

Victoria: The Keep-It-All State? The Impact on Archives of the *Crimes (Document Destruction)* *Act 2006* and the *Evidence (Document* *Unavailability) Act 2006*



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RÉSUMÉ En 2006, Victoria est devenu le premier État australien à promulguer des lois qui criminalisent spécifiquement la destruction de documents dans des situations où aucun procès n'a encore commencé. Le *Crimes (Document Destruction) Act* et la législation complémentaire, l'*Evidence (Document Unavailability) Act*, incluent des infractions et des peines pour celles et ceux qui détruisent des preuves. La nouvelle législation a immédiatement provoqué un malaise profond dans les secteurs publics et privés de Victoria : est-ce que ces lois voulaient dire qu'une organisation ne pouvait plus détruire aucun document car on pourrait un jour en avoir besoin dans des procès n'ayant pas encore été présentés en cour ou n'ayant même pas encore été envisagés? Les agences se sont tournées vers le *Public Record Office Victoria (PROV)*, l'autorité en matière des archives de l'État, pour obtenir des conseils et des éclaircissements sur les répercussions possibles de ces lois sur la gestion des documents et l'archivistique. Cet article examine les questions que le *PROV* a dû considérer pour développer sa réponse aux deux lois et, de façon plus large, il explore comment la tendance de « garder au cas où » peut créer des défis d'ordre intellectuel et pratique, tant pour les gestionnaires de documents que pour les archivistes.

ABSTRACT In 2006, Victoria became the first state in Australia to enact laws specifically criminalizing document destruction in situations where no legal proceedings had yet commenced. Included in the *Crimes (Document Destruction) Act* and its supporting adjunct, the *Evidence (Document Unavailability) Act*, are offences and penalties for those who destroy evidence. The new legislation sent an immediate and profound wave of unease throughout Victoria's public and private sectors: Did these laws mean that organizations could no longer destroy any record because it may one day be needed in discovery for a case not yet launched or even contemplated? Agencies turned to the Public Record Office Victoria (PROV), the state archival authority, for advice and clarification on what the Acts meant for recordkeeping and archives. This article reviews the issues that PROV considered in developing a response to the two Acts, and more broadly, how open-ended directions to "keep in case" can pose both intellectual and practical challenges for records managers and archivists alike.

“Documents create a paper reality we call proof.”¹

Introduction

Archives, like all parts of a civil society, intersect continually with the law. It is through the rule of law that most archival institutions and bodies are created and empowered. It is to serve the purposes of a civil society, represented at the boundaries by the law, that archives are collected, preserved, and made available. A lapse in the rule of law is often, if not always, accompanied at some level by an erosion of archival and record-keeping practices, and often by the destruction of archives themselves. This has been demonstrated time and again, from the multiple sackings of the library and archive at Alexandria in ancient times, to the destruction during the conflicts of the 1990s of the archives of the former Yugoslavia. “Destruction of the archives eliminates a vital link in a nation’s connection to its past and destroys a people’s ability to learn about themselves and to defend their rights and interests.”²

Archives and archivists are not, however, merely static preservers of the past. Archivists are, in the modern world, often active and integral players in overseeing records in their native environments as well as issuing standards, monitoring compliance, and shaping the future archives through appraisal, collection management, and disposal. In this role, the archives, therefore, are not merely enabled by the rule of law, but also an enabler of it. This is particularly true in environments where recordkeeping and archives are functionally joined, either within the ambit of a single administrative entity, or in practice as those who handle living records work closely with those who manage the archives. The relationship between archives and law in such an environment is symbiotic and powerful. Archives not only form part of the legal framework of a society, but also shape and support that framework through their role in ensuring that good records are created, managed, and kept, as well as endure.

This article considers a specific and novel legal development within the Australian state of Victoria. The passage of the *Crimes (Document Destruction) Act 2006* (hereinafter CDD Act) is discussed as a case study on the intersection between the imperatives of the law, and the roles, practices, and responsibilities of recordkeepers and archivists. Through this lens, we can consider some broader questions about the role of records and archives in supporting lawful outcomes, and, conversely, the impact of legal change on organiza-

- 1 Mason Cooley, *City Aphorisms*, 6th Selection (1989), cited in the judgement of Shira A. Scheindlin, USDJ, in *Zubulake v. UBS Warburg LLC, UBS Warburg, and UBS AG (Zubulake IV)*, 02 Civ. 1243 (SAS) SDNY, p. 1.
- 2 Society of American Archivists, *Resolution on the Systematic Destruction of Archives in Kosovo and War-Caused Devastation of Archives Throughout Yugoslavia* (adopted 14 April 1999).

tions' record-keeping behaviours within a society. The particular legislation in question relates to a negative requirement: a prohibition on the destruction of documents. (Although outside the scope of this article, it would be possible to extrapolate some of the same themes in considering legislation that imposes positive requirements on recordkeepers and archivists, particularly in the areas of privacy, probity, and accountability).

Before we turn to a detailed consideration of the history, implementation, and parameters of the CDD Act, let us reflect on the nature of the relationship between archives, recordkeeping, and the law. That the relationship is a symbiotic one is rarely disputed; however, it is not always fully enunciated. The unevenness of the relationship (whereby the law and legal outcomes are seen as the destination, and record-keeping activities as the tool) is also not usually expressed. It is worth asking what exactly the value of recordkeeping is to the law, and, further, what aspects of recordkeeping are either not understood or not valued by the legal process. Understanding the basis of the law–records relationship provides a useful starting point for looking at the legislation in Victoria and its impact.

One of the core ways in which archives and recordkeeping support and enable the delivery of the law is in the field of documentary evidence. All adversarial legal systems are predicated on the production of proof and a chain of reasoning built upon it. Documents have a particularly vital role to play in proving facts at issue, especially – although not exclusively – in civil actions, which are often very document-heavy in their progress. Livia Iacovino believes that, “the law as it has evolved has been tied to developments in recordkeeping in two ways; firstly in terms of its dependence on documents to enforce the rights and obligations of organisations and individuals in society, and secondly in developing rules for the acceptance of records as evidence ... Records by their very nature provide evidence of the activities of organisations or persons ...”³

The flaws and inaccuracies of a document as truth-teller are somewhat obscured at law, which tends to place high importance on demonstrating *authenticity* – that is, that the document is what it purports to be – and *reliability* – that is, that the document has not been tampered with. These concerns are paramount, as opposed to *verity* – that is, that the document states true facts and in an unambiguous way. While there are certainly legal theorists who think differently, the practice of law itself in most common law nations tends to treat documentary evidence in the manner that Michel Foucault contends that history no longer does: “The document ... is ... an inert material through which [it] tries to reconstitute what men have done or said, the events of which

3 Livia Iacovino, “Teaching Law in Recordkeeping Courses: the Monash University Experience,” *Archives and Manuscripts*, vol. 25, no. 2 (November 1997), p. 273.

only the trace remains...⁴ This is at odds with the notion more favoured by many of the social sciences: that truth is a product not of information but of interpretation.

Truths emerge from facts, but they dip forward into facts again and add to them; which facts again create or reveal new truth (the word is indifferent) and so on indefinitely. The “facts” themselves meanwhile are not true. They simply are. Truth is the function of the beliefs that start and terminate among them.⁵

There is a remarkably strong sense among legal practitioners and laypeople alike that the law equates “having all the documents” with “knowing what actually happened.” In part, this is based on the idea that documents, being fixed, immutable (hopefully) and complete, tell a story that cannot vary, and thus, assuming they are not tampered with in some way, are more likely to offer reliable information about contemporaneous events than the more compelling, but also more variable, human witness. The notions that any document is only of full value if read within its context, and that the decontextualization of records may cause them to lose some of their probative value (and may actually make them misleading), are not often expressed in legal arenas.

In the legal realm, records creators, recordkeepers, and archivists are therefore primarily seen as the makers, guardians, and producers of trial cannon fodder in terms of self-contained, truth-telling, documentary evidence. Perhaps this is because, as Livia Iacovino suggests, “the intellectual discourses of law and recordkeeping have generally not cross-fertilized each other. Thus the legal fraternity may be locked into a particular view of what record-keeping professionals do and why they do it.”⁶ In such a legal worldview, the primary task of the archives specifically and of recordkeeping more generally, is to make sure that good evidence – evidence that is authentic, reliable, complete, accessible, and useful – exists and can be produced. The often unexpressed assumption behind this position is the notion that good records are more likely to protect the less powerful than the more powerful; that documents – independent, impersonal, and truth-telling – will uphold the cause of right and of justice in the face of denial of responsibility by big players.

In other words, the purported impartiality of documents is seen to both protect individuals and constrain the ability of powerful interests to rewrite the past in their own favour. It must be said that a multitude of real-world examples

4 Michel Foucault, *The Archaeology of Knowledge and The Discourse on Language* (London, 1972), p. 7.

5 William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (1907; Indianapolis, 1981).

6 Livia Iacovino, “Recordkeeping and the Law: General Introduction,” *Archives and Manuscripts*, vol. 26, no. 2 (November 1998), p. 195.

can be advanced in support of this instinctive view; after all, it is usually those in power who engage in wholesale destruction of records. As a recent Australian Royal Commission noted, “accurate records provide the first defence against concealment and deception.”⁷

Thus, when a crisis of confidence in the availability of evidence arises (as it did in the Australian state of Victoria in 2002), the law returns to this “pre-serve-and-produce” view of those who make and those who keep the very records that fuel courtroom disputes. As we will see, the reaction to the removal of evidence – an action deemed prejudicial to the interests of justice – was to enact a strong legal injunction against document destruction. Was Victoria on the way to becoming “the keep-it-all-or-the-sky-will-fall” state?

Criminalizing Destruction

Victoria is the southern-most mainland state on the Australian eastern seaboard, and is both the second most populous and second oldest state in the Australian Commonwealth. Like most jurisdictions established through British colonization, Victoria follows a system of combined common (court-made) law and statute law. The legislative framework is derived both from laws passed by the state legislature and from national laws enacted by the federal government, the Commonwealth of Australia. The nominal head of state in Victoria is the Governor, who is the legal representative of the British Crown. However, in practice, it is unusual for the Governor to play an active role in the state’s governance.

The Victorian government has responsibility for many areas of administration and governance, such as education, health, transportation, business regulation, infrastructure, land management, as well as justice and policing. Certain overarching responsibilities, such as defence, immigration, foreign affairs, and taxation belong to the Commonwealth. Most areas of civil administration and regulation are state responsibilities and wide variability between state laws in these areas is not unusual (although the past two decades have seen a strong move toward uniformity and agreement in state lawmaking).

Legal history was made in Victoria in 2002. Rolah Ann McCabe, a dying grandmother, became the first Victorian plaintiff to win an award of damages from a tobacco company. The defendant was British American Tobacco (BAT), the successor to the company that manufactured the cigarettes Ms. McCabe had smoked for many years prior to contracting terminal lung cancer. In a landmark decision on 22 March, Supreme Court judge Justice Geoffrey Eames

7 Western Australia, Royal Commission into the Commercial Activities of Government [W.A. Inc.] and Other Matters (1992), *Report of the Royal Commission into the Commercial Activities of Government [W.A. Inc.] and Other Matters—Part II* [1.1.27].

ruled that BAT's defence to the product liability negligence action should be struck out. He then referred the matter directly to the jury for assessment of damages. Justice Eames took this precedent-setting step on the basis that BAT, in destroying relevant evidence, had made it impossible for McCabe to receive a fair hearing of her case. In his ruling, Justice Eames referred to the uneven relationship between parties in lawsuits such as this one, and asserted that his decision addressed the potential outcome of such an imbalance; he contended that otherwise the result would be simply unfair: "Failure of a claim where a plaintiff had been denied a fair trial, could never be shown to be a just result."⁸

This was not, however, a straightforward case of a defendant's destruction of evidence once a lawsuit had begun – which would have been a straightforward perversion of the course of justice, something that has always been illegal. The uniqueness of the McCabe case lay in the fact that BAT had destroyed the documents *before* McCabe launched her lawsuit. This destruction occurred following the conclusion of an earlier, highly analogous lawsuit, the Cremona proceedings, which concluded in 1998, and also involved a product liability claim from a plaintiff dying of lung cancer.⁹ The destruction of records by BAT took place following advice from the company's solicitors, the legal firm of Clayton Utz. Lawyers from Clayton Utz worked with BAT to develop an apparently routine, innocuous document retention and disposal policy that authorized the destruction of the records used in the Cremona proceedings, as well as thousands of other documents. Further, many more documents were stored at Clayton Utz's premises instead of at BAT, a strategy designed to bring the records under the umbrella of legal privilege, thereby rendering them untouchable in any future legal discovery.

Despite the existence of a corporate retention and disposal policy, the court in the McCabe case did not accept the destruction of BAT records as an innocent administrative act. It was alleged, and Justice Eames accepted, that BAT had destroyed the documents with the intention of keeping them out of evidence in future proceedings, which the company knew or must have reasonably expected would occur, precisely because they were potentially damaging: "... at the conclusion of the Cremona litigation, thousands of documents which had been discovered as relevant in Cremona were destroyed by the defendant. The destruction was performed as a matter of urgency. When the destruction of documents occurred the defendant considered that further proceedings were not merely likely, but a near certainty, although it did not know the identity of

8 *McCabe v. British American Tobacco Australia Services Limited*, [2002] VSC, SC 73 (22 March 2002), p. 378.

9 In February 1996, proceedings against British American Tobacco were commenced in the Supreme Court of Victoria by Phyllis Cremona. The proceedings were discontinued in March 1998, thus no case citation exists.

any proposed litigant.”¹⁰

The actions of the defendant and its legal firm were alleged to have involved three related strategies, outlined in a subsequent report by the VicHealth Center for Tobacco Control:

The deliberate destruction of thousands of documents and of records of the documents destroyed, beginning in 1985;

Misleading the Court as to what had happened to missing documents;

The ongoing “warehousing” of documents, i.e., having relevant documents held by third parties so as to keep them from discovery, but to have access to them should they be necessary to the defence of the claim.¹¹

It was contended that with these three strategies, the tobacco company and its lawyers had acted in a manner contrary to the spirit of the law, thereby making it impossible for McCabe to receive a fair hearing in her product liability lawsuit. In his judgment, Justice Eames outlined his view of the role of documentary evidence, and of the responsibilities of litigants in managing such evidence:

The civil litigation system is an adversarial process, but it is a process governed by rules which the judges must administer. The formal rules of procedure [i.e., including document discovery] complement and acknowledge the inherent powers of the Court[,] which apply with the overriding objective of ensuring that parties to litigation receive a fair trial.

Central to the conduct of a fair trial in civil litigation is the process of discovery of documents. That process is particularly important where documentary evidence is likely to be both voluminous and critical to the outcome of the case, and where access to documents is very much dependent on the approach adopted by one party and its advisers. For a fair trial to be assured in such circumstances the approach which that party must adopt may well conflict with its self-interest. The party which controls access to the documents must ensure that its opponent is not denied the opportunity to inspect and use relevant documents, and it must disclose fully and frankly what has become of documents which have been in its possession, custody or control.¹²

The McCabe case caused immediate and widespread controversy and consternation among several different circles including the legal community, particularly product liability lawyers, the health sector, and the tobacco industry as well as other industries operating in highly litigious environments. There had

10 *McCabe v. British American Tobacco Australia Services Limited*, p. 289.

11 Jonathan Liberman, *Rolah Ann McCabe v. British American Tobacco Australia Services Limited Judgment of Justice Eames, Supreme Court of Victoria, Delivered 22 March 2002, striking out the defence of BAT, and entering judgment for the plaintiff: Summary and implications* (VicHealth Centre for Tobacco Control, Melbourne, 2002), p. 5.

12 *McCabe v. British American Tobacco Australia Services Limited*, p. 383.

never been a judgment quite like it in Australia before, and it created great uncertainty in an area that had previously been considered settled – when documents or records could, or, more to the point, could not, be destroyed. The records management and the archival communities saw the immediate problematic implications of the judge’s decision; suddenly, advice about retention and disposal to companies in litigious areas was less certain. What would the long-term effects be for managing records and managing risk?

It seemed that the question might be moot, or at least put on hold for a period of time, when the Victorian Court of Appeals overturned Justice Eames’s decision in November 2002 on the basis that he had erred in law, and ordered a new trial. However, this proved to be only the beginning. Widespread commentary targeted the tobacco company and the action of its lawyers as unacceptable. “[T]he public and media reaction to the case indicated that ordinary members of the public considered Clayton Utz [the lawyers’] advice to be at least unethical, if not illegal.”¹³ Subsequent revelations from Frederick Gulson, a corporate secretary of BAT’s predecessor company, confirmed what was generally understood by other commentators as to the intention and extent of the actions: “[Gulson deposed that] he understood the purpose of the document retention policy was to sanitise the company’s files by either destroying them, attaching legal privilege to them or placing them beyond the legal control of the company in order to minimise the risk that they could be used in legal proceedings against the company.”¹⁴

The case sparked such interest, scrutiny, and strong public sentiment that the Government of Victoria commissioned Professor Peter Sallman to conduct an inquiry into the appropriate course of action. The final report of that inquiry, released in 2004, recommended that a criminal penalty for destruction of documents be enacted to cover the kind of scenario that had taken place in the McCabe case.¹⁵ In part, this recommendation was designed to obviate the possibility of variable interpretation in how judges assess document destruction and to ensure that document destroyers did not work around the issue when explaining document destruction to the courts:

A judge only ever decides the case before him or her. A judgment is not prescriptive in the way that legislation is. Future cases are assessed against the principles or guidelines set by earlier cases, but the facts are different in each case, different judges give different weight to different facts, and ultimately reach conclusions based on their view of the particular circumstances of the case before them ...

13 Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (Victoria, 2007), p. 213.

14 William Birnbauer, “The Insider and the Ghost of Rolah McCabe,” *The Age* (19 July 2003), p. 23.

15 Peter Sallman, *Report on Document Destruction and Civil Litigation in Victoria* (Victoria, 2004).

Presumably, in future cases, BAT will have learned that it ought to be frank with the Court about its destruction of documents and that it should re-consider its ongoing document warehousing arrangements. If it does learn these lessons and comes to the Court with a different approach ... the results may be different.¹⁶

As a result of Professor Sallman's report, the Government of Victoria committed to enact legislation that would ensure that such corporate behaviour would specifically and unambiguously be illegal in the future. The result of that political commitment, which received bi-partisan support, was the enactment of two pieces of legislation: the *Crimes (Document Destruction) Act 2006* (hereinafter CDD Act) and the *Evidence (Document Unavailability) Act 2006* (hereinafter EDU Act). The government's intention in introducing these modifications to the law was highlighted by then-Attorney General Hulls in his second reading speech to Parliament, once again stressing the link between records and the rule of law: "It is essential to the rule of law that individuals and corporations cannot intentionally destroy documents to prevent their use in judicial proceedings with impunity."¹⁷

The amendments to the *Crimes Act*, which imposed criminal sanctions on certain types of document destruction, were correlated to changes in the Victorian *Evidence Act*, which was, at that time, a fairly aged and minimalist piece of legislation.¹⁸ The *Evidence (Document Unavailability) Act* was introduced "... to enable the courts and the Victorian Civil and Administrative Tribunal to intervene in civil proceedings where relevant documents are unavailable to ensure a fair outcome between parties in civil proceeding."¹⁹ Put simply, where the amendments to the *Crimes Act* rendered destruction a criminal offence, the *Evidence Act* amendments created a range of remedies for judges to apply in cases where some of the evidence was unavailable. With one piece of legislation focusing on criminalizing the behaviour, and the other on removing any beneficial consequences of that behaviour, the idea was clear: document destruction in certain instances was very unprofitable and possibly even a criminal act for corporations and their employees. As one commentator on the McCabe case put it: "We cannot change the past, or prevent our courts adjudicating on conduct of the past. But we can learn our lessons and prevent the conduct of today, and of the future, delivering the same difficulties as, we now see, has the conduct of the past."²⁰ In enacting these two pieces of legislation, Victoria became – and

16 Liberman, p. 6.

17 *Victorian Hansard* (16 November 2005), p. 2181 – Crimes (Document Destruction) Bill 2005 – Second Reading Speech.

18 In 2008, a new *Evidence Act* was passed, which greatly modernized and unified the law of evidence in Victoria.

19 *Victorian Hansard* (30 May 2006), p. 1470 – Evidence (Document Unavailability) Bill 2006 – Second Reading Speech.

20 Liberman, p. 9.

remains – the Australian state with the most comprehensive legal restrictions on document destruction.²¹

The Offences and Remedies

In order to appreciate the interpretive problems that immediately followed the enactment of these Acts, it is worthwhile examining what they actually say. The criminal offence is found in section 254 of the Victorian *Crimes Act*:

A person who –

- knows that a document or other thing of any kind is, or is reasonably likely to be, required in evidence in a legal proceeding; and
- either –
- destroys or conceals it or renders it illegible, undecipherable or incapable of identification; or
- expressly, tacitly or impliedly authorizes or permits another person to destroy or conceal it or render it illegible, undecipherable or incapable of identification and that other person does so; and
- acts as described above with the intention of preventing it from being used in evidence in a legal proceeding – is guilty of an indictable offence.²²

The CDD Act specifies penalties for the offence, for both individuals and for corporate entities. For individuals, the penalty is a maximum of five years in prison or a fine of six hundred penalty units (currently AUD\$62,886). For corporations, it is a maximum fine of 3,000 penalty units (currently AUD\$314,430).

The offence requires that four elements be proven beyond a reasonable doubt. First, the court must be satisfied that the destruction or concealment of the document(s) actually took place. Second, the destruction or concealment must have been performed, ordered, or authorized by the defendant in the case. Third, the defendant had to know that there was a reasonable likelihood that the document(s) would be required in legal evidence at some later stage. Fourth, it must be shown that the defendant's actions were intended to prevent the use of the document(s) in evidence. This would seem a fairly high burden of proof, and indeed it was designed to be so, catching only the most egregious of document destruction. Innocent or even negligent destruction is not the target of these criminal penalties; they were specifically crafted to punish behaviour that

21 The state of New South Wales has not followed the legislative path set by Victoria, but has imposed a degree of difficulty and risk around document destruction in similar circumstances by virtue of amendments to the *Legal Professional Regulations 2005* (NSW). Under these Regulations, lawyers in NSW are now legally prohibited from giving advice to destroy documents where it is likely that they might be required for use in legal proceedings.

22 *Crimes (Document Destruction) Act 2006* (Victoria), section 254.

is both deliberate and unconscionable.

There are a number of interpretative problems with the CDD Act, however, and several areas where it does not yet appear to provide certainty about what actions are liable to prosecution. Emilios Kyrrou and Stephen Jaques Malleons noted that, “for a statute that imposes severe criminal penalties, the Act uses a surprising number of vague expressions,”²³ and, with no cases yet available to show how the courts might interpret the language, this lack of clarity can lead to over-cautiousness among businesses and agencies in destroying records. The main areas where the language of the CDD Act appears ambiguous relate to “knowledge,” “reasonable likelihood,” and to the new concept of “corporate culture” as described in section 253.

Like most common law jurisdictions, Victoria has some offences in which “to know” requires actual and proven knowledge. However, for most offences, a reasonable certainty that a person “knew” will suffice. In the case of some offences, it is even enough that the person “should have known” about the facts at issue. The CDD Act is unclear as to what kind of “knowledge” is required for the offence. Similarly, “reasonable likelihood” is a phrase capable of multiple interpretations. Further, the Act does not indicate what test of reasonableness or likelihood should be employed. The Act’s lack of a timeframe adds ambiguity; it provides no time limit on how long an organization must refrain from destroying records if there is any chance of a lawsuit. Organizations immediately began to wonder if any imaginable lawsuit – no matter how far off in the future – would fall under the category of “reasonable likelihood.”

In terms of corporate liability, the CDD Act requires that not just the corporation’s ostensible actions and statements be considered, but also its underlying “corporate culture.” The Act defines “corporate culture” as “an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant conduct is carried out or the relevant intention formed.”²⁴ This provision is consistent with a recent trend in Australian legislation to put boundaries around tacit, as well as overt, behaviour. Part 2.5 of the *Commonwealth (national) Criminal Code*, as amended in 2001, for instance, deals with corporate responsibility. Like the CDD Act, the Criminal Code states that corporate culture will be examined to see if a situation existed whereby employees and agents were given to understand that non-compliance with the law and stated policy was accepted, encouraged, or even required. In other words, the legislation is framed to penalize corporations that attempt to hide behind ostensibly lawful and proper policies

23 Emilios Kyrrou and Stephen Jaques Malleons, *Document Destruction: Victoria Introduces New Criminal Offence* (Melbourne, 2006), http://www.axsone.com.au/pdf/Document_destruction_Victoria_introduces_new%20criminal_offence.pdf (accessed on 20 June 2009).

24 *Crimes (Document Destruction) Act 2006* (Victoria), section 253.

while in reality behaving very differently.

How can a company be liable for the actions of an employee through its culture? If the employee commits an offence and the company's culture (that is, the attitude, policy and rules within the company) could be said to expressly, tacitly or impliedly authorise or permit that offence, the company itself is guilty. The company's policies and procedures will be relevant to a consideration of its culture, as will knowledge of, and actual compliance with[,] those policies and procedures.

Each company's files, minutes, email and other digital records will (whether the company likes it or not) provide evidence of the company's culture of compliance or non-compliance, as will the processes and procedures which have been introduced, and the degree of compliance and encouragement of compliance with the company's processes and procedures.²⁵

There is still no real clarity around what might or might not be considered to provide evidence of a culpable corporate culture in respect to document destruction.²⁶ At present, it appears to be a matter of "you'll know it when you see it" – an instinctive or intuitive response to actions that seem to be more than an individual off on "a frolic of their own."²⁷ It has been suggested that factors such as past behaviour, verbal testimony of past and present employees, and overall practices would be relevant considerations for the court. It is also likely that the court would take into account the "normalcy" of the destruction within the organization's retention and disposal habits. In other words, if an organization has never made a practice of performing regular destruction in accordance with a retention and disposal authority, and then suddenly disposes a class of records that is relevant in evidence, the court would probably view this destruction with some suspicion.

The *Evidence (Document Unavailability) Act*, supporting the CDD Act, provides a range of remedies for the court to apply in cases where evidence has in fact been destroyed:

89B. Court may make ruling or order

- (1) If, in a civil proceeding, it appears to the court that –
 - (a) a document is unavailable; and
 - (b) no reproduction of the document is available in place of the original document; and
 - (c) the unavailability of the document is likely to cause unfairness to a party to the

25 Jeremy Blackshaw, "Corporate Culture in the Spotlight: Criminal Offences," *Keeping Good Companies* (1 July 2006), p. 2.

26 This issue is considered in Alice Belcher, "Imagining How a Company Thinks: What is Corporate Culture?" *Deakin Law Review*, vol. 11, no. 2 (2006), pp. 1–21.

27 Referencing the classic 1834 English case that established some of the core principles of vicarious liability, *Joel v. Morrison*, England, Nisi Prius (Exchequer), 6 Car. & P. 501, 172 Eng. Rep. 1338 (1834).

proceeding – the court, on its own motion or on the application of a party, may make any ruling or order that the court considers necessary to ensure fairness to all parties to the proceeding, having regard to the matters set out in section 89C.

- (2) Without limiting sub-section (1), a ruling or order may be –
- (a) that an adverse inference will be drawn from the unavailability of the document;
 - (b) that a fact in issue between the parties be presumed to be true in the absence of evidence to the contrary;
 - (c) that certain evidence not be adduced;
 - (d) that all or part of a defence or statement of claim be struck out;
 - (e) that the evidential burden of proof be reversed in relation to a fact in issue.²⁸

In determining which remedy to apply, the court must consider the circumstances in which the documents became unavailable.²⁹ Not surprisingly, the more deliberate the destruction of evidence, the heavier the remedy. It is important to note, however, that the EDU Act does not tell the court exactly what remedy *must* be applied in any given fact situation; the discretion is left with the court itself and determining the seriousness of the destruction is made on a case-by-case basis. This provides even less certainty, in many ways, than the wording of the CDD Act, which at least requires actual, demonstrable malfeasance.

Uncertainty of this nature is, of course, a familiar result of the introduction of new legislation, especially statutes such as these, which impose serious rather than trivial or administrative consequences for a breach. Like all common-law jurisdictions, Victoria relies on judicial interpretation in the case law to help build a clear view of how particular wording within legislation should be understood. Only once case law exists, can any individual or organization make a truly educated assessment of how the law applies to their fact situation.

Implications for Recordkeeping and Archives

As the Victorian state archival authority, Public Record Office Victoria (PROV) has responsibility for providing both standards for government recordkeeping, and preserving and making accessible the permanent archives of the state of Victoria. These responsibilities as well as the authority to carry them out are bestowed on the head of the Public Records Office Victoria, the Keeper of Public Records, through one of Australia's oldest archival statutes, the *Public Records Act 1973* (hereinafter PR Act). Interestingly, of all the Australian states, only Victoria has a "Keeper" of public records. As Terry Cook notes in his article "What is Past is Prologue," the "keeper" terminology

28 *Evidence (Document Unavailability) Act 2006* (Victoria).

29 *Ibid.*, section 89C.

harkens back to the British Jenkinsonian view of archivists as custodians, not active selectors or agents in the preservation of archives.³⁰

One section of the PR Act enforces this Jenkinsonian view by assigning responsibility for the creation, management, and selection of the majority of active records to the heads of public agencies rather than to the archival authority. The Keeper's responsibilities, as defined under section 7 of the PR Act, relate almost entirely to the archive-as-presented – or what Chris Hurley calls the first-generation, or “dustbin” model of defining the archives.³¹ Under the PR Act, the Keeper is responsible for:

- (a) the preservation and security of public records under his control;
- (b) the logical and orderly classification of such records and the publication of lists, indexes and other guides facilitating their use;
- (c) the duplication and reproduction of public records for official and other purposes; and
- (d) the authentication of copies of, and extracts from, public records required as evidence in legal proceedings or for other purposes.³²

Under the above provisions, neither the PROV Keeper nor the staff have a formal statutory role in appraisal or selection of public records, let alone in the good management of records in the public sector.

However, despite some of the language of the PR Act, it is clear that the legislators did not envisage a completely Jenkinsonian approach to the creation of the public Victorian archive. In a later section, the PR Act charges the Keeper with establishing standards to manage recordkeeping in the public sector.

The Keeper of Public Records shall establish standards for the efficient management of public records and in particular with respect to –

- (a) the creation, maintenance and security of public records;
- (b) the selection of public records worthy of preservation;
- (c) the transfer of public records to the Public Record Office; and
- (d) the segregation and disposal of public records not worthy of preservation – and shall assist public officers in applying these standards to records under their control.³³

This section more than implies an active role for the archivist in both selecting what will be preserved and in shaping the archive. It also, arguably, defines

30 Terry Cook, “What Is Past Is Prologue: A History of Archival Ideas Since 1898, and the Future Paradigm Shift,” *Archivaria* 43 (Spring 1997), pp. 17–63.

31 Chris Hurley, “From Dust-Bins to Disk-Drives: A Survey of Archives Legislation in Australia,” *The Records Continuum. Ian Maclean and Australian Archives First Fifty Years*, eds. Sue McKemmish and Michael Piggott (Clayton, 1994), pp. 210–11.

32 *Public Records Act 1973* (Victoria), section 7.

33 *Ibid.*, section 12.

a role for PROV as part of a larger web of regulatory bodies in the Victorian public sector. As the standard-setter for public recordkeeping, PROV has a crucial role to play in maintaining public sector accountability and transparency; in order for government to perform its own business and withstand scrutiny of its actions, standards need to be comprehensive, defined, and followed. Conversely, in situations of contest or bad faith, rights cannot be supported without records and, as a result, injustices may more readily occur.

Whether this role was understood or intended by the legislators is debatable, but this double role is a critical part of the way PROV operates within the Victorian context today. Working with other agencies with regulatory and supervisory authority (e.g., the Auditor-General's Office, the Ombudsman's Office, the Office of the Privacy Commissioner, the Office of the Health Services Commissioner, and the Victorian Government Purchasing Board), PROV participates in, and supports the maintenance of, good governance and rights protection.

The dated nature of the PR Act, which is very much a creature of its times in terms of language, authority, and coverage has been the subject of recent criticism; in a 2008 report into public sector recordkeeping, the Auditor-General of Victoria noted that “[t]he Act ... requires review to bring it up-to-date with current conditions. The existing legislation does not cover all the elements of a sound, contemporary, regulatory framework or outline the roles and responsibilities of PROV and agencies relevant to today's world.”³⁴

The PR Act is one of several remaining pieces of legislation to be reviewed as part of the current government's commitment to updating, simplifying, and modernizing all key infrastructural legislation in Victoria. Review is expected to take place in the next three to five years. Meanwhile under the current PR Act, PROV is designated as the eventual destination of all public records of permanent value created in Victoria. Furthermore, PROV is charged with specific responsibilities to ensure good and sufficient recordkeeping in the public sector with regard to *all* records, including those of temporary as well as permanent value. The PR Act also assigns responsibilities to the heads of public agencies, who:

- (a) shall cause to be made and kept full and accurate records of the business of the office;
- (b) shall be responsible, with the advice and assistance of the Keeper of Public Records, for the carrying out within the office of a programme of records management in accordance with the standards established under section 12 by the Keeper of Public Records; and
- (c) shall take all action necessary for the recovery of any public records unlawfully

34 Victorian Auditor-General's Office, *Records Management in the Public Sector* (Victoria, 2008), p. 3.

removed from the office.³⁵

Both aspects of PROV's role can therefore be described as supervisory or standard-setting, and custodial or archival. PROV has a primary responsibility to maintain and make available the permanent records of the state; in order to perform this duty PROV must act in an advisory and standard-setting capacity in the record-keeping practices of public agencies. In order to identify and then safeguard the records that will eventually be transferred to PROV for archival preservation, PROV must establish standards for the management of records.

A critical part of this role is the issuing of Retention and Disposal Authorities (RDAs), which give agencies direction about the minimum length of time for which records must be preserved. In researching and creating these Authorities, PROV staff consider all relevant legal and other factors that may affect how long particular classes or series of records should be kept; as the process involves stakeholders with variable interests, it is, by necessity, a negotiated exercise. PROV's RDAs represent a legally binding constraint on records destruction within agreed time frames. This co-location of the record-keeping government business function with the archival and public access function is typical in Australia – although not necessarily mirrored elsewhere in the world. One could argue that there is a cause and effect relationship between this function-sharing and Australian theoretical work in the archives and records management spheres. However, it remains true that Australia's tendency to combine records management (supervisory) responsibilities with archival and custodial responsibilities sits comfortably with the Records Continuum Model developed by Frank Upward,³⁶ which is a prominent part of Australian archival thought. As Sue McKemmish points out, "In Australia the records continuum has provided us with a way of articulating a professional mission that brings together records managers and archivists under the recordkeeping umbrella. Records continuum thinking focuses on the unifying purposes shared by all recordkeeping professionals."³⁷ Theoretically, PROV's dual role in both the records management and archival/access spheres allows for seamless, end-to-end records management in Victoria, the result of which should be a better archive, and a more transparent and accountable public sector. However, as the recent Auditor-General's report makes clear, PROV, and the public sector in general,

35 *Public Records Act 1973*, section 13.

36 Frank Upward, "Structuring the Records Continuum, Part One: Postcustodial Principles and Properties," *Archives and Manuscripts*, vol. 24, no. 2 (November 1996), pp. 268–85, and "Structuring the Records Continuum, Part Two: Structuration Theory and the Records Continuum," *Archives and Manuscripts*, vol. 25, no. 1 (May 1997), pp. 10–35.

37 Sue McKemmish, "Yesterday, Today and Tomorrow: A Continuum of Responsibility," *Proceedings of the Records Management Association of Australia 14th National Convention, 15–17 Sept 1997, RMAA Perth 1997*.

do not entirely succeed in meeting this utopian ideal;³⁸ nonetheless, the framework offers significant advantages and has had success.

Given this context, the CDD Act and accompanying evidence amendments presented potential problems for PROV in both its supervisory (standard-setting) and custodial (archival) roles. Government client agencies, concerned with appropriate and legal destruction of their records turned to PROV for guidance on, and interpretation of, the CDD Act requirements. While government agencies were not especially targeted by this legislation, like any organization operating in the state, they are bound by it. The passage of the Acts caused a wave of unease in agencies, most acutely in areas where government business is considered particularly risky or litigious. Agencies in these areas were suddenly concerned that *any* destruction of records would be vulnerable to future prosecution.

Some reassurance can be found in Explanatory note 1 of the CDD Act. It explicitly states that records destruction pursuant to a PROV Retention and Disposal Authority remains lawful.

The offence will apply where all of the elements of the offence can be proven by the prosecution. The offence will not apply to lawful forms of document destruction that do not involve the type of criminal misconduct covered by the offence. For example, under the *Public Records Act 1973*, records can be destroyed in accordance with standards issued by the Keeper of Public Records. Record destruction practices in accordance with these standards that do not involve the criminal conduct targeted by the offence will be unaffected.³⁹

Despite this assurance, some public agencies became convinced that even destroying records that were legitimately scheduled for destruction would be fraught with risk. Agencies pointed to the exception at the end of the exclusion (“Record destruction practices in accordance with these standards *that do not involve the criminal conduct targeted by the offence ...*”). Did this mean, in fact, that offices could no longer rely on the disposal directions provided in existing Retention and Disposal Authorities? After all, most of the current RDAs were written well before the passage of the CDD Act and the related evidence amendments. Agencies were fearful that the destruction of records according to a formal schedule would be vulnerable to prosecution, or at the very least subject to penalties, if the records were later identified as being required in a lawsuit.

38 See the executive summary and recommendations in Victorian Auditor-General’s Office, *Records Management in the Public Sector*.

39 *Victorian Hansard* (15 November 2005), “Explanatory Memoranda to the Crimes (Document Destruction) Act 2006,” p. 3, http://www.austlii.edu.au/au/legis/vic/bill_em/cdb2005316/cdb2005316.html (accessed on 20 June 2009).

Agencies wanting direction with a range of potentially problematic scenarios approached the PROV policy advice team. While some of these requests were individual, confidential, and specific, there were some shared areas of concern.

1) The Widespread and Growing Practice of Destroying Paper Originals Following Digitization

In recent years and usually for a mixture of financial and business efficiency reasons, government agencies have begun destroying paper originals after digitizing them. In taking this step offices relied on yet another piece of recent legislation in Victoria: the *Electronic Transactions Act 2000* (hereinafter ETA). According to its statement of purpose, the ETA was intended:

- (a) to recognise that transactions effected electronically are not by that reason alone invalid;
- (b) to provide for the meeting of certain legal requirements as to writing and signatures by electronic communication;
- (c) to permit documents to be produced to another person by electronic communication;
- (d) to permit the recording and retention of information and documents in electronic form;
- (e) to provide for the determination of time and place of dispatch and receipt of electronic communications;
- (f) to stipulate when an electronic communication will bind its purported originator.⁴⁰

Relying on subsection (d), agencies launched digitization projects of various types, from the wholesale to the targeted. This activity was contrary to advice from PROV, which urged caution in relying on the vaguely worded and untested ETA. PROV also specifically precluded scanning and destroying paper originals that had been appraised as permanent.⁴¹ The business imperatives toward digitization were, and remain, overwhelming for many agencies, and projects to convert many or all temporary value records to digital form continue apace.

However, when the CDD Act was enacted in 2006, evidence law in Victoria was a compendium of case law and an outdated *Evidence Act* passed in 1958. Written well before any concept of electronic evidence existed – when microfilm and microfiche were the exciting new technologies of the day – the Act was clearly suspicious of copies of any kind. By virtue of the “original as best evidence” rule, the *Evidence Act 1958* cast doubt on the admissibility and probative weight of copies of records as evidence. Nonetheless, in practice,

40 *Electronic Transaction Act 2000* (Victoria), section 1.

41 *PROV Advice to Agencies 2: Scanning or Digitising of Records* (Victoria, 2001).

copies were regularly tabled into evidence when the original was unavailable. One legal commentary blog, talking about a media release associated with the revised *Evidence Act 2008*, noted dryly that, “[t]he Attorney-General’s media release is all about the millions which will be saved by the abolition of the best evidence rule, which requires the originals of documents, rather than copies, to be adduced in evidence. He obviously hasn’t noticed that no one takes any notice of the rule anyway. Indeed, one of Melbourne University’s evidence gurus says the rule no longer exists.”⁴²

Practical considerations aside, the fact remained that in judicial cases, digitized records would logically be considered to be “copies.” Agencies were proactively making their own risk assessments around the possibility that digitized records submitted as evidence would be excluded or assigned a reduced weight because they were copies. However, the CDD Act and the EDU Act added a new dimension to the equation: If copies are not the best evidence, and if, having digitized records, an agency destroys the originals, does this post-scanning destruction of paper amount to illegal, or at the very least “penalizable” destruction of evidence because the “best evidence” had been removed?

While this particular concern is now less critical with the introduction of the *Evidence Act 2008*,⁴³ which specifically abolishes the “original as best evidence” rule, it was a real concern for many agencies in 2005 as they launched digitization programs. Even with the removal of the best evidence rule, however, it remains the case that some originals still appear to have a weight and validity that do not attach to copies (e.g., items bearing physical signatures, seals, or watermarks). In the event of a dispute, destruction of originals that have unique or legally significant features could at least potentially attract evidence penalties.

2) The Mash-up Model of Creating Records and Data Flows

In 2005–2006, the Victorian public sector began experiencing an exponential rise in the use of mash-up processes to create and serve data. Mash-ups were emerging as powerful tools for delivering lighter, more integrated, and more tailored services both within government and to the public. Several agencies in the Victorian public sector were deeply invested in developing or trialling mash-up applications. Mash-ups were being used, among other things, to:

- deliver customized (user-based) web pages to public clients;
- deliver improved business functionality within agencies’ own applications;

42 Stephen Warne, *The Australian Professional Liability Blog* (14 July 2008), <http://lawyerslawyer.net/2008/07/14/victoria-to-adopt-uniform-evidence-legislation/> (accessed on 16 July 2009).

43 *Evidence Act 2008* (Victoria).

- provide customized advice to grant applicants, government service recipients, and business sector groups; and
- provide consolidated pathology and cytology profiles of public hospital patients with the intention of developing a full, medical record mash-up.

As has historically been the case with many emerging technologies, technology's ability to perform a particular function has outstripped the social, business, and record-keeping capacity to deal with the changed environment. This problematic phenomenon has received attention beyond the archival and record-keeping sphere. It is also still in need of a solution as a recent conference call for papers makes clear: "... little has been reported to demonstrate the real value or identify the problems, practicalities and pitfalls of their [mash-ups'] construction. Essentially, we need to understand how mash-ups emerge and change, succeed or fail, in settings where people, policies, systems, and data are intertwined with each other, forming a complex yet dynamic system."⁴⁴

Mash-ups, like portals, pose a wide range of record-keeping and archival challenges, including technical issues as well as philosophical and policy considerations concerning how the record should be defined, contextualized, and managed in these environments. Agencies identified two difficulties with mash-ups from a document destruction point of view: 1) uncertainty about what constituted the record or document that could not be, or should not be, destroyed; and 2) a lack of ability or mechanism to actually guarantee the preservation of every view or iteration of the record that might be required. This uncertainty was a great deal worse in environments where mashed-up data had the capacity to be printed out and potentially written upon, thereby adding handwritten data to the record, which could be supremely relevant in evidence.

The CDD Act and EDU Act like most pieces of legislation that address record-keeping practices, are technologically agnostic: they neither mention, nor even imply, a preferred format of records or documents. This silence creates problems in assessing mashed-up data for retention and disposal. In an environment in which all data is codependent and where the actual view relied upon by one individual may not be reproducible if any element of the background data is removed, the requirements of both the CDD Act and the EDU Act might force some organizations in litigious industries to adopt a very conservative approach to records and data destruction. This does, of course, beg larger questions: What exactly is the recording in a highly mashed-up environment? What should those responsible for developing retention and disposal authorities consider in establishing and defining retention periods? (Although worthy of discussion, these questions are beyond the scope of this article.)

44 IEEE First International Workshop on Socio-Technical Aspects of Mashups, Call for Papers (30 June 2009), <http://www.aina2010.curtin.edu.au/workshop/stamashup/> (accessed on 15 March 2009).

3) *Uncertainty About the Potential for Litigation*

Some government agencies knew, or at least believed, themselves to be in low-risk environments with respect to litigation. Others, particularly those in the areas of health, community services, justice, planning, environment, and construction understood from past experience that their core operations rendered them vulnerable to both class and individual legal actions. Agencies that operate in fields with a higher litigation risk already had well-established policies and procedures for managing records and the evidence related to lawsuits. Legal hold practices were normative and unproblematic. Many agencies, particularly those in the health sector, had already adopted a conservative approach to legal hold, halting records destruction as soon as an incident took place whether or not lawsuits were explicitly contemplated at that time. Thus, in some sense and for some agencies, the CDD Act did not impose any additional or burdensome requirements. The Act merely imposed a more conservative approach to legal hold.

Despite this, many agencies claimed that the new legislation did not include enough information about the extent to which legal hold should be expanded to cover possible but unlikely or unpredictable lawsuits. Public agencies operating in fields requiring a very long statute of limitations on legal actions were particularly concerned about this possibility. These public institutions (e.g., hospitals) dealt with issues or events that could create unanticipated liabilities in the future. The questions repeatedly asked were: Just *how* “unanticipated” does a lawsuit have to be in order to fail to invoke these barriers to destruction? Does the mere fact that the area of operation of the agency creates the potential for a higher volume of litigation mean that everything must be kept “in case” until the statutory period for actions has expired?

If Not Disposal, Then What?

Given all these concerns and the highly risk-averse posture adopted by most government agencies, the very real possibility arose that some agencies would temporarily or permanently discontinue their RDA-authorized destruction. Agencies that had already been party to lawsuits or were engaging in high-risk sectors were particularly hesitant to shred. In some cases, their in-house legal counsels urged immediate and indefinite cessation of disposal/destruction activities. In other offices, local business area managers became reluctant to dispose of records, despite the reassurances of in-house counsel.

If records destruction was stopped, a number of consequences might have logically been expected to follow. First, the retention of any and all records would have overwhelmed resources, in some cases with great rapidity. As Archives New Zealand notes in the preamble to the organization’s appraisal policy: Systematic records disposal is good business practice, ensuring that

money and staff time are not wasted on administration and storage of records with no business or archival value.⁴⁵ In Victoria, most, if not all, state government agencies were already struggling to adequately resource the storage and management of their records. Indeed, this was one of the key drivers for mass digitization. Proper use of RDAs and the transfer of permanent records to PROV were critical to containing storage and management costs.

Second, while limited resources were the first and most obvious problem with suspending or limiting lawful destruction programs, there remained other compelling reasons why disposal should not be suspended. A decision to keep everything – to destroy *nothing* – is an acquiescence to drowning in detail. Where everything, no matter how ephemeral it may appear to be, is preserved, the ability to find relevant and compelling evidence is drastically hampered and the ability to know anything is thereby compromised. While appraisal is inherently an expression of value – and as such is vulnerable to challenge – failing to destroy records also implies a judgment. Keeping everything does not lend itself to good recordkeeping, where that is defined as the useful management of active records to the benefit of organizations and individuals. At the other end, the practice of retaining everything is unlikely to be the progenitor of good archives, which reflect the core activities, functions, and values of the society that produced them. In such an overcrowded environment, future users would struggle to see the proverbial wood through the trees.

Responding to the Changes

PROV needed to respond to the CDD Act and the EDU Act as it is the state archives and the standard-setter for public sector recordkeeping. A response was necessary in order to both reassure agencies that they were still able to lawfully destroy records under their Retention and Disposal Authorities and also to counter a growing sense that PROV should expand its criteria for permanent records in order to accommodate the increased volume of state records being retained.

PROV had a number of options for responding to the CDD Act. These included incorporating its requirements into a standard or standards, and engaging in a wholesale education campaign to reassure stakeholders. A combined approach was chosen. Knowing the importance of providing firm authority for agencies to rely upon and to reference, PROV added a clause relating to the CDD Act into all its Retention and Disposal Authorities. To satisfy the

45 Archives New Zealand, *Appraisal Policy*, “Preamble” (2009). The preamble, which is not yet available on the Archives New Zealand website, was circulated among Australasian archival authorities for comment, review, and reference.

demand to understand the implications of the Act, PROV worked with legal advisors to develop and publish an explanatory *Advice to Agencies* document outlining their responsibilities under the CDD Act. Staff from the policy unit also undertook a series of presentations, conferences, industry forums, and working groups to establish PROV as a knowledgeable and reliable source of information about the Act's provisions.

Before PROV could begin its response, however, it was important to gain a sense of what exactly the new legislation was really designed to achieve. This was not as straightforward a matter as many supposed; as discussed earlier, the CDD Act is sometimes vague in its wording, and the explanatory material within both Acts is minimal. The nature of the legislation, being novel within Australia, also meant that there were few interpretive guides available. In order to respond appropriately, PROV staff found that ultimately they had to go back to the source and examine the circumstances that gave rise to the legislation in the first place. Examining the original intent of lawmakers through a close reading of the McCabe litigation, the Sallman report, and the parliamentary documents foreshadowing and introducing the legislation, PROV staff developed a clear sense of what behaviour the legislation was trying to prohibit.

The Acts were responsive pieces of legislation designed to minimize the chance of future injustice whereby small or less powerful parties would be disadvantaged by the strategic destruction of evidence by larger, more powerful parties. The Acts were essentially codifications of the instinctive moral opprobrium that BAT attracted when it acted to make it difficult for Rolah Ann McCabe, and any future plaintiffs of the same kind, to receive a fair hearing of their case on its merits. The Acts were designed, in their most reduced form, to protect vulnerable evidence, and through this, to protect vulnerable people. Understanding this focus was an invaluable aid to PROV in helping agencies to parlay the new legislation into manageable strategies for day-to-day records management, and in resisting any calls for the archive to take up the overflow of extra records retention.

One of the key products in PROV's formal response was advice to agencies. In consultation with the Victorian Government Solicitor's Office, PROV staff produced an *Advice to Agencies* document addressing the core concerns raised by state offices as they began to implement the new legislation. That Advice contained key recommendations and a discussion of the implications – and limits – of the CDD Act. As well as advising general awareness-raising among government staff, PROV recommended that:

4. All departments and agencies refrain from destroying records or documents that they know are reasonably likely to be needed in evidence in future litigation, regardless of whether or not the destruction would otherwise be in accordance with a PROV Retention & Disposal Authority (RDA), or any other relevant standard authorized by PROV.

5. All departments and agencies refrain from destroying records or documents that have been requested in legal discovery in a concluded lawsuit, if the nature of the lawsuit is such that further actions may follow (e.g., product liability, mass personal injury).
6. The implementers of RDA sentences (i.e., the people actually performing records disposal within an agency) be made aware that they cannot simply initiate a destruction based on a sentence contained in an RDA, if there is a known possibility of litigation related to the subject of the records.
7. Departments and agencies in highly litigious areas of business refrain from destroying records or documents relating to incidents, activities, or situations where litigation may occur, even if no cases are yet commenced.
8. A comprehensive analysis should be undertaken of possible gaps existing in records management processes within, and the nature of documents held by, the organisation. Following this analysis, a risk management decision must be made on the retention of documents to avoid breaching provisions of the Act, and subsequent litigation.⁴⁶

PROV recommended that agencies behave in a risk-averse but sensible way. Do not, the Advice urged, keep it all; rather, understand your environment, behave ethically and transparently, err on the side of caution if in doubt, and above all, do the same thing every time in like circumstances. The Advice document was the best the Office could construct to calm the concerns of those who were fearful about the effect of the Act's provisions and, on the other hand, those who were too casual about the possible implications. The Advice also embodied what PROV believed to be the essential spirit of the laws: upholding justice by protecting evidence and thereby minimizing less powerful parties' disadvantage when facing litigation with powerful entities (including government departments).

The Advice document was very well received throughout the public sector and beyond; PROV employees found themselves in the position of quasi-experts on the CCD Act. The Office received several requests from legal firms to use the *Advice to Agencies* as a plain-English primer for their corporate clients. PROV employees were invited to speak about the legislation at several major industry forums and conferences across the country. The Advice, one of PROV's most used and referenced publications, is still cited in discussions of real-world models for how to handle the Act's vague document destruction provisions.

46 Public Record Office Victoria, *Advice to Agencies 18: Crimes (Document Destruction) Act 2006* (Melbourne, 2006), p. 5.

Conclusion

When the Victorian State legislature, encouraged by the Sallman report recommendations, enacted the *Crimes (Document Destruction) Act* and the supporting *Evidence (Document Unavailability) Act*, a situation was created that had ramifications well beyond appropriate litigation behaviour. Designed to aid justice and to enforce ethical behaviour in document retention and disposition practices, the CDD Act also created radical uncertainty in lawful destruction. PROV had to fully understand the intentions and limitations of the Act in order to relieve the concerns of agencies about records destruction and to ensure that Retention and Disposal Authorities would not be rendered meaningless.

In the CDD Act, the Victorian legislature affirmed its belief in the primacy of fairness in legal disputes and that fairness could only be supported if evidence was aggressively protected and preserved. Keeping documents became a mark of good faith and of fair behaviour; destroying them signaled the opposite. In passing the acts, the state legislature reinforced the notion of documents as powerful tellers of stories: impartial, immutable, and inherently valuable. Balancing this understanding into a workable position for organizations that must both preserve and destroy enough to function was a challenging task for PROV.

The relationship between the law's understanding of records as essentially *only* evidence and recordkeepers' understanding of the multitude of functions that records perform, is always a complex one. Reactions to the CDD Act and the EDU Act highlighted the need for recordkeepers to understand not just the legal requirements, but also the intentions of lawmakers as they relate to record-keeping behaviours. Because of the co-location of the records management and archival authority for public sector records in Victoria, PROV was also a key stakeholder in controlling the potential ways in which a drive to keep an excessive storehouse of records could shape, or in fact distort, the eventual archive.

Understanding the imperatives and motives of the law is essential to any recordkeeper trying to interpret and manage the impact of new legislation. Determining what the two Acts were trying to achieve was therefore critical in gaining a clear perspective on how compliance could be accomplished without being overly cautious. Through analysis of the background to the legislation and the words of those involved in its passage, the key themes of protection of the interests of less powerful parties in disputes emerged. It became apparent to PROV staff what kind of destruction was really at issue here: the ill-intentioned destruction of evidence that would enable another person or organization to prove their case in court. Gaining a sense of what the law actually wanted – its spirit, rather than its vaguely worded letter – enabled a functional and pragmatic application in record-keeping practice. The process clearly highlighted

the absolute necessity for recordkeepers and archivists to understand the legal framework in which they work and to accept the role of records as evidence. Changes to the law are not always as directly and immediately concerned with recordkeeping as these Acts were. However, all major changes to the law affect the overall environment in which recordkeeping takes place.

At the end, like Umberto Eco's library, sit the records, "immeasurable as the truth [they] house, deceitful as the falsehood [they] preserve."⁴⁷ Protected fiercely by these laws, records exist in symbiosis with the legal framework, upholding the interests of trial justice through their very existence. In passing these laws, Victoria signalled a willingness to tighten the bond between recordkeeping, archives, and the law. Time will tell whether or not this legislation is one that benefits good recordkeeping and archiving as much as it aspires to uphold justice.

47 Umberto Eco, *The Name of the Rose* (New York, 1983), p. 38.