

by Ken White 2005

## FRED FOGARTY AND HIS LAND CLAIM

A Northern Territory Supreme Court judgement by Mr Justice Blackburn early in 1971 appeared to establish, in the words of a Federal Cabinet submission, that 'Aborigines... have no legal rights to land with which they and their ancestors have traditionally been associated.' There was an immediate outpouring of demands for legal change to ensure Aboriginal land rights. Two years later, in September, 1973, the Northern Territory was to witness the first publicised Aboriginal land rights claim, but certainly not in a manner or form that subsequently would occur with other such claims and certainly not one that could possibly have been envisaged by His Honour Justice Blackburn.

The background to the case was fairly straightforward with elements of black humour. For some months prior to September, a part Aboriginal man known as Fred Fogarty, together with several full-blood Aborigines, had camped on land abutting the then Nightcliff Drive-In theatre in Progress Drive, Nightcliff, a leafy northern suburb of Darwin inhabited mainly by well-to-do public servants. Fogarty was a small, nuggetty man with a rolling walk and distinguished himself by habitually wearing a red head-band; he could not by any means be described, as did one young female solicitor who was involved in the subsequent trial, as 'cute.'

Fogarty, along with his small band of followers, sought to occupy an area of land known as Kulaluk as the claimed descendants of the traditional Kulaluk tribe. At the time, however, the area was formally identified as Crown land that had been leased in perpetuity to a white developer, Leo Viscentin, who planned to clear and develop it as a residential subdivision. This also involved reclaiming an

area of swamp. Viscentin set to work, employing some workers and hiring earth moving equipment. Fogarty and his followers proceeded to blockade the heavy machinery and, in a confrontation that followed, several trucks and other equipment were firebombed and Viscentin's employees attacked with metal chains and driven off the land.

The incident sparked widespread police and media attention as, for all intents and purposes, it signalled a possible beginning of hostilities between descendants of tribal Aboriginal landowners and white title-holders.

Fogarty subsequently was charged with a number of criminal offences, ranging from assault to causing grievous bodily harm to malicious damage. Oddly, none of his followers, although involved in incitement of Fogarty's actions, were charged with any criminal offence. Following a preliminary committal hearing in the Darwin Magistrate's Court in October, 1973, Fogarty was committed to stand trial before a judge and jury at the next sittings of the Northern Territory Supreme Court. It was as a result of the publicity surrounding Fogarty that the Northern Australian Aboriginal Legal Service decided to engage the services of one of Australia's leading barristers, Francis (Frank) Eugene Galbally, from Melbourne. Galbally had long been associated with representing people in the news and took an immediate interest in representing Fogarty as the circumstances indicated that such actions could well be the forerunner of other land claims. As Galbally was later to point out, the then Minister for Aboriginal Affairs, Gordon Bryant, not long before the Kulaluk incident, had visited the land in question and had told Fogarty and his followers, in the presence of his press entourage, that 'this land is your land' and 'we [the government] are going to give it back to you.' The Minister, Galbally remarked, had unwittingly incited Fogarty to take the law into his own hands.



Galbally arrived in Darwin three days before the trial. Not only was he flamboyant in his court manners, he was as equally colourful in his dress and general demeanour. A towering man in statue, with a booming voice, he conducted his preliminary briefings from his suite in the Travelodge dressed in a Hawaiian shirt and sandals. As a matter of courtesy, however, one of his first tasks was to seek an audience with the trial judge, the Chief Justice, Mr (later Sir) William Foster, who was sometimes viewed as an uncompromising man who relayed little compassion to those appearing before him.

In the meeting in his chambers, the judge forcibly indicated to Galbally that 'this trial has nothing to do with land rights,' but rather the serious issues of 'assaulting workmen with chains.' His Honour made it clear that he would not allow his court to become a 'national showcase' for Aboriginal land claims. Galbally, according to his instructing solicitor, Mr Neil Halfpenny, left the judge's chambers 'seething.' The judge's comments were 'outrageous,' he fumed. It wouldn't happen anywhere else in Australia that a trial judge would so blatantly pre-judge the issue and direct Defence counsel accordingly.

It was at this stage that Galbally was made aware of Fogarty's background and the fact that it did not suggest his ancestry was connected with the traditional land occupiers, the Kulaluk tribe. It appeared that his only identification with Kulaluk arose as a result of his live-in arrangement with one of the Kulaluk women camping on the land. Furthermore, it quickly became apparent to Galbally that Fogarty was a person of limited intellect and was being used to ferment such claims by well-known Darwin white activists.

The opening day of the trial began with the empanelling of the jury, the selection of which was made difficult for Galbally given the absence of prospective jurors with any Aboriginal heritage. Available jurors, from

the ranks of Darwin's burgeoning Public Service, were mostly supporters of the Country-Liberal Party which at the time was identified for its anti-Aboriginal land rights stance. But rather than deter him, Galbally saw the empanelling process as an added spur to his general trial approach.

The Crown's case, led by Mr Bill Raby, essentially relied on the evidence of the investigating police and the contractors who were assigned the task of clearing the disputed land. Mr Raby, ponderous, meticulous and fussy, was at great pains to establish that Fogarty was the principal party involved in both the assaults and the fire-bombing. Each of the contractors called had no difficulty in identifying the accused as the person who assaulted them with chains and subsequently set fire to their equipment.

Galbally, on cross-examining the Crown witnesses, sought to unsettle Prosecutor Raby by light-heartedly touching him on the shoulder when referring to earlier examination in chief. It had its desired effect as the jury and the packed courtroom became more engrossed in Mr Raby's growing annoyance at being patted on the shoulder. At one stage several jury members openly chuckled at the prosecutor's futile attempts to avoid being touched. Galbally also sought to confuse the Crown's evidence by suggesting that the identification of Fogarty arose solely out of him being the only part Aboriginal present, rather than a formal facial identification.

As for the police forensic evidence, it was, Galbally suggested, unreliable and vague. The Crown's chief forensic 'expert' had even admitted that he was not only not an expert in firearms, or Molotov cocktails for that matter, but 'not really an expert in anything at all.' However, when Galbally, during cross-examination, referred to the forensic exhibits as 'junk,' Judge Foster decided he had gone too far in demeaning the evidence of police witnesses and curtly told him he would not have



the word 'junk' used in his court. Galbally promptly responded: 'With due respect, Your Honour, the word 'junk' is contained in the English dictionary' and with that turned away from the shocked judge and repeated his question to the police witness: 'Now, where did you get this junk from?' From that point onwards the judge did not seek to interfere with Galbally's cross-examination again.

The end of the first day saw the completion of the Crown's case. In terms of Forgarty's defence, Galbally decided to limit the evidence to that of the accused alone. He required Forgarty to support the line of his cross-examination of Crown witnesses by denying that he was the person responsible and that they were mistaken as to identity.

That night, over several bottles of white burgundy, Galbally told his instructing solicitor, Mr Halfpenny, that he needed to brief his client as to his evidence the next day. On the way to Forgarty's caravan on the outskirts of Darwin Galbally became obsessed with the belief that the police were following him and kept telling his driver to check the rear vision mirror. If indeed he was being followed, the police kept well in the background.

It was a surprised Forgarty when Galbally burst into his caravan. Quickly placing eye drops into his blood-shot pupils, Forgarty offered Galbally a drink. Galbally declined and told him in no uncertain terms what his evidence should be the following day. He reminded Forgarty that the Crown case against him was essentially based on identification. It had no admissions or confessions from either him or his followers. It relied, Galbally emphasised, on the identification by the contractors and that identification was based solely on the premise that he was the only part Aborigine on the land on the day in question. All the other Aborigines, the Crown had alleged, were full bloods. Galbally then looked Forgarty in the eye and said:

'Fred, you know that there were other part Aboriginal persons there, don't you?' Before a bewildered Fogarty could reply, Galbally said: 'Fred, you know them - you know who they are. There was Jimmy Ryan, Bill O'Day, Jackie Smith.' At this point Galbally bent forward and, staring Fogarty in the eyes, added: 'Fred, you can say any name you like because no one is going to contradict you. Do you understand?' Fogarty, looking glassy-eyed, nodded, albeit reluctantly. It then occurred to the two lawyers that perhaps their client saw himself as a hero for Aboriginal lands rights, so much so that it was doubtful that he wanted to accede to Galbally's briefing; that perhaps he wanted to be found guilty. There was also another problem: Fogarty was too inarticulate to allow him to make an unsworn statement from the dock.

When the trial resumed, Galbally decided the best course of approach was to offer no formal evidence from the Defence, and to rely solely on his submissions to the jury that the Crown had not proved beyond reasonable doubt that the accused was the person responsible for assault and malicious damage. Notwithstanding his eloquence and showmanship in his final address to the jury, it took them little time in returning a guilty verdict on all charges.

It was after the jury was discharged and the Crown sought to provide some background to the accused that it was revealed that Fogarty was not of Aboriginal descent, but was, in fact, part Maori. Such a revelation possibly vindicated Galbally's decision not to run the defence on Aboriginal land rights issues. One will never know as Galbally's parting comment was: 'You know this whole thing could have been one great hoax by the developer to extract maximum compensation from the Federal Government for a worthless mosquito-infested piece of swamp land. That is to say, he set Fred up as a stooge for Aboriginal land claims.'



Shortly afterwards, the Federal Minister for Aboriginal affairs, Gordon Bryant travelled to the Territory promising to give all the disputed land back to the original tribal inhabitants.

Fred was sentenced to 18 months jail with a non-parole period of nine months. Not long after his release he was found drowned off Kulaluk beach. The Kulaluk land was returned to the remnants of the Kulaluk tribe and the land developer was compensated handsomely by the Federal Government. In April, 1975, Mr Justice Richard Ward was appointed Interim Aboriginal Land Commissioner and the land claims process began. Sadly, Dick Ward, regarded as one of the Territory's greatest men, died two years later.

Nineteen years after the Fogarty case the High Court handed down its historic Mabo decision that recognised the concept of native title. The Court said that native title pre-dated colonisation and had only been extinguished wherever the Crown had granted interest in land to third parties. Native title could no longer be denied or removed for reasons that were unjust.

## HOGAN, THE ANTI-HERO AND OTHER EDITORS

It isn't often that journalists get the chance to take the micky out of an unpopular editor. One memorable case occurred in the early sixties when a disgruntled writer on *The Bulletin* who faced the sack penned a cleverly constructed poem that was published, in which the first letter of every line that wasn't indented read, 'Fuck all editors.' John Hogan, a New Zealander who took over as managing editor of the Murdoch-owned *NT News* after Cyclone Tracy, had an unfortunate habit of needlessly ruffling the feathers of quite a number of Territorians. Unlike his predecessor, Jim Bowditch, he just didn't seem to fit in. The London-born Bowditch was a member of the famed Z Force that operated behind Japanese lines during the Second World War. Arriving in the Territory he worked as a stockman, gold miner and axeman before becoming a reporter, then editor of the *Centralian Advocate* at Alice Springs and, later, the *NT News*, finally winning the Walkley Award, journalism's ultimate accolade. He was immensely popular and many stories have been told, and written by Bowditch himself, about his career. Errol Simper who, together with this writer, worked for him during his editorship tells of one occasion that summed up the man when Bowditch was invited to a swish function in Darwin and, on his way to the event, encountered an Aboriginal friend. The Aborigine fell into step with Bowditch and followed him into the function room, only for Bowditch to be told his friend couldn't accompany him because he wasn't wearing shoes. Bowditch promptly raced into the street and managed to catch a startled taxi-driver about to pull away.

Bowditch: 'Cabbie, how much do you want for your shoes?