

## Northern Territory Bar Association Annual Dinner

### 'It's Not Whether You Win or Lose ...'

Chief Justice Robert S French

14 August 2010, Darwin

Your Excellency the Administrator the Hon Tom Pauling, President Raelene Webb, Chief Justice Brian Martin, Chief Justice-Elect Trevor Riley, your Honours, ladies and gentlemen:

As we are all only too aware, there is a federal election next week. There has been endless and repetitious discussion in the media about it. So much so that one is reminded of the slogan used by Roy Slaven and HG Nelson for their *This Sporting Life* program: 'When too much sport is barely enough'. Thinking of HG Nelson led me to think of a simpler electoral time in the Northern Territory of the 1920s, when the Territory was voteless but not voiceless in the federal parliament. Its voice was Harold George Nelson.

In an article in the *Northern Territory Times & Gazette* of November 1925<sup>1</sup>, Thomas Nelson, described, tongue in cheek, as a 'poet laureate', was reported to have circulated a pamphlet attaching a song to be sung for HG Nelson MHR, when passing through Two Mile on his way to Darwin. The pamphlet referred to arrangements made for as many children as possible living in the Two Mile area to take part, by kind permission of their parents, in a welcome for Mr Nelson MHR. Each child was to sing the song. Each would have a small flag with the letter 'N' on it so that when the train arrived at Two Mile there would be waving of the flags and

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<sup>1</sup> JA Porter, 'Thomas Nelson [Poet Laureate]', *Northern Territory Times and Gazette* (Darwin) 20 November 1925, at 4.

singing of the song. Singing practice would be offered every evening from 6 pm to 7 pm at Mr Thomas Nelson's residence. The song was as follows:

*BRAVO NELSON*

*Bravo Nelson give us a bit of your mind  
Bravo Nelson your [sic] the best that we can find  
To speak for us in parliament  
For Nelson you are the only gent  
To represent the people of the Territory  
Vote, Vote, Vote me boys for Nelson  
Never mind old Story or his lot  
For Nelson will win the day,  
And we drive old Story away  
And will put old Porter in the pot pot pot.*

The newspaper ended its report of this creative effusion by observing:

Some people are born to greatness; others achieve greatness; and some have greatness thrust upon them.

Mr Thomas Nelson has achieved greatness by this wonderful poetry so we require his photo, also that of his wife, for publication in this paper.

No doubt Mr and Mrs Thomas Nelson will occupy seats on the platform during Harold Nelson's address at the Town Hall.

HG Nelson, as many of you will know, was the first member for the Territory in the House of Representatives from 1922 until 1934. He had served a brief term of imprisonment in June 1921 for refusing to pay taxes. His refusal was related to his campaign for no taxation without representation for the Northern Territory. He was the father of Jock Nelson, who also served as a Territory member in the House of Representatives and was the first Territory-born Administrator. Harold led a march on Government House in December 1918 calling for the removal of the unpopular Administrator, J Gilruth – an event which became known as 'The Darwin Rebellion'. His son, Jock, also led a march on Government House in 1961 to protest the deportation of two Malaysian nationals.

The history of the Territory and that of its legal profession are closely intertwined. And much of the relevant history of the profession seems to have been written by Justice Dean Mildren. It tells us of colourful characters and conflicts and events which, in today's media-heated social and political environment, would have taken on near apocalyptic significance. There was the primal lawyer, the first practitioner in the Northern Territory, William James Villeneuve Smith, described by Dean Mildren as a 'colourful and impetuous character who delighted in upsetting the establishment'.<sup>2</sup> In 1911, when the Territory was surrendered to the Commonwealth, there were two practitioners, John Symes and Ross Mallam. Later there were still only two, Donald Roberts and Ross Mallam. In criminal matters one would prosecute and the other defend. Mallam was suspended from practice for twelve months in 1920 by Deputy Judge Gerald Hogan for filing an affidavit in probate proceedings with intent to mislead the court. Hogan had been appointed a Deputy Judge following the removal of Judge Bevan, whose closeness to the Administrator Gilruth, led to his dismissal following the Darwin Rebellion of 1918.<sup>3</sup> Hogan's appointment was found by the High Court in 1921 in *Presley v Geraghty*<sup>4</sup> to have been invalid and his orders nullities. This was broadly on the basis that you couldn't be a deputy if there were no-one to be a deputy to. The Court divided 3:2 on the point. Retrospective validating amendments to the Supreme Court Ordinance restored all of Hogan's decisions, save for the decision to suspend Mallam and the decision at first instance in *Presley v Geraghty*. Mallam, in 1928, became a Judge of the Supreme Court of the Northern Territory. He probably has the distinction in Australian legal history of being the only practitioner suspended from practice who later became a judge of the Supreme Court.

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<sup>2</sup> D Mildren, 'A short history of the bar in the Northern Territory' (2001) 21 *Australian Bar Review* 81 at 81- 82.

<sup>3</sup> D Mildren, 'The Role of the Legal Profession and the Courts in the Evolution of Democracy and Aboriginal Self Determination in the Northern Territory in the Twentieth Century' (1996) 7 *Journal of Northern Territory History* 47 at 47.

<sup>4</sup> (1921) 29 CLR 154.

The numbers of the private profession in Darwin were low for many years. They swelled to 3 in the 1920s. A fourth, Bateman, who arrived in 1926, was struck off 67 days after being admitted for a false affidavit made four days after his admission.<sup>5</sup> By 1933 there were five.<sup>6</sup> Gradually and inevitably over the decades that followed the profession grew.

In 1969 came the formation of the Law Society and in the 1970s the phenomenon of practitioners working as in-house counsel and carrying on a kind of barrister's practice. In 1974, Michael Maurice set himself up as an independent barrister and was shortly afterwards joined by Tom Pauling. And so the Independent Bar began and developed and grew. What sustained its development was demand for its services. An important mark of its growth and maturity was the formation, in 1980, of the Northern Territory Bar Association. Initially, the Association lacked a Constitution but seems to have been none the worse for that. Then came Counsels' Chambers (NT) Pty Ltd, which held the assets of the Bar under a discretionary trust which Dean Mildren later said was void for failure to comply with the rule against perpetuities.<sup>7</sup>

Dean Mildren's history in the *Australian Bar Review* recounts the growth of the Bar since its foundation to the creation of the Bar Council in 1999 and the twentieth anniversary dinner in 2000. And in that year, for the first time, the Association was represented on the Executive of the Law Council of Australia, by Steven Southwood QC – now Justice Southwood of the Supreme Court.<sup>8</sup> It is my great privilege to be here in the thirtieth year of the Association's existence to speak at your Annual Dinner.

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<sup>5</sup> Mildren, n 2, at 83.

<sup>6</sup> Mildren, n 2, at 83.

<sup>7</sup> Mildren, n 2, at 89.

<sup>8</sup> Mildren, n 2, at 100.

As a visitor to the Territory, over twenty years since my first visit here in 1987 on the occasion of a Supreme and Federal Court Judges' conference, I have been able to sense, as outsiders do, the distinctive relaxed approach to life which is symbolised by such things as the dress code and its highest point, Territory Rig, which we wear tonight.

That relaxed approach was captured neatly and pungently for me in a short literary work which I saw some time in the 1990s. I had been in Darwin on native title work and went down for a weekend with our youngest son to the Katherine Show. There I saw a tee-shirt on sale bearing a message which I have kept in memory and which struck a particular resonance. It said:

It's not whether you win or lose  
It's the piss up afterwards that counts.

I don't suggest its adoption as the Bar Association's motto, but it was a kind of Territorian two-fingered salute to the competitive focus of modern life.

Seeing the tee-shirt and the message reminded me of an occasion which was the closest I had ever come to appearing as counsel in court in the Northern Territory. The appearance wasn't in the Northern Territory. It was in Wyndham, but that is close enough and there was a certain Darwinian flavour about it. The case led me to reflect upon the nature of friendship in the Top End. It was in the 1970s. My client was charged with unlawful wounding. He had glassed his best mate with a broken bottle in the course of a fracas at a Wyndham Football Club show. His best mate recovered from the collapsed lung that resulted and loyally told police that he had fallen on the bottle. He also made himself unavailable as a Crown witness. The evidence disclosed that their fight was one of a series of altercations between a number of young men centred on a new girl in town who had come down on the barge from Darwin.

The jury found my client guilty, but the judge put him on probation. After the rising of the court, the prosecutor and myself, and other assorted persons (who might even have included the accused for all I know) adjourned to the hotel across

the road from the courthouse where, as I recall, members of the jury had also foregathered, for a convivial drink. Hence 'it's not whether you win or lose ...'.

The next morning as I was on my way to Kununurra to catch the plane back to Perth, I saw a rather badly dented motor vehicle on the roadside. It had been driven by my client in celebration of his non-custodial disposition. It belonged to another of his friends. As I continued on to Kununurra my client was facing charges of driving under the influence of alcohol, dangerous driving and, no doubt, breach of his newly minted probation. I did not see him again but the case taught me something about the nature of friendship in this part of the world. It also gave particular meaning some years later to the epigram which I saw at the Katherine Show and in particular the second half of it. My client lost the case but it was the celebratory drink or three after the event that really counted against him.

I first became acquainted with the Territory and the Territory Bar when sitting on cases in Darwin as a Federal Court Judge in the 1980s. One of them was an industrial matter involving underpayment of drivers by a transport company.<sup>9</sup> It had been in the system for a long time. In fact some collateral litigation had been to the Full Court of the Federal Court<sup>10</sup> and then, on an unsuccessful special leave application, to the High Court. Mr Colin McDonald appeared for the respondent with instructions to apply for a permanent stay of the proceedings. He produced a copy of Magna Carta and quoted the famous lines:

To no one will we sell, to no one will we refuse or delay, right or justice.

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<sup>9</sup> *Hennessy v Keetleys Tours Pty Ltd* (1988) 23 IR 277.

<sup>10</sup> *Keetley v Hill* [1985] FCA 352.

Upon the application for a stay being refused<sup>11</sup>, he confirmed that his instructions were limited to that application and politely took his leave. His client also took his leave, although I do not recall that he was as polite as Mr McDonald.

Later I was to sit on a case concerning the commercial use of traditional Aboriginal art.<sup>12</sup> The work in question was the beautiful 'Morning Star Pole' created by Terry Yumbulul, and subsequently depicted on a bank note. I was unable to find for Yumbulul but the case did throw up the need for some kind of statutory recognition of the communal interest in certain expressions of traditional art.

Since that time I have visited the Territory on many occasions on native title work in the 1990s and, later, on Full Courts of the Federal Court in a number of matters including *Alyawarr*<sup>13</sup> and *Blue Mud Bay*.<sup>14</sup> The quality of advocacy which I have experienced from counsel here and their courtesy and polite demeanour, even under provocation, is a measure of the maturity of the Bar.

The preceding reflections have a certain local and anecdotal quality about them. It is necessary however, even in a dinner speech, to make some reference to universal themes. One of these is what I call the big question for barristers.

The big question is that which anybody who practices as a barrister has been asked at least once, and sometimes on many occasions, in his or her lifetime. That is the question, usually delivered on a social occasion over a drink with a kind of unctuous or cynical passive-aggressive delivery: How can you defend someone who you know is guilty?

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<sup>11</sup> *Hennessy v Keetleys Tours Pty Ltd* (1988) 23 IR 269.

<sup>12</sup> *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481.

<sup>13</sup> *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442.

<sup>14</sup> *Gumana v Northern Territory* (2007) 158 FCR 349.

There are a number of ways of dealing with this tedious interrogatory, which is an occupational hazard for legal practitioners. One technique is to try to unsettle the questioner's moral certainties by quoting Franz Kafka: 'My guiding principle is this: guilt is *never* to be doubted'. By impliedly depicting yourself as a moral vacuum you should be able to leave your questioner with nothing more to say and no grounds for saying anything more. The same effect may be achieved by saying 'I will do anything for money'. Another approach in the 'moral vacuum' category, with a thin veneer of social utility, is to explain what a criminal trial is by quoting Ambrose Bierce's definition of a trial:

A formal inquiry designed to prove and put upon record the blameless characters of judges, advocates and jurors. In order to effect this purpose it is necessary to supply a contrast in the person of one who is called the defendant, the prisoner or the accused. If the contrast is made sufficiently clear, this person is made to undergo such an affliction as will give the virtuous gentlemen a comfortable sense of their worth.<sup>15</sup> (Footnotes omitted)

On occasion the question about the barrister's ethical dilemma is asked by a medical practitioner and may be coupled with a complaint about the barrister's immunity from suit. The immunity may be compared unfavourably with a doctor's liability for mistakes committed in the course of surgery and accompanied by reflections on lawyers' cabals. An immediate response to this class of questioner is to describe in detail some acute pain upon which you are seeking his or her immediate advice.

For the truly persistent and intransigent interrogator you can deploy the nuclear option, namely rule 33 of the Northern Territory Bar Association

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<sup>15</sup> A Bierce, *The Devil's Dictionary* (1911).

Professional Conduct Rules<sup>16</sup>, which you should carry with you at all times and in extremis read in full. The utility of this approach deployed against the non-legal interrogator is that it may drive your questioner off to look for another drink.

In this company it is possible to say, without sending people running off to the drinks bar, that barristers do sometimes find themselves representing morally unpleasant people. Sometimes they find themselves representing good people for whom justice seems elusive. The law, we hope, will serve justice in most cases. But we must recognise, with harsh modesty, that it does not always do that. This reality was reflected in the remark by the resilient and robust ancestor of you all, Ross Mallam, one half of the Northern Territory legal profession in 1911, who told a client who wanted justice:

We will probably do better. I think we can win your case.<sup>17</sup>

Discomforts about law and justice do not cease upon appointment to the Bench. Judges occasionally find themselves constrained by the law to make decisions which have harsh or unfair results or unable to make decisions which can be tailored precisely to the justice of the case. Rigid one-size-fits-all laws, such as laws providing for mandatory minimum penalties or broadly based automatic forfeitures, give rise to the risk of such outcomes. In the end, however, our adherence to the rule of law serves larger and more enduring values than that of the avoidance of transient unpopularity or unhappiness with the result. And when the law is inadequate to the requirements of justice, it is the profession in particular which is in a position to advocate change. In my opinion, it has a public duty to do so. Sometimes injustice can become a catalyst for reform.

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<sup>16</sup> Rule 33 deals with the situation in which a client confesses guilt to the barrister appointed to represent him or her in criminal proceedings but maintains a plea of not guilty. The text of the Rule is set out at the end of this speech.

<sup>17</sup> D Lockwood, *The Front Door: Darwin 1869-1969*, (Rigby, Adelaide, 1968) 234.

A good example in this Territory was the Gove land rights case.<sup>18</sup> In 1971, Justice Richard Blackburn of the Supreme Court of the Northern Territory rejected a claim for the common law recognition of native title rights. The evidence showed what Justice Blackburn described as 'a subtle and elaborate system highly adapted to the country in which the people led their lives', a system which he was prepared to characterise as a government of laws and not of men.<sup>19</sup> Yet he was bound, inter alia, by the Privy Council decision of *Cooper v Stuart*<sup>20</sup>, decided in 1889, to hold that the Colony of New South Wales, which included what was to become the Northern Territory, was practically unoccupied and without settled inhabitants or settled law at the time when it was annexed to the British Dominions. On that historical fiction, the common law which he was bound to apply was not capable of according recognition to customary native title.

The ruling and agitation in response to it led to the establishment of the Woodward Royal Commission, which in turn recommended a land rights regime for the Northern Territory. The Royal Commissioner, Sir Edward Woodward, made those recommendations and set out a number of aims including:

The doing of simple justice to a people who have been deprived of their land without their consent and without compensation.

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) resulted. John Toohey was appointed as its first Aboriginal Land Commissioner and pioneered procedures for taking evidence on country including what must have seemed the rather radical procedure of group testimony. Counsel involved in the new inquiry processes included Tom Pauling, now the Administrator of the Northern Territory,

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<sup>18</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

<sup>19</sup> (1971) 17 FLR 141 at 267.

<sup>20</sup> (1889) 14 App Case 286.

Trevor Riley the Chief Justice-Elect, Michael Maurice, Graham Hiley and many others.

John Toohey had been involved in indigenous issues in his home State of Western Australia in the 1970s having worked for the Aboriginal Legal Service in Port Hedland for a year in 1974. He was a superb choice to lead and develop this new and, at the time, contentious law.

The operation of the land rights regime in the Northern Territory was hotly contested. It generated an extraordinary amount of litigation in the High Court. But I think it delivered in two ways. One was by the grant of lands to traditional owners. The other was more subtle and perhaps my theory about it is a little speculative. By the time that *Mabo* fell for decision in 1992, the High Court had delivered some 14 decisions in cases involving the *Aboriginal Land Rights (Northern Territory) Act*. It is not too much of a stretch of the imagination to think that the repeated exposure of the Justices, one of whom from 1987 was John Toohey, to the concepts of traditional land ownership worked out in the land rights cases set the scene for the Court's acceptance of the proposition in *Mabo (No 2)*<sup>21</sup> that the common law could recognise and give effect to customary native title.<sup>22</sup>

The land rights/native title story is a story of a measure of justice emerging from what appeared to be a major forensic defeat in 1971. The successes that followed have not yet delivered a full measure of justice to indigenous people in Australia. To amend the Katherine Show tee-shirt message to serve a nobler purpose than the original – It doesn't matter whether you win or lose – justice is never complete. There is always more to be done in the pursuit of justice. Winning

<sup>21</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>22</sup> The Role of the High Court in the Recognition of Native Title (2002) 30 *University of Western Australia Law Review* 124-166. Republished in: *A Dialogue about Land Justice*, L Strelein (ed) (2010) 78.

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and losing and doing more is what the legal profession and this Bar Association must be about.

**Attachment**

Northern Territory Bar Association Professional Conduct Rule 33:

A barrister briefed to appear in criminal proceedings whose client confesses guilt to the barrister but maintains a plea of not guilty:

- (a) may return the brief, if there is enough time for another legal practitioner to take over the case properly before the hearing, and the client does not insist on the barrister continuing to appear for the client;
- (b) in cases where the barrister keeps the brief for the client:
  - (i) must not falsely suggest that some other person committed the offence charged;
  - (ii) must not set up an affirmative case inconsistent with the confession; but
  - (iii) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged; and
  - (iv) may argue that for some reason of law the client is not guilty of the offence charged; or
  - (v) may argue that for any other reason not prohibited by (i) or (ii) the client should not be convicted of the offence charged.