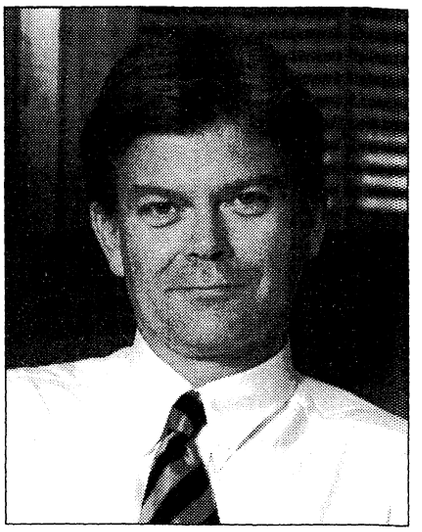
president's column

"... LIKE DESPERADOS WAITING FOR A TRAIN"



Jon Tippett, Law Society President

Dawn 01.01.01. It found me on my back in the pool yard face inconveniently directed skywards. A heavy still dawn. Silence before the coming heat tripped a bandsaw of cicadas. The quiet disturbed by the plop of debris falling on the fronds of the fan palm as a sulphur-crested furtively demolished my star-apples. A bronze wing calling Machu Picu.

It was a new century. Australia still had a British head of state. The race card would still be played at another Territory election as it had been at every election since the introduction of self government. The brute metaphysics of mandatory sentencing still tortured the wisdom of our legal system.

My first thought for the new century was to wonder where I had left the analgesics. The hundredth birthday of federation did not come to mind until later. That occurred at the end of a day spent trying to ratchet down the mother of all hangovers.

I sat down to watch the evening news bulletin. Scattered images of the Federation Day parade bounced around the screen. A television reporter fought to infuse the affair with an atmosphere of gaiety. It was a tough call. A piece of vision particularly caught my attention. A lot of people were carrying an enormous blow-up white baby doll. The issue of loins? Ah yes! The birth of a nation. Symbolism with all the depth of a kiddies paddle pool. The ensuing spasm of cringe was bad enough to bring on a teeth grind. That was it. I turned off the box and went in search of a stick of celery and the makings for a calming Bloody Mary.

Its not that the celebration of federation should be dismissed. Quite to the contrary. 1901 did see the creation of a nation. A constitution was in place. It was a constitution, however, that included only two citizens rights; the right to freedom of religion and the right to trial by jury. An earlier draft of the constitution prepared by Inglis Clark included twelve citizens rights. It would appear that the prevailing "white Australia policy" (oddly symbolized by the big white baby) caused the Founding Fathers some disquiet as to who might be able to exercise those rights and they were removed from the final document. The effect of that decision has echoed down through the decades in the form of discriminatory laws that have been passed by the states and the Commonwealth affecting in particular such groups as Kanakas, Chinese and indigenous Australians who were not even included in the commonwealth census until the 1960s. Citizenship for the first Australians didn't come until later. The constitution's most recent failure to protect the citizens of this country can be found in the amendments to the Sentencing Act NT.

Federation had notable consequences for the Northern Territory. Section 122 of the constitution provided that federal parliament could make laws for the government of any territory surrendered by any state and accepted by the commonwealth. The area from Palmerston to the Simpson Desert had become part of the Commonwealth of Australia in 1901 "by the name of the State of South Australia". It would seem that the WASP's in Adelaide had been of a mind to off load this costly piece of real estate (despite its gold and pastoral industries) for some time and federation provided them with their chance. South Australia passed the Northern Territory Surrender Act in 1907 but the federal parliament showed a little reluctance to take on an economic basket case and did not pass a complimentary Northern Territory Acceptance Act and a Northern Territory (Administration) Act until 1910. The formal transfer took place on 1 January 1911. The commonwealth also agreed to purchase the existing railway from Port Augusta to Oodnadatta and to complete the line through Central Australia to Pine Creek. The politicians are still playing choo choo's. The argument now appears to have distilled into who will blow the whistle first.

So federation resulted in the name of Palmerston being changed to Darwin and a Professor of Veterinary Pathology being appointed as first administrator of the territory. Dr John Gilruth turned out to be a charmer. He brought about the nearest thing to a revolution in this country since the Eureka Stockade. He was in effect run out of town. The *Northern Territory Times and Gazette* barked: "It behoves us to say unto Dr Gilruth as one man, " Get thee hence, thou Scottish bawbee-chaser and darken this land no more". At a later royal commission into the Darwin disturbances Gilruth said he left because "I was told that if I did not there would be a revolution". Gilruth opined that there was a very real element of Bolshevism in Australian ports. He told the royal commission that a member of the Advisory Council had ended a speech with the words "Long live the revolution". Included in the grievances that saw the demise of Gilruth and his cohort Judge Bevan were the high cost of food and drink (especially beer) and certain allegations of improper collaboration between government officials and corporations such as the giant British meat firm Vesty Brothers. The royal commissioner eventually reported that Gilruth and Judge Bevan had failed to exercise their powers with common sense and justice. How things change only to remain the same.

The issue of race has bedevilled the political and legal development of the Northern Territory since federation. At the ceremony of transfer of the Territory to the Commonwealth outside the administrators residence on 2 January 1911 the white citizens of Darwin prevented the use of the commonwealth flag because it had been made by a local firm of Chinese tailors. The famous anthropologist Professor W. Baldwin Spencer, in the course of seeking the release of a young Aboriginal sentenced to life for murdering another Aboriginal at the instigation of a white man wrote: "He is a fine fellow and I should like to have him with me when I go up country. His physique is splendid and when once you get a native

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like this he will do anything for you. It is just like having a splendid watch dog." South Australia, in preparation for the transfer to the commonwealth enacted the Northern Territory Aboriginals Act. That became incorporated in a Commonwealth Aboriginals Ordinance gazetted in 1912. Under the power of that ordinance the chief protector could take any Aboriginal or "half-caste" into his custody and his staff and the police were empowered to make arrests without warrant for breaches of the ordinance. A stolen generation was thereby created.

It is not enough for people, in particular lawyers, to argue that the injustices of the past were often a product of prevailing social thought at the time as if to displace responsibility for the result or dismiss them as irrelevant to the present. The party of shooters that thundered down on the creek at Coniston knew what a massacre was. They knew that to shoot children and unarmed adults was a crime. If it is argued that they did not humanity was, and remains, a victim. The inquiry into the events of May 1926 announced by Prime Minister Bruce was later tabled in federal parliament but was never printed. It was an embarrassment to the rule of law in this country. Coniston was the last punitive expedition. Concern about international opinion saw to that. The same concern may see the end of mandatory sentencing laws and the disclosure of the Federal Government's response to the NAALAS complaint lodged with the United Nations.

The writings of the nineteenth century barrister Richard Windeyer are reflected in the attitudes of the present day government of the Northern Territory. He railed against the fallacies of the philanthropists (read "southern do gooders") in their defence of Aboriginal interests particularly as they related to land. As a lawyer he stuck to the black letters of English jurisprudence. There was also the power of parliament to do what it liked and the will of the majority that justified an unjust position. The difference is that his conscience did trouble him. After a discourse in which he attacked Aboriginal rights he asked "How is it that our minds are not satisfied? What means this whispering in the bottom of our hearts?" Perhaps the silence in the collective heart of government over mandatory sentencing is explained in Proverbs IX,13 where it contrasts wisdom with stupidity. The victims of stupidity it says "do not know that the people die who go to her house, that those who have already entered are now deep in the world of the dead".

Chief Justice Gleeson in his work "The Rule of Law and the Constitution" refers to the wisdom of the law. He states that the "Law is not the enemy of liberty; it is its partner." He explains what he means by liberty by reference to the writings of Edmund Burke where Burke says, "The liberty I mean is social freedom. ... This kind of Liberty is indeed but another name for justice, ascertained by wise laws, and secured by well constructed institutions". Gleeson determines that "The rule of law is meant to be a safeguard and not a menace". He writes, "In our society, threats to the rule of law are not likely to come from large and violent measures. They are more likely to come from small and sometimes well-intentioned encroachments upon basic principles, sometimes by people who do not understand those principles". Mandatory imprisonment is one such encroachment. It is certainly not well-intentioned. The person who gave it life was a lawyer and "Queens Counsel". It is certain that those who seek to retain mandatory sentencing fail to appreciate that, "a civil society is a partnership between those who are living, those who are dead and those who are yet to be born'. Using that analogy Gleeson observes ,"The law is a product of that partnership." It is not, he says, "a set of rules devised and constantly changed to suit the immediate interests and needs of those whose only concern is what they can take from, or force upon, their fellow citizens."

To much power given to anything, thought Plato, was like too large a sail on a vessel, it is dangerous; moderation is overthrown. Excess leads on the one hand to disorder and on the other to injustice. In her book, "The March of Folly", Barbara Tuchman also takes part of her thesis from Burke. She observes that the capacity to admit an error means the ability to halt the march of folly. In the words of Burke "Magnanimity in politics is not seldom the truest wisdom, and a great Empire and little minds go ill together." The Northern Territory has a scheme called "crime stoppers", a phone line to police to dob in would be offenders, but it has yet to officially recognize its penchant for "crimestop". That was a word coined by George Orwell in his work *1984*. It means the faculty of stopping short at the threshold of any dangerous thought and includes the power of not grasping analogies, of failing to perceive logical errors, of misunderstanding the simplest arguments and of being bored and repelled by any train of thought which is capable of leading in a heretical direction. Crimestop, in short, means protective stupidity. Any unbalanced dalliance with the utilitarian philosophy of Jeremy Bentham is neatly circumscribed by the term "crimestop".

It is my experience that most lawyers know little about the constitution. Regrettably I am of their ken. I don't really know why that may be. Perhaps it is because the document is an insufferable read or that it fails to capture the imagination say like the American constitution on which it is based. Certainly men like Deakin, Barton and Parkes were brilliant men of great insight. They formulated a document that has stood the march of time well. To look at their faces in the old photographs it is almost impossible to conceive they were ever babies like the symbol in the Federation Day parade. They look like they were born with beards. They don't come across as blokes who ever played a game of backyard cricket. The other thing is that, to my mind a least, they were boring characters. They did not seem to have had a mastery of the language or the ability to inspire like Jefferson and Franklin. I am prepared to stand corrected. It may be a perception solely garnered in ignorance.

Chief Justice Gleeson began the Boyer Lectures with the imagery of the law which he said carries the important idea that "The law restrains and civilises power". He tempers that statement later with the remark that the law is not always wise. He goes on to say that the law "serves its purpose best when it is based upon an understanding of the past and a concern for the future". That is why, dare I pursue a great mans line of thought, a reflection upon the operation of the law and its effect upon indigenous people in the Northern Territory is important in the centenary year of federation. The laws that allowed the arbitrary use of neck chains on Aboriginal but not white prisoners and the most recent laws that can capriciously, unjustly and

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unreasonably punish any Territorian for a trivial property crime, but particularly Aboriginal Territorians, are not different but symptomatic of the same malaise. That is the misuse of political power that the Constitution does not adequately provide protection against. It is often argued that the will of the majority is reason enough to have bad laws. But that is not democracy. Democracy is government that is elected by majority but governs for the whole having regard to the interests of minorities and the wise rule of law. Democracy should not be used as a camouflage for injustice. To so use it is to assume an entitlement by the many to vest injustice upon the few. Lynchings have always been carried out by the majority usually in the name of justice. We know from history that majorities cannot always be relied upon to be sensitive to the interests and the legitimate concerns of minorities. It is timely that we should examine the introduction of a Bill of Rights in an effort to ensure that democracy does not become the fall guy for laws that attack the few for the satisfaction of the many. The first question we must ask ourselves is; do we have a real democracy in the Northern Territory?

The hundredth birthday of federation is not only an opportunity to be self congratulatory about the development of a nation in the absence of conflict (Although the works of Henry Reynolds expose the chimera of that folk lore, conflict there was). It is a wonderful opportunity to look at what needs to be altered in the constitution to continue its relevance into the future. Australia is the only Western democracy that does not have a Bill of Rights. The whole point about having a constitutional right is to put it beyond the reach of parliament. Chief Justice Gleeson makes the point in arguendo that "rights are often important precisely because of the unpopularity of the people they are meant to protect. People who only say things that are popular and that are greeted with general applause do not need the right of free speech. Freedom of speech only matters when a person wants to say something that will displease somebody else." The Lord Chancellor of England said in relation to the *Human Rights Act 1998* that it "will lead the Courts to exercise a more intensive form of scrutiny over Government and public authorities. The judges will have to employ such concepts as proportionality and necessity, permitting the Government to cut down human rights only if it does so in response to a pressing social need." To my mind the Northern Territory experience both prior to and after 1911 and particularly since the coming of self government is a living breathing argument profoundly favouring the introduction of a Bill of Rights.

It is difficult to conceive that the founding fathers of the Australian Constitution would have foreseen that document being the genesis of a piece of legislation as impoverished as the *Northern Territory (Self Government) Act 1978*. The separation of powers is not articulated in the Act. That was unwise. Attacks upon the courts are an increasing source of self aggrandisement for politicians in power. Perhaps an understanding of the wisdom of the doctrine of the separation of powers would see the attacks abate. But then I am an optimist. As Gleeson CJ wryly observed, "When the jurisdiction of a court is invoked, and the court becomes the instrument of a constraint upon power, the role of the court will often be resented by those whose power is curbed. That is why judges must be, and must be seen to be, independent of people and institutions whose power may be challenged before them".

The thing that really put the kybosh on the celebrations for the centenary of federation as far as I am concerned was the fact that they began in the "Old Country". Mungo McCallum writing in the Sydney Morning Herald recently described them exquisitely in the following fashion; "Unsurprisingly, those who were part of the ceremony at Westminster Abby and the pomp and circumstance the Poms do so well, and who went on to feast on peacocks' tongues and jellied eels at the Grand Guildhall of the Royal and Ancient Order of Masterwankers, found the whole exercise deeply moving, profoundly historic and worth every cent of the barrowload of taxpayers' funds involved." The time for celebration of federation is a time to cast off the post-colonial cringe and examine our legal institutions in the context of a history that has for a long time demanded we do so. Lawyers should be instrumental in such a process. After all the likes of Deakin and Parkes were able to contemplate a future that required considerable changes.

It is a sweet irony that as we celebrate the centenary of federation the "Poms" have already introduced a Bill of Rights and look like becoming a republic before we do.

A happy new year to you all.