

2003-2004

THE
NORTHERN
TERRITORY
LAW REPORTS

THE AUTHORISED REPORTS OF THE DECISIONS OF
THE SUPREME COURT OF THE NORTHERN TERRITORY

EDITORS-IN-CHIEF

MELANIE J LITTLE

To January 2005

CAMERON FORD

From December 2004

VOLUMES 13-14

LAWBOOK CO.

2006

THE COUNCIL OF LAW REPORTING FOR THE
NORTHERN TERRITORY

CHAIRMAN

THE HONOURABLE JUSTICE DEAN MILDREN RFD

EDITORS-IN-CHIEF

MELANIE LITTLE SM
CAMERON FORD

EDITORS

COLLETTE DIXON
MARKO CUJETICANIĆ
PETER MCNAB
USHA VIDOT
WOJCIECH KARCEWSKI QC

SUB EDITORS

JAMES BROHIER
FRIEDA EVANS
JILLIAN ERIKSEN

SECRETARY

CRAIG SMYTH

TREASURER AND PUBLIC OFFICER

FRIEDA EVANS

REPORTERS

CAMERON FORD
COLLETTE DIXON
GREG FISHER
JUAN ALBERTON DOMINGUEZ JR
MARCUS HASSELL
MARGARET MICHAELS
MARK GUMBLETON
MARK JOHNSON
MATTHEW HUBBER
MICHAEL GROVE
NIKOLAI CHRISTRUP
PETER MCNAB
PETER TOMPKINS
SUSAN POLDEN
TANYA LING

Published in Sydney by
Lawbook Co.
PO Box 3502, Rozelle, Sydney, NSW
560 Lonsdale Street, Melbourne, Victoria
239 George Street, Brisbane, Queensland
77 St George's Terrace, Perth, WA

ISSN 1038-9237

© 2006 Lawbook Co. a part of Thomson Legal & Regulatory Limited
ABN 64 058 914 668

The Northern Territory Council of Law Reporting gratefully acknowledges donations from Hon Justice Angel; Ms J Blokland SM; Mr H Bradley CM; Cridlands Lawyers; Paul Ewens; David Francis; Halfpennys; Robert Jobson; Brian Johns; Paul Maher; Hon Chief Justice Martin; PD McQueen; ER Mildren; Hon Justice Mildren; Bill Piper; Hon Justice Riley; Sivyver & Associates; Janet Terry; Hon Justice Thomas; C Tys; Priesley Walsh and Woodcock Solicitors

Printed by Lawbook Co.
Bound by Ligare Pty Ltd, Riverwod, NSW

SUPREME COURT OF THE NORTHERN
TERRITORY OF AUSTRALIA

DURING THE CURRENCY OF THIS VOLUME

CHIEF JUSTICE

THE HONOURABLE JUSTICE BRIAN FRANK MARTIN AO MBE
(retired 31 October 2003)

THE HONOURABLE JUSTICE BRIAN ROSS MARTIN
(appointed 27 January 2004)

ACTING CHIEF JUSTICE

THE HONOURABLE JUSTICE DAVID NORMAN ANGEL

JUDGES

THE HONOURABLE JUSTICE DAVID NORMAN ANGEL

THE HONOURABLE JUSTICE DEAN MILDREN RFD

THE HONOURABLE JUSTICE SALLY GORDON THOMAS AM

THE HONOURABLE JUSTICE STEVEN RONALD BAILEY
(deceased 25 November 2004)

THE HONOURABLE JUSTICE TREVOR JOHN RILEY

ACTING JUDGES

THE HONOURABLE JUSTICE LANCELOT JOHN PRIESTLEY

THE HONOURABLE BRIAN FRANK MARTIN AO MBE
(appointed 1 July 2004)

THE HONOURABLE LESLIE TREVOR OLSSON AO MBE RFD EO
(appointed 6 July 2004)

ATTORNEY-GENERAL

THE HONOURABLE DR P TOYNE MLA

CORRIGENDUM

Some minor typographical errors in the unbound parts have been corrected, and so where the parts differ from the bound volume, the bound volume is to take precedence.

SUPREME COURT OF THE
NORTHERN TERRITORY OF AUSTRALIA

CEREMONIAL SITTING TO FAREWELL
THE HONOURABLE CHIEF JUSTICE
BRIAN FRANK MARTIN AO MBE

On 31 October 2003, at a sitting before the Full Court, tributes were paid to the Honourable Chief Justice B F Martin AO MBE to mark his Honour's retirement as Chief Justice of the Court. His Honour was appointed a Judge of the Supreme Court in September 1987 and as the Court's fourth Chief Justice in March 1993.

Addresses were delivered by the Attorney-General, Dr Peter Toyne; by Mr John Reeves QC on behalf of the Bar Association; by Ms Merran Short on behalf of the Northern Territory Law Society; and by the Director of Public Prosecutions, Mr Rex Wild QC, after which his Honour delivered a reply. Some edited parts of these addresses follow.

DR TOYNE:

The Chief Justice Brian Martin retires from a career of distinguished public service. It is said he will have left the Northern Territory better off. Brian Martin moved to Alice Springs from Lithgow in 1963 and commenced practice there as a Barrister and Solicitor. Whilst in Alice Springs he became a member and Chairman of the Alice Springs Town Management Board and later, Deputy Mayor and Mayor of Alice Springs Town Council during the period 1972 to 1975.

He was appointed Solicitor-General and relocated to Darwin in 1981. He was appointed Queens Counsel in 1983 and as a Judge of the Supreme Court in September 1987. He became Chief Justice of the Supreme Court of the Northern Territory from March 1993.

Prior to taking up judicial office, Brian Martin was appointed by the Government of the Northern Territory to chair wide ranging public inquiries throughout the Northern Territory, into such diverse matters as pastoral land title and the welfare needs of the Northern Territory.

From 1980 to 1989 he was a Director of the Australian Bicentennial Authority and Chairman of the Northern Territory Council.

Since his appointment as Chief Justice he has served as Chairman of the Northern Territory Parole Board and been appointed as acting Administrator.

Chief Justice Martin was appointed a Member of the Order of the British Empire in 1982 and as an Officer in the Order of Australia in 1989.

I have said earlier that the Chief Justice will leave the Northern Territory better than he found it. His lengthy service to the law, as private solicitor, Solicitor-General, Judge and Chief Justice and his many contributions to the greater community speak for themselves. His legacy is a sound, experienced, highly respected court system. It is the cornerstone of the administration of justice, the importance of which I do not need to remind this audience.

The Chief Justice has consistently and fiercely defended the independence of the judiciary and the need to maintain the separation of powers that create the environment that allows us to live safely, freely and in harmony in a healthy dynamic democracy.

Throughout his time as Chief Justice he has demonstrated compassion, balance and justice in the courts of the Northern Territory.

Notwithstanding the normal passionate debates in society about such matters as sentencing, human rights, land rights and many other matters that touch most ordinary Australians, the administration of justice in the Northern Territory is in a very sound state. Our courts enjoy genuine support and respect of the public in general. This is no small measure due to the steady, principled and wise leadership of the Chief Justice over the past ten years.

MR REEVES QC:

As the Attorney has pointed out, your Honour has been a Judge of this court for a little over 16 years and was Chief Justice for about ten and a half years. During that time much has changed and much has stayed the same.

None of the Judges who sat with your Honour at your swearing in ceremony in 1987 is still a Judge of this Court.

Sadly, Rice, Forster and Muirhead JJ are no longer with us. Fortunately, all the others who are members of the Bench on that day are with us but they, like Mr Hiley QC, have taken the precarious decision, all of them and I must say that I know your Honour does not intend to follow them, of moving to various remote parts of this country and in the case of Kearney J to New Zealand.

But there are other things that have not changed, your Honour. Other speakers have mentioned and will mention many of them, so I will restrict myself to just two. The first is your Honour's support for the independent Bar in the Northern Territory. That has remained unchanged and steadfast throughout the past 16 years and remains so

today. On behalf of the Northern Territory Bar I acknowledge that support and thank you for it.

The second matter that I should mention that has not changed is your Honour's support for and strong defence of the independence of the judiciary. That remains unchanged. In this respect your Honour has had to meet many challenges over the past 16 years and particularly over the past few years while you have been Chief Justice, including defending the judiciary against some extraordinary attacks from quite unexpected quarters. Indeed, the way in which your Honour has met those challenges and defended the independence of the judiciary has earned you the title of 'Bull Mastiff', a title that I think your Honour should be proud of.

So the Northern Territory Bar would like to thank your Honour for your support over the years and recognise the enormous contributions your Honour has made to the community, to the law and to this Court.

MS SHORT:

The Law Society has enjoyed a close working relationship with the Chief Justice. We have worked together to see the introduction of a streamlined process for civil claims in the Supreme Court. He has assisted with the development and the adoption of the Priestley 12 admission requirements and introduced judicial case management for civil matters.

During his time at the helm of the Northern Territory's judiciary, Martin CJ has worked to open public access to the court system. To help explain sentencing decisions, he initiated judgments being published on the internet. He has generally increased the use of technology in the courts and has laid the groundwork for the electronic lodging of documents in the future. We can largely thank Martin CJ's leadership for the strong, stable and well respected judiciary that we currently enjoy.

He will be remembered for his staunch defence of judicial independence in the face of controversy and his ongoing efforts to protect the integrity of the legal profession.

There is no question that Martin CJ's significant contribution to the Territory has had a profound and lasting impact on the legal profession. Under his reign the judiciary has achieved significant developments and we look forward to a continuation of his legacy of strong leadership, open access and innovation.

MR WILD QC:

Your Honour has been neither a friend nor an enemy to the prosecution service. Your Honour has been, in those lovely and unpleasant words that prosecutors hate to hear from judges when they

are dealing with prosecutors' arguments about corroboration acts, 'intractably neutral'.

Your Honour, this is of course as it should be and we have accepted and applauded your Honour's fairness and firmness in that regard to both sides and we have respected the compassion that you have demonstrated when dealing with offenders and alleged offenders and the way in which you have dealt with the victims of crime who come before you and the impact of the criminal justice system generally on the community.

This has been appreciated by us, your Honour, as it should be by the whole community.

MARTIN CJ:

During my term as Chief Justice I have striven to ensure that the court maintains a reputation in the community as the institution upon which it can rely to administer justice according to the law and it is not open to be criticised based upon the perception that it lacks independence or that any of its members are partisan in any respect or that they do not act fairly in the discharge of their judicial duties. Those ends, as I think have been mentioned, are only met by a strict adherence to principle.

It has been my privilege for the time being to have been entrusted with the office of Chief Justice and I trust that it has not been diminished. I want to take this opportunity to mention just a few things, some of which have already been referred to in the addresses from the Bar table.

The first thing I think to be noted is that judges do not live in ivory towers. They are not remote from the community as is often suggested. We all live in the real world. We are affected by each and everything that goes on in it. But the proper discharge of the judicial function means that we may not engage in it to a degree which we might wish or might even enjoy, or as some members of the community might expect.

Maintaining impartiality requires that judicial officers remain clear and away from public debate on issues touching upon the discharge of their functions. That is, unless of course, they are sorely pressed. So a judge is not being aloof or unsympathetic but simply properly detached. It is not to say that we are entirely isolated from the wider world and many judges are actively involved in the wide range of community activities.

I asked the other judges of the court if they would give me a list. I was going to read it but it would take far too long. It is astounding the number of things that they do outside the work as a judge.

The court is also expected to pay regard to the impact of cost upon litigants. It is a challenge, but we have been adapting to it over the past years; we have been ready to take into account intelligent suggestions for improvement. The Bar and the Law Society and other legal agencies have been most helpful and supportive in that regard.

The overriding consideration in all management systems, as they have come to be called, and in their application to particular matters is the doing of justice as between the parties before you in that particular case, and that does not necessarily mean setting speed limits for final disposition as a priority.

The hands-on approach of judges has, I believe, been a significant contributor to cost reduction by engendering settlements in an environment where it is “all the cards are on the table”. There is now an insistence upon complete disclosure of the evidence with which parties hope to achieve success in their case, in the civil jurisdiction.

That has led a great deal to settlements which are a cheaper way and a more satisfactory way of resolving disputes than having to have it dealt with in public in open court. It promotes a win/win situation. And in that, the changes incorporated in this Court’s procedures and many others, with the support of the legal profession, I think has achieved some significant success.

Then there is technology – the advances that have been made in recent times, which have also been a great contribution to efficiency and reducing costs. With resources provided by governments of both persuasions, the Territory courts now have access to video conferencing equipment, which enables parties to present their witnesses and even arrange appearances by counsel, from remote places in Australia such as Sydney or Adelaide.

I want to say something about criticism because it is something that is in the air quite often and nobody likes unfair criticism, especially when it is supported by innuendo only and not based on any firm foundation of fact. There are a variety of sources, often piggy-backed one upon the other, to bring adverse reflections on the standing of the court or that of a particular member of it.

Judgments sometimes touch on issues which have an interest beyond that of the parties. It is of the very nature of the role of the court that there will be winners and losers upon the finalization of litigation, unless a result is achieved by negotiation.

Naturally enough the losers or those who feel they are on a losing side will be disappointed. Sometimes they have been involved in public disputation out of court as well as in, and there is a loss of face to them, which can be considerable. The initial psychological reaction

to loss, such as denial and anger, comes into play and the messenger, that is the court, becomes the target.

What is overlooked in the sub-editorial headline or the five second grab, is that the court has done what it has a duty to do; that is to apply the law to the facts as they have been found, upon the issues which have been joined by the parties and on the evidence which they have produced.

Courts do not initiate cases; the parties do that and it is the duty of the court to resolve the dispute. It is in the nature of things that not everybody involved in the case will be pleased with the result and you might be surprised to learn that it is not unusual that about half the people are dissatisfied.

We acknowledge that we are open to fair criticism. After all, usually diametrically opposed arguments are advanced on behalf of the parties and the trial judge makes up his or her mind as to which of them is to be preferred and gives judgment accordingly. But the appellate courts are there to correct the errors that might be made at the trial stage.

Some people in the community apparently think that making a fuss and enough noise might cause a judge to change his or her mind. To do so would be to abandon judgment to external influence which is the very antithesis of judicial independence and impartiality. The legitimacy of judicial decision making would be lost.

If there is perceived to be a real problem with the law as the court has determined it, then the matter can be taken up and resolved in the Parliament. Amendments to legislation are often sponsored on the basis that the interpretation given by a court has not produced the result which the government of the day had expected.

The combative nature of political debate here and elsewhere engenders an atmosphere in which like means are employed in order to criticise the judiciary. The incongruity is that judges are not trained to be combatants. Responses may be considered to be slow and miss the morning edition. Tactics may not be thoughtfully considered, all because a judge is attending to his or her real job. Our language may not be constructed with a view to the attention-grabbing journalistic headlines.

So long as unjustified criticisms are likely to continue there will remain the need for the court to have access to a media-savvy adviser and public information officer. That is, a qualified person who could act as required in a timely way to respond to unfounded, unfair or incompetent criticism from whatever source and promote the role of the judiciary in society.

In recent times a request that funds be made available to engage such a person has been met with a sympathetic response. I trust the matter will come to fruition shortly.

SUPREME COURT OF THE
NORTHERN TERRITORY OF AUSTRALIA

MEMORIAL SITTING ON THE
OCCASION OF THE DEATH OF
THE HONOURABLE JUSTICE STEVEN RONALD BAILEY

On 6 December 2004, at a sitting of the Full Court, tributes were paid to the Honourable Justice Steven Ronald Bailey who served as a judge of the Court from 6 January 1997 until his death on 25 November 2004.

Addresses were made by the Chief Justice; by Mr Rex Wild QC on behalf of the Attorney-General, the Office of the Director of Public Prosecutions, the Northern Territory Legal Aid Commission, the various Aboriginal legal aid services and the Northern Territory Criminal Lawyers' Association; by Mr John Reeves QC on behalf of the Northern Territory Bar Association; and by Ms Merran Short on behalf of the Northern Territory Law Society. Some edited parts of each of these addresses are set out below.
MARTIN (BR) CJ:

When Leigh and I first met Bailey J on our arrival in Darwin earlier this year, we were quickly welcomed by Steve and Jenny into their home. We greatly appreciated their generosity and the warmth of their welcome.

Bailey J was a very fine lawyer and judge. Not only did he have an excellent legal brain, but he knew how to apply that brain in a practical manner well guided by a great deal of commonsense and wonderful sense of humour. I will leave it to others at the Bar table this morning to speak of Bailey J's history and of the manner in which he conducted his court.

In my short time, very quickly I came to realise that Bailey J was always willing to assist. I will miss his wise and trusted counsel. That counsel was always honest and direct. Bailey J was a straight shooter who was admired not just by the judges, but by everyone at the court here and in Alice Springs.

It cannot be left unsaid that Bailey J was an exceptionally hard worker.

I finish by reminding you of Bailey J's words in response to his welcome to this court on 3 February 1997. He said:

"I am deeply honoured to have joined my brother judges. My fondest ambition now is to live up to the high standards that they and their predecessors have set. I can only promise that I will

devote my best endeavours to upholding the high standards and reputation of this court.”

I can say with the utmost confidence that my colleagues on the Bench this morning, and all those who have sat with Bailey J since February 1997, are in unanimous agreement that Bailey J not only devoted his best endeavours, but he achieved with distinction that ‘fondest ambition’.

MR WILD●●C:

Firstly, I am instructed, as you have indicated, on behalf of the Attorney-General the Honourable Dr Peter Toyne. He is unable to attend this morning’s celebration of the life and work of his Honour Bailey J. You will know, I think, that Dr Toyne paid tribute to his Honour in the condolence motion in the Legislative Assembly last week. Eloquent speeches were made by a number of the Members of the House. In them his Honour’s career was canvassed. I do not propose to remind the court of that today. The President of the Law Society who will follow me soon will speak of that.

The Attorney in his speech described his Honour as an honourable man. He spoke of his humour, humanity, wit and love of his family. He was passionate about the Territory. He chose to spend substantial parts of his life here in the Territory and contribute to our community. He was hard working and fair. He served the community well, both as a judge and chairman of the Parole Board. He and the people of the Territory, said the Attorney, are saddened by his loss.

His Honour was easily persuaded to travel to Oenpelli and hold sittings of the Supreme Court in 2001 when the merits and justice of a particular case justified it being heard within the community most affected by it. Not for Bailey J was what Edward Edmond Burke called the cold neutrality and impartial judge. Impartial he certainly was, but he was never cold. He was a most compassionate man.

His involvement in the Parole Board and in particular in relation to the provisions relating to mandatory life prisoners was well known here in the Territory. His Honour jointly chaired a session at the CLANT Bali Conference in 1999 which led to a unanimous resolution from the delegates that the Government review the legislation dealing with such prisoners. As we know, that review was subsequently carried out and new legislation was introduced earlier this year. The first of the persons affected by that legislation and entitled to the benefit of it was released by the Parole Board chaired by his Honour very recently and I was reminded the other day that it was at a time when his Honour’s health was already substantially impaired. His Honour nevertheless chaired that Board appropriately.

His Honour is remembered as a fair and decent judge by the lawyers of both KRAALAS and CAALAS and I am instructed to extend their condolences to the judge's family and friends. His Honour was a fair supporter of CLANT. He attended each conference from 1997 onwards when he arrived here and was a real contributor to those conferences.

I spoke to Steve just a couple of months ago about next year's Bali conference. He said, 'I'll be there'. It was at a time when he must have known the odds were against it. He remained cheerful in his adversity and optimistic and displayed the stoicism which you would expect from this fine man.

The court and the legal profession greatly respected Steve Bailey and will be the poorer for his passing. His family and his friends who loved him will remember a dear and true friend who for an all-too-short time graced their lives. I borrow these words from Shakespeare *Julius Caesar* wrote of Brutus:

"His life was gentle and the elements so mixed in him that nature might stand up and say to all the world, 'This was a man'."

May it please the court.

MR REEVES QC:

On behalf of the members of the Northern Territory Bar Association, may I express our sincere condolences to Jenny and Steve's family. Whilst we have all suffered a great loss by his passing, your loss is of course infinitely greater than ours.

Bailey J was a diligent and fiercely independent judge. The Director has already spoken of his great qualities as a judge, particularly as they were displayed in the criminal jurisdiction. I respectfully agree.

I want to add some comments about his work in the civil jurisdiction. As many of you will know Bailey J obtained a Bachelor of Laws degree with first class honours from the University of London. In that year he was awarded the University Medal. He then obtained a Master of Laws which was awarded with distinction. He was offered a teaching post at the University of London immediately upon the completion of his degree, an offer previously unheard of and testament to his academic eminence. His wanderlust got the better of him and he immigrated to the colonies and a teaching post at the University of Western Australia. He taught in commercial and civil law. So, whilst criminal law became his main focus in more recent years as a judge, he began his career in the law on the civil side.

On the civil side, just as with the criminal side, he was not a judge who was affected by the legal equivalent of political correctness.

Instead he dispensed justice according to the law, not according to popular fashion or fads, not according to his personal view of the law, but according to the law as expressed by the Parliament and the courts. Some may have thought this approach conservative or black-letter law. I think he would say that he simply applied legal principle, as his office required him to.

To consider Bailey J's contribution to the Territory only in terms of his tenure as a judge is to significantly understate that contribution. As others have or will point out, he worked as a parliamentary counsel and policy lawyer in the Northern Territory from self-government until 1985. In those roles, together with Mr Ian Barker QC and Mr Graham Nicholson, he was the architect of much of the Territory's early legislation and legal policy initiatives. It was a huge task starting from scratch and again the manner in which he discharged the job was a testament to his great capacity.

As well as being a devoted family man and a lawyer of distinction, Steven Bailey was a modest man. Whilst he was obviously intellectually gifted, that did not lead to him displaying arrogance or excessive pride. In fact the word 'humility' best describes his attitude to life.

MS SHORT:

Bailey J had a distinguished legal career both in Australia and overseas. Steven Ronald Bailey was born in England and undertook his Bachelor of Laws at the University of London from where he graduated with First Class Honours and won the University Medal.

In 1975 he migrated to Australia to take up an academic appointment as a senior tutor in legal studies at the University of Western Australia. He then started lecturing in law at the University of Newcastle in New South Wales. Bailey J moved to Darwin in 1978 to take up a position at the then Department of Law and from 1981 until 1985 he was the Director of the Executive and Policy Division of the Department.

In 1985 the Bailey family moved further north for Steven to take up a position as Senior Crown Counsel in the Prosecutions Division of the Attorney-General's Department in Hong Kong. Here Bailey J's career flourished. From 1992 until 1994 he was the Senior Assistant Crown Prosecutor and then in 1994 he was appointed as a judge of the District Court in Hong Kong.

Bailey J returned to Darwin in 1997 to take up a position on the Bench of the Northern Territory Supreme Court where he served until his recent untimely death. During his time on the Bench, Bailey J was also involved in the National Steering Committee for the annual

National Supreme and Federal Court Judges' Conference and he was appointed as the Chairman of the Northern Territory Parole Board in 2000.

His significant contribution to the Territory's legal profession cannot be questioned, but it is the man, not the career, that will be sorely missed. The primary responsibility of a judicial officer is to uphold the judicial oath and administer the law without fear or favour, affection or ill-will. However, as judges are placed under constant scrutiny by the media, the community and the profession, increasingly high expectations are attached to people who hold judicial office. At times the expectations must seem limitless.

Despite the challenges, Bailey J managed to command respect as an accomplished judge with a reputation for his compassion, commonsense and a firm but fair approach, and he also maintained an active involvement in the local community and social engagement with the legal profession, including participating in this year's Law Society's annual cricket match, albeit playing for Mildren J's XI, not the President's XI.

Despite ailing health, Bailey J continued balancing his involvement with work, family, friends, colleagues and the community. On behalf of the Law Society and its members I would like to offer our sincere condolences to Bailey J's family, particularly his wife Jenny and his children Tom and Kate.