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A Matter of Records: The Federal Court, The National Archives and 'The National Estate' in the 1970s

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Introduction

Australian scholars of law and history have duties to the places and institutions in which we practice our activities, to show adequately the conduct of the encounters between laws, and the histories of lives that have experienced those laws. This includes being conscious of the diverse range of records and sources that are needed to tell these law stories (the institutional to the unofficial; film to interview; diary to case law; legislation to memoir). It also means being conscious of the diversity of styles and genres of writing (reports, chronicle and fragments as much as articles, reviews and scholarly monographs) that are required to shape those records into narrations and dissertations that make visible the traditions and innovations of 'an Australian jurisprudence'.¹ For Australian historians of law of the 20th century, the matter of records is something we have perhaps experienced in unique ways to our colleagues

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¹ This contention underpins much of my current work; see, for example, Ann Genovese, 'About Libraries: A Jurisographer's Notes on Lives Lived with Law (in London and Sydney)' (2016) 20 *Law Text Culture* 32; Ann Genovese, 'Introduction: Australian Critical Decisions: Remembering the Koowarta and Tasmanian Dam Cases' in Ann Genovese (ed), *Australian Critical Decisions: Remembering the Koowarta and Tasmanian Dam Case* (Routledge, 2017) 1.

whose concerns lie primarily in interpreting earlier periods. For a start, Australian historians of the 20th century not only need to work with documents that are comparative, but must also undertake the basis of the comparison by prioritising the records produced by Australian institutions whose formation and arguments are themselves often the subject of our attention. This raises some obvious problems. The most pressing is how to account for the fraught ways the relationship between records, institutions and national histories has been experienced, particularly by Indigenous peoples in settler colonies.² The second is how the complex questions of complicity and authority that lie between documents of state and the articulation of national visions and nightmares are addressed by each generation of scholars. It is worth noting that although experiencing a reinvigorated critical turn in the sun for legal theorists and historians alike,³ this particular questioning of archives is not a new historiographical problem.⁴ As Hegel famously noted, 'it is the state that first presents a subject-matter that is not only *adapted* to the prose of History but involves the production of such History in the very progress of its own being'.⁵

In light of these concerns, it is perhaps incumbent on historians of Australian law and state of the 20th century, writing their immediate past as it edges into frame, to worry overtly about what historiographer and theorist Hayden White has called 'the preconditions of the kind of interests in the past which informed historical consciousness and the pragmatic basis for the production and preservation of the kind of records

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2 Antoinette Burton (ed), *Archive Stories: Facts, Fictions, and the Writing of History* (Duke University Press, 2005); Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common sense* (Princeton University Press, 2009).

3 For leading examples across the scholarly and disciplinary spectrum, see Jacques Derrida, *Archive Fever: A Freudian Impression* (University of Chicago Press, 1996); Carolyn Steedman, *Dust: The Archive and Cultural History* (Rutgers University Press, 2002); Matthew S Hull, *Government of Paper: The Materiality of Bureaucracy in Urban Pakistan* (University of California Press, 2012), doi.org/10.1525/california/9780520272149.001.0001; Arlette Farge, *The Allure of the Archives* (Yale University Press, 2013); Francis X Blouin Jr and William G Rosenberg, *Processing the Past: Contesting Authority in History and the Archives* (Oxford University Press, 2011); Cornelia Vismann, *Files: Law and Media Technology* (Stanford University Press, 2008). For the particularity for legal administration in a different sense, see Bruno la Tour, *The Making of Law: An Ethnography of the Conseil D'Etat* (Polity Press, 2010).

4 For a classic historian's account, see Fritz Stern, 'Introduction' and Jules Michelet, 'History as National Epic' in Fritz Stern (ed), *The Varieties of History: from Voltaire to the Present* (Meridian Books, 6th ed, 1960) 1 and 108.

5 Georg Hegel, *The Philosophy of History* (Dover Publications, 1956), cited in Hayden White, 'The Question of Narrative in Contemporary Historical Theory' (1984) 23 *History and Theory* 1, 4.

that made historical enquiry possible'.⁶ This includes worrying about the changing relationships in the 20th century between administrative practices, archival science, historiographical reflexivity and concepts of public accountability, and how these underpin our theoretical questions and reshape the possibilities of our empirical practices. For those of us who are historians of the late 20th century rather than the federation or mid-century period, this also includes the specific technical difficulty of working in the gloaming: between a distinct administrative paper past that is unencumbered by copyright, privacy and living memory (and also now often digitised newspaper records or case law or cabinet documents free of the 30-year rule); and a present and future where records are digitally born.⁷

I have been worrying about these questions, the records we keep (and those we do not) and how I might personally undertake my duties to address them, in a range of projects for some time. But I have been doing so in deliberate and direct fashion regarding the Court as Archive, the subject of this collection and the name of the project I have been undertaking with Kim Rubenstein and Trish Luker. A key concern in this project has been to consider the nature and responsibilities of courts to past records and future histories. Part of our purpose is very practical: to think alongside the Federal Court of Australia about how, as an institution of law, they might also function as an archival repository, although that goes beyond, and potentially complicates, their status as courts of record.⁸ The other part of our purpose is to flesh out the implications of what it means to recognise that a modern court like the Federal Court (which was established in 1976 and commenced its institutional life in 1977) carries records of meaning to a diverse public that tell stories of experiences of law and people in a particular time, and over time, as well as shape our law and our experience of life lived in Australia now. This includes how we take responsibility for the relationships between Anglo-Australian law and people and Indigenous Australian laws and peoples.⁹

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6 Ibid 3.

7 See, for example, Blouin Jr and Rosenberg, above n 3, 13–33.

8 That superior courts have duties as courts of record is a matter of history and of common and constitutional law; see *Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales* (2010) 239 CLR 531 and *Craig v South Australia* (1994) 184 CLR 163. They also have a range of different duties to the people and state because of the nature of court record more broadly defined, as noted in the Introduction to this volume.

9 This question has a long history in itself: Henrietta Fourmile, 'Who Owns the Past? Aborigines as Captives of the Archives' (1989) 13 *Aboriginal History* 1; Henrietta Fourmile, 'The Need for an Independent National Inquiry into State Collections of Aboriginal and Torres Strait Islander Cultural Heritage' (1992)

In this chapter, I want to add some particularity to our project's purposes in the context of my own body of work and methodological activities. As a historian of modern Australian jurisprudence, the practical activity of my work involves two things that I aim to join that act as a point of orientation and organisation. One, as already noted, is a duty of historians to demonstrate, and remind, that history writing is intimately related through sources and records to the practices of institutions and institutional life—archives broadly conceived—and is always a contested relationship. The other is a duty of jurisprudence—to contemplate, and elucidate, how people in time and place relate to their law—and this relationship is mediated, not always happily, by the procedure and purpose of institutions.

What this means in terms of my own practice, the doing or writing of histories of jurisprudence (or *jurisography*, as I have called it),¹⁰ suggests a particular relationship with, and responsibility for, records. This is not identical in every project, but in the Court as Archive Project has involved my taking responsibility for institutional experience that complements and underscores the technical questions of archival practice, the problems of public law and court administration, and the changing nature of the political community that mark what it means to consider the court as archive.

In this chapter, I will endeavour to demonstrate these interrelated duties to records in two different forms of historical writing. The first is narration: to tell a small slice of the institutional provenance of the Federal Court and the National Archives of Australia (NAA). Both were established as consciously modern 'Australian' institutions at a particular moment in time and shared material concern—records—that drew them

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1 *Aboriginal Law Bulletin* 3; Martin Nakata and Marcia Langton, *Australian Indigenous Knowledge and Libraries* (Australian Academic & Research Libraries for the Australian Library and Information Association, 2005); Terri Janke, *Our Culture our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 1998); Lynette Russell, 'Indigenous Records and Archives: Mutual Obligations and Building Trust' (2006) 34(1) *Archives and Manuscripts* 32; Livia Iacovino and Trust and Technology Project, *Exposure Draft Position Statement: Human Rights, Indigenous Communities in Australia and the Archives* (Monash University, 2009); Tahu Kukatai and John Taylor, *Indigenous Data Sovereignty: Toward an Agenda*, CAEPR Research Monograph No 38, (ANU Press, 2016), doi.org/10.22459/CAEPR38.11.2016; Darren Jorgensen and Ian McLean (eds), *Indigenous Archives: the Making and Unmaking of Australian Art*, (UWA Press, 2017); see also UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: Resolution adopted by the General Assembly*, 2 October 2007, A/RES/61/295, arts 3, 4, 7 and 8; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19.

10 Jurisography is a practice and term devised in collaboration with Shaun McVeigh and Peter Rush; see Ann Genovese and Shaun McVeigh, 'Nineteen Eighty Three: A Jurisographic Report on *Commonwealth v Tasmania*' (2015) 24 *Griffith Law Review* 68; Ann Genovese, Shaun McVeigh and Peter Rush, 'Lives Lived with Law: An Introduction' (2016) 20 *Law Text Culture* 1.

into association. The other is to offer a commentary on the provenance, location and status of the records that should be available to tell that story through my own methodological adventures in undertaking the project.

To address the Court as Archive in these ways—as jurisographer, rather than theorist or legal policy advisor—I also want to suggest, by way of brief conclusion, that the sum of my experience in undertaking the project offers a particular view of writing histories: that fragmentation in the way the documents are kept itself requires careful documentation; and that such fragmentation opens the historiographical conversation about the forms and nature of sources and records adequate to represent our past for the present.

The National Estate (A Narrative)

How the period of Australian renaissance from the late 1950s to the late 1980s has been described and recorded is diverse. Both in style and form, as well as the terms of dispute of its political legacies.¹¹ But there is consensus in what the 1970s in particular represented, and it is useful to consider what those best trained to review and make sense of events in the context of politics—historians—wrote of the period, while also living through it. Manning Clark, for example, expansively described in his *Short History* that during this period, ‘Australians ... liberated themselves from the fate of being second rate Europeans’.¹² Russell Ward was more pointed. Before abruptly ending *A Nation for a Continent* with a cliff-hanger (the Dismissal in 1975), he argued that although:

basic cultural and material ties with Britain remained strong, Australia adopted a more critical and self-reliant attitude. After the UK’s entry into the European Economic Community on 1 January 1973 it was hardly possible to do anything else. The words ‘British Subject’ disappeared from Australian passports and ‘Advance Australia Fair’ replaced ‘God Save the Queen’.¹³

11 As examples, see now famous contemporaneous accounts of the times, written across disciplines: Donald Horne, *The Lucky Country* (Penguin Books, 3rd ed, 1971); Manning Clark, *A Short History of Australia* (Penguin Books, 4th ed, 1995); Bernard Smith, *The Antipodean Manifesto: Essays in Art and History* (Oxford University Press, 1976); see also biographies and histories that address the period, written from the perspective of our own time: Frank Bongiorno, *The Eighties: The Decade that Transformed Australia* (Black Inc., 2015); Jenny Hocking, *Gough Whitlam: The Definitive Biography* (Miegunyah Press, 2014).

12 Clark, above n 11, 351.

13 Russell Braddock Ward, *A Nation for a Continent: The History of Australia, 1901–1975* (Heinemann, 1977) 403–4.

What interests me in the context of the Court as Archive Project is how this orientation away from Britain and towards an articulation of an independent and self-confident Australia manifested itself in a range of state-generated national projects (from art galleries to the Australian Film Institute, childcare to conservation), but had a particular institutional focus for the law. On a purely qualitative basis, this resulted in a proliferation of law and legal institutions—the artefact of a growing and diversifying population with changing desires and requirements—and a slow encroachment of federal power over states with a concomitant development of federal jurisdictions that required more, and more responsive, legislation.¹⁴ What is a harder-to-pin-down story (but the one I want to show) is how the idea of the ‘Australian Nation’ as a law story is not only about accounting for Acts, but carries a jurisprudence of public relationship, public accountability and, less overtly, public record. To sketch, rather than give a detailed accounts of the establishment of the Federal Court or the NAA in those terms (noting that aspects of both the Federal Court and NAA’s establishment histories are already written by key participants),¹⁵ I want to discuss three reports that link that story together: the Committee of Inquiry into the National Estate (‘Hope Report’);¹⁶ the Report into the Development of the National Archives (‘Lamb Report’);¹⁷ and the Commonwealth Administrative Review Committee Report (‘Kerr Report’).¹⁸

Although the Kerr Committee was established by the Gorton Government in 1968, the commissioning of specialist commissions and inquiries, their rate and number, was a marked technique of the Whitlam Government after 1972. Whitlam expressly noted the development in his 1973 Robert Garran Lecture ‘The Role of the Australian Public Service’.¹⁹

14 This is clearly evidenced in an example of direct relevance to this essay: Michael Black, ‘The Federal Court of Australia: The First 30 Years — A Survey on the Occasion of Two Anniversaries’ (2007) 31(3) *Melbourne University Law Review* 1017.

15 Susan Kenny, ‘Federal Courts and Australian National Identity’ (2015) 38(3) *Melbourne University Law Review* 996; Sue McKemish and Michael Piggott (eds), *The Records Continuum: Ian Maclean and Australian Archives First Fifty Years* (Ancora, 1994); Black, above n 14.

16 Australia, Committee of Inquiry into the National Estate, *Report of the National Estate: Report of the Committee of Inquiry into the National Estate* (Australian Government Publishing Service, 1974) (‘Hope Report’).

17 W Kaye Lamb, *Development of the National Archives* (Australian Government Publishing Service, 1973) (‘Lamb Report’).

18 Commonwealth, *Commonwealth Administrative Review Committee Report 1971*, Parl Paper No 144 (1971) (‘Kerr Report’).

19 EG Whitlam, ‘The Role of the Australian Public Service’, (Speech at the Sir Robert Garran Memorial Oration, Canberra, 12 November 1973).

In this address to (perhaps) unsettled officers of the Commonwealth encountering Labor after 23 years of coalition government, Prime Minister Whitlam was careful to reassure that Westminster traditions remained an unshakeable foundation to responsible government. However, Whitlam was also unabashed in opening a conversation about the changing status and political demands of the Australian people towards the end of the 20th century and the need to modernise government policy, law and institutional action in response. He stated:

All governments are expected to make changes and deliver benefits with a precision and promptitude never before expected or experienced in history. When a new government comes in after so long an absence, those demands, those pressures are accelerated and intensified.²⁰

Whitlam's broad theme was 'greater participation in the affairs of Government by concerned people in the community'.²¹ As he explained, 'we want Australian people to know the facts, to know the needs, to know the choices before them. This is really at the heart of what has been called "open government"'.²² For Whitlam, this involved two broadly defined programs. One program was about the accountability to the public of the business of government itself. This included proposed legislative schemes such as the yet-to-arrive freedom of information legislation 'to provide greater information to the public' and to 'clarify the rules relating to access to official records and facilitate such access'.²³ It also included a related national scheme to store those records at a national archive, rather than a Commonwealth repository of state documents *per se*, which was to also 'greatly improve the service that the public gets when they want to consult some of the more ancient records'.²⁴

The other program was about how these, and other national projects, might best be achieved to bring about 'immediate action' on 'a wide range of issues'.²⁵ This involved the establishment of 'no less than continuing bodies to assist us achieve our policies',²⁶ and drawing into

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20 Ibid 1.

21 Ibid 7.

22 Ibid.

23 Ibid.

24 Ibid. It is important to note that there, of course, existed a repository of administrative files and records before this time, but these did not yet have the same status as public records as exist in the NAA; see Lamb, above n 17; McKemmish and Piggot, above n 15.

25 Whitlam, above n 19, 3.

26 Ibid.

policy formation a range of experienced Australians from the business, law and community sectors, who did not sit within the traditional structure of government.²⁷ The importance of these task forces, inquiries, committees and commissions; who sat on them; their powers to hear and receive submissions and undertake social and factual investigations; and the recommendations of their reports, was to provide 'a key channel of communication between Parliament and the people'.²⁸ As Whitlam noted, 'a real contribution is made to public administration and to the development of policies [and institutions] acceptable to the community'.²⁹

Of these bodies, it is the aptly named Hope Committee (named after its Chair, Justice Robert Hope of the New South Wales Supreme Court)³⁰ that offers the underpinning example of how aspirations about the government's relationship with the Australian public was broadly conceived and how these bodies were concretely given shape. Although the concept of the national estate had United Kingdom (UK) precedents,³¹ it was the example of the Kennedy Administration in the United States that Whitlam (and other senior Australian Labor Party figures, like Tom Uren and Moss Cass) chose to emulate and apply to the Australian experience. The aim was to preserve the past for the future by maintaining 'intergenerational equity' and 'to bequeath our full national estate to our heirs'.³² The rhetorical term entered Australian political conversation in the 1960s as a way to capture government action and public commitment to preservation of the natural and built environments.³³ The purpose of the Hope Committee, convened in 1973,³⁴ was to recommend ways

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27 Ibid 5.

28 Ibid 7.

29 Ibid.

30 The committee also included Milo Dunphy, Judith Wright, Len Webb, Keith Valance and Judith Brine; it, thus, had 'several prominent conservationists' in its ranks; see Sharon Veale and Robert Freestone, 'The Things We Wanted to Keep: The Commonwealth and the National Estate 1969–1974' (2012) 24 *Historic Environment* 12, 16.

31 Ibid 12, citing the work of British architect Clough Williams-Ellis, the Hobbhouse Committee and the 1949 *National Parks and Countryside Act* as UK precursors.

32 Ibid 12, citing Whitlam's open acknowledgment of American President John F Kennedy's influence in adoption of the rhetoric and political commitments.

33 As the Hope Report noted, what they sought to protect and preserve were sites and objects 'of such aesthetic, historical, scientific, social, cultural, ecological or other special value to the nation or any part of it, including a region or locality, that they should be conserved, managed and presented for the benefit of the community as a whole'; above n 16, 334.

34 One of the Hope Report's key terms of reference was to determine 'the role which the Australian Government could play in the preservation and enhancement of the National Estate'. Hope's view was that the Commonwealth 'could and should give a lead to the whole of Australia'; above n 16, 27; Veale and Freestone, above n 30, 16.

‘to conserve and present’ and ‘bring under direct Government control’ objects and places of ‘such aesthetic, historical, scientific, social, cultural, ecological or other special value to the nation’, and to do so for ‘the benefit of the community as a whole’.³⁵ This was, it is important to note, a commitment shared by the Coalition Opposition. As Senator Alan Missen argued in support of the Australian Heritage Commission Bill in 1975, the aim of the Hope Inquiry was to show how ‘the Government can give a practical lead. People of a later generation will either bemoan the fact that we have destroyed things which should have been preserved, or they will be grateful to us for those things we have retained’.³⁶

The Hope Report recommended, among other things, establishing a system of national parks;³⁷ promoting sites and buildings for World Heritage status;³⁸ protecting and taking responsibility for ‘significant Aboriginal sites’ (this was ‘not only for the benefit of Aboriginals themselves and of the world’s cultural heritage but for the sake of the national conscience’);³⁹ establishing university research and teaching priorities on ‘conservation and protection of built and national environments’;⁴⁰ and establishing a Heritage Commission and National Trust.⁴¹ The Hope Report also, significantly for my purposes, understood cultural property and its institutions (such as museums and libraries) as central components and representations of this national estate, and was explicit that the artefacts and records these institutions held were essential for government to preserve and manage.⁴² The Hope Report noted expressly that ‘the new initiative by the Australian Government in establishing a national archives system will help to ensure the preservation of archival resources’.⁴³

35 Hope Report, above n 16, 334.

36 Commonwealth, *Parliamentary Debates*, Senate, 5 June 1975, 2361 (Alan Missen). Senator Missen also noted (2360): ‘Therefore there is one thing that comes from the Report and the creation of this Commission and that is we are recognizing at last the wide range, the very much wider view that we have now of the heritage that should be preserved’.

37 Hope Report, above n 16, 337.

38 Ibid 339.

39 Ibid 340 and continues: ‘It is past time that the Australian Government accepted the full responsibility laid on it by the people at the 1967 referendum’.

40 Ibid 347.

41 Ibid.

42 Ibid 341–2.

43 Ibid 342. Note, too, Missen’s comments, *Parliamentary Debates* above n 36, 2362: ‘One of the jobs found probably in all other States is the important job of preserving the archives of the community. These are often kept in conditions of great danger from fire and decay. If this were to happen, part of our history would disappear because we were not farsighted. In that one area in which I was doing some work, I believe that the position has not improved greatly. There is obviously a great need for the restoration and preservation of this part of our National Estate’.

The 'new initiative' to which the Hope Report referred was the subject of a different inquiry on a smaller and more specialised scale. In June 1973, the Special Minister of State, Don Willesee, had commissioned W Kaye Lamb to 'visit Australia for six weeks to advise on the development of a charter, and necessary legislation, for a National Archives'.⁴⁴ Lamb was the Dominion Archivist—the title of the National Archivist of Canada—and had been educated in British Columbia and at the London School of Economics, completing a PhD with Harold Laski.⁴⁵ Clearly understood in the Commonwealth world as a man capable of building national institutions, W Kaye Lamb 'earned wide recognition for turning the Canadian National Archives system into a highly successful institution at the service of the Canadian people'.⁴⁶

During his six weeks in Australia, Lamb visited all established state archives and public records offices, including university archives.⁴⁷ Lamb's Report, at the conclusion of his tour, unsurprisingly recommended that the then Commonwealth Archive Office was capable of being 'developed into a fully-fledged National Archives of Australia',⁴⁸ with its own building, permanent staffing and its own specialist headquarters in Canberra.⁴⁹ The Lamb Report stated that the function of such a national archive was 'to assume custody, ownership and control of the records of permanent value that will form the permanent official archives of government of Australia and to make available for research those that can be released for use by the public'.⁵⁰ This gave the proposed framing of the NAA a particular set of responsibilities. For example, Lamb recommended that it was the NAA who should, as might be expected, have authority to guide and control the final disposition of records. But the NAA should work with government departments and agencies cooperatively on which of their records should be acquired for permanent preservation,⁵¹ and what

44 Lamb Report, above n 17, 1.

45 *William Kaye Lamb*, The Canadian Encyclopedia (24 July 2015) <<http://www.thecanadianencyclopedia.com/en/article/william-kaye-lamb/>>.

46 Lamb Report, above n 17, 1. This a worthy topic for another paper: the relationship between thinking of the state and the public in the 20th century in terms of different official duties, and the transmission of ideas by those who perform those duties, across the Commonwealth.

47 Ibid 1–2.

48 Ibid 1.

49 Ibid 13.

50 Ibid 9. The Report also stated: 'The heart and centre of any system must be a strong national archives ... its success as a national institution will depend upon the extent to which its influence is felt and its services are provided outside its own walls and outside Canberra': ibid 29.

51 The Report stated that it was important to make clear to agencies that there is a difference between 'housekeeping' and 'operational' records, the latter being preserved: ibid 7–8.

restrictions might apply to classes of those documents in terms of public access.⁵² However, the Lamb Report also argued that official government records should, by the 1970s, be subject to greater scrutiny by, and availability to, the general population. They should not be limited to the traditional practices and uses for official depositories that had lasted since the 18th century. As Lamb argued:⁵³

The last 25 years have seen a great expansion in the public that wishes to make use of public records ... [for] modern times and current problems ... [people] seek access to recent records ... [beyond war and politics] to multiple disciplines.⁵⁴

Relevant to the story I am trying to tell, Lamb's recommendations exemplify how the ideas that underlay his terms of reference (and are also foundational to the Hope Report, as well as Whitlam's Garran Address) were in sharp tension, if not potential conflict. For example, Lamb supported 'the view that public records are the property of the people, not of civil servants nor of whatever administration happens to be in power', and, as such, 'archives should be one step removed from civil service and political control and from restrictions that might result from it'.⁵⁵ 'On the other hand', he was careful to delineate, 'the relationship of Archives with the Government is necessarily very close, and to perform its proper functions [preserving and curating the records of administration] it must work closely with every department and agency of the Government'.⁵⁶ In other words, Lamb articulated that it was the government's duty to carefully balance its competing obligations to effective execution of executive authority and to its citizenry. To do so, a proposed NAA should be an institution that remains within the structure of government, not a public institution with a distinct charter, like the National Library. Lamb was clear that if legislation to establish the NAA gave 'adequate authority to perform its functions, I see no reason why this status should not be satisfactory both to the Archives and to members of the public who wish to make use of its collections'.⁵⁷

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52 The Report stated that 'no records should be destroyed without the approval of the Archives': *ibid* 9–10.

53 Blouin Jr and Rosenberg, above n 3, 13–31.

54 Lamb Report, above n 17, 21. On the question of public access, Lamb noted that the current Office of Archives was 'highly unpopular, especially in academic circles. This is due in great part to the difficulties experienced by researchers in securing access to public records in the keeping of archives': 22.

55 *Ibid* 4.

56 *Ibid*.

57 *Ibid* 5.

Although the Lamb Report was careful about setting out these tensions and responsibilities for executive documents, what was not clear was how those same precautions might apply to the records of all national institutions.⁵⁸ Courts, for example, were not mentioned at all. Reading the Lamb Report in the context of 1974, as opposed to 2018, this omission is odd. This is because the expression of the state's underlying commitments to public accountability in the 1970s via open government (in all its senses) and its vision of a national estate, was not extant to how a new court—a federal court—had already begun to be imagined. Clearly, as noted, there is a more expansive history of the Federal Court as a national institution yet to be written.⁵⁹ But the Kerr Report of 1971 is an important source through which those commitments, and a jurisprudence of public relationship and public accountability in the 1970s, can be made visible.⁶⁰ However, the Kerr Report itself has been written about at great length, especially by public lawyers. It is rightly, I think, understood by them to be the cornerstone of the modernisation of public law in Australia: a 'vision splendid', as described by Lindsay Curtis, a former President of the Australian Capital Territory (ACT) Administrative Appeals Tribunal.⁶¹

58 Archives Bill 1979 (Cth), pt V. Debates about the Archives Bill in Parliament took a long time because of interlinked concern over freedom of information. These are interlinked narratives. In the Lamb Report, for example, it is expressly noted that there are limits to open government, and that the NAA should appropriately withhold certain classes of documents (such as those that were security classified or in confidence correspondence, and, of course, Cabinet minutes). But it also recommended that the 30-year rule on non-disclosure 'must not be interpreted as meaning that more recent records are automatically inaccessible': *ibid* 25.

59 There was always a constitutional possibility for a federal court since 1901, but the necessity did not really arise until the late 1950s. One of the earliest references to the need for a 'Federal Supreme Court' was raised in the second reading debate on the Judiciary Bill 1959 (Cth) and Australian Capital Territory Supreme Court Bill 1959 (Cth). The objective of the two Bills was to address a lacuna in the existing law that prevented the Commonwealth from being sued in the Supreme Courts of the Territories, those matters having to go directly to the High Court. Speaking on the Bills, Whitlam made a number of suggestions concerning the appellate structure for Territory Supreme Courts and noted that 'I would go further and express the hope that an appeal from a judge of a Supreme Court of a Territory might be heard *by the Full Bench of a Federal Supreme Court* instead of going to directly to the High Court' (emphasis added); Commonwealth, *Parliamentary Debates*, House of Representatives, 13 May 1959, 2108 (EG Whitlam); see also Kerr Report, above n 18, 71–5. As one example of parliamentary debates, see Commonwealth, *Parliamentary Debates*, Senate, 4 June 1975, 2542–54.

60 However, as John McMillan has described, these changes can be seen as the outcome of the 'maturing recognition' by Parliament of what the committees, led by lawyers and public officers of experience, proposed. As he notes, this is despite the fact that the Report 'attracted meagre publicity at the time. Not [sic] did it mirror any groundswell of public discontent, or catalyse a vocal public reform movement'; John McMillan, 'Foreword' in Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law at the Twenty-Five Year Mark* (Centre for International and Public Law, 1998) iii–iv.

61 Lindsay Curtis 'The Vision Splendid: A Time for Re-Appraisal' in Creyke and McMillan (eds), above n 60, 36.

The committee was chaired by Sir John Kerr who, in 1968 when it was commissioned, was a Judge of the Commonwealth Industrial Court and a Deputy President of the Trade Practices Tribunal—offices easily misremembered after the events of 1975. Kerr and the other committee members⁶² had vast accumulated experience in public law and public administration, and knew how costly, alienating and near impossible it was for an ordinary citizen to challenge unlawful government action.⁶³ The terms of reference for the committee were quite narrow: to investigate the need for a new federal court to hear disputes arising from increased federal jurisdiction, and to alleviate the demands of the High Court.⁶⁴ But its 1971 recommendations—subsequently developed in the Ellicott and Bland Reports—were expanded by its members to do a great deal more.⁶⁵ In considering the jurisdiction of such a federal court, the committee also developed what we now understand as ‘the New Administrative Law’: merits review of government action at specialised tribunals; access to judicial review and reasons for decisions via the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*Administrative Decisions (Judicial Review) Act*) that removed the ancient requirements of the prerogative writs; proposed freedom of information legislation; and a package of other institutional measures such as the establishment of an office of Commonwealth Ombudsman.⁶⁶

What I want to draw out, for the purposes of this story, is how the Kerr Report and its recommendations were founded on the two principles that also shaped the rhetoric and policy of the Hope and Lamb Reports and Whitlam’s 1973 Garran address. The first was a desire to formalise and give legal form to open government in a postwar world. For example, the Kerr Report makes plain that ‘in formulating our proposals we have concluded

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62 The committee’s other members were Anthony Mason (an experienced advocate who, as Solicitor-General, had prepared foundational thinking within the executive on a new superior court, and subsequently joined the NSW Court of Appeal); Robert Ellicott (in 1968 Solicitor-General, and later Attorney-General in the Fraser Government); and, perhaps most importantly, Professor Harry Whitmore, Dean of Law of The Australian National University (a pioneer in the development of an Australian jurisprudence on review of government action, and a member of the Social Science Council); Kerr Report above n 18, i. The Report also notes in this frontpiece: ‘NOTE: Mr Justice Mason was appointed a Judge of Appeal of the Supreme Court of New South Wales on 1 May 1969. Mr R.J. Ellicott was appointed Solicitor-General on 15 May 1969 and thereafter became a member of the committee’.

63 Curtis, above n 61, 45–6.

64 Kerr Report, above n 18, 1–4.

65 Robin Creyke and John McMillan (eds), ‘Administrative Law Assumptions Then and Now’, above n 60, 3–9.

66 Kerr Report, above n 18, 112–18.

that there is an established need for review of administrative decisions. We have not thought this to be a matter of real debate'.⁶⁷ Their point was not that governments in the late 1960s and early 1970s⁶⁸ were any worse than their predecessors *per se* in making lawful decisions. Rather, their argument was that older methods of opening those decisions to scrutiny had become antiquated. The committee stated that they wanted 'merely to point to the changing circumstances affecting the operation [of those older methods] in these days of vast expansions in the range of regulated activity and the range of services provided' and concluded that 'the traditional democratic methods in bringing possible injustices to notice seem to us to be inadequate'.⁶⁹

The second foundational principal foundation was that the practice of Australian law needed to be understood, by 1971, as federal, or national, in ways it had not been before, and that this was perhaps an expression of an Australian jurisprudence that had not been institutionalised or legislatively recognised before either.⁷⁰ This included a careful consideration of the specificity of Australian constitutional arrangements, which did not permit a replication of either British or American models.⁷¹ The Kerr Report noted that:

Our consideration of the matters covered by our terms of reference has led us to the view that it is highly desirable to encourage in Australia a comprehensive system of administrative law, but one which is essentially Australian and which is specially tailored to meet our own needs, experiences, and constitutional problems.⁷²

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67 Ibid 10.

68 The Kerr Report also addresses French, UK and US responses to the rise of the administrative state postwar: *ibid* 31–75.

69 Ibid 8.

70 See Black, above n 14, where he makes these points in detail, and expressly.

71 In order to consider the nature of the 'jurisdiction to be given to proposed Commonwealth Superior Court', the terms of reference for the Kerr Report interlinked viewing comparative jurisdictions to see what new legislation had been introduced in administrative law (and why), and if and how that would be applicable and useful to the Australian experience shaped by its constitutional context. The terms noted that 'it is the uniform experience of the common law countries, including the UK, that the traditional supervision by the courts of the administrative process must be supplemented by provision for review on questions of law or on the merits of administrative decisions affecting the property and rights of citizens'; Kerr Report, above n 18, 2.

72 Ibid 71.

This included forming a view not only on matters of jurisdiction, but on the role that a federal court ‘should play more generally’,⁷³ of how it might undertake its institutional responsibilities in assisting Australian people to understand and challenge the decisions taken about them, and what correlative duties the state had to be just, fair and open with its citizens.⁷⁴

The Federal Court began its institutional life in 1977 on the basis of these recommendations and visions. Former Chief Justice Michael Black, in his memoir of its first 30 years, shows how the Federal Court was responsive to new jurisdictions (most significantly, the *Administrative Decisions (Judicial Review) Act*, the *Trade Practices Act 1974* (Cth) and later, of course, the *Native Title Act 1993* (Cth)) and also new practices, procedures, ceremonies and protocols.⁷⁵ From the desire to innovate technologically to promote efficient court services, to the desire to represent itself differently from inherited British tradition by revolutionising rules regarding robing, wigs and architecture, the Federal Court has developed as a distinctively Australian and determinedly modern institution, reinventing the role of a court to meet the circumstances of time, place and the needs of a changing public.⁷⁶

Many of these are innovations that we have had the opportunity to uncover in greater material depth in the course of our project. This is because our method involves an examination of the Federal Court’s own archive of operational practices since its establishment, rather than an exploration of the rich litigation materials the court holds. These kinds

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73 Ibid. The idea of a Commonwealth superior court had been the subject of discussion and planning in the Attorney-General’s Department since the early 1960s; see, for example, NAA: A5819, VOLUME 12/AGENDUM 461.

74 During the second reading speech of the Federal Court of Australia Bill 1976 (Cth), government members referred to the need for the existing federal court system, which included separate industrial and bankruptcy courts as well as making the High Court the first instance jurisdiction for the review of Commonwealth administrative decisions, to be ‘put on a more rational basis’ (Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 1976, 2110 (Robert Ellicott)) and the significance of the role of the court in introducing ‘streamlined methods’ to address its jurisdiction (Commonwealth, *Parliamentary Debates*, House of Representatives, 10 November 1976, 2536 (Maurice Neil)).

75 Black, above n 14.

76 The need for change to the federal court structure to meet the demands of increasing population and an increasingly diverse jurisdiction was a central argument advanced by then Attorney-General Barwick in his initial recommendation to Cabinet for a Commonwealth Superior Court; see NAA: A5819, VOLUME 12/AGENDUM 461. As the proposal developed, the increasing diversity of state and Commonwealth jurisdiction was also drawn on by public servants working on the proposal to recommend that the new court also have an exclusive jurisdiction over some matters to ensure uniformity and consistency in the development of the law; see, for example, Memorandum from Mr L Naar to the Secretary of the Attorney-General’s Department, 14 July 1967, NAA: A432, 1961/2132 pt 6.

of records are what the German legal theorist Cornelia Vismann would designate as files—bureaucratic documents—as opposed to the records of law that are required for courts to perform their juridical and, in common law countries, appellate function.⁷⁷

I would, perhaps, describe these files in a slightly different way: as the records of how an institution conducts itself. These records have revealed to us how the Federal Court has made decisions about its role and public function over time, including how it considered the value and purpose of its own archive, and how and where they should be subject to democratic methods in bringing institutional court activity to notice. However, our problem is that these records are scattered, fragmented, not fully accounted for and potentially missing. Many sit alongside the official record of the Federal Court and its litigation files and within the custody of the Federal Court itself. But there are real and material difficulties caused to our project by the fact that although the NAA and the Federal Court shared responsibility for records of different kinds, they were never directly brought into relation in terms of their public roles. As we have seen in the Lamb Report, the NAA was designed to be a national enterprise responsive to collecting the public experience of Australian government for posterity and for use by future Australians. It is clear from the Kerr Report that the Federal Court was designed to be a national court responsive to the Australian public and its legal experiences. Yet the court records of the Federal Court, from the moment the NAA was established in 1983, were neither open for future use nor understood as part of Australian cultural property to be protected (in the language of the Hope Report) for intergenerational equity. They were excluded from the *Archives Act 1983* (Cth) (*'Archives Act'*). In the context of a prevailing culture of the time, it is important to note that this exclusion of court records was subject to challenge before it became law.⁷⁸ When the Archives Bill and the Freedom of Information Bill were scrutinised together by the Senate Standing Committee on Legal and Constitutional Affairs in 1978,⁷⁹ the committee (presciently) reported:

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77 Files, in Vismann's terms, are 'not the instrument or medium for the arbitration of conflicts but a repository of forms of authoritarian and administrative acts that assume concrete shape in files' And she adds provocatively 'in this way law and files mutually determine each other': Vismann, above n 3, xiii.

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

79 Senate Standing Committee on Constitutional and Legal Affairs, Commonwealth, *Report on the Freedom of Information Bill 1978 and aspects of the Archives Bill 1978* (1979), [33.29] ('Senate Standing Committee Report').

The purpose of the Archives Bill is to guarantee that our national history can be both preserved and reconstructed. This guarantee must exist with respect to the operation of the Head of State, of the Legislature and of the Judiciary, much as it exists in relation to the operation of other departments ... [t]here must come a time when public interest in obtaining access to information necessary for the understanding of Australian government and history overrides the niceties of constitutional arrangements, and in our opinion that time has certainly arrived when an event is thirty years of age.⁸⁰

But in 1983, such ‘niceties’ remained dominant. The view of Parliament then was that special treatment should be afforded to ‘records of those arms of the Government which traditionally enjoy a certain degree of independence and autonomy’.⁸¹ The rationale for the exclusion of Federal Court’s records was then founded in both the common law (the traditional provenance and authority of courts to be masters of their own rolls and the custodian of their own records for the purposes of appellate matters) and the *Constitution* (protection of separation of powers to avoid ‘interfer[ence] with the independence of the judiciary and the proper administration of justice’).⁸² This left records of a major innovation in Australian jurisprudence officially outside of a national archive that was designed to preserve the national estate.

A Matter of Records (A Commentary)

My purpose in revisiting the Hope, Lamb and Kerr Reports has been to offer a narration about the animating vision of Australian institutions as they ‘liberated themselves’ from Britain⁸³ and to contribute to an expanded understanding of the administrative mode of setting up such institutions

80 Ibid [33.23] and [33.26]. This, of course, became the subject of review of records in 1998 by the ALRC; see ALRC, above n 78. The ALRC pushed for reform to bring court records within the NAA. It also outlined the informal disposal and archiving practices under way in federal courts.

81 *Archives Act*, pt V excludes courts from operation of the open access provisions; see also Explanatory Memorandum, Archives Bill 1979 (Cth) and Senate Standing Committee Report, above n 79.

82 Senate Standing Committee Report, above n 79, [33.21]: ‘The Explanatory Memorandum to the Bill explains the exclusion of vice-regal records and the records of parliament and the courts on the basis that it would be inappropriate for the regulatory powers of the Archives to be made application to the records of those arms of the Government which traditionally enjoy a certain degree of independence and autonomy. In part this independence can be viewed on constitutional grounds, particularly the separation of the powers of the Executive, the Legislature and the Judiciary. It is also felt that, as a practical matter, it should be for bodies like the Parliament and courts to determine what is to happen to their own records. For instance, attention is drawn to the difficult questions involved in determining what should happen to judges’ notebooks’.

83 Clark, above n 11, 351.

in the 1970s and 1980s. But it has also been to make plain that the time ‘when public interest in obtaining access to information necessary for the understanding of Australian government and history’⁸⁴ has clearly arrived.

I want to now discuss the implications of my narrative. In doing so, I want to hold against turning ‘the archive’ (and the archival) into normative principle by offering a different form of address—a commentary—that invites thought on the technicalities of public administration of records in terms of how they are experienced. More precisely, I want to describe my own activities in undertaking the Court as Archive Project as a set of comments about how my official relationship with the administrative machinery of archives is also a reflexive part of my training and scholarly traditions. I will do this by focusing on the tangle of where the records of the Federal Court during the period 1977–90 might be kept (and by whom), and the instruments that arrange those institutional relationships. By paying attention to these administrative technicalities, I can emphasise why court records of the very recent past reveal things about public law and life, in the omission and dispersal, that are themselves necessary to write into Australian histories of jurisprudence. I can also exemplify how maintaining a relationship to records is varied, not always romantic, but part of the practice and duties of the conduct of office of the historian and the jurisographer.

Provenance

Our archival adventures in the Court as Archive Project began at the Principal Registry of the Federal Court in Queens Square in Sydney. With the assistance of Lyn Nasir, the court archivist, we were able to take advantage of the work the Federal Court has done to digitise the records and papers that it possesses on site. We viewed, for example, records of committee meetings, as well as management files from 1977, and some of the papers of Chief Justices Bowen and Black. These internal papers included letters and memos concerning the relationship between the Federal Court and the Commonwealth Attorney-General’s Department (AGD). Primarily, this is, of course, because the Federal Court began its institutional life administered by AGD. Predating the Federal Court, the earliest available records about the idea of establishing a new Chapter III court are the provenance and within the jurisdiction of AGD.

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84 Senate Standing Committee Report above n 79, [33.23] and [33.26].

These earlier AGD records date from the early 1960s and include opinions about the status of a proposed court authored by Sir Anthony Mason as the then Solicitor-General and Sir Garfield Barwick as the then Chief Justice of the High Court. They also include terse exchanges between existing state supreme courts and the federal government over the vexed matter of jurisdiction.⁸⁵ These records remained within the AGD's physical and legal control until the NAA was itself established in 1983, at which point the NAA assumed control over the AGD records. From 1983 onwards, AGD records were therefore consigned to the NAA, under the authority of the general Records Disposal Authority (RDA) for government agencies and departments.⁸⁶ Records relating to the Federal Court that were the provenance of the AGD for both these early periods of the Federal Court's history (before 1977 and from 1977 to 1983) are noted in the NAA's database. They are easily identified, although until we began our project, most had not yet been declassified and others had not yet opened for public use—a point to which I will return.

What was more unexpected was how records of the Federal Court *after* 1983 also came to be within the custodianship of the NAA. A central legislative and administrative fact that underpins the narrative I have already told is that Federal Court records were excluded from the operation of the *Archives Act*.⁸⁷ Yet our archival investigations indicated that the governance relationship between the Federal Court and AGD that was instantiated as a matter of practice, if not law, continued after 1983. There is no specific RDA to authorise this relationship as a matter of records. The assumption from what was available for us to view through public channels is that the records about the Federal Court and AGD relationship were still subject to general NAA Departmental Disposal of Records Schedules, although the agency RDAs for this period are themselves classified AGD documents.⁸⁸

85 See, for example, Memorandum from Anthony Mason to First Assistant Secretary (Executive), 26 July 1966, NAA: A432, 1961/2132 pt 2.

86 A Records Disposal Authority (RDA) is the administrative instrument necessary to organise the legal association and conditions of consignment, disposal and transfer of records between agencies.

87 This is in the following footnote and the exclusion is discussed earlier.

88 For a general overview of the development of the Federal Court's RDA, see Lyn Nasir, 'Presentation on the Records Authority (Speech delivered to the 9th Australasian Institute of Judicial Administration Librarians Conference, Sydney, 21 August 2015). For the historical development of the management of AGD and Federal Court records, see NAA: A432/27, 1979/3205; NAA: A432, 1987/016464-01; National Archives of Australia, *Records Disposal Authority 1234 for the Industrial Relations Court of Australia Principal and District Registries* (1996); National Archives of Australia, *Records Disposal Authority for the Federal Court of Australia, Principal and District Registries, Court Records other than Bankruptcy* No. 1124, 1994; National Archives of Australia, *Records Disposal Authority for Bankruptcy records, Principal and District Registries*, No. 1124, 1994. A Disposal Authority was agreed between

What was even more intriguing to us was that some records of the Federal Court continued to be sent to the NAA after 1990—the date when the Federal Court became self-administering and legally free from AGD management or association.⁸⁹ This state of affairs continued until 2011, when a specific RDA was established between the NAA and the Federal Court, instigating a more sustained conversation between the agencies about what records of courts might be worth preserving (to return to the language of the 1970) for the national estate.⁹⁰

Describing the detail of the negotiations and practical compromises of that formalisation of public relationship between the NAA and the Federal Court are perhaps the duties that inform different kinds of writing in court administration and archival science.⁹¹ However, the point I want to emphasise here is what a specific Federal Court RDA represents for Australian historians of jurisprudence of the 20th century. It is an instrument of administration that takes responsibility for records and imposes formal and legal consideration of the specific status of court records for the first time since both the Federal Court and NAA were established. I think that this has allowed a different, and perhaps more conscious, conversation about what it is courts do that other institutions do not that complicates yet gives shape to the nature of decisions about access and protocols that have happened, as well as those yet to come.⁹²

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the NAA and National Native Title Tribunal in 2009; see National Archives of Australia, *Records Authority National Native Title Tribunal*, No. 2009/00121658, November 2009. This activity of the NAA stands alongside the internal Federal Court initiatives that were occurring concurrently during this period, preserving all their own records of litigation through the introduction and innovations of e-filing.

89 Warwick Soden, 'Self Administration in the Federal Court of Australia' (Speech given at the JCA Colloquium, Noosa, 10 October 2014); Black, above n 14.

90 National Archives of Australia, *Records Authority: Federal Court of Australia*, No. 2010/00315821, 19 October 2011. The 2011 Authority designates all files not determined to be 'significant' or not native title matters into Part A, which is to be retained permanently by the NAA, and Part B, which is to be retained by the NAA for up to 25 years. Part A incorporates court documents that identify the issues before the court and the parties; final orders; reasons for decision; High Court orders remitting the matter to the Federal Court; and any signed orders disposing of the matter if there was no judgment. Part B incorporates the balance of the materials on the file.

91 Livia Iacovino, 'Rethinking Archival, Ethical and Legal Frameworks for Records of Indigenous Australian Communities: A Participant Relationship Model of Rights and Responsibilities' (2010) 10 *Archival Science* 353; Judith Bellis, 'Public Access to Court Records in Australia: An International Comparative Perspective and Some Proposals for Reform' (2010) 19 *Journal of Judicial Administration* 197.

92 Ian Irving, 'Information Held on Federal Court Native Title Files' (Speech given at the National Native Title Conference, Darwin, 2006). That the Parliament could legislate for the Federal Court to be exempt from the NAA—that it had to be *sui generis* and set apart—seems defensible in the 1970s in ways it is not today. In particular, the arrival of the native title jurisdiction in the Federal Court in

One aspect of that conversation is a concern of public law jurisprudence. On its face, the tangle of administrative control and legal authority over records is not simply an exercise of governance, but a practice that reveals how the legal exemption of the Federal Court from the NAA in 1983 is an executive recognition that, at common law and under the *Constitution*, Commonwealth superior courts have jurisdiction over ‘the court record’, which of course has not altered.⁹³ The historical association between courts and the executive that is a necessary part of their establishment, I think, reinforces the need to write about administrative and constitutional law, and about national institutions that emerged in the 1970s and 1980s, in a way that joins them together.⁹⁴

Practice

The other aspect of that conversation is of course about the activity of writing those histories. This returns me to my own archival experience in this project. For example, Federal Court Archivist Lyn Nasir had told us that there were many consignments of records that travelled between Federal Court and NAA (without a formal RDA) via the agency of the AGD between 1977 and 1990. The Federal Court has the record

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1995 made pressing and real what it means, and meant, to be a national court with responsibilities to holding an entire class of materials that tell stories of encounters between laws, as well as people, in this country. That we can see, perhaps, in 2018, other ways through this knot of who takes responsibility for decisions about court records, not only by negotiating an RDA with NAA, but also by establishing advisory committees with stakeholders to discuss significant matters (as Lamb suggested in 1974) or building relationships in different ways with as yet unimagined institutions that might house only native title records, says things we might in fact suggest at the end of the project. It also says a great deal about how the relationships between people and institutions have changed since the 1970s.

93 The court record (what the Federal Court, in their RDA, identify as Part A of a file) is, of course, what needs to be preserved by courts to review decisions of lower courts; above n 8. This has not legally altered since 1983. The point is that the ‘court record’ does not hold (and never has held) the same status as ‘records of the court’ (what in the Federal Court’s and NAA’s terms is now identified under the RDA as Part B). These are the abundance of materials that disclose the organisation of courts as institutions (ie, what we are looking at in the project); materials of litigation and decision-making not legally mandated as part of ‘court record’ (such as transcript and evidence); and judicial papers, bench books and ephemera.

94 The decision to exempt the court in 1983 from NAA, I think, was clearly aimed to quarantine Commonwealth courts’ ‘record’ in its legal sense. The fact that this did not occur cleanly as a matter of administrative practice, and that the lines have been tangled because of the historical association between courts and the executive that is a necessary part of establishment, reinforces the need to write about administrative and constitutional law, and national institutions that emerged in the 1970s and 1980s in a way that joins them together. This is necessary to reveal the very complex ways that courts and executive (at the level of agency activity) practise their constitutional roles and, in turn, consider the changing shape of their public duties in time and place. The current RDA (now that there is one) offers a way to organise and make the context of those relations (and their implications) visible.

of the consignment batches and file numbers, but there is no record of the content in each consignment. The consignments are signified by a number or code only, which do not appear on the NAA catalogue. We knew nothing about those materials in any practical sense: what was in them; what they tell us; where they might be; and whether they had been sentenced let alone whether we could view them.

In 2015, we met with officers of the both NAA and the AGD in Canberra to try and find out what had happened to the Federal Court consignments. We also wanted to ask if certain AGD documents relating to the Federal Court that did appear on the NAA catalogue, but were at present unclassified or unopened, could have their status reviewed by the normal channels to assist with the process. On this latter point, the decision-making as to declassification was straightforward, as we expected it to be. The files we were asking to examine would, in most cases, have been opened by now under the 30-year rule. What is instructive is that these files had never been opened simply because no one, until the project, had made the request. If this project were being conducted in the US, the fact that a recently established federal court and its history had not been addressed would be highly unusual. It says something, too, about Australian legal historians' attentive focus on the 18th and 19th centuries and the early years of federation.

On the fate of the consigned Federal Court records, on the other hand, the story was instructive in a different sense. The lists did not appear on the NAA catalogue. The AGD had no knowledge of their lists. Yet we had access to a paper file, full of consignment numbers. This is worth imagining: the vast repositories in suburban Canberra, filled with containers of documents, from various departments, numbered by dispatch, as opposed to the delicate and precise numbering of individual items. This is the very material space between raw files, data and recoverable records that can be accessed in a form capable of carrying stories.

In the end, we asked for permission to view the AGD's RDAs to the NAA for the period we were interested in to see how they reflected the visions of Lamb, how they reflected the court disposal authorities after 1990, and to see what had been 'sentenced'. It is, of course, those instruments and the opened files that have shaped this very short dissertation on the institutional archival practices in Australia in the 1970s and that will help us produce more detailed accounts for the future.

Conclusion: Records and Australian Institutional Responsibilities

By way of conclusion, I want to make three points about my narration and commentary on the matter of records.

The first is about access. We would note that as academics with particular kinds of experience and institutional affiliation, we were supported and welcomed by the Federal Court to look at their records of internal administration. Our team were also given excellent assistance by the NAA and AGD. We are grateful for these opportunities, and the trust shown in us, but would acknowledge our archival adventures based in the Federal Court are not yet available to everyone. This is another demonstration of urgency in determining which records of courts can be viewed, by whom and under what conditions and protocols.

The second point is about court records as objects for history writing. That files produced by the Federal Court (and also files produced about them) are missing, lost, destroyed, in a lacuna or simply waiting in a repository speaks sharply to how lawyers, legal historians and scholars of the present and the future might address our past and present national stories, as a matter of record or a matter of litigation.

The precariousness of this slice of Federal Court paper records also reminds us not only that we need to pay close attention to a digital future, but also that we need more than the reports and the other documentary records I have drawn on in this paper, especially of the immediate past, to adequately tell stories of living with law and legal institutions. Indigenous people's experiences of Anglo-Australian encounters in law, particularly in native title, show this need clearly. In addition, if we are writing stories about the 1970s and 1980s, we have obligations for gathering oral histories and memoirs, for we need all kinds ways of thinking about what it means to record experience of building institutions, as much as living with them, and marking what they mediate or enable.

My third point returns to my opening remarks about the duties involved in writing histories of jurisprudence—what Shaun McVeigh and I have called the practice of jurisography. The sum of my experience in undertaking this particular project as jurisographer, rather than theorist, archival scientist or legal policy advisor, has meant paying attention to how the matter of court records is not only epistemological—it is not

only about how we organise practices of legal knowledge and consider law's relationship to other practices. Court records also shape what we say about the national experience in time and place as matters of law. This is not just a matter of technology and technique. It also requires a historical understanding of how to step back, to think about institutions and their sense of duty, as representations of how a nation understands itself.

My own experience in the project of looking at the Federal Court as an archival question (as much as seeking to suggest how it might understand and arrange itself as an archive) is, then, allegorical. Joining the court to the public in and through archives is neither about past nor future, but, rather, about contemporary political ordering of the relationships between people, their law and their institutions, as a matter of national formation. Attention to archives as allegories of this political ordering requires our vigilance, our care and our sense of responsibilities as historians of public, and Australian, legal experience. By attending to our own duties and training, we can hopefully properly understand the implications of how and why law has been withdrawn or set apart from the national formation projects of the late modern period, as well as address what an archive about a court as an institution of law holds and represents as a consequence. In these ways, offering protocols about archival responsibilities of courts, as well as telling their own institutional histories as central to public concerns, contributes to the recording of a more complex national story in our own times, and as a story in which Australian jurisprudence is central.

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