Introduction
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Until the late 20th century, ‘an archive’ generally meant a repository for documents, as well as the generic name for the wide range of documents the repository might hold. An archive could be visited, and then also searched, to discover past actions or lives that had meaning for the present. While historians and historiographers have long understood the contests that archives contain, and represent, the very idea of ‘the archive’ has, over the last 40 years, become the subject and object of widening, and intensified, consideration. This consideration has been intellectual (from scholars in a wide range of disciplines) and public (from communities and individuals whose stories are held captive, or sometimes hidden or excluded from official archives), as well as institutional. It has involved scrutiny and critique of official archives’ limitations and practices, as well as symbolic, affective and theoretical expansion and heightened expectation of what ‘the archive’ is, or should be. The very language of ‘the archive’ now carries freight as administrative practice, normative value, metaphor, description and aspiration in different ways than it did in the 20th century (or even 10 years ago, when we began our collaboration).

The Court as Archive offers a unique contribution to these reinvigorated—and sometimes new—conversations about what an archive might be, what it can do as a consequence and to whom it bears custodial responsibilities. In particular, this collection addresses what it means for contemporary Australian superior courts of record not only to have constitutional and procedural duties to documents as a matter of law, but also to acknowledge obligations to care for those materials in a way that understands their public meaning and public value for the Australian people, in the past, in the present and for the future.
The Court as Archive Project

This collection began its life in a prosaic manner: from a sense of practical frustration—unique perhaps to scholars who work with documents generated and located in courts—with the difficulties that occur in attempting to access these rich materials. These difficulties, although neither uniform across jurisdictions or academic pursuits, nor new, are strikingly similar when scholars step back from their research to share with each other experiences of restriction and inaccessibility of court materials, and the implications of these experiences for their research. Indeed, the grounding for this book, and the subsequent project collaboration, had its genesis in such a conversation in 2008 at a workshop hosted by the Centre for International and Public Law (CIPL) at The Australian National University (ANU). Kim Rubenstein, then director of CIPL, invited scholars from history and law to engage with the book Rights and Redemption: History, Law, and Indigenous People.1 This book analysed and examined the use and production of historical expert evidence in Australian litigation involving Indigenous parties in the late 1990s and early 2000s. The Rights and Redemption Project involved direct engagement with the Federal Court of Australia, examining (under court order) the historical materials adduced in those matters at a time when there was a genuine sharpness to public debate surrounding the status of Indigenous litigants’ claims against the past and present Australian state.

The difficulties of access to court material emerged as a common theme in the CIPL workshop. Each of the presenters had encountered roadblocks in scholarly research due to a lack of access to key material held by the court. For example, Trish Luker, who had completed a PhD on the Stolen Generations case Cubillo v The Commonwealth,2 and Kim Rubenstein, in seeking the transcript of the David Hicks Federal Court matter concerning questions of citizenship.3 Whether it be transcripts of evidence, submissions of parties or a range of other material that could help enlighten our respective research, we had all been interested to draw insights from the court experience around the ways that individual citizens had challenged the exercise of state power within the judicial context and what that may mean in a range of scholarly interventions.

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3 Hicks v Ruddock (2007) 156 FCR 574.
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At the CIPL workshop, we also discussed how the Federal Court recognised that it was at a formative moment in its own institutional history and practice regarding its responsibilities as a court and, potentially, as an archive. This recognition is encapsulated by former Native Title Registrars of the court, Louise Anderson and Ian Irving, in an interview we conducted for our research, which appears as Chapter 8 in this book. In particular, the arrival of native title litigation and the legal necessity for Indigenous peoples to tender enormous amounts of evidentiary proof of ‘continuity’ to country resulted in exponential funding and growth of cognate disciplinary research about Indigenous experience on country. It also led to the production and preservation of Indigenous parties’ law, including testimonial evidence recorded in on country hearings, artworks and other material objects tendered as evidence. These materials, although fraught, given they were produced for a legal proceeding, were nevertheless understood by the court (as well as Indigenous parties and scholars) as carrying a weight and purpose for which the court assumed a significant responsibility. In that context, the court became acutely aware of its ill-defined function as an archival repository. However, it also realised that coming to terms with those native title holdings made visible its role as custodian of law stories not only confined to that jurisdiction. It reminded the court, and those scholars meeting at the CIPL workshop, about the nature, status, access, preservation and location of all of the materials courts hold that are of value to the Australian citizenry and public more broadly.

So began a series of regular meetings, over the course of five years, which led ultimately to the Australian Research Council (ARC) Discovery grant that took that research interest seriously. In 2013, we began our investigation on general questions about Chapter III courts as archives, centred on the paradigmatic example of the Federal Court of Australia. One of our purposes has been very practical: to think alongside the Federal Court about how, as an institution of law and of the state, it might also function

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4 The Federal Court of Australia provides an ideal site for investigation of the contested issues associated with the civic role of courts in administering legal archival records of national significance. Established as an innovative response at a key moment in the development of Australian administrative law (Commonwealth, *Commonwealth Administrative Review Committee Report 1971*, Parl Paper No 144 (1971) (‘Kerr Report’)), the court has a unique mandate and jurisdictional scope, specifically in adjudicating disputes between citizens and the state. It is a court established under Chapter III of the *Australian Constitution* and by statute, thereby illuminating core issues concerning the judicial power of the Commonwealth. As a superior court of record (SCOR), the Federal Court makes determinations that are binding and conclusive, unless or until set aside on appeal. Further, it has an expanding jurisdiction and legislative responsibility.
as an archival repository. That question goes beyond, and potentially complicates, its status as a court of record (a legal status we explain in the following section). To address the question methodologically, we deliberately chose to examine the Federal Court’s archive of administrative practices, rather than an exploration of the rich litigation materials the court holds. This approach holds firmly to Australian public law principles and, at the same time, relates these to the broad innovations occurring in research institutionally situated and focused on and in ‘the archive’. We describe our method, and how it exists in conversation with current fields of related inquiry, in more detail below; however, note here that this approach has enabled us as a research team to examine, through a range of diverse records and sources, how the Federal Court has conceived its own citizenship and its own place and role in shaping a modern democratic nation.

Alongside close empirical and analytical work of our own, the Court as Archive Project was also envisaged as a way to extend a key insight of our earlier meeting: the necessity of collaboration, cross-disciplinary and cross-institutional dialogue when addressing difficult questions of law and public meaning. The problems that come into view once a court of record is conceived of, and engaged with, as an archive are complex. They do not lend themselves to analysis situated solely within universities, government agencies, courts, or diverse public communities—nor are they limited to Australia. We interviewed court officials facing similar problems, in similar jurisdictions, with similar histories. For example, in ‘Sentencing Acts: Appraisal of Court Records in Canada and Australia’, Trish Luker includes Canadian and Australian jurisdictional approaches to the sentencing of court records and in ‘Archiving Revolution: Historical Records Management in the Massachusetts Courts’, our research assistant, Andrew Henderson, highlights the values of international comparison.

Most significantly for the genesis of this book, our project design was predicated on convening a symposium, which was again held at CIPL, in 2016. We invited collaborators and interlocutors who had diverse official and scholarly duties to archives and their use to consider with us how to recognise the implications of a court of record’s responsibilities to the materials it holds and the communities it serves. A core outcome of the symposium was clarification of a key point: this work requires close networked thinking to engage well with practical questions of custodianship, access, legal and constitutional requirements, and preservation and future use of court materials. As we elaborate below, this book is a direct reflection of the symposium.
The Court as Archive Project: Methods in Scholarly Conversation

Before we introduce the chapters in this book, it is important to briefly set the scholarly scene. Our grounding objectives in the Court as Archive Project have been to interpret and clarify the institutional purpose and civic responsibilities of courts through their archival role; to consider explicitly, and for the first time in Australia, the unique role of the Federal Court as a site of production of significant national archives since its establishment in 1976, and to develop principles through empirical research to inform the administration of materials held by Australian superior courts of record as responsive civic institutions in 21st-century Australia. In designing a method to join and undertake these objectives, it was important to situate our objectives and institutional approach in relation to theoretical and empirical scholarship around archives and public law jurisprudence on superior courts.

The Archival Turn in Law

In the Court as Archive Project, we are joining the contemporary scholarly interest in, and interventions into, how archives are perceived and used. The shared challenge in this diverse work is to make visible and scrutinise the 19th-century presumption that state archives exist to sustain and promulgate the nation and, in the process, to underwrite a particular account of history. This redirection in archival thinking includes paying attention to materiality and material culture, including documentary theory and practices of documentation. In settler colonial contexts like Australia, the scrutiny and rethinking of archives and documentation


6 See, for example, Derrida, above n 5; Steedman, above n 5; Blouin Jr and Rosenberg, above n 5; Stoler, above n 5; and Chapter 4, this volume.

is also a matter of justice and politics: it is understood by Indigenous scholars, communities and institutions as an engagement in political relationships that have been driven by Indigenous peoples as an assertion of their sovereignty and a performance of their citizenship.8

In the time since we began our research, interest in archives and archival theory and its relationship with law and jurisprudence has grown.9 In a critical legal context, it has been described as a ‘counter-archival’ practice, taking up a long-established tradition in historiography and directing it to law: reading legal texts against the grain; revealing lacunae, silences and omissions in the archive; or exposing layers of meaning in archival documents.10 Alternatively, a close reading of transcripts of trials and court records may identify bias, discrimination or deference to flawed knowledge.11 Other projects are creating and re-creating archives of law and of legal lives. This includes oral history projects enlarging the archive on women lawyers reflecting on their lives, their own sense of active citizenship and their contributions to the state.12 In Australia, the National Library of Australia now houses over 50 full life oral histories of ‘trailblazing women lawyers’ who have practised in Australia and internationally,13 with parallel projects in other countries.14 It also includes rewriting conspicuous and established legal archives. In addition, feminist judgments projects have emerged in a number of common law jurisdictions to produce imagined judicial decisions that serve to correct the archive


10 Motha and van Rijswijk, above n 9; Trish Luker, ‘Animating the Archive: Artefacts of law’, cited in Motha and van Rijswijk, above n 9.


13 See the full list at <http://www.womenaustralia.info/lawyers/browse_oralhistories.html>.

14 In the United States of America, the American Bar Association houses a Trailblazing Women Lawyers oral history collection at <www.americanbar.org/groups/senior_lawyers/women_trailblazers_project_listing/> and in Canada there are women lawyers oral histories in <https://www.osgoodesociety.ca/oral-history/>.
of common law jurisprudence. Rather than engaging a critical outsider position, participants in these projects take on a performative ‘drag’ that serves to parody the judicial subject, while simultaneously correcting the archive of judicial decisions.

At the same time, legal historians are conducting projects where they interrogate the operation of legal authority and legal procedure by rethinking, recovering and reanimating a range of court archives. Others, working as historians of jurisprudence, are attending to the writing of jurisprudence itself in official and unofficial forms, styles and genres to question the conduct of lawful relationships and the expectations of what an archive of and for law might look like, and for whom. Further, and building on long-held traditions of empirical scholarship in court and public administration and legal ethnography, court records have become sites for analysis in different ways, with attention to documentary meaning-making practices, as well as public law jurisprudence.

As legal scholars with interests and training in other disciplines, we have been actively participating in these developments. However, it was clear to us that further work was necessary to consider the questions of courts’ duties to the people they serve, through the question of how their records are preserved, curated or accessed. In particular, we recognised that it was necessary to connect the innovations in thinking about how scholars might address ‘an archive’ with long-standing legal principles about a superior court’s role and function. For us, as a research team, it seemed clear that

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by returning to core questions of public law scholarship—namely, who is the court for, as much as what it must do—we would be able to begin to think about the court as an institution that records contemporary Australian life for the future.

Public Law and Courts of Record

Our questions circulated around superior courts of record because they have an institutional mandate to maintain a conclusive ‘testimony of all that has taken place’.20 As a matter of common and constitutional law, courts of record can unmake and redecide decisions that are otherwise determinative, and the ‘record’ of their own proceedings is limited by, and subject to, legal requirements.21 Superior courts of record are guided by the civil law principle of ‘open court’, which encourages the public to witness the court’s functions to promote the rule of law so that justice can be seen to be done. Federal superior courts of record are also subject to other constitutional imperatives, such as the principle of separation of powers. However, they must also respond to competing legal imperatives that arise because of the diverse accrued national jurisdictions, notably the right of individual litigants to privacy; the need to respect Indigenous control of cultural knowledge; the maintenance of legal professional privilege; and the protection of copyright. These matters of jurisdiction carry deeper public law issues underlying the institutional role of federal superior courts of record that are civic, as well as constitutional. When resolving disputes between parties (whether between individual citizens or between a citizen and the state), a federal superior court of record inevitably has an impact beyond those parties, through the democratic values it espouses and pronounces, the methods of administrative and judicial decision-making undertaken, as well as its engagement as one arm of government in the overall constitutional make-up of the state. The documents produced by and for federal superior courts of record as a result of litigation, which must be recorded, clearly have significance beyond the resolution of disputes. They are also rich records of public interest and importance about the relationship between the individual

and the state that are not readily accessible elsewhere, as the ‘archival turn’ across scholarship in legal history and theory has demonstrated. However, through our experience as researchers, we were also aware that there is no comprehensive, national approach or principled framework to administer or recognise how the preservation of a court’s documents and records may also act as an archive of Australian jurisprudence, of Australian citizenship and of Australian civic life.\textsuperscript{22}

It was these issues and contradictions that we had to place centrally, rather than to the side, while considering appropriate methods for the project. For example, while the principle of open court is well established in Australia, there is no common law right of access to court records.\textsuperscript{23} Significantly, court records are also exempt from the operation of the \textit{Archives Act 1983} (Cth) (‘Archives Act’), despite a recommendation to the contrary.\textsuperscript{24} The complex, inconsistent and restrictive regime governing public access to court records across Australian jurisdictions has attracted concern, and different kinds of response, from public lawyers and scholars.

\textsuperscript{22} Despite urgent and repeated calls for action (see, for example, Bellis, above n 19; Ernst Willheim, ‘Are Our Courts Truly Open?’ (2002) 13(3) \textit{Public Law Review} 191; Ernst Willheim, ‘Australian legal procedures and the protection of secret Aboriginal spiritual beliefs: a fundamental conflict’ in Peter Cane, Carolyn Evans, and Zoe Robinson (eds), \textit{Law and Religion in Theoretical and Historical Context} (Cambridge University Press, 2008), doi.org/10.1017/CBO9780511493843.010; Justine Twomey, ‘Legal and practical considerations in managing access to materials held by NTRBs and Land Councils’ (Speech delivered at the National Native Title Conference 2007, Cairns, 6–8 June 2007) <http://ntru.aiatsis.gov.au/collections/pdfs/ALATSIS%20Native%20Title%20Conference%20Materials%20Access%20Policy%20%20Twomey.pdf>, no comprehensive, national approach or principled framework for administering access to court records exists. Preliminary work towards a state access regime in Victoria was initiated in 2005 (County Court of Victoria, \textit{Discussion Paper: Access to Court Records} (2005)), without large impact on public access rights. In NSW, the \textit{Court Information Act 2010} (NSW) was passed in July 2010, but is still not in force, with acknowledgement by the relevant standing committee that the root of the delay lies in the unresolved ‘contradiction in the act between open information and privacy’ (Richard Coleman, quoted in Nicola Shaver, ‘How privacy hobbles push for open justice’, \textit{The Australian} (online) 3 June 2011 <https://www.theaustralian.com.au/business/legal-affairs/how-privacy-hobbles-push-for-open-justice/news-story/fe622d88862f6cd810f60512a8ff9401sv=7cb3819c07653ff99a97c9ca992109d>). At the same time, no specific consideration has been given to the structural or practical implications of the mounting judicial records of Indigenous knowledge on file. As Willheim points out, Australian law has ‘failed to resolve a fundamental conflict between, on the one hand basic common law values including openness and transparency in public administration … and on the other hand, Aboriginal religious value, in particular, the secret nature of much Aboriginal religious belief’. This research will assist in developing that principled framework for federal SCORs and will also be of value to broad conceptual and practical application in other jurisdictions.

\textsuperscript{23} \textit{Public Service Board (NSW) v Osmond} (1986) 159 CLR 656.

\textsuperscript{24} A recent discussion of the development of the \textit{Archives Act} and which documents would be exempt can be seen in the judgment of Griffith J in \textit{Hocking v Director-General of National Archives of Australia} [2018] FCA 340, [29]–[36] in the context of assessing access to certain documents of the office of the Governor-General.
of court administration,25 the judiciary,26 government27 and the media.28 In general, these responses argue that without the ability to meaningfully witness the judicial process, the operation of open justice—famously called the ‘hallmark of the common law system’29—is significantly curtailed, and the institutional legitimacy30 and public confidence31 held in these superior courts is compromised. The absence of public access to the records of ‘public interest claims’ under adjudication32 also has detrimental consequences for understanding the court’s role in promoting the rule of law and judicial process, as well as societal norms and behavioural standards.

There are also procedural problems, perhaps less publicly debated, that complicate these questions. Court procedures designed to enhance the efficiency of judicial administration now commonly require evidence in chief by way of affidavit. Written submissions are filed without oral explanation and pleadings are not ordinarily read in full.33 Even meaningful public access to oral evidence is frequently now sought via the written record as few people now attend judicial proceedings,34 and the severe truncation of spoken evidence has made ‘the adjudicative process less and less comprehensible to the person in the public gallery’.35 Similarly, substantive media and academic access has been curtailed, further limiting public access to information about courts’ daily business. Therefore, the complexity for courts to uphold their constitutional duties and, at the same time, recognise the function the records play for the public (historical or otherwise) speaks to profound issues underpinning civics and citizenship

25 Bellis, above n 19; Willheim (2002), above n 22; Sharon Rodrick, ‘Open Justice, the Media and Avenues of Access to Documents on the Court Record’ [2006] University of New South Wales Law Journal 40.
32 See, for example, Habib v Commonwealth of Australia (No 2) (2009) 175 FCR 350.
33 Willheim (2002), above n 22.
34 Rodrick, above n 25, 90.
35 McCabe [2002] VSC 150, [19].
in our own time. As civil law scholar Hazel Genn has explained, ‘for civil justice to perform its public role—to cast its shadow—adjudication and public promulgation of decisions are critical’.36

An Institutional, Interdisciplinary Method

In addressing these problems, our project placed at the centre of its inquiry the unique institutional role of the Federal Court of Australia and how it is distinct from other bodies that produce and curate comparable records of rich national significance. We were, in short, interested in the Federal Court as a legal institution: how it developed (as a matter of jurisprudence and history) and how it now operates and exists in relationship not only with the people it serves, but also with other institutions that share responsibilities for civic organisation and experience in Australia, and over time. This institutional approach had a unique starting point. As an interdisciplinary team, with expertise in citizenship and public law doctrine and jurisprudence (Kim Rubenstein); empirical court-based and historical archival research (Ann Genovese); and evidence law and documentary theory (Trish Luker), it seemed to us that to consider the role and duties of ‘a court as archive’ necessitated scrutiny of the Federal Court’s own administrative practices, rather than the rich seam of litigation materials the court also holds that are more usually the subject of scholarly and public inquiry.

Our central contention has been that through viewing the operational decisions taken by the court, over time, it is possible to learn a great deal more about its past, present and future priorities. These priorities pertain to file management and record-keeping practices, as well as how the court has imagined itself and its relationship to the public, including how it grapples with the challenges of what ‘an archive’ currently signifies in a settler colony like Australia.

To do this, we examined internal operational documents of the court housed at its registries, and documents about the court’s relationship with other branches of government and agencies housed at the National Archives of Australia (NAA). We did this to understand, and be able to tell a story about, how administrative decisions have been taken over time about what materials should be retained, how they are stored, how they

are organised and classified, and whether, how and by whom they can or should now be made accessible to broader society. We report on some of our findings in our respective chapters in this collection.

In undertaking this empirical archival work, there was a puzzle to piece together about which internal (and litigation) records are not currently available, to ask where they are held and why, and whether they have been subject to archival practices. We were reminded why scholars need more than official records to analyse and tell stories about their experience of institutions. In the case of the Federal Court of Australia, there are very few biographies, memoirs, public opinion pieces, scholarly articles or contemporary histories yet written that address the court as a national institution (in the ways that our project seeks to do) that we could draw on and that might help us contextualise these documentary traces and omissions. In addition, although there are farewell speeches by judges in open access, and also interviews undertaken with judges on the occasion of their retirement, for the most part, these form part of the court's own internal archive and are not available for public disclosure. Further, and surprisingly for an institution that is only 40 years old, there are no records, beyond the files, of how court administrators or officers understood and experienced their duties, and perceived the court's responsibilities: whether to the immediate question of our research (record management) or to what the records signified and carried, and for whom. What we noticed in undertaking our own archival research was an absence of oral histories about the Federal Court as an institution that mediates the relations between Australian people and their law. This has meant that to undertake our project aims adequately, we had to create sources of our own. We undertook oral histories with court officers rather than judges for the simple reason that these lives lived with law are generally underrepresented in scholarly conceptualisations of court histories, or in any archive broadly conceived. In conducting these interviews, we perceived


38 These interviews are unique in an Australian setting. While county and state courts in the United States appear to publish recorded interviews with court officers on a range of issues, it is not a practice common to Australian courts. The Federal Court has started to undertake oral histories with some of its retiring judges; these are on file with the court, but are not open to the public at this time. Some of the women who have been judges in the Federal Court of Australia have been interviewed in another ARC project for the National Library of Australia's oral history collection. See Kim Rubenstein, Australian Women Lawyers as Active Citizens (November 2016) <http://www.womensaustralia.info/lawyers>.
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them clearly as oral histories, where our interview subjects’ life experience and professional experience could be considered in relationship to each other and, once recorded, could become a ‘significant part of our collective public memory’. The interviews we conducted have been included in this collection.

The Court as Archive Collection

In February 2016, we convened the Court as Archive Symposium to provide an opportunity to report on our research findings up to that point and to engage in roundtable discussions with scholars, archivists, judges and administrators of courts and tribunals who share intellectual and administrative concerns in their own work and practices. Participants were invited because of their important contributions to the field. These included senior members of the judiciary, court and public administration from Australia and Canada: the Hon Michael Black AC QC, former Chief Justice of the Federal Court of Australia; Warwick Soden OAM, Principal Registrar and Chief Executive Officer, Federal Court of Australia; Ian Irving, then Native Title Registrar, Federal Court of Australia; Barbara Kincaid, General Counsel, Supreme Court of Canada; and Ernst Willheim, Visiting Fellow at ANU, who had headed several policy and professional divisions in the Australian Attorney-General’s Department. The concerns and perspectives of key archival and research institutions were addressed by Anne Lyons, Assistant Director-General, NAA; Dr Pamela McGrath, then Research Director, National Native Title Tribunal; Grace Koch, previous Director of Research, Australian Institute of Aboriginal and Torres Strait Islander Studies; and Mr Michael Piggott, a former Senior Archivist at the NAA with extensive experience in major archives and library institutions. Scholarly contributors joined us from the fields of law, jurisprudence, archival theory and history, and are represented by their chapters in this collection and discussed in more detail below. On the day, we were also joined by Katherine Biber (Law, University of Technology Sydney), Emma Cunliffe (Law, University of

40 The Court as Archive Symposium, ANU College of Law, The Australian National University, 17 February 2016.
British Columbia) and Shaun McVeigh (Melbourne Law School), whose presentations were not developed for this collection, but whose work has been a valuable input to our thinking.41

The symposium was closely convened to provide productive engagement with the themes of the Court as Archive Project. We asked participants to consider specific questions in relation to three key areas around which the symposium was structured, as a way of focusing attention on the particular and unique issues relevant to our research. These themes were intended to draw together consideration of diverse institutional, legal and scholarly responsibilities around how courts and their records can also be understood as archives of national, and transnational, significance. The collection draws its arrangement from these themes, discussed below.

Public Law and Citizenship

The collection opens with the theme of public law and citizenship, linking court records to public law principles. This theme raises questions about the role of Chapter III courts and whether this can be extended to deepen our understanding of their function as guardians and producers of the civic experience, as well as the expectations of the Australian litigants who come before them. In ‘Court Records, Archives and Citizenship’, Kim Rubenstein (with Andrew Henderson) illustrates the importance of the Federal Court’s records as an archival resource by exploring its role within a broader context where it contributes to understandings of citizenship. As a superior court of record, the Federal Court performs a fundamentally important role within Australia’s democratic system. It has served as a site for the disputation, negotiation and resolution of issues important to Australian society. It does so in the context of a constitutional system affirming the principle of the separation of powers and the rule of law as a means of preserving and enforcing the rights of individuals and navigating the boundaries of the powers of the state. In that context, its records, gathered both through the internal workings of the court and through the cases that come before it, contain a narrative shaping our contemporary understanding of the rights of the individual and the role of the state. It is this relationship that is central to a conception of Australian citizenship. Citizenship in Australia, as described by Kim Rubenstein

41 Other participants who did not present papers on the day include Hollie Kerwin (who did develop a paper subsequently for this collection) and James Stellios, an expert on Chapter III of the Australian Constitution.
through her broader scholarship,\textsuperscript{42} and in this chapter, represents an understanding of the changing balance between the power of the state (including its responsibilities and duties to its citizenry) and the citizen’s rights in relation to the state. Given that the Federal Court hears matters that reflect on and are central to that relationship, through contestation around federal laws that regulate and determine that relationship, the importance of its records in that narrative is key. Yet the preservation of and access to the Federal Court’s records continue to be seen through the lens of traditional understandings of the management of litigation.

The ability of individuals to access records of court proceedings is the subject of Ernst Willheim’s contribution, ‘Aspects of Citizen Access to Court Archives’. Willheim, a former senior lawyer in the Australian Attorney-General’s Department, has unique legal and administrative insight into the consideration of court records as they exist in relationship to the principles of the separation of powers and open justice. In this chapter, he argues that the insistence on preventing access to records of proceedings is at odds both with the appearance of judicial independence and the implied freedom of political communication. In doing so, he provides a number of examples where maladministration in government may be concealed by the rigid application of existing controls of access to affidavit evidence and submissions.

In ‘When the Carnival is Over: The Case for Reform of Access to Royal Commission Records’, public lawyers Hollie Kerwin and Maya Narayan investigate the unique role and status of royal commissions as archives. As executive bodies, royal commissions may be characterised as public record-keeping institutions. However, their central function of receiving evidence, often coerced, raises important questions about the appropriateness of public access to their records, notwithstanding their distinctive characterisation as public events intended to facilitate truth-telling. Kerwin and Narayan argue that considering the royal commission as an archive raises risks, opportunities and imperatives for continued remembrance of significant public issues, critical engagement with state archives, as well as unpacking the royal commission as an instrument of government. The authors propose a \textit{sui generis} regime for the management of and access to royal commission records involving a cooperative scheme between the Commonwealth and the states, supported by

\textsuperscript{42} See Kim Rubenstein, \textit{Australian Citizenship Law} (Thomson Reuters, 2\textsuperscript{nd} ed, 2017).
referrals of legislative power from the states. They remind and encourage policymakers to transcend the complex institutional identity of the royal commission, rather than accepting it as an organising principle to provide greater certainty around the management of archival material, and to set a benchmark for community expectations of records management during, and after, the life of a royal commission.

Histories and Jurisprudence of Australia

The second section of the book turns attention to the limits and possibilities of courts as archives from the vantage point of scholarly practice and production. Here, Ann Genovese, Susan Priest and Narrelle Morris, all Australian historians who are also legal scholars, consider what it means to publicise and attend to the records of courts, to write about how those records tell stories about the relationships between Australians and their law. They each consider distinct archives and institutions and the vulnerabilities of these institutions’ records and materials. Reading their papers together enables consideration of broader questions about the conduct and establishment of legal institutions and jurisdictions in an under-theorised and under-researched aspect of the 20th century in Australia. The section also offers insight into how Australian historians of jurisprudence and law reflect on questions of temporality, method and duty in their own archival and narrative practices, often in response to the nature of materials preserved and available to tell the story.

In ‘A Matter of Records: The Federal Court, The National Archives and “The National Estate” in the 1970s’, Ann Genovese uses materials drawn from the Court as Archive Project to give a short history of the institutional provenance of the Federal Court, the NAA and their relationship to each other. Despite the Federal Court being officially exempt from the Archives Act, which established the NAA, both were conceived as consciously modern ‘Australian’ institutions and shared a material concern with records that drew them into association. In telling this story, Genovese offers one of the only histories of the Federal Court’s establishment, written from archives and by a historian. In doing so, she also offers a side note about method and practice. She demonstrates and exemplifies that the records necessary to write modern histories of jurisprudence are precarious, contingent and require our attention, offering a particular view of writing histories. Genovese contends that fragmentation in the
way the documents are kept itself requires careful documentation and opens the historiographical conversation about the forms and nature of sources and records adequate to represent our past for the present.

Susan Priest locates her narrative and methodological inquiries in the High Court of Australia in its earliest years. In ‘Framing the Archives as Evidence: A Study of Correspondence Documenting the Place of Australia’s Original High Court in a New Commonwealth Polity’, Priest examines the archives of written communications that lead the original justices of the High Court, Chief Justice Samuel Griffith and Justices Edmund Barton and Richard O’Connor, in May 1905, to adjourn proceedings and famously ‘go on strike’. She examines the official correspondence—namely, formal court and departmental letters—as well as the personal correspondence of the court at the time. For Priest, the personal nature of correspondence in the High Court’s archival collection is a rich source of detailed information not only about historical events, but also about the individuals involved. Alongside the historical narrative, Priest is also offering a careful consideration of her methods, and her relationship as a historian to the materiality of the available archive, through the questions that arise when ‘reading other people’s mail’.

The ‘national interest’ has been a constant factor and idea in the state’s creation and preservation of records, as well as how it controls those same records to guard the ‘security’ of its citizens. In ‘Accessing the Archives of the Australian War Crimes Trials after World War II’, Narrelle Morris explores the creation and management of the extensive records of Australian war crimes trials conducted after World War II. Through short vignettes that describe the shifting relationships between Australia and Japan, as much as those between the institutions of the Australian Government, Morris demonstrates that despite the ‘public’ nature of Australian war crimes proceedings, they were later classified as confidential national records (not court records), and of such international political consequence that they had to be ‘zealously protected’ until our own times. In exploring the histories of archival access and international relationships, Morris, like Genovese and Priest, also offers insights into her own duties and practices as a historian. She shows how ‘protectionism as

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43 The control of access to those records is central to the recent Federal Court decision of Hocking [2018] FCA 340 in assessing the request for early access to the letters between the Governor-General, Sir John Kerr and the Queen around the dismissal by the Governor-General of the Prime Minister, Gough Whitlam.
confidentiality’ operated to tell a history running parallel to the expected narrative of the trials themselves. Morris demonstrates how this has had ‘an indelible effect on knowledge’, and it is only now that we can see in this tale of archival refusal how Australia may still have some way to go in coming to terms with what it means to recognise that a complex national past, in which government is an actor, ‘should be everyone’s property’, as Morris quotes former Attorney-General Kep Enderby from 1975.

Administration of Legal Records: Duties and Recommendations

In the final section of the book, we return to our project’s research objectives. We do so by drawing into the discussion the practices of archival use and production, public law and public value and meaning, with accounts of how legal records are administered. Central to this section is the description of, and commentary on, the problems of modern legal institutions in coming to terms with their public role as ‘an archive’. As a whole, this section asks the questions: How might we reconcile, as a matter of policy, practice and theory, the current tensions and future problems that occur in relation to legal records as archival material, especially in settler colonial states? And, can we think between different public institutions, and in different jurisdictions, to address these questions responsively? The chapters take two different approaches to address these questions. The first is directly institutional: the oral history interviews we conducted as part of our research, including an interview with Warwick Soden, the current, and only the second, CEO (previously Principal Registrar) of the Federal Court of Australia; and a joint interview with Louise Anderson (the first) and Ian Irving (the second) Native Title Registrars at the Federal Court. We chose to interview Ian and Louise together to draw out the collaborative role they played in centring the archival responsibility for the court in the late 1990s, and also to examine their shared (but different) experiences in undertaking these roles. Read together, the interviews demonstrate the centrality of procedural and institutional reforms at the Federal Court in its recent history. These reforms relate to practice directions and trial management as much as the reconsideration of the formal agreements between agencies regarding custodianship and preservation of court records. The interviews also clearly give an account of how a court record is not only legally determined, but also creates and maintains the conduct of law that lies beneath each matter the court must determine. In addition, the interviews also contribute to
the history of the Federal Court more generally, giving insight into topics such as the transition to administrative independence from the executive arm of government, and the introduction of a native title jurisdiction. In different ways, we see what the legal professional conduct of an official life looks like, and the differences in time, location and gender in how those roles have been created and executed.

Therefore, court archives, in any form, are clearly not an impersonal or dehumanised collection of data but tell real stories about real people. Acknowledgement of what legal records carry, particularly in native title matters, has implications for litigants. However, as noted in the interview with Louise Anderson and Ian Irving, in a different way, it also has particular implications for those court officials charged with responsibility to institutionally care for the records. In ‘Providing Public Access to Native Title Records: Balancing the Risks Against the Benefits’, Pamela McGrath asks similar questions from her experience as an anthropologist who has worked in the field alongside Indigenous claimants and in her role as Research Director at the Native Title Tribunal. McGrath discusses some of the ethical concerns associated with the extensive archive of litigation materials and research reports produced for native title determinations in Australia. She argues that the potential significance and value of these collections far exceeds their original function as records of litigation, mediation and evidence gathering. Although there are some compelling reasons for making these records publicly available, there are many challenges around doing so. The chapter summarises, describes and complicates these from the perspective of a tribunal (rather than a court). McGrath argues that a seemingly incommensurable array of legal, cultural and ethical obligations around privacy and cultural authority are complicated by an overarching imperative to provide transparent justice. However, she concludes that the development of any future access policy for the Native Title Tribunal must recognise that ‘a fundamental intention of the [Native Title Act 1993 (Cth)] is to provide for the advancement and protection of Aboriginal and Torres Strait Islander peoples, and to progress the process of reconciliation among all Australians’. As such, McGrath reminds, and we agree, that it is ‘incumbent on those of us who are responsible for developing policy to put those interests and relationships at the centre of all decisions about the fate of native title records’.

In ‘Archiving Revolution: Historical Records Management in the Massachusetts Courts’, Andrew Henderson provides a comparative assessment of the treatment of court records as valuable social and
cultural records of the pre- and post-revolutionary United States by superior courts in Massachusetts. Massachusetts’ superior courts hold colonial records of civil and criminal proceedings as far back as the 17th century. The sheer volume of paper records, and the haphazard manner in which they had been collected and preserved, meant that Massachusetts courts were confronted with a challenging question about the application of resources for ongoing preservation and retention. Through a careful process of inspection and sampling, Massachusetts superior courts have sought to preserve a representative sample of almost 300 years of records. Although the Federal Court does not face the same substantial volume of materials, the experience of the Massachusetts courts illuminates some important considerations when determining a policy for the management of nationally significant records.

In ‘Sentencing Acts: Appraisal of Court Records in Canada and Australia’, Trish Luker considers the role of courts as archives through an examination of approaches to appraisal and disposal of court records. Identifying a number of disputes over the preservation and destruction of records from legal inquiries and court processes from the Australian and Canadian contexts, she argues that these disputes highlight questions about responsibilities in relation to preservation, curation, storage and access to records. While legal principles and obligations are necessary and important requirements for courts’ approaches to decisions about appraisal and disposal of records, Luker argues that courts can benefit from approaches reflected in contemporary archival theory, which recognises appraisal choices as political and ethical.

Finally, we conclude the book with a memorandum written for the Federal Court, with advice on a process for the selection of significant matters for its records authority regarding its archival responsibilities. The advice is the culmination of our empirical work and thinking on the basis of the research conducted for the project. We include it in the collection, as a postscript, and in its form as a memorandum, as an official response from us as academic researchers to those charged with the responsibilities of administration of the significant files of the Federal Court into the future.
INTRODUCTION

The Court as Archive: Future Directions

As we finalise this book for publication, it is remarkable to reflect on the 11 years that have passed since the CIPL symposium that ignited the project. That decade represents significant developments in scholarship around ‘the archive’, which we have been able to engage with, contribute to and draw upon to extend and grapple with our central research questions. Indeed, as we review the final proofs, judicial attention to the interpretation of the Archives Act itself has been of public interest through Jenny Hocking’s application to the Federal Court to review the decision of the NAA to refuse early access to what has been described as the ‘palace letters’.44 Throughout this project, with the benefit of the ARC grant, we have conducted extensive research with the support of our capable research assistants throughout the process, Peter Moore and Andrew Henderson. We have created an extensive database that has informed our approach and we have developed a protocol for the Federal Court’s consideration. This protocol reflects a methodology that recognises the relationship between records; the archive and the public it reflects; and the citizenry who benefit from understanding what it represents, both individually and institutionally, to the Australian community.

The research conducted for the Court as Archive Project has enabled us to interpret and clarify the institutional purpose and civic responsibilities of Australian superior courts of record through an analysis of their archival role. Therefore, this collection reflects and responds to our interest in the citizenship principles informing Australia’s evolution as a democratic society through the empirically based qualitative analysis of the Federal Court’s own archival practices. It has enabled us to engage with the question of how superior courts of record can address the demands of the Australian people who come before it.

In that sense, this book represents a significant moment, for it is the first time since its establishment in 1976 that the unique role of the Federal Court has been chosen for analysis as a site of production of significant national archives. In our view, this is the first step towards producing an institutional history of the Federal Court, which we believe needs further analysis to demonstrate how its constitutional role, and the way this

has been interpreted by those responsible for its operations, reveals and complicates our thinking about the state and its relationship and duties to citizens.

Indeed, the content in our extensive database created from this research will be a rich resource on which to draw to inform future oral histories that should be undertaken, together with further research on the significance of Federal Court as an institution. It is research that will benefit from bringing multiple perspectives to bear on important civic projects that help Australia identify and come to terms with its own citizenship—its own institutional story, as a nation, grappling with its past, enlivened in doing so by focusing on the meanings attributed to, and use of, the court as an archive.

In conclusion, it is important to consider that as the papers for this book were being finalised and brought to completion in 2017, the Federal Court itself marked its 40th anniversary. This is a telling reminder that the questions we collectively engaged with in *The Court as Archive* are ongoing. Indeed, the issues relevant to our present inquiries will themselves become of archival value. The material gathered in the Court as Archive Project, and the conversations with collaborators represented in this book, will also enable future researchers to assess and analyse how, from 2008 to 2019, we conceived of our own roles as active research citizens, committed to understanding the relationships between people and their institutions, in the past, present and for the future.