



# Forbes Flyer

THE NEWSLETTER OF THE FRANCIS FORBES SOCIETY FOR AUSTRALIAN LEGAL HISTORY

Spring 2005

## History reports itself

In the last issue, reference was made to the jailing of a *New York Times* reporter. Judith Miller had refused to give up her sources, and was suffering the law's penalty. According to a recent article in the *Sydney Morning Herald*,<sup>i</sup> Ms Miller has been released "after agreeing to testify before a grand jury investigating who in the Bush Administration leaked a covert CIA operative's name".

Miller's arrest and the release have been the subject of some wry comments and conjecture, at least here in Australia.<sup>ii</sup> But even in the more mundane world that the rest of us inhabit, the law and the media are uneasy bedfellows. Recently, as part of the New South Wales Bar Association's Speakers' Program, the *Herald's* legal affairs reporter Michael Pelly defended journalists and their coverage of the legal system.<sup>iii</sup> Journalism was not about trivializing, Pelly said, rather, it was about simplifying. And, as Pelly said, it is a role of the journalist and of the media to hold public institutions to account.

Readers interested in exploring the role of journalists in our legal system could do worse than to read a recently published book by *The Age's* chief court reporter, Peter Gregory.<sup>iv</sup> On its face, it is a text, a primer for journalists intending to report in this area of public activity, a discussion of how-tos and dos-and-don'ts. It is also a lucid summary of deeper concerns that any interested citizen should have in the relationship between justice as an individualized concept and the public's right to be involved in its administration.

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In some senses, the ways in which the law and the media operate are diametrically opposed. Many lawyers would argue that the slowness of a legal system is part of its strength. Deliberate, considered steps are the surest steps. The media does not have – and cannot have – such deliberation. The harsh commercial reality of deadlines and competition means that the journalist's court of appeal is summary in its disposal.

Perhaps the best that can be hoped for, is that various media outlets provide to their readers, or viewers, or listeners, some regular forum in which legal issues can be raised. Some radio stations, for example, provide weekly spots for listeners' legal queries. Some newspapers, for example, have a weekly legal column or a weekly legal section. Whether the media is willing to go much further, is to ask whether there is a market. With so many fascinating stories in the law, past and present, we

can only conclude that the market will come, when the product is given the attention it deserves.

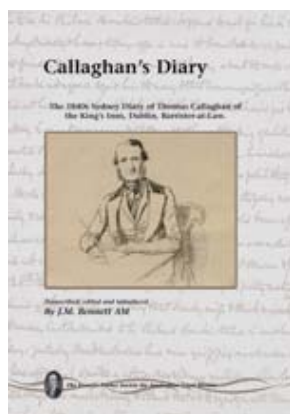
And for lawyers and others who think that the modern media can be at times too cruel, spare a thought for Billy Hughes's first two appointments to the High Court. On 20 February 1913, under the heading "The Ghastly Error of W. M. Hughes", the *Bulletin* lamented that "Powers and Piddington, regarded as High Court Judges, are not so much mistakes as grim tragedies..."<sup>v</sup>

## The Francis Forbes Lecture 2005

The annual Frances Forbes Lecture will be delivered from 5.30 pm on Thursday 3 November 2005, in the New South Wales Bar Association's Common Room, at 174 Phillip Street, Sydney.

This year's lecture, which is titled "New quilts from old rags", addresses the reception of English law into Australia.

The lecture is being given by the Honourable Justice Bruce McPherson CBE, judge of the Queensland Court of Appeal.



### Callaghan's Diary

The Forbes Society is pleased to announce the publication of *Callaghan's Diary*, the 1840s Sydney diary of Thomas Callaghan, barrister-at-law and later a foundation judge of the District Courts of New South Wales.

Readers will know of the Society's recent works relating to Sir James Dowling, the colony's second chief justice, being *Dowling's Select Cases* and *The Dowling Legacy: Foundations of an Australian legal culture 1828 to 1844*. In *Callaghan's Diary*, we see

Dowling's legal world through the eyes of a young advocate, struggling for income and recognition.

This fascinating insight into the legal Sydney of the 1840s is available through the efforts of the distinguished legal historian J M Bennett AM. Dr Bennett has transcribed and edited the original journal, and has provided notes and an index for readers.

Publication details of the Diary and the Society's other publications, and how to order, can be found at the Society's website, [www.forbessociety.org.au](http://www.forbessociety.org.au).

## Biography of Sir Victor Windeyer

Sir Victor Windeyer served as a military commander in a number of campaigns in World War II, and as a justice of the High Court from 1958 to 1972. With the consent of Sir Victor's family, Justice Bruce Debelles of the Supreme Court of South Australia is undertaking a biography.

The Society welcomes the project for two particular reasons. First, the Windeyer family's association with Australian law over almost two centuries. For example, in *Dowling's Select Cases* (a recent Society publication), a forebear of Sir Victor's appears regularly as counsel. Secondly, Sir Victor himself was a noted scholar of legal history. At Sydney University, he obtained the medal in history in 1922, and was lecturer in legal history from 1929 to 1936. The relationship of law and history flows through Sir Victor's judgments.

If readers have any anecdotes, humorous or otherwise, comments or other contributions on any aspect of the life or career of Sir Victor, Justice Debelles would be grateful to receive them.

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## Spring Quarters

### In spring 1805

On 21 October, the chances of the colony of New South Wales ending up with the Code Napoleon rather than the common law, take a step back with the Battle of Trafalgar.

### In spring 1855

On 5 November, the Court of Common Pleas affirms the principle that what goes on in the jury room, stays in the jury room: *Raphael v The Bank of England* (1855) 17 CB 161; 139 ER 1030.<sup>vi</sup>

### In spring 1905

"Anonymous" has not been much of a litigant in Australia. He or she appears as the named party in only three reported cases, all tax cases, all Tasmanian, the first one being given on 6 October, and known to posterity as *Anonymous* (1905) 1 Tas LR 116.

### In spring 1955

In the "Thundering Legion" scandal, an electric battery found its way into the jockey's whip. The scandal rates in *The Age's* top ten.<sup>vii</sup> The High Court's contribution – involving the service of process interstate – was delivered on 17 October, in *Aston v Irvine* (1955) 92 CLR 353.

## Indigenous peoples, the High Court & the criminal law system to 1992

The High Court is Australia's "Federal Supreme Court".<sup>viii</sup> However, unlike the US Supreme Court, it hears not only "federal" matters, rather, it is a national court of appeal of general and unlimited jurisdiction.<sup>ix</sup> And with the passing of, first, appeals from the court to the Privy Council, and, secondly, appeals from the various state Supreme Courts to the Privy Council by way of alternative to appeals to the court, the High Court is now not only a national court of appeal, but the final court of appeal.

For this reason alone, this court's rulings and reasons in respect of matters touching Indigenous peoples of the place now commonly known as Australia is of importance in our legal history.

Why 1992? Because this is when *Mabo* was decided.<sup>x</sup> In this decade-long litigation, Eddie Koiki Mabo and others sought declarations that in respect of lands and waters in the Murray Island group in the Torres Strait, they held a traditional title, a title not extinguished by the actions of subsequent governments.

The litigation was commenced in the High Court in May 1982 and led to two Full Court decisions, the second of which – and the one popularly understood as "*Mabo*" – was handed down in June 1992. In the result, a legal system with its roots in a foreign law and which had hitherto denied the existence of an Indigenous land system, repudiated its denial.

Perspectives on *Mabo* may be found elsewhere.<sup>xi</sup> What of the High Court? John Toohey, first Aboriginal Land Commissioner for the Northern Territory, and, later, High Court justice, is the author of the entry "Aboriginal peoples" in the 2001 tome, *The Oxford companion to the High Court of Australia*. The entry understandably deals in the main with native title, and in it Toohey concludes optimistically:<sup>xii</sup>

... the Court, which for most of its life has not been presented with issues relevant to Aborigines and Torres Strait Islanders, has been in the last decade [ie, the 1990s] greatly immersed in such issues, whether they have come before it as constitutional questions, as problems of statutory construction, or as part of the development of an Australian common law.

Toohey refers readers to an earlier work by John McCorquodale, "Aborigines in the High Court",<sup>xiii</sup> wherein, again, the focus is mainly upon cases dealing with ownership of or interests in, land. Writing nine years before *Mabo*, McCorquodale observes that Indigenous peoples "have

demonstrated a capacity to fight the white man in the white man's courts, utilising white man's law, and to win."<sup>xiv</sup> [emphasis in original]

In the article, McCorquodale examines "all the High Court decisions in civil matters taken on appeal by or against Aboriginal parties."<sup>xv</sup> He says in an endnote that "[c]riminal matters—of which there are four—are not discussed".<sup>xvi</sup>

The author is not aware that those criminal cases have been collated, so this article, whose purpose is not to repeat what Toohey and McCorquodale have isolated as an important, current theme in Australian common law, the reconciliation of fundamentally different concepts of land. Rather, it is to pick up and record other pre-*Mabo* cases, relating to the criminal law system.

By reference to Toohey and McCorquodale, and to the Consolidated Index of the High Court reports, the Commonwealth Law Reports, the author has identified five criminal cases, the last being delivered after McCorquodale's article. Three appear under the heading "Aboriginals" in the index. Two do not. Noted immediately below is Toohey's explanation for the first omission. As to the second, the case's subject matter is referred to, but the case name can only be got by cross-referring to another heading, "Criminal Law".

### *Tuckiar v The King (1934)*

Toohey's entry opens:

The first reported decision of the High Court in which an Aboriginal person was a party to the proceedings seems to have been *Tuckiar v The King* (1934). This was an appeal against conviction for murder by a 'completely uncivilized aboriginal native' whose lack of familiarity with the English language was a relevant consideration in allowing his appeal (compare *Ngatayi v The Queen* (1980)). Interestingly, *Tuckiar* does not appear under the heading 'Aboriginals' in the index to the Commonwealth Law Reports. The likely

explanation is that the term does not appear in the headnote to the report.

Certainly, the language of the judges in *Tuckiar* is of another age. As well as the quote by Toohey, there is reference to "a mission boy",<sup>xvii</sup> and to "lubras",<sup>xviii</sup> terms which would now be regarded by white as well as black Australians as derogatory. That said, the judgments reveal a concern for individual rights in an environment of systemic bias. As one commentator says:<sup>xix</sup>

The case was the Court's first encounter with issues of Aboriginal rights. By unanimously quashing a conviction for murder and sentence of death, and expressing grave disquiet at the whole Northern Territory system of justice, the Court established a pattern of broad sympathy for the rights of Aboriginal peoples, to which it has increasingly returned.

The case involved the death of a (white) policeman, and a history of the incident, more complete than one would expect to find in a law report, can be found elsewhere.<sup>xx</sup> A point of particular interest, for readers familiar with the restrained and formal style one usually associates with written judgments, is the relative vigour of the language used by the court, in criticizing both the trial judge and *Tuckiar*'s own counsel. The former's observations to the jury, in two aspects, attracted particular condemnation. First:<sup>xxi</sup>

...we think the observations made by the learned Judge upon the failure of the prisoner to give evidence amounted to a clear misdirection and one which in the circumstances was calculated gravely to prejudice the prisoner.

And later, after dealing with the fact that the judge had permitted the dead policeman's good character to be admitted before the jury:

... The purpose of the trial was not to vindicate the deceased constable, but to inquire into the guilt of the living aboriginal... the [judge's] observations as to the slander upon a dead man

and the possibility of a miscarriage of justice by the escape of a guilty man were calculated to do anything but fix the jury's attention on the necessity of being satisfied beyond reasonable doubt of the guilt of the accused.

Ultimately, the court found not only that the trial had miscarried, but also that another trial could not fairly be had, and Tuckiar was acquitted.<sup>xxii</sup> As historian Henry Reynolds notes dourly, it was widely believed in Darwin that Tuckiar was soon after shot by police and his body dumped in the harbour.<sup>xxiii</sup>

### *Namatjira v Raabe (1959)*

The first case to appear in the Commonwealth Law Report index under the heading "Aboriginals" – indeed, the only case to appear in the index covering cases to 1959 – is *Namatjira v Raabe*.<sup>xxiv</sup> The entry says "Aboriginals – declaration that person is a ward, procedure..."<sup>xxv</sup>

Albert Namatjira is best known as a successful and prolific artist, an Indigenous artist who painted landscapes in a western and not Indigenous style. His fame brought him "privileges" not available to other Indigenous Australians, and was a basis of this litigation.<sup>xxvi</sup>

In 1958, there was in the Northern Territory a piece of legislation called the *Welfare Ordinance*. Section 14 provided that the Territory's Administrator could declare a person to be a ward, if that person by reason of (a) their manner of living; (b) their inability, without assistance, adequately to manage their own affairs; (c) their standard of social habit and behaviour; and (d) their personal associations, stood in need of such special care or assistance as was provided by the ordinance.

Given the time and place, it is not surprising that the section went on to exclude almost everyone but Indigenous peoples from the ordinance's operation. There was, however, a right of appeal from a declaration.

In 1957, the Administrator made what the court referred to as a "block" determination,<sup>xxvii</sup> with over 15,000 people becoming wards.<sup>xxviii</sup> Namatjira and his wife were not included in the determination.

How, then, did this feted painter become involved? On 26 August 1958, Namatjira shared a taxi with Henoch Raberaba, a fellow Aranta and artist, to Hermansberg.<sup>xxix</sup> Namatjira left liquor on the back seat, in what appears to have been a deliberate attempt to invite a charge that he had supplied it to Raberaba. The latter, by virtue of the "block", had been declared a ward.

Namatjira was arrested, and, despite a growing public outcry, tried and jailed. The sentence was reduced on appeal by Justice Kriewaldt, a noted jurist who saw regularly – and struggled often with – the tension between Indigenous identity and an alien criminal law.<sup>xxx</sup>

Namatjira sought leave to appeal to the High Court. The primary ground was that the declaration that Raberaba was a ward, was void. For if that argument was correct, a necessary element of the criminal charge, that the supply of alcohol be to a ward, was missing.

The gist of the artist's argument was that the ordinance impliedly required that before anyone was declared a ward, notice had to be given to them. Chief Justice Dixon, who gave judgment for the court, said that such an implication might be proper, were there no context to control or rebut the implication.<sup>xxxi</sup> However, after considering the history of the ordinance and its other provisions, the Court was not prepared to invalidate the "block" procedure. In particular, the court felt that the presence of an appeal procedure militated against the asserted implication. However, an argument by the Crown – that the legislation was beneficial – received the understated response that "[i]t is easy however to understand that a person who is regarded as a ward might not so view the matter".<sup>xxxii</sup>

The postscript is spelt out by Blackshield:<sup>xxxiii</sup>

The Court heard the appeal on 12 March [1959] and gave judgment on 13 March. Namatjira was taken into custody on 18 March. He served most of his sentence at Papunya Native Reserve, received one month's remission for good behaviour, and was released on 19 May. On 8 August, less than three months later, he died.

### *Da Costa v The Queen (1968)*

This case<sup>xxxiv</sup> was another appeal from the Northern Territory Supreme Court, an appeal against a conviction of murder. One of the issues arising on the appeal was the effect of the trial judge allowing to go before the jury, the unsworn evidence of two Indigenous Australians. As Justice Windeyer – who, as is noted elsewhere in this issue, was a distinguished legal scholar – said:<sup>xxxv</sup>

Difficulties about the evidence of untutored aboriginals arose in Australia at an early date after British settlement began and as British law was being administered in new areas as the frontiers of settlement were pushed out. It was then considered, in accordance with the accepted doctrines of the common law at the time, that the aboriginal inhabitants of the country were incompetent to take an oath and therefore could not give evidence in any court. As J. H. Plunkett, *The Australian Magistrate* (1835), p. 118, put it:

"Atheists or persons who profess no religion, and have no belief in a future state of rewards and punishments can never be admitted to give evidence. It is to be lamented that the Aboriginal natives of New South Wales are at the present time incompetent to give evidence on this ground."

Justice Windeyer then traces briefly the legislative history.

Here, the situation was peculiar. The trial took place upon an indictment laid in April 1968. Until

August 1967, a court in the Northern Territory could "receive the testimony of [an Indigenous Australian] without administering any form of oath", provided that the court explained that to the witness that they were required to tell what they knew about the matter.<sup>xxxvi</sup> Meanwhile, in June 1967, another provision had entered the legislation. As Justice Owen records, from that time the legislation provided:

"Where a person called as a witness in a court... appears to the court... to be incapable of comprehending the nature of an oath or of understanding the meaning" of the affirmation to which s. 25 of the principal Ordinance refers "the court... shall, if satisfied that the person called as a witness understands that he will be liable to punishment if his evidence is false, declare in what manner the evidence of that person shall be taken, and when evidence is so taken the same consequences follow as if an oath had been administered in the ordinary manner."

What happened in Mr Da Costa's case was an inadvertence. The trial judge in 1968 explained to the two Indigenous Australian witnesses what would have had to have been explained in a trial up until August 1967, but didn't do what the post-June 1967 legislation provided.

In a narrow sense, it didn't matter, as even if the post-June 1967 process had taken place, a majority of the court felt that the outcome would have been the same. However, it is not immediately apparent why the post-June 1967 legislation, which in its reported form and unlike the pre-August 1967 legislation made no specific reference to Indigenous witnesses, necessarily applied in any event. The only member of the court to describe the witnesses in any detail was Justice Owen, who said of them:<sup>xxxvii</sup>

They were each described by [the trial judge] as "unsophisticated" and each was questioned by [the trial judge] for the purpose of determining whether he understood the nature of an oath. One said that he had never been to school and



was not a Christian, the other that he had never been to school and did not understand what was meant by a Christian.

### *Ngatayi v The Queen (1980)*

In Western Australia, an Indigenous Australian who did not speak or understand English was charged with murder. After his arraignment, his counsel had said to the judge that the accused was incapable of understanding the proceedings so as to be able to make a proper defence, and had asked for a jury to be empanelled to determine whether this was so, in accordance with the procedure laid down in the state's Criminal Code.

The judge refused to do so. The accused was again called upon to plead, and this time pleaded guilty. The judge refused to accept the plea and entered instead a plea of not guilty. In doing so, the judge was acting under another state law, section 49(1) of the *Aboriginal Affairs Planning Authority Act 1972*. This was to the effect that a court should not accept a plea of guilty, where it was satisfied that the accused was of "aboriginal descent" who from want of comprehension of the nature of the circumstances alleged, or of the proceedings, was not capable of understanding the plea.

At first blush, as the majority noted, it might be thought that the Code, dealing with the case where an accused is incapable of understanding the proceedings, would include the case covered by the Act, where the accused is not capable of understanding a plea of guilt.<sup>xxxviii</sup> But, as the judges then say:

It is possible that in some cases - and the present may perhaps be one of them - the accused has sufficient capacity to understand the proceedings so as to make a proper defence with the assistance of counsel but that he nevertheless does not understand the plea of guilt because he believes that if he has committed the act he is guilty of the charge, irrespective of the intention with which he acted. In such a case the trial may proceed, but as upon a plea of not guilty.

Justice Murphy in dissent held that the procedure in the Code was available and ought to have been followed. In relation to one aspect of the matter, the relevance of customary law, Justice Murphy noted:<sup>xxxix</sup>

The existence of two systems of law side by side, the prevailing one and aboriginal customary law, with their very different attitudes to guilt and responsibility creates serious problems and the question of how far our laws should apply to aboriginals and how far their law should be allowed to apply to them is controversial.

### *Walden v Hensler (1987)*

Mr Walden, an Indigenous Australian of the Gungalida, was interviewed by Mr Hensler of the Queensland National Parks and Wildlife Service. In apparent contravention of the *Fauna Contravention Act 1974*, Mr Walden had in his possession a dead plain turkey – or Australian bustard – and a live plaint turkey chick.<sup>xl</sup>

Mr Walden believed, in accordance with custom and with his own practice of a lifetime, that he was entitled to take the turkeys as bush tucker and that he had committed no offence. The gist of Mr Walden's defence to his subsequent prosecution was that he had acted with "an honest claim of right and without intention to defraud" within the meaning of the *Criminal Code*.

Whilst a majority of the court held that Mr Walden's defence was not available, they nonetheless found that it was appropriate to apply another provision in the Code, which permitted a court to not record a conviction, even though an offence was proved, if the circumstances allowed. In this regard, Justice Brennan as one of the majority said:<sup>xli</sup>

To deprive an Aboriginal without his knowledge of his traditional right to hunt for bush tucker for his family on his own country and then to convict and punish him for doing

what Aborigines had previously been encouraged to do would be an intolerable injustice. It adds the insult of criminal conviction and punishment to the injustice of expropriation of traditional rights. It can and should be avoided by discharging the appellant absolutely...

Justices Deane and Dawson formed the rest of the majority. Justices Toohey and Gaudron would have allowed Mr Walden's appeal.

## Conclusion

Questions of Indigenous involvement in colonial or post-federation criminal law systems were and are complex. As the above cases show, Indigenous issues arose in a pre-*Mabo* High Court not only when the accused happened to be an Indigenous Australian. Ancillary structures, such as methods for taking evidence, were also considered. An interesting area of inquiry, not within the scope of this short article (about an appellate court in any event), may be the history of the participation of Indigenous peoples in the nation's various jury systems.

## Membership

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<sup>i</sup> "Reporter agrees to testify on CIA leak", *Sydney Morning Herald*, 1 October 2005.

<sup>ii</sup> Richard Ackland, "Truth trapped in the law's cruel machinery", *Sydney Morning Herald*, 7 October 2005.

<sup>iii</sup> For a summary, see "'We're only storytellers': SMH legal reporter", The NSW Bar Association – Bar Brief, Issue 125.

<sup>iv</sup> Peter Gregory, *Court Reporting in Australia*, 2005, Cambridge University Press.

<sup>v</sup> See Fricke, *Judges of the High Court*, 1986, Hutchinson, p 72.

<sup>vi</sup> See Justice Kirby, "Delivering justice in a democracy III – the jury of the future" (1998) 17 Aust Bar Rev 113, fn 18.

<sup>vii</sup> Paul Daffey, "The Ten", *The Age*, 31 October 2004.

<sup>viii</sup> The Constitution, s 71.

<sup>ix</sup> Quick & Garran, *The Annotated Constitution of the Australian Commonwealth*, 1995, Legal Books, §304.

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

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<sup>xi</sup> Blackshield, Coper & Williams (eds), *The Oxford companion to the High Court of Australia*, 2001, Oxford University Press, pp 446-452.

<sup>xii</sup> Blackshield, Coper & Williams (eds), *The Oxford companion to the High Court of Australia*, 2001, Oxford University Press, p 3.

<sup>xiii</sup> John McCorquodale, "Aborigines in the High Court" (1983) 55(1) Australian Quarterly 104.

<sup>xiv</sup> *Ibid*, 112.

<sup>xv</sup> *Ibid*, 105.

<sup>xvi</sup> *Ibid*, 112, endnote 3.

<sup>xvii</sup> 52 CLR, 340.

<sup>xviii</sup> Eg 52 CLR, 339, 348.

<sup>xix</sup> Jack Waterford, "*Tuckiar v The King*", an entry in *The Oxford companion to the High Court of Australia*, pp 687-688, at p 687.

<sup>xx</sup> See Waterford, above.

<sup>xxi</sup> 52 CLR, 344, 345.

<sup>xxii</sup> 52 CLR, 347, 355.

<sup>xxiii</sup> Quoted in Waterford, *ibid*, at p 688.



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- <sup>xxiv</sup> *Namatjira v Raabe* (1959) 100 CLR 664.
- <sup>xxv</sup> Lane, *An Index-Digest with Table of Reported Cases in the Commonwealth Law Reports volumes 1-100 (1903-1959)*, 1961, Law Book Company, p 2.
- <sup>xxvi</sup> The wider tale is summarised by Tony Blackshield in “*Namatjira v Raabe*”, an entry in *The Oxford companion to the High Court of Australia*, pp 491-492.
- <sup>xxvii</sup> 100 CLR, 670.
- <sup>xxviii</sup> 100 CLR, 667.
- <sup>xxix</sup> The artists are part of what is sometimes known as the Hermannsburg school: see generally [www.hermannsburgschool.com/?artists](http://www.hermannsburgschool.com/?artists) .
- <sup>xxx</sup> See eg Douglas, “Justice Kriewaldt, Aboriginal Identity and the Criminal Law” (2002) 26 CLJ 204; see also his obituary at (1960) 34 ALJ 57.
- <sup>xxxi</sup> 100 CLR, 668.
- <sup>xxxii</sup> 100 CLR, 669.
- <sup>xxxiii</sup> Blackshield in “*Namatjira v Raabe*”, an entry in *The Oxford companion to the High Court of Australia*, pp 491-492, at p 492.
- <sup>xxxiv</sup> *Da Costa v The Queen* (1968) 118 CLR 186.
- <sup>xxxv</sup> 118 CLR, 198.
- <sup>xxxvi</sup> Section 9A(1) of the *Evidence Ordinance 1939-1960 (NT)*, set out at 118 CLR, 215.
- <sup>xxxvii</sup> 118 CLR, 203.
- <sup>xxxviii</sup> *Ngatayi v The Queen* (1980) 147 CLR 1, 9-10 (Gibbs, Mason & Wilson JJ). Barwick CJ would have refused leave to appeal, and so in effect reached the same result. Murphy J dissented.
- <sup>xxxix</sup> 147 CLR, 14.
- <sup>xl</sup> *Walden v Hensler* (1987) 163 CLR 561, 597 (Toohey J).
- <sup>xli</sup> 163 CLR, 578.