Corporate and Social Regulation: An Introduction

These notes were prepared by Anne Picot and Frank Upward, with some alterations by Judith Ellis (2004). The material is not to be used by bodies other than Monash University and their students in the course of study without their permission, and in all cases must carry appropriate attribution.

(Related reading: Kennedy and Schauder, chapter three. Corporate Recordkeeping Requirements in the Australian Environment)

Organisational analysis as foundation for recordkeeping processes

The foundation of the application of understandings of corporate and social regulation and its effect on business records management could be described as organisational analysis.

Organisational analysis, at least in records management, involves studying the organisational context including the external requirements affecting an organisation's recordkeeping. This involves identifying the regulations with which an organisation should comply and the environmental factors such as community expectations which an organisation needs to be aware of if it is to function effectively. This approach operates at a relatively high level of analysis and sets up a base for many of the other forms of analysis that will be introduced over the next few weeks.

All business records management analysis is more effective if it take note of the organizational framework in which the recordkeeping activities take place. Without the big picture, we cannot see where individual transactions feed into other activities and functions. (Workflow, to be discussed in week 5, is a method of analysing individual transactions). This is often called function analysis in records management (although functional analysis is used differently as a term in many of your information systems subjects, because there the teacher will have been discussing the function of the system... in records management you are trying to analyse the function of an organisation). Without locating the specified activity or function in its organisational context, the legal requirements, the business rules, the community expectations to which the activity must comply, and other regulatory influences may not be properly identified.

Organisational analysis includes establishing a base for:

- business rules (identifying and embedding procedures for doing particular tasks into the authorized way the tasks are done within an organisation)
- resource allocation (ensuring that all resources available to a work process are available and utilized to maximum capacity)
- resource management (allocating tasks and transactions according to availability of resources)
- process management and control (the systems of monitoring progress, auditing job completion)
- determining what are considered satisfactory outcomes as well as being able to expand, redirect or roll back recordkeeping processes as required.
The regulatory environment

AS ISO 15489.1 (s.5) provides the following description of the regulatory environment.

“All organizations need to identify the regulatory environment which affects their activities and requirements to document their activities. The policies and procedures of organizations should reflect the application of the regulatory environment to their business processes. An organization should provide adequate evidence of its compliance with the regulatory environment in the records of its activities.

The regulatory environment consists of:

a) statute and case laws, and regulations governing the sector-specific and general business environment, including laws and regulations relating specifically to records, archives, access, privacy, evidence, electronic commerce, data protection and information,

b) mandatory standards of practice,

c) voluntary codes of best practice;

d) voluntary codes of conduct and ethics, and

e) identifiable expectations of the community about what is acceptable behaviour for the specific sector or organization.

The nature of the organization and the sector to which it belongs will determine which of these regulatory elements (individually or in combination) are most applicable to that organisation’s records management requirements.”

There is an hierarchy of elements to the legal and regulatory framework as indicated in the ISO standard:

- statutory law and regulations
- industry standards
- codes of conduct, reflecting community expectations about how organisations and practitioners conduct themselves in the relevant industry sector
- policy directives
- organisation rules and procedure
- local directions, conventions and practices.

The following is a brief checklist of some of the questions asked in an organisational analysis:

- What are the legal requirements?
- What other regulatory considerations, such as industrial agreements, mandatory industry standards or codes of practice, should be taken into account?
- What are the organizational rules, such as policy directives, organisational codes of conduct, procedures manuals codifying occupational safety directives or personnel administration which govern the performance of this activity?
- To whom is the manager of this activity accountable and for what key outcomes?
**Socio-Legal Context: The Organisation’s External Environment.**

This topic considers the socio-legal context of recordkeeping in Australia. Each country will have their own socio-legal context which will impact upon what style of records management solutions are pursued. We look at the structures of the Australian legal system and consider how the legal system works to regulate social behaviour. We will also consider the legal framework in terms of the definition of Appraisal in the earlier Australian Standard, AS 4390, and explore the meaning of "community expectations".

This discussion is set within the concept of a "juridical system". We consider the relationship between accountability and the legislative foundation for recordkeeping in the Commonwealth. We briefly examine accountability in relation to evidence and the concept of the ‘literary warrant’. [A later topic will look at risk management and risk assessment, which influences the application of socio-legal understandings derived from organisational analyses].

**What do we mean by the socio-legal context?**

Whenever we talk about recordkeeping or archives to people from outside the recordkeeping profession, they tend to respond that, yes, the law says you have to keep records, and if they are from a business context, they may even quote "for seven years". There is a general understanding that there are legal requirements which oblige individuals and organisations to keep records, and the dominant perception of this is derived from taxation laws and the Australian statute of limitations where seven years is the figure beyond which prosecution of all but serious misdemeanours lapses. However records managers we need to move beyond the letter of the law and see how the legal structures operate in our society, what other considerations impact on the legal imperatives, and understand what the social context of the law is.

There is a raft of legislation which affects, for example, recordkeeping in the Commonwealth Government. This includes legislation specific to recordkeeping, (the Archives Act), access to information, (Freedom of Information Act) and protecting privacy, (the Privacy Act).

Beyond these, there are a number of statutes which regulate and/or monitor the behaviour of Commonwealth government agencies and which have recordkeeping implications. (Administrative Appeals Tribunal, Audit, Ombudsman Acts) Built on this legislative scaffolding are the patterns of Commonwealth government policies, procedures and practice, documented or otherwise, and a certain expectation in the community about how the government should conduct its business.

**Question?** What legislative elements affect records management analysis in private enterprise?

The former Australian Standard, AS 4390-1996 incorporated these elements into its definition of appraisal:

> Appraisal is the process of evaluating business activities to determine which records need to be captured and how long the records need to be kept, to meet business needs, the requirements of organisational accountability and community expectations (AS 4390.1, s4.3, p.6)

We will look at appraisal in week 6. Note here that the definition grasps the relationship between what the law requires, the reflection of that in business procedures, the matter of accountability and a broader dimension vaguely expressed in terms of community expectations, but it has to be expressed vaguely because these vary so much depending on the industry you are analysing.
Society at large does not simply consider the letter of the law. Moral and political considerations, standards and competitive requirements come into play, whereby corporate behaviour is judged. A recent newspaper article referred to this aspect in relation to (of all things) marketing:

Ninety per cent of Australians believe companies have a responsibility to contribute to the community and that their activities in this area now are mediocre or poor, a study shows.
A similar percentage say that a company's commitment to the community would influence their purchasing decisions.
( "Consumers buy into idea of a good cause", ROCHELLE BURBURY, The Australian, 14 April 1998, p.21)

Juridical system

There is a concept which embraces all the social aspects of the legal framework beyond the letter of the law.

Every social group ensures an ordered development of relationships among its members by means of rules. Some of the rules of social life arise from the ad hoc consent of small numbers of people; others are established and enforced by an "institution", that is, by a social body firmly built on common needs and provided with the means and power to satisfy them. The latter rules are compulsory; their violation incurs a sanction or penalty. A social group founded on an organisational principle which gives its institution(s) the capacity of making compulsory rules is a juridical system. Thus a juridical system is a collectivity organised on the basis of a system of rules. The system of rules is called a legal system. A legal system is a complex paradigm containing many divisions and subdivisions. It can be broken down into positive law, as set out in the various legal sources, legislation, judicial precedent, custom, and literary sources, either authoritative, consisting of statutes, law reports and books of authority, or non-authoritative, such as mediaeval chronicles, periodicals, other books, and all the other conceptions and notions of binding law (natural law, morality, orthodox religious beliefs, mercantile custom, Roman/Canon law). Because a legal system includes all the rules that are perceived as binding at any time and/or place, no aspect of human life and affairs remains outside a legal system.
(Luciana Duranti, "Diplomatics: New Uses for an Old Science(Part II)", Archivaria, No.29, Winter 1989-90, p.5.)

The totality of the legal system places constraints on certain social behaviours and sanctions or authorises others. Depending on the circumstances, people will invoke the statutory or common law, necessity, morality, human nature or religion to justify or condemn an individual action. Consider for a moment the act of driving through a red light. This is generally a "prima facie" offence (meaning the act is the offence, intent does not enter into it). Why do drivers do it? Why don't they do it? Is it a matter of morality, convenience, foolhardiness, fear of being caught and being penalised, a reasonable risk or an unreasonable thrill-seeking act?

Questions?
• Are there circumstances in which it is reasonable to drive through a red light? If so, what are they? (consider the risks, the necessity in emergencies, local practices at some intersections, time of day)
• Why do people generally not drive through red lights? (fear of penalties or acceptance of the utility of the law)
• If there were no traffic police enforcing compliance, would stopping at red lights cease?

**Compliance and Enforcement**

After a moment of consideration of compliance with the traffic laws you will recognise that there is a difference between legal compliance and what people consider acceptable behaviour. Generally speaking the red light laws are obeyed on the consensus that they exist for the safe and effective management of traffic. Accepting that the traffic laws are there for the good of all, it has been possible for the traffic authorities to change drivers' behaviour and establish a new consensus on other matters, exemplified by the attitudes to drink-driving over the past decade. Here a two-fold strategy of community education and the enforcement of the laws by random-breath testing has changed both behaviour and community perceptions of what formerly had been acceptable if risky driving practices. Both the inherent risks of drunken driving and the risk of getting caught and being severely penalised have reinforced compliance with stricter laws.

There are several matters under consideration here:

1. The extra legal authorities which people invoke to justify their conduct, whether flouting the law or obeying it
2. The relationship between risk assessment and legal compliance

The understanding that there are considerations beyond the letter of the law, which affect how it is interpreted and how it is complied with, is embraced in the legal system itself. This is reflected in the distinction drawn between the law laid down in the statutes and the findings in matters before the courts which are contentious in the community, such as industrial action, Aboriginal land rights, abortion or euthanasia. To some extent in the Australian jurisdiction this is reflected in the standing of the common law.

**Case Law**

Richard Chisholm provides an account of how case law works. Richard Chisholm & Garth Nettheim, *Understanding Law: An Introduction to the Australian Legal System* (extract) (Sydney 1992, pp. 36-46). His account deals with the operation of precedent, case law or judge-made law. Judge-made law interprets the common law and statutory law in individual cases in response to the arguments made by counsel and their own perceptions of the socio-political context of those cases. Community opinion about personal behaviour, criminal actions and legal sanctions has an impact on the decision-making of judges and consequently on the enforcement of the law. Hence the statutory law can remain unchanged but judges may decline to apply "the full letter of the law" and police will accordingly not bother to bring charges or otherwise enforce it.

The state of enforcement against the medical procedure of abortion exemplifies the gap between the statute law and the law as it operates according to precedent or case law. In all Australian states and territories abortion is prohibited under a Crimes Act or a Criminal Code. Two decisions in the Victorian Supreme Court in 1969 and in the NSW District Court in 1971 established circumstances in which the procedure was judged lawful. These judgements have formed the precedents for both non-compliance with the criminal codes and for non-enforcement of those codes. Police in those states have ceased to pursue the matter, and in the absence of enforcement and in the evolving state of public opinion about the issues, abortion is regarded by...
a majority of the public as legal and more or less acceptable.

However, because it is still an emotionally charged issue with a vocal campaign opposing the availability of the procedure, politicians have been reluctant to change the statutory law to bring it into line with enforcement practice, actual levels of compliance and majority public opinion. The complex relationship between the community's views, compliance with the law, enforcement of compliance and the statutory and common law could equally be illustrated by a number of other matters, such as drug abuse policies, taxation matters, euthanasia or In Vitro Fertilisation programs.

**Legal Institutions and Structures**

Australia has a complex court structure reflecting the three levels of government we enjoy (local, state and Federal). The Commonwealth Attorney-General's website gives an excellent introduction to the court structures and guide to the relationship between the legislative function and the operation of the courts. Called Australian Law Online, it is at [http://law.gov.au/](http://law.gov.au/) which is also linked to other sites for legislation, law (case) reports and the states' legal institutions' sites, e.g., [http://www.nla.gov.au/oz/gov/leg.html](http://www.nla.gov.au/oz/gov/leg.html)

**What do we mean, community expectations?**

The legal framework places constraints and obligations on organisations, requiring certain things to be done and/or reported and setting a minimum standard of behaviour. The community's views of that behaviour will reflect and reinforce that legal minimum but may add a considerable amount to that minimum, depending on the sort of activities the organisation undertakes, and the authority it has to command community opinion. For example, consider the community's attitudes towards banks and churches.

People expect banks to behave in compliance with the law but only to a legal minimum. On the other hand, churches, which speak with moral or religious authority, are expected to comply with the law, to act with probity, and not to seek to profit unduly from business dealings. A hardline with debtors in trouble is expected, if not liked, from banks. It would be less acceptable from churches or from other non-profit organisations such as major charities. This is reflected in the recordkeeping aspect: While the standard for accounting for such non-profit organisations may not be formally adhered to, the expectation of probity may be higher and the recordkeeping will need to match that higher expectation (than for profit-making companies where it is expected that recordkeeping costs will not be in excess of minimum standards to support the business - if the costs exceed the benefits the business may run into financial problems and many in the community are opposed to excessive regulation if it has this impact.).

**Sources of authority**

Beyond the letter of the law and case law, there operates a variety of other sources of regulation and authority secondary legal instruments, standards and technical specifications, quality assurance systems and codes of ethics, which may be mandatory or voluntary. The whole range of secondary legal instruments, such as regulations and schedules appended to statutes, government gazette notices, Cabinet directives, Orders in Council, local laws or by-laws, have their origin in government decisions and are mandatory.
Standards or codes issued by or professional associations like the Institute of Chartered Accountants or the AMA are usually mandatory for their members. Standards issued by organisations such as Standards Australia are usually voluntary but have considerable authority depending in part, on the levels of perceived risk or liability. These are supported or extended by industry-best practices and community attitudes which set limits on what organisations may do and continue to enjoy community good will, or at least, tolerance. These various sources of authority, in relation specifically to recordkeeping, have been embraced in the term, "literary warrant", a concept adopted by the Pittsburgh Project as a component of a model for determining requirements for electronic recordkeeping systems. In developing recordkeeping requirements the researchers at Pittsburgh acknowledged the importance of looking through the literature of management and business, looking for elements which support sound recordkeeping practices. Partly this is because so much information systems development considers recordkeeping requirements long after the system is in place, which is far too late to think about such things. This is why, in the DIRKS methodology, you can see agencies trying to incorporate records management decisions into systems design, rather than shut the gate after the horse has bolted.

The accountability framework and the law

The "Pittsburgh" view of literary warrant, or sources of authority, is focused on recordkeeping as the central activity. In the Commonwealth government the main legal warrant or statutory basis of recordkeeping is found in the Freedom of Information and Archives Acts. These acts plus the Privacy Act specifically mandate the keeping and protection of, and provision of access to, records. However they build on a scaffolding of legislative requirements around the operations of the Commonwealth Government. The focus of these sources of authority in the Commonwealth Government context is not recordkeeping, it is the actions and decisions the executive make. Recordkeeping is an outcome, sometimes a mandated outcome, of those decisions and actions. The legislation in mind is the body of law concerned with the accountability of the government for its actions - the legislation mandating the operations of the Auditor-General and the role of the Finance Department, the acts establishing the Commonwealth Ombudsman, the Administrative Appeals Tribunal, and the Human Rights Commission and associated bodies, and specific provisions in the enabling statutes of many Commonwealth government agencies requiring annual reports or subjecting their operations to particular scrutiny. The target of this body of legislation is the decision-making of government to ensure it is lawful, equitable, cost-efficient, consistent and non-discriminatory, and, accountable. Sound recordkeeping is both a means of managing the equitable and competent conduct of government business and a principal accountability mechanism. Implementation of these statutes has profoundly affected the conduct of government business over the past two decades which has been reflected in both the quality and quantity of records kept.

In private enterprise there are industry codes and regulations, governmental controls, and a raft of particular provisions in company, taxation, environmental and other law which compel records to be created and maintained or relate to access to them. A main element of accountability is to shareholders. Just as government agencies have to report to parliament, businesses have to report to those who ‘own’ them.
Further Reading - The Law pertaining to Evidence

There is one area of law of particular relevance to records management. It is the law pertaining to evidence in our legal system. The Commonwealth conducted an extensive review of the laws pertaining to evidence and passed a new consolidating law in 1995. This has been mirrored in much state legislation shortly afterwards. This landmark legislation has enabled the acceptability of modern information technology for production of documents in court proceedings and replaced much of the common law and various State and Territory statute law on evidence in general. The National Archives of Australia has produced an excellent guide, *Records in Evidence*, on the impact of the legislation on recordkeeping which is available at its Website.

By now you should all be skilled enough at internet searches to locate the legislation itself. Legislation of the Australian Parliament always has a table of contents and you should have no trouble finding the table of contents for the Evidence Act.

**Note** in particular

- the NAA's guidelines on recordkeeping requirements; and
- the sections of the act which refer to business records.