Ceremonial sitting
Supreme Court of the Northern Territory, Darwin
Tuesday 4 September 2018

The Hon Susan Kiefel AC
Chief Justice of Australia

This ceremonial sitting marks a historic occasion. This is the first time that the Court has sat to hear cases in the Northern Territory. The Court is grateful to the Supreme Court of the Northern Territory for accommodating us.

The Court acknowledges the presence of Her Honour the Administrator of the Northern Territory, the Chief Justice of the Northern Territory, the Attorney-General of the Northern Territory, Judges of the Supreme Court, the Chief Judge of the Local Court and Judges of that Court, the Solicitors-General for Queensland, the Northern Territory and South Australia, and the Presidents of the Northern Territory Bar Association and the Law Society Northern Territory.

It was not long after Federation that the High Court began undertaking circuits around Australia. After the transfer of the Northern Territory to the Commonwealth on 1 January 1911 and the establishment of a Supreme Court in the Territory, the circuits did not extend to Darwin even though the Court sat in the capital city of each State in 1911 and 1912[1].

There may be a number of factors which explain this important omission. One might have been the perception of Darwin as remote and, to an extent, inaccessible. The fateful first and only circuit of the Supreme Court of South Australia to Palmerston in February 1875 may have been recalled. The circuit

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[1] *Commonwealth of Australia Gazette*, No 71, 19 November 1910 at 1766; *Commonwealth of Australia Gazette*, No 20, 25 March 1911 at 883; *Commonwealth of Australia Gazette*, No 90, 2 December 1911 at 2274.

Judge, his Associate and the Crown Prosecutor all perished on the return journey when their ship struck a reef during a cyclone.

The limited facilities of the Supreme Court in Darwin, and for a period in World War II when it was relocated to Alice Springs, may have been a factor. This might not explain the period after the present building was opened in 1991.

Other factors might include the limited number of appeals brought from courts of the Northern Territory in those early days and the fact that there may have been some uncertainty as to the High Court's jurisdiction to entertain appeals from those courts. *Mitchell v Barker*[2], which was heard in Melbourne in March 1918, involved the question whether a Special Magistrate lacked jurisdiction to enter a conviction for an offence against the *War Precautions Regulations 1915* (Cth). Griffith CJ, delivering the opinion of the Court, expressed doubt as to whether the Special Magistrate's Court was a "federal court" such that the matter fell within the appellate jurisdiction of the High Court. His Honour observed that the Court had earlier held that Chapter III of the Constitution did not apply to the Territory of Papua although he suggested that "a distinction may some day be drawn between Territories which have and those which have not formed part of the Commonwealth"[3].

It was not until 1926, in *Porter v The King; Ex Parte Yee*[4], which was also heard in Melbourne, that the Court, by a majority, conclusively determined that it had jurisdiction to entertain appeals from the Supreme Court of the Northern Territory. In the years following 1926 the High Court heard a small number of appeals from the Northern Territory. One of the most notable of the time was no doubt *Tuckiar v The King*[5].

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[2] (1918) 24 CLR 365; [1918] HCA 13.

[3] (1918) 24 CLR 365 at 367.

[4] (1926) 37 CLR 432; [1926] HCA 9.

[5] (1934) 52 CLR 335; [1934] HCA 49.

Over the years the Court heard matters from the Northern Territory brought in its original jurisdiction, although at an early point some hurdles were also encountered. In *Waters v The Commonwealth*[6], which involved the detention of Mr Waters, an Aboriginal man, under the *Aboriginals Ordinance 1918* (NT) after allegedly organising a strike[7], an application for a declaration that his detention was unlawful, habeas corpus and other orders was refused on the basis that the Court did not have original jurisdiction under s 75 because Chapter III did not extend to the Northern Territory. The decision was later overruled in *Spratt v Hermes*[8].

It was to be expected that in subsequent years, the Court would consider a number of matters concerning the scope of s 122 in connection with laws made for the government of the Territory such as *Lamshed v Lake*[9] or laws affecting the Territory such as the *Territory Senators cases*[10].

In the 1980s the Court heard a number of matters relating to the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). They included *R v Toohey; Ex Parte Northern Land Council*[11] and *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[12]. After the enactment of the *Native Title Act 1993* (Cth) the Court heard a number of appeals concerning native title with respect to land in the Northern Territory including *Fejo v Northern Territory*[13] and *The Commonwealth v Yarmirr*[14]. The matter to be heard in this first sitting is one relating to native title.

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6 (1951) 82 CLR 188; [1951] HCA 9.

7 See Harris, "*Waters v Commonwealth*: The Lingering Traces of Historical Legislation That is 'Ill-Advised or Mistaken, Particularly by Contemporary Standards'" (2017) 4(1) *Law and History* 1 at 10-11.

8 (1965) 114 CLR 226; [1965] HCA 66.

9 (1958) 99 CLR 132; [1958] HCA 14.

10 *Western Australia v The Commonwealth* (1975) 134 CLR 201; [1975] HCA 46; *Queensland v The Commonwealth* (1977) 139 CLR 585; [1977] HCA 60.

11 (1981) 151 CLR 170; [1981] HCA 74.

12 (1986) 162 CLR 24; [1986] HCA 40.

13 (1998) 195 CLR 96; [1998] HCA 58.

14 (2001) 208 CLR 1; [2001] HCA 56.

This brief summary shows that there have been important cases emanating from the Northern Territory over the years. It cannot be denied that their resolution has added to the jurisprudence of the Court in constitutional and other areas of Australian law. This raises the question why, at least in more recent times, cases have not been heard in Darwin. A search of the records of the Court provides no insight.

The Justices of the Court appreciate the importance of circuits not only to the profession but to the public more generally. It is sometimes suggested that we should undertake them more often, but it needs to be understood that the considerable cost associated with circuits must be weighed against the matters available to be heard at a given time. That said, any opportunity to undertake a circuit is given careful consideration.

Whatever be the omissions of the past, the Court is now here and no doubt will be again in the future. The Justices and I look forward to meeting members of the judiciary and of the legal profession and enjoying the hospitality of Territorians.

The Court will now adjourn.