

SUPREME COURT OF THE NORTHERN TERRITORY  
STATE SQUARE, DARWIN

CEREMONIAL SITTING TO MARK THE RETIREMENT OF  
THE HONOURABLE JUSTICE GRAHAM HILEY

TRANSCRIPT OF PROCEEDINGS

COURTROOM 1, FRIDAY, 5 MARCH 2021

PRESIDING JUDGES:

THE HON. CHIEF JUSTICE MICHAEL GRANT  
THE HON. JUSTICE JENNY BLOKLAND  
THE HON. JUSTICE GRAHAM HILEY  
THE HON. JUSTICE SONIA BROWNHILL  
THE HON. ACTING JUSTICE TREVOR RILEY AO  
THE HON. SALLY THOMAS AC

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EPIQ

GRANT CJ: The Court welcomes and acknowledges the presence here this afternoon of her Honour the Administrator Vicki O'Halloran AO; the Minister for Health and former Attorney-General, the Honourable Natasha Fyles MLA; the Honourable Austin Asche AC QC, former Administrator and Chief Justice of this Court; the Honourable Tom Pauling AO QC, former Administrator and Solicitor-General; the Honourable Sally Thomas AC, former Administrator and Judge of this Court; the Honourable Clare Martin AO, former Chief Minister of the Northern Territory; the Honourable Brian Frank Martin AO MBE QC, former Chief Justice of this Court; the Honourable Trevor Riley AO QC, former Chief Justice of this Court; Miles Crawley SC, Judge of the District Court of South Australia; Mr Nikolai Christrup SC, Solicitor-General for the Northern Territory; Mr Ken Fleming QC, Independent Commissioner against Corruption; Ms Gemma Lake, Acting Chief Executive Officer of the Department of the Attorney-General and Justice; Mr Peter Shoyer, Ombudsman and Information Commissioner; Ms Sally Sievers, Anti-Discrimination Commissioner; other distinguished guests, ladies and gentlemen.

The Attorney-General, the Honourable Selena Uibo MLA, is presently in Gapuwiyak and has asked me to register her apology.

As you are all aware, today the Court is sitting to mark the retirement of Justice Hiley. Justice Hiley was sworn in as a Justice of this Court on 1 March 2013. Prior to his appointment to this Court, Justice Hiley had a long and distinguished career at the Northern Territory and Queensland Bars. While the speakers here today will have more to say about Justice Hiley's career, in every capacity in which he has worked in the law Justice Hiley has been known for his industry, his intellect, his courtesy and his humility.

Justice Hiley has been a model Judge of this Court and a much loved and respected colleague. Fortunately, he has agreed to take appointment as an Acting Judge. His first sittings in that capacity commence on 17 May this year, so we will not have to miss him for long and Sue won't have long to enjoy his retirement.

The Court thanks Justice Hiley for his valuable service as a permanent Judge and looks forward to his further service as an Acting Judge. We wish he and Sue all the best for their future.

Mr Solicitor, do you move?

MR CHRISTRUP SC: May it please the Court I appear on behalf of the Attorney-General, the Honourable Selena Uibo MLA who the Chief Justice has noted is an apology today. I acknowledge the Larrakia peoples as the traditional owners of this land and I pay my respects to elders past and present.

Today marks the occasion where we gather to thank your Honour Justice Hiley for having dedicated the eight years that have just passed to the dispensation of justice in this Honourable Court.

Your Honour's time on the Bench marks the end of an illustrious and successful career in the law, a career which has taken your Honour from New South Wales to the Northern Territory, to Queensland and then back home again to the Northern Territory.

A childhood which began in Sydney at Epping Public School and Epping Boys High School was to be the springboard to a Bachelor of Arts and a Bachelor of Laws degree from the University of Sydney in 1969 and 1972 respectively.

Your Honour wasted no time and proceeded immediately to obtain admission as a legal practitioner of the New South Wales Supreme Court. Your Honour started working as a solicitor at Stephen, Jaques and Stephen, now King & Wood Mallesons, in Sydney, until 1975 when you made the journey to Darwin.

Your Honour was in your mid 20's at the time and was quickly snaffled up by the local commercial law firm that was then known as Cridland & Bauer. You worked tirelessly as a Darwin solicitor for two years however the lure of the Bar was too much for your Honour to resist.

And so it was that in January 1978 you joined Michael Maurice and John Harrison at the Darwin Bar at Mallam Chambers in Mitchell Street. The local Bar was very much in its infancy at that stage, and we have your Honour to thank for seeing it through its adolescence and well into its adulthood. The strength and robustness of the Bar today is in no small measure due to your Honour's contribution.

Your Honour witnessed Counsels Chambers, as the barristers Chambers were called back then, first move to 99 Mitchell Street which incidentally is today occupied by Bargain Car Rentals. Chambers was then to move to Beagle House in 1983 and to the Qantas Building in 1989.

Along the way, in 1987 your Chambers was renamed William Forster Chambers in honour of Sir William Forster, the first Chief Justice of this Court following his retirement in February 1985.

The cases which your Honour argued in this Court whilst at the Northern Territory Bar are legion. Time does not permit me to list all of them but they include such seminal cases as *Wickham v Tacey*, *Rogerson v Law Society*, *Buric v Transfield*, and *Augusto v Territory Insurance Office*. Your Honour was also Counsel in several Territory cases which proceeded to the High Court including *Traut v Rogers* and *Northern Territory v Mengel*.

I will make special mention of *Davison v Totalisator Administration Board* because it was one of the many Riley/Hiley stand-offs that took place at the time. I note that his Honour Justice Riley joins you on the Bench this afternoon fresh in from Alice Springs. In deference to Justice Riley I won't mention who won that particular case.

Your Honour quickly established a reputation as a hardworking barrister with a natural flair for Court work. You were an object of admiration for the profession and you generously shared your knowledge and expertise by providing guidance to the younger members of our profession on countless occasions.

Although briefed in many areas your Honour soon became recognised as one of Australia's leading counsel in Aboriginal land rights. Your work included taking on the responsibility as Counsel assisting Justice Toohey in his capacity as the inaugural Land Commissioner in a number of the earlier claims under the *Aboriginal Land Rights (Northern Territory) Act* (Cth).

Those were frontier days for the legal profession and many land claim reports show pictures of your Honour relaxing after a day of hearings complete with a bucket hat, thongs and of course stinnie shorts.

Nevertheless, in your capacity as Counsel you contributed to land claim reports which have resulted in large areas of the Territory being granted by the Commonwealth to traditional owners - just as you have contributed to systems of law and anthropology which would pave the way for the eventual recognition and development of native title in this country.

Your hard work and legal acumen as a barrister caused you to be held in the highest regard by the Bench and as an opponent to be feared.

After only nine years at the Bar your Honour took silk in 1987, a year that also marked your appointment as the Supreme Commander of the Law Society, a position you occupied for two years. This was then followed by a further appointment, this time as President of the Northern Territory Bar Association in 1990, the organisation you had been instrumental in forming only nine years earlier.

A photo still hangs in the library of William Forster Chambers to mark the years of your Honour's reign as the President of the Bar Association. I personally have consumed many a lunch in that room under the watchful gaze of your Honour.

Having achieved more than most by then, a QC-ship and two presidential positions and not quite prepared to settle in an ivory tower just yet, you and your family moved to Brisbane in 1994 to accept new challenges. Building on the experience from your days with Justice Toohey, your Honour embarked upon establishing a most impressive native title practice from Jeddart Chambers in Brisbane.

Aside from *Mabo [No.2]*, your Honour was Counsel in all of the most significant native title cases in this country, often with particular importance to the Territory. Those cases include *Wik Peoples v Queensland* which determined that native title could co-exist with pastoral leases which led to the possible recognition of native title over the vast majority of Australia. The *Commonwealth v Yarmirr*, which determined that native title could exist over the sea, in that case the sea adjacent to Croker Island. *Yorta Yorta v Victoria*, which determined the requirements for connection to

prove native title. *Risk v Northern Territory of Australia* concerning native title in and around the town of Darwin. *Western Australia v Ward*, the longest decision ever handed down by the High Court, which clarified the operation of the *Native Title Act* and *Gumana v Northern Territory of Australia*, also known as The Blue Mud case, which determined that traditional owners held title to the inter-tidal zone to most of the Northern Territory coast.

It is not possible to over-emphasise your Honour's enduring contribution to this rich and complex area of the law.

As was the case in Darwin, you were one of the most respected and revered practitioners in Queensland. The breadth and success of your practice at the Queensland Bar is still a subject of conversation.

Which then brings me to 1 March 2013 when your Honour came up trumps again - this time by being sworn in as a Justice of this Supreme Court, exactly eight years and four days ago to this day.

Armed with a Commission signed by the Administrator at the time, her Honour Sally Gordon Thomas AC, herself a former Judge of this Court and present here today, your Honour took your place on this Bench.

In that office you became known not only for incisiveness and fairness but also as a person who displayed the utmost courtesy to those who appeared before you.

You have adjudicated countless matters over the last eight years. A search reveals no less than 153 published Reasons for Decision both as a Judge at first instance but also as a member of the Court of Appeal and Court of Criminal Appeal.

But there is also another side to your Honour – perhaps a less well-known side. The same year that you graduated from law school, you also commenced national service at the Officer Training Unit at Scheyville, New South Wales. Your Honour became a legal officer in the Australian Army, a role that you held until the compulsory retirement from the Australian Army Legal Corps in 2014, reaching the rank of Lieutenant-Colonel and being awarded the Reserve Forces Decoration.

However, your Honour's retirement from the Legal Corps did not mean that you ceased giving up your time in the service of the armed forces. You became one of the five judicial members of the Defence Force Discipline Appeal Tribunal, the most senior service tribunal in the Australian Defence Force. In that capacity your Honour contributed to the seminal decision in *Williams v Chief of Army* which, after many years of controversy, determined the constitutional basis for military discipline. Your Honour's view was subsequently challenged in the High Court and vindicated in the decision last year in *Private R v Cowan*. Your Honour has passed on the mantle and now His Honour Justice Barr is a member of that tribunal.

1972 to 2021 is a long legal journey. The year of your Honour's admission to legal practice 49 years ago was marked by events such as President Nixon meeting

Mao Zedong in China, The Godfather movie premiered and the Vietnam War was in full swing.

Over your time in the Territory your Honour witnessed many important developments, the commencement of self-government in 1978, as I have mentioned, the establishment of the Bar Association, the move of the Supreme Court to this present building, the opening of Parliament House in 1994 and critically, the enactment of the *Justice Legislation Amendment Act* in 2019, which increased the retirement age in s 38 of the *Supreme Court Act* for Supreme Court Judges from 70 to 72. This amendment ensuring, of course, that the Northern Territory would reap the benefit of having your Honour as a Judge for an additional two years.

Our Northern Territory is forever changing. Your Honour's departure from the Bench is yet another instance, but you leave it a much richer place - or so we thought - until we heard the comments from his Honour, the Chief Justice. It sounds like your Honour is not quite ready to cash in your judicial chips.

Thank you Justice Hiley and good luck.

HILEY J: Thank you.

GRANT CJ: Thank you, Mr Solicitor.

MR CHRISTRUP: May it please the Court.

GRANT CJ: Yes, Mr President of the Bar Association?

MR MCCONNEL: May it please the Court. It is my privilege and great honour to appear on behalf of the Northern Territory Bar to acknowledge and express our gratitude to your Honour's service to the law, to justice and to the legal procession over a lifetime in the law.

The majority of that time has been in the Northern Territory and the majority of your Honour's time in the Northern Territory has been at the Northern Territory Bar. Your Honour served as an office bearer of the Bar Association including as its President from 1990 to 1993.

It would be remiss to allow the occasion of your Honour's retirement after a full and distinguished career in the law to pass without at least some reminiscences from those days.

HILEY J: Oh oh.

MR MCCONNEL: In the early 1970's the *Aboriginal Land Rights (Northern Territory) Act* was passed by the Commonwealth and it brought in the regime of land claim inquiries that my learned friend, the Solicitor-General, has already alluded to. They were modelled on the Fox Inquiry that had been undertaken in relation to establishing Ranger Uranium Mine in Arnhem Land and Kakadu National Park. The

regime involved the appointment of a Federal Court Judge as Aboriginal Land Commissioner to hear inquiries into those claims. They were regarded with hostility and suspicion by the fledgling Northern Territory Government and in the early days at least, the land claims were rigorously disputed. Needless to say, right time - right place - and a burgeoning new practice fell into the laps of many in the Northern Territory legal profession including your Honour.

Your Honour was, as my learned friend has said, for a period of time, Counsel assisting the first Aboriginal Land Commissioner, Justice John Toohey, who went on to become the closest thing so far to a Territory appointed High Court Judge.

In the course of representing the Northern Territory on one such land claim, speculation began to mount that your Honour was, in fact, a Rhodes Scholar, this being so because of your Honour's erudite and detailed exposition of argument on what constitutes a public road and should therefore be excluded from the grant. Literally, no stone was left unturned, as your Honour set about arguing why every formed structure, cutting, culvert, drain, clearing, graded strip, flat open area and even at one indefinable point in the future, a future road, should be classified as a public road and therefore excluded. Such was the magnitude of the exercise that your Honour undertook in advancing the Territory's interests that I am reliably informed you were regarded in that claim hearing as, "The Colossus of Rhodes".

The Warumungu Land Claim Report makes for fascinating reading and a result that could only fairly be described as a "mixed bag" for your Honour's client. The highways were duly excluded, the tracks to stock watering bores were excluded but the gravel pits, the power line access tracks and the wide-open spaces of imagined future super highways, were not.

I am told you enjoyed land claim work immensely, as did many who were involved at the time. It provided a rare glimpse into another world of mystical spirituality, a belief system still so powerful in places that it had the power to cause people to become sick and die. It involved expeditions into some of the most remote and secret places in the Territory to hear evidence from the traditional custodians.

The work was not without its risks, including exposure and insect bites. I am told that during the Daly River land claim, your Honour was required to travel up and down river in a small punt under the stewardship of a Conservation Commission field officer known as 'Disaster Dick'. That particular claim saw 'Disaster Dick' lose no less than three outboard motors and at one point, the punt carrying the whole party, your Honour included, sank in the Daly River.

History shows that your Honour was successfully rescued and the claim went on. Your Honour's enthusiasm for land claim work was not diminished.

That work and the unique jurisprudence that developed in the Northern Territory in those years would have significant national ramifications a few years later in 1992, when the High Court handed down *Mabo v Queensland (No 2)*.

The decision that exposed the fiction of terra nullius and finally recognised an Indigenous right of native title that existed at the time of sovereignty of Australia by Great Britain, derived from the laws and customs of Indigenous communities, was the foundation of the *Native Title Act*.

Your Honour had by then appeared in over 20 land claims and so, when the *Native Title Act* came into force, there was arguably no more experienced barrister in Australia in dealing with claims for traditional ownership or native title based on Aboriginal law and custom.

As my learned friend, the Solicitor-General has outlined, your Honour went on to practise in that field and appeared for one interest or another in every landmark case in that jurisdiction. In 1997, your Honour literally wrote the book, or at least edited and contributed to the collection on the *Wik* case, its issues and the implications and an autographed copy lives on the shelves of your former Chambers, William Forster Chambers.

I had the privilege of being your Honour's junior in one of the last native title cases that your Honour undertook before appointment to the Supreme Court in 2013. That was the native title claim over Jabiru, a case in which Justice Brownhill also appeared. It involved determining whether native title had been extinguished by certain acts in circumstances where the town of Jabiru had been built as a residential facility for a mine of limited lifetime in a national park held under a lease, from the traditional owners.

Following the decision in that matter, agreement has been reached between the Commonwealth, the Northern Territory and the traditional owners that will see the transition of management of the town to those traditional owners. The implications of that case are now playing out. We have seen bold plans for the redevelopment of Jabiru and we have observed the tensions between aspirations of development and tourism on the one hand and of self-determination and a desire to return to traditions on the other. It reminds us of what a truly fascinating place the Northern Territory is to live and work in and something which no doubt your Honour has reflected upon many times.

On your Honour's appointment to the Supreme Court, your involvement and familiarity with Indigenous and traditional owners was to take a slightly different turn.

Sadly, much of your Honour's experience and exposure has been in the area of criminal law in which your Honour and all of the Judges of this Court face the unremitting burden of a caseload that invariably involves inter-generational trauma associated with alcohol and violence amongst the Indigenous community. However, the profession has had the benefit of your Honour's unique insight and experience, coupled with an exemplary standard of reasoning and judgment in a range of decisions very relevant to your Honour's former practise area at the bar.

In 2014, your Honour delivered a decision in *Tiwi Land Trust v Munupi Wilderness Lodge*. It contained a straight forward concise analysis of how the



*Aboriginal Land Rights (Northern Territory) Act* works in relation to ownership of Aboriginal land, control of Aboriginal land, entry onto Aboriginal land and conducting business on Aboriginal land.

It laid out with singular clarity how the concept of permits work under the *Aboriginal Land Rights (Northern Territory) Act* and considered the interplay between those rights and the property rights conferred and exercisable under Territory laws. It will serve as an important and instructive guide to lawyers drafting commercial agreements for activities being conducted on Aboriginal land well into the future.

In 2017, your Honour decided an important question in relation to the Groote Eylandt Aboriginal Trust or GEAT. The question was whether the trust set up by the Church Missionary Society in the 1960s for the benefit of Aboriginals from mining on Groote Eylandt was in fact a charitable trust.

It was said by reference to principles of the law of trust developed over hundreds of years under English law that a trust for the benefit of a group of Aboriginals identifiable by reference to an apical ancestor, offended one of the rules of the creation of charitable trusts. Charitable trusts had been a mechanism for provision and distribution of royalties, benefits and social support to Aboriginal people throughout Australia for decades.

Your Honour found that the argument that had been advanced failed to recognise the significant difference between descent from an ascertainable person and descent of the kind involved in classifying people into definable and practical groups under traditional law and custom.

In the case of those clans forming the beneficiaries of that trust, your Honour found that their membership was much more complicated than descent from a particular ascertainable person. Your Honour said that they were rules based upon descent from people who have belonged to and owned particular land since time immemorial and also from mythical ancestors, some of whom were believed to have created the land, its features and bestowed the rights in the land and features onto those who are now described as “clans”.

Your Honour would know, it was your Honour’s life’s work.

And late in 2020, in *Windbox v Daguragu Aboriginal Land Trust*, your Honour determined a commercial dispute that had arisen in the context of grazing licences issued to pastoralists by the Central Land Council under the *Aboriginal Land Rights (Northern Territory) Act*. The dispute itself had all the hallmarks of classical commercial litigation; allegations of fraud, breach of director’s fiduciary duties, breach of contract, tortious interference, validity of grants of licences and even a bit of cattle duffing thrown in for good measure.

The backdrop of that dispute was once again the *Aboriginal Land Rights (Northern Territory) Act* and the land ownership regime, including questions of identity of traditional owners, powers of land trusts, indefeasibility of title under that

Act and so on. The decision is under appeal as we speak. But irrespective of the final determination, it can be observed that, once again, your Honour was able to seemingly effortlessly and with rare clarity marry these two apparently very different legal regimes and their underlying concepts together in a way that makes practical sense and offers guidance for future practise.

In many ways, cases such as these represent a snapshot of the story of the Territory's development, of the emerging commercialisation of Indigenous ownership and use of land, of a growing jurisprudence marking the progression of a changing society some 40 years or so after the first grants of Aboriginal freehold title.

More recently, your Honour has written extra-judicially on the phenomenon of the jury trial in the Northern Territory and the absence of Aboriginal people from jury selection despite the large number of criminal matters involving Aboriginal people. Your Honour observed that whatever the solution to that problem may be, it was of critical importance to seek the views of Aboriginal people involved in the justice system, especially those from remote communities. Your Honour said: "Only they can provide reliable advice on how best to aim for a fair trial where one or more of the participants are Aboriginal".

As your Honour draws the curtain on this tertiary phase of the traditional barrister's career, it might be thought that the work is done and that your Honour may put his feet up and watch others carry on. Well, the Chief Justice has dispelled that myth for us all. It would be a great shame and a loss to the profession in the Territory if that were to happen and particularly so for the members of our Indigenous communities of the Northern Territory.

Your Honour's combination of intellect, decency, empathy, insight and that unique body of knowledge gained from your unusual journey leaves us in no doubt that your Honour still has an enormous contribution to make to this community. The Territory is about to embark on a bold new experiment with the implementation of the Aboriginal Justice Agreement. Change will be a long time coming, but that is neither a reason not to start, nor not to try. I am sure that the profession will be able to find something for your Honour to do along the way.

For now though, we, the members of the Northern Territory Bar, simply say thank you, your Honour, for your service, for your unfailing courtesy to the Bar, your respect and friendship and most importantly, for your lifelong commitment to the law and the community of the Northern Territory.

May it please the Court.

GRANT CJ: Thank you, Mr President.

Yes, Madam President of the Law Society.

MS FARNELL: May it please the Court. I would like to acknowledge the Larrakia people as the traditional owners of the land on which this Court sits. I pay my respects to elders past and present and to emerging community leaders.

It is a great honour for me to address the Court today on behalf of the legal profession of the Northern Territory to pay tribute to your Honour's contribution to this Court. Your Honour is widely respected and known for your kindness and patience.

Your Honour has had a long and great relationship with the Law Society. The Law Society is proud that your Honour's name appears on the Council Roll of Honour and that your face is on the Honour Wall which peers down at us during Council meetings. Your Honour has served as Councillor, Vice-President and President.

As the third speaker, your Honour, I am conscious of needing to avoid any repetition. It is clear that your Honour has had a noteworthy career both as a barrister and on the Bench but at the Society, we've done some research.

Your Honour was President, or Supreme Commander, of the Society during 1987 to 1988 during which time the Society was overseeing the introduction of a professional indemnity insurance scheme and the establishment of the Public Purposes Trust.

The Trust, over the years since its establishment, has funded many important community education projects such as supporting the publication of the NT Law Handbook which is produced by both the Darwin Community Legal Centre and the Northern Territory Legal Aid Commission.

However your Honour's first involvement with the Society was on a much more practical and personal basis. As part of telling the 50 years of history of the Society, your Honour spoke about arriving in Darwin as part of a round Australia driving trip with your wife, Sue. Having arrived during the wet season and getting stuck in Darwin due to impassable roads, you were eager to find short term work and approached Paul Everingham as the then President of the Law Society to investigate vacancies. I must note before going further that this presidential duty has fallen away given the rise of Seek and LinkedIn.

However in March 1976 it appears that the job boards at the Society were bare. But as your Honour was walking down the street, presumably considering your next steps, your Honour was chased down by Mr Everingham who advised that he had made a few phone calls and John McCormack was looking for a lawyer. The official history is strangely silent about whether working for Mr McCormack involved any long lunches at Charlie's but the rest, as they say, is history.

Your Honour's commitment to the integrity of the profession and its regulation has been longstanding. And considering these important matters seems to have been through-line of your career. As already noted, your Honour was the President

of the Society during a time when amongst organising some sort of 'sundowner drinks' at Le Club - the professional conduct rules were under review.

Some seven years later in 1995 your Honour acted for the Society in a special leave application in the Brisbane Registry of the High Court of Australia. Your fellow Justice, Southwood J, was appearing for the applicant before Dawson, Toohey and McHugh JJ in relation to the cancellation of the applicant's practicing certificate.

Your Honour ably defended the Society's position in an efficient and cost effective manner. The High Court had your written submissions and did not need to trouble you before dismissing the application.

Finally, your Honour has considered the scope of a legal practitioner's obligation under the *Legal Profession Act 2006* while on the Bench including a practitioner's obligations to the Court and to disclosure and candour - resulting in a decision which is often cited in similar matters around Australia, all 436 paragraphs.

But your Honour's contribution to the profession while on the Bench has extended to more than comprehensive and lengthy decisions. Your Honour has been instrumental in running the annual practical advocacy course which over the years has been attended by many younger members of the profession and assisted those members progress their advocacy skills and careers. Your Honour's time, commitment and support is noted and the Society thanks you for your efforts over the years.

Your Honour was appointed to the Supreme Court after a long and distinguished career at the Bar dealing with complex litigation, as we have heard, involving native title matters. These matters likely involved very senior practitioners and in depth discussions about technical matters such as connection and extinguishment.

However joining this Court was an education of a different sort. Your Honour was heard to remark on more than one occasion and particularly in those early days that being on the Bench was a great educator in relation to changes to modern life. Specifically given this Court's practice to hire Associates at the start of their legal careers meant your Honour was forced to listen to, and indirectly learn about, the various types of online dating apps.

But your Honour is also credited with introducing modern technology into the Court and being instrumental in ensuring that there was regular and reliable WiFi on the sixth floor. Apart from encouraging the Court to join the 21st century in terms of its facilities, I am informed that the improvements would have also assisted in your pastime of ship watching from the sixth floor balcony with a pair of binoculars in hand.

On your Honour's appointment, the then President of the Bar Association, Mr Lawrence SC, observed that as a member of the Bar you "*were universally liked by the profession and the Court staff. This fondness came by virtue of your decency, courtesy and your self-effacing manner. Significantly you are still fondly remembered*

*by many in the profession for the fact that you were approachable and extremely helpful to the junior ranks of the profession."*

Your Honour has evidently retained those qualities after your appointment because you were very shortly thereafter universally referred to amongst the profession as Cuddles J.

Your Honour's courteous and patient approach is afforded to everyone in your Honour's Court - Counsel, witnesses and potential jurors seeking to be excused from duty for a range of reasons.

Your Honour was welcomed as a Justice of this Court on 1 March 2013. To butcher a 1990's midway number, how do you measure those years on the Bench? It can be done numerous ways. Mathematically it is 2,295 days. Productively it is 153 written and published judgments. But at the Society we like to count these years based on wins and losses of the annual Law Week cricket match.

Since your Honour's appointment to the Bench, the President's XI has won the match four times compared to the Chief Justice's three. Your enthusiasm was always welcomed but it has been said, because of the strange scoring protocols, that your Honour was always the best player for the other team.

Anecdotally this seems to have some credence. In 2012, before being appointed to the Bench, your Honour played for the President's XI. The President's team lost. In 2013 after being appointed to the Bench, your Honour played for the Chief Justice's XI. The Chief Justice's team lost.

The profession and the public has had the benefit of an extended period of time with your Honour on the Bench given the commencement of the *Justice Legislation Amendment Act 2019*. The profession has had more time than expected to appear before you and they expect and welcome continuing to appear before you over the coming years - commencing 17 May.

As your Honour departs the Court and on behalf of the legal profession I wish you a happy and fulfilling retirement and perhaps some more time to enjoy your pastimes like tracking the movements of ships through Darwin Harbour.

May it please the Court.

GRANT CJ: Thank you, Madam President.

Justice Hiley, would you like to respond?

HILEY J: Yes thank you, Chief Justice. Your Honour the Administrator, the Honourable Vicki O'Halloran; Mr Craig O'Halloran; Chief Justice of the Northern Territory Supreme Court, Michael Grant, fellow judges of the Supreme Court; the Honourable Minister, Ms Natasha Fyles; Judges of the Local Court; past Judges including Brian Martin, previous Chief Justice; and Sally Thomas, previous Judge

and upstairs Austin Asche, previous Chief Justice. Also welcome to friends and family, many of whom have travelled a long way within Australia, and everyone else.

Thank you for your kind words Mr Solicitor-General, Mr Christrup. I better confess I was told by Sally Thomas in the waiting room before, that I should confess that I lied about my age and that, in fact, I am 75 not 72 next Tuesday, and I don't have to come back.

Thank you, Mr McConnel for your kind words. I didn't realise that I was a Rhodes Scholar but I do remember Tom Pauling used to appear in a lot of cases against me and I think he might have given me that tag then.

And thank you Ms Farnell for going back and reminding me of my success, particularly as a cricketer and many other things. I appreciate all your kind words.

Special thanks to Debbie Carr for all the wonderful organising that she has done to make this ceremony a success and to the many other Court staff who have assisted, including my own PA, Maysa.

Thanks to others, especially my wife Susan and to my Associates, some of whom are here now. Thank you all for your patience, your assistance and loyalty.

I am especially pleased to have our two older children here, Nicole and George, with their partners and their young children and also my brother who I have known since I was six.

So, a warm welcome to everyone. You include representatives of various groups that I have been part of over the past 50 years or so. They include the Army. They include the mighty Court Jesters Tennis Team. I can see Clare Martin, Southwood J not here, but Gordon Berner is here, and John Harrison and Belinda Paspaley, the mighty Court Jesters. Also, the Casuarina Hash House Harriers - I have enjoyed their company ever since about 1976 and I have always felt that running - and nowadays it is walking or limping - with those fellows is a wonderful release from the pressures of work - just getting out there and talking to normal people.

Also, my dear friend, as a representative of the Wild West Poker Club in Brisbane is here. Members of the Melville Street Tennis Group. Members of the East Point Gentlemen's Tennis Club, fellow sailors, campers and holidaying companions. I am really pleased to be here with all of you.

When I accepted the invitation to join this Court in 2013, I did so with great pleasure, and I said so at the time. In particular, I was already well acquainted with my good friend the then Chief Justice Trevor Riley, and with the other four Judges, all of whom I had practiced with at the Bar - sometimes appearing against them and sometimes with them. I had known them all professionally and socially.

I knew that I would get on very well with each and every one of these people. Since then the Court has been joined by the present Chief Justice, who I keep

reminding that I taught him at law school. Maybe I didn't do very well with that - but there you go.

And finally, my replacement, Justice Brownhill, with whom I had also worked at the Bar doing some native title work.

My original hopes and expectations were and continued to be fulfilled. I could not imagine a happier workplace. A wonderful group of intelligent, hard working and sincere human beings, all intent on applying their skills and experience to advancing the administration of justice in the Northern Territory. Thank you to each and every one of you for the privilege of working with you.

I particularly enjoyed sitting on the Court of Appeal and also on the Court of Criminal Appeal. That has provided a wonderful opportunity to learn how my fellow Judges operate and to engage with them in the process of deciding the case and writing the Court's reasons.

Thank you to the speakers for going back on some of the highlights of my career. I won't go back to travel over those again but I am particularly pleased to see present here today, George Cridland. Thank you George because as one of the speakers commented, I did start here working with Cridland & Bauer after my brief stint with John McCormack.

I then joined the independent Bar, as we've heard, in 1978. John Harrison, who is here, and I joined Michael Maurice. We were then a Bar of three. The Bar had already been started by Tom Pauling and Michael Maurice and Ian Barker but Pauling and Barker of them had gone off onto different paths.

Since joining the independent Bar, as has already been mentioned, I have been privileged to participate in its growth. That has included the formation of the Northern Territory Bar Association, the expansion and then the naming of William Forster Chambers and then the expansion of additional Chambers in the Territory. I have not done a count but my guess is the Bar probably numbers about 40 now, a big increase from the meagre three when I started. I am pleased to see some of my old colleagues, as I mentioned, John Harrison and Tom Pauling, Colin McDonald and Trevor Riley, here today.

As we have also heard, I had the privilege of working on a lot of land claims with a number of Aboriginal Land Commissioners including Justice Toohey. I had to learn very quickly - and I think I did - about Aboriginal laws and customs. Even though I started working as Counsel assisting, I then began to get briefs, and I have always prided myself on the fact that I was able to get briefs from all sides of the litigation. Of particular pride, I suppose, is a success that I had helping the people out at the Nicholson River area get their land under the *Aboriginal Land Rights (Northern Territory) Act* and moving, a long way forward to just before I was appointed to the Bench, helping the Barngala people get their native title on the Eyre Peninsula in South Australia.

I have also been very proud of the pro bono work that the Bar has done. I particularly think back to the day - or the week or so - when a boat load of Cambodian asylum seekers arrived here - I think about the mid-80's. Colin McDonald was instrumental in gathering the then 11 of us at the Bar to split up the passengers on the boat, who ranged from age four to 44. Between us we were able to help them fill out their forms and process their applications. The Darwin community as a whole got on board to help these people and their families. It is one of those particular moments that I am very proud of and, as I said, Colin and Trevor and other members of the then Bar were involved in that too.

Some of my career, as you've gathered, has involved me being away from home a lot. Susan reminded me this morning that that has enabled her to bring up our four children without too much interference from me.

And then of course my last eight years as a Supreme Court Judge have been truly valuable parts of my life, sitting not only here in Darwin but also in Alice Springs for at least a month every year and once in Katherine.

My judicial career has had many highs and lows. It had an awkward beginning when I first appeared on the Bench. I had not worked much in the criminal jurisdiction over the preceding 20 years, so I spoke to my fellow Judges - including the Chief Justice about procedures and practices. I studied up the *Criminal Code* and the *Sentencing Act* and all those sorts of things before I went down to do my first case. There is one thing they did not tell me. After I had heard all the submissions from the barristers and I very confidently said, "Please adjourn the Court" I proceeded to leave the Bench. Unfortunately, I walked through the wrong door and found myself stuck in a broom cupboard where I felt obliged to remain. I had to quietly ask my Associate, I am not sure whether it was Bridget or James, to let me know when the coast was clear to come back out.

I have learned a lot since then. As a Judge I have been able to continue learning from other people – that is a practice that I have always tried to follow. As a barrister I would always say to my junior, "What did we learn from our case today?" We learned some good things, some bad things, good things to do, bad things not to do. Work as a barrister, and as a Judge, has provided me - and I am sure it does other lawyers - with a wide range of opportunities over a wide range of matters. In my case these have included anthropology, as you have heard. In the sentencing regime we get very much involved in rehabilitation, particularly of youths. We also have a lot to do with mental impairment cases. We learn about medicine, medical negligence cases, engineering, DNA and other forensic tools, cattle, as we've heard before, helicopters, just to mention a few.

The experience that we have in the Territory in our Court is wide-ranging, and very rewarding because we learn about all of these things. Having said that, speaking for myself, a lot of it is information in and straight out again, but there you go. And of course, jury management has been a challenge, because we non-criminal lawyers have had no experience at all in managing juries.



I do propose to speak briefly about two areas of concern.

My major concern relates to the continuing high levels of incarceration of Indigenous members of our community, often over 80 percent of our prison population. Of the 261 current lodgements in this Court, 151 relate to serious crimes of violence. 37 of those, that is about a quarter, involve non-Indigenous defendants.

Over 100 of that 151, that is about two thirds, concern Indigenous male defendants and in most cases involve a serious assault upon a female partner resulting in serious harm or even death. Concerns about the prevalence of high levels of violence against Aboriginal women have been referred to on numerous occasions in decisions of the Court of Criminal Appeal in particular, going well back into the 1990's. They were also referred to in farewell speeches of Brian Martin as he was leaving from his job as Chief Justice in 2007 and Trevor Riley when he left in 2016.

As we know, when sentencing people, we need to take into account a number of factors: rehabilitation is very important, and, of course, deterrence is very important. But sadly, rehabilitation and deterrence as such, sometimes have to play a lesser role than the need to protect the community.

It is often the need to protect the victim of domestic violence that is of paramount importance when we are sentencing a particular offender. Sadly, we sometimes see the same offender coming back after he has spent two or three years in gaol for similar offending on the same woman. That is obviously tragic.

Most assaults, not only in the Northern Territory but Australia and I assume worldwide, involve offenders, and sometimes victims, who have committed crimes of violence while under the influence of alcohol and/or drugs. Sadly, many of the Indigenous offenders that come before the Courts have found themselves addicted to alcohol and/or drugs.

This is often associated with their inability to improve their lives by becoming fully conversant in English and consequently, difficulties obtaining meaningful employment. Understandably, these things have often resulted in lack of self-esteem and boredom and consequently, they resort to alcohol and/or drugs.

Sadly, we still need interpreters quite frequently in Court to help young people, that is, people between 17 and 27 and so on, give their evidence or hear the questions, understand the questions. This is because, although their primary language might be an Aboriginal language, they do not have sufficient understanding of English. I can see Mr Lawrence SC here. He conducted a trial in my early days on the Bench involving a murder said to have happened out at a community. Sadly, about five or seven of the witnesses who were aged between about 16 and 24 all needed interpreters, whereas the older ones, the grannies, our age I suppose, didn't need that. They seemed to be quite confident. That is something that has stuck with me. These kids really need to be required – or assisted I should say - to improve their education, consequently to learn a trade, or find some skill, so

that they can then find some meaningful employment.

So, in short, that is a great source of disappointment that we see from the Bench. We have been seeing it for well over 30 years. We only see the cases after the crimes have already been committed and we only see the more serious ones. Often there is no alternative but to send some people to prison.

The second thing I want to talk about briefly is judicial workload. In short, we need more Judges. As a barrister, I had no idea of the considerable amount of time that Judges need to spend out of Court - time to prepare for each case in advance and time to consider and provide proper reasons for every decision.

I recall that when I was the President of the Law Society and later the President of the Bar Association, it was often incumbent upon me to attend upon the then Chief Justice to make formal complaints about the length of time that some Judges were taking to write and deliver their judgments. I now understand why it is difficult for Judges to produce their reasoned judgments more quickly.

Ideally, Judges should have more time out of Court than we do have. Perhaps at least half a day before a matter is heard and at least a day or two after a matter is heard. The time before, to read the papers and better understand the arguments being put and the evidence, and to better engage with Counsel during the hearing. The time after, of course, to start drafting the reasons whilst the witnesses are still fresh in your memory and the arguments and submissions are also fresh in your memory. But sadly, that is a luxury we do not have.

If we took that time our listings would blow out significantly. People would have to wait years for their trial, be it civil or criminal. This is a problem and has been for some time, even though we have been fortunate to have the services of retired Judges who effectively have been doing the work of a seventh Judge.

I will trouble you with some statistics. This Court has had six, only six, permanent Judges since the late 1980's. That is, over the last 30 years. After my retirement we will still only have six permanent Judges.

When my family and I left Darwin in 1994, there were 1,351 criminal listings, over 1,000 here in Darwin and about 250 in Alice Springs. During the last financial year, 2019/2020, there were 4,967 criminal listings. And for the first 8 months of this financial year, we already have 4,853 criminal listings. That is more than three times the number of criminal listings in 1994 when even then, as I say, we had six Judges.

Regrettably, the average time that it now takes for a criminal matter to proceed through the Supreme Court has more than doubled over the last 6 years: from about 125 days, as at December 2014, to about 300 days, as at December 2020. This means that people accused of serious crimes will have to spend at least 12 months in gaol on remand before their case can be heard, unless a Judge has considered it safe for that person to be released on bail.

This in turn has placed enormous additional pressure on Judges to list more and more cases for trial. For the financial year 2018/2019, the number of sitting days in the criminal jurisdiction was 888. Our present estimate for this financial year is 1,264. That is an increase of over 42% over the last 3 years. That is in addition to the 100 or so sitting days set aside for civil matters.

Let me just speak of last month, for example. One of our Judges was in Alice Springs for the month conducting jury trials, as is always the case. One of us chairs the Parole Board which occupies several days every week. Three of us heard nine appeals in the Court of Criminal Appeal and in the Court of Appeal and of those nine, it was only possible to provide ex-tempore reasons for one. In other words, there are still eight decisions yet to be provided. Two Judges were conducting jury trials. One was on leave for two weeks and I was writing detailed reasons in relation to a lengthy and complicated civil matter, and another matter. We were also all doing the usual sentencing and bail applications and breach applications.

In short, we need more Judges in order to assist the administration of justice efficiently and effectively in the Northern Territory.

I now conclude my remarks and thank you for your patience. I have been privileged to progress through various stages of the justice system, much of it here in the Northern Territory, and much of it in the context of the wide range of matters associated with Aboriginal people.

As a Judge, I have taken great pleasure in seeing young lawyers doing their best to represent their clients including making novel and sometimes outrageous submissions. I have enjoyed teaching advocacy and enjoyed seeing many young practitioners applying their learned skills in Court before me. I think every lawyer who I have taught, perhaps except for the Chief Justice - he never did anything I told him - and each of my Associates, now knows that if they appear in Court in front of me, they will come along with a chronology.

As the Chief Justice mentioned, I do intend to do some work from time to time as an Acting Judge. But as I said, the time is ripe now for me to move on. I thank you all for your kind words and wish you all well. Thank you.

GRANT CJ: Thank you, Justice Hiley. Again, the members of this Bench thank you for your service and your camaraderie during your time as a Judge and we wish you and Sue all the best for the future.

Ladies and gentlemen, the Judges of the court invite you to join us for refreshments in the foyer once proceedings have adjourned.

Adjourn the Court please.

ADJOURNED 3:02 PM INDEFINITELY