

Centenary of the Northern Territory Supreme Court Kriewaldt Lecture

The Northern Territory – A Celebration of Constitutional History

Chief Justice Robert French
23 May 2011, Darwin

Introduction

In one sense the occasion of a centenary is nothing special. It is an artefact of the means we have adopted for measuring the passage of time by the earth's orbit around the sun. Every instance of time since the first one hundred years after the adoption of that measure has been the centenary of something. Despite its intrinsic triviality, we use the centenary as a device to review the past, and to think about the future.

2011 is the Centenary of the creation of the Northern Territory as a Territory of the Commonwealth of Australia and the creation of the Supreme Court of the Territory, which is celebrated in a history of the Court written by Justice Dean Mildren.¹

This lecture is a reflection upon the constitutional history of the Northern Territory. It is an occasion to think about the future. It is also an opportunity to honour the memory of one of the most distinguished members of the Supreme Court of

¹ Mildren D, *Big Boss Fella All Same Judge A History of the Supreme Court of the Northern Territory* (Federation Press, 2011).

the Northern Territory, Justice Martin Kriewaldt, who was a significant part of that history.

Martin Kriewaldt was born in South Australia in 1900, the son of a school mistress and a Lutheran Pastor.² His father had come to Australia from Wisconsin as a missionary in the 1890s. After his father's death in 1916, Martin studied in the United States. He returned to South Australia and graduated from the University of Adelaide with Bachelors degrees in Arts and Law in 1923 and 1925. He practised as a solicitor and taught at Adelaide University, largely in the law of property. He married twice and had five children.

Justice Kriewaldt was appointed to the Supreme Court of the Northern Territory in 1951 and died in office on 12 June 1960. The great Australian constitutional scholar, Professor Geoffrey Sawer, described him as one who possessed the virtues traditional in the Anglo-Australian judiciary – learning, wisdom, uprightness, fair-mindedness and a profound sense of public duty.³

Justice Kriewaldt thought seriously about the relationship between indigenous people and non-indigenous society and its laws. Some of his views would be controversial today. Then again, it is difficult to express any views in this complex and difficult area that will not be thought controversial by somebody. He recognised the importance of cultural difference. He thought it appropriate to have regard to customary law in sentencing.⁴ He was aware of the difficulties confronted by

² Biographical details of Justice Kriewaldt are found in Heather Douglas' paper, "Assimilation, Lutheranism and the 1950s Justice of Kriewaldt" (2004) 8 *Australian Journal of Legal History* 285.

³ Sawer G, "Judge Martin Kriewaldt Nine Years of the Northern Territory Supreme Court" (1961) 1 (2) *Adelaide Law Review* 148.

⁴ Douglas H, "Justice Kriewaldt, Aboriginal Identity and the Criminal Law" (2002) 26 *Criminal Law Journal* 204 at 208.

traditional indigenous witnesses in the understanding and use of the English language and in giving evidence. He might be surprised, and I suspect pleased, to see the extent to which indigenous cultural awareness programs, including such topics as "Aboriginal English" are part of continuing judicial education across the country, funded by the Commonwealth and managed by a National Judicial College.

Justice Kriewaldt's memory lives on. There is a set of chambers named after him in the city of Darwin, a street named after him in Palmerston, and this bi-annual lecture in his name. It is a privilege to deliver this lecture in honour of a distinguished member of the Supreme Court of the Territory who made a major contribution to its jurisprudence and development as the third branch of Territory Government and so to the constitutional development of the Territory itself.

National Stories

Australia is often referred to as the oldest continent. Some minerals found in the Mt Narryer area of Western Australia have been dated back over four billion years. Microfossils and stromatolites found in the Pilbara are said to be amongst the earliest known life on earth.⁵ Although the history of mankind is just the blink of an eye in the geological timescale, the Australian landscape is laced with the marks and records of human occupation which stretch back forty or fifty thousand years. That represents the period over which Aboriginal people travelled to and occupied the Australian continent, beginning with Northern Australia until the whole land mass was occupied by their societies. They produced no written histories. Their Dreaming, which frames their laws and customs and their relationships to the landscape, its plants and animals, and to each other, was told through songs, traditions, ceremonies, extraordinary visual

⁵ Joyce B, "Different Thinking: The oldest continent", standing Committee for Geological Heritage, Geological Society of Australia, 16 February 1999; web.earthsci.unimelb.edu.au.

arts and the kinetic arts of the dance. The Aboriginal relationship to the land was described by Galarrwuy Yunupingu in a "Letter from Black to White" in 1976:

The land is the art. I can paint, dance, create and sing as my ancestors did before me. My people recorded these things about our land this way, so that I and all others like me may do the same. I think of land as the history of my nation. It tells us how we came into being and what system we must live ... My land is my foundation ... Without land I am nothing.⁶

A different perspective on land and a new story began with the arrival of the British colonisers. On 26 January 1788, Arthur Phillip annexed the eastern half of Australia in the name of the British Crown. That event was followed by successive annexations of the rest of the continent and the evolution and division of the colonies so created into six self-governing polities. The colonising culture collided traumatically with that of the indigenous inhabitants. The law of the colonisers, including the common law of England, was incapable of engaging meaningfully with the laws and customs of Aboriginal societies. In 1833, the Aboriginal people of the Colony of New South Wales, which then encompassed the Northern Territory, were described by the Supreme Court of New South Wales as "wandering tribes ... living without certain habitation and without laws ..."⁷ This was the Imperial judicial perspective on Australian Aborigines enunciated in 1889 by the Privy Council when it described the Colony of New South Wales and, by implication, the rest of Australia, as:

⁶ Yunupingu G, "Letter from Black to White" (1976) *Land Rights News* 2(6) p 9.

⁷ *McDonald v Levy* (1833) 1 Legge 39 at 45.

... a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions.⁸

The reality on the ground was exposed by the 1971 judgment of Sir Richard Blackburn in the Supreme Court of the Northern Territory in *Milirrpum v Nabalco Pty Ltd.*⁹ He had to decide whether Aboriginal native title could be recognised by the common law of Australia. He regarded himself as bound by the view of history embedded in the common law as enunciated by the Privy Council in 1889. Nevertheless, on his own examination of the evidence put before him concerning the traditional law and custom of the people of Gove, he found what he described as a "subtle and elaborate system highly adapted to the country in which the people led their lives", a system which he called "a government of laws, and not of men".¹⁰ His decision, although adverse to the peoples' claim, was a defeat which yielded a large result for indigenous people in the Territory. It was a catalyst for the establishment of the Woodward Royal Commission and the development of a statutory land rights scheme for the Northern Territory. That scheme set the scene for the recognition of native title at common law in the 1992 *Mabo* decision.¹¹ With that recognition came a constitutional shift away from the view of history propounded by the Privy Council in 1889.

Indigenous occupation and British colonisation are two important parts of our history. Another important part is non-British migration. Since the second half of the

⁸ *Cooper v Stuart* [1889] 14 App Cas 286 at 291.

⁹ (1971) 17 FLR 141.

¹⁰ (1971) 17 FLR 141 at 267.

¹¹ *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

twentieth century Australia has received waves of migrants of non-British origin from all over the world. They bring with them many different stories. Some have come seeking refuge from oppression and persecution. They represent a diversity of cultures and customs and outlooks which have enriched our society. Their coming is also reflected in the diversity of the people of the Northern Territory. Nearly one-quarter of the people who live in Australia today were born somewhere else. More than forty percent of Australians were either born overseas or have at least one parent who was born overseas. In recent years, migrants to Australia have come from over 180 different countries.¹²

The stories of our people, the indigenous, the colonisers and the migrants and the refugees are all important chapters of our national history. Despite the dark moments of that history, there is much to celebrate. Australia is one of the world's most successful and stable representative democracies. It has institutions which we sometimes take for granted, law-makers elected by the people, ministers and officials who are responsible to the elected law-makers and ultimately to the people, and a judiciary with high standards of independence, competence and honesty. A healthy and questioning scepticism about our institutions is a necessary part of a vibrant democracy. That scepticism, which does not accept the say-so of authority on matters of public importance, is expressed in many ways, including through national and regional media. It is good, however, from time to time to remember those features of our society in which we can take some pride.

In spite of its small population relative to the rest of the country, the Northern Territory has played a significant role in the constitutional history of the nation. That role may be understood by reflecting upon the chronology of colonisation, federation,

¹² Australian Immigration Fact Sheet 4 – More than Six Years of Post War Migration, Revised 30 January 2007. www.migration.gov.au/media/fact/sheets/04fifty.htm.

self-government and the developing understanding of the scope and limitations of Commonwealth powers with respect to the Territory.

The Constitutional Evolution of the Northern Territory

Arthur Phillip's Proclamation of the Colony of New South Wales in January 1788 covered the area from the eastern coast of Australia to the 135th meridian, which passes close by Millingimbi in Arnhem Land. His Proclamation was the first step in the assertion by the British Crown of sovereignty over the land which is now the Northern Territory. The second step was the establishment by Captain Bremer, in 1824, of a military settlement at Fort Dundas on Melville Island. He took possession of the coastline as far west as the 129th meridian, which is the present boundary. The third step was taken in 1828 when the inland boundary of New South Wales was also extended to the 129th meridian by Governor Darling of New South Wales.

A misstep occurred on 17 February 1846. The Colony of North Australia was created by an Order-in-Council issued under the *Australian Constitutions Act 1842*. The new colony comprised that part of New South Wales north of the present South Australia and Northern Territory border and included what was later to become the Colony of Queensland. Sir Charles Fitzroy was appointed Governor. The putative government was never established in fact and on 28 December 1847 the Order-in-Council was revoked.¹³

Tasmania was separated from New South Wales in 1825 and Victoria in 1851. The colony of Western Australia was created in 1829 and of South Australia in 1834. Queensland was carved out of New South Wales by Ordinance in 1859. Its western boundary was the extension of the border between New South Wales and South

¹³ *Rogers v Squire* (1978) 23 ALR 111 at 116 per Gallop J.

Australia and a little to the East of the present boundary. In 1862, Queensland's boundary was extended further west to 138° east longitude, which is its present boundary with the Northern Territory

Save for the interregnum when it was part of the short lived Colony of North Australia, the Northern Territory, until 1863, was part of the Colony of New South Wales. On 6 July 1863, by Letters Patent, Queen Victoria annexed the area known as the Northern Territory to the Colony of South Australia.¹⁴ Robert Garran, Secretary of the Commonwealth Attorney-General's Department, in an opinion which he wrote in 1909, said:

It appears clear that by the Letters Patent the Northern Territory became part of the State of South Australia although power was reserved to the Queen to detach it again from that Colony.¹⁵

The annexation of the Northern Territory to South Australia has been described as "an act unique in Australian colonial history: colonial expansion, largely for pastoral purposes, by another colony".¹⁶ It is perhaps ironic, in light of South Australia's surrender of the Northern Territory to the Commonwealth in 1911, that it had a serious concern about the permanency of the annexation. South Australia made a request to the British Colonial Secretary in 1888 that the annexation be made permanent. The request was refused. The Colonial Secretary in classically opaque bureaucratic language said

¹⁴ Pursuant to s 51 of the *Australian Constitutions Act 1842* (Cth); 5 & 6 Vic c 76 and s 2 of the *Queensland Government Act 1861* (Q), 24 & 25 Vic c 44.

¹⁵ Opinions of Attorneys-General of the Commonwealth, vol 1 (1901-1914) No 341.

¹⁶ Renwick J, *The Constitutional Position of the Northern Territory of Australia: A Thesis Submitted for the Degree of Doctor of Juridical Studies* (University of Sydney, 1993) p 8.

that the Northern Territory was "an integral part of South Australia".¹⁷ South Australia itself treated the Territory administratively as a species of dependency.

Sir Isaac Isaacs in his judgment in *Buchanan v The Commonwealth*¹⁸ described the effect of the annexation:

The Northern Territory though "annexed" to South Australia, and in one sense a "part" of that political organism, was always known by the distinctive name of the "Northern Territory", and in the official despatches between the Government of South Australia and the Colonial Office reference is made to South Australia proper and to the Northern Territory.¹⁹

The South Australian legislature passed a *Northern Territory Act 1863* (SA), which made provision for the sale of land in the Northern Territory in order to fund its administration. The town of Palmerston, which later became Darwin, came into existence in 1869. The telegraph line from Adelaide to Palmerston was completed in 1872. Administration of the Territory originally conducted from Adelaide until 1874, was carried out thereafter by a Government Resident in Palmerston.²⁰

Justice Dean Mildren in his history of the Northern Territory Supreme Court suggests that although South Australia assumed that it had full constitutional power to deal with the Territory, the true legal position was not clear. He points to a case in the Supreme Court of South Australia in 1866 in which it was argued that the Court did not have jurisdiction to hear the trial of a man accused with the murder of an Aboriginal

¹⁷ Renwick, n 16, p 9.

¹⁸ (1913) 16 CLR 315.

¹⁹ (1913) 16 CLR 315 at 335.

²⁰ Renwick, n 16, p 8.

person at Chambers Bay in 1864. The argument was based upon the proposition that the Letters Patent annexing the Northern Territory confined the authority of the Governor of South Australia to the existing limits of that colony. The argument was that the Northern Territory was still subject to the government of New South Wales. That argument was not tested to the point of decision as the prosecution was dropped.

Initially, it was the Government Resident who was the judicial presence in the Northern Territory. He acted as a Special Magistrate. The Supreme Court of South Australia, which was a long way away in Adelaide, decided to establish circuit sittings. The first circuit judge, Judge Wearing, died on the return voyage from Darwin to Adelaide in 1875 when his ship was broken up by a tropical storm. The *Northern Territory Justice Act 1875* (SA) was enacted to provide for a resident Commissioner to be appointed to exercise the powers of a judge of the Supreme Court of South Australia. In 1884, that Act was amended to provide for the appointment of a judge as "Judge of the Northern Territory" with the same powers and jurisdiction as a judge of the Supreme Court of South Australia. The first appointment was Justice Pater, described in the Northern Territory Times as a man whose "nervous, excitable temperament and hasty, violent temper proved him utterly unfitted for the position of Judge"²¹. Subsequently, to save money, South Australia decided to combine the functions of Government Resident and Judge. Those offices were occupied consecutively by Justice Dashwood, known as Northern Territory Charlie (1892 to 1905), Justice Herbert (1902 to 1910) and Justice Mitchell who was appointed in 1910. Justice Mitchell was to become the first judge of the Supreme Court of the Northern Territory when it was established by Commonwealth Ordinance in 1911.

By the 1880s, the movement to form an Australian Federation had well and truly begun. Each of the Australian colonies had established self-government through a

²¹ Quoted in Mildren, n 1, p 20.

series of constitutions made under the authority of Imperial Statutes. By the end of the 19th century, as Professor Daryl Lumb wrote:

The co-existence of six colonies on the Australian continent independent of each other in local policies, although united by common law, nationality and similar institutions of government, could not be the basis for a permanent constitutional system.²²

There was also, as the Constitutional Commission wrote in 1987, a self-confidence in Australia largely due to economic prosperity and reinforced by Australian cricketers who were able to beat Great Britain at her own game. Australian artists, writers, poets and agricultural investors were also emerging.

The move to Federation

In the 1890s representatives of the Australian colonies came together in a series of Conventions to endeavour to agree upon a Constitution for the creation of an Australian Commonwealth. In the 1897 session in Sydney, a South Australian delegate, Mr VC Solomon, moved an amendment to the proposed *Commonwealth of Australia Constitution Act*, the Imperial Statute which was to give effect to the proposed Constitution, to ensure that the definition of the area comprising the Commonwealth of Australia included what he called "the Northern Territory of South Australia" as part of South Australia. One of the delegates was Isaac Isaacs. He asked:

Is that part now technically South Australian territory?

²² Lumb, RD, *Australian Constitutionalism* (Butterworths, 1983) p 47.

Mr Solomon thought that was a rather difficult question to answer, given that the 1863 annexation had been at the pleasure of Her Majesty. He was concerned that a doubt might arise about the right of electors in the Northern Territory portion of South Australia to a voice in the affairs of the Commonwealth. His amendment was accepted. There is a certain irony in reflecting upon that discussion, having regard to the post-surrender history of the Northern Territory's representation in the Federal Parliament, the challenge to that representation and the Territory's long, slow evolution towards self-government.

Two provisions of the Constitution, adopted by the colonial delegates, have been pivotal in the constitutional history of the Territory. The first is s 111, which provides:

The Parliament of a State may surrender any part of the State to the Commonwealth and upon such surrender and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

The other provision is s 122, which relevantly provides:

The Parliament may make laws for the Government of any territory surrendered by any State to and accepted by the Commonwealth, ... and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

Importantly, s 122 provided for the possibility that Australian territories might be represented in the Parliament. It did not confer any right to such representation. That was a matter for the Commonwealth Parliament.

As a result of Mr Solomon's motion to amend the Commonwealth of Australia Constitution Bill, which was to be submitted to the Imperial Parliament, the status of the Northern Territory at the time of Federation was expressly reflected in cl 6 of the

Commonwealth of Australia Constitution Act 1901. Clause 6 of that Act, generally known as covering clause 6, listed the colonies entitled to become States of the new Commonwealth. On that list was the colony of "South Australia including the northern territory of South Australia". Upon the proclamation of the Constitution, as Sir Robert Garran wrote:

South Australia ... became a State of the Commonwealth; and the State of South Australia clearly, in accordance with covering clause 6, includes the Northern Territory.²³

As part of a State, the Territory was part of the Commonwealth by the operation of cl 6. There was a question about what constituted the Commonwealth. In the course of argument in the *Buchanan* case in 1913, following the acquisition of the Northern Territory by the Commonwealth, Isaacs J, then a Judge of the High Court, asked the question:

Does "the Commonwealth" in s 6 of the Constitution Act include a territory acquired by the Commonwealth.

That foreshadowed the important constitutional debate, which would echo through the years, about the extent to which the powers of the Commonwealth to make laws for the Territory, stand outside other provisions of the Constitution or are affected by constitutional guarantees and limitations.

The Commonwealth of Australia came into existence on 1 January 1901 and the Northern Territory as part of the State of South Australia, was part of the Commonwealth. The residents of the Northern Territory therefore began their life

²³ Opinions of Attorneys-General of the Commonwealth, vol 1 (1901-1914) No 341.

under the new Constitution as residents of a State. The State of which they were part was entitled to all the same constitutional powers and protections and was subject to the same constitutional limitations as the other States. The Northern Territory, as part of South Australia, had statehood and continued to have statehood for the first ten years of Federation. However, change was soon in the air.

In 1907, South Australia, which was finding its administration of the Northern Territory financially burdensome²⁴ made an agreement with the Commonwealth under which it would surrender the Territory to the Commonwealth. That surrender was effected under s 111 of the Constitution. Under the agreement the Commonwealth took over South Australia's loans in respect of the Territory. They exceeded £3 million. The Commonwealth also agreed to purchase the partly completed Transcontinental Railway from Adelaide to Darwin and promised to finish it. An attempt by South Australia in 1962 to compel the Commonwealth to honour that promise was rejected by the High Court on the basis that the Commonwealth had never promised to do the job within any particular time. Three of the Justices also thought that the agreement was political, and not legally enforceable.²⁵

Both the Commonwealth and South Australian Parliaments passed Acts giving effect to their agreement.²⁶ The Northern Territory became a Territory of the Commonwealth on 1 January 1911. On that day its inhabitants ceased to be residents of a State and became subject to the legislative powers conferred upon the Commonwealth Parliament by s 122 of the Constitution.

²⁴ Renwick, n 16, p 10.

²⁵ *South Australia v The Commonwealth* (1962) 108 CLR 130.

²⁶ *Northern Territory Surrender Act 1907* (SA); *Northern Territory Acceptance Act 1910* (Cth).

The *Northern Territory (Administration) Act 1910* (Cth), made under s 122, provided for the government of the Territory after its surrender was accepted by the Commonwealth. The Territory was to be governed by an Administrator appointed by the Governor-General. The Administrator was subject to ministerial instructions. The laws of the Territory were Ordinances, a species of subordinate legislation, made by the Governor-General. This was government by a Federal Minister. In Dean Mildren's book on the history of the Supreme Court there is a quotation from Dean Jaensch which sums up the effect of the surrender:

The transfer of the Territory to the Commonwealth in 1911 removed all representation for Territorians, ended local participation in policy-making, and the style of administration was summed up by the portfolio of the administering authority – the Minister for External Affairs.²⁷

The loss of statehood in 1911 meant that the residents of the Territory had no representation in the Federal Parliament. In 1922, the *Northern Territory Representation Act 1922* (Cth) was enacted providing for a single non-voting member of the House of Representatives. The rights of that member were gradually expanded over the ensuing years. In 1968 the Northern Territory representative acquired full voting rights and the same immunities, privileges and rights as other members of the House of Representatives. Representation in the Senate was not achieved until 1973 with the enactment of the *Senate (Representation of Territories) Act 1973* (Cth) allowing for the election of two senators from the Northern Territory.

The Bill for the *Senate (Representation of Territories) Act* had a troubled history. With associated Bills and the Petroleum and Minerals Authority Bill it was twice rejected by the Senate. This led to a double dissolution and an election for both

²⁷ Mildren, n 1, p 34 quoting Dean Jaensch, *The Slow Road to Statehood*.

Houses, followed by a joint sitting of both Houses at which the Bill was passed pursuant to the provisions of s 57 of the Constitution. Western Australia challenged the validity of the process which had led to the double dissolution and joint sitting. It also challenged the validity of the Act alleging that it was beyond the power conferred on the Commonwealth by s 122. The High Court held that the Bills had been duly passed. It also held, by a 4-3 majority, that the Act was a valid law of the Parliament within s 122 of the Constitution.²⁸

The challenge to the validity of the Act was based upon s 7 of the Constitution, which provides that "[t]he Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate". On the other hand, s 122, the territories' power, authorises the Parliament to allow the representation of a Territory "... in either House of the Parliament to the extent and on the terms which it thinks fit". The majority of the Court held that s 122 qualified the requirements of s 7. Sir Anthony Mason, who was a member of the majority, put it this way:

Sections 7 and 24 should be regarded as making provision for the composition of each House which nevertheless, in the shape of s 122, takes account of the prospective possibility that Parliament might deem it expedient, having regard to the stage which a Territory might reach in the course of its future development, to give it representation in either House by allowing it to elect members of that House. To the framers of the Constitution in 1900 the existing condition of the Territories was not such as to suggest the immediate likelihood of their securing representation in either House, but the possibility of such a development occurring in the future was undeniable. The prospect of its occurrence was foreseen and in my view it found expression in s 122.²⁹

²⁸ *Western Australia v The Commonwealth* (1975) 134 CLR 201.

²⁹ *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 270.

The road to self-government was long. By the *Northern Australia Act 1926* (Cth) the Commonwealth divided the Territory into North and Central Australia, to be administered by Government Residents with partly elected Advisory Councils. That initiative failed because it was administratively too costly in a time of economic hardship.³⁰ The 1926 Act was repealed in 1931. The Territory's representative in the House of Representatives moved a motion in 1931 to amend the *Northern Territory (Administration) Act* to create an Advisory Council with plenary power to make Ordinances for the Territory with the consent of the Governor-General. The proposed amendment was rejected in the Senate.

In the period from 1942 to 1947, the Territory was effectively under military control and governed by an Administrator. However, in his 1943-44 Report the Administrator recommended the creation of a Legislative Council with equal numbers of elected and nominated members and power to make Ordinances on particular subjects, subject to veto by the Administrator. Nothing was done about this until 1947.³¹

The *Northern Territory (Administration) Act 1947* (Cth) established a Legislative Council in the Territory consisting of seven appointed members and six elected members. The Council had the power to make Ordinances for the "peace, order and good government of the Territory subject to assent by the Administrator or the pleasure of the Governor-General". The validity of that legislation and what that power involved was considered by Justice Kriewaldt in his decision in *Namatjira v Raabe* in 1958.³² The case is helpfully summarised in Dean Mildren's book.³³ The Legislative

³⁰ Renwick, n 16, p 16.

³¹ Renwick, n 16, p 17.

³² (1958) NTJ.

³³ Mildren, n 1, pp 165-166.

Council made a *Welfare Ordinance* 1953-1957 under which the Administrator could declare an Aboriginal person to be a ward if that person stood in need of "special care and assistance". The effect of such a declaration was to impose major restrictions on the ward's liberties, including freedom of movement, residence, association, cohabitation and marriage. By a block declaration, every Aboriginal in the Territory, save for six, was declared to be a ward. Albert Namatjira was one of the six who was not so declared. He was charged with supplying alcohol to an Aboriginal who was a ward. In his defence, the validity of the *Welfare Ordinance* was challenged. One of the arguments advanced was that the Commonwealth Parliament could not validly delegate legislative power to the Legislative Council. It had to make the laws for itself under s 122. Justice Kriewaldt rejected that argument. He placed his conclusions in the context of the progression of the Territory towards statehood and said:

In the passage of the Northern Territory to statehood two steps have been taken in the legislative field: (a) legislation by the Governor-General and (b) legislation by a Legislative Council with a majority of nominated members. Further steps bringing the Legislative Council nearer in status and power to a State Parliament will, I have no doubt, be taken and be necessary before the Northern Territory takes its place as one of the States of the Commonwealth. In my opinion, section 122 of the Constitution does not prohibit the gradual advance towards Statehood.³⁴

He also rejected an argument which has been raised on a number of occasions in different contexts that the Ordinance was not for the peace, order and good government of the Territory, Kriewaldt J said:

If the members of the Legislative Council in their collective wisdom, decide that the proposed law is a desirable law to be enacted, then that

³⁴ (1958) NTJ at 616, see Mildren, n , p 166.

law must be taken by the Courts and the people to be a law for the peace, order and good government of the Territory.³⁵

This reflected a proper respect for the separation of powers and the limitation of the judiciary to its proper function. It is that mutual respect between the three branches of government which is indispensable to a constitutionally grounded representative democracy.

In 1959, the composition of the Legislative Council was changed to eight elected members, six official members and three appointed non-official members.³⁶ An Administrator's Council was formed which acted as an advisory body to the Administrator. It could be regarded as a precursor to an Executive Council. The Commonwealth retained its power to disallow Ordinances and its absolute control of the Executive Government. There were frequent disallowances of Territory Ordinances, accompanied by a failure to provide adequate reasons when referring legislation back to the Council for amendment.³⁷

In 1974, the Commonwealth replaced the Legislative Council with a fully elected Legislative Assembly of 19 elected members. This was done by the *Northern Territory (Administration) Act 1974* (Cth). The Administrator's Council now comprised the Administrator and five elected members. In the same year, a Joint Committee on the Northern Territory's Constitutional Development delivered a report proposing that a Northern Territory Executive be established with responsibility for statutory authorities and boards and an increasing number of what were called "State-type" functions, which were then the sole responsibility of the Commonwealth Executive. A second report in

³⁵ (1958) NTJ at 617.

³⁶ *Northern Territory (Administration) Act 1959* (Cth).

³⁷ Renwick, n 16, p 19.

1975, which was set up to reconsider those recommendations after Cyclone Tracey, maintained them. An Executive Council, to advise the Administrator, was established with effect from 1 January 1977. This was done by the *Northern Territory (Administration) Act 1976* (Cth). The members of the Executive Council were to assist in governing the Territory in such matters as the formulation of policies and plans and directing the activities of some public servants. Some statutory boards, authorities and functions previously discharged by the Commonwealth Department were transferred. In July 1977, the Commonwealth announced its intention to grant self-government to the Territory. That self-government commenced with the enactment of the *Northern Territory (Self Government) Act 1978* (Cth).

The *Self Government Act* established the Northern Territory as a "body politic under the Crown ..."³⁸ A Legislative Assembly was created, similar in composition and powers to its predecessor. The Assembly received from the Commonwealth Parliament a grant of legislative power to make laws for the "peace, order and good government of the Northern Territory". The Executive Government consisted of ministers drawn from and responsible to the local legislature presided over by the Administrator.³⁹ There were a number of express limitations on the law-making powers of the Assembly. The Assembly could not make a law acquiring property, other than on just terms. This was in similar terms to the constitutional limitation on the legislative power of the Commonwealth imposed by s 51(xxxi) of the Constitution. Section 49 applied the guarantee of free trade in s 92 of the Constitution into the Territory, as had s 10 of the *Northern Territory (Administration) Act 1910*. Importantly, the grant of legislative power to the Territory did not qualify or reduce the power of the Commonwealth under s 122. It could still make laws for the Territory. Executive power was divided between

³⁸ *Northern Territory (Self Government) Act 1978* (Cth), s 5.

³⁹ *Northern Territory (Self Government) Act 1978* (Cth), Pt 4.

the Northern Territory Ministry and a Commonwealth Minister. The Northern Territory was empowered to establish its own treasurer, control its finances and borrow moneys.

The Supreme Court of the Territory had continued under the *Supreme Court Ordinance 1911* until that Ordinance was repealed in 1961 and the Court re-established by Commonwealth law under the *Northern Territory Supreme Court Act 1961*. It continued to operate under that Act until 1979 when the *Northern Territory Supreme Court (Repeal) Act 1979* (Cth) was passed by the Commonwealth and the *Supreme Court Act 1979* (NT) passed by the Northern Territory Legislative Assembly. In that year, the office of Chief Justice was created, replacing the previous office of Chief Judge, which had been established in 1975 and whose only incumbent was Sir William Forster.

The power of the Commonwealth to endow the Territory with separate political, representative and administrative institutions and control of its own finances had been asserted by the High Court in *Berwick Ltd v Gray*.⁴⁰ The establishment of the Northern Territory as a self-governing polity was no less effective, because it derived from the exercise of Commonwealth legislative power, than the Constitutions of the Australian colonies in the 19th century which derived from Imperial Statutes.⁴¹

The Territory today has the constitutional infrastructure for statehood. It has a legislature, an executive and an independent judiciary. It has representative democracy and responsible government. But constitutionally, it is not a State. There is a qualitative difference between a self-governing territory and a state under the Constitution. There are specific provisions in the Constitution relating to the

⁴⁰ (1976) 133 CLR 603 at 607 per Mason J, Barwick CJ, McTiernan and Murphy JJ agreeing.

⁴¹ *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 279 per Wilson J, adopted in *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 66 ALJR 794 at 804.

Constitutions of the States, the powers of State parliaments and the saving of State laws. The *Self Government Act* is a law of the Commonwealth. In theory, it could be amended or repealed by the Parliament of the Commonwealth. That theory is, of course, a long way from any practical reality. But it is an inescapable aspect of the constitutional relationship that the Commonwealth still has the power to make laws under s 122 affecting the Territory that it could not make with respect to the States. An ongoing question is – how large is that power today?

Not long after Federation, Quick and Garran in their commentary on the new Constitution took the view that the position of the Commonwealth Parliament with respect to its territories was that of "a quasi sovereign government" and that it could "rule the Territory as a dependency, providing for its local municipal government as well as for its national government".⁴² Robert Garran in an article which was published in 1935, said that the Commonwealth's power under s 122 was not affected by limits on its other legislative powers.⁴³ Harrison-Moore in his text *The Constitution of the Commonwealth of Australia*, written in 1910, regarded the Commonwealth Parliament as having "all the powers of a unitary government" over the territories.⁴⁴ That early idea that the territories' power stood apart from the other legislative powers of the Commonwealth attracted the label "disparate power" theory and was reflected in decisions of the High Court during the first fifty years of Federation. As Professor Leslie Zines wrote in 1966:

On this reasoning, the provisions and doctrines relating to such things as the separation of powers, free trade, religious freedom, compensation for

⁴² Quick J and Garran RR, *The Annotated Constitution of the Australian Commonwealth* (1901) p 972.

⁴³ Garran R, *The Law of Territories of the Commonwealth*, ALJ (Supplement) vol 9 (1935) 28 at 31.

⁴⁴ Harrison Moore W, *The Constitution of the Commonwealth of Australia*, (2nd ed, Melbourne, Maxwell, 1910) p 589.

acquisition of property, jury trials and life appointments for judges are 'not applicable to the territories'. They do not limit the full sovereign power given to the Commonwealth by s 122. Associated with this approach are usually statements that distinguish between the territories and 'the Commonwealth proper' and state that the territories are not 'part of' or 'fused with' the Commonwealth.⁴⁵

In affirming the decision of the High Court in the *Boilermakers' Case*⁴⁶, the Privy Council said that s 122 was a "disparate and non-federal matter".⁴⁷ A significant departure from that disparate theory occurred in the year following the decision in *Boilermakers*. In *Lamshed v Lake*⁴⁸ the Court held that a law of the Commonwealth made under s 122 could operate in a State. Dixon CJ in that case discussed the relationship between laws made under s 122 and other parts of the Constitution affecting legislative power. He could see no reason why the guarantee of religious freedom and the prohibition against establishment of a religion under s 116 could not apply. Kitto J spoke of the need to adopt an interpretation of s 122 which would treat the Constitution "as one coherent instrument for the government of the Federation, and not as two constitutions, one for the Federation and the other for its Territories".⁴⁹ The integrationist view was stated forcefully by Menzies J in 1965 in *Spratt v Hermes*:⁵⁰

⁴⁵ Zines L, "Laws for the Government of any Territory: Section 122 of the Constitution" (1966) 2 *Fed Law Rev* 72 at 73.

⁴⁶ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

⁴⁷ *Attorney-General of the Commonwealth v The Queen* (1956) 95 CLR 529 at 545.

⁴⁸ (1958) 99 CLR 132.

⁴⁹ (1958) 99 CLR 132 at 154.

⁵⁰ (1965) 114 CLR 226.

To me it seems inescapable that territories of the Commonwealth are part of the Commonwealth of Australia and I find myself unable to grasp how what is part of the Commonwealth is not part of the federal system.⁵¹

On the other hand, in 1969, in its decision in *Teori Tau v The Commonwealth*⁵² the High Court held unanimously that the power of the Commonwealth to make laws acquiring property in a territory were not limited by the constitutional requirement applicable to other Commonwealth laws that just terms be provided.

The question of the interaction between s 122 and the just terms requirement of s 51(xxxi) of the Constitution arose recently in the decision of the High Court in *Wurridjal v The Commonwealth*.⁵³ That case concerned a challenge to the validity of a Commonwealth law supporting the Northern Territory intervention. The question was whether a law creating, in favour of the Commonwealth, statutory five year leases over Aboriginal land, was an acquisition of Aboriginal property and had to comply with s 51(xxxi) of the Constitution, requiring just terms for the acquisition. The Court, by majority, overruled its 1969 decision that the guarantee did not extend to the Northern Territory.⁵⁴ As a result of that decision Commonwealth laws operating in the territories are subject to the requirements of s 51(xxxi). That is to say, the people of the Territory have the same protection in respect to the acquisition of their property by a Commonwealth law as do the people of the States. There is a similar protection built into the Self Government Act in respect of Territory laws.

⁵¹ (1965) 114 CLR 226 at 346.

⁵² (1969) 119 CLR 564.

⁵³ (2009) 237 CLR 309.

⁵⁴ *Teori Tau v The Commonwealth* (1969) 119 CLR 564.

There are, of course, many unanswered questions about the interaction between s 122 and other provisions of the Commonwealth Constitution. There have been a number of decisions of the High Court touching on those questions. Importantly, some of those decisions have established that courts of the Territory are courts which may exercise the judicial power of the Commonwealth if invested with federal jurisdiction by laws made by the Commonwealth Parliament. It follows that such courts must be and appear to be independent and impartial tribunals.⁵⁵ That means that the courts of the Territory enjoy constitutional protection against legislative impairment of their independence and impartiality as do the courts of the Australian States. So far as the Northern Territory is concerned, however, questions about the limits of Commonwealth power under s 122 may arise from time to time unless and until the Territory becomes a State of the Commonwealth.

The questions raised by cases about s 122 have provided an opportunity for judges, practitioners, legislators and scholars to reflect upon the long-standing questions about the nature of the Commonwealth and the essential unity of its people, whether they live in a State or a Territory. I have no doubt that the perspective of many Territorians is that they are members of the Commonwealth, and should be treated as such.

The Territory is, in one sense, poised to become a State. Whether it does, and when it does, and on what terms it does, will depend a great deal upon the people of the Territory. No doubt, there will be debate about the terms of a constitution. Should it simply reflect existing arrangements with room for change? Should it include some aspirational statements? Should it include provisions recognising indigenous people and their connection with the land? Constitutions are important, but whether they work

⁵⁵ *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.at 163.

well or not is critically dependent upon the people – the electors – those whom they elect and those who are appointed to operate constitutional institutions.

It is good to remember the words of Dr BK Ambedkar, who chaired the committee which drafted the Indian Constitution. On 25 November 1949, the day before that Constitution came into effect, he said:

I feel however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot.⁵⁶

Conclusion

The Northern Territory, in the hundred years of its existence as a Territory of the Commonwealth, has played a significant part in Australia's constitutional history. It has reached a stage in its constitutional development, when it is equipped with the constitutional infrastructure necessary for statehood, an elected legislature, responsible government and a well-established and well respected judiciary with one hundred years of history behind it. I expect that by the time the next centenary comes around, the Northern Territory will have many years of statehood behind it and, as a state, will have made its own contribution to constitutional practice and no doubt litigation in the field of Commonwealth/State relations.

⁵⁶ Address by Prime Minister of India, Shri Atal Bihari Vajpayee on the occasion of the 50th anniversary of the Republic of India (27 January 2000) citing Dr BK Ambedkar participating in the Constituent Assembly Debates:
<<http://parliamentofindia.nic.in/jpi/MARCH2000/CHAP1.htm>>.