8

A Conversation with Louise Anderson and Ian Irving (Former Native Title Registrars, Federal Court of Australia)

Interviewed by Ann Genovese and Kim Rubenstein¹

On 27 February 2017, Kim Rubenstein and Ann Genovese interviewed Louise Anderson and Ian Irving for the Court as Archive Project. Louise and Ian are former Registrars of the Federal Court of Australia. Louise was the first Native Title Registrar appointed in 1998 and Ian was appointed a Registrar in 2003 and became the second Native Title Registrar in 2005. At the time of the interview, both worked at the Victorian Supreme Court, Louise as the Chief Executive Officer and Ian as a Judicial Registrar. In 2019, Louise Anderson returned to the Federal Court in the role of National Director, Court and Tribunal Services.

In the interview, we discuss, among other topics, what it meant for the Federal Court of Australia to accrue the native title jurisdiction in 1996 and what changes that occasioned for the Federal Court's practices, procedures and records management. We also discuss what the arrival of

¹ Please cite as Louise Anderson and Ian Irving, interview Ann Genovese and Kim Rubenstein in Ann Genovese, Trish Luker and Kim Rubenstein (eds), *The Court as Archive* (ANU Press, 2019).

the jurisdiction meant for the relationships between the court, Indigenous litigants and other parties; there are also aspects of this discussion that highlight key issues around active citizenship as a form of participation.

We interviewed Louise and Ian together to capture their significant collaborations and their different institutional and professional experiences. The full interview is not included below, but further publications are planned around other aspects of their interview.

Alongside the interview with Warwick Soden, the following extract from this interview offers another rare example of an oral history undertaken with key administrative office holders of the Federal Court conducted around the time of its 40th anniversary as a national institution.

In the same spirit as the interview with Warwick Soden, this interview represents a point in time. Some of the issues discussed will have progressed, but they are a timely record of significant aspects of this project's research interest.

Kim Rubenstein (KR): There's an interesting backdrop to our conversation today. We're sitting in the Victorian Supreme Court, Louise as the CEO and Ian a Judicial Officer, but we're taking you back to your Federal Court life.

Louise Anderson (LA): So in terms of taking this back, the Federal Court just had its 40th anniversary and, well, in fact, it was created in 1976 by statute. Both Ian and I were invited to the official anniversary event, which was great. It was great that the Chief Justice had invited Professor Mick Dodson to address the court as part of the anniversary celebrations. That motivated me to attend. I'm so pleased I did. Why I mention it now is that submissions were made at the event and almost all mentioned a native title jurisdiction, mediation and case management and digital innovation. These initiatives/innovations were things that we were passionate about and drove very hard. So that was incredibly exciting when you think of the time, the life of the Federal Court and, really, well, 1994 was a significant part of the court's history.²

Ann Genovese (AG): In looking at internal documents, of its own administration, and what you have just commented on regarding the anniversary is confirmation, adding context and flesh to what we know from the documents: that your stewardship, alongside former Federal Court of Australia Chief Justice Michael Black, marks a central moment

2 The time of the commencement of the Federal Court's native title jurisdiction.

for the court. If you go back, looking at the files and arguments about the establishment of the court in the first place, a key issue was: what is a modern Australian jurisdiction going to look like?

LA: That's right.

AG: How that's realised? It doesn't really, in my view, come of age until after *Mabo*³ and the arrival of the native title jurisdiction.

LA: It's really interesting, because I felt that so strongly when I was there on the 40th anniversary, and I felt that strongly, that I was sort of growing up, as it were, in the Federal Court. Chief Justice Allsop spoke passionately about the native title jurisdiction. For the Federal Court, notwithstanding being in the rarefied air of a commercial jurisdiction, you've got to hang on to something that makes you relevant to the community of which you're a critical part.

KR: The heart of it.

AG: So that's exactly what I would observe, that after *Mabo*, the whole game changes. Australian law—what does [Chief Justice] Brennan say?: 'The law of Australia is Australian law'. So institutions have got to start being responsive and responsible in different kinds of ways.

KR: It's interesting. From my perspective, the sort of migration jurisdiction is the other point of analysis too there, because of that key workload. It also asks of the court: who is the community? And that in law we define ourselves by who we are not: the 'aliens' head of power. That all plays out so amazingly here too.

LA: Yeah, very true. Very true.

KR: Louise, you made a lovely statement that you grew up in the Federal Court. Can you both tell us, well, one by one, how you came to the Federal Court?

LA: Sure. I did law as a graduate after my first degree and then I moved to Sydney and I was admitted to practice a year before the High Court delivered *Mabo*. So, for me, having come from a very political activist background and worked in ...

AG: In Tassie, for the record.

[Laughter]

3 *Mabo v Queensland (No 2)* 175 CLR 1.

KR: In terms of Tasmania Dams case.⁴

LA: Yeah. That was my first experience of consensus decision-making, learning about it with Bob Brown.

KR: Were you at UTas [University of Tasmania] for your law degree?

LA: No. I started ... I did one year at UTas for an Arts degree and then I got a small scholarship on the understanding that I would come back and continue in political science because that was my passion, but I didn't. I became a 'mainlander'. Yes. Then I worked in the union movement actually and then went to Sydney and worked in community legal centres. Ian and I, in fact, had a crossover. We both worked at the Inner City Legal Centre. Just by chance, really, which has been my career, a bit by chance. I then fell into a role as an Associate at the AAT [Administrative Appeals Tribunal] when Justice Deirdre O'Connor was the President in Sydney. Anyway, from there, I realised how much I liked working in tribunals and courts. Then the NNTT [National Native Title Tribunal] was established, so that was 1 January 1994. I worked on and off in the community legal centres for a number of years. Then a position came up at the NNTT as a senior case manager. So I went for that really with passion about what native title could be. That was when Justice French was the President and I was one of the first 50 employees. So that was a very exciting time. Michael Black had decided that post-*Brandy*,⁵ and with the increase in the jurisdiction in the Federal Court, there needed to be a native title specialist role within the court. Now, again, what was interesting was that it was at a time when the NNTT really were still very, very, very challenged by the notion that their decisions could not be enforced and the belief was that the court would rubber stamp the agreements. However, the court was never going to be a rubber stamp, because courts don't operate in that way. I was in Sydney and it was a Melbourne position, but the twins were quite young. There was family in Melbourne, so I applied. It was a very intense time. I first started working in the old High Court, which is now part of the Supreme Court, which was the Federal Court in 1998. I remember my first meeting with Chief Justice Black was in a stairwell. He said, 'So how are you going to resolve all these cases in three years?'. I was quite surprised and said, 'I'm not. We need to have a conversation'. That's what happens when you're kind of young and ...

AG: You just say it.

LA: Yes. Rather than now, I'd probably be far more nuanced. So ...

4 *Commonwealth v Tasmania* (1983) 158 CLR 1.

5 *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.

AG: But I take it he didn't respond negatively to that?

LA: No. He said, 'Well give me a plan'.

Ian Irving (II): He was throwing out a challenge.

LA: At the same time, the court's expectation for prompt disposition remained paramount, and a three-year target for all cases had been set. This started a really interesting journey in itself and a lot hangs on that, because the court under [Principal Registrar] Warwick [Soden] and the Chief Justice's leadership was absolutely and understandably focused on efficiency and effectiveness. In doing that, disposition targets and dockets were central to it. So to have a jurisdiction [like native title] that didn't necessarily fit within the docket system [introduced to the Federal Court in 1997], that was clearly going to challenge the ordinary notion of case management and disposition targets. There was a real opportunity for shaping that, but the three-year disposition target for all cases remained something I think that was a reputational risk for us. Although, on reflection, Warwick Soden's focus on the target did focus attention on what target was reasonable; a question that played out for many, many years. So we had to hear strongly from others. So what we went to do was organise. For example, I went and spoke at conferences and was really the spokesperson for what in my view was a fairly untenable position; to set that target so early on [in] the court's journey with the [native title] jurisdiction.

KR: Can I just clarify, who had set the three-year disposition target in the first place?

LA: The court had set up a native title coordination committee, which—primarily at that point—comprised judges who had land rights experience from the [Land Rights] Commission, so Justices Olney, Gray, Merkel, Beaumont, O'Loughlin ... with leadership from Justice Toohey—notwithstanding he was on the High Court ... What we did very quickly was put in place specialist native title judges. And [Justice] French was also a member notwithstanding being the President of the NNTT. So to meet the disposition target [in native title], I think, was around saying to government: 'what resources do we need to drive [these native title cases]?'. So it was quite strategic on that part. What we organised very early on, so—well, it didn't culminate until 2001—was a series of user groups. It drove both a different level of community engagement that wasn't there in the Federal Court before. It drove a different level of public information that wasn't there in the Federal Court before. Also, specialist rules and procedures and a very different way of doing business,

notwithstanding it was still a superior court of record. Each of these things required significant submissions from me, presentations to our judiciary, really cross-examination in a way that just made me grow up very quickly.

KR: Your advocacy skills must have really been honed in that period.

LA: They did. I really learned how to get a message across in the most, I hope, effective way. Even the user group narrative had to be well-argued and presented, because the Federal Court wasn't in the position of saying to the people who had come before it, other than through formal engagement with the Bar: 'what are we doing well and where could we do better?'. So that was my message. The two things we've got to be saying out aloud and actually open to hearing are enormous. I mean, Ian certainly worked and followed that through ...

II: I was originally on the other side of that.

AG: So that seems like a convenient moment to ...

KR: A nice segue ...

AG: ... and Ian enters the picture!

II: But I didn't enter the picture until 2005 at the Federal Court, but from 2001 through to 2005, I'd been at the Kimberley Land Council. I was at UNSW [University of New South Wales]. I did a science-law degree, genetics and immunology. I was going to be a research scientist. Started doing operations on rats and all of the rest. Realised pretty quickly I didn't want to be a research scientist. Finished my law degree. Thought, what am I going to do? Travelled around for a while. Tried my hand at a few things ...

[Laughter]

II: Ended up somehow after that at community legal centres, so doing volunteer work at Marrickville Legal Centre, getting a job at Marrickville Legal Centre, eventually working at Inner City Legal Centre. I think [Louise] you had just left there ...

LA: I was on the Board. I'd just left.

II: Then I worked at Legal Aid. I had a really good friend who had recently got a job in Alice Springs. Thought: 'I want to get out of Sydney. What am I going to do?'. A job came up in Broome at the KLC [Kimberley Land Council] and I thought, 'well, what the hell. I'll give it a go'. Had a mad interview by video from Glebe to Broome.

AG: So had you been to Broome before?

II: I had been luckily once before. Anyway, it was amazing. But, so that was 2001, and I think in 2001, in some senses, I was on the other side of [the user groups Louise was organising]. So the KLC for better or for worse had, at one stage, five matters that were all in litigation at the same time. They had hardly any lawyers. The lawyers that they had had no real litigation experience. I'd at least worked at Legal Aid, so I knew how ...

AG: To run a file ...

II: Yes, run a file and broadly how courts worked, but also that experience of working there and being kind of trapped in this litigation process meant that I was going to user group meetings with a sense of 'hang on a second, there's almost too much litigation pressure'. But we were also passionate about getting outcomes in a way that's not only through litigation.

LA: It was a very clear intention and explicit that native title was around an intersection of two laws and customs, so we wanted the Federal Court's presence to be, and the structure, to be there. But we also needed to find a way to properly listen and hear on a more equal footing. That was a real challenge.

AG: Can we come back to that? Because that's hugely significant ...

LA: Well, I—to return to my arrival at the Federal Court in 1998—in my first three weeks, I was in the old High Court building in Little Bourke Street in Melbourne, on a chair that fell apart and a desk that was wonky! The first thing was to write some native title procedural rules.

AG: In the first three weeks!

LA: So I rang Graeme Neate [at the NNTT] and asked for his advice. I rang others—judges and legal practitioners, academics. But the conversation about 'what are rules?' can be difficult if you're not immersed in it. So then I started to think about, well, what were they, the court rules? Now, my—for my sins ...

II: You can't subvert the rules without knowing what they are.

LA: Yeah. I love rules! So when we tried to work out how to rewrite the rules, Justice French was very helpful. People gave me the Northern Territory land rights regime, all of that. Then we started to think about—and [Chief Justice] Michael Black was great on this, because there was great concern from within the Federal Court about including music, language, art and dance as evidence. That was something that I felt really passionate about.

II: And statements of cultural and customary concerns.

LA: Yes that's exactly right. If you're working within a predominately oral culture and you don't have the written record, how are you going to get it across there?

AG: I want to come back to that, it is very important. But Ian, to return to your arrival at the Federal Court; so obviously if you're at the KLC, legally that's a very specific set of experiences.

II: So I arrived there from Sydney. I had always lived in Sydney. So then I was transplanted to Broome. As soon as I got there, we had the AGM [Annual General Meeting]. It was at a pastoral station outside of Kununurra, so it was just boiling hot. So we get back to the office in Broome, which is where all the lawyers were, and I asked, 'where are the files?'. Well, they kind of didn't really have a proper filing system. No sense of when you have a conversation, write it down, make a file note, put it on a file, make sure the file has a date when it has to come back to you. Like, to try and get people to understand why that was important was kind of ...

AG: When you say people here, we're talking [about] the other lawyers?

II: Other lawyers. There were only really two other lawyers at that stage: Julie [Melbourne] and Kristy [Guest]. Julie had been at the KLC since the '80s, and the KLC had been really a community kind of political organisation.

AG: I think that is really important, because how practitioners, not just judges working on claims, but practitioners working with communities learn particular skillsets, which are unbelievably important, but they're not litigation focused.

II: Yes. Really skilled at actually working with groups—mediation skills. But litigation is very different. By the time I got there, Julie was in Kununurra, so she didn't have any time for me, because she was busy at the hearings ...

LA: With *Rubibi*⁶ and *Miriuwung Gajerrong*⁷ looming.

II: *Miriuwung Gajerrong* had just been remitted by the High Court.

AG: Wow.

6 *Rubibi Community v State of Western Australia & Ors* (Unreported, National Native Title Tribunal, 7 November 2001).

7 *Attorney-General of the Northern Territory v Ward* (Unreported, National Native Title Tribunal, 9 December 2003).

II: We were saying to Justice Merkel, ‘Please don’t put *Rubibi* into litigation. Please don’t put *Rubibi* into litigation’. But he did. Then *Bardi Jawi*⁸ somehow ...

AG: So this extraordinary. These are major matters. And there are three of you?

II: There were three of us, but we quickly brought on more people. So, hence, going to the Federal Court user group and just saying ...

LA: I remember. You made a submission. It was in 2001. We had, I remember, the first and only, I think, national user group. I had the Full Court there. It was in Adelaide.

AG: So having you two in the interview together is perfect, because how you are coming to know each other happens at the same time as the jurisdiction you’re imagining, from the ground up. You need all these different experiences. So Louise, how did you argue for the user group in the first place?

LA: I wrote a lot, because it’s still submission-based. You had to write things and we’d put things up to the Native Title Practice Committee. We needed to find a managerial approach within the Federal Court. It is important to remember that we had the docket system from 1997; the principle of a single judge in control of a case as soon as it’s filed. So the native title jurisdiction got caught up in that. I mean, I think the docket system is an extraordinary success and it works as a core principle of accountability and transparency in a court system. But you’ve also got this notion that ran counter to the complexity of native title. So there was so many things that were at odds with each other, but you’re trying to make this work. Anyway, what we identified was the risk. We could have had 50 individual judges with native title matters and neither the ‘system’—because it was by now being seen as a ‘system’ ...

II: The court couldn’t afford that.

LA: No. Well, that was part of the driver: one, just financially; two, credibility; and three, managing the workload. So we needed to get education streams running: one, how’s the *Native Title Act*⁹ to work?; and two, what are the Indigenous perspectives running under, in and around the Act. There’s sense, for the court, for the first time, that there was criticism of it. That it wasn’t loved by this jurisdiction and the stakeholders.

8 *Sampi on behalf of the Bardi and Jawi People v State of Western Australia (No. 2)* (Unreported, National Native Title Tribunal, 30 November 2005).

9 *Native Title Act 1993* (Cth).

So we had a number of pressures, and we needed to engage at every stream of government through that point, with the Wik Task Force, with the rep bodies, with ATSIC [Aboriginal and Torres Strait Islander Commission] as it was then.

AG: Were all of these in your consultative framework?

LA: Yes, then also internally supporting our judiciary to understand that we needed a different managerial structure for native title. So we improvised with the docket system and we created these judges called provisional docket judges. Those judges were the managerial judges. They were not intended to hear matters. They were to be case management judges and then we aligned very quickly the idea of specialist Registrars to support all that. That took me a long time to get up. So just in terms of the user groups, we get through to 2001, and we've now got conversations at local level. A lot of internal professional development. In fact, Noel Pearson was really excellent in that, because he gave a lot of his time and came to a number of our internal training [sessions] as it were with the judiciary and spoke in a way that crossed the divide.

AG: Well, he is a lawyer.

LA: He's an advocate. Beautiful advocacy. Compelling. So, by 2001, in Adelaide, we had the first national user group, which was to deal with the three-year disposition target, amongst other things.

AG: So, how many people?

LA: One hundred.

II: At the court, was it?

AG: There was no Federal Court building in Adelaide then.

II: But you know what, it's interesting that you talk about they 'all came in' and they—such strong engagement and leadership—and I reckon there's something about that. It's obvious in a way. Aboriginal people and their interaction with institutions and law. So it's not about coming from a place of 'I've got rights; I'm going to assert them'. It's 'how am I going to negotiate in this?'.

AG: Exactly.

II: 'How am I going to engage with this in a way that I'm going to come out with an outcome I like, for my law, not depending upon my rights?' So that coming in together is really deliberate.

LA: Very deliberate.

II: I think that was important for my clients' approach to native title. I think, in the Kimberley, they had been using the *Heritage Act*¹⁰ as their way of actually getting outcomes. Then suddenly native title comes along and it was really uncertain, but they thought, 'Well, what the hell? We'll sign on. We'll become a rep body. We'll do it, because that was another opportunity. Let's see what happens'.

AG: That's important to note: instead of saying 'Here's Australian law and Aboriginal people have been completely done over [by it]'—which removes Indigenous people from their own law story. You are reminding us that at every single point is an encounter of laws and what you, as the lawyer, bring to the meeting, how you take instruction and how the meeting is ceremonially staged at every single level is important

LA: That's right. The ceremonial staging was critical. I think. And I absolutely agree with your point, Ian, that there wasn't anything on either side accidental about this. Native title was supposed to be a mediated outcome through the tribunal, but there was such opposition from government to local Aboriginal land councils that had just created their own governance in that space. So there was heritage interaction already, and native title was this overlay. In principle, in theory, sensational, but then you go ...

KR: How do you fit it all together?

LA: Yes, from a governance perspective. So Indigenous leadership was very, very cogent, particularly for saying to the court, 'You've got it wrong in applying a disposition target'. So we shifted from there. But in shifting, the court couldn't move too far. We still needed to look at outcomes and that's something, as Ian said, both he and I were very passionate about; that you couldn't have these matters languishing for so long; and the court must look at all sides and bring that sort of perspective. So the user groups were, sort of, looking from the outside in.

II: That's huge.

LA: They were extraordinary and they shifted the court's engagement. The court really then ... Many of its jurisdictions adopted that approach.

AG: Had that happened before?

10 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

LA: No. It had only happened with the Bar Association and the Law Council of Australia. Well, these national user groups ... there were hundreds of people in that room. I mean, it was like a conference.

AG: So I'm just imagining how hard you worked.

LA: Yes. We had everyone with speaking notes and we had everyone structured and everyone knew what was going to be said and what was going to be the response. So these were very orchestrated events. The local user groups were a bit different and that's where Ian and I met. I mean, Ian and I had sort of known of each other from Inner City and just around the traps, but it was [at] the WA user group. I remember. For me, one of the things was, as an officer of the court, I was invisible a lot of the time. Whilst I was quite comfortable with that, now and then you'd sort of go, 'Oh, hang on a minute. Is this where I actually want to position myself?' because it was so much back-room wheeling and dealing to get things sorted, and I remember being in that meeting and, Ian, you went, 'Louise Anderson'. I looked around I thought, 'Who's that?'.

[Laughter]

Then you made a very compelling presentation to Justice French and you basically said, 'We have five trials on, we can't do it'.

AG: God, Ian. Five.

II: Yeah. We had *Miriuwung Gajerrong*. We had *Neowarra*.¹¹ We had *Karajarri*,¹² the remainder of *Karajarri*. We had *Rubibi*. And we had *Bardi Jawi*.

AG: That's huge. How many solicitors at the time?

II: At that stage, we probably had four.

AG: Ian.

KR: Wow.

II: We had brought in ... so we were just buying in barristers, really, to try cases and financially, what happened was that FaCSIA [Family and Community Services and Indigenous Affairs] turned around and said to KLC, 'Well, you can't manage your money. So we're putting in an administrator'. So we were just caught between what felt like a broader conversation between the court and the bureaucracy about native title

11 *Neowarra v Western Australia* [2004] FCA 1092.

12 *Nangkiriny on behalf of the Karajarri People v The State of Western Australia* (Unreported, National Native Title Tribunal, 12 February 2002).

funding models. We were just stuck in the middle, saying, 'We're trying to get out of this, but we can't get out of it and now we're closing all of these regional offices and laying off a quarter of the staff', which was awful. Yeah. As well as ...

KR: Running the cases.

II: ... just trying to keep on top of it. Yes. So you had an organisation, which had started as a community organisation, where suddenly it's like, 'Wait a minute. We're getting rid of the local officers, which are the main connection with the community and becoming a law firm'.

AG: So on that point—which, I think, is another important point about native title practice—if you're losing the local office, and, obviously, the on-the-ground work you're doing with your clients is so fraught to get consensus or agreement that fits into the form for native title litigation, that must have been hugely problematic.

II: It was, because you had all of these groups who needed to be together to form the Kimberley Land Council. But we had to say to claimants, 'We don't have any time or resources to actually do any of your future act work. We are for the next X number of years—well, really we do—yeah, stuck with this. We're going to effectively work for these five groups in the litigation and that's it'. So the others are just, like, 'Well, what am I doing here?'.

AG: So that's a huge amount of political negotiation going on.

LA: With your community.

II: Yes. And even considering who claimants might be. But that was fascinating. As someone who had kind of come from Legal Aid and working with individual clients, to go to groups and group dynamics and that was a whole level of complexity, which wasn't the same; exhausting, but so exciting.

AG: But this is the thing. To think as lawyers across the board, to have that sense that the client is not a corporation in a traditional sense, even though under the [Native Title] Act, you are a corporation in different kinds of ways, but a group who have not only different relationships to law, but different relationships to each other, to fit as a litigant for everyone would have been difficult.

KR: It's just such interesting democratic flow-on in terms of thinking originally as participatory democracy in terms of user groups to then the ways in which a Western liberal system conceives the individual as separate from and whereas this is so connected. It's very interesting.

LA: That's right.

AG: So I want to return to that national user group in 2001. So there you went, 'Louise Anderson', and then gave a compelling submission. What did you say?

II: From what I can remember, French J asked a question. I can't remember exactly what the question was. But the sense was, 'If we did this, would it make a difference?'.

LA: Which was a small thing, but we had taken forever to say we can't run native title matters all at the one time. So really it was just a prioritisation process.

II: Yes, but our priorities at KLC were just kind of keeping our heads above water and trying to hang on to some staff. So we were saying, 'Just back off for a minute and let us get through this thing'.

[Laughter]

LA: It was important in the Federal Court to always be thinking in that broader sense of 'What's the point of engagement?'. It's not just at an individual. It's not just at a claim. We needed to think more broadly about what's the role of the court. How can the court, as such a critical institution in the Western legal democratic principles, engage with legal practice and principles that actually run almost counter to the way that the court sees itself? So it's ... While the user groups were the sort of theatre, but what had gone behind it was so much engagement around decision-making, the management of knowledge within Indigenous communities. So the orders that started to come out around gender-restricted evidence, what was interesting in terms of the practice of the court, in my observations, were judges who in the main would have been making orders per case in isolation of others now needed to be quite collective in their thinking around that.

So—and I remember Justice Branson—there was quite a big engagement at one of our judicial conferences around the making of those orders around restricting gender evidence. Not only the mechanics of it, but also the conceptual thinking around it in the way that knowledge is. So they had to learn so much about the demarcation of knowledge, and that knowledge in our Western legal democratic institutions should be as open as possible. We've got to be as transparent as we can. Then we ran up against how that actually can offend the principles you're trying to recognise.

So that's in itself a very, a really critical, acknowledgement that native title was alive and law and custom was alive, if there was debate and ...

II: So while you're doing all of that internally with the court, the KLC and, I suppose, the legal team that's involved is working at it from the other side by bringing Pat Dodson into court as an Indigenous person who has that *gravitas* within a broader kind of audience to actually try to educate the court from an Indigenous perspective.

LA: That was a brilliant move, because the Pat Dodson transcript was just used and used and used.

KR: When you say his transcript of ...

II: His evidence, yeah.

LA: It was an extraordinary piece of advocacy, wasn't it? It wasn't in respect of *Karajarri*. It was in respect of the neighbouring claim, wasn't it, around ...

II: Well, he's Yawuru, so he's Rubibi. So he did get brought in to ...

LA: To speak, yes. Well, Ian you were part of orchestrating that as the lawyer. But what worked for us at the court was it spoke volumes of all of what we were trying to ask the judiciary to understand internally around a vibrant dynamic law and custom working on the ground in a native title community, if we can use those terms, and had so many rules of disclosure within Indigenous law. It was such an articulate piece to be able to say, 'This is how it works in practice'. We referred to it a lot. I mean, what I was doing during that time, after the rules, my second piece of work was putting together a bench book. We launched that at a judges' conference, I think, again in 2001; we did the front of it in, not Federal Court colours, but Indigenous and land rights colours. The bench book broke down the life of a case, which has always been my thing. Beginning to end. Each part of it: What was the nature of the orders? What secondary source material? What are the critical issues you need to think about at this juncture? What are going to be the pressures at play? We did it online and in hard copy.

AG: A manual, a training manual. So, Ian, you joined the court in 2005. What was your official role when you joined?

KR: Or can you tell us the transition of the move, what happened?

II: So I was in the Kimberley until about 2005. Decided I wanted to come back to a city.

LA: Well, just before then, Chief Justice Black's—one of his Associates, [Kristy Dunn] was at a juncture. I said, 'There's a great media role going at the Kimberley Land Council. You'd be excellent'.

II: Okay. So Kristy came to work at the KLC. She was fantastic and I said, ‘Come and work in the legal unit’. So she came to work as one of the lawyers, which was fantastic. She worked on *Rubibi* a lot. In fact, I’m sure she would have looked at various papers and things that I wanted to talk to at user groups, so she was a really good insight into the other side in terms of what’s happening at the court. Anyway, Justice North was up in the Kimberley. He must have been doing the *Karajarri* Part A determination maybe and, through Kristy Dunn, we ended up having dinner. Just felt like a real connection there. But he had been so—I don’t know what he was like before *Karajarri*—but he had been so, kind of, open to the experience ...

LA: Yes, brilliant.

II: ... to the extent where the claimants used to call him Mudjanunja or something, like Boss North. Like, ‘he’s our judge’. They felt such a level of connection, such a respect for someone who was going to listen to them, who was going to hear what they had to say, they ... But they also recognised that he was a law boss as well, so ...

AG: So the procedure—so I’m just thinking back to the institutional—we are sort of slowly moving to the actual nub of the archive question in doing this, because obviously Ian took particular responsibility for that question around that time. But before we do so, I want to ask about how institutions become transformed, a theme of this conversation. Obviously, the Federal Court, on one level, thinks of itself as always being responsive and transforming itself. But from my observation, and keeping in mind protocols in and outside the court, it would seem your influence and role, both of you, in speaking with judges in chambers, or at user groups, helped to change jurisprudence, not just rules. I mean, it’s under-sung. So it is important to acknowledge it here. But from the outside perspective looking in, the key things are not just transforming the culture of the court, how you think with outsiders, who comes to court and what happens, but writing the rules—the on-country hearing question.

LA: So the on-country hearings ... I mean, whilst we inherited some of that from the land rights regime and the Land Commissioner, the majority of our judges were very opposed to it. They were opposed to it because land rights was an administrative procedure ...

AG: Absolutely.

LA: ... with a judge exercising quite a different power and authority than the Federal Court. The Federal Court had never contemplated operating outside of its own premises within states and territories. We drove that. There were many conversations. It was advocacy coming in predominately

from either our internal professional development opportunities or externally through land councils and others. So, for me, there were three things running. One was I knew instinctively, I suppose, that once you get judges on country, you're going to get a whole other quality of decision-making, because there has to be, at some point, a sense of the meeting of those ... an intersection of those laws and that needed to be palpable and experienced on that very sensory level, not just through reading, so there's that. The second thing that we sort of were able to argue strongly was oral tradition versus written submissions. You've already got a ... you're going to deliver a significant disadvantage to people if you're trying to determine whether their law and custom is sufficiently robust or intact, and at a certain point you were requiring all to be done, mediated, through advocates on a written submission basis. So that was good because judges could understand that there was a fairness principle running in it, and there was a quality of the evidence. You were going to get your best evidence by being on country. So we had those messages coming in from all places. The other piece of it was I had to negotiate, and we did very well with this, was to get the funding for it.

[Laughter]

II: Have you seen the manual? It's so comprehensive in terms of every possible risk including shark bite, mosquitos, flat tyres ... Each region had its own set of risks.

LA: I mean, when you look at risk assessment, we had to do everything. We had to have protocols. My brother was in CASA [Civil Aviation Safety Authority] at the time, so he was helpful on twin-engine planes and the nature of the plane and what time we would invest into pilots! I had this scarce precious resource: a judge. Then you also had the cultural manual. But it was to give judges comfort that we were not doing this without very significant consideration of what we were asking them to do. So you had the bench book running, you had the rules, you had the OH&S [occupational health and safety] manual and our checklists and then the kind of cultural protocols. So basically, we did research. Some of it we got from the tribunal but, in the main, we generated things ourselves, around cultural norms, outside of native title, and how it was going to be put in the case—how to interact, what to expect. So there'd be things like, 'What was the temperature like?', 'What are things?', 'What's the colonial history?', 'What are you ... ?' 'How do you want to address things?'; that ...

AG: But it worked.

LA: Yes. So they were read. Yes. Then we had to [get] a portable coat of arms, you know?

II: That's right.

LA: [Laughs]. We don't go anywhere without a coat of arms. I had no idea. I'm, like, 'What? I have to have a coat of arms?'.

AG: Because you're a court. And when you speak to Indigenous people on country ...

LA: Yes.

AG: ... you're coming here as law, you've got to be ...

LA: Be, I know, law. You've got to come robed. It was all of that and it was ...

II: ... getting permission to go on pastoral stations ...

LA: That was huge. God, that took me a long time to negotiate.

AG: If we could turn, Ian, to your role. In 2006, you wrote a really significant briefing paper on access to native title records.

II: It came about because the ... it was for a rep body conference. It was because, from memory, Louise said, 'Can you address this?'. It was actually ... I thought it was Indigenous rep bodies. Rep bodies being concerned that their connection reports, their expert reports, were going to be made available to absolutely anyone who asked for them. That's how it came about.

LA: It did come about a bit before. It was actually native title lawyer Andrew Chalk and someone else saying, 'You've got this incredible body of material. We want it to be available. And we want it to be available for best practice. But we know that there's a whole lot of ...'.

AG: ... problems ...

LA: That ran parallel with some consideration we'd had internally, because dealing with some of the anthropologists and the rep bodies and dealing with Ron [Levy] actually in the Northern Land Council. Ron was really instrumental in that.

II: So that's how that came about; so it was actually asking, 'Well, let's just start at the beginning and look at what is actually accessible and not accessible, and what happens to records once they're in the court and all the rest of it'; 'How do we deal with archives?', *et cetera*.

AG: Because the Federal Court hadn't really been worried about it in those terms before you undertook the briefing paper, from our investigations.

KR: In the sense of when you were coming in to the court was there anyone that you thought, 'Oh, I'll go and speak to so-and-so' because, of course, a court with records would have to have think about records.

II: Within the court?

KR: Yes.

II: No. It was talking to you, Louise, I think. That was it.

LA: And I was talking to Justice Mansfield and that was it. [Laughs].

KR: I mean, this is what our project is about in the sense of how much had the court thought about managing its own records before.

LA: No, it hadn't. Hardly at all. It was native title that really pushed that.

AG: That paper was 10 years ago now, but the actual movement of the native title materials between institutions goes on. Obviously the politics of what repatriation looks like, and the replication of things that are evidence or submissions or not, which you covered in the paper, goes on. That's not over. But the Record Disposal Authority that sends native title matters to the National Archives when every single other thing at the Federal Court is still exempt—can you offer any comment on how that happened?

LA: So there were a few things pressing. I mean, one was just the physical ... the space that we needed. So we had the Miriuwung Gajerrong Room in Perth. We had the Yorta Yorta room in Melbourne, you know? We had the ...

II: ... sending things offsite, and then the places offsite saying, 'We're not taking them' and they're wanting to send it back and ...

LA: Yes. So we had a real pressure around just the cost of storage. Then we had the cultural kind of questions around what's our responsibility with this material? Are there ways that we could make it available to others to both benefit from as a researcher, but also the nature of what we've got, particularly in those expert reports. I mean, they were ...

AG: Extraordinary.

LA: ... extraordinary. You don't want them lost in the bottom of an archive box in the basement of a Federal Court—not that we had basements—but the concept of being lost. Yes. So we started some discussion. In fact, we had a couple of archivists, but none of them had engaged with this. So that work came with Grace [Koch] and Toni [Bauman] from AIATIS

[Australian Institute of Aboriginal and Torres Strait Islander Studies]. Toni and I worked very closely on how we could ... First of all, it was AIATIS who wanted to be the holders of it and then there was just some concern about that, because from our judges, well, AIATIS is for Aboriginal and Torres Strait Islanders. Whilst that might be appropriate, it doesn't send the message that if these documents are going to be available ...

KR: Information.

LA: Yes. Exactly. So that's when we started the discussion with the National Archives and then there was a lot of concern around just the protocols and things—I mean, I don't know how many papers I had to write on Judge's Orders in Perpetuity, and what was the enforcement principle, and if a judge died and what the protocol archives would have? It sounds simple.

KR: All that work that you did. It's important too.

II: Whereas I came at it from the other angle, which was having done *Rubibi* and been in the KLC. So there was a big debate within the KLC about, well, what happens to all of our knowledge and our material? There was a library that was in Derby. Was everyone going to send all their stuff to Derby for it to be in library? Was that going to last? Come to the court ...

LA: Because you were closing Derby office, I remember.

II: ... by this stage the Yawuru had won *Rubibi*, so they wanted to be independent of the KLC. They were saying, 'Well, we've asked the KLC for the the copies of our stuff. They won't give it to us. Can we get it from the court?'. So then you had ...

LA: ... Indigenous people coming here to access their own materials.

KR: That is so interesting, isn't it, in terms of ownership?

II: And also that thing about, you know ... but that Indigenous people actually trying to mine the archive for the purposes of their cases and coming up with nothing or pretty well nothing, or not much, or really having to see and read in a lot to the archive and the silences within the archive to say, 'Wow, there's something so rich here that actually represents Indigenous people speaking the way that they want to talk to an extent, to the way that they want to talk and its importance'.

AG: The court record does something that other records do not?

II: Yeah, absolutely. Yeah.

KR: Were there key people at the National Archives at the time who you ...

LA: The archivist. Grace and Toni would know from AIATIS.

II: Well, Grace kept on saying, 'Have you done anything more about that archive policy and the issue?'. You'd be, like, 'Oh, God. Got to get back onto that and trying to talk'. A lot of it was actually trying to get the judges to actually agree, well, what are we going to keep? If we're going to keep it, there's no point in keeping it unless we've got an access arrangement. What are our rules around access going to be?

AG: So now there are kind of different historiographical conventions going on about those discussions; what is part B of the record ...

KR: I think, probably, it takes time because there is an interpretive element that the judges then feel they're responsible for. What is the record for the purposes of judicial review as opposed to archival practices?

AG: That's the part A – part B demarcation.¹³

LA: Yes, it is.

KR: And part B revolves around what is the significance to the nation?

II: Yeah. So there's one thing about the record that determines let's keep it, which is great. It's kept, but then, it's then what? The management of it, accessibility arrangements ... The only other thing that I just wanted to say really quickly, even whilst we're grappling the actual record: there's a whole other series of documents and materials that courts have, which is far harder to work out.

AG: The file.

II: Yes.

AG: Exactly, because the record is not the file.

II: Or if we choose to save in native title matters: the correspondence; those digital diaries; the tapes of the transcript; so people singing; people's actual voices; those gifts that the court gets given—which, to me, is like, you know, well, what is the significance of those gifts? How do we understand them? Should we have them as a collection? All of those things. But they are not part of the physical ...

13 See Warwick Soden and Lyn Nasir, interview by Kim Rubenstein and Ann Genovese; Chapter 7 in this volume.

AG: ... file. So if you're talking about what should happen with a file. You've got a set of kind of understood procedures and practices and processes around trying to decide what should happen with those, and how to access those things, but you've got these other things, objects, songs that, in some ways, that should free the courts up, as in how to curate them. The point is now I think, because of the negotiations that you've all done, they are safe, right? They're with the National Archives? Or the court? In any event, native title remains unlike other important matters, in which the materials are definitely not 'safe'. So ...

LA: Yeah, but I think that it's absolutely important to keep that alive really and we should probably have some conversations reminding people, and I think ... that it is so important. I mean, generationally you need to move on and there needs to be an uplift of other capability. But going back, I suppose, to where I started, at the anniversary celebration, I just felt like the court was at risk of forgetting itself a bit. The statements at a senior level are still about passion and the importance. I mean, CJ Allsop, in the 40-year anniversary, was talking again about the incredible importance of the native title ... the intersection between ... this is about the development of a nation.

II: Well, he's an historian.

AG: Exactly.

LA: But to me, what that said was, well, is the Federal Court now seeing itself as an administrative vehicle no more in a way? It seems that it has fallen back from how critical courts are to do this. Now, whilst that might be relevant and appropriate now, in those early days, it wasn't. We were much more instrumental in making and breaking the system. I'm just not sure if all of those questions are going to remain alive. For example, the 2006 to 2007 amendments to the *Native Title Act*, the 2009 amendments and now, of course, the most current coming out of the Noongar claim issues, and we were instrumental in driving or reacting to or trying to inform those amendments. There's so much documentation around all of that. Some of it, whether it's ever appropriate to see the light of day ... That is a whole other administrative record sitting in the Federal Court that's now ...

KR: Yeah. It's, well, this is the active citizenship and the legislative citizenship experience.

LA: Yeah, exactly. Yes.

As discussed in the introduction to this collection, and to this chapter, the various issues raised in the interview are of continuing relevance to the court and to Indigenous and non-Indigenous scholars and communities. As Louise Anderson notes in the extract, native title represented the recognition of an intersection of two laws by Anglo-Australian law, and it was after the arrival of the native title jurisdiction in 1994 that the Federal Court addressed its public role and responsibilities in new ways. For the purposes of the Court as Archive Project, this included the fact that it became more broadly involved in the content and management of its records and stories, which we think it is important to emphasise.

This interview, as noted, is the first of its kind in Australia to record the work of Native Title Registrars in the early years of a new jurisdiction. We hope it forms the basis for our further work on the encounters between laws and people, and how they changed our institutions, in the years after *Mabo*.

This text is taken from *The Court as Archive*, edited by Ann Genovese,
Trish Luker and Kim Rubenstein, published 2019 by ANU Press,
The Australian National University, Canberra, Australia.

doi.org/10.22459/CA.2019.08