The Court as Archive Project has focused on the Federal Court of Australia as a paradigmatic example of a federal superior court of record with responsibility for significant national archives. One of the aims of the project has been to develop principles based on empirical research to inform the administration of the archives held by the Federal Court. The Court as Archive symposium in February 2016 provided an opportunity to engage directly with senior members of the judiciary and administrators of the Federal Court: The Hon Michael Black AC QC, former Chief Justice of the Federal Court; Warwick Soden OAM, Principal Registrar and Chief Executive Officer of the Federal Court; and Ian Irving, then Native Title Registrar, Federal Court.

Following the symposium, and in response to an invitation from the Principal Registrar, we wrote a memorandum to the Federal Court with advice on a process for the selection of significant matters for the purposes of its records authority. 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.
Memorandum: Federal Court of Australia and the National Archives of Australia—Selection of Significant Matters

The Federal Court of Australia performs a fundamentally important role within Australia’s democratic system. The court’s records, gathered through its internal workings and the cases that come before it, contain a narrative that shapes contemporary understanding of the rights of the individual and the role of the state in Australia.

In October 2011, the National Archives of Australia (NAA) endorsed the Federal Court’s Records Authority (RA) for the management and disposal of the court’s records. The RA delineates the requirements for ‘keeping and destroying records for the core business of case management’ as well as for national preservation.

Court of Record and Significant Matters

The RA establishes 10 classes of records related to case management. Four classes deal with case files; that is, files containing material relating to individual proceedings.

The default position for every case file is that material constituting the ‘court record’, as defined by the court for the purposes of the RA (referred to in the RA as ‘Part A’ of each file), is retained by the court. This is entirely appropriate and consistent with the court’s position as a ‘superior court of record’ established under Chapter III of the Constitution (Federal Court of Australia Act 1976 (Cth) s 5). Material that is not part of the court record (referred to as ‘Part B’) may be disposed of between 10 and 25 years after the end of the proceedings.

Certain classes of case file have been identified as so important that their entire contents (both Parts A and B) are to be permanently retained by the NAA as a national archive, namely:

- all native title files
- significant, non–native title files
The court is responsible for deciding which cases are ‘significant’, subject to the condition that the number of cases selected not exceed 10 per cent of all cases finalised by the court ‘in any one year’.

Selecting Significant Matters

The process and selection criteria for significant cases are still to be finalised. There are some general criteria for determining a significant case suggested by the court:

1. Precedential cases, being cases likely to set a new precedent or change an existing precedent.
2. Cases likely to have a long-term historical interest due to the parties involved in the dispute or issues involved in the case.

Factors for consideration include high media profile, public interest and cross-section of cases.

As researchers on the Australian Research Council–funded project, The Court as Archive: Rethinking the Institutional Role of Federal Superior Courts of Record,¹ we have been invited to offer suggestions on how the protocol for determining significant cases for national retention might be developed by the court. In our opinion, the above two criteria are important and capable of covering most issues and contingencies. We are also of the opinion that the suggested current factors for consideration are relevant, direct and flexible.

However, preserving cases ‘likely to be of long-term historical interest’ may require consideration of additional factors. These factors will change over time to ensure that social and political problems of a particular time are appropriately reflected in the nature of the cases selected for preservation. This matters as much for the nature and experience of litigants, the conduct of legal practice and changing technologies of court administration. As such, and in lieu of identifying a long list of additional factors (which would require review over the longer term), we believe attention should be directed to the process by which the criteria and factors are applied.

Selecting Significant Matters—Process

The process for determining a significant case for retention by the NAA, in our opinion, could be:

1. Utilising the Proposed National Courts Framework

The establishment of the National Courts Framework, and the responsibility for certain jurisdictions by specialist judges, should be incorporated into the process.

The judge responsible for each National Practice Area could take responsibility for the selection process for cases of precedential value, applying the appropriate factors for consideration, including a proportionate limit of 10 per cent.

Additional cases that could potentially be, in the judges’ opinion, of longer term historical interest should be flagged and sent to committee (see point 2 below for discussion).

2. Establishment of a Significant Cases Committee

Membership of a Significant Cases Committee could include the Chief Justice (or representative), the CEO (or representative) and members drawn from the court’s Planning and Policy Committee.

The committee should also include members from outside the court, in particular, experts in Australian history (legal, cultural and social), public law and archives.

The committee members from outside the court should have the following broad skill sets or experience:

- experience in using court materials for scholarly research
- an understanding of the parameters and shifting values of archival collections
- an appreciation of importance of the relationship between public access and future use of legal materials in fostering public understanding of Australian social and political life.

The committee would meet annually to discuss the additional cases flagged by the National Practice Areas. At these meetings, additional research and preservation considerations could be discussed, reflecting the experience of all members, as outlined above.
We thank you for the opportunity to offer our advice on this important matter.

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Professor Kim Rubenstein
ANU College of Law
The Australian National University

Associate Professor Ann Genovese
Melbourne Law School
University of Melbourne

Dr Trish Luker
UTS Faculty of Law
University of Technology Sydney