Times" earlier this week.>>

<<Joanna Sassoon: ... As many researchers know, the costs of digitising archives held in NAA is well nigh prohibitive and for those outside the eastern triangle where most of the archives now reside, doing research on NAA collections that have not been digitised has all but ground to a halt. Given the high profile of 'The Palace letters' and the immediate international interest given the court case, I hope that once the NAA has made its access determination, that the letters will be digitised and released via the NAA website so that all scholars and interested parties can have immediate and equal access.>>

2020, June 8:

<<Andrew Waugh: Professor Hocking's latest piece in the Conversation...

In it she says, "But in an emphatic 6:1 decision, the High Court ruled against the archives. It found the letters were not "personal" but rather Commonwealth records, and as such must now be available for public access under the provisions of the Archives Act." There is an interesting elision here. It could be read as saying the High Court found that the letters "must" be available for public access. The High Court, of course, found no such thing. It simply found that the letters were Commonwealth

records and were therefore subject to the normal public record access arrangements. This could result in them being closed under an exemption. The "must" is Professor Hocking's view about what should happen.

I suspect that Professor Hocking is building the public perception that the records will now be opened. This perception puts pressure on the NAA (and the government behind it) not to now arbitrarily close the records "because". If correct, the attempt to shape public opinion to apply political pressure is a very interesting, and sensible, tactic by Professor Hocking. Given the events to date, there is no evidence to suggest that either the Crown or the Federal government wants to release the records.>>

2020, June 15:

<<John Waddington: I would not be confident that (post-High Court) NAA assessment of the correspondence will result in it being fully released any time soon. My own experience seeking research access to Dept of Foreign Affairs papers may be instructive. The most common reasons for DFAT document redactions or closures are because access may/will damage Australia's international relations or because they contain confidential information from a foreign entity.

My observation is that if a foreign source does not agree to release, it is not released. My impression is there is no set time limit to this foreign veto. It would probably take an AAT or court case to test it. So if my experience is at all relevant to the admittedly trickier Palace Letters matter, then my pessimistic view of what Prof Hocking will see of the Palace letters in the first instance will be:

(1) John Kerr's letters but with redactions of any direct reference to what the Queen has said, and

(2) Nothing from the Palace side until at least 2027 (the most recent embargo date set by the Palace).

***Unless* of course the Queen says it is ok to release them now.**

2020, June 18:

<<Andrew Waugh: It appears that the decision has been made to release the letters>>

<<Michael Piggott: ... one assumes some interested parties are also consulting the Copyright Act, 1968 as amended. One will be Scribe Publications, who are making quite a thing of Prof Hocking's next book, due out in November 2020; see here and here. Now we know the letters are Commonwealth records, will Scribe be allowed to publish the letters - as opposed to fair dealing permitting a "reasonable" portion be reproduced for the purposes of "research or study"? The relevant Archives advice states:

> **Ownership of copyright in records held by the National Archives**
> **The Commonwealth government owns copyright in most of the records held by the National Archives as they are official records produced by Commonwealth government agencies. The Commonwealth is not the copyright owner for records in the collection of the National Archives which were not made by the government, for example letters written by private individuals to the government or documents provided by other governments. Although such records are the property of the Commonwealth, the Commonwealth cannot give permission to reproduce them as it is not the copyright owner. [The NAA's advice ends with a warning it is just "general advice" and "should not be relied upon as a substitute for legal advice"].**

Will the Queen's Private Secretary's permission be required before anyone can publish the Palace's side of the correspondence, i.e. the "originals of letters and telegrams" as the High Court majority decision described them? Too bad for Scribe if so, especially if Julia Baird's account of her research for her Queen Victoria biography (2016) is any guide. Or can NAA just scan and load the lot (or those not redacted) for public consultation via its online portal RecordSearch and take back? Then "launch" them at

a big media event hosted by the relevant Minister with a guest appearance by Governor-General? .... While we wait ....>>

<<Andrew Waugh: Crown copyright in Australia is 50 years from date of creation, not publication. So, yes, the correspondence is still in copyright for another five and a half years and the government could block exact reproduction until 1 January 2036. But it's hard to see the point. It wouldn't block use of the letters, nor could it block quoting anything really juicy.

Of course, the next question is who actually owns the copyright. Discussions on 'Crown' copyright usually relate to government agencies, and the copyright is owned by the Crown as represented by the government. I can't remember seeing anything discussing whether letters personally penned by the Monarch fell under the Crown copyright - I would assume they do as you can't get more 'Crown' than that. In any case, of course, these letters would have been penned by a member of her staff, again, presumably considered 'Crown', as would the GG himself. And if they are Crown, would control of the copyright be exercised by HM personally, the palace (i.e. the agency), or the government?

Partially, the issue with Queen Victoria's correspondence would have been that it was unpublished, and hence copyright had not expired (*). This changed in Australia a year or so ago so that copyright of published and unpublished works was the same. The other part of the issue was that Viccy's letters were held in the Crown archive, and hence still controlled by the Palace. They could set any conditions they wanted on access and use of the letters. And did. In this case, the letters are held by the government archive. And we've just had a high court judgement that the records are not personal, and access is controlled by the Commonwealth law.

(*) The UK has also revised its Copyright Act. I believe that copyright in historic unpublished material will now expire in 2039.>>

2020, June 19:

<<Michael Piggott: ... The issue I'm thinking aloud about is the different parties' rights regarding publication; not ownership, not control of access, but rights to publish an unpublished "work". The section from the NAA website I quoted is clear:

> **"The Commonwealth is not the copyright owner for records in the collection of the National Archives which were not made by the government, for example letters written by private individuals to the government or documents provided by other governments...".**

And of course, it's clear the references in Part VII Division I of the Copyright Act, 1968 to "the Crown" mean the Commonwealth and the States, not any other country's Crown. In theory, might it not be possible for the Palace to say we do not give permission to publish our side of the correspondence?>>

<<Andrew Waugh: ... "Rights to publish an unpublished work" is specifically and exclusively copyright. There is also an informal mechanism for controlling reproduction: control over access to the original. As far as I am aware there is no other mechanism for controlling publication. In the case of Queen Victoria's letters, both controls could be applied by the palace. The letters, being unpublished, were still in copyright. The letters were also held by the palace and hence they could apply any restrictions that they saw fit on use of the material as a condition for access. Together these provide almost complete control.

In the case of the correspondence between the Queen and Kerr the situation is more complex. The letters are still in copyright, so the copyright holder has to give permission for publication. But who is the copyright holder in this case? Normally, in the case of the 'Crown' we are speaking of government agencies, and the government is considered to hold the copyright - this is what the quote from the NAA is saying. In this case we are speaking of the Monarch personally, the personal staff of the Monarch, and a creation of the Australian constitution that represents the Monarch. I have a sneaking suspicion that government control over copyright is a shorthand for the convention in a Westminster system that the Monarch acts on the advice of the PM.

That the holder of Crown copyright is, actually, the Monarch personally, but as a shorthand the government just acts as if it controls copyright (which it does in practice). Would this apply to letters from the personal staff of the Monarch when she is acting in her formal role of Queen of Australia? Probably, if the PM so advised the Monarch.

The next question is how long the letters are in copyright. Once they are out of copyright anyone can reproduce them. How long does copyright exist in these letters? The recent changes to the Copyright Act in Australia treat unpublished material (nearly) the same as published material. In Australia Crown copyright expires 50 years after creation; the person who created them is irrelevant. Again, are these actually Crown copyright? I'd suspect so - they can't get more 'Crown' than the Monarch personally, her personal staff, and the GG. If they are Crown copyright, the copyright will expire, for the letters leading up to the dismissal on 1 January 2026. So the government (and possibly the Monarch) could prevent (re)publication of the letters up to that time.

But would they bother? The right to prevent publication does not prevent an historian from describing the content of the letters, and allows a 'reasonable' portion to be reproduced. So, once access is granted, this means that neither the government nor the Monarch could control release of the substance of the letters. And, in any case they could only prevent publication for 5 1/2 years. That would be a rather pyrrhic victory.

The final level of control is over access - if the historian cannot see the letters, they cannot be released. This is where custody is important. The letters are held by the NAA, and the High Court judgement means that the letters must be treated, for access purposes, as any other Commonwealth records. This provides specific rights of access to researchers and allows specific exemptions. Determining which, if any, of those exemptions applies in this case is what is happening at the moment. But neither the government nor the Monarch can arbitrarily block access, as they could in the case of Queen Victoria's letters. But, of course, the recent ASA webinar on the letters highlighted the weaknesses of the process for determining access. In this case, however, both the government and the Monarch can be fairly confident that the researcher will appeal any redactions or closures. Do they feel lucky?

So, my answer to your question is... Yes, the government and the Monarch could block a reproduction of the letters until the beginning of 2026 under copyright. But it is not clear of the benefit to them of doing this - they could only do it for a short period and the substance of the letters would be released anyway - assuming researchers can gain access. In controlling access they are theoretically limited by the High Court decision, but not necessarily in practice. This may, however, be a rare case where a researcher is willing to appeal any adverse access decision all the way to the High Court.>>

2020, July 9:

<<Andrew Waugh: It's been announced that the NAA is releasing all the letters without exemption on 14 July.>>

2020, October 23:

<<Andrew Waugh: The cost to the NAA of the legal action (including costs) was reported in the Senate Estimates committee...The article, of course, ties this cost to the lack of budget for access determination.>>

> ... Mr Fricker defended the legal action, saying he was bound to pursue the litigation to defend the archives' interpretation of its founding act...The delays at DFAT were a product of greater demand from a relatively small number of researchers... "People work very hard to make records publicly accessible but we do it lawfully. We're not going to go off on a frolic and just hand out stuff unless we've properly assessed it," Mr Fricker said. The archives is under funding pressure, with its council warning last year that its $90 million annual budget needed to be doubled for the institution to be sustainable and meet its legislative

> requirements…Australian National University professor Frank Bongiorno said the delays showed the public record process, by which government records are supposed to be released decades after their creation unless there is an exemption, had "broken down"… A review of the archives by former finance department secretary David Tune was completed in January but has not been made public by the government…

NAA's approach to access clearance has been the subject of criticism since the Lamb Report (and before). No government, especially in the straightened times a-coming after the COVID crisis, is going to pour money into functions that aren't absolutely necessary. Prioritizing preservation vs access is an old, old argument (not a dichotomy but a question of balance). Now, the picture is even more complicated. How do we juggle-

- Preserving the archival remnant
- Providing access for a "relatively small number of researchers"
- Maximising access to a small fragment of the archival remnant through digitization
- Providing entertainment and delight through display and story-telling (if we're in NSW)
- Regulating recordkeeping.

Does satisfying the needs of a "relatively small number of researchers" for access to records that can't be handed out "unless we've properly assessed [them]" represent a fair return on investment? After 30 years, how much risk is entailed from un-scrutinized release of all but a tiny fraction of the tiny fraction? Is the system being run according to an over-abundance of caution? What incentives are there for the decision-makers not to be decision-delayers? What mechanism could be put in place to force (yes, that's right, force) decision-makers who are delaying decisions to pay a penalty for the delay or, at least, be called upon to justify the delay itself – not just the tired old under-resourcing response but to say exactly what are the apprehended dangers of un-scrutinized release of these particular records. And, if "prudence" is the answer, let them justify that. Yes, our archives programmes are under resourced, but that explains systemic consequences, not particular failures.

The access-clearance/declassification system is always fraught. Not all records requiring to be cleared are classified in the technical sense and many of them which are ought not to have been classified in the first place. Time limits on classification unless renewed periodically (with reasons) long before the 30 year threshold is reached is one possible approach. Make all government records "Confidential" for 10 years if not classified more highly at the outset with the proviso that the classification then ceases **and** the record is then open for public scrutiny **unless** action is taken **in advance of any request** to extend it. Bulk clearance (which I believe NAA already has and which is the norm in many other jurisdictions) is essentially an exercise in risk management and should be zealously applied.

It is to be hoped that the Tune Report, if ever released, tackles these issues.

PS. The Swedish model might raise the hackles of some of our allies but it should not be lightly dismissed. It would require a commitment to accessibility rather than an overly cautious approach.

PPS. The article cited by Andrew is backward-looking towards paper-based systems and access to born-digital records raises other issues – not least with dating and the whole idea of 30 years or any closed-access-period. The Swedes have an answer to that too.

2020, October 8:

<<Adrian Cunningham: … there was an article in the Australian on Saturday about a letter that Prince Charles wrote to John Kerr a few months after the dismissal saying that he thought the GG did the right thing in dismissing Whitlam. This was followed by statements from Jenny Hocking deploring the Prince for expressing such partisan views. All grist to the mill. But what is particularly interesting is that the Oz says

nothing about the whereabouts of the letter and how the Oz became aware of it. Presumably it is not amongst the Kerr papers at the NAA recently opened, otherwise others would have seen it and commented on it. Another mystery that may or not eventually be clarified.>>

2020, June 8: More commentary on the Palace Letters

<<Michael Piggott: ...

- **"How the Queen and Kerr were blind-sided" by David Solomon, 5 June 2020 in Pearls and Irritations (kind alerted to me by John Waddingham)**
- **"Why my battle for access to the 'Palace Letters' should matter to all Australians" by Jenny Hocking, 8 June 2020 in The Conversation**
- **"High Court decision on palace letters" by Daniel Sleiman, 2 June 2020 in Eureka Street >>**

The Solomon article draws attention to two matters :

- the results of drafting changes made to the ***Archives Bill 1978*** to include the vice-regal office within the ambit of archives law;
- the significance given by the High Court to the process by which the Palace Letters were transferred (viz. they saw it, correctly, as a ***recordkeeping process*** rather than a property transaction – yay!).

Along those lines, and as I have already posted several times here, there was another change to the original drafting that bears on this case. In the ***1978 Bill***, access to personal deposits at NAA was if the Archives agreed (an important qualification) to be at the discretion of the donor irrespective of whether this included Commonwealth records. This was subsequently changed so that donor's wishes would prevail **except** in the case of Commonwealth records (as defined in terms of ownership) contained within a personal deposit. It has warmed my heart to discover online the ***Explanatory Memorandum*** for the earlier draft because it was substantially my work (I reckon the phrase "of cardinal importance" gives me away) and which sets all this out at length:

> Pages 7-9
> Under sub-clause 5(2)(f), the Archives may seek to obtain ... the records of persons (e.g. ex-Ministers and officials) and organisations who are or have been closely associated with the Commonwealth and whose records often contain a high proportion of official material ... It is open to the Commonwealth to seek to recover by legal means any Commonwealth records out of official custody ... but such an action could not extend to records containing official information which were not the property of the Commonwealth. The Commonwealth's right to seek recovery of Commonwealth records under existing laws [will be] unchanged ... the Archives [is], to some extent, in competition with other custodial institutions ... for the custody of ... such material. There is often some difficulty in distinguishing precisely between the private and official nature of records amongst this kind of material and it is of cardinal importance, in any case, that groups of records should not be divided arbitrarily on the basis of such distinctions. In law, persons and organisations having custody of any Commonwealth records will be prohibited (by clause 24) from depositing them elsewhere than in the Archives but in order that this should not have the result of undesirably separating such records from associated papers, and in order to meet the difficulty which might arise in having to establish in all cases that records of an official nature are also Commonwealth records ... the Archives is empowered to take into custody whole groups of records containing or likely to contain official material ... and not seek merely that portion which is of an official character ... Records received from non-Government hands under this sub-clause will be accepted into custody in accordance with sub-clause 6(2).
> Pages 11-12 dealing with sub-clause (6)
> Under sub-clause (2) the Archives may accept custody of records which it receives from non-Government sources ... on conditions laid down by the depositor. This could have the result that the conditions of access applying to official material amongst such records will be different from the conditions of access which will be applied to Commonwealth records

> received from Government agencies. It is important for the Archives to be able to offer potential depositors conditions of deposit which are comparable with those offered by other custodial institutions … it would be inappropriate for the Archives to be required, uniquely among such institutions, to apply the official access policy … The Archives is not, however, obliged to accept conditions laid down by the depositor and could refuse to take records on conditions which it judged to be inappropriate. The Commonwealth could then seek to recover by legal action those records to which it had a legal right. As a general rule, the Archives will seek, with the concurrence of the depositor, to ensure – as, under this legislation, it alone is able to do – that the official access policy is applied to material amongst such records which it judges to be of an official character …

Well, that sets out **the road not taken** and we are now where we are. As Solomon points out, however, the Palace Letters were not received by NAA from non-government hands. So, even if the original drafting had survived, it would have been open to the High Court to have reached the decision that it did on purely recordkeeping grounds ("the way the papers were taken into custody"). Take it from here, David Fricker.

2020, June 13:

> A researcher in France has won a protracted legal battle for access to ex-President Francois Mitterrand's archives on the 1994 Rwandan genocide … The State Council, France's top administrative court, ruled on Friday the documents would allow researcher and author Francois Graner "to shed light on a debate that is a matter of public interest".
>
> Presidential archives are usually confidential for 60 years after they were signed, but under certain circumstances, such as public interest, can be made public earlier. "Protection of state secrets must be balanced against the interests of informing the public about historic events," the State Council said … Rwandan President Paul Kagame has accused France of being complicit in the bloodshed in which Hutu militias killed about 800,000 Tutsis and moderate Hutus …
>
> The Rwandan president, who had led the Tutsi rebel force that eventually overthrew the genocidal Hutu regime, broke off ties with France for three years … France's perceived foot-dragging on bringing genocide suspects living in the country to justice, has aggravated tensions …

2020, July 14: Palace Letters

<<Joanna Sassoon: Early article from ABC on Palace letters>>

<<Andrew Waugh: Reading the Guardian live blog. This shows that Sir John was being a little cute here. Yes, he specifically did not inform the Queen before he made the actual decision; but what he didn't say was that he'd been discussing the possibility of dismissing the government with the Palace for several months.>>

2020, July 19:

It seems to me that the letters tell us nothing we didn't already know.

The Palace was privy to the possibility of a dismissal. So was everyone else. We've known that all along. There were dozens of letters. What did we suppose they were writing about? The weather? The Opposition's urging of that course of action, based on the Ellicott opinion, was widely canvassed at the time. All the Palace had to do to learn it was a possibility was read the newspapers. The letters simply demonstrate that Kerr hadn't ruled it out. He didn't rule it out in conversation with Whitlam either – the charge against him is that he didn't frankly alert Whitlam to his intentions. By the same token he didn't alert the Palace to his intentions either. The endorsement by the Queen's Private Secretary came after the event (and it's at best confused about whether he's endorsing the dismissal itself or Kerr's handling of it). We've known all along that Kerr sought the views of the law officers on the issue and that Whitlam provided them to him. We've known for some time that he also sought the views of his legal cronies (Barwick and Mason) without Whitlam's knowledge. As Kelly and Bramston concluded, however, based on interviews with participants as well as the

documents available to them, the Palace was not privy to Kerr's intentions before the event and the letters uphold that view. It seems that Kerr did drop hints to Fraser in advance and we've known that too all along.

It is ironic that some who hyped up expectations that the Queen would be shown to have been privy to some kind of plot (that she improperly intervened to spur on the dismissal) are now critical that she did not improperly intervene to prevent or reverse it. The Queen may be formally Head of State but she does not exercise those powers. Those powers are vested in the Governor-General. They are exercisable by him (or her) alone and not subject to control in any way by the Monarch. For the Queen to have intervened to prevent or reverse the dismissal was simply beyond her power. It would have been just as improper for her to have prevented it as to have encouraged it. Like it or not, this is the Constitution we have. It's the one we wanted and not (as Paul Keating once stupidly asserted) one designed by the British Foreign Office.

This was made clear when a Motion of No Confidence was passed by the HoR in the brief interval between the dismissal and the prorogation of Parliament. This motion and a demand that Whitlam be reinstated was conveyed by Speaker Scholes to Kerr who refused to see him until Parliament was dissolved. Scholes later sought from the Queen a reversal of Kerr's actions and the Palace had to explain to him (and, since the response was made public at the time, to many uninformed Australians) that she had no power to do so. In 1975, I was one of those uninformed Australians and that was what turned me into a republican.

<<Andrew Waugh: "We've known that all along." No, we haven't actually. At the time, Kerr was very clear that he made the decision on his own and had not informed the Queen of his decision before taking action. It was only Professor Hocking's work in the archives much later that indicated that this wasn't the whole truth … What was interpretation before is now knowledge. We know that Kerr spoke the literal truth when he said that the Queen did not know of his decision before he took action. However, we know that Kerr discussed dismissal with the Palace over a period of months, and very clearly signalled where he was headed … My view? The Queen could have guided Kerr to many alternative outcomes. She didn't; she channelled him towards dismissal … None of these alternatives is a great argument for retaining the monarchy.>>

At least we can agree about that. Regardless of whether the Monarch was intrusive or impotent in 1975, the case for retaining the Crown within our Constitution is a weak one. The real issue is how to remove it without giving greater power to politicians. Hence the debate over an elected Head of State who would (to a greater or lesser extent) be beyond their power. Good luck resolving that one.

2020, July 21:

<<David Povey: … Perry Anderson writes [in the London Review of Books, Vol. 20 No. 15 · 30 July 1998] of looking for records of his father's work in the Chinese Maritime

Customs, an organisation established to render reparations to European powers for the costs associated with the "Opium Wars". Perry goes to the Second National Archives in Nanking … There are three series of reports, being "Official" … "Semi-official" … and "Confidential … In these reports, he is easily able to locate his father's correspondence and … follow my father's path …".

Back in Europe, Perry is told of a cache of letters in a barn in Eire that he might be interested in, and there his finds thirty years of his father's letters … What Perry has discovered are "the fourth – Personal – series of reports complementing, or offsetting, the three stored in Nanking" … He writes they contain "all the reservations that attach to family correspondence of this kind".

I've only looked briefly at the Palace Letters but what I saw was more like the fourth category of records that Perry refers to here … the record identifiers at National Archives [registered them] as personal records series number AA1984/609 and the creator registered as CP 266, who is the Rt Hon Sir John Robert KERR AK, GCMG, GCVO, KStJ, QC. (The metadata also include references to CA 1, the Governor-General, as a controlling agency, however this may be a recent amendment.)

It seems that the High Court is wrong and that the National Archives had correctly described the letters. By their very nature - *meta* to the activity at hand - these are letters written for advice on how to behave regally, a task that very few are called upon to execute without being born and raised to it. The original classification followed sound archival practice, and it may have been preferable that these letters remained private until the correspondents decided otherwise, as stipulated in the deposit agreement. >>

2020, July 22:

At just over 100 pages, the HC Judgement is worth reading in full. Towards the end (paras 241-266) the court canvasses issues of convention and practice as they affect the definition of Commonwealth record. As with many legal judgements, the reasoning is, for those unfamiliar with the peculiarities of the common law, a confusing admixture of high principle ("the vibe") and circumstance particular to the instant case.

> [242] … the exchange of correspondence was treated by Sir John Kerr as an official issue. Sir John was assisted by Mr Smith in the preparation of correspondence sent to the Queen and in discussing the correspondence received from the Queen. As Sir John observed in a letter to Mr Smith, he adopted a system "of the Official Secretary participating in the preparation" of what he described as "Palace correspondence" and providing comments on the replies from the Palace … [243] …it was correspondence "arising from the performance of the duties and functions of the office of Governor General" [244] Sir John's expression of the desire to preserve the documents given their historical import, understood in light of his duties of public loyalty, militates powerfully against the originals having been created or received by him personally …

Are the Letters Special?

> [245] …the subsequent treatment of the "original" correspondence as institutional, that is, part of the official establishment of the Governor-General, is supported by a letter written by Prime Minister Malcolm Fraser to Sir John Kerr towards the end of Sir John's period as Governor-General and from which there is no suggestion of demur by Sir John. The Prime Minister referred in that letter to the draft Archives Bill and said that "Government House records … are part of the history of Australia and it is proper that they should receive all the care and protection possible". The Prime Minister continued: "For that purpose clause 21 provides that Australian Archives may enter into arrangements with a Governor-General to take custody of records under access rules which a Governor-General may lay down." In the draft of the Archives Bill that was current at the time that the Prime Minister wrote, cl 21 permitted those arrangements to be made for records of the Governor General that were exempt from the operation of Divs 2 and 3 of Pt V of the Archives Bill, concerning dealings with Commonwealth records and access to Commonwealth records. Although that draft of the Archives Bill contained no reference to the "official establishment of the Governor-

General" as a category of Commonwealth institution, it was still contemplated that the records were Commonwealth records. The Prime Minister was referring to an exemption from the regime of dealings with Commonwealth records and access to Commonwealth records which assumed that those records were Commonwealth records that required exemption. Naturally, once there was express provision for the institution of the Governor-General and removal of the exemption from the Archives Bill when it was reintroduced in 1983 the inference that originals of the correspondence were created or received institutionally, and were therefore Commonwealth records, became even stronger.

Are the Letters Official?

246 … Very shortly before Sir John's retirement as Governor-General took effect, on 18 November 1977 the Director-General of the Australian Archives wrote to Mr Smith, as Sir John's Official Secretary, confirming their agreement that both the originals and the "copies" would be transferred to the Australian Archives with the copies then to be sent to a London address for Sir John. After Sir John's retirement took effect, Mr Smith (who was then the Official Secretary to the new Governor-General, Sir Zelman Cowen) wrote to Sir John on 23 December 1977 and described photocopying that he had been undertaking on the instructions of Sir John of correspondence in the "original file" at Government House … [248] …it was an agreed fact that Mr Smith lodged the originals of the correspondence with the Australian Archives on 26 August 1978 (at which time the Governor-General was Sir Zelman Cowen) as the Official Secretary to the Governor-General …

Does Confidentiality Affect Title?

249 … some of the content of that correspondence might have been confidential, and some might have contained observations of a personal nature, akin to those in correspondence between State Governors and the Queen concerning "reports relating to affairs in the State", which were described as "most helpful to Her Majesty" when containing information "of a general nature, from … personal enquiries or experiences, and impressions gained during travel". Nevertheless, the agreed fact in this case was that the correspondence "relat[ed] to the official duties and responsibilities of the Governor-General". There was no convention that the correspondence was not official or institutional …

How did the Involved Parties Regard the Letters?

[251] … Sir John Kerr probably did not hold the view that he had title to the originals, as opposed to the copies, to the exclusion of the Commonwealth. For the reasons explained above, Prime Minister Fraser did not hold that view and Sir John had not demurred from the view of the Prime Minister in correspondence with him … [252] Sir Paul Hasluck also did not regard his correspondence with the Queen as part of his personal property. [253] As for the opinion of the Archives itself, the clearest expression of the opinion that such correspondence was not a Commonwealth record was made decades after the correspondence in issue. Earlier expressions of opinion are more equivocal…. [254] More fundamentally than any factual overstatement, the legal flaw in the respondent's submission is that a person does not obtain a property right by thinking they have a property right or merely by them or others expressing that belief….

Does it Matter?

255 … The convention could not contradict the effect of the Archives Act; it could only operate to establish a rule based upon the uniform consensus of the relevant persons that correspondence passing between the Governor-General and the Queen is never created or received by the Governor General officially nor retained institutionally … [257] … a convention that excludes from government records the correspondence between the Governor-General and the Queen is "difficult to substantiate" … [258] … the precedents in relation to the manner in which vice-regal records are handled are, at best, "thin" …]259] … there is also the lack of evidentiary support for the submission that the behaviour of the relevant actors is attributable only to a belief in an underlying norm that the original correspondence was personal and was not official. For instance, even if Sir Paul Hasluck believed that he held property rights to the exclusion of the Commonwealth in the personal and confidential correspondence between him and the Queen during his tenure as Governor-General, there is no evidence to suggest that he saw those property rights as arising due to an

> understanding that correspondence with the Queen must be treated as non-institutional. A similar point was made by the Director-General of the Australian Archives in evidence to a committee consideration of the draft Archives Bill about the practice of public servants and Ministers in treating official papers as if they were personal records ...The Director-General said this: "The papers of Lord Bruce, for example, are called personal papers. They are copies of every cable sent by Bruce and received by Bruce while he was in office in London, every record of conversation he had with every ambassador and with every British official, and of records, of which he should never have made, of debates which took place in the British War Cabinet. There is nothing whatsoever private or personal about them. They are copies of official records and in the [Archives Bill] sense they are copies of Commonwealth records ... Many other Ministers have followed this practice and they have kept in their offices complete sets of copies of correspondence crossing their desk". In the report of the Committee the view of the Australian Archives was recorded that "in many of the collections of personal papers of former ministers and officials there were records which might be the property of the Commonwealth".

Can Convention Outweigh the Law?

> [260] ... No coherent principle could justify a convention that title to the originals of final correspondence, created and received as part of official duties, should vest in a holder of high public office to the exclusion of the Commonwealth ... [263] Confidentiality is not a reason that could justify a convention that correspondence passing between the Governor-General and the Queen is never created or received by the Governor-General officially nor retained as part of the institution of the official establishment of the Governor-General ...the confidentiality of such correspondence is protected by the general law of confidence304. It is also protected by the categories of exemption to which Senator Hamer referred during the hearings concerning the Archives Bill before the Senate Standing Committee ... [264] The labelling convention of "personal and confidential" is also not inconsistent with a 109ealized109109ation109 of the correspondence as official or with its retention institutionally ... The law determines its character, not the will of the sender ... [266] ... it could hardly be supposed that confidences would be more likely to be protected if title to the correspondence were held privately, to the exclusion of the Commonwealth, so that the Governor-General personally could sell, publish or distribute the correspondence at any time ....

The judgement refers to the first *Archives Bill* (to which I have alluded several times). That drafting allowed access to personal papers deposited with NAA to be determined by the donor on the argument (inter alia) that, absent a ruling by a court or some quasi-judicial body, neither the Archives, nor the donor, nor anyone else could say definitively what was official and what was not. The fact that this case has gone through three tribunals, which could not agree, and at considerable trouble and expense validates that argument.

All the legislation in the drafting of which I have been involved (C'wealth, W.A., Queensland, NSW, NZ) has had to deal with what I call "precious" records (official records thought to be "different"). These include Vice-Regal records, court records, registration records (titles, identity, patents, etc.), municipal records, state-owned corporation records, even (God help us) police and military records – to name but some. This is to say nothing of the very special records held by houses of memory that are creatures of the government. Negotiating an outcome in each case has as much to do with politics as with principle. No wonder, then, that the results are incoherent. It will be seen that in developing the *Archives Bill* attempts were made to deal with Vice-Regal records not as "personal" but as "special". Once it is accepted, depending on the drafting, that official Vice-Regal records (however conceived) come within the ambit of the Act, NAA would really have no business treating them as "personal" in the first place.

The judgement establishes that this class of Vice-Regal records are Commonwealth records. The judgement may provide some basis in principle for dealing with other offers of personal deposit received by NAA in the future. If, on the basis of "the vibe" uncovered by this

judgement, NAA concluded that what was being offered in a particular instance consisted unequivocally and in its entirety of Commonwealth records it would be wrong to accept them as "personal". If, on the other hand, the circumstances of future donations are sufficiently different from the Palace Letters case to enable that instant case to be distinguished, NAA remains in the same unenviable position – unable to say definitively what they are dealing with or how to treat them under the Act. Anyway, such deposits seldom consist (as did the Palace Letters) of a single class of material, being a mixture of official and not-so-clearly-official material. In an earlier post, I said that I have been told that NAA has abandoned its personal papers programme and I asked if this was true. There has been no answer to that question on the list. It can't be a state secret. Can it?

PS. Thinking about "special records" in relation to archives law has re-awakened, in all its horror, the memory of past experiences in dealing with them during legislative drafting. I thought I had put it all behind me into the category of recordkeeping-experiences-too-awful-to-be-recalled-with-equanimity. Two examples I overlooked, probably because they were even more dreadful than the others, were parliamentary records and statistical records (e.g. census).


The obtuseness encountered when dealing with the "specials" would make carving granite with a butter knife seem like child's play.

No. We're special. How dare you even suggest covering
***US** in your legislation? Impertinence!*

Many of them seemed incapable of distinguishing the archives law from their feelings of hostility and resentment (contempt even) against the archives authority that would administer it or to understand that the law's purpose was to control the activities of the authority just as much as theirs (more so, even).

It was no good explaining that any genuine special needs they had could be dealt within the Act and that wholesale exclusion from its ambit was unnecessary to achieve their professed goal.

No. They had to be completely outside its provisions. *How dare you?*

I'm afraid I took malicious pleasure in pointing out to them that a law dealing with the documentary record of government had, at least, to make provision for "their" records if and when they themselves were wound up.

Us? Disappear? Unthinkable!

At least Parliament had some justification for taking that view.

Forgive me. This has nothing to do with the Palace Letters. But this aspect of the case has let a genie out of its bottle for me and I just have to let off steam.

<<Michael Piggott: ... Re Chris' ... point ... as to whether NAA has abandoned its personal papers programme ... my sense is NAA long ago abandoned what it called its personal records service, ie a dedicated administratively differentiated activity with

distinct and specialist staffing. This 'service' was last mentioned in its 2012-13 annual report. But NAA continues to seek and receive and manage personal records within broader agency services/government information roles. The current 2018-19 Annual Report states (p 93):

> 'The National Archives collects official Commonwealth government records, and the personal records of governors-general, prime ministers, ministers, federal and High Court judges and some senior Commonwealth public servants. Our collection grows through the transfer of records from the custody of government agencies and Commonwealth persons into the Archives'.

This formulation, repeated in several recent annual reports, will doubtless need to be redrafted for future reports. And, thinking of Chris' later PS post and understandably letting off steam, perhaps 'collects' will be reconsidered too. >>

2020, July 19: Sunday Reads

<<Andrew Wilson: The Editor of the Monthly has a fairly unfavourable view of NAA's actions over the release of the 'palace letters'. Note in particular the third paragraph. Unlike Chris I subscribe to the Hocking view of what was going on in 1974-5.>>

Impossible to say what the "Hocking view" is because she has so many views on so many things. You need to stipulate a conclusion – "... the Hocking view (?on what) ...". I assume the premise is something to be found in the Palace Letters. If there are "sophisticated and informed readings" of the constitutional position in 1975 that differ from mine, I am prepared to argue the point. If there are "sophisticated and informed readings" of the political events of 1975, I have expressed no opinion and won't start doing so now.

My point is that "sophisticated and informed readings" of the events of 1975 are not the same thing as "sophisticated and informed readings" of the letters themselves. Post modernists and other believers in the narrative will dispute this. This harks back to the distinction canvassed in other threads between the record and interpretations of the record. That the Queen was kept informed and that she wasn't told beforehand of the sacking seem to be undisputed. We've always known that and the Letters don't add to our knowledge. How she handled the situation and speculation about what she did or didn't do can only be an interpretation of the facts – facts that are not materially altered by what is in the letters. Of course, the Letters provide additional circumstantial corroboration for your views but also for different views to yours (corroborative detail intended to give verisimilitude to an otherwise bald and unconvincing narrative). At best though they just provide further grist for an interpretative mill that has been grinding along for the last 45 years.

<<Andrew Wilson: Apologies for not being specific enough. I meant Hocking's view, expressed in an article in the Guardian, that the 'palace' in the guise of Martin Charteris deliberately and knowingly encouraged Kerr to dismiss Whitlam.>>

2021, January 3: "Palace Letters" repercussions ...

... equality, accountability, history, transparency

<<Michael Piggott: Earlier this year there was discussion and speculation concerning the implications of the High Court decision re access to the so-called Palace Letters, in relation to Governors-General and State Governors. In yesterday's *Pearls and Irritations*, Jenny Hocking wrote: "With that decision, as I argued at the time, the correspondence between other Governors-General and the Queen must also be recognised as Commonwealth records and released. This the Archives has told me it will now do, 'early in the new year'."

Though she is yet to see the correspondence, she noted: "With over 1,340 pages of correspondence between the Queen and Governors-General Casey, Hasluck, Cowen, Stephen and Hayden, spanning eight Prime Ministers and five private secretaries to the Queen, this will be the most significant addition to the history of the vice-regal relationship since the release of Kerr's Palace letters. The letters cover a

period of dramatic social and political change in Australia. From the last gasp of the cold-war certainties and royalist fervour of Sir Robert Menzies, the successful 1967 referendum allowing the Commonwealth to create special laws for Aboriginal people, the disappearance of Prime Minister Harold Holt and the ensuing instability of three coalition Prime Ministers, the 1972 election of Gough Whitlam as the first Labor Prime Minister in 23 years and his re-election in 1974, the controversial coalition government of Malcolm Fraser, through to the stability of Labor Prime Ministers Bob Hawke and Paul Keating. The Queen's correspondence with such a range of governors-general will greatly illuminate on this period of our political history."

And its significance? The Archives' decision to release this vast new cache of royal correspondence underscores the broader significance of the Palace letters case in breaking down the outmoded presumption of 'royal secrecy' which has routinely kept the Queen's correspondence hidden from history and which, like the monarchy itself, has no place in a modern democracy founded on notions of equality and accountability. The Palace letters case was a tremendous victory for history and transparency, and it's about to get even bigger.>>

2023, June 4:

Clinton's Socks

> A 2012 court case denying access to White House audiotapes kept in former President Bill Clinton's sock drawer after he left office could help the Trump legal team in its battle to retrieve records that the FBI seized from Mar-a-Lago this month. The 10-year-old court ruling, issued by U.S. District Court Judge Amy Berman Jackson, rejected arguments by a conservative watchdog group that sought access to dozens of tapes recorded by Mr. Clinton and historian Taylor Branch during his administration. Judge Jackson ruled that the tapes belonged to Mr. Clinton, even though the discussions included a broad range of presidential matters. The court ruled that the National Archives and Records Administration had no power to "seize control of them" because Mr. Clinton had used his authority under the Presidential Records Act to declare the recordings part of his personal records.

When we were discussing the "Palace Letters" on this List, no one (so far as I can recall) referred to this US case dealing with the status of official records taken by former office-holders. I didn't even know about it. Our courts (ultimately) determined that letters between G-G Kerr and the Palace were "Commonwealth records". The Socks Case went the other way.

Notice one significant difference – the Palace Letters were already in NAA's custody (deposited there by Kerr, or at any rate by the Official Secretary, in the belief that Kerr retained access control) but Clinton's recordings weren't under NARA's control. The point of the Socks Case was to obtain a court order bringing about a "return" of the tapes and submission to archives law. The Australian judges were aching to determine that the Palace Letters were official but were compelled, by the wording of the *Archives Act*, to decide on "ownership" of material in NAA's custody. The case did not touch on the application of archives access law to official estrays outside custody of NAA or a "Commonwealth

institution" - bearing in mind that the *Archives Act* specifically excludes material held by National Library or AWM from the access provisions.

On 3 Jan., 2021, Michael touched on the implications of the Palace Letters. Surely one such implication is that the precedent applies only to material in NAA's custody and that the intentions of the original drafting (intended to give personal depositors and unfettered discretion to control access) are well and truly blasted. This original drafting was subverted by changes to the final Bill to exclude "Commonwealth records" from that discretion – thereby vitiating the whole purpose of the provision (as originally drafted) and giving Hocking a cause of action.

But how if the estrays go not to NAA but into some other custodial institution (e.g. the Mitchell Library)? They would then be official estrays out of official custody and the Palace Letters judgement, against NAA, would have no effect. It would then be a matter of NAA's powers to recover them but, irony of ironies, NAA has virtually no powers to recover official estrays. We deliberately avoided drafting such powers on the argument partly on the difficulties of doing so and preferring a policy of encouraging voluntary donation in preference to compulsion. One inducement to depositors was to leave them in control over access. Then that whole policy was trashed by the last-minute amendment withholding from depositors control over access to Commonwealth records amongst material in their hands. This opened the whole question to litigation (which the original drafting was intended to avoid).

The result is that intending personal depositors (i.e. intending depositors of official estrays) who do not wish to surrender access control have simply to deposit them anywhere else except NAA (indeed, are almost compelled by the faulty drafting to do so) without much fear of having to face legal action of the kind now being faced by Trump. Unlike some of the State Archives, I believe NAA does not seek return of estrays under legal compulsion. I am open to correction on this and they may, for all I know, seek to do by persuasion. It would be interesting to see the outcome here of legal action to compel return of Commonwealth official estrays for the purpose of subjecting them to access law.

PS. The Commonwealth has from time to time sought to wrest control over official estrays using legislation other than the *Archives Act* but (to the best of my recollection) with mixed results.

2023 June 15:

<<Adrian Cunningham: My reading of the High Court's majority judgement in the palace letters case is that the Court decided that the records were the property of the Commonwealth because they were always managed/stored by the official Office of the GG, until they were then transferred to the NAA's custody - and, as such, remained the property of the Commonwealth. At no time were they ever in the personal possession of John Kerr ... The key takeaway for me is that the core precedent established by the Court ruling is not that all vice-regal letters are Commonwealth records ... rather that all records continuously managed, stored and controlled by an official office of the Commonwealth (as opposed to an individual person) are Commonwealth records. Custody by the NAA appears to be regarded as part of this continuum of official ownership ... I think Chris is probably right though that a transfer of records to a State Library or other non-Commonwealth institution could constitute a transfer of ownership. But a court might also rule such a transfer to have been illegal - in the absence of any case law all we can do is speculate ... So, the High Court ruling, while helpful in providing some clarity in some limited circumstances, still leaves us guessing about the true legal status of most of the instances of 'official' records being treated as the personal property of former office holders ... Archives Act muddies the waters in a very unhelpful manner. Just change the Act!>>

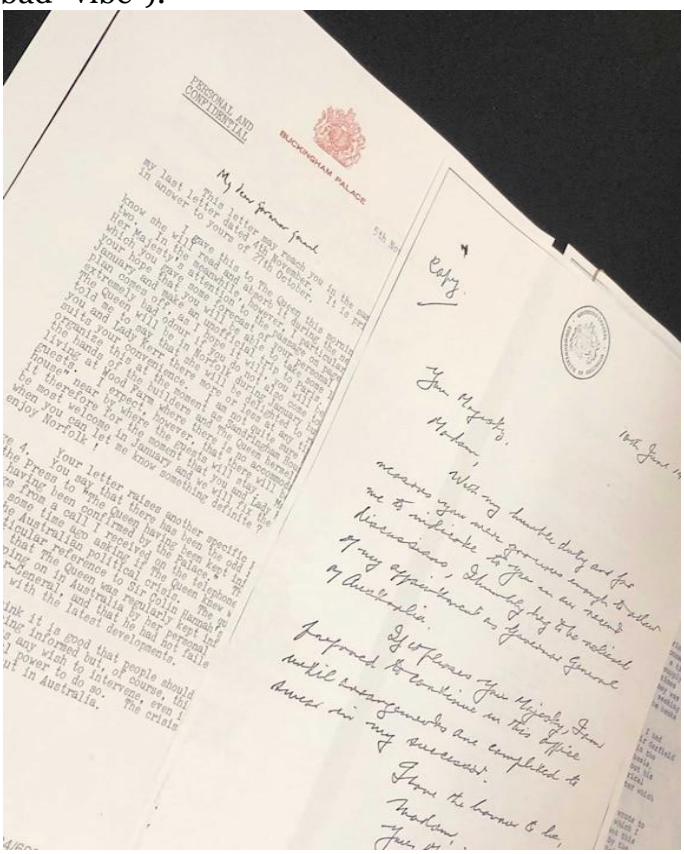
<<Rather than waiting for years for more expensive and rancorous court cases to provide more clarity that may or may no ever come, wouldn't it be easier to simply change the Archives Act to get rid of the ownership-based definition of Commonwealth Record?>>

No question.

Other jurisdictions have provisions (of one sort or another) for replevin (of one kind or another). Obviously, consideration was given to including such provisions in the *Archives Bill*. The argument raised in opposition was that the Commonwealth (unlike the States) is constitutionally bound to acquire property "on just terms" – cf. *The Castle*. To proceed to the recovery of estrays, we would have to first establish that the material was in fact Commonwealth property. Otherwise compensation would have to be paid "on just terms", at least for that portion of a body of estrays that could not be proven to be Commonwealth property.

To settle the issue, if ownership was disputed in a particular case, it would become necessary to establish (to be able to establish during litigation if the claim was resisted) whose property the estrays are. That would get us back to the point where we started, viz. to a property test.

To say nothing of the difficulty of establishing ownership in court over material whose provenance and chain of custody was uncertain. The history of the Palace Letters was well known and that matter had to go all the way to the High Court for settlement. The chain of custody with many estrays is unclear and often betrays evidence of such carelessness on the part of the Administration that a court might very well rule that they had been abandoned (bad "vibe").



They don't belong to you

Tell her she's dreamin'

So, the practical benefits of not using a property test, it was argued, would be negligible.

… and now an example that is unfolding on this very day of letters written to a former PM concerning public business that are being deposited in the National Museum not NAA. Maybe official estrays, maybe not. That's the trouble: even when property rights are not in dispute, the question of what is official and what is personal remains doubtful. Over several

years (as I've explained before) it was part of my job to lay out for eminent nobodies examples to illustrate the difficulty. One and all, they decided which was which. Trouble is that no two of them ever decided the same way. Wonder who controls access in this case?

<<Adrian Cunningham: If the property based definition of Commonwealth record were replaced with the kind of definition used elsewhere for public records, then from time time someone might opt to say, 'actually I believe that I own that thing that appears to fit the definition of Commonwealth Record and if you want to take it from me you will have to give me fair compensation for seizing my property'. If and when that happens, then some legal process would be required to determine ownership and, where necessary, appropriate compensation. I strongly suspect, however, that such instances would be extremely rare and may in fact never happen ... Clearly, it is better to say from the outset that any record created in the course of official business is a public record - thus removing doubts over the overwhelming majority of cases and saying that any questions of ownership that may arise over the remaining 0.0001% of cases can be resolved later if and when they arise ... Nothing I have ever heard or read makes me want to change my opinion that the property based definition of Commonwealth record is a very bad thing that should be ditched as soon as possible. The fact that it has stood for 40 years is 40 years too long, in my opinion. >>

2023, June 17:

<<the fear of hypothetical and extremely unlikely challenges on the property question seems to me to be a poor justification for a provision in the Archives Act that has caused so many other real and non-hypothetical problems>>

It is poor drafting etiquette to place before Parliament a Bill known to be in violation of the Constitution and just hope no one will notice. Not unheard of, of course, viz. banking nationalisation and Communist Party dissolution.

<<and extremely unlikely challenges>>

On a less elevated plane, a successful challenge to poorly drafted replevin provisions only needs to happen the first time. After that, they would be un-usable and of no practical use

<<Adrian Cunningham: Would it really be unconstitutional to have a law that said that any record created by a Commonwealth employee or office holder in the course of performing official duties is a Commonwealth record and the property of the Commonwealth?? It may not be possible to apply such a provision retrospectively, but at least if we stopped the problem occurring in the future that would be a very good thing. Alternatively, could such a provision be included in oaths of office when people are appointed and in Commonwealth employment contracts?>>

<<Would it really be unconstitutional to have a law that said that any record created by a Commonwealth employee or office holder in the course of performing official duties is a Commonwealth record and the property of the Commonwealth??>>

Possibly not.

> ***"Commonwealth record"*** means:
> (a) a record that is the property of the Commonwealth or of a Commonwealth institution; or
> (b) a record that is to be deemed to be a Commonwealth record by virtue of a regulation under subsection (6) or by virtue of section 22;
> but does not include a record that is exempt material.
> ***"record"*** means a document, or an object, in any form (including any electronic form) that is, or has been, kept by reason of:
> (a) any information or matter that it contains or that can be obtained from it; or
> (b) its connection with any event, person, circumstance or thing.
> Note: For the definition of ***document*** , see section 2B of the *Acts Interpretation Act 1901* .

The idea of "official record" is foreign to the *Archives Act*. It would have to be introduced. You would first have to develop a new definition of official record or a replacement definition for Commonwealth record: e.g. "official record of the Commonwealth". Next, you would have to draft provisions for dealings in official records of the Commonwealth. You couldn't easily just substitute the new definition for the old throughout because most of those provisions are drafted to apply to dealings between NAA and C'wealth agencies. Any Commonwealth record (as already defined) that is in the possession and under the control of the C'wealth or a C'wealth institution would be subject to the existing provisions of the Act anyway so not much would change - but new provisions or revised provisions would be needed for official records in custody that weren't C'wealth property (see below). And another whole new set of provisions would need to be drafted to cover handling of official records out of custody.

"Official records" in custody

So, what additional provisions would you wish to have governing official records in custody that are not deemed as property … etc. that you do not already have? This is essentially the issue that underlay the Palace Letters Case though it was never made explicit owing to the peculiarities of the existing definition. Such provisions applying to "official records" that are not indisputably the property of the Commonwealth may well run foul of the just terms provisions in the Constitution. Asserting control over any material (including records) is in essence asserting the benefit of ownership - property rights under another name. You can't just define away ownership rights w/o either being able to establish ownership (property) or else providing for compensation (as provided for in the Constitution). This would be complicated and give rise to disputation if the *Archives Act* included provisions recognising and providing for acquisition of privately owned "official records" in C'wealth custody. Unavoidably, you'd end up disputing the very property rights you are anxious to annihilate as well as legitimising the idea of private property in C'wealth custody (and needing to define the circumstances in which that could arise). Also giving such material a market value, tax status, etc. and providing an inducement to litigate. I can't see an objection to your suggestion but you'd have to check with the constitutional lawyers on that. I'm not sure, however, that you'd be very much better off because resistance to NAA's exercise of ownership rights over official records that are not also C'wealth property could still be based on the claim of property acquisition w/o regard to just terms. No mere archives law can trump the Constitution.

Official records" out of custody – estrays/replevin

The Palace Letters, as I understand it, had never been out of official custody. So replevin was never the issue. The circumstances in which official records may be found out of official custody are of endless variation ranging from theft, espionage, et al to carelessness on the part of the C'wealth itself. To turn your argument about infrequent application on its head, my understanding is that the State Archives which have them use such powers sparingly and usually quietly. I've no idea how often they are resisted. In Victoria, at least in my time, the power of compulsory acquisition allowed PROV to impose limitations on trade in prescribed records (but did not forbid such trading) and allowed PROV to acquire the records at agreed compensation during any subsequent transfer of ownership (or not, until such time as it intervened at its pleasure during any subsequent trade to acquire the records at what would effectively be market value). Again, we would need to consult the lawyers about the feasibility of such provisions in the C'wealth Act. Be that as it may, the policy course chosen in the original Bill was persuasion rather than compulsion.

PS. Just so I'm clear, I'm not a fan of the property test. I hate it. Always have. But I accept (unhappily) the difficulty of the alternative you propose.

<<most of those provisions are drafted to apply to dealings between NAA and C'wealth agencies>>

PPS I should, of course, have said "between NAA and C'wealth agencies and the public". Reverting to Michael's original post and the implications for "equality, accountability, history, transparency", the consequences of establishing the concept of "official records" in the *Archives Act* would have to include consideration of the public's right to see NAA take effective control over such materials out of custody (regardless of ownership and even if they had already been placed with another collection) at least in order to enforce the public's access rights under the Act as well as (what would then be NAA's job) to satisfy the public's concern in protecting official records out of custody in the interests of equality, accountability, etc. How NAA could be empowered to pursue official estrays out of custody for this purpose (not necessarily by taking possession since the existing access provisions apply regardless of where C'wealth records are housed) but by taking control over access arrangements at least would be a biggie. Bearing in mind that archival access is not just about who gets to see what but also about restricting access where necessary (e.g. security, privacy, cultural sensitivity, etc.) according to C'wealth law and policy and subject to appeal through C'wealth tribunals. The consequences of NAA assuming access control over "official records" deposited in (say) the Mitchell Library under open access arrangements agreed with a depositor and then closing them under C'wealth access policy (or, for that matter, enforcing open access to the official records in violation of such agreements where non-disclosure had been agreed with the depositor) would, I suppose, be newsworthy.

The alternative would be to exclude official records out of custody from the access provisions - which would make a lot of this debate pointless. But that would, in fact, bring us back close to the original drafting - viz. letting the donors decide and what a bitter irony that would be.

2023 June 18:

<<Andrew Waugh: TBH, I think the 'property' definition of records is simply an instance of the tail wagging the dog. You're tying yourself in knots to deal with a situation that, given the vast number of Commonwealth records, is actually quite rare. What would be wrong with:

- **Defining Commonwealth records along the lines suggested by Adrian**
- **Using this definition to define the duties of public officers (and agencies) in creating, managing, and retaining public records**
- **Using this definition to define the duties and powers of the NAA**
- ***Stating any required exemptions and special processes to points 2 & 3 for Commonwealth records that were never owned by, are no longer owned by, or are not in the possession of the Commonwealth***

The last would, of course, be the place in which details of due compensation for resumption of private property would be covered. I can't help but feel that the core problem here is the implications of the continuum model and parallel provenance. There's no underlying concept that Commonwealth records could be both Commonwealth records and some other records.>>

2025, March 13:

Queen's letters to G-G go missing

Article by Troy Bramston in *Weekend Oz* (8-9 March, 2025) p.3

> Queen Elizabeth II's letters to governor-general Michael Jeffrey are missing with Government House and the National Archives ... acknowledging they do not know where they are even though they are Commonwealth records open for public access after 20 years. No routine vice-regal correspondence ... from 2003 or 2004 have been transferred ...
>
> The vice-regal correspondence is classified as official Commonwealth records and are required ti be deposited ... They are not personal records. All [other] correspondence either to or from the monarch ... has been transferred ... for later public release ... Only one letter from Jeffrey to the queen has been located [thanking] her for lunch ...

The usual confusion between "official" record and "Commonwealth record". What would an "un-official Commonwealth record" be, I wonder. Not altogether clear, but he seems to be talking about copies of outwards letters as well as "letters to [the] governor-general". And, although there may be dispute over whether Hocking's case actually resulted in release of information we didn't already know, the High Court judgement appears to have produced certainty as to their status and the arrangements for handling them.

Two other notable articles in "The Inquirer" section:

> **Paul Kelly (Beware the looming mediocre contest)**
> (p.17 and 20-21) Berates both Albanese and Dutton as Tweedle-Dum and Tweedle-Dee, unable or unwilling to "*identify and respond to the numerous and contradictory demands being imposed on Australia*". These include (according to Kelly): strategic danger, weak economic growth, deepening economic competition, social inequity, technological upheaval, unresolved fiscal demands (spending outstripping income- *Labor has … increase[d] spending by $124bn and … raise[d] taxes by $46bn*)), chronic budget deficits, pressures in health, education, child care, and renewables, and a demographic timebomb. Whew!
>
> **David Kilcullen (Trump's gift to the world: a wake-up call on geopolitical reality)**
> (p.17 & 20) Argues that Trump is demonstrating what we (and the Europeans) should already have known, viz. that the US always has and always will act, first and foremost, in its own interest scrubbing "*away the veneer of fine words that often obscures the nature of America's relationship with allies*". After 124 years of federation, it may be time (Kilcullen argues) "*to stand on our own feet and finally and fully grasp our independence*" which would demand "*costly and controversial*" prioritisation and *"considerable political will and leadership skill"* [the kind Kelly says we do not have].

While I was working in Canberra (many years ago), an official from Defence told me (in his cups) that we had only one defence secret: viz. that Australia is indefensible because the land mass is too large and arid to support a population that could generate the GDP needed to sustain the armed forces required to do so. Kilcullen appears to agree:

> Australian strategists must … reckon with the real-world mismatch between our vast territory, our globally connected trade-dependent economy, and our small population. As the planet's sixth-largest country by area, Australia has the world's 12th largest economy by nominal GDP but only its 54th largest population. We are separated by sea from trading partners, and our national survival depends on lengthy maritime supply chains … [In a crisis] could we secure the global petroleum imports without which Australia runs out of fuel in seven to eight weeks?

I've always been unsure whether the Defence official I spoke with was joking. Kilcullen suggests that our military establishment has always known the way of things, but neither they nor the politicians talk about it – *not in front of the children*.

Perhaps we should all move to Tasmania and try to defend that.

Secrecy and Government Suppression

2016, February 22: Expunging records to restrict or deny access

QLD is moving to expunge records of homosexual offences. QLRC has called for submissions by end of March on a Consultation Paper that has been released. Does ASA have a position on permanent deletion of records vs access control (cf. Census debate, privacy, etc.)? If so, this would appear to be an opportunity to express it.

One of the questions raised is the position of data subjects who are now dead. If this issue arose in the U.K. (perhaps it already has) what would be the position of the trial records relating to Oscar Wilde?

2016, March 30: Another dimension to closed access

From Archives Professionals :

In July last year the Russian State Archives published a 1948 Report debunking an heroic WWII exploit. It is now reported that the head of the Archives had been sacked for –

> … allegedly using document releases to editorialize rather than being neutral. "[He is] not a writer, not a journalist, not a fighter against historical falsifications," Russian culture minister Vladimir Medinsky said at the time, according to Radio Free Europe. "If he wants to change profession, we will understand this."… Read more.

The veracity of parts of the story is questioned and one commentator says the Director was moved, not sacked. This appears to be true. In another report, on March 16 this year, the Archivist (Sergei Mironenko)

> "… said in an interview with RFE/RL's Russian Service that the change [from Director to Head of Research] was the result of a "collective decision." He claimed that his earlier statements which were at odds with the authorities, including Culture Minister Vladimir Medinsky, were "not the deciding factor." However, the Russian paper *Moskovsky Komsomolets*, has sources who claim that Mironenko was very well regarded by his colleagues and that the conflict with Medinsky may indeed have led to his dismissal … Vladimir Putin's government was not pleased with Mironenk when, in July 2015, he published formerly classified correspondence between Soviet officials in 1948. The communications undermined the legend of Panfilov's 28 Guardsmen, that a group of Soviet soldiers led by died battling German tanks on the outskirts of Moscow in the winter of 1941-1942 … According to the document released by the Archive, Soviet officials recognized the legend as being untrue when some of the supposedly deceased soldiers turned up alive. On July 20, Mironenko gave another interview where he stated that the Panfilov legend was a deliberate "falsification."

It is unclear how much editorial comment (contextual description) was given when the 1948 Report was released. All archives are contained within a contextualising narrative provided by the Archivist in descriptions that accompany them and this story, regardless of real reason for the "collective decision" to move Mironenko, raises interesting issues, e.g.

1. Editorialising vs neutrality in the description. In describing the legend as "falsification" was the archivist making a judgement on the veracity of the report? Was that a judgement too far?
2. What is the difference between "falsification" and "calls into question"? Is there a test to distinguish between editorialising and neutrality? If so, is it objective or subjective?
3. Would it be different if the Archivist said "these documents recognize the legend is untrue" rather than "the legend is a deliberate 'falsification'"?
4. What is the archivist's duty, if any, to uphold (or not to affront) myth-making or any cultural norm? What can/can't be done (descriptively) within the boundaries of anti-vilification or political correctness?
5. Would it have been OK merely to release the Report if the Archivist had not "editorialised? In what terms could it have been described that would not be offensive?
6. Could the description of an ISIS recruitment pamphlet be itself an incitement to terrorism?
7. And, of course, the biggies : Who controls the truth? Are there only versions of Truth? Who decides? Who tells?

Now that clever people like Tim Sherratt are harvesting descriptive data and providing tools that enable discovery, display, and research not of the records themselves but essentially of descriptions, a new set of dimensions is added (I believe) to such questions of responsibility, care, and comment. How, for example, if Mironenko had decided not to release the Report, had continued to keep it closed, could he have described its existence without the metadata revealing the very thing that was found to be objectionable (debunking the legend)? How much, in other words, can/should be revealed in the description of a closed record? How much information about the nature of the access decision actually reveals the content of the closed record? Information about closures and the reasons for them has not usually been itself secret but, like all harvesting technology, Tim's tool enables more to be learnt than when it was held inertly in disaggregated descriptions.

Many years ago, Canberra refused to admit the existence of the Joint Intelligence Organisation (J.I.O.). It was forbidden even to refer to it (in much the same way as the Governor of Florida now refuses to allow his officials to say the words - "climate change"). Maybe it still is. We had some of their records (closed, of course) but how to describe them in the finding aids without using the forbidden name? PJS was adamant that some kind of description had to be used. The ingenious Ron Gordon came up with a solution: they were accessioned as a Defence deposit with the series title : "J.10 Records".

2016, July 27: More on activism

In my on-line short paper on Activism, I posed the question of potential conflict between a recordkeeper's professional standards and secrecy/confidentiality restraints imposed on them by law or as a condition of their employment. Inter alia, I used (as an example of possible conflict between professional and employment obligations) the position of medical staff speaking out about conditions in the detention camps affecting those in their care. It is reported in today's SMH that -

> Australian doctors will launch a High Court challenge to controversial laws they say gag them from speaking out over child abuse and other threats to asylum seekers in detention centres .... Doctors for Refugees, represented by the Fitzroy Legal Service, said the case will question if the secrecy provisions breach health professionals' constitutional freedom to engage in political communication – in this instance, highlighting and debating the effects of the detention regime on their patients. "If doctors stand by and allow people [in detention centres] to walk through raw sewage, just to get to the meal area, they're failing their patients and their profession," said Dr Barri Phatarfod, the group's convenor...The federal government enacted the laws in July last year as part of the contentious Border Force Act. It insists the laws are not aimed at doctors, and do not prevent detention centre workers from speaking out on matters of public interest or from reporting child abuse...In September last year, the United Nations postponed a planned visit to Australia because it said the federal government could not guarantee legal immunity to detention centre workers who discussed conditions faced by asylum seekers. The case follows revelations by *Guardian Australia* in May that the department sought an investigation by the Australian Federal Police, which resulted in a whistle-blowing psychiatrist, Peter Young, having his phone records accessed. The AFP reportedly compiled hundreds of pages of file notes and reports involving the Sydney-based psychiatrist and detention centre critic, after media reports that contained details of the medical records of Hamid Khazaei, a Manus Island asylum seeker who died in September 2014 after a cut on his leg progressed to septicaemia.

If the case proceeds, it will be interesting to see whether, if the claimed freedom to engage in political communication is upheld, it covers all employees in the camps or special status is accorded to those with professional obligations (such as doctors, nurses, and psychiatrists). In other words, do health professionals (and by extension, other professionals) enjoy any special constitutional freedom or protection when speaking out on matters coming within their professional competence, a freedom beyond that enjoyed by ordinary citizens? The case of Peter Young also illustrates another r/keeping issue: viz. use

of records by the professional in furtherance of professional obligations but for a purpose other than that for which the records were compiled (to say nothing of the issue of privacy/confidentiality for the dead).

2018, March 7: Personal papers and whistleblowing in the news

Personal Papers

Ainslie Gotto, high-profile assistant to former PM John Gorton, died a week or so ago. Her papers, deposited at NLA, are in the news. According to press reports they comprise :

> ... a secret trove of official and personal documents ... [to be] released after her death or on her orders while she is alive ... Including personal letters, official documents and insight into the inner workings of the PM's office, the material donated includes over 40 boxes of historic records ...

A story in today's *Australian* (which you won't be able to see online without paying) says the access conditions were altered shortly before her death to give access to her biographer and to extend the barrier to public access until 2023.

Whistleblowing Documents Seized

In the continuing story of Australian bugging of the Timorese Government's Cabinet deliberations, it is reported that the spy who blew the whistle has had his passport seized. On top of that authorities have seized papers from his lawyer's Canberra home:

> The Australian secret intelligence service agent, known only as Witness K, had his passport seized in 2013 as he prepared to give evidence in The Hague on an Australian bugging operation ... The revelations caused Timor-Leste to launch legal action at The Hague, saying Australia's espionage voided a John Howard-era agreement on sharing the reserves. Witness K's passport was taken at the same time as authorities raided the Canberra home of his lawyer, Bernard Collaery, seizing a cache of documents. Witness K has since launched action in the security division of the administrative appeals tribunal to have his passport handed back. The proceedings have been resisted by the Australian government, which still describes him as a security risk. On Wednesday, as Australian and Timor-Leste signed a new agreement about sharing the reserves, Collaery spoke out about the continued "disgraceful" treatment of Witness K. "The refusal of a passport to witness K long after the director-general of Asio cleared him for a passport is pure retaliation," Collaery told Guardian Australia ... "The cover-up continues." Were it not for Witness K, Collaery said, the misconduct towards Timor-Leste would "never have been disclosed".

None of this should come as a surprise once you understand that persecution of whistleblowers is not about punishment or mitigating damage, it is about discouraging the others (the Admiral Byng principle).

In normal times, "files" can be seized under a court order or as part of a police investigation of crime. They may become evidence, under the control of the court, during any ensuing court action and are then disposed of in orderly ways (sometimes not so orderly) according to judicial procedures that have been developed over many years. Some documents seized as evidence for a prosecution but not actually used in court create another class of records

(usually left behind in the custody of the police or the DPP - leading to a quite different set of disposal issues). In the brave new world of anti-terrorism and tougher security legislation, authorities are grabbing documents (electronic and physical) in greater quantities than ever before for purposes which are not always clear. In some cases official documents are involved (e.g. ABC's handing back the wrongly dumped Cabinet papers) and seizure is on grounds (or pretext) of ownership of the artefact as much as it is about limiting access to the information. In other cases, however, such as that of David Miranda and Witness K's lawyer, authorities have no claim to ownership and, if prosecution is not in prospect, seizure must be based on some statutory power to protect security.

The Admiral Byng Principle

My question is what ultimately becomes of "files" seized in this way if no prosecution is undertaken? Are they eventually returned to the owner? Do they become property of the State? Are they "Commonwealth records"? Are they subject to government disposal and access rules? Once the State can no longer plausibly argue that security is at risk, how is access governed? Are they, in effect, in the same disposal class as "files" seized in a criminal matter but never presented as evidence in court? At the very least, our archives authorities need to have a view on the disposal of such records as they will have had to develop a view already on the disposal of "files" seized in criminal investigations that were not presented in court (are they, or are they not, subject to government disposal regulation).

2018, June 28: Perils of being a recordkeeper?

In 2004, Australia (in dispute with East Timor over gas reserves) unlawfully bugged the East Timor Cabinet rooms. So far as I am aware, this has never been officially denied. But Australians seem to get more upset about ball-tampering than illegal spying on a friendly neighbour. For nearly 5 years, since Australia's wrong-doing came to light, our Government has been going after a man known only as "Witness K" who revealed the illegality and was only prevented from testifying in a case brought by East Timor before the Permanent Court of Arbitration in the Hague when Australian authorities seized his passport. For much of the intervening period, Witness K has been pursued under anti-terrorism powers (the same powers that were further strengthened within the last few days). Now he and his lawyer are being charged with a criminal offence.

As with Daniel Ellsberg, Mordechai Vanunu, and Edward Snowden, the information in question concerns unlawful activity by government, the truth of which is undeniable. This makes no difference to authorities. Indeed, the truth of what is revealed seems to make the offence worse in their eyes. Witness K is different to the others, however, because, according

to his lawyer, he's not a whistleblower. He took his information to proper authority – the Inspector-General of Security. Whatever the rights and wrongs of the case, it demonstrates the growing danger of being an information handler in a post 9/11 world.

Archivists have always known that information can be dynamite. The view of the State is unequivocal. A breach of security cannot be excused on the basis that what is being exposed is wrong. Handlers of information are expected to be complicit in covering up the wrong-doing. That expectation extends to state employees of course and, under the laws used to frame these charges and so recently broadened with bipartisan support, extends also to anyone else dealing with information in a way deemed "harmful" to the State.

Daniel Ellsberg

Mordechai Vanunu

One does not offend only by actions that are prohibited, but by actions officials deem "harmful". Such laws are not about breaches that are knowable in advance; they are about the state of mind of officials when offence is taken. No one can know, until one's actions are deemed harmful, whether or not one is doing wrong. It follows that one can offend without knowing or meaning to. How did we come to this? The common response to encroachments on our shared freedoms is to shrug and say, "Oh well, it's necessary I suppose" and not to think too much about it. Despite many warnings from lawyers and journalists, most people seem to think that only the "baddies" are going to be affected. But we know that when basic freedoms are subverted, it is not just the baddies who suffer – we all do sooner or later.

What has all this to do with archives-and-recordkeeping-professionals? Well, we are information handlers and the risks associated with information handling have been growing of late. I don't think we have considered deeply enough what this means for us. If charities and not-for-profits are alarmed, for goodness sake, how much more reason do we have? But perhaps I'm just being paranoid (living a country in which Peter Dutton is responsible for home security will do that to you). I trust those who are unlawfully monitoring our email traffic are taking all this down.

2018, July 2: Perils of recordkeeping? cont'd

Viewed through the prism of an access regime, the prosecution of Witness K and his lawyer (Bernard Collaery, who is being charged with conspiracy) reveals the capriciousness and unknowability of the "rules" now governing restricted access to official information. As r/keepers we have a vested interest in rules-based access. In totalitarian regimes, of course, the rule is "Whatever The Man wants" but we flatter ourselves that it's different here. In Crikey (you'll need a free trial subscription) it is reported that –

> … Collaery is being charged with illegally communicating information via interviews or conversations with a number of ABC journalists and producers … [in] … early December 2013 or March 2014 … [but] … the revelation of the illegal bugging of the Timorese cabinet wasn't by the ABC in December 2013, but by *The Australian* on May 29, 2013 — when Collaery told *The Australian's* Leo Shanahan what ASIS had done. Shanahan isn't mentioned in the

> summons to Collaery, which goes through chapter and verse of all the times he is meant to have illegally shared information with ABC staff. Why the selective focus on the ABC when the original "offence" was committed with News Corp? If the government has its way in preventing Collaery and K's trials from being held in public, we'll likely never find out. No journalists, editors or producers have been directly charged.

You're in breach of the rules if someone thinks harm is done to Australia by talking to the ABC but not by talking to the *Australian*. Perhaps someone thinks it's the ABC that needs to be muzzled, not Mr Collaery. Australia is not harmed, apparently, by publishing such truths (yet) but we are harmed, it would seem, by the actions of those who reveal them to the media. Is it too much of a stretch to suggest that access is being weaponized (as they say)? The media isn't under direct attack (yet) but those who handle "harmful" information that ends up in the media can be picked off. If you want to get a grip on all this try reading Peter Greste's "The Grey Zone: space that gives us freedom is under threat". The Grey Zone is -

> … the pluralist, open, multicultural space that is fundamental to the way a functioning democratic society works. The Grey Zone allows us to live alongside different faiths without killing one another … The Grey Zone is the space that journalists work in, interrogating all sides to any given story; questioning and challenging those in positions of power and authority. It allows the free flow of ideas, both good and bad, so that the solid ones prove their resilience, while the lousy ones get knocked into piles of intellectual rubble … And the organisation that coined the term? … It was Islamic State. IS has an English-language online magazine called *Dabiq*, and in 2015 it published a cover story calling for "The Extinction of the Grey Zone". For IS, pluralism, nuance and debate are antithetical to all it believes in. The article makes clear that there can be no room for questioning the theocrats in charge … Their world is black and white, where free speech, free thought and a free press are simply unacceptable ….

IS coined the term to celebrate attacks such as the one on *Charlie Hebdo* and to identify an ideological target in their war on pluralism. Greste continues –

> … Governments the world over have been using national security to chip away at the space a free press traditionally regards as its own … Whether it is the data retention laws that make it almost impossible to protect journalists' sources; or the foreign fighters' legislation that prevents the media from interrogating the ideas that drive extremism; or the latest tranche of national security legislation, each in their own way chips away at the Grey Zone … the Espionage and Foreign Interference Bill … makes reporting on a host of national issues extraordinarily risky. As the latest draft was worded, it becomes an offence to damage national security, where "national security" is defined as anything that could cause harm or prejudice Australia's political or economic relations with other countries. Other secrecy offences are similarly vague. They prevent publication of any information (not just classified information) which harms "Australia's interests". Any critical reporting of government policy around trade, international relations, security and so on, all risk being seen as "harming Australia's national interest" and putting reporters in prison …

How ironic that by attacking the Grey Zone, by squeezing us all into black-and-white-thinking, our government is actually doing the terrorists' work for them because that is exactly what IS wants too. If the Government establishes in court that it is harmful to reveal that Australia committed an illegal act, how much longer can it be before someone decides it is harmful to publish it? And how much longer after that before they start applying the doctrine selectively to those critics they don't like? But the press is protected isn't it? Tell that to Julian Assange.

> *When you fight someone, you take on that person's qualities. You become that person. You become your enemy. And your enemy wins because now there's another one of him in the world.* (Michael Prescott, Becoming Your Enemy)

2018, November 13: Publish and be damned!

This list interests itself from time to time in the administration of FOI and how that freedom is apparently being chipped away by bureaucratic obstacles to release. But what about limitations on the use that can be made of the information when it is released (or escapes)? We don't seem as interested in how information that does get out (via FOI, leaks, or as a result of investigation) may be stifled by the dead hand of our defamation laws. There's not that much to know, possibly, because the news that isn't published is hard to find out about. Richard Ackland has begun a two-part series in the Guardian. A lot of it is about actions that have been launched involving celebrities, spats between politicians, and low-life journalism. Ackland cites data that doesn't specify whether the kind of published stories that are being prosecuted pertain to genuine public interest matters (as distinct from matters in which the public are interested). His conclusions are that the public interest defence is useless and that our defamation laws are amongst the worst in the so-called free world – more on that is promised in Part 2. I have always accepted the anecdotal assertions that our defamation laws stifle freedom of the press and that the "press" (an increasingly slippery entity) should have greater immunity than you or I to comfort the afflicted and afflict the comfortable.

> … Writing for the majority in *New York Times Co. v. Sullivan* (1964), Brennan declared that public officials may not sue news media for slander or libel unless the injurious statement is made with actual malice or reckless disregard for the truth … Brennan noted that the nation's interest in "uninhibited, robust, and wide-open" debate on public issues might include "vehement, caustic, and sometimes unpleasantly sharp attacks on public officials." The Constitution requires those officials to endure such criticism unless the statements were made with "actual malice — with knowledge that it was false or with reckless disregard of whether it was false or not." While *Sullivan* reduced public officials' protection from libelous statements, the Court believed that free discussion must include the freedom to criticize those in power … *The First Amendment Encyclopedia*

I'm with Brennan. Unfortunately, Part 1 of Ackland's article seems more about press freedom (or lack of it) to titillate rather than to expose wrong-doing on the part of public officials and private enterprises. Perhaps Part 2, by comparing us with other countries, will put up a better case for reforming our laws. Without wishing to re-open the "collections" thread, I would note that in collections already published information generally makes up a higher proportion than in r/keeping. Of course, published/unpublished is becoming more problematic and the whole issue of how published/distributed material is handled (collectable or record?) hasn't been raised here yet (at least not for a very long time).

On a related matter, the dead hand of our security laws (arguably a much greater threat to our freedoms) is still on display in the case of "Witness K" where the defence of truth is involved:

> Commonwealth prosecutors are seeking to hold parts of the trial of "Witness K", a former senior intelligence officer, and his lawyer Bernard Collaery in private. The pair have been charged with conspiracy to communicate ASIS information after they revealed Canberra had ordered the bugging of East Timor's cabinet offices in 2004 during negotiations with the fledgling nation over an oil and gas treaty. The government has never confirmed, nor denied, whether the operation took place. "If they want to convict Witness K and Collaery, they need to admit that they were in fact carrying out an espionage operation against East Timor," said Clinton Fernandes, a professor at the University of New South Wales, who has written about the case in a new book, *Island off the Coast of Asia*. "They want the hearing in secret to do so. They want to prevent the defence publicly making its case that the order to conduct the espionage was illegal." … Last month, a group of crossbenchers – Rex Patrick, Tim Storer, Andrew Wilkie and Nick McKim – also asked the Inspector-General of Intelligence and Security (IGIS) to investigate. They want to know whether the bugging operation, allegedly ordered by former Foreign Minister Alexander

> Downer, broke intelligence laws … The Attorney General's Department , in an emailed response to questions, said: "the Government is not seeking to have the whole trial heard in camera."

I suppose the press isn't reporting this case as vigorously as I supposed it would because it's a security prosecution not a defamation case. And, let's not get into how copyright can be (mis)used ….

2019, January 25: Snooping, swatting, and spying

Pithy review on the CLA site of legislation passed by our Federal Parl't in the last hours of 2018:

> Peter Dutton's Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 passed on the last sitting day of the year at the very last opportunity … The new legislation provides law enforcement and security agencies with access to citizens' encrypted messages by requiring communications providers to give assistance in gathering data. And it also sets up a new warrant system enabling authorities to covertly obtain evidence from electronic devices … thrown on top of the pile of more than 70 other pieces of legislation that have been passed at the federal level in the name of counterterrorism since 9/11… The Assistance and Access Bill allows authorities to access encrypted data stored by communications providers via three avenues.
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> - A technical assistance request allows providers to give voluntary assistance to authorities in gathering information from their systems.
> - A technical assistance notice is a compulsory request made by the director general of security, which requires a provider to give assistance they are already capable of providing, such as decrypting any information that they have the ability to do so.
> - And then there's the technical capability notice, which is another compulsory request requiring a provider to build a new capability that will give authorities access to data information.
>
> Both these compulsory requests are made under the threat of major fines if they're not carried out.
>
> > *"We must set ourselves on a course of information sharing between law enforcement agencies and other government departments, with this end in mind: when does the right of privacy for the individual start to impinge on the common good of society?"* Mr Dutton told the parliament in 2002.

We might ask when does the common good of society start to become the tyranny of the majority? Even with push back from the courts, it is speculated that governments won't back off from exploiting the digital gold mine and with all the revelations about dubious or illegal government snooping here and overseas, it makes you wonder why they bother to arm themselves with yet more legal powers. To say nothing about snooping by private corporations. On a completely unrelated matter, there is just one more week left in which to opt out of MHR. Meanwhile-

1. The Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 was passed on 27 November. This legislation lowered the threshold of when the

government can send in the Australian Defence Force (ADF) to assist state and territory police forces with domestic incidents. Prior to its passing, the troops could only be sent in when state authorities had exhausted all options. Now they can be sent in to "enhance" the ability of local police. And the bill also specifies certain circumstances in which the troops can be deployed to break up protests and strikes.

2. The trial of Witness K and Bernard Collaery continues in secret. They revealed how our government spied on the East Timorese Government during negotiations over undersea resources and then lied about it.

2019, March 18: Archives and the public good

- They can raid your bank account without telling you.
- They can persecute you in order to achieve revenue and performance targets.
- They can delay for months (even years) rather than admit they're wrong.
- They can destroy your business.
- They can define a bank loan and a tax refund as income.
- They can raid your home and remove information, photos, and emails.
- They can imprison you for over 150 years for telling the truth.

In a post-truth era, what responsibility (if any) do we recordkeepers have for exposing the truth contained in records with which we are entrusted under bonds of secrecy or confidentiality? Not simply opining, mind you, but revealing the evidence when we're not supposed to. Are we ever entitled, for a "higher" purpose, to breach the trust that is the basis of our employment? Or, are we bound by the terms of our employment come what may? What do the ethics of our profession tell us? Can we ever take on the mantle of Sir Henry Vane the Younger (1641: confidential notes leaked to Pym during the trial of Strafford), Benjamin Franklin (1773: Hutchinson Letters), Daniel Ellsberg (1971: Pentagon Papers), Mark Felt (1972: Deep Throat), Mordechai Vanunu (1986: Israel's illegal nuclear weapons), Witness K (2004: Australian spooks bugging the East Timorese Cabinet Room), Libor Michalek (2010: Prague water treatment plant), Edward Snowden (2013: covert security internet surveillance), Benjamin Koh (2016: CBA chief medical officer on handling of insurance claims) - to name but a few - or does the public good, or at least our interpretation of it, never justify a breach of faith?

> The case of Richard Boyle, ATO whistleblower and alleged phone-tapper and leaker of "protected" information, is coming to a close. He's been charged with 66 offences arising out of leaking against ATO and stimulating a joint media investigation with *The Age*, *The Sydney Morning Herald* and ABC's *Four Corners* titled *Mongrel Bunch of Bastards*, which blew the lid on abuses by the ATO against small business and individuals.
>
> Days before he went public his home was raided by the AFP and the ATO, which alleged in a warrant he had illegally taken copies of taxpayer information, photos of ATO computer screens or emails. Weeks earlier he had declined a settlement with the ATO on the basis he didn't want to be gagged from exposing questionable behaviour inside the country's most powerful institution. So, it would seem that authorities were sufficiently unconcerned by the gravity of his offences while they could be used as a threat to silence him and only prosecuted them when he refused.
>
> Subsequently, the bipartisan House standing committee on tax and revenue on Friday released a scathing report on the ATO, making 37 recommendations for reform. "As the committee commenced its annual report review in March 2018, there was an acceleration of bad press as the ATO fought off allegations of systemic unfairness to small business, and performance-driven debt action, which were televised," the committee said. "The recommendations made in this report intend to adjust the imbalance of power perceived by taxpayers in their engagement with the ATO, and to ensure that, under the ATO's Reinvention [agenda], willing engagement will be the test for fair treatment."

In all these cases, it is clear that it is not the supposed damage done by the leak that concerns "them"; it's about punishing whistleblowers to discourage the others (the Admiral Byng effect). As a profession, are we discouraged or are we courageous? It is common amongst us to speak of records (so far as we, their handlers, are concerned) as value-free carriers of evidence - as if we have no more moral responsibility in their handling than bombardiers releasing high explosives over cities. We glory in the virtue and hide from the shame of our trade in dangerous secrets. What view do we take of our responsibilities (if any) in that situation - when the possibility arises that records in our care expose wrong-doing that may not come to light unless we act? Absent a total professional prohibition on whistleblowing in all such cases, the balance of right and wrong will never be easy and I doubt any formula could give unequivocal guidance. But is it an issue we can avoid and say nothing? It appears to me that's what we do and, if our heads stay in the sand, the default position is that we do nothing.

But, what is the alternative? For many years, governments didn't transfer to archives because it was seen as a danger to confidentiality; it took many decades to overcome that attitude. How could a recordkeeper ever be entrusted with any confidential material if we belong to a profession that entitles (or even commands) us to reveal such information in circumstances over which the begetter of the information has no control? Echoes of the medivac debate: how can those responsible for border security entrust the final decision to medical staff dedicated not to security but to healing? In a blundering, muddle-headed, politically charged and opportunistic way, they seem to have balanced security-vs-humanitarianism in the medivac imbroglio (sort of). Is it really beyond our wit to find a middle way or must confidentiality trump all? Must the balance between truth and trust remain as it is currently set?

2019, May 17: More concerned with disclosure than damning substance

Chelsea Manning is facing jail and penury for refusing to testify against Julian Assange. The case against Witness K and his lawyer for revealing unlawful actions by Australia's security services is being held behind closed doors. No one has denied the unlawful behaviour of the US and Australian Governments in these two cases. That is simply ignored while those governments pursue people who helped bring those actions to light. How to handle dangerous information that exposes evil-doing and the possible consequences of the choices you make are r/keeping issues. Manning's lawyer hits the nail on the head in a statement that applies equally to both cases:

> "It is telling that the United States has always been more concerned with the disclosure of those documents than with the damning substance of the disclosures."

Chelsea Manning

von Gersdorff

In order to understand the attitude of authority towards whistleblowers you must take to heart the tale of General von Gersdorff. He was one of the military plotters against Hitler,

one of the few to survive the War. He turned himself into what we would now call a suicide bomber when escorting Hitler around an exhibition of captured weaponry. But The Fuhrer left early and Gersdorf had to disarm himself. After the War he was in an American POW Camp along with other staff officers – Nazis and anti-Nazis. The Americans started to release the former into their Zone of Occupation, but not the latter. Gersdorf asked why. The American Commandant was frank:

> *General So-and-So*, he said (referring to a recently released officer), *has shown throughout his career that he obeys orders. He will give us no trouble. You and your friends, on the other hand, have demonstrated that you are, on occasion, prepared to disregard your sworn duty and act upon individual conscience. That attitude represents a threat to orderly administration. You will stay where you are.*

Those in authority prefer obedient Nazis to witnesses for truth. Understand that, and you will know what to expect.

2020, December 3:

From today's Guardian (3 Dec. 2020)

> The Australian lawyer Bernard Collaery has won a prestigious British free speech prize for his efforts exposing a secret Australian operation to bug Timor-Leste's fledgling government during sensitive oil and gas negotiations. Collaery is still being pursued by the Australian government through the criminal courts and, if convicted, the barrister and former ACT attorney general faces jail for allegedly sharing protected intelligence information.
>
> The charge stems from an episode during which Collaery, who frequently acted for intelligence officers, represented an Australian spy known as Witness K, who had grown increasingly concerned about a 2004 mission to bug the government offices of Timor-Leste during commercial negotiations with Australia, an ally, to carve up the resource-rich Timor Sea. The actions of Witness K and Collaery helped Timor-Leste, one of the world's poorest nations, take a case to the international courts and, eventually, renegotiate a fairer deal.
>
> Now, Collaery has been recognised with the International Blueprint for Free Speech Whistleblowing prize, which recognises the bravery and integrity of whistleblowers who have made a positive impact in the public interest. Previous winners of Blueprint for Free Speech awards include Chelsea Manning, who won while behind bars in 2016 at a maximum security prison in Kansas, and Nick Martin, the doctor who blew the whistle on Australia's treatment of asylum seekers on Nauru ...
>
> One of the judges, Lady Hollick, an award-winning former investigative television journalist, described Collaery's story as "extraordinary" ... She said it showed the dangers posed to those who told the truth about the Timor-Leste scandal ... In October, the Law Council of Australia threw its support behind Collaery. It took particular umbrage at the secrecy surrounding his case, in part enforced through the national security information act, which is designed to govern the handling of sensitive and protected information by the courts ...

2020, December 4:

<<Michael Piggott: ... there's a depressing pattern to these and related posts:

(a) events are perpetrated by individuals or groups acting for or sanctioned by entities exercising power (often violently),

(b) then the aftermath, i.e. the contest about what "actually" happened, who is allowed to know what happened (coverup, obfuscation, redaction etc), why it happened, what it meant and means and who is accountable today.

Concepts such as right to know, FOI, responsibility, historical accountability, shame, honour, culture, reconciliation, redress, compensation, and reputation will be in play. States, churches, corporations, police forces, armies, families, NGOs, dominant cultural mindsets etc etc are all implicated. As are creators of records (eg a soldier, a priest, a government minister's chief of staff) as well as the keepers of records if not "the" record and designers of recordkeeping systems and technologies.

As the Brereton inquiry and by extension the Australian War Memorial continues to be topical in this regard, consider two contrasting reactions of its Directors to allegations of war crimes. Dr Brendan Nelson in the Summer 2018 issue of *Wartime* while still in charge of the AWM (but previously a Defence minister in the Howard government), wrote that "*bad stuff happens in war*" and derided judging past events today as happening "*through the prism of our comfortable sanctimony*". Yesterday, retired AWM Director Brendon Kelson in an ABC podcast "Correcting the war record" called for "*truth telling*". >>

Less than a fortnight ago, the conclusions of the Report (years in the making) were being accepted, seemingly unreservedly, by the Defence Force and by a " *shocked*" PM. Then came the blow-back and the PM disavowing the Army's proposal to strip medals from the units involved by saying it wasn't up to Army. What to do about the AWM Exhibition (and whether that will be decided by the AWM Council or by curators) seems to be up in the air. Now, Andrew Hastie MP is describing earlier allegations of atrocities (in the Crompvoets "Report") which were part of Brereton's investigations are based on "*unproven rumours*". Perhaps the treatment of whistleblowers was one reason the conversations Crompvoets describes were "*off the record*".

"*The Crompvoets [report] detailed unproven rumours of Australian soldiers murdering Afghan children*," the backbencher and former soldier told parliament. "*It may have prompted the Brereton report, but its evidentiary threshold was far lower. The Brereton report neither rules these rumours in or out. So why are they in the open? It has undermined public confidence in the process and allowed the People's Republic of China to malign our troops.*"

The 465-page inspector general's report published by the ADF in November included details of Crompvoets' early interviews with sources including special forces insiders. It said that Crompvoets had been told of "*an incident where members from the SASR were driving along a road and saw two 14-year-old boys whom they decided might be Taliban sympathisers*". "*They stopped, searched the boys and slit their throats*," the report said. "*The rest of the Troop then had to 'clean up the mess', which involved bagging the bodies and throwing them into a nearby river. Dr Crompvoets says she was told this was not an isolated incident.*" The report added, however, that Crompvoets did not detail any specific incident and did not identify any perpetrator or unit involved. "*Rather, she described the information she received as 'a whole lot of vague, nameless scenarios', in conversations which she characterised as 'off the record',*" the report said ...

Crompvoets was contacted on Thursday but declined to comment. In an interview with Guardian Australia earlier this week, she warned Australians against dismissing the Afghanistan war crimes scandal as the work of a "*few bad apples*" and expressed dismay at the tenor of the public debate since the report's release. Hastie's speech was triggered by an article in the West Australian newspaper by the broadcaster Alan Jones, who accused the prime minister, Scott Morrison, of giving China an opening to attack the special forces. Jones argued the prime minister had lit the match by warning Australia to expect "*brutal truths*" to be revealed in the Brereton report ...

2019, June 5: Confidentiality, secrecy, and privacy

An ATO whistleblower is facing jail time (and lots of it) for breaching laws re nondisclosure of documents:

> A key crossbencher will seek a Senate order when Parliament resumes next month to investigate the Australian Taxation Office's handling of whistleblower Richard Boyle, who faces six life sentences if found guilty...He will appear in court in July where he will plead not guilty to the 66 charges of breaching laws on handling public documents and recording phone calls when he spoke out on the ATO's mistreatment of taxpayers...Boyle became an internal whistleblower on October 12, 2017 when he made a disclosure under the provisions of the Public Interest Disclosure (PID) Act 2013 to the ATO. His allegations were investigated by a senior ATO investigator and rejected 15 days later on October 27..."It is clear from the ATO's obstructive response to my FOI application that they don't want anything known about what happened in the 15 days between when Richard Boyle lodged his Public Interest Disclosure and when they dismissed it," Senator Patrick said. "Richard Boyle raised very important concerns about unethical and unprofessional conduct in his disclosure, yet the ATO determined that his disclosure 'does not, to any extent, concern serious disclosable conduct'. There is no doubt in my mind that the conduct described by Richard fits within the meaning of disclosable conduct as described in the Public Interest Disclosure Act."...Boyle faces more than 160 years in prison if convicted of breaching laws on handling public documents and recording phone calls when he spoke out on the ATO's mistreatment of taxpayers...

Boyle leaked after ATO cleared itself in response to his PIC complaint because ATO doesn't believe mistreatment of taxpayers amounts to serious misconduct. At what point does an individual's sense of obligation to the public outweigh duty to an employer (even where that duty is founded on legal obligation, or, even more solemnly, on a professional code of ethics)? Bear in mind that it is only insiders who really know. Can anything ever justify the actions of any of these whistleblowers:

> ***Henry Vane*** *(executive power in 17th century England),* ***Samuel Shaw*** *(torture),* ***Herbert Yardley*** *(espionage),* ***Herbert von Bose*** *(atrocities),* ***Peter Buxton*** *(Tuskegee),* ***John Paul Vann*** *(Vietnam),* ***John White*** *(Tonkin Gulf),* ***Frank Serpico*** *(NYPD),* ***Perry Fellwock*** *(covert surveillance),* ***Karen Silkwood*** *(nuclear power),* ***Daniel Ellsberg*** *(Pentagon Papers),* ***Vladimir Bukovsky*** *(psychiatric abuse in USSR),* ***Mark Felt*** *(Watergate),* ***Stanley Adams*** *(price fixing),* ***A Ernest Fitzgerald*** *($US2B cost over-run),* ***the "GE Three"*** *(nuclear plants),* ***Frank Snepp*** *(Vietnam),* ***Ralph McGehee*** *(covert operations),* ***Clive Ponting*** *(Belgrano sinking),* ***Duncan Edmonds*** *(Canadian security breach),* ***Ingvar Bratt*** *(Bofors scandal),* ***Ronald J Goldstein*** *(nuclear power),* ***Mordechai Vanunu*** *(Israeli nukes),* ***Henry Templeton*** *(pension funds),* ***Myron Mehlman*** *(toxic petrol),* ***Arnold Gundersen*** *(nuclear again),* ***Mark Whitacre*** *(price-fixing),* ***George Galatis*** *(nuclear yet again),* ***Jeffrey Wigand*** *(tobacco),* ***David Franklin*** *(pharmaceuticals),* ***Michael Ruppert*** *(CIA drug-traffiking),* ***Nancy Olivieri*** *(toxic pharmaceuticals),* ***David Shayler*** *(criminal acts of MI5),* ***Christoph Meili*** *(Holocaust victims' assets),* ***Marc Hodler*** *(IOC hi-jinx),* ***Stefan P Kruszewski*** *(mentally ill children),* ***Joseph Nacchio*** *(NSA telecommunications surveillance),* ***Jesselyn Radak*** *(document destruction by DOJ!!!!),* ***Kevin Lindeberg*** *(document destruction in Queensland),* ***Joe Darby*** *(prisoner abuse in Iraq),* ***Anat Kamm*** *(Israeli extra-judicial killings),* ***Witness K*** *(Australia spies on East Timor),* ***Cathy Harris*** *(racial profiling),* ***Edward Snowdon*** *(NSA surveillance again),* ***Chelsea Manning*** *(US diplomatic cables), and many, many more .....*

Go through the full list and tick off which ones (if you were in their position and in possession guilty knowledge) you would condemn. When does corporate wrongdoing become so egregious that it outweighs any countervailing considerations of security, privacy, or confidentiality? What do you think? And what does our profession have to say about whistleblowing to expose illegality/misconduct, possibly in violation of one's obligations as an employee, but in the service of the public interest?

> ... 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 standards ... The Code ... includes several clauses that serve to remind archivists of their wider responsibilities in the business world, to the law, and as managers, scholars and teachers...The Code largely excludes matters which are more appropriately regulated by institutions or which require a discretionary response, such as archival processing (arrangement, description, finding aids, conservation), reading room rules and interpersonal relations with readers and donors...
>
> *"2.2.1 Archivists **avoid irresponsible criticism** of other archivists or institutions and address complaints about professional or ethical conduct to the individual or institution concerned or to an appropriate professional organisation."*
>
> *"2.4.1 Archivists **distinguish** clearly in their actions and statements between their **personal beliefs and attitudes** and those of employing institution or professional body."*
>
> *2.4.2 Archivists **resist** pressure from any source to manipulate evidence so as to conceal or distort facts, **subject to access provisions** expressed in clause 3.6.2."*
>
> *"3.5.1 Archivists preserve, protect and maintain the **integrity of the records** in their control and the information contained therein."*
>
> *"3.6.2 Archivists **observe any restrictions on access** to records in their care imposed by legislation, administrative or executive decision, or by owners or donors of the records. They explain pertinent restrictions to potential users and apply them equitably."*
>
> *"3.7.1 Archivists **protect the privacy** of employers, clients, donors and users with respect to information sought or received and materials consulted."*
>
> *"3.7.4 Archivists **shall not without permission, use any confidential information** acquired during the course of their work for personal advantage or for the advantage of a co-worker or a third person. Nor shall an archivist use such information to the disadvantage of employer, donor or client nor disclose such information, except where such disclosure may be justified at law."*
>
> *"3.7.5 Archivists shall **protect personal information** gained under privilege and contained in records in their custody. Subject to relevant legislation and/or conditions of records transfer, archivists shall neither disclose nor enable others to disclose, personal information that would identify individuals as subjects of case files without their consent."*
>
> ***ASA Code of Ethics***

So, if Boyle were an archivist he would be bound professionally to repress any personal beliefs (2.4.1), to be satisfied with ATO's response to the PIC complaint (2.2.1), to observe ATO's restrictions on access when asked (3.6.2) even if it means concealing or distorting facts (2.4.2), and not to use confidential information to ATO's disadvantage (3.7.4). What could be clearer?

If you want to understand the official attitude to whistleblowing look at the Canadian case of Duncan Edmonds who was blacklisted not for breaching security but for exposing a security breach. Go figger.

Even as we speak of this, our Government is raiding journalists and news outlets under laws passed ostensibly to protect us from terrorism but actually being used to avoid scrutiny. The politicians told us this wouldn't happen. Now they say "It's the law, we cannot intervene".

> ... The legal director at the Human Rights Law Centre, Emily Howie, said the government's new espionage laws, passed with the help of Labor last year, raised concerns about the future of public interest journalism. "The new espionage offence is just the latest law to cover government in a shroud of secrecy and prevent insiders from speaking out. It's a dangerous law that goes too far and damages press freedom and should urgently be reformed," she said. "The raids highlight just how dangerous it has become for whistleblowers to reveal information in the public interest." The media union, the Media, Entertainment and Arts Alliance, said the ABC raid represented "a disturbing attempt to intimidate legitimate news journalism that was in the public interest". The president of the union's media section, Marcus Strom, said both the Coalition and Labor needed to "take collective responsibility for

the legal framework they've created that is allowing for what appears to be a politically motivated assault on press freedom". "A second day of raids by the Australian federal police sets a disturbing pattern of assaults on Australian press freedom. This is nothing short of an attack on the public's right to know ... "It is equally clear that the spate of national security laws passed by the parliament over the past six years have been designed not just to combat terrorism but to persecute and prosecute whistleblowers who seek to expose wrongdoing. These laws seek to muzzle the media and criminalise legitimate journalism. They seek to punish those that tell Australians the truth."

Richard Boyle

AFP Raids ABC

The triggers seem to be

- a story about operations in Afghanistan involving killing of civilians (possibly unlawful);
- another story suggesting ASD was covertly trying to expand its powers.

These laws are not being used to thwart terrorists trying to blow us up but to thwart scrutiny. They are being used to prevent us from finding out what the Government doesn't want us to know about alleged wrong-doing in the defence and security forces. Who needs a mealy-mouthed Code of Ethics to stop r/keepers from being whistleblowers? The State can intimidate us without any help from the profession. The Government says it's not the media they're after, it's the leakers. Indeed. If they shut down the leakers, they've got nothing more to fear from the press.

What made Orwell such a great prophet was not his nightmare vision of an all-powerful State, it was his masterful account of the incremental steps (each one hardly worth bothering about) by which we get there.

2019, June 6:

<<Deb Leigo:...I would like to see more discussion on this - perhaps it's time for another ASA Ethics, Lies and Archives (1993) seminar? We are certainly being presented with a variety of scenarios which may not have even been thought of 25 years ago. "*What is the difference between (and should there be a difference) professionals who have statutory obligations to report suspected activity - such as teachers and others reporting suspected child abuse, public servants reporting corruption or misconduct, a citizen reporting suspected illegal activity - calling Crime Stoppers - and an employee/whistle-blower doing similar. If an employee (or anyone) is aware of such activity and does nothing they may end up an accomplice.*" And then there is the line between illegal and unethical / immoral activity - each of us has our judgement, based on personal constructs, on degrees of morality and ethics.>>

<<Andrew Waugh: ...this is the government that Australia just voted for. This behaviour sits squarely in how the government has acted over the previous six years, so no-one can realistically claim they weren't aware of the government's approach or beliefs ... Just remember that next time you are tempted to be a whistle blower ... Chris provided a long list of well known examples of instances of these scenarios dating back

a century or more. They are only the tip of the iceberg. Governance and corruption issues haven't changed an iota as people haven't changed … There is no legal or professional issue what-so-ever. If you, as an archivist, encounter evidence of illegal or unethical behaviour, there is a process that you should follow to raise the problem and get it addressed …>>

2019, June 7:

Apparently, the raids were not conducted under recent anti-terrorist legislation but under provisions of the Crimes Act dating from 1914. Makes you wonder why they didn't resort to the Treason Act of 1351.

2019, June 8:

<<Andrew Waugh: Just to underline the reality of leak investigations, the AFP quietly dropped its investigation into the 'medevac' leak "due to the limited prospects of identifying a suspect". This was a leak that supported the government's position. Sir Humphrey said "The ship of state is the only ship that leaks from the top." Of course, Yes Minister was written in the days of a professional public service which took the UK equivalent of the Crimes Act 1914 seriously and kept stchum.>>

2019, June 27:

<<Debra Leigo:
"… If you follow this process you will be covered. … In practice, the evidence is that the processes often do not result in the correct outcomes. … many processes (and laws) are set up to fail. So, what do you do?"
Andrew, what do we do? Is the issue that the correct processes are not followed and therefore "often do not result in the correct outcomes" or is the system too flawed to allow for correct outcomes? If the former, do we need better education on the correct processes and if the latter, can we do anything to change the situation?>>

2020, April 19: Spooks 1 : Twitter 0

U.S. judge blocks Twitter's bid to reveal government surveillance requests

Twitter Inc will not be able to reveal surveillance requests it received from the U.S. government after a federal judge accepted government arguments that this was likely to harm national security after a near six-year long legal battle. The social media company had sued the U.S. Department of Justice in 2014 to be allowed to reveal, as part of its "Draft Transparency Report", the surveillance requests it received …

Tech companies were seeking to clarify their relationships with U.S. law enforcement and spying agencies in the wake of revelations by former National Security Agency contractor Edward Snowden that outlined the depth of U.S. spying capabilities …

2020, May 30: National Archives responds to Jenny Hocking's article …

To encourage the others

While devotees of open-ness celebrate court-led release of information about an old scandal [Palace Letters], they should note how they are being used to suppress the truth about a much more recent one.

> On Wednesday, in Canberra's labyrinthine new court complex, a procession of remarkable power made its way past the guards stationed outside Bernard Collaery's hearing … Collaery stands accused of sharing protected intelligence information by helping his client, the former spy Witness K, expose Australia's bugging of Timor-Leste government offices in 2004, while the two allies were negotiating to carve up lucrative oil and gas reserves in the Timor Sea …
>
> Anthony Whealy, a former judge who has presided over NSW's highest courts, has followed the case closely through its various twists and turns … The hearing is designed,

largely, to work out what evidence can be heard publicly ... The commonwealth has intervened in the matter by invoking powers in the National Security Information Act, which strictly govern how sensitive information is handled by the courts.

... as the Collaery case was heard on Wednesday, the same powers were being used to prevent the public airing of evidence in a defamation case brought by special forces veteran Ben Roberts-Smith, which is canvassing disputed allegations of war crimes by Australian troops in Afghanistan. Two years earlier, the commonwealth powers were used to prosecute and jail a former military intelligence officer, Witness J ...

The powers are designed to stop sensitive information finding its way into the wrong hands. The identities of intelligence officers, for example, or information about military tactics and capabilities... Whealy [says] "In the Collaery case, the commonwealth has adopted a neither-confirm-nor-deny approach," he said. "This means that for the purpose of arguing about national security they will neither confirm or deny the bugging has taken place, even though at the same time they are alleging that Collaery wrongly communicated information about the bugging." ... The chief executive of Transparency International Australia, Serena Lillywhite, says the NSI Act is one element of what she sees as an "ever-increasing state of secrecy"...

Witness K was among a number of intelligence officers involved in a mission to bug the government buildings of Timor-Leste during oil and gas treaty negotiations in 2004. The listening devices gave Australians the upper hand ... Witness K became deeply uncomfortable about the operation, conducted at a time when Australian intelligence resources were needed to counter terrorist threats following the Bali bombings. He approached the intelligence watchdog and was given approval to talk to a lawyer, Collaery. Collaery later helped mount a case on Timor-Leste's behalf in the international courts.

The scandal was revealed publicly, causing significant embarrassment to the Australian government. It responded by raiding Collaery's home office in Canberra, and seizing Witness K's passport, in effect preventing him from going to the Hague to give evidence ... Whealy says the fact of Australia's bugging of Timor-Leste is now well known. "You could honestly say that horse has bolted now, it's been known for a long while that this happened," he said. "Even though the commonwealth won't admit it, it could hardly damage our international standing," he said ...

Bernard Collaery

Serco's Ugly Legacy

2020, October 30: Not in the public interest

A video from 2015 obtained by SBS under FOI shows a Christmas Island detainee being pushed, punched, and wrestled to the ground by five guards. The video was part of the evidence that persuaded the Australian Human Rights Commission to make a finding of excessive force. AHRC released the video under FOI despite objections from D. of Home Affairs. The Department's objections make fascinating reading –

... the footage should be kept under wraps as it would have a "*substantial adverse impact*" on the operations of Serco, the multinational company that provides security in Australia's immigration detention network. "*The release of this information could result in operational and administrative inefficiencies for Serco, and, ultimately, expose the Commonwealth to additional contractual burdens,*" the department said in a consultation letter to the

> commission. "*Given the possible contractual impacts for the Commonwealth and the risks to the centres as a whole, this would be contrary to the public interest*."

They live in a little world all of their own, some of these people. AHRC, deciding to grant the FOI request, disagreed with the Department, saying -

> .. the footage would inform the public about "*the practices followed by the department and Serco, and its conduct of operations ... in closed immigration settings*". "*Disclosure of this type of information ... goes towards increasing scrutiny, discussion, comment and review of the government's activities*," the commission wrote in a consultation letter.

Scrutiny, discussion, comment, and review are in the public interest? Who knew.

<<Michael Piggott: You've really got to wonder about the people who draft and the people who approve for release phrases like "*substantial adverse impact*", "*additional contractual burdens*" and "*possible contractual impacts*" ... As Orwell observed at the end of his essay "Politics and the English Language, "*Political language .... is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind.*">>

Along the same lines, the latest offering from A.Word.A.Day is "vaporous". One meaning given is *vague, hazy, obscure, insubstantial, transitory, unreliable, fanciful.*

2022, December 9: "Compelling Force" – Hidden in plain sight

Al-Jazeera has been running and re-running *A Very British Way of Torture* (next viewing: 11.00pm tonight, Friday 9 December). At the top of the programme is a statement to camera by David Anderson (Professor of African History, Warwick University):

> When the British decided to leave Kenya in '63, they took with them more than 1,500 government files – all marked "Top Secret". Over the next 40/50 years, these documents were spirited away and hidden in a facility called Hanslope Park, linked to GCHQ, which was used by MI5 [and] MI6 – hidden in plain sight. And, when you tried to request these documents, you were told that they didn't exist ...

In 2013, British Foreign Secretary, William Haig, acknowledged that torture had taken place but said the British Government was not responsible. Responsibility lay, he said, with the Colonial Government in Nairobi – which no longer exists. Paradoxically, it could be argued that responsibility then passed to the current post-colonial Kenyan Government. Perhaps not, but the instruments of the policy were mostly native Kenyans (under British control and direction) and Mau-Mau victims were mostly black as well.

Kenya, 1953

Arthur Young

Commissioner of Police, Arthur Young, resigned, stating that his efforts to deal with torture had been obstructed at the highest levels. His resignation letter was (partly) suppressed for the next 50 years. Here, Attorney-General Dreyfus is still pursuing whistle-blowers in court who exposed wrong-doing by Australian soldiers in Afghanistan and in the

ATO. Typically, Governments are less concerned with pursuing those who do wrong than in punishing those who expose it.

— Amalia G Sabiescu *Living Archives and the Social Transmission of Memory*

Privacy

2016, November 16: Privacy restrictions on public access to archives

It's been announced ("Archives liberates wartime records") that NAA has digitised and released medical records of WW1 Anzacs. "Some individuals' files contain more than 500 pages of information — often revealing distressing details of their ongoing battles with illness, disfigurement and shell shock." Why isn't this a massive breach of privacy? Is it because –

- There is no privacy for the dead?
- NAA operates under legislation that prevails because it precedes the Privacy Act?
- NAA operates under legislation that prevails because it is more specific as to public access release?

Presumably no WW1 Anzacs are still living but NAA also releases "service records" for both world wars and AWM, I think, releases its official holdings under the same statutory regime:

> The National Archives holds the service records of Australians who served in World War I and World War II in the Australian Army, Royal Australian Navy (RAN), and the Royal Australian Air Force (RAAF). Defence service records set out the essentials of a person's service in the forces. They commonly contain biographical information supplied on enlistment, such as name, address, next of kin and age, as well as service information such as movements, postings, changes in rank, and brief mention of injuries or illness. Although most records contain these basic elements, they do vary in the amount of information they contain. Service records were used by the services to administer the movements and pay of their personnel and they were not intended to be an everyday account of events in a serviceperson's career. Under the *Archives Act 1983*, the Archives provides access to records once they enter the open access period.

I have long wondered how some archives escape statutory privacy restrictions on public access (i.e. giving public access to their holdings) that other archives are bound by. I once discussed this with another business archivist and got them worried about their own digitisation programme until they were advised by their parent body that because they operated within the organisational framework of a library they didn't need to worry since libraries are excluded as a class. No such class exclusion exists, so I believe, for archives.

Both NAA and the Privacy Commissioner state or imply that public access under the Archives Act is not restricted by privacy principles (see extracts below). Curiously, both say or imply that this exclusion applies when public access is given under s.31 of the Archives Act to "*Commonwealth records in the open access period that are in the care of the NAA*" (or words to that effect). But s.31 doesn't say that at all. The relevant words are "*in the care of the Archives or in the custody of a Commonwealth institution*" – s.31(1A)(c). The access scheme set up by the Archives Act applies to all C'wealth records in the custody of any C'wealth department or agency, not just those held by NAA. Most of the key concepts in the 1983 Act were carefully and deliberately crafted so that they applied regardless of custody and the word "collection" was never used.

> **Note:** Despite being sandwiched in with stuff about the "collection", it is possible to read the NAA Page as correctly interpreting the Act ("all records in the open access

> period") but the APP Guidelines flatly state the opposite. This is important, though not directly relevant to my concerns (see below), because it means there is more stuff in the open access period available w/o reference to the APPs than the Privacy Commissioner seems to imagine is possible and official records at AWM released under the Archives Act could not be described as being "in the care of the NAA".

I haven't combed through the whole of the Privacy Act or all 211 pages of the APP Guidelines (life is short) but the provisions of the Privacy Act that I have looked at – e.g. s.6A(3) – have more to do with dealings between NAA and C'wealth agencies than with excluding NAA from the APPs when granting public access. To save me time and trouble, is there anyone across all this who can point me to the relevant statutory provisions (or legal interpretation) that enables NAA (and AWM too, I think) to grant public access w/o reference to the APPs? Then we might look at the situation with State & Territory Archives.

My Concerns : The legal drafting principle is clear enough : don't apply APPs (or State/Terr. privacy) under one Act to an access regime set up under another Act (especially since the Archives Act is earlier and more specific). That's how lawyers think and the result may be good law but bad policy. The larger principle, beyond legalistic pettifogging, is that library access and some archival access (by whatever reasoning) seem to be allowable despite the breach of privacy involved. But, assuming NAA does in fact have a legal right to release personal information under the public access provisions without reference to APPs, that still leaves numerous non-government archives (unless they're part of a library) unable to give public access to similar material as NAA is releasing despite the fact that they are doing the same as NAA is doing. From a policy (as distinct from a legalistic) perspective, unless I'm missing something, this is screwy. I have read that the C'wealth law does not apply to smaller private enterprises, so that may result in many barefoot archives (not part of a larger corporate enterprise) also being excluded. The Australian Privacy Foundation (uproariously contemptuous of what it sees as the craven approach to privacy taken in Australia) has the following delightful description :

> "The law has all manner of exceptions, exemptions, authorisations and designed-in loopholes scattered through it, and the complexities are such that there are many unintended loopholes, ambiguities and uncertainities as well. Corporations and expensive lawyers and consultants spend a lot of time wading through the verbiage in order to find multiple ways in which organisations can breach data privacy, but not data privacy law."

But however many archives are covered by "unintended loopholes, ambiguities and uncertainties" some of us will still be frustrated and prevented from giving public access like some or most other archives by having to administer public access within the APPs. Can anyone enlighten me? Wouldn't it be a paradox if corporations could find a way "through the verbiage" and a handful of unoffending archives couldn't? Has ASA made representations about a class exception for public access in archives? If so, what was the outcome?

EXTRACTS

> **NAA Homepage**
> The APPs do not apply to the Archives collection
> The APPs do not generally apply to Commonwealth records in the Archives' collection.
> The Archives is responsible for the custody and care of records in the 'open access' period. These are records created more than 26 years ago which form part of the Archives collection. The Archives collection is made up of approximately 40 million items (which includes records, images, maps, volumes and other objects) in over 80,000 series. They are the records of almost 10,000 past and present

Commonwealth agencies and persons. The APPs have very limited application to the Archives collection.

The Archives collection is administered under the Archives Act. The Archives is required to make all records in the open access period available to the public unless they are exempt. When deciding if a record should be made available to the public your personal affairs will be considered in line with the Archives Access Examination Policy – personal, business and professional affairs of a person, rather than the APPs.

APP Guidelines (revised 1 March 2014)

B.89 The definition of 'personal information' in s 6(1) refers to information or an opinion about an 'individual.' An 'individual' means 'a natural person' (s 6(1)). The ordinary meaning of 'natural person' does not include deceased persons.28

B.122 A number of the APPs provide an exception if an APP entity is 'required or authorised by or under an Australian law or a court/tribunal order' to act differently (for example, APP 3.4(a) (Chapter 3), APP 6.2(b) (Chapter 6) and APP 12.3(g) (Chapter 12)). Some other provisions refer more narrowly to an act that is 'required by or under an Australian law (other than this Act)' (s 16B(2) (Chapter D)) or 'required by or under an Australian law, or a court order' (APP 11.2(d) (Chapter 11)), and do not include an act that is 'authorised'.

11.28 If an organisation is required by or under an Australian law or a court/tribunal 11.28 order to retain personal information, it is not required to take reasonable steps to destroy or de-identify it (APP 11.2(d)).

12.25 An agency is not required by APP 12 to give access to personal information if the agency is required or authorised to refuse access to that information by or under:

- the FOI Act (APP 12.2(b)(i))
- any other Act of the Commonwealth, or a Norfolk Island enactment, that provides for access by persons to documents (APP 12.2(b)(ii)).

12.31 APP 12.2(b)(ii) provides that an agency is not required to give access to personal information if it is required or authorised to refuse to give access by another Act that provides for access by persons to documents. An example is a statutory secrecy provision that requires or authorises that access be refused in certain circumstances.

12.32 A further example is that the National Archives of Australia (NAA) is authorised to refuse access to certain 'exempt records' under the *Archives Act 1983* (the Archives Act). The Archives Act provides that the NAA must make available for public access Commonwealth records in the open access period that are in the care of the NAA and that are not exempt records (s 31 of the Archives Act). The categories of exempt records include information whose disclosure would constitute a breach of confidence, would involve the unreasonable disclosure of information relating to the personal affairs of any person, or would unreasonably affect a person adversely in relation to his or her business, financial or professional affairs (s 33 of the Archives Act)

Archives Act 1983

31.(1A) This section applies to a Commonwealth record that:

(a) is in the open access period; and

(b) is in the care of the Archives or in the custody of a Commonwealth institution; and

(c) is not an exempt record.

(1) Subject to this Part, the Archives must cause the record to be made available for public access.

Privacy Act 1988

6A (3) An act or practice does not *breach* an Australian Privacy Principle if the act or practice involves the disclosure by an organisation of personal information in a

record (as defined in the *Archives Act 1983*) solely for the purposes of enabling the National Archives of Australia to decide whether to accept, or to arrange, care (as defined in that Act) of the record.

2018, January 2: Archives/Privacy

Every now and again I try to figure out the relationship between archival access and privacy. New or revised legislation keeps on surfacing and the situation is bedevilled by the fact that there are both Commonwealth and State privacy regimes which may or may not over-lap (some say yes, some say no). I was drawn to it again by the release of 75-year old criminal records by PROV ("section 9 records" – viz. records withheld longer for privacy related reasons; 75yrs for adults and 99 years for minors). That release also brings to mind the regulation of spent convictions and similar statutory or regulatory attempts to wipe the slate clean (but let's not go into that now). How does it all fit together? Not just in Victoria but across the jurisdictions (also putting aside, for a moment, the conflict of laws issue). What I'd really like to know, but have not had the fortitude to pursue, is whether there is an accepted set of principles about the relationship between privacy and archival access that informs the approach taken in all jurisdictions (State and Federal). I think I can guess the answer.

In the instant case, the Victorian situation seems to be fairly simple (simplicity being a relative concept in this context). PROV administers a statutory scheme for providing discretionary access to public records in its custody. This is not third generation archives law so access provisions apply only to stuff held by PROV (gathered records) and not to un-transferred (ungathered) records. The Victorian Privacy & Data Protection Act 2014 (s.12) excludes "a public record under the control of the Keeper of Public Records that is available for public inspection in accordance with the **Public Records Act 1973**" from the operation of Victorian privacy law. The question is how does a public record held by PROV come to be available for public inspection without breaching privacy law? If privacy law doesn't apply to public records held by PROV that are available for inspection, doesn't it follow that privacy law does apply to public records held by PROV that have not yet been made so available? PROV does two things: it makes a decision to release a section 9 record and, once that decision is made, it provides the access. After the decision is made PROV is clear of privacy law, but before then privacy law does apply; so how does the decision get made without breaching privacy law? Embedded somewhere in the overall scheme (assuming there is one) there must be something that enables PROV, without breaching privacy, to make a decision to release s.9 records in the first place.

- It can't be that any statutory scheme for the provision of access can operate regardless of privacy law otherwise there would be no need to mention the *Public Records Act* specifically in s.12, and in any case the principle of statutory interpretation is that later and more specific legislation overrides earlier and more general laws and Victoria's privacy law would appear to be both.
- It could be that privacy laws generally don't apply to the dead. Yet; privacy enthusiasts haven't given up on that I believe. It might then be assumed that the 75/99 year rule will necessarily mean that no released s.9 records will apply to living persons, even though one could not be certain in each and every case. We are all, of course, living longer.
- Or it could be something else.

There are other complications: such as Victoria's approach to "registers" and reference to the definitions in the *Copyright Act* (C'wealth) – the latter being a reference point whereby some archives (but not all) are given statutory recognition for copyright purposes which is then applied as a definition via State/Territory laws for other purposes (in some other C'wealth laws, too, for that matter). This latter practice has the result that these and similar

laws lay down one principle for "libraries, museums, and galleries" (defined generically) and for some archives identified by name or sub-class but a different principle for all other archives. As one who is leery about getting too close to GLAM, I suppose I can't complain too much about being excluded from their company by law. Privacy is only one area in which the differentiation of public archives (most of them) and the rest of us makes it unlikely that there is, in fact, any cross-jurisdictional principle in operation for our industry as a whole in this area of the law or in any other – so much so that archives institutions operating with some kind of connection to a library are usually better off identifying as such for purposes of privacy law.

The other thing that makes it unlikely that a cross-jurisdictional approach is or could be taken is the disparity between the access release processes in our industry (even within the narrow confines of the government archives programmes). The Victorian approach (custodial) vs the Commonwealth approach (non-custodial) is a case in point. Notwithstanding, I would be interested in hearing from anyone who has made a study of this to learn if the lawmakers believe they are following a consistent approach across jurisdictions (Federal, State, and Territory) – even if it is only with regard to gathered records – or if they see any need to do so.

PS A couple of years ago I started asking colleagues how the several digitization initiatives shoveling personal stuff out via the Internet were able to circumvent privacy. The simple answer (then) was that you are OK if you are a government archives programme, a named institution, or you can pass yourself off as a library. In-house archives and non-government archives that are not libraries (or part of a library) had problems (then) because there wasn't (then) a generic legal definition of "archives" as there was (and still is so far as I can see) for "libraries, museums, and galleries". Of course, things may have changed since then. My knowledge of the situation I describe regarding recognition of archives in the *Copyright Act* is several years out of date. If things have changed, I would welcome information on that also.

2018, June 1: Private & Confidential?

Privacy decision sets worrying precedent for what the Government can reveal about us

Legal experts are warning a recent decision by the Privacy Commissioner sets a worrying precedent allowing the Government to reveal people's private information without their consent. This week the acting Privacy and Information Commissioner, Angelene Falk, determined that the Department of Human Services was justified in releasing the personal information of blogger Andie Fox to the media last year. In February 2017, Ms Fox wrote an opinion piece for Fairfax critical of Centrelink's automated debt-recovery system, commonly known as "robo-debt". Fairfax journalist Paul Malone subsequently wrote a follow-up article about Ms Fox which included details about her financial and personal affairs based on information provided by the Department of Human Services. The disclosures resulted in a complaint to the office of the Australian Information Commissioner, which ruled on Tuesday that the Government's actions were justified.

> But Anna Johnston, director of privacy consultancy Salinger Privacy and a former NSW deputy privacy commissioner, believes the commissioner's decision sets a terrible precedent ... The commissioner's decision rests on section 6.2 of the Australian Privacy Principles which allows a government department to reveal personal information if the disclosure is directly related to the purpose for which it was collected, and within the reasonable expectations of the individual. Anna Johnston says it is hard to see how releasing Ms Fox's information fits this principle ... Ms Johnston says it is especially hard to see how the requirements for disclosure could apply to Andie Fox's former partner, whose details were also revealed to Fairfax ...

<<Andrew Waugh:...Indeed. The original press release by the Office of the Australian Information Commissioner,,,The meat is the link to the precedent (note this dates back to 2010). Essentially, the argument is that if you publicly criticize a government agency, then you should have a reasonable expectation that the agency will give your personal information to the media in response. Hence, APP 6.2(a)(ii) applies. There is an explicit statement in the (2010) Guidelines to the Information Privacy Principles:

> **a person who complains publicly about an agency in relation to their circumstances (for example, to the media) is considered to be reasonably likely to be aware that the agency may respond publicly – and in a way that reveals personal information relevant to the issues they have raised.**

This 2010 case was an interim decision, and the complainant chose to withdraw the complaint. This case then became a precedent. There is one important qualification to the 2010 precedent. The information provided by the agency has to be confined to responding to the issues raised publicly by the complainant. I don't know whether this was the case with the Centrelink example; the decision does not make this clear.

A second issue that could be considered was whether the agency was actually responding to the criticism. The information provided by the agency has to be confined to responding to the issues raised publicly by the complainant. In the Centrelink case, the agency provided information to the Minister's office, who provided it to a specific journalist. The information was not released as a formal press release generally to the press. I can't remember if the information was published with any indication that it had been officially released. If not, it could be argued that the agency is not responding publicly. A third issue that could be considered is that APP 6.2(a)(ii) requires that:

- **the subject would reasonable expect the data to be released AND**
- **the secondary purpose (the release) is related to the primary purpose**

The precedent purportedly covers the first part of the conjunction. But is the release related to the primary purpose of collecting the data?>>

I suppose the Dept could argue that one of Centrelink's purposes in gathering the information is to be able to use it to monster and intimidate fractious clients who denounce them (thereby coming within PP2) and that any client should have a reasonable expectation that bureaucrats are b******s. But seriously...

If you read the article that started it all (link embedded in original post) it is not about criticizing Centrelink for the handling of Fox's own case and only the most wilful prevarication can be used to suggest otherwise. The article's hook is an account of debt recovery taken against Fox but what it is about is what she discovered concerning Centrelink's systems and processes. It is not a "criticism" of what they did to her it is a howl of outrage about bureaucratic misconduct as it affects thousands. It is a denouncement of systemic wrong-doing, not a complaint about the handling of her own case. The 2010 statement is about pay-back against someone who "complains publicly about an agency in relation to their circumstances." It permits Centrelink to fight out a disputed case in public if the complainant chooses to go public. The article, on any reasonable reading, is not such a case. Whether you agree with Fox or not, the article's clear purpose is to expose Centrelink's allegedly flawed systems, its alleged procedural unfairness, and its alleged irresponsible use of power. To portray this as a public complaint about the author's own

circumstances is simply duplicitous. The only legitimate way to defend against the allegations is to provide information refuting them about its systems, procedures, and use of power. It is not a legitimate defence against the allegations to do dirt on the accuser.

2018, July 21: Data privacy and sharing data

<<Andrew Waugh: … The Commonwealth is investigating a new law governing data sharing and release. The process of developing the law is being run out of Prime Minister and Cabinet, and they have released an issues paper: For data that is not 'open by default' and is not easily shared under existing legislation, this new law will allow data to be shared (both within the Commonwealth public service, with other State governments, and private bodies) … Essentially, the proposed law will give pretty much carte blanche to the sharing of sensitive and personal information whenever it is convenient for government. You can pretty much forget about any privacy.>>

Well spotted, Andrew. We need to bear in mind, however, that sanctioned use of personal data held by third parties is already well entrenched. That horse has, so to speak, already bolted – making it harder and harder to protest each new encroachment. I generally don't subscribe to thin-end-of-the -wedge arguments but privacy protection in the brave new world of data gathering and re-use was always going to be one of the times when those arguments would be relevant. Once the pass is sold, it's very hard to stop. The best example of federally sanctioned re-use is at the ATO:

> **Australian Taxation Office:**
> We collect personal information from a number of sources. As well as obtaining your personal information directly from you, the law allows us to collect personal information about you from other people and entities…Sometimes you may not be aware that we have received this information about you. Some of the third parties we collect information from are listed below.
> - Employers…..
> - Banks, financial institutions and share registries…
> - Financial institutions must send us information about their customers' nvestments and investment income.
> - Super funds….
> - Treaty partners…
> - Government agencies and other statutory authorities…
> - Taxation forms … information about individuals associated with partnerships, trusts and companies when those organisations lodge returns…
> - Data-matching programs…

Unregulated snooping is also allowed for some law-enforcement and security agencies

> … the Privacy Act does not cover some Australian Government agencies that are involved in law enforcement, intelligence gathering and national security. The Inspector-General of Intelligence and Security oversees the following six Australian intelligence agencies.
> - The Office of National Assessments
> - The Australian Security Intelligence Organisation
> - The Australian Secret Intelligence Service
> - The Australian Signals Directorate
> - The Defence Intelligence Organisation
> - The Australian Geospatial-Intelligence Organisation

Of course, the list of agencies overseen by the I-GIS isn't the whole story. But there is a clear distinction (isn't there?) between data matching to catch out individuals in respect of tax obligations, in receipt of benefits, or suspected of transgressions and doing it for less specific ("public interest") purposes. What distinction, if any, is there between data-matching to investigate suspected transgressions and data-matching to discover them in the first place? It is not clear to me whether what is now being investigated by the Turnbull Government

goes very far beyond what is already allowed under data-matching guidelines set out below (open to correction from those more knowledgeable). Two points seem to me to be relevant:

1. Would any future expansion be subject to the voluntary data-matching guidelines ("voluntary data-matching guidelines are not mandatory"!)
2. Would action taken under such an expansion be covert or publicly listed and acknowledged?

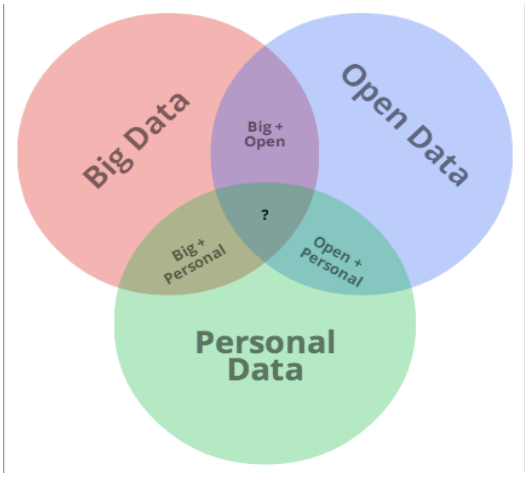
Australian Information Commissioner
has data matching guidelines (my emphasis added)-

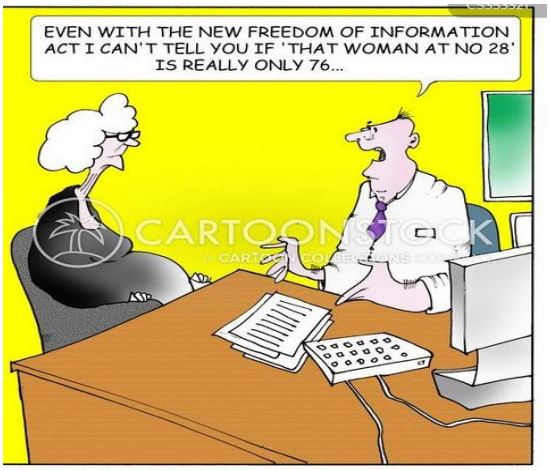
> … Agencies that carry out data-matching must comply with the *Privacy Act 1988* (Privacy Act)…The Data-matching Act and the Guidelines for the Conduct of Data-Matching Program (statutory data-matching guidelines) regulate how the Australian Taxation Office (ATO) and assistance agencies, including the Department of Human Services (DHS) and Department of Veteran's Affairs (DVA), use tax file numbers to compare personal information so they can detect incorrect payments. The Office of the Australian Information Commissioner (OAIC) oversees compliance with these guidelines. The Data-matching Act and the statutory data-matching guidelines require that statutory data-matching be conducted in accordance with written protocols and technical standards…**Agencies also conduct data-matching for a range of purposes other than detecting incorrect payments**…This can include matching their own data with data obtained from other Australian Government agencies, or from state government agencies or private sector businesses. For this kind of data-matching, the OAIC has issued Guidelines on Data Matching in Australian Government Administration (voluntary data-matching guidelines). The **voluntary data-matching guidelines are not mandatory** but have been adopted voluntarily by a number of agencies. Agencies can request an exemption from complying with some parts of the guidelines, if the agency believes that is in the public interest…

2021, March 23: FOI and Privacy

It will surprise no one to learn that I have, for many months, been in dispute with a Commonwealth Government agency. I won't bore you with the details or the name of the agency. You'll have to take it from me that their incompetence borders on the heroic.

What is revealing is how they have used PRIVACY as a cloak for their incompetence and (now they have finally succumbed) as an excuse for it. The use of PRIVACY in this way is something we have become used to in dealings with FOIA requests. So, has the concept of FOI privacy been "expanded and distorted" to thwart public interest journalism or is FOIA used unscrupulously by the media to violate privacy in search of a sensational story?





Even more difficult to deal with is the pursuit of information for the purpose of harassment. The purpose for which information is sought is supposed to be irrelevant. But when it's weaponised????

2024, December 31: Muddling through

A posting by Sonya Sherman on Linkedin celebrating the passage of *Privacy and Responsible Information Sharing Bill* (WA) resurrected in my mind the conflict between privacy and archival access. Personal records (both by and about) are the "*breadcrumbs of history*" but they can also contain "*things that we'd rather no one else see either due to their embarrassing nature or simply because they are entirely private, they should belong only to us*". With exceptions, privacy does not apply to the dead because "*the reasons for privacy protection, such as the ability to feel shame or humiliation, no longer apply to the dead.*" But this principle has always been disputed by more zealous privacy advocates (sometimes referred to as the right to be forgotten) and there are certainly exceptions extending privacy beyond the grave – some of them built around a 30-year span post mortem (possibly a quaint echo of the now out-dated 30-year rule for access to public records).

Over the years, I have been marginally (and frustratingly) involved in the conflict between privacy and archival access. Perhaps at this remove I should now say "was" rather than "have been". That conflict was at its most raw when it was advanced that records should be destroyed (as a privacy measure) once the reason for gathering the data was past. So far as I remember there wasn't ever a satisfactory resolution on the question of principle: whether one prevails over the other, when, to what extent, how, or in what circumstances? That's ultimately a legal question. The other way of approaching it is to treat it as a minefield for the archivist to navigate (cf. Le Clere). This echoes the themes in a recent book (Windon and Youngblood) which portrays archivists as "*seek[ing] a balance between sensitivity to the rights and well-being of creators and subjects and responsibility to researchers and the access mission*". Digitisation raises the added peril that it transports the archivist (legally) from the position of custodian to publisher.

In a submission to a review of the *Privacy Act* in 2020, the ASA made five key recommendations, some of which would be startling to archivists with what I might call orthodox views (e.g. support for "*individuals having rights over data about them*") balanced with advocacy for "*for the 'long now', for the information that is needed over the long term as evidence, accountability and for personal and cultural storytelling*." This is consistent with the resolution (?) of the long-running battle over the census – viz. allowing people completing the census form to choose for themselves.

Regrettably, the ASA submission skirts over larger issues around the national memory by focusing on the official memory:

> There also needs to be balancing of an individual's right to be forgotten with the accountability and information retention frameworks managed by the national, state and territory archives authorities. These retention frameworks which govern data retention and deletion across all government business environments, seek to balance privacy protection alongside long term accountabilities. They provide a community's right to know. Maintaining this right is critical, in balance with important privacy reform.

The question *which prevails?* has no answer. Rights to access (including but not confined to archival access) and rights to privacy are inextricably mixed up (I decline to say inter-woven) in a tangle of legal, ethical, and professional issues. The situation is not helped by the fact that privacy regimes have existed at both Federal and State levels (not always in harmony). Moreover, privacy principles have been applied differently as between government and the private sector (justifying perhaps ASA's skirting the national issues when submitting to a review of the Commonwealth *Privacy Act*), although the distinction has been progressively eroded over the years.

PS Privacy regimes evolve and change. You might be able to pose an intriguing little exam question based on whether privacy protections over an historical record should be the ones

in operation at the time the record was created or the ones in force at the time access is being considered.

2024, December 31: The perils of opening records

<<Andrew Waugh: There could not be a more apposite news story to Chris' recent posting touching on the intersection of access and privacy policies on records than this story in the Guardian. It relates to the imminent opening of records relating to Dutch wartime Nazi collaborators, held by the Dutch National Archives.

> Initially, the intention had been to put the archive online at the website Oorlog voor de Rechter ("war before the judges") on Thursday. But the prospect sparked public disquiet and the Dutch Data Protection Authority (AP) issued a warning that putting the archive of suspected collaborators online would breach privacy laws.
>
> "In the spring of 2024, the AP had a signal from a surviving relative that the planned publication of the CABR was possibly not being organised in a lawful way," it announced. "The national archives must now start working on an alternative method."
>
> Online publication is delayed and the culture minister, Eppo Bruins, says the archive should not be indexable by search engines such as Google. But eventually it is hoped that 30m pages of witness reports, diaries, membership cards for the Dutch fascist party, medical records, court judgments, pardon pleas and pictures will all be searchable.

It would be interesting to find out exactly what the breach of privacy laws was. Did it breach the privacy of the suspected collaborators (who would be mostly dead by now), or their descendents? Note also the change in the first paragraph where it is quite definite that providing access would breach privacy laws, to the second where access "was possibly not being organised in a lawful way". I'd also note that making things indexable by Google is considered quite different to providing access by the archives.>>

2025, January 9:

The latest ICA *SAHR Newsletter* contains a CFP (Call for Papers) for a special issue of *Library Trends* on "compelling tensions" including-

- Access versus privacy
- The Right to Remember versus the Right to be Forgotten
- Evidence versus spectacle
- Connotative meanings and denotative meanings
- Linked data and data management
- Cultural sensitivity and cultural control
- Epistemicide and cultural preservation
- Intellectual freedom and social good/responsibility
- Neutrality versus activism
- AI & algorithms versus human-mediated services

The same issue of the *Newsletter* has an amusing piece on an FOI request by the NSA (National Security Archive) for records of Bush2/Putin dialogue. Estimated to involve less than 150 documents, the Bush Library has advised NSA that it will take them "approximately" 12 years to respond.

2017, June 1: (Un)broken links

Those of you with sufficiently long memories will recall the aus-archivists listserv that operated under the control of the ASA from 1995. When ASA irresponsibly decided not to support it any longer, it disappeared overnight sometime in the 00s. This googlegroups list

was hurriedly inaugurated to take its place (on the welcome initiative of Tim Robinson). Aus-archivists passed through 2 stages: firstly hosted by U. of Melbourne (1995-2003) and secondly by an ISP (2003-????). At the time the list went down, I recall that it was stated that the list archive was no longer available and I have always taken that to be the case. It is possible that it is true (if at all) only of the second stage and not of the first because cultural vandals oftentimes miss stuff (thankfully). It was a typical listserv with a lot of meaningless chatter but also with some useful discussion on important issues and sometimes lengthy analysis. As an unabashed exponent of lengthy analysis on lists I have missed being able to refer back to some of the postings.

The other day I had occasion to refer to one of my conference papers from a decade or so ago that is now held on-line and a link to the old list was embedded there. I looked at it and said to myself, "hhmmmm; I wonder what would happen if I pressed this?" I did and the list thread appeared. You can do the experiment yourself by clicking on the link:

http://www.asap.unimelb.edu.au/asa/aus-archivists/maillist.htm .

Not only is the thread still there, but you can click on it see the actual postings gloriously preserved in all their magnificence and dottiness. If only as evidence for the cultural history of a small group of self-regarding semi-professionals from the 1990s, I would appraise it as permanent.

I don't know how much of the archive has survived or how much of its functionality still works, but it appears to be complete for 1995 to 2003 when it ceased to be hosted by U. of Melbourne and went to the ISP:

- beginning with "Subscription stats – Day 1" Tue, 19 Dec 1995 09:06:48 EST-11
  Dear Aussie-Archivists – Thank you all for responding with subscriptions to this new lisrserv. All we need now is something to discuss etc..
- ending with "Aus-archivists listserv news" Tue, 24 Jun 2003 17:06:28 +1000 announcing the transition
  Dear Listservers – The ASA Council has established a new arrangement with an ISP for the provision of Internet services. As a result the aus-archivists listserv will be moving to the new ISP. This transfer will occur tomorrow and there are few changes for list subscribers. The main thing is the new address for posting messages. This is **aus-arc...@archivists.org.au**. .....Once the change over has been effected an email will be generated by the new ISP for each list member containing their own list membership password and general subscription details.

What became of the 2003+ archive I have no idea but its fate may have been dire. I surmise that the earlier portion may have survived through the good offices (or oversight) of the University while the latter is now lost as the result of a deliberate policy which overlooked the existence of the earlier portion. I would implore someone with the technical ability to save the 1995-2003 archive – now – fast – before it disappears.

<<Angela McGing: I thought the old List-Serv survived until around 2010 when Archives Live was established? I miss it too...I do recall emailing the then Executive Officer about it but did not receive a response.>>

<<Katie Bird:You can also find the aus-archivists listserv messages up until August 2007 at
http://web.archive.org/web/20070829235144/http://lists.archivists.org.au/pipermail/archivists.org.au/aus-archivists/ >>

Didn't know about that link either. As to content, the link referred to by Katie seems to be complete back to 1995 but it is less friendly as to format (it seems to me).

My Health Record

2018, July 19: My Health records post-mortem

ABC reports that a decision has been made on retention of My Health records after death:

> "My Health Record information will be held for 30 years after your death. If that date isn't known, then it's kept for 130 years after your birth."

Both periods would result in retention into the open access period under the *Archives Act* (C'wealth) 1983. Presumably, the system is being set up on the basis that a My Health record is owned by the government (a Commonwealth record), not by the data subject and that it is not heritable (cf. earlier posting re ownership and control over Face Book pages post-mortem by family).

Open Access: There is a statutory obligation to release records after 30 years (s.31) This is not discretionary although there are exemptions. Presumably it is envisaged that My Health records will exempt from public access after 30 years although nothing that I could see says so in the propaganda. In any case, if that is based on a reading of the Act, it could only be an expectation since no could say what the decision will be until it is made and (possibly) appealed. This raises, yet again, the question of privacy of the dead and whether the privacy laws could be relied upon in such cases. The relevant provision in the *Archives Act* s.33(1)(g) does extend to the dead:

> (g) information or matter the disclosure of which under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person);

Bear in mind that s.31 applies regardless of custody.

Conflict of Laws: If legislation is (or has been) passed concerning confidentiality of My Health records, this may nullify the public access rights conferred by the *Archives Act*, on the principle that later and more specific legislation over-rides earlier legislation that is more general in its application. The *Archives Act* (s.33) does contain a provision resolving conflict of laws in relation to taxation:

> (3) For the purposes of this Act, a Commonwealth record is an exempt record if:
> (a) it contains information or matter:
> (i) that relates to the personal affairs, or the business or professional affairs, of any person (including a deceased person); or
> (ii) that relates to the business, commercial or financial affairs of an organization or undertaking; and
> (b) there is in force a law relating to taxation that applies specifically to information or matter of that kind and prohibits persons referred to in that law from disclosing information or matter of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

But I am aware of no such general over-riding provision as there is, for example, with disposal regulation – cf. s.24(2)(a). During drafting, we were told the new *Archives Act* would over-ride earlier legislation unless specifically provided for but not later legislation (especially but not only if later legislation was expressed to nullify the *Archives Act*). Nor could any guarantee be given that later nullifying provisions would be inserted into the *Archives Act* rather than into another statute (or even retro-fitted into another statute that pre-dated 1983). So it's entirely possible that post-mortem access to My Health records will be handled outside the public access provisions (viz. "notwithstanding anything in the Archives Act").

Special Access: The *Archives Act* allows for selective access (s.56) at any time for sufficient reason (e.g. medical research). Wonder how that might apply post-mortem?

Informed Consent: The propaganda suggests that once you opt in you are agreeing to use of your medical data for legitimate health care purposes. Presumably the scope of such purposes is defined somewhere so you know what uses you are agreeing to (does my podiatrist count? My pharmacist? My acupuncturist?). But the scope of legitimate health care purposes probably changes after you're dead (My mortician?). In any case, a well-informed decision on whether to opt in/out should be based on some kind of explanation as to how the Government intends to administer the records post-mortem in relation to agreed purposes and to legislation concerning access in the archival period.

<<Katie Bird: Also, as I understand from this story unless you have specifically opted out from a My Health Record by October 15, you will automatically have one created for you.>>

It is reported in Crikey (for what that is worth) that

> The bureaucrat overseeing My Health Record presided over a disaster-plagued national health record system in the UK, and has written passionately about the belief people have no right to opt out of health records or anonymity. Tim Kelsey is a former British journalist who moved into the electronic health record business in the 2000s. In 2012, he was appointed to run the UK government's national health record system, Care.data, which was brought to a shuddering halt in 2014 after widespread criticism over the sale of patients' private data to drug and insurance companies, then scrapped altogether in 2016. By that stage, Kelsey had moved to Telstra in Australia, before later taking a government role. There was considerable about the lack of information around Care.data, and over 700,000 people opted out of the system. Kelsey criticism vehemently opposed allowing people to opt out — the exact model he is presiding over in Australia....

Care.data (UK)

Tim Kelsey

We can probably expect to hear more of this. None of the derogatory tone of Crikey's report is reflected in Kelsey's own Linkedin profile

> ... Between 2012 and 2015 I was National Director for Patients and Information in NHS England – a role which combined the functions of chief technology and information officer with responsibility for patient and public participation. I was also chair of the National Information Board and led development of 'Personalised Health and Care 2020' – a framework for implementation of a modern information revolution in the NHS. In November 2015, George Osbourne, the Chancellor of the Exchequer, announced in the government's spending review that a minimum new investment of £1bn would be made available to support delivery of this strategy. I took up the post at NHS England in 2012 after serving as the British government's first Executive Director of Transparency and Open Data ... I believe that digital and social media can transform the customer experience in public services. In 2007, I launched NHS Choices, the national online health information service (www.nhs.uk) which now reports around 50 million unique users per month. I was named a Reformer of the Year

> by the think tank Reform in 2012 and one of the 500 most influential people in the United Kingdom in 2014 by the Sunday Times. …

An article in the Conversation from 2016 raises other pertinent questions: What happens after My Health is scrapped (if it is scrapped) as care.data was in the UK? Will guarantees given for My Health carry forward if it is rebranded as something else? What about health data sources already subject to mandatory reporting requirements? Is there a "tent"; if so, who's inside it, who's outside, and can this change over time?

> … the UK government decided to pull the plug on care.data, a controversial NHS initiative to store all patient data on a single database [following a report by Dame Fiona Caldicatt]. This may seem like a victory for data-privacy advocates, but NHS data-sharing initiatives are still being planned and the goalposts are being moved on patient consent…Care.data was an initiative that aimed to add patient records from GPs' surgeries with existing data already collected by the NHS data centre, HSCIC. The resulting single database could then be used for medical research, NHS planning and maybe even commercial exploitation. The 2012 Health and Social Care Act ensured that any data sharing would be legal, even in the absence of patient consent … Caldicott's much delayed report said that the government should "consider the future of the care.data programme", but it didn't go as far as to say it should be axed. So how and why did the report lead to the care.data programme being scrapped? The answer lies in the recommendations made by Caldicott on opt-outs. They back-pedal significantly on … concessions made … in 2013. The easiest way for the government to recant [those] concessions is to withdraw the care.data programme they are associated with, and start with a clean slate…In Caldicott's new proposals, medical records from GPs' surgeries can be sent to HSCIC without patients' consent. The report argues that HSCIC is a safe haven for all medical data. Significant limitations on type 2 objections have also been proposed. For "legally mandatory" data collection for HSCIC, such as Hospital Episode Statistics (data on treatment in NHS hospitals), opt-outs won't apply. Also, opt-outs won't apply to any anonymised data passed on to HSCIC's customers, such as NHS divisions and research organisations. The new Caldicott consent model explicitly excludes the use of medical data for marketing and insurance purposes. But companies that do data analysis for the NHS are viewed as "inside the tent" of a partially privatised NHS and will not need patient consent to receive data … despite the end of care.data, medical data sharing is still firmly on the table … [viz.] the NHS's plans for care.data successors, one of which appears to be a "single GP dataset" – basically, care.data without the opt-outs … The mechanism proposed for "consent" consists of providing information, and then granting patients a few limited opt-outs. As this does not sit well with the new European data protection law's idea of consent (a "clear affirmative action"), we should expect further developments, both in the public debate and on the legal side.

We always knew r/keeping was complicated but … whew!

<<Michael Piggott: I'm lost in the twists and turns … yet again health/medical recordkeeping seems to be seen as something fundamentally different … what was/ is/ should be/should have been the NAA's role is all this; after all, isn't it the C'th government's expert policy and technical adviser on ….? [add bias here].>>

And it gets worse, Michael. news.co.au reports on difficulties experienced by those wanting to opt out – systems that refuse to process your data, long wait times, stringent ID requirements. These are problems when it's not an opt-in system. The opt-out system will just sweep up the poor, the indigent, and the technically un-savvy – also those without the time and patience to wrestle a system that may even have been designed to discourage opt-outs by making it hard. The ID issue is real. Not everyone has a passport or a driver's licence. My mum didn't and while I was her carer I encountered repeated difficulties in simply getting her entitlements without them. I am assured this is a common problem for the elderly and the cared-for, so how the un-cared-for manage I have no idea.

The website talks about cancelling your record, not deleting it. What does that mean? Does a cancelled record continue to exist and simply become non-operative? For those of us who already have a record (over 5 million of us, apparently) the process for cancelling an existing record seems to be different to opting out (requiring even more ID data). The process for cancelling includes providing your bank account details (the one into which Medicare payments go automatically). Does this mean that you lose this facility by cancelling? It sounds as if what you opt out of is future uploads from your GP but that already existing protocols for maintaining other health data about you are unchanged and that those records will continue to exist regardless of whether you opt out of My Health or not. So the sleeper here is what health data about you is the Government already keeping and is My Health just about expanding the scope of that to include GP data? In other words does a Health Big Brother already exist and this is simply about extending its reach? The current excitement is 151ealize on My Health but maybe there's a bigger issue. A classic example of how information without context can be worse than useless.

On another front, just to reinforce this point and to warn us that we shouldn't run away with the idea that on-line use of our health data is something new, take note of the comments of the head of the AMA (as reported in the news.com.au story)

> … Australian Medical Association (AMA) president Dr Tony Bartone says the system will move the industry from a "prehistoric" way of information sharing and collate data that is already in the hands of the medical industry, albeit not linked or even 151ealized151. "It will bring data presently located in many different parts of the health system … and attempt to bring it into an online repository in the one place," he told news.com.au. "Your health data is already in various portals. What isn't there yet is this online, connected repository … that will facilitate a communication revolution." …

I would think so. Some would argue that a single "online repository in one place" (really?) is more secure than a network of disconnected systems and that privacy can be more safely controlled because harvesting from many systems is easier than cracking one big one – as the Russians and the Chinese can testify. But the suggestion is that Big Brother won't displace the disconnected systems, just suck up data from them and leave them doing what they already do.

<<Catherine Robinson: …I will certainly be taking this up with my federal MP and asking lots of questions.>>

When you do, don't forget to ask the archivist's question:

> We are told that a My Health record will be created if we don't opt out. How? Where do they go
> - to decide that I exist and to verify my identity,
> - to decide that there should be a record about me, and
> - to find and verify the data used to populate the record in the first instance?

In other words, to echo Michael's questions, what is the records-making process here? How does this process (and the pre-existing processes for gathering online health data for that matter) escape the privacy principle requiring informed consent from the data subject and limitation of use to the purpose for which the record was created? In short, how can the Government just create a personal record about me without my participation and (opt-in) consent? I'm sure there will be an answer to that question and I think you may find it chilling.

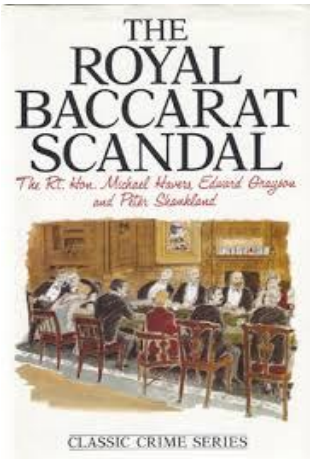
2018, July 24: More on My Health

Who Has Access to the Record?

The propaganda says you control who does. But will you really? In 1890, Edward, Prince of Wales, was involved in a scandal over alleged cheating at cards by one of the guests at a

private party held at Tranby Croft. It was decided to hush it up and the offender agreed never to play at cards again if the affair was not spoken of in society. The culprit along with the other male guests, including the Prince, signed a paper to that effect. PoW expressed his confidence that the gentlemen would all keep their word. A wiser guest, Arthur Somerset, tried to disillusion him: "*It is impossible, sir. Nothing in the world known to ten people was ever kept secret*". I read somewhere that "secondary users" of My Health records could number as high as 900,000. Here is an ABC report on the latest loophole to cause concern:

> My Health Record is scrambling to put tough new restrictions on mobile phone apps that use its sensitive patient data, including an option to cancel if the companies damage the system's reputation. Companies Telstra, HealthEngine, Tyde and Healthi already have access to My Health Record information such as Medicare records, test results, scans and prescriptions, for their app users to view on mobile phones. The Australian Digital Health Agency (DHA) ... has sent out a heavily amended agreement to the four app companies. The new agreement, obtained by the ABC, will mean that companies' contracts would be terminated if they damage My Health Record's reputation and will give the chief executive Tim Kelsey a five-day cancellation option if he "forms the view that this agreement ... may be contrary to the public interest". ... Mr Kelsey was unavailable for an interview. A spokesperson for the DHA said it was "best practice" to regularly review contracts with suppliers and partners and the app providers had undergone "strict assessment". The agency's contractual fix comes after the ABC reported on June 24 that one of the partner apps HealthEngine was passing on client information to personal injury lawyers and boasting to advertisers it could tailor advertising to patient's illnesses... The agency spokesperson said My Health Record had "the highest level of security and meets the strictest cyber security standards". ... The new portal operator agreement shows companies will be given three days to notify the agency if they have had any My Health Record data breach. ... The new contract also builds in the ability to terminate immediately if the company or associates "engage in any other conduct that we consider, in our absolute discretion, could adversely affect our reputation or the reputation of the My Health Record system or the Commonwealth of Australia or any of its agencies"....



What Kind of A Record is it?

Is My Health a centralised r/keeping system for storing "your" medical record(s) **or** is it a r/keeping system established by the Government for storing uploads (harvested data from systems actually holding your medical records) – in effect, copies of all or part of your "raw" medical data and therefore a different record altogether? Will you have one medical record (distributed across multiple systems) or two? What if some of those involved in your health care don't submit raw data to the centralised system and the My Health record is incomplete? Alternatively, what if data harvested from elsewhere is added to your My Health record by the Government and the source records are not kept up-to-date? In short, do we have two r/keeping systems or one? Here is some background on this from the Australian Privacy Foundation

> … These record systems need to enable health professionals to make better decisions, be intuitive to use, be adaptable and in no way make their jobs harder than they are already. Unfortunately, simplistic IT solutions that gather large amounts of raw, un-managed patient data, which can be matched with other data sources, which are onerous to use, and which are easily accessible over the internet, potentially by hackers, can create far more insidious problems than they solve. In our opinion the My Health Record falls into all these categories. It is also worth noting that My Health Record is a summary system, is not a real health record like the ones your GP and hospital might hold … because it is not really your health record but a less-reliable copy, the My Health Record has little value for either your clinicians or you as a patient … Most clinicians already use an electronic medical record system. These can be improved by better communication between existing systems, not by introducing another, less useful, less secure copy in a system that has some of the hallmarks of a scheme designed for surveillance and less-controlled disclosure, rather than your healthcare. It is not generally known but the government has several mechanisms by which they pay GPs to upload your health data. In other words, GPs are selling your health data to the government … If you look at [the] advertising material or the government's website myhealthrecord.gov.au there are many claims about the alleged benefits of having a My Health Record. What you won't find is anything about the costs and risks. Neither will you see anything that tells you that you are responsible for your My Health Record – nobody else is. It is up to you to ensure that it is accurate, up-to-date and fit for purpose – i.e. it does what you want it to do…

It is well established that patients do not own their medical records. So, pace the APF, it would be even less apt to describe a My Health record as "your My Health record". The rule is that the physician/health provider owns "your" medical record (why then do I get left holding my own x-rays?) but you have certain rights to see and copy it. You will have similar access rights over your My Health record but you don't own it. The propaganda suggests that unlike current arrangements for sharing your medical record(s) - effectively in the hands of health professionals subject to certain limitations – control over access to your My Health records is with you. Does this mean I will be able to block **all** secondary use? If I do, what is the point of having one in the first place? Ownership over the harvested copy (with all that it entails) will vest in the owner (the records-maker) which, it would seem, is the Government. How comes it about, by the way, that there are already 6 million of these things in existence ("5.9 million Australians currently have a My Health Record")?

2018, July 25: Access – regulation vs practice and discretion

The MHR debate is raising all sorts of juicy r/keeping issues (haven't had this much fun in years –testimony to how drab my life has become). A piece posted by the Commonwealth Parliamentary Library explores the distinction between administration of access restrictions to personal information based on statutory rule as distinct from an operational policy (in the case of government agencies or ministers exercising a statutory discretion) or a practice statement (in the case of medical practitioners, for example).

Law enforcement access to My Health Record data
Posted 23/07/2018 by Nigel Brew

> My Health Record (MHR) was introduced in June 2012 by the Gillard Labor Government originally as an opt-in system … before legislative amendments in 2015 … laid the groundwork for it to become an opt-out system. Law enforcement access to MHR data is among the privacy concerns raised about the program, but this provision was in the original legislation and received little attention when the Bill was debated. The PCEHR/MHR has been operating for six years now since July 2012 …The MHR system is operated by the Australian Digital Health Agency (ADHA) as a 'secure online summary of an individual's health information'. However, under certain circumstances, MHR data may be provided to an 'enforcement body' for purposes unrelated to a person's healthcare. An 'enforcement body' is defined in section 6 of the *Privacy Act 1988* as the Australian Federal Police, the Immigration Department, financial regulatory authorities, crime commissions, any state or territory police force, anti-corruption bodies, and any federal or state/territory agency

responsible for administering a law that imposes a penalty or sanction or a prescribed law, or a law relating to the protection of the public revenue. Section 70 of the *My Health Records Act 2012* enables the System Operator (ADHA) to 'use or disclose health information' contained in an individual's My Health Record if the ADHA 'reasonably believes that the use or disclosure is reasonably necessary' to, among other things, prevent, detect, investigate or prosecute any criminal offence, breaches of a law imposing a penalty or sanction or breaches of a prescribed law; protect the public revenue; or prevent, detect, investigate or remedy 'seriously improper conduct'... The general wording of section 70 is a fairly standard formulation common to various legislation—such as the *Telecommunications Act 1997*—which appears to provide broad access to a wide range of agencies for a wide range of purposes.

While this should mean that requests for data by police, Home Affairs and other authorities will be individually assessed, and that any disclosure will be limited to the minimum necessary to satisfy the request, it represents a significant reduction in the legal threshold for the release of private medical information to law enforcement. Currently, unless a patient consents to the release of their medical records, or disclosure is required to meet a doctor's mandatory reporting obligations (e.g. in cases of suspected child sexual abuse), law enforcement agencies can only access a person's records (via their doctor) with a warrant, subpoena or court order. The Australian Medical Association's existing *Ethical Guidelines for Doctors on Disclosing Medical Records to Third Parties 2010 (revised 2015)* note: .....

> In cases where there is a warrant, subpoena or court order requiring the doctor to produce a patient's medical record, some doctors and/or patients may wish to oppose disclosure of clinically sensitive or potentially harmful information. The records should still be supplied but under seal, asking that the court not release the records to the parties until it has heard argument against disclosure.

It seems unlikely that this level of protection and obligation afforded to medical records by the doctor-patient relationship will be maintained, or that a doctor's judgement will be accommodated, once a patient's medical record is uploaded to My Health Record and subject to section 70 of the *My Health Records Act 2012*...Although it has been reported that the ADHA's 'operating policy is to release information only where the request is subject to judicial oversight', the *My Health Records Act 2012* does not mandate this and it does not appear that the ADHA's operating policy is supported by any rule or regulation. As legislation would normally take precedence over an agency's 'operating policy', this means that unless the ADHA has deemed a request unreasonable, it cannot routinely require a law enforcement body to get a warrant, and its operating policy can be ignored or changed at any time. The Health Minister's assertions that no one's data can be used to 'criminalise' them and that 'the Digital Health Agency has again reaffirmed today that material ... can only be accessed with a court order' seem at odds with the legislation which only requires a reasonable belief that disclosure of a person's data is reasonably necessary to prevent, detect, investigate or prosecute a criminal offence...

It is a basic principle of administrative law that a decision-maker cannot decide to routinely deny requests where a law gives them a discretion. That is deemed to be divestment contrary to (and a violation of) parliament's intention which was to provide for a decision-making process to be applied on the merits of cases as they arise. This principle was litigated in the High Court many years ago over a challenge to the Two-Airline Policy). A blanket denial should be enshrined in the enabling statute itself (there is no point in giving someone a discretion to always say "No").

> Failure to exercise of discretion, means failure to make choices between the courses of action where such power to make a choice was vested upon the public authority by a statute. The courts in such situations have an authority to impose controls on the way in which the discretion can be exercised with a view to see that there is no failure to exercise discretion...The public authority would be said to have failed to exercise its discretion when:.....
> - It makes general rules and policies applicable to all without looking into merits of a special case in which the authority ought to exercise discretion.

Hence the CPL's conclusion that ADHA and the minister cannot give blanket assurances in advance about how requests for access by law enforcement agencies will be determined in all cases. That is not how a statutory discretion is supposed to work. The AMA's position on how to handle warrants, subpoenas and court orders, on the other hand, is a practice statement and not subject to such a principle because medical practitioners are establishing an ethical standard and not exercising a statutory discretion.

<<Michael Piggott: ... there was a saying during the Vietnam moratorium days - when brilliant cartoonists such as Richard Cobb were alive - that one of the most potent protest weapons was ridicule. When people start laughing at leaders, they're really in trouble. Mind you, that was before facial recognition software.

But anyway, here's the latest from The Shovel:

Health Minister Assures Local Man That The My Health Record System Is Secure,

And Wishes Him Well For His Upcoming Genital Herpes Treatment &#8211

; The Shovel
www.theshovel.com.au

<<Andrew Waugh: As I thought, 'law enforcement' is much broader than the police. It includes *any* federal or state agencies "responsible for administering a law that imposes a penalty or sanction or a prescribed law, or a law relating to the protection of the public revenue".

I couldn't even begin to think of the number of agencies that would qualify under this description. Possible agencies could include:

- **local government (by-laws)**
- **public transport authorities (ticketing infringements)**
- **transport accident commission (compulsory third party insurance)**
- **whatever agency looks after traffic offences**
- **agencies enforcing fishing/hunting licenses**

It should be remembered that, about 18 months ago, there was a issue in the UK where it was discovered that, under a similar legislative regime, some local councils were using a law 'intended' to allow police to use covert video monitoring equipment to prosecute people misusing bins.>>

2018, July 26:

Just so.

> Greg Hunt's claims that a warrant will be required to access My Health Record has been contradicted for the second time in two days – this time by the Queensland Police Union. After taking legal advice, the union has written to its members – the very police who could gain power to access the records – warning them that investigators of police misconduct would have access without warrants. The union also openly discussed "the advantages this type of access may have" for police investigating other crimes. Access to My Health Record will not be limited to police, as the list of enforcement bodies who may access records includes the immigration department, anti-corruption commissions, financial regulators and any other agencies that impose fines or are tasked with the "protection of the public revenue". Hunt and the Australian Digital Health Agency have repeatedly said that "no documents will be released without a court order" but the claim has been contradicted by the parliamentary library and now the Queensland Police Union... *Guardian* 26/7/2018.

The propaganda talks about **you controlling access** but it is all about access by health care providers. It says nothing (that I could find) about your being able to control access by

blocking statutorily mandated snoopers such as those listed by Andrew. Indeed, it is difficult to see how you could be given control over access by statutorily mandated snoopers when they are entitled under the Act to snoop into your affairs and the Act says nothing about your being able to block it. It's looking more and more like a surveillance system and less and less like a health care system.

<< It's looking more and more like a surveillance system and less and less like a health care system.>>

If this is not the case then why is the disposal rule that you can cancel your MHR but not delete it until 30 years after death or 130 years after birth. Once the MHR is cancelled it ceases to be of use as a health care record but it continues to be available for surveillance purposes.

<< It may be accessed by us for maintenance, audit and other purposes required or authorised by law.>>

The only continuing rationale for retention is surveillance. This is pure recordkeeping. It is heartland stuff for our profession. We understand this (or should do) better than anyone else. Maybe it's time for ASA and RIMPA to issue a statement explaining it to people.

2018, July 27:

<<Andrew Waugh: Of course. And you will note the *very* careful language used when the Minister and his spokespeople talk about your ability to regulate access.

It's looking more and more like a surveillance system and less and less like a health care system.

I can understand this perception, but I think it is wrong. This view actually misunderstands the nature of the information management problem that this system illustrates.

This is a health system. It attempts to solve a real problem, and as the medical people have said could be very valuable. I don't believe it was set up as a surveillance system.

However, the system is a honey pot of information. And this honey pot attracts people who want to exploit the information for their own purposes. The focus has been on bad actors (hackers) and those that could be bad actors (health insurance companies). But this overlooks the fact that the Commonwealth itself is an actor. The problem is that the Commonwealth public service (and their masters) couldn't resist the honey pot of information. They acted like any other stakeholder, saw the benefits that access to the information could give them, and grabbed it. Of course, they had an advantage as they own the system and the legislative framework and so could easily give themselves permission.

Having done so, of course, they undermined the original purpose of the system, and its chance of success. Many people (we'll see how many) will refuse to use the system. The system will collapse if enough people don't use it. It won't be of use to anyone, even the Commonwealth.

This issue illustrates the value of privacy principles, and the threats, particularly in the government sphere. It is too easy for government to excuse itself from privacy requirements because their goals are important, and they see themselves as ethical players.>>

I agree. It is a health system, it confers all the health care benefits that are claimed for it, it solves "a real problem". It has been, for those reasons, enthusiastically endorsed by health care professionals, though some are now having second thoughts. Its utility as a clinical record on top of its insecurity has been questioned in the *Business Insider* (copied from or copied to the *Conversation*) so its virtues may not be all they are cracked up to be. Like climate change, however, I am prepared to accept the preponderance of technical (medical) opinion on that. But is it also a Trojan Horse? Can it save lives and chew gum at the same time? You don't have to be as paranoid as I am to harbour suspicions that as well as being a

desirable health care initiative it also has a covert purpose. It is going to have near universal coverage and a universal identity system has been a goal of the bureaucracy for over thirty years. They've tried it twice before: in 1987 and in 2006.

Those of us who are old enough can recall the Australia Card, the Hawke Government's ill-fated attempt to introduce a national identity system. At the time it was mooted that the Medicare Card could be used as the vehicle instead, an idea later resuscitated by Joe Hockey as the Access Card. In the end, they used an augmentation of the tax file number. Be in no doubt: "they" want to keep track of us all. We don't all pay taxes, but we all (nearly all) use the health care system. What "they" really want is universal coverage and with statutorily mandated snooping into an MHR linked to your Medicare number "they" will hit the jackpot. Is it too far-fetched to suppose that MHR offered an opportunity for "them" to hitch the long desired goal of universal identification to a popular and desirable health care initiative expecting that it would sail through on the coat tails of this virtuous solution to a "real problem"? Bureaucrats have long memories too.

- S.70 type access is available to allow statutorily mandated warrant-less snooping into many other reservoirs of personal data. The current debate is highlighting that and (one hopes) might prompt a more wide-ranging discussion of the limitations that should be imposed not just here but elsewhere (though I doubt it). The response to MHR involves two components –
- The evil of s.70 type access in relation to MHR (and much more personal data besides). This could be fixed and a "clean" MHR introduced with better safeguards. But that would be less useful to "them" and conceding it might even raise the question of why similar safeguards couldn't be imposed in other areas where warrant-less snooping occurs. So there would be a bureaucratic push back. Nevertheless, that is the easier of the two components to deal with.
- The more difficult question is whether or not such a digitized reservoir of personal data, regardless of its virtues, represents per se an unacceptable risk to privacy. There can be no definitive answer to that and it is an issue that exists elsewhere than in the Australian context. It is a difficult question upon which honest differences can arise. Other countries have considered and rejected the MHR/EHR/EMR approach and there are alternatives here (i.e. equally acceptable solutions are possible without having a digitized data system that can support warrant-less snooping).

<<Andrew Waugh: I would certainly agree with the questioning about its utility as a clinical record, which is why I said 'attempts to solve' and 'could be very valuable'. The problem of utility directly relates to a question you asked in a previous email:

> **Is My Health a centralised r/keeping system for storing "your" medical record(s) or is it a r/keeping system established by the Government for storing uploads (harvested data from systems actually holding your medical records) – in effect, copies of all or part of your "raw" medical data and therefore a different record altogether? Will you have one medical record (distributed**

across multiple systems) or two? [...] In short, do we have two r/keeping systems or one?

This is a new recordkeeping system. The records in it are a mixture of copies of records in other systems (test results, prescriptions), and original records (summaries of health information kept in other systems).

A fundamental principle of archiving and recordkeeping is unselfconcious creation. Records can be trusted because they are created and kept as a side effect of carrying out your business, and are necessary for carrying on further business. (There is a whole other argument whether modern recordkeeping practice actually implements this, but that's not the point here.)

The potential failure of utility is because this system absolutely ignores this principle; in fact it takes the absolute opposite tack. The key records (health summaries) have to be consciously created by doctors. At best, a good record will take significant metal effort to create and a reasonable amount of time (this ignores the additional time possibly imposed if the centralised system is slow or difficult to use). These records are of no future benefit to the doctor themselves as he or she has a much better record in their own practice system. There is no penalty to the doctor in not creating these records.

Archival theory consequently tells us that most doctors will not create the health summaries, and if they are created, will not maintain them.

Even if a summary record does exist, future readers of these documents (i.e. doctors) using this system will not be able to distinguish between well maintained health records, and ones that are incomplete, inaccurate, or seriously out of date. At best they might be of use to suggest topics of discussion with the patient.

Hence, archival theory tells us that this system will fail as a record system.>>

2018, August 1: MHR – a Small Victory

<< The health minister, Greg Hunt, has been forced to back down because of escalating controversy over My Health Records, saying legislation will be amended so no record can be released to police or government agencies without a court order. The adjustment, confirmed late on Tuesday night, follows general practitioners and social services groups calling for major changes to My Health Record to ensure it can only be used for medical purposes. The prime minister had signalled the government would make "refinements" to the scheme – but a growing backlash lead to calls for changes including requiring law enforcement agencies to get a warrant to access the records and dramatically narrowing the grounds to release information ... "The amendment will ensure no record can be released to police or government agencies, for any purpose, without a court order," the health minister said ... The RACGP president-elect Dr Harry Nespolon said Hunt's amendments were necessary. "Changes to the legislation that remove any questions about who may be able to access the records ensure that the records will be able to be used in line with the RACGP's position statement on My Health Records. When a patient steps into the office of one of our GPs, we want them to know that their health information is private and protected," he said. Digital Rights Watch was also positive. "This is excellent news, and vindication for the privacy experts, medical practitioners, concerned public and even members of the minister's own government, who have all outlined their privacy concerns with this rollout," said the group's chairman, Tim Singleton Norton ... Last week the parliamentary library released advice, which was later taken down from its website, warning the law governing MyHealth Records represented a "significant reduction" in safeguards on police getting medical records because the operator could not routinely require them to get a warrant.>> The Guardian

1. "We "want them to know that their health information is private and protected". It is no such thing. The availability of the information and the wide-ranging definition of who can access it remains unchanged (apparently). All that will change is that the snoopers will need a warrant and (I suppose) that the basis for release, which gave wide-ranging discretion to the Authority, will have to be redrafted. Snooping will go on as before but it will be on a different footing. The story says "...changes including requiring law enforcement agencies to get a warrant ...". What about the other snoopers listed in s.70,

many of them not, by any stretch, law enforcement agencies? They also (one hopes) will need warrants.

2. The question why MHR should be available for snooping at all remains unaddressed. As Andrew Waugh (and others) have trenchantly argued, MHR is not a good health care record, it is a possibly incomplete and misleading copy of the clinical records, it is maintained for longer than is needed to meet health care requirements, and once created it cannot be deleted or redacted by the patient. If statutorily mandated snooping is to be allowed (and it already is) why not confine it to the source health care records and deny it altogether for MHR?
3. The reasons for allowing it for MHR at all are twofold:
   a. it will be so much easier to snoop into a centralised record,
   b. MHR will contain or link to more personal information than straight health care data (e.g. identity, bank details, address, relationships, etc.).
   These features (mainly resulting from the linkage to the Medicare card) make it more valuable as a surveillance system than just the primary health care records it summarises.
4. Once the snooper has obtained access to an MHR under a warrant, what prevents matching with other personal data bases not so protected? In other words, will a warrant limit the snooper to using the MHR data for the purposes stipulated in the application? Will it require the data be destroyed once that purpose has been fulfilled?

Apparently the site at which you can opt out is experiencing difficulties and cannot be accessed. I'm off to o/s next week and I'd like to get it done before I go.

2023, May 10:

Once, there was bickering over the My Health Record. Now, increased funding for it in the Budget scarcely seems to raise an eyebrow.

- A modernisation of My Health Record that will create a new national repository to share patient data across "all health care settings" $429 million (2023-24 to 2025-26)

A good example of how, once something that is controversial is established, it becomes part of the furniture.

2018, November 14: MHR amendments

The MHR (My Health Record) opt out period expires tomorrow but the promised "safeguards" have still not been enacted.

> ... After questions were raised about the ability of law enforcement agencies to access individual My Health Records without a court order, the Government introduced a bill making two key changes to the My Health Record legislation:
> - Requiring law enforcement to have a court order to access My Health Record.
> - If someone cancels their record, the Australian Digital Health Agency (ADHA) must "destroy" it, rather than holding it for 30 years after your death.
>
> The amendment is set to be debated in the senate this week, but some experts still question when deleted is truly "deleted". Without knowing the technical details of the system's software, Robert Merkel, a software engineering lecturer at Monash University, said it would be important to understand how the ADHA is implementing the "permanent" deletion of records. He wants to know whether it means deleting them off the live system and ensuring backups are destroyed, or simply making it illegal to access a cancelled record. The ADHA said that, after the legislation is passed, the record and any backups will be "permanently deleted" if someone cancels their record ... Health Minister Greg Hunt dismissed calls for an extension, but last week he announced additional changes to the legislation that are unlikely to be debated before the opt-out period ends:

- The penalties for improper use My Health Record will be increased.
- To protect those in family violence situations, a person will not be allowed to be the authorised representative of a minor if they have restricted access to the child, or may pose a risk to the child, or a person associated with the child.
- Employers will be prohibited from asking for or using an employee's My Health Record information.
- Insurers will be excluded from accessing health information or deidentified health data for research.
- The ADHA won't be able to delegate functions of the system to any authority other than the Department of Health and the Chief Executive of Medicare.

Dr Bruce Baer Arnold, a law and health expert at the University of Canberra, said the changes were "a band-aid on the My Health Record train wreck", particularly as the new bill's language is yet to be disclosed … Critics argue the nature of an opt-out system means that many Australians will have a My Health Record created, but never take control of it or even know it's there. Currently, users of My Health Record can apply an access code over the record or documents, so no one who doesn't have the code can see it. But they must opt in to these privacy controls, and it appears relatively few do so. As of Wednesday October 31, the ADHA said 18,288 record access codes and 3,991 limited document access codes had been created. More than 6 million Australians already have a record …

I have some questions. Here are three:

1. On what grounds will a court issue an "order to access"?

2. What is "destroyed" (whatever that term means) when a record is "cancelled" –

- the content merely and/or
- the metadata (the "stump") and/or
- the record of use as well.

Once a record is used (and leaving aside the fiendishly complex issues of documenting evidence of what was added, by whom, and when) a simple audit trail of who accessed my record, when they did so, and (if documented) for what stated purpose (especially which enforcement agencies have accessed my record, when, for what stated purpose, and details of the court order under which access was obtained) becomes part of the record. I can see several arguments (not all of them hostile to privacy interests of a data subject) for keeping the record of use and that probably means keeping the metadata.

3. As I understand it, MHR is not a system of record. Health care providers submit information from source systems where my real health record resides and continues to be updated. Nothing ensures that information is kept up to date in the MHR and nothing is done by ADHA to reconcile conflicting data from different health care providers. (I am open to correction on all of this). My question then is: what liability does ADHA and the Crown have for genuine mistakes made by health care professionals acting on incomplete or mistaken data derived from MHR? Very little would be my guess.

<<Andrew Waugh: … software engineering lecturers would have little or no expertise of the intersection of records and digital technology. Personally, I would have little concern if a delete meant a physical delete from the operational database, with the backups left to take care of themselves. We (records professionals) know that recovery of individual records from a backup is so expensive that, generally, it is simply not practical. This is exactly the reason that archival authorities have consistently given advice that backup systems are not archival systems … What I would be more concerned about is how the delete is going to be performed on the operational system. Bear in mind that this system exists already, and it does not have, and was not designed to have, the ability to permanently delete a person's record. Therefore the system owners are looking at adding a significant additional function. That is always expensive, with long lead times, and risky. Putting on my software developer's hat, I

would be looking at simple methods of 'deleting' records … The very simplest method would be add a flag in the patient's information saying this person is 'deleted'. The access mechanisms would be altered to check this flag, and if it is set, simply not return any information. Of course this doesn't actually delete anything … The next simplest method would be to destroy the linkage in the system between you (as a person) and each medical record … The good thing about relational database design is that software engineers have long understood that redundant information is a bad thing (increasing storage cost and leading to inconsistencies in data). If the designers have implemented the database correctly, the linkage between a record and the person it relates to should only need to be destroyed in one place … neither of these approaches actually detes the MyHealth record. This is contrary to what Minister Hunt is promising …>>

If you are correct, Andrew :

1. The bad news is that the public is being hood-winked (I agree this probably results from ignorance and incompetence rather than malice or duplicity).
2. The good news is that a record (of sorts) remains, or could possibly be reconstructed, of usage and mis-usage (again as a result of ignorance and incompetence rather than benevolence).

Once a personal record has been used by a third party, the privacy interest of the data subject reverses itself to some extent. It then becomes material for the data subject to be able to find out how his/her private information was used, by whom, when and for what stated purpose.

Opt-out deadline extended!

> Federal Health Minister Greg Hunt has extended the deadline for opting out of the Government's contentious My Health Record system. He confirmed the delay on Twitter within hours of the opt-out website suffering issues and the Senate agreeing to an extension. "The opt-out period will be extended until January 31, 2019 … " he said. The opt-out website suffered issues on Wednesday morning as Australians tried to remove themselves from the scheme ahead of the previous deadline, which was set to expire at 3:00am (AEDT) on Friday. The Senate is currently debating the legislation, but already agreed to extend the opt-out deadline to the end of January….

2018, December 31: Careless not malicious

> A child has had an incorrect guardian assigned to their My Health Record in just one of a series of "data breaches" uncovered by the Australian Digital Health Agency. Seventeen people also had another person's medical details listed as their own – among 42 data breaches reported by the agency that oversees the medical records system … Australian Digital Health Agency revealed the 'breaches' in their annual report saying "in all instances" the records were later corrected. The agency's chief medical advisor, clinical professor Meredith Makeham stressed it was not a malicious attack that comprised the medical records system. "They constitute alleged fraudulent Medicare claims or human processing errors when there is an administrative error of some kind," she said. "There has been no purposeful attack compromising the integrity of the security of the My Health Record system." … Ms Makeham said those affected by the 'breaches' were notified in all circumstances and defended them as a "minuscule number" of "human processing errors." … More than one million Australians have opted out of the My Health Record so far. … The system will hold information on all Medicare funded visits to the doctor, medical tests and medications… Source: SBS News

This story doesn't make things at all clear; not to me at any rate. How do "fraudulent Medicare claims or human processing errors when there is an administrative error of some kind" give rise to "data breaches"? An article in Medical Republic entitled "What could a MHR data breach look like?" didn't help as much as its title suggests –

> Health information is …. An attractive target for offenders. They can use this to perpetrate a wide variety of offences, including identity fraud, identity theft, blackmail and extortion … Last year Australians' Medicare details were advertised for sale on the dark net by a vendor who had sold the records of at least 75 people. Earlier this year, Family Planning NSW experienced a breach of its booking system, which exposed client data of those who had contacted the 162ealized162162at within the past two and a half years. Further, in the first report since the introduction of mandatory data breach reporting, the Privacy Commissioner revealed that of the 63 notifications received in the first quarter, 15 were from health service providers. This makes health the leading industry for reported breaches. It's important to note that not all data breaches are perpetrated from the outside or are malicious in nature. Human error and negligence also pose a threat to personal information. The federal Department of Health, for instance, published a supposedly "de-identified" data set relating to details from the Medicare Benefits Scheme and the Pharmaceutical Benefits Scheme of 2.5 million Australians. This was done for research purposes. But researchers were able to re-identify the details of individuals using publicly available information. In a resulting investigation, the Privacy Commissioner concluded that the Privacy Act had been breached three times … There are also concerns about sharing data with health insurance agencies and other third parties. While not currently authorised, there is intense interest from companies that can see the value in this health data. Further, My Health Record data can be used for research, policy and planning. Individuals must opt out of this separately, through the privacy settings, if they don't want their data to be part of this.

On the Avant Mutual site ("by doctors for doctors") matters are a little clearer-

> … your practice must notify the Australian Digital Health Agency … and the Office of the Australian Information Commissioner … of certain data breaches relating to the MHR. This is **separate from** your obligations under the Privacy Act … The [MHR obligation] does not apply to information that has been downloaded from the MHR and incorporated into your local practice records. If you download information to your practice records, that information becomes part of your practice record. Any breach related to your practice records would need to be considered under the Privacy Act's Notifiable Data Breaches Scheme .

What breaches do I have to notify? A MHR data breach is:

a. **The actual or suspected unauthorized collection, use or disclosure of health information in an individual's My Health Record**

   > **Example** … Dr Smith searches the system to see if her neighbour, a high-profile sports star who is a patient at the clinic, has a record. She finds the neighbour's record and – as her neighbour has not set access controls – views the information in it, including his MBS data and a file uploaded by a psychologist… As Dr Smith used the information in her neighbour's record and it was not for the purposes of providing healthcare to her neighbour, she has breached s59 of the My Health Records Act. When Dr Smith's neighbour next logs on to his My Health Record, he notices that the audit log shows that a doctor at the healthcare provider organization has accessed his record. He calls up the healthcare provider organization at to ask why someone has accessed his record. As soon as the healthcare provider organization becomes aware that a doctor has accessed the patient's record for purposes unrelated to providing healthcare, it is required to comply with the data breach notification requirements of s75 of the My Health Records Act. In addition, Dr Smith may be subject to a civil or criminal penalty under the My Health Records Act. Adapted from: OAIC Guide to mandatory data breach notification in the My Health Record system

b. **An event or circumstance that has or may have occurred and that has or may have compromised or may in the future compromise the security and integrity of the MHR (this includes past, current and potential compromises of the system).**

   > **Example** A registered healthcare provider organization discovers that an external party has hacked into its IT system. As its IT system connects to the My Health Record system, there is a possibility that the hacker was able to use the organization's credentials to log in to the My Health Record system and access information in the system. This would be

> considered a circumstance that has arisen that may compromise the security and integrity of the My Health Record system. As such, the healthcare provider organization would be required to comply with s 75 of the My Health Records Act when reporting and responding to the potential breach. Source: OAIC Guide to mandatory data breach notification in the My Health Record system

But what is not clear is whether the reported "data breaches" are of this kind. If they are, then the process would seem to involve breaches reported to ADHA by concerned medicos or concerned patients rather than breaches "uncovered" by them. In that case, whether or not the number of breaches is "miniscule" depends on how effective this process is in identifying them. At this point, my head started to hurt – and it's not New Year's Eve yet!

2024 August, 29: Zotero translators for PROV and QSA

Tim Sherratt

Just letting you know that Zotero users can now capture item metadata and digitised files from the PROV and Queensland State Archives collection databases. More details here: https://updates.timsherratt.org/2024/08/22/new-zotero-translators.html

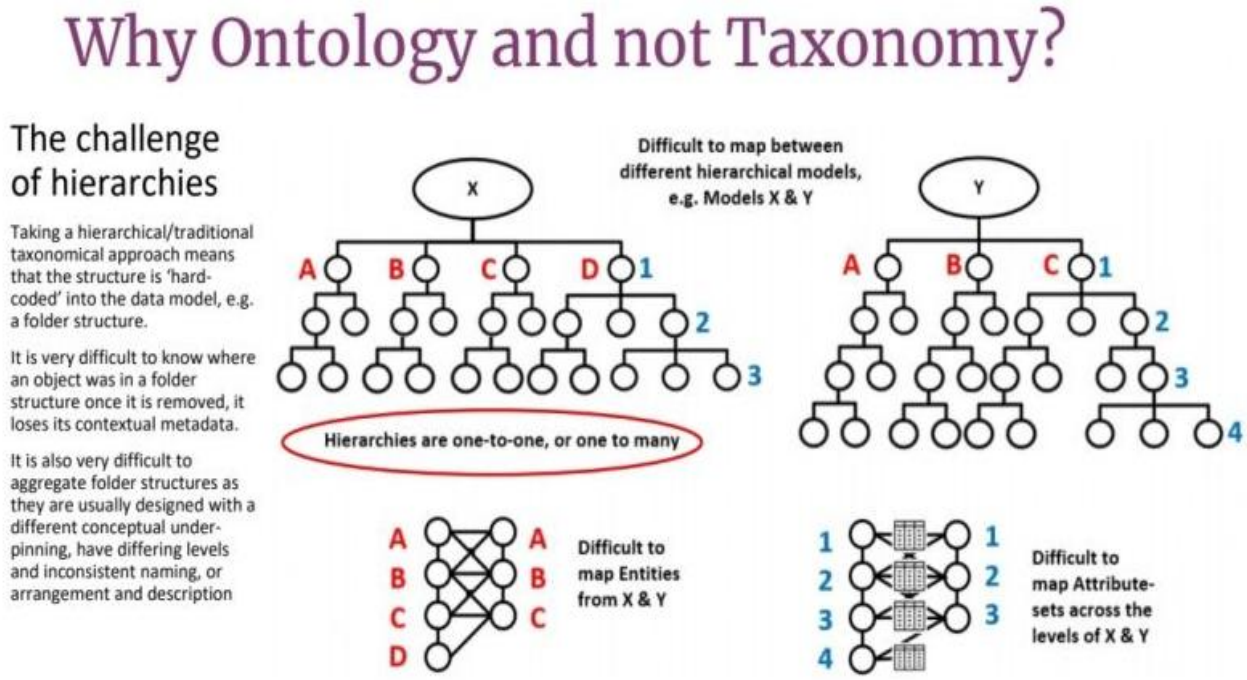
2024 August 29

Tim has long been a great champion for ubiquity. You can do wonderful and useful things in flatland. I'm all for it.

> The PROV translator makes use of PROV's collection API. It will capture item records from search results or individual item pages – just click on the Zotero icon in your browser's toolbar.

But, in our world, structure also has its place (*"as well as"* not *"instead of"*), not least as a support for global discovery (cf. Requirement One of the *Modest Proposal*) and also to mitigate the risk of getting 512, 121 results. I would like to see more debate on how structure and ubiquity can be brought together (perhaps a new Requirement for the MP). Ubiquity is essentially proactive, structure reactive; maybe AI could build a bridge.

On Linkedin Stephen Clarke has posted an intriguing demonstration of the use of Ontology in contrast to Taxonomy (viz. the dreaded Multi-Level Rule).



Building arrangement & description consistency – through ontology

Ontological Model Benefits

Ontologically-based models can:

- Embed many-to-many relationships, and relate objects dynamically according to need, a query, or a view/visualisation
- Be provided and viewed/visualised as being hierarchical through business rules if necessary (i.e. it's not a binary choice of how we view the data)
- Allow us to map to and across other relational models, and their attributes and value sets
- Enable reuse of the elements/values in, rather than duplication.
- Allow global changes through updating in one place, i.e. the data dictionaries.