RESPECT THE PAST
EMBRACE THE FUTURE
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Unwrapping the Past – Revealing the Future

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Introduction

I have taken the liberty of manipulating the theme of the Conference – Respect the Past; Embrace the Future – along the lines of those intriguing pictures remembered from childhood where by changing the angle of vision you revealed another image.

As a child I grew up in a household where the most significant piece of technology was a cabinet wireless, powered by a car battery. When we finished our after school chores we were able to listen to the *Argonauts* and serials such as *Robin Hood*. The *Bulletin*, with its violent pink cover, was read and discussed with considerable passion; the *Women's Weekly* was a weekly and the Piccaninnies Pages in *New Idea* offered a creative outlet for children, particularly those living in the bush. Looking back I can see the good bits and also the bad bits just as I can in the present

Going back to the manipulation image, I was fascinated by the magical way in which the pictures changed, in reality interwoven images called lenticulars. When I came to write this paper, and started thinking about how we view the past I realised what an appropriate image the lenticular is when talking about respecting or unwrapping the past. Unlike the legend of Athena who was born fully formed, physically and intellectually, from the skull of Zeus, our view of the past depends on how our brains have been shaped by the cultures, religions and philosophies of the time. As we grow and develop we either accept these values or seek to challenge some or all of them, while in some cases it is just a realisation that differing viewpoints are simply a result of different perspectives. As an example a recent trip to Cambodia and Vietnam

really brought this home to my husband and myself when we realised the term "Vietnam War" is a western construct; it is never used in the Asian countries we visited because there it was the "American War".

There are those who hold the view that some of the past is too shameful to be remembered and question why anyone would seek to unwrap it. That view says some things are best forgotten, that there is nothing to be gained by digging up sordid details of bygone eras which can only serve to hurt the living. The danger with that attitude comes when people take the next step and seek to destroy the records of the past.

Along with respect for the past comes the responsibility of ensuring the preservation of the records of the past. We use the records of the past – oral, pictorial and written – to tilt the picture and reveal other views which we will use to in creating our futures. Thus in unwrapping the past, viewing it from different angles we both reveal and embrace the future. If these records are lost or destroyed we have no maps to guide us on our journeys.

By nature human beings are storytellers. For thousands of years people have gathered together round campfires, in caves, in houses and theatres listening to saga poets, traveling troubadours and troupes of actors, acting out in song and dance important events. They have drawn their picture on the walls of caves and chipped out characters to record their laws and financial transactions. Pen and ink, the printing press and electronic signals are merely an extension of this compulsion to record and remember.

Today I have some stories from the past to share with you and some thoughts on the future.

Starting to unwrap the past

Not long after I began working in the Tasmanian Supreme Court Library I had cause to retrieve some transcript from an Exhibits Storage room on the lower level of the Court. First I had to make my way past Billy Bones, the skeleton who makes the occasional appearance in court but is best remembered as

making an application for bail on 1 April 2002.[1] Bail was granted on the grounds that he was unlikely to abscond.

After retrieving the bundle of material I needed I realised that the large number of brown paper parcels tied up with string, which I had seen before but never stopped to examine, all had luggage labels attached that were inscribed, intriguingly, with regnal years.

Curiosity aroused, I went back some time later and literally started to unwrap and unfold the past. Each parcel contained all the Acts of Van Diemen's Land for the year written on the label, starting from 1833. The years 1826-1832 were to remain a mystery until I started doing research in the Tasmanian Archives this year and found hand written copies of the Acts from 1829-1859 in two extremely large volumes, and also tracked down a volume from the British Parliamentary Paper series that contained the Acts and Ordinances from Van Diemen's Land from 1826-1830.

During this period the original handwritten documents were produced on vellum sheets of various sizes, often with many artistic flourishes and embellishments. Large sheets were folded for storage purposes and opening them up is a tricky process because the vellum, made from the skins of young mammals, has a muscle memory and once folded for a period of time, will resist being laid flat.

The Acts are signed by the relevant Lieutenant Governors, including Colonel George Arthur, Sir John Franklin and Sir William Dennison. The tradition continues today with the present Governor giving the Royal Assent to every Act passed by the Tasmanian Parliament and the Act then being delivered to the Supreme Court to be signed by the Registrar as being received and enrolled within the records of the Court.[2] The practice in those early days was for the Act to be copied again (using pen and ink) and those were the documents that had been transferred to Archives.

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[1] Now part of the oral folk law of the Supreme Court of Tasmania; it was the Chief Justice's birthday and his Associate and Attendant has asked if he could hear an urgent bail application.

[2] *Acts Custody Act 1858*, section 1 - All Acts of the Legislature which have been passed since 2nd July 1851 shall, within 7 days after the commencement of this Act, be transmitted, by the persons in whose custody such Acts are at the time of the commencement of this Act, to the Supreme Court, to be there deposited and kept among the records of the said Court.

The Court neither has the expertise nor the money or space to continue to be the custodian of these important historical documents, which are the bedrock of the Tasmanian legal system. An illustration of their importance is that some sixty years ago a request was made for an original Act, with its red wax seal and blue ribbon to be produced in court to settle a legal point.

As the Court Librarian I have been concerned about the future of this body of work since that fateful day around 20 years ago when I stopped to read the labels and have regularly raised it at Library Committee Meetings. The present Chief Justice agreed in 2008 that we should request the legislation be changed to allow us to transfer the documents to Archives and we have now reached the stage of a Cabinet Minute being prepared to recommend the required legislative change. Needless to say there is still a long road to travel.

Having begun the unwrapping process the question remains – what are the reasons for respecting these relics? Is it of any significance that we have discovered such things as a handwritten letter to Her Majesty Queen Victoria from Lieutenant Governor Eardley-Willmot advising that the Chief Justice, Sir John Lewes Pedder, has found an Act to be repugnant to the laws of England? Or that a researcher gathering material for a book on the Tasmanian Constitution could not locate a copy of 2 Vict 31[3] in any law library in Tasmania or in the Archives Office[4] until we untied the string and went through the Acts for 1838. The reason it was not in any bound volume of statutes was because it had been certified against by Puisne Judge Montagu and not adhered to by the Legislative Council. It has since been discovered that such repugnant Acts, while they have not been printed in the annual statute volumes, were printed, along with the rest of the year's legislation, in the Hobart Gazettes. However, because the early Gazettes were not indexed, locating this material requires one to leaf through up to a thousand pages in an annual volume.

In the early days of the colony, when an Act was delivered to the Supreme Court to be enrolled in the records of the Court, there were still two hoops to

[3] An Act to rectify and amend certain errors and supply certain omissions in the Act lately passed for the more perfect constitution of Courts of General Quarter Sessions and to provide for the more effectual punishment and control of transported and other Offenders.

[4] In August this year I did discover it in Archives but the index entry meant that an online search could not have retrieved it.

be jumped through. The judges could certify against it[5] or on transmission to the Colonial Office the Act could be disallowed.[6] These safeguards meant that the Legislative Council, while creating a body of statute law for the colony, was subject to professional legal oversight by the judiciary and the Colonial Office in the UK though in reality this was blurred due to the fact of having the Chief Justice as a member of both Councils.[7] Canny Lieutenant Governors, such as Arthur, would sometimes get round this obstacle by setting a two year period for the life of an Act. By the time the Act had been sent to England, scrutinised by the Colonial Office and sent back to Hobart with any required amendments, the law would have been in place long enough for the Lieutenant Governor to have achieved his purpose.

One might speculate that the process of judicial review before an Act comes into force could have a place in the operations of modern day governments and courts. However I doubt that either side of the fence would push for such an arrangement and, as we will see in the next anecdote, there is a good argument for using the courts to test the merits of legislation.

The Dog Act 1846

One notable occasion in Van Diemen's Land saw Justice Montagu, who generally had the task of scrutinising Acts, failing to pick up on the opportunity to certify against an Act, namely the *Dog Act* of 1846.[8] It was not until one John Morgan, on being fined in the Police Court under the provisions of this Act, challenged the decision in the Supreme Court, and had the initial decision quashed, with the result that the Act was declared illegal. Not only did the illegality of the Act result in a loss of revenue of some £3,000 it also brought into question the legality of other taxing Acts and was seen by Lieutenant Governor Dennison as a serious assault on the government's ability to collect revenue, and also for the judges to step away from a local convention that

[5] Certification was required by statute – (UK) Australia Courts Act of 1828, 222; 9 Geo IV c 83.
[6] In some cases this merely meant a suggestion that the Act could be fixed by passinb an appropriate amendment
[7] The Legislative Council originally consisted of the Chief Justice, the Colonial Secretary and four non-official members, with the Lieutenant Governor as President; The Executive Council consisted of the Lieutenant Governor, the Chief Justice, the Superintendent of Policed and the Colonial Treasurer.
[8] 10 Vict No 5.

seems to have been accepted that the judiciary would act compliantly in relation to the working of government, in particular with regard to law-making.

The resulting "Judge Storm" whereby Montagu was amoved by Dennison and the Executive Council, the Chief Justice was charged with neglect of duty in not examining and certifying to the validity of certain Acts[9] and was pressured to consider taking 18 months leave of absence and Montagu's replacement, Thomas Horne, was generally regarded as being subservient to Dennison's will, reached its peak at a protest meeting at the Theatre Royal in January 1848. Amid scenes of wild enthusiasm a resolution was carried demanding the Lieutenant Governor's recall and declaring 'the proceedings of the Government (in attempting to destroy the independence of the judges with a view of collecting taxes and duties which have been pronounced to be illegal and inconsistent with the Act of Parliament under which this colony is governed) were an encroachment on their just rights and privileges as British subjects, a violation of the law and a flagrant infringement of the Constitution.[10] The meeting was also notable for the vigorous defence of Justice Monatgu by two lawyers who had often suffered from his acerbic tongue in court proceedings.

In the end Pedder was vindicated when the Secretary of State, Earl Grey, administered, in the words of Lady Dennison "an awful rap over the knuckles" to her husband for his conduct with respect to Sir John Pedder.[11] Grey informed Dennison that Pedder was to be treated with the deference due to a judicial officer and legal opinions expressed in the Supreme Court were only to be challenged in the court hierarchy. The executive branch of the government was not to criticise legal opinions expressed in the court. He also emphasised the importance of the role of an independent legal profession, asserting it is a "matter of familiar observation in the profession, that the faults and inaccuracies of a document are very rarely detected except by the attentive examination of hostile parties".

[9] Pedder was tried before Dennison and the Executive Council under the Imperial Act of 22 Geo III c 75 and acquitted
[10] British Sessional Papers, 1847-48, Vol XLIII, 577.
[11] Varieties of Vice Regal Life, pp 97-8

The actual hearing – *Symonds v Morgan* – had consisted of two days of detailed argument which provided the attentive examination referred to by the Colonial Secretary and is an example of how legal argument can assist in clarifying the law. It also underlined the role of lawyers in counterbalancing the uncontrolled use of government authority as well as helping remind the courts of their responsibilities.

Algernon Montagu did not fare so well, losing his appeal to the Privy Council to be reinstated as a judge, and was finally shipped off to be a Magistrate on Falklands and later a court officer in Sierra Leone. As with a number of other government officials in the early days of the colony, Montagu was often in financial difficulties. When a creditor had threatened to sue him in the Supreme Court Montagu had argued that this was impossible as the court could only by properly constituted by two judges and there were at the time only two judges in Van Diemen's Land. While this was technically true, it left Montagu vulnerable to being targeted when other opportunities arose.

Ten years later the independence of the judiciary was affirmed with the passing of 20 Vict No 7 – *An Act for better securing the Independence of the Judges of the Supreme Court of Tasmania* – an Act that is still on the Statute Books today, though many of it provisions have been incorporated into two other Supreme Court Acts.

Civil Law v Martial Law

The laws of the Australian colonies were bases on UK civil and criminal law. Martial law was only to be used in the most desperate circumstances, and then restricted to specified areas. In March 1804 martial law was briefly imposed in the colony of New South Wales when over 233 convicts, mostly Irish, escaped with the intention of seizing a ship and returning to Ireland. Called the Battle of Vinegar Hill, after the 1798 Irish rebellion, it was quickly crushed and martial law was revoked. It had been in force for around a week.

Not so in Van Diemen's Land. The death of Lieutenant Governor David Collins, an able and competent administrator through some very difficult years, in 1808 saw the administration of the colony eventually pass to Thomas Davey,

commonly referred to as Mad Tom. Reading between the lines of how he came by this appointment it seems that the British were happy to arrange for his debts to be paid off and to ship him off to the other side of the world. Seemingly an amiable character, happy to socialise in the taverns of Hobart Town (in the words of a local historian boozing with the low class locals), he had no concept of how to run a colony and as a result problems multiplied, culminating in escaped convicts becoming a serious menace in the colony.

Instead of offering amnesty (as Collins and later Macquarie had done) Davey decided to declare martial law against all legal advice. This resulted in the military being able to punish anyone as they saw fit and Hobart Town residents were subjected to a curfew. Many bushrangers were sentenced to death in their absence but as few were apprehended it made little difference to their activities. Macquarie refused to sanction his actions and after a period of six months, ordered Davey to revoke martial law.

The inhabitants of Hobart Town and surrounds did not appear to be too concerned about the removal of their civil law rights as there was considerable fear and apprehension about the activities of the banditti or bushrangers as they later became known. Nearly two hundred years later we saw little resistance to the introduction of quite severe measures into our criminal law, curtailing a number of civil liberties, to deal with the threat of terrorism.

The operation of martial law during this period resulted in the delay of the introduction of the Judge Advocate's Court in Van Diemen's Land, which would hear civil cases in the colony. Edward Abbott, the Judge Advocate, insisted that he could set up this new court while martial law was in force. It was not until 1816 that it finally opened its doors for business.

Ownership of Land

In the latter half of the 18th century two distinct types of colonies were recognised in English law: those that were conquered or ceded and those that were settled. Pre-existing laws in conquered or ceded colonies generally remained in force until altered by Parliament or the Crown; in a settled colony, on the other hand, the laws governing the colonists generally derived from the

common law and the reception of some parts of the statute law from their home country. The understanding of the British Government would have been that that those aboard the First Fleet that arrived in New South Wales in 1788 were occupying *terra nullius*, ie land not owned by any group or state, although it was inhabited.

Events in 1835 led to this belief being officially documented, largely due to the activities of John Batman. Born in 1801 in Sydney, in 1821 he came to Van Diemen's Land, taking up land grants around Ben Lomond and participating in colonial activities such as capturing bushrangers and the euphemistically called "round up" of aborigines, where in the words of Governor Arthur he "had much slaughter to account for". In 1827 Batman, along with Joseph Gellibrand, had applied for a grant of land at Port Phillip which was then part of New South Wales[12] but this was refused as it was deemed inconsistent with the Nineteen Counties Order which restricted settlements to defined boundaries extending our from Sydney. One of the main concerns of the colonial administration was to keep control of the allocation of land and the activities of the squatters, in pushing beyond those boundaries, was of considerable concern.

In 1835, with legal advice again from Gellibrand, Batman adopted a different approach, sailing to Port Phillip and eventually signing a treaty with the aborigines of the area. Returning to Van Diemen's Land he informed Lieutenant Governor Arthur who was not best pleased. Arthur in turn informed Governor Bourke in New South Wales who was also not impressed and felt it necessary to issue a proclamation[13] declaring that Batman's Treaty was "void and of no effect as against the rights of the Crown" and went on to declare that any person on "*vacant* land of the Crown" without authorization from the Crown to be trespassing. Neither Batman, nor the aboriginal people, were judged to have any legal standing with regard to engaging in land transactions. This proclamation was ratified by the Colonial Office later that year.

[12] The first lawyer to be enrolled to practice in the Supreme Court of Tasmania. Appointed as Attorney-General, he fell out with Governor Arthur over his association with a newspaper proprietor, and was dismissed from his position, but continued to practice law in the colony.
[13] See < http://foundingdocs.gov.au/item-did-42.html>.

With regard to the legal position of the aboriginal people in Van Diemen's Land, a proclamation board, painted around 1830 and nailed to trees during the time of the Black Wars[14] was supposed to show that colonists and aboriginals were equal before the law but the depiction of friendship and equal justice did not exist in reality.

Can we respect the activities and attitudes of these times?

The prevailing attitude towards the principles setting guidelines for the occupation of overseas territories – political, economic, religious and philosophical – determined the nature of the legal foundations of newly acquired British territory overseas. It was generally accepted that governments were able to acquire empty territory and treat it completely as their own. However the mere discovery of such unoccupied lands and claiming them was not sufficient – it was an essential pre-condition that steps were taken to occupy the land and improve it. This lead to an acceptance of the belief that regions could be regarded as *terra nullius,* even with people living there. The mind-set of the times was that wandering, nomadic people could not be regarded as occupying land as occupation carried the moral obligation to cultivate and improve the land.

In 1836 the New South Wales Supreme Court made what is probably the first explicit use of the term *terra nullius* in *R v Murrell and Bummaree*[15] although it was not endorsed by the Judicial Committee of the Privy Council until the decision of *Cooper v Stuart* in 1889,[16] some fifty three years later.

When one reads the documents of the times, it is necessary to remember that they reflect the prevailing legal beliefs and in being passed down to us over the years they are open to further interpretation, as has happened with 20th century lawyers vigorously arguing that the doctrine of *terra nullius* should not have been applied and that the aboriginal people had their own customary laws which should have been respected. It may have taken 150 years but a

[14] There is disagreement about the term and the period of official conflict. It was never an officially declared war but during the years 1828 to 1832 there was considerable government activity against the aboriginal people who saw their hunting grounds and food sources being taken over by white settlers.
[15] *R v Murrell and Bummaree* (1836) 1 Legge 72; [1836] NSWSupC 35.
[16] *Cooper v Stuart* (1889) 14 App Cas 286

paper trail was laid down which could be re-visited and reinterpreted. In 150 years' time how many of today's laws will still stand as good law?

French exploration

The activities of French explorers, around the turn of the century, in particular Nicholas Baudin, led to some angst in Sydney. The reactions of Governor King when Baudin sailed in to Port Jackson could well have been scripted by Joseph Conrad such was the cloak and dagger approach that was adopted. Outwardly the French were made welcome but Governor King was extremely concerned that there would be a French attempt at colonisation in the areas south of Sydney. King had even resorted to preparing a set of dummy instructions that were deliberately leaked to the French then ordered a young midshipman to put to sea and to shadow their ship when they sailed south. The finale to this little drama was the raising of the British flag on King Island in full sight of the French vessel, thus demonstrating that the island was occupied British Territory.

The fears of Governor King were not allayed by the departure of Baudin. On 28 March 1803 he despatched Lieutenant John Bowen to establish the first permanent occupation of Van Diemen's Land. The basis of his legal authority came from his appointment as a Justice of the Peace by Governor King. Provisions were made for land grants to settlers, land for public building, though nothing for Aborigines. Bowen was given permission to wear the uniform of a British Naval Commander – sadly no Frenchman ever arrived to see him in his finery.

Colonising Van Diemen's Land

The arrival of David Collins a year later, after an abortive attempt to create a settlement in Port Phillip Bay, saw law enforcement largely in the hands of justices of the peace. The Oath sworn by justices was to enforce the laws and customs of the realm and the statutes made thereof. Justices had the power to try those charged with minor criminal offences, were able to appoint and supervise constables and they had powers to deal with riots and disturbances. They controlled the use of weights and measures, set the price of bread, regulated the sale of alcohol, the conveyance of passengers and goods and

determined wages and other employment conditions. While there was a strong military aspect to the administration convicts and free settlers were not subject to military law. Official orders directed at the local community were called General Orders, as opposed to Garrison Orders which were for military personnel. The first General Order promulgated by Collins in Hobart in March 1804 forbad the molestation of swans within the vicinity of the British Settlement. The regulation was needed as "they had been much harassed and disturbed with a consequence this resource might totally fail".

Despite the problems with food shortages and local banditti Collins maintained the civil law administration. His major frustration (as it also was for Colonel Paterson at Port Dalrymple in the north of the Island) was that British authorities had not made adequate provision for the full enforcement of criminal law – serious criminal offences had to be heard in Sydney and this resulted in some ludicrous situations, with many offenders being sent back to Van Diemen's Land because of incorrect, or complete lack of, documentation to be used in their trials.

Record Keeping

Many early records of the early administration of Van Diemen's Land are not held in Tasmania. Some are in the Mitchell Library in New South Wales (until 1824 Van Diemen's Land was still part of New South Wales) and others in the United Kingdom. If I want to read the General and Military Ordinances of Collins I need to go to the Mitchell Library.

A quantity of other documents has gone missing. Legend has it that on the night Collins died many of the papers relating to his administration were stolen and destroyed by those who feared retribution if their deeds were to be scrutinised by colonial officials. Others believed that these papers had been buried with him in what is now St David's Park. In 1925, when the area was being turned into a public park, his tomb was located and after opening a huon pine casket, then a lead casket and finally another huon pine casket the body of Collins, in full regimental dress, was revealed almost as though he had just died. This was attributed to a pile of native herbs and vegetation in the coffin which was supposed to have had an embalming effect. No papers were found

and the tomb was quickly re-sealed and the location promptly forgotten so that today no one is exactly sure of where it is in the park.

Records from the time of Collins's successor, Thomas Davey, are also very sketchy though this is likely to be just as much a reflection on Davey's lack of administrative ability as from from any deliberate attempt to hide records of his activities. From the time of Lieutenant Governor Arthur's administration meticulous recording of the convict population has been a boon to family history enthusiasts and researchers who can explore detailed records of their ancestors and the administration of the colony.

Law Reporting

It was not until 1896 that the first official law reports were published in Tasmania. Prior to that one has to rely on newspaper reports, but that is not to say they are of inferior quality. The shorthand writers of the 19th century were remarkably efficient in producing and transcribing detailed accounts of the judicial decisions read out in Court. Even some judges were proficient in shorthand.

From around 1856 the judges collected the majority of newspaper reports of their judgments in what are known as the Judges' Scrapbooks. The columns of newsprint were carefully cut out and pasted into A3 size blank page books and, in the majority of cases, indexes to the names of the parties created. These records are also available on microfilm in the Archives Office and are now mirrored by the digitised newspapers on Trove so that for those who have the time and patience, the decisions of Tasmanian Supreme Court judges are accessible.

Bruce Kercher and Stefan Petrow have collaborated on producing an online collection of early Van Diemen's Land decisions covering the period from 1824 to 1844. For the period 1845-1855 the only available resources are Trove and the archived files of the Supreme Court.

Embracing and Revealing the Future

Technological change is redefining the information landscape of the 21st century. Where once libraries figured prominently on the skyline, easily recognisable as repositories of treasures from the past, storehouses of knowledge with librarians as the custodians and collectors, today these structures and their staff are under threat. Outwardly the buildings may appear to be the same though once inside it is apparent they have been gutted and reconfigured to conform to the perceived needs of the corporate and government world. When money is tight too often libraries are seen as the soft target. Public libraries are being closed by cash strapped local governments and many special libraries in government and corporate bodies are shrinking in size and budgets are being cut.

Before we swallow the pill called *It's all on the Internet* consider some of the values of the ideal library.

- It is a community gathering place where people can come to explore the physical and digital resources from their own area and also from the rest of the world;
- It is a place where the necessity for preservation of important documentation is understood, and where possible, implemented;
- It is a safe haven where one can step away from the conflicts and stresses of institutions or communities; and
- It is our link to the past and our crystal ball for the future.

Libraries have embraced the future. All over the world they are involved in projects to digitise and make more easily available treasured documents, images and audio files. In Australia the work of the National Library and institutions such as AustLII, is opening up access to a wealth of historical information; resources that will be invaluable in revealing the future.

There is still one more step I believe. That is for libraries to use their traditional skills of gathering, sorting and retrieving information and applying these skills to the digital resources being created today, while at the same time continuing to maintain access to what is not on the internet. When I first started working

in librarianship there was much talk about mapping the information landscape. The need to continue mapping that landscape is even more pressing today. Librarians, much like geologists, need to use all the technological devices they can to chart the digital environment and provide the maps that will point the way for future exploration.

2 September 2012

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