**Tuckiar v The King: Cross-Cultural Justice in a Kangaroo Court**

The plain fact is that in the Northern Territory the trial of an aborigine [sic] in most cases proceeds, and so far as I could gather, has always proceeded, as if the accused were not present. If he were physically absent no one would notice this fact.

—Martin Kriewaldt, Former Justice of the Supreme Court of the Northern Territory

On 17 September 1932, several indigenous Australians killed five Japanese trepang fishermen at Caledon Bay, Arnhem Land. According to news reports, the ‘brutal treatment’ of the indigenous women, or ‘lubras’, at the hands of the Japanese had incensed the Arnhem Land Aborigines. Consistently with tribal law, they had declared a murderous vendetta against the trepangers.¹ Such a forthright display of vigilantism perturbed the Commonwealth. In June 1933, the Federal Government despatched Northern Territory police officers to investigate and, it was hoped, to promptly arrest the perpetrators. Albert Stewart McColl, then a little-known mounted constable, was among the contingent on that fateful expedition. While much of what occurred on 1 August 1933 remains the subject of controversy, it is generally accepted that Dhakiyarr Wirrpanda, a Yolngu elder, fatally speared McColl on the secluded Isle Woodah.² In the unadorned language of fellow Constable Ted Morey, writing to Superintendent Stretton on 21 August 1933, McColl was ‘found dead, speared through the heart’.³ He had fired his revolver twice. A further bullet had misfired. A bloody spear lay near his body.⁴

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¹ Sydney Morning Herald, 3 June 1933, A1, 1933/7639, p. 126, National Archives of Australia (NAA), Canberra; Daily Herald, 5 June 1933, A1, 1933/7639, p. 125, NAA, Canberra.
⁴ Sydney Morning Herald, 22 September 1933, A1, 1933/7639, p. 40, NAA, Canberra.
Accounts of Dhakiyarr's motive vary considerably. They range from a snap reaction of fear to Dhakiyarr's single-minded determination to prevent a rapacious constable from indecently assaulting his wife, Djapari. Most recently, Peter Read has argued that the mere sight of a lawman plunged Dhakiyarr into a quasi-dissociative state, rousing in the Yolngu warrior haunting memories of the indiscriminate 'frontier justice' to which the authorities had subjected his own family. In Dhakiyarr's mind, McColl had come to 'finish the job', as it were.

Given what we know about the plasticity of oral evidence, such speculation may be little more than smoke and mirrors. But beyond that, motive is not an endpoint. It is merely a point of departure. Accordingly, it is not my concern to piece together what happened on that fateful day on Isle Woodah. The academy has traversed that terrain rather exhaustively. Instead, I want to suggest that Dhakiyarr's tale resists the 'whodunit' framework. Fermenting in its background was a discourse on cross-cultural justice and anthropological difference played out in the public sphere. Disparate individuals and interest groups, comprising what we might call 'civil society', took the opportunity to use Dhakiyarr's case as an opening wedge for a total reassessment of bi-cultural law and order. That the Commonwealth buckled under the pressure they exerted is telling. It suggests that the criminal trial is not merely a tool used by the State to try a person accused of transgressing societal norms. Rather, it puts on trial the very legal injunctions and policies that the State prescribes, both in the formal setting of the courtroom and in the court of public opinion. The defendant, although ostensibly held up by civil society as a martyr to the cause, is simply lost in the fray of partisanship. While admittedly humane, the particular strain of cross-cultural justice involved in Dhakiyarr's case did not recognise an

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6 Read, 'Murder, Revenge and Reconciliation', pp. 10-11.
inherent right to self-determination for Aboriginal Australians. On the contrary, it was tainted by protectionism and the methods of white colonial administration.

Constable McColl’s death unleashed a maelstrom of media coverage in the Territory and beyond. On 14 August 1933, the *Melbourne Sun* reported ‘a strong feeling that the Arnhem Land aborigines [sic] must be taught a severe lesson’. It had previously reported, with more than a hint of satisfaction, that police reinforcements were being despatched to Woodah Island to quell the violence. Harry T. Bennett, who had participated in one such armed expedition to Caledon Bay in 1925, plainly remarked that ‘the murderers can never be taught, except by a large properly organised force ... the Arnhem Land blackfellow [sic] has vowed that he will kill any policeman he sees on sight’. At least one police officer based in Darwin was in agreement, proclaiming that ‘the only good aboriginal [sic] is a dead aboriginal [sic]’. These heavy-handed sentiments were not without consequence. By 9 September, tensions were running so high that Prime Minister Joseph Lyons had to downplay any talk of a ‘punitive’ expedition to Arnhem Land. He was at pains to make clear not only that he ‘didn’t know how that word crept in’, but also that the Commonwealth was seriously contemplating a peaceful expedition led by the Church Missionary Society. By 20 September, Lyons’ exasperation had become outright frustration:

[I]t is clearly the duty of any Government to apprehend murderers, whether they are black or white ... The suggestion that there is any intention to send a punitive expedition against the aborigines [sic], however, is

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8 *Melbourne Sun*, 11 August 1933, A1, 1933/7639, p. 124, NAA, Canberra.
9 *Sydney Morning Herald*, 14 September 1933, A1, 1933/7639, p. 51, NAA, Canberra. Perhaps Bennett was suffering from a case of unrequited bloodlust, for his own expedition fizzled into nothing upon his contingent’s discovery that a one Constable Bridgland, whose supposed murder had necessitated the deployment, was alive and well.
absurd, and I hope that no further expression of opinions on this matter will be heard from various organisations interested.\textsuperscript{12}

Given that other high-profile spokesmen for the Federal Government were indeed making bellicose noises, Lyons' indignation was unwarranted. Certainly, the Prime Minister's innocuous policy contrasted starkly with the populist rhetoric spouted by Minister of the Interior John Perkins. On the same day Lyons' attempt at damage control was detailed in the \textit{Sun}, the \textit{Argus} reported Perkins as opining that a failure to clamp down on the Aborigines responsible for McColl's death would embolden the indigenous population and thereby unleash a flood of violence in the Territory. To that end, the Ministry had ominously authorised the Administrator of the Northern Territory, Colonel Robert Wedde, to 'take all action necessary' to protect the Groote Eylandt mission.\textsuperscript{13} As it turned out, Wedde thought it necessary 'to teach the Caledon Bay natives a lesson'.\textsuperscript{14} Joseph Aloysius Carrodus, then Chief Clerk of the Department of the Interior, explained who would fulfil that educative role:

\begin{center}
\begin{quote}
The party, to be of any use, must be fairly large, because the abos [sic], having routed the first party, will be in high fettle and will certainly attack the second expedition. I think we must do something, in view of the killing of a police constable. Otherwise the lives of all whites in the North East will not be safe.\textsuperscript{15}
\end{quote}
\end{center}

And, for a time, 'do something' it seemed they would. A Department of the Interior memorandum dated 8 September reveals that Wedde originally planned to arm 24 experienced bushmen with 20 rifles, 2,000 rounds of rifle ammunition, 12 revolvers, 1,000 rounds of revolver ammunition, and four shotguns with 300 cartridges. Although the Administrator discouraged

\textsuperscript{12} \textit{Sydney Morning Herald}, 20 September 1933, A1, 1933/7639, p. 41, NAA, Canberra.

\textsuperscript{13} \textit{Argus}, 9 September 1933, A1, 1933/7639, p. 66, NAA, Canberra.

\textsuperscript{14} \textit{Melbourne Herald}, 2 September 1933, A1, 1933/7639, p. 103, NAA, Canberra.

\textsuperscript{15} J. A. Carrodus to H. C. Brown, 28 August 1933, A431, 1947/1434, pp. 188-89, NAA, Canberra. My emphasis. See also \textit{Argus}, 9 September 1933, A1, 1933/7639, p. 66, NAA, Canberra, in which Perkins expressed a similar opinion. But see \textit{Melbourne Sun}, 2 September 1933, A1, 1933/7639, p. 82, NAA, Canberra, in which Perkins is reported as being much more apprehensive about the expedition.
‘unnecessary killing’, one newspaper cynically, but perhaps accurately, observed that ‘bloodshed [would] be inevitable’ if the Federal Government pressed on. A display of such brute force had not been seen since 1824, when Governor Brisbane declared martial law against the Wiradjuri people of New South Wales. Yet it all came to nothing. At the eleventh hour, and much to the consternation of trigger-happy public servants in the Department of the Interior, Lyons acquiesced to public pressure and announced a peaceful expedition to Caledon Bay. With the Church Missionary Society at its helm, and with the aid of Fred Grey, a trepang fisherman who had formed a rapport with the Arnhem Land Aborigines, the expeditionary force persuaded Dhakiyarr to submit peacefully to the Darwin authorities.

In accounting for what compelled the Commonwealth to change tack so abruptly, we must look to the influential roles played by anthropologists, laypeople, public intellectuals and missionaries. Indeed, civil society served as an important and increasingly potent counterweight to the kind of lynch-mob mentality responsible for reprisals such as that of 1928, in which the killing of two white men at Coniston Station, ostensibly motivated by their refusal to pay for sexual favours, precipitated the massacre of perhaps 100 Walbiri Aborigines. Yet the advocates of social justice, sobered as they were by such profound tragedies, could not go it alone. By tracking their opinions and exploits, the media was the true catalyst for the Federal Government’s about-face. Indeed, it bears noting that in the very same edition of the Argus in which Perkins so chillingly foreshadowed a punitive expedition, a public lecture on ‘The

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16 Department of the Interior Memorandum, 8 September 1933, A431, 1947/1434, p. 159, NAA, Canberra.
17 Sydney Morning Herald, 4 September 1933, A1, 1933/7639, p. 100, NAA, Canberra.
19 Daily Herald, 6 September 1933, A1, 1933/7639, p. 79, NAA, Canberra. See also C. E. Gaunt, Pine Creek, to the Northern Standard, 25 May 1934, A1, 1933/7632, p. 64, NAA, Canberra. Not all were pleased with this about-face. One disgruntled resident in Darwin pointed to the markedly different British response to the death of Gordon of Khartoum: ‘Did the English government send a Methodist missionary to parley with them, the only weapon a Bible in ... hand? Not on your life’.
21 See generally Dewar, ‘Death in the Gulf’, p. 5; Read, ‘Murder, Revenge and Reconciliation’, p. 3. In support of this death toll, Read cites eyewitness accounts of the Coniston Massacre.
Aborigine as a Human Being’ is prominently advertised. Another general interest story centres
on one Miss Dove, who boasts ten years’ experience on a Groote Eylandt mission. She observes
that ‘the blacks have feelings similar to our own, and until this fact is generally realised not much
progress can be made in their uplift and development’. Evidently not similar enough for
harmonious co-existence with whites, for she then proposes that Aborigines become proficient in
subsistence farming so that they may settle in their own ‘special country’. 22

Condescension aside, however, Miss Dove’s assessment of indigenous society as
relatively benign and undeserving of subjection to a punitive expedition was emblematic of
public opinion. The Prime Minister had clearly overestimated his powers of persuasion, for
opinions on the matter did not cease. 23 On 4 September, well-known anthropologist Olive Pink
sent this anxiously worded telegram to Lyons: ‘FOR SAKE OF HUMANITY – DASH – EVEN
NOMINAL CHRISTIANITY – AND NAME OF AUSTRALIA DO NOT SEND EXPEDITION
AGAINST ARNHEIM [sic] NATIVES WHAT IS CHIEF PROTECTOR FOR’. 24 Professor
Adolphus Peter Elkin, then head of the Anthropology Department at the University of Sydney,
bolstered Pink’s case. In reference to Weddell’s clarion call, Elkin wryly noted that “giving the
natives a lesson” is, to those who know the north, more sinister than the term ‘punitive
expedition’. 25 This assessment was not unique to the ivory tower. Letters of protest poured in
from what could only be described as a veritable cross-section of Australian society. Among the
individuals and organisations agitating against the expedition were the International Labour
Defence Organisation, the Tasmanian State Council of Churches, Archbishop Daniel Mannix,

22 Argus, 9 September 1933, A1, 1933/7639, p. 66, NAA, Canberra.
23 See also Melbourne Herald, 19 September 1933, A1, 1933/7639, p. 45, NAA, Canberra, in which Lyons
expressed the ‘disappointment’ felt by Cabinet at the unrelenting passage of resolutions condemning the Federal
Government’s punitive intentions.
24 Olive Pink to Lyons, 4 September 1933, A1, 1933/7632, p. 182, NAA, Canberra.
25 A. P. Elkin to J. A. Perkins, 6 September 1933, A1, 1933/7632, p. 157, NAA, Canberra. See also Ted Egan,
Justice All Their Own: The Caledon Bay and Woodah Island Killings (Melbourne, Melbourne University Press,
the New South Wales branch of the London Peace Society, the National Council of Women, the Citizens’ Education Fellowship, the Workers International Relief Organisation, the Women’s Central Organising Committee of the Australian Labor Party, and the Amalgamated Postal Workers’ Union. Replying to their representations was a task of such gargantuan proportions that the Prime Minister’s office prepared a pro forma response that dismissed claims of an armed expedition as a concoction. But despite the tedium they bore, pleas for a peaceful expedition were not lost on those in the upper echelons of government. By 9 February 1934, the Department of the Interior had compiled a confidential document, for the Commonwealth’s own internal use, in direct response to what it perceived as the unsubstantiated claims of several newspapers. Moreover, the Federal Government was cognisant of agitation abroad. Former Prime Minister Stanley Bruce, who by this time was serving as Australia’s High Commissioner in London, anxiously informed Lyons that the UK-based Anti-Slavery Society and the British Commonwealth League were up in arms at the prospect of a punitive expedition. Painfully aware that the international gaze was upon Australia, Bruce tactfully but firmly demanded answers from the Prime Minister.

26 Daniel Mannix to Joseph Lyons, 5 September 1933, A1, 1933/7632, p. 186, NAA, Canberra; Jean Daley to Perkins, 5 September 1933, A1, 1933/7632, p. 188, NAA, Canberra; A. M. Rienits to Lyons, 7 September 1933, A1, 1933/7632, p. 80, NAA, Canberra; A. N. Brown to Lyons, 16 September 1933, A1, 1933/7632, p. 58, NAA, Canberra; Josiah Park to Lyons, 8 September 1933, A1, 1933/7632, p. 78, NAA, Canberra; A. Golding to Perkins, 27 September 1933, A1, 1933/7632, p. 40, NAA, Canberra; P. Saunders to Perkins, 22 September 1933, A1, 1933/7632, p. 34, NAA, Canberra; W. Howard to Lyons, 19 September 1933, A1, 1933/7632, p. 32, NAA, Canberra; Perkins to Secretary of the Amalgamated Postal Workers’ Union, 8 September 1933, A1, 1933/7632, p. 149, NAA, Canberra.

27 H. C. Brown to Secretary of the Prime Minister’s Department, 9 February 1934, A431, 1947/1434, pp. 42-48, NAA, Canberra.

28 H. C. Brown to Secretary of the Prime Minister’s Department, 9 February 1934, A431, 1947/1434, p. 181, NAA, Canberra.
Having their own stake in the matter, missionaries and special interest groups also mounted vigorous protests. 'With horror and amazement', the Association for the Protection of Native Races (ANPR) argued against an armed expedition on three distinct bases: contravention of British common law, inconsistency with the Commonwealth's 'professed care of subject races', and improper resort by the white man to 'primitive tribal vengeance'. The ANPR nevertheless tempered its pleas with realism, imploring the Crown to disallow rifles if it insisted on going ahead with the expedition. Conversely, the Methodist Missionary Society was 'indignant' at what it perceived as the Commonwealth's face-saving motives. Reverend J. W. Burton, a spokesman for the Society, lamented that it had 'done its best' to dissuade the Federal Government from proceeding with the expedition, but to no avail. Nor was lobbying the preserve of the missions. On 11 September, the Victorian Trades Hall Council passed a resolution condemning the expedition; two days later, the Victorian Council Against War convened its own meeting of protest. The broadsheets scarcely missed a beat in giving voice to the myriad protests against the proposed expedition. Even the news media abroad felt compelled to comment on the rapid mobilisation of civil society. The Times summed up public sentiment best when it noted 'a remarkable display of feeling in the Commonwealth over the fear of a conflict in Arnhem Land if the expedition is to be a success'. But it was not above journalistic partisanship either, writing on 4 September that 'the Government has not the courage to tell Japan that it can only protect Japanese who observe the law'.

30 W. Morley to Joseph Lyons, 4 September 1933, A1, 1933/7632, p. 140, NAA, Canberra; Sydney Morning Herald, 5 September 1933, A1, 1933/7639, p. 95, NAA, Canberra.
31 Sydney Morning Herald, 14 September 1933, A1, 1933/7639, p. 50, NAA, Canberra.
32 Canberra Times, 13 September 1933, A1, 1933/7639, p. 56, NAA, Canberra; Melbourne Herald, 13 September 1933, A1, 1933/7639, p. 57, NAA, Canberra.
33 Melbourne Herald, 13 September 1933, A1, 1933/7639, p. 57, NAA, Canberra.
34 A. E. Monk to Lyons, 11 September 1933, A1, 1933/7632, p. 30, NAA, Canberra.
35 Extracted in Sydney Morning Herald, 14 September 1933, A1, 1933/7639, p. 50, NAA, Canberra.
36 Extracted in Sydney Morning Herald, 5 September 1933, A1, 1933/7639, p. 95, NAA, Canberra. This was in reference to the allegation, widely known by that point, that the trepangers had abused indigenous women. See also
A number of caveats are in order at this point. First, we must be wary of investing these exhortations with a significance they simply did not bear. Despite the misguided altruism inherent in the views of Miss Dove and the ANPR, it is erroneous to conflate pleas for cross-cultural justice with the germination of indigenous self-determination. These sentiments were doubtless a cut above assimilation in that they crudely attempted to rationalise Aboriginal customs. That concession notwithstanding, Charles Rowley observes that they remained, at their core, profoundly protectionist.\(^{37}\) For the most part, proponents of cross-cultural justice portrayed themselves as disinterestedly observing complex cultural phenomena from the periphery; indeed, at no point did they purport to identify with the peculiar experiences of Aborigines.\(^{38}\) This was empathy at arm’s-length, narrowly circumscribed by the tenets of colonial administration. That outspoken academics such as Olive Pink, Donald Thomson and Professor Elkin were at the forefront of the debate on bi-cultural law and order speaks volumes.\(^{39}\) Quite apart from emotionalism, cross-cultural justice was, generally speaking, an intellectual preoccupation with the Other. Consider, for example, the wild surmise, and sometimes even the derision, with which self-appointed social commentators described Aboriginal customs. One self-described authority on indigenous Australians spoke of their traditional practices with an almost clinical mysticism: ‘Not one Japanese would have been killed – nor would Constable McColl – without a decision, after exhaustive discussion by a council of old men, that they had violated native law’.\(^{40}\) In like fashion, the President-General of the Australian Methodist Church, speaking in defence of the

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\(^{38}\) Cf. Michael Sawtell to J. A. Perkins, 15 August 1934, A1, 1936/1229, p. 41, NAA, Canberra. I make room for a few exceptions. Sawtell, with a remarkable lack of condescension that belied the era, characterised Dhakiyarr’s ‘crime’ as simply acting in defence of his wife.

\(^{39}\) See generally Stephen Gray, *Criminal Laws: Northern Territory* (Annandale, NSW: Federation Press, 2004), pp. 18-19. Gray observes that Elkin clung to a fundamentally assimilationist policy which less-renowned anthropologists such as Donald Thomson vehemently opposed.

\(^{40}\) *Daily Herald*, 6 September 1933, A1, 1933/7632, p. 79, NAA, Canberra.
Arnhem Landers, bizarrely described their behaviour as one would that of an animal: 'The blacks are in constant fear. When questioned by white people they shiver, fearing the treatment that is about to be handed out to them'.

These were not merely the idiosyncratic views of disparate individuals. Indeed, an article in the Melbourne Herald marvelled at how similar indigenous children were to white children, as if this were some extraordinary revelation. Tolerance of Aboriginal customs was tantamount to neither acceptance nor understanding, with The Times, an in-principle supporter of a peaceful expedition, proclaiming that 'the facile intermingling of white and black must not be repeated'. Evidently, civil society held out cross-cultural justice as a 'gift of civilisation'; it was, for the most part, a product of poor-law type relief, ethnocentrism and the entrenchment of white colonial administration. Put simply, bi-cultural justice was of the legal rather than social kind. Worse yet, the motives of civil society were not always selfless or pure. The Minister of the Interior no doubt breathed a sigh of relief upon receiving the following letter:

I attended the public meeting called by the "Council against War" to protest against the Arnhem [sic] land expedition, and for your information desire to state that none of the speakers, in my opinion, knew anything about the matter. In fact the meeting was really to further their own interests in their fight against capital, rather than to assist the blacks in any way ... About 500 were present, and from the views expressed, and judging by those whom I saw there, it was practically a meeting of socialists.

Nor was the often sensationalist news media beyond reproach in this respect. True enough, the broadsheets cast a spotlight on public opposition to a punitive expedition. But many were complicit in the Administrator's fear-mongering tactics, even as they relayed assurances from

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43 Extracted in *Sydney Morning Herald*, 14 September 1933, A1, 1933/7639, p. 50, NAA, Canberra.
government officials, missionaries, white Darwinites and the former Protector of Aborigines himself that the Arnhem Landers posed no threat whatsoever to the Groote Eylandt mission. The *Canberra Times* gave credence to Weddell’s paranoia by describing indigenous men in the Territory as ‘fierce and cunning – far superior to the average Aboriginal Australian’; the *Sydney Morning Herald* matter-of-factly explained that the Aborigines were ‘at their most dangerous state’ owing to the recent paucity of foodstuffs in the north, and the *Melbourne Herald* dedicated two lengthy articles in its 6 September edition to Weddell’s alarmist take on the situation, relegating the contrary opinions of missionaries based in Groote Eylandt to a cursory sentence. In that same edition of the *Melbourne Herald*, the paper made the gross generalisation, contrary to all the foregoing evidence, that the majority of white Darwinites had given a punitive expedition their stamp of approval. Dhakiyarr’s plight, then, was simply the opening wedge for a fragmented, inconsistent and occasionally self-interested discourse on anthropological difference and cross-cultural justice. As we will see, such partisanship subsisted well into Dhakiyarr’s trial and High Court appeal.

In the Supreme Court of the Northern Territory, where twelve jurors deliberated upon Dhakiyarr’s culpability at the instruction of a presiding judge, the balance of power shifted. The proponents of cross-cultural justice, once so formidable in strength that they induced the

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45 *The Times*, 7 September 1933, A1, 1933/7639, p. 80, NAA, Canberra; *Daily Telegraph*, 8 September 1933, A1, 1933/7639, p. 81, NAA, Canberra; *Argus*, 9 September 1933, A1, 1933/7639, p. 66, NAA, Canberra; *Melbourne Herald*, 11 September 1933, A1, 1933/7639, p. 61, NAA, Canberra. Cf. *Melbourne Herald*, 19 September 1933, A1, 1933/7639, p. 45, NAA, Canberra, in which Lyons contended that the missionaries’ assurances that they were safe was ‘beside the point’.

46 *Canberra Times*, 1 September 1933, A1, 1933/7639, p. 104, NAA, Canberra.

47 *Sydney Morning Herald*, 9 September 1933, A1, 1933/7639, p. 67, NAA, Canberra. See also *Melbourne Herald*, 8 September 1933, A1, 1933/7639, p. 70, NAA, Canberra.


Commonwealth to recast a punitive expedition as a peaceful one, could now only watch helplessly from the sidelines. Justice Thomas Wells, and not the news media or civil society, wielded the most potent kind of power. In spite of continuing public agitation at Wells’ conduct of the trial, an intricate set of rules regulating the removal of judges prohibited the Commonwealth from taking action, as did the insulation of judicial power more generally. The essential point is that once criminal litigation is set in train, the State invests one ideally impartial person with a great deal of control over the liberty of the accused. While the jury is ultimately responsible for rendering a verdict, its powers are narrowly circumscribed in two respects. First, the judge, in deciding questions of law, ultimately decides what legal defences and facts may be put to a jury. Through this filtering process, combined with a judicial instruction prior to deliberation, judges impinge upon the fact-finding process in their own subtle ways. Moreover, a jury of twelve people unfamiliar with criminal laws and procedures draws much inspiration from a judge, whom they simply assume to have a great deal of experience in such matters. The jury is apt to think that the judge has ‘seen it all’ and therefore commands an impeachable level of respect. This, I suggest, is precisely what occurred in Dhakiyarr’s trial. In his conduct of the case, Judge Wells effectively secured a guilty verdict for Dhakiyarr even amid public outcry and timely amendments to the criminal law which, on their proper application, would have practically guaranteed his acquittal. Dhakiyarr’s trial and successful appeal have much to say about the unevenly matched power play between the judiciary and the public sphere.

Peter Read notes that the disproportionate death sentences meted out to Aboriginal men, particularly in cases involving the deaths of whites, made the Commonwealth uneasy in the lead-up to Dhakiyarr’s trial. Anecdotal evidence suggested that some Aborigines had sat through the

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50 See, eg, Melbourne Herald, 7 August 1934, A1, 1936/4022, part 2, p. 333, NAA, Canberra.
51 Read, ‘Murder, Revenge and Reconciliation’, pp. 5-6.
entirety of their trials without understanding a word, only to be later informed by an interpreter that they had been sentenced to death.\textsuperscript{52} And whereas whites enjoyed the benefit of spousal privilege, Aboriginal women could be compelled to give evidence against their husbands.\textsuperscript{53} Moreover, the reluctance of Territory judges to admit expert evidence from missionaries and anthropologists, even at sentencing, was notorious.\textsuperscript{54} Evidently, the prevailing culture of frontier justice within the Northern Territory judiciary made for a public relations debacle. Still reeling from public castigation at its enthusiasm for a punitive expedition, the Commonwealth hurriedly passed ordinances that expressly empowered judges to consider the anthropological evidence they had so blithely disregarded in the past.\textsuperscript{55} As a result, Minister for the Interior Perkins gave his assurances that, whatever the verdict, Dhakiyarr would not face the death penalty.\textsuperscript{56} No doubt the Minister was anxious to appease a public that continued to campaign, for cross-cultural justice even after Dhakiyarr's committal. With the fiasco over, the expedition having abated, public outrage was now directed at the false pretences under which the missionaries had persuaded Dhakiyarr to submit to the authorities in Darwin and the cruelty of his imprisonment.\textsuperscript{57}

\textsuperscript{52} Melbourne Herald, 11 August 1934, A1, 1936/4022, part 2, p. 338, NAA, Canberra. This was, in fact, what occurred in Dhakiyarr's own trial: 'until an interpreter is taken to the gaol, Tuckiar will probably sleep unconcernedly as he did all this morning'.

\textsuperscript{53} Read, 'Murder, Revenge and Reconciliation', p. 5. This inequality was eventually remedied in 1940 by the \textit{Ordonance to Amend the Criminal Law Consolidation Act 1876 (No 14) 1934 (SA)}, in its application to the Northern Territory.

\textsuperscript{54} Read, 'Murder, Revenge and Reconciliation', p. 2.

\textsuperscript{55} \textit{Ordonance to Amend the Criminal Law Consolidation Act 1876 (No 10) 1934 (SA)}, in its application to the Northern Territory, A432, 1934/1437, pp. 10-11, NAA, Canberra. For accounts of its reception, see \textit{Canberra Times}, 31 March 1934, A1, 1936/327, p. 89, NAA, Canberra; \textit{Sydney Morning Herald}, 30 March 1934, A1, 1936/327, p. 90, NAA, Canberra.


But Justice Wells would not have a bar of political interference. A fiercely independent jurist, Wells, when consulted on the amending regulations, variously derided them as 'a backdoor way of abolishing the death penalty' and 'just another case of ill-considered legislation'. The Secretary of the Attorney-General's Department coolly chided that Wells should limit himself to matters of legal drafting rather than national policy. In response to the rebuff, Wells made it abundantly clear that, at least in his courtroom, anthropological evidence was admissible only if adduced from elders of the tribe of the accused person. Obviously, professional anthropologists of Elkin's ilk did not fit the bill. Not without reason, the Federal Government anticipated problems. In open court, Wells opined that 'the best and kindest thing to do with these men would be to hang them'. A public sympathetic to Dhakiyarr soon dubbed Wells 'the new Judge Jeffreys', in reference to an eccentric jurist in seventeenth-century England with a penchant for dispensing the death penalty. Worse yet, Wells commented upon the paucity of Crown evidence. He chastised the Commonwealth for failing to marshal material witnesses, namely Constable Morey, two trackers and four indigenous women. Wells evidently

58 Egan, Justice All Their Own, p. 198f, describes Thomas Wells as 'last in a long line of strong-minded but eccentric Northern Territory Justices'. See also Dean Mildren, 'The Administration of Justice in the Northern Territory During the War Years', Journal of Northern Territory History 5, no. 1 (1994), p. 22, who describes Wells as 'a man of strong convictions and an independent spirit'. Cf. Tigger Wise, The Self-Made Anthropologist: A Life of AP Elkin (Sydney: Allen & Unwin, 1985), p. 122, who cites a description of Wells as a 'bull-headed [and "briefless"] barrister from Sydney, with a wen on his upper lip, a curl to his mouth and an inflexible interpretation of the letter of the law'.


61 Attorney-General's Department minute on Judge Wells, A432, 1934/1477, pp. 59-61, NAA, Canberra; Read, 'Murder, Revenge and Reconciliation', p. 5.

62 Sydney Morning Herald, 8 August 1934, A1, 1936/327, p. 88, NAA, Canberra. Professor Elkin complained that the arbitrary restriction made the ordinance 'unworkable'.

63 Daily Herald, 8 August 1934, A1, 1936/4022, part 2, p. 41, NAA, Canberra. See also A. Markus, Governing Savages (Sydney: Allen & Unwin, 1990), p. 112. Within months of Wells' appointment as a Supreme Court Judge, he had sentenced eight Aborigines to death. Markus argues that this was at least partly attributable to the timing of Wells' appointment, as by that time a large number of homicides involving Aborigines were present on the judicial docket.

64 Cabinet briefing prepared by the Attorney-General's Department, A1, 1936/4022, part 2, p. 173, NAA, Canberra.
believed Djaparri was fit to give evidence in the absence of Aboriginal spousal privilege. 65 Although the Commonwealth originally entertained the idea of sending a further expedition to obtain the witnesses and thereby placate Wells, Cabinet documents reveal that it ruled out that option owing to the likelihood of further bloodshed — a testament, perhaps, to the subsisting influence of civil society. 66 The judge was unimpressed. By the eve of Dhakiyarr’s trial, Wells’ boisterous conduct had raised eyebrows at the Department of the Interior. At any rate, it certainly vindicated the Secretariat’s order, by way of a coded telegram dated 3 August 1934, that Acting Administrator Carrodus transcribe Wells’ incendiary remarks without his knowledge. 67

Unsurprisingly, the trial was a farce. The jury was presented with the conflicting testimony of two Arnhem Land Aborigines. 68 A kinsman of Dhakiyarr, Parraner, gave a thoroughly incriminating version of events which was essentially to the effect that the accused had killed McColl in cold blood. 69 Harry, on the other hand, gave credence to the defence’s case theory, namely that Dhakiyarr had killed McColl in order to protect Djaparri. 70 As evidenced in his summation to the jury, Wells made no bones about whose testimony he deemed credible:

The story of Parraner fits in very accurately with the story told by Constable Hall and Paddy [another Crown witness] but that is for you to decide … It [Harry’s story] is a mighty ingenious story and if he did invent it, it means he is a mighty ingenious and cunning gentleman. I put it to you that he did invent it. That is my view but you are not compelled to accept it … The story is so ridiculous that you should not have the slightest difficulty in coming to the conclusion that it is a fabrication from start to finish. 71

65 Affidavit of Carrodus to the High Court of Australia, A1, 1936/4022, part 2, p. 214, NAA, Canberra.
67 Department of the Interior to J. A. Carrodus, 3 August 1934, A1, 1936/4022, part 1, p. 45, NAA, Canberra.
68 Rowley, The Destruction of Aboriginal Society, p. 293, opines that in view of the imprecision of Aboriginal pidgin, the witnesses’ stories ‘could be regarded either as conflicting or complimentary’.
70 Statement by Harry at the coronial inquest into the death of Constable McColl, 27 July 1934, A432, 1934/1437, p. 244, NAA, Canberra.
71 Affidavit of Carrodus to the High Court of Australia, A1, 1936/4022, part 2, pp. 218-19, NAA, Canberra. My emphasis. See also Tuckiar v The King (1934) 52 CLR 335, p. 343.
Told on the one hand that the material findings of fact were theirs and theirs alone, and, on the other, that they would be adjudged incompetent if they failed to make certain findings adverse to Dhakiyarr, one wonders what the jury made of Wells' instruction. Contrary to the defendant's rights, Wells further instructed the jury that they could draw whatever inference they liked from Dhakiyarr's decision to refrain from giving testimony. In the course of the trial, Wells had also intimated, quite irrelevantly, that a guilty verdict would besmirch McColl's good name. To that end, Wells permitted the Crown Prosecutor, Harris, to adduce from a fellow police officer evidence of the late Constable McColl's 'moral character', if only to refute Harry's allegations. Extraordinarily, Dhakiyarr's own defence counsel, W. J. P. Fitzgerald, shared the prosecution's concerns. Immediately after the jury returned a verdict of guilty on 3 August 1934, Fitzgerald breached client-legal privilege by declaring in open court that Harry's story was a complete fabrication. In what seemed a bipartisan effort, the defence and prosecution had preserved the good name of a white policeman. It mattered not that their preoccupation with McColl's character was quite irrelevant to resolving the issues at hand. True to form, Wells praised Fitzgerald for his candour.

By the trial's end, Wells truly had the all-white, all-male jury in his thrall. At the delivery of the verdict, the foreman, perhaps taking his cue from Judge Wells, announced that the jury was 'disgusted at the manner in which the Crown [had] presented [its] case'. His Honour

72 Affidavit of Carrodus to the High Court of Australia, A1, 1936/4022, part 2, p. 219, NAA, Canberra.
73 Affidavit of Carrodus to the High Court of Australia, A1, 1936/4022, part 2, pp. 214, 216, NAA, Canberra.
74 Affidavit of J. A. Carrodus to the High Court of Australia, A1, 1936/4022, part 2, p. 217, NAA, Canberra.
75 Affidavit of J. A. Carrodus to the High Court of Australia, A1, 1936/4022, part 2, p. 216, NAA, Canberra. This from a jury that, upon hearing Harry's evidence, intimated to Judge Wells that they might be unable to reach a verdict either way. Unsurprisingly, Wells advised the jurors of the implications of double jeopardy.
76 See also Egan, Justice All Their Own, p. 139. Casting further light on the inadequacy of Dhakiyarr's legal representation, Egan has characterised Fitzgerald's summation to the jury as 'pathetic, the half-hearted defence of a man perhaps weighing up the prospects of continuing to live in remote Darwin after "letting the side down" by gaining an acquittal for a savage who had murdered a white policeman'.
77 Affidavit of J. A. Carrodus to the High Court of Australia, A1, 1936/4022, part 2, pp. 220-21, NAA, Canberra.
concurred. And while it is true that the media was notorious for taking pot shots at Wells, none of the broadsheets were game enough to publish the substance of Harry’s testimony until the trial had concluded, and others refused to do so even then. On 7 August, Jessie Litchfield, a journalist for the *Northern Standard*, namely reported Harry’s evidence in the following terms:

> Harry ... gave evidence of a conversation with accused in which he confessed to witness, which differed to that told to Parriner [sic] by accused. The story told to Harry was when accused was on his way to Darwin. No evidence was called for the accused.

This rather half-hearted attempt at journalism must be understood in the context of the coronial inquest that preceded the trial. In a letter to McColl’s brother, Stewart, dated 8 August 1934, Litchfield explained that she, along with the police, F. Thompson (a fellow reporter), Fitzgerald, Harris, the Coroner, and a correspondent for the *Melbourne Herald*, had agreed to suppress Harry’s testimony. But it would be misleading to say that the Fourth Estate as a whole was complicit in suppressing the potentially exculpatory evidence. In her letter to Stewart, Litchfield scathingly refers to other papers that planned to publish the ‘scoop’ and were puzzled as to why she had not done so already. Their reporters, she explained, were ‘lost to all ethics’.

No doubt the irony of such self-righteous foot stomping was lost on Litchfield. Among the papers she had impugned was the little-known *Darwin Proletarian*, which for all its partisanship had at least reported Harry’s testimony faithfully. Evidently, the judiciary's coercive power over the media had its limits. The most we can say is that some media outlets, which had hitherto acted as a

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79 Egan, *Justice All Their Own*, p. 147. Egan notes that, prior to 8 August 1934, no newspaper reported on Harry’s account of McColl’s impropriety. Among those that eventually did report on Harry’s testimony was the *Darwin Proletarian* and the *Sydney Sun*.
80 *Northern Standard*, 7 August 1934, extracted in Egan, *Justice All Their Own*, p. 147.
82 *Darwin Proletarian*, 8 August 1934, quoted in Egan, *Justice All Their Own*, p. 147. The *Proletarian* released a ‘special supplement’ to unveil ‘what must be one of the greatest travesties of a trial ever held in Australia’.
soapbox for the cross-cultural justice movement, drew the line at the point where serious aspersions were cast on the character of a white man.

The whiteness of the victim was relevant in more ways than one. Indeed, Wells’ submissions on policy to the Attorney-General are telling. The judge had no qualms about treating Aboriginal customary law as a mitigating factor in the sentencing of an indigenous person guilty of murder, provided, of course, that the deceased was not white.83 Wells’ selective leniency is borne out by his judicial record. Following the conviction of the three Aborigines accused of murdering the Japanese fishermen at Caledon Bay, Wells sentenced each of the offenders to 20 years imprisonment. Not without sympathy, he recommended their release after four years of good behaviour.84 Moreover, Dean Mildren has observed that Wells frequently imposed the prescribed minimum penalty for certain offences. On such occasions, his Honour would point out that the prescribed minimums diminished judicial discretion and were in dire need of legislative reform.85 Yet the death of a white man, a police officer no less, was a spanner in the works. Wells was adamant that ‘blacks ... could not murder policemen in cold blood and escape with a short term of imprisonment’.86 Predictably, his Honour sentenced Dhakiyarr to death on 6 August 1934.87

A most curious thing occurred once Wells had passed sentence. The balance of power shifted once more, from Wells back to the public sphere. The proponents of cross-cultural justice, who had once banked on the prospects (however unlikely) of an outright acquittal or a

83 H. C. Brown to J. A. Carrodus, 4 May 1934, A1, 1936/327, p. 55, NAA, Canberra. Brown’s memo describes the differences between Wells’ recommendations and the ordinances in their final form.
84 Egan, Justice All Their Own, p. 98. Wells, however, did not accept the jury’s finding that the Aborigines had been provoked. He considered the primary motive of the offenders to be the obtaining of Japanese loot rather than the protection of indigenous women.
86 Argus, 7 August 1934, A432, 1934/1437, p. 320, NAA, Canberra.
87 Order of the Northern Territory Supreme Court, 6 August 1934, A1, 1936/4922, part 2, pp. 103-104, NAA, Canberra.
lenient sentence, no longer had reason to brood quietly. On the very evening of Dhakiyarr’s sentencing hearing, protestors convened at King’s Hall, Sydney University, to call for Judge Wells’ immediate dismissal.88 The press did not hold back. The *Melbourne Herald* reported with disgust that Dhakiyarr had not even been informed of his imminent execution,89 while another broadsheet decried the procedural irregularities of Dhakiyarr’s show trial.90 In what must have seemed a case of *déjà vu* for the Commonwealth, the usual suspects inundated the public service with letters of protest.91 The administration publicly disowned Wells.92 Dissent became more brazen. The International Labour Defence Organisation, which had agitated on Dhakiyarr’s behalf since before his trial, indicated that it would spearhead his appeal to the High Court of Australia.93 A secret inter-governmental memo reveals that a newly drafted ordinance, which empowered the Attorney-General to recommend the postponement of any execution, was enacted in direct response to these disquieting developments.94 J. G. Lathain promptly made use of this newfangled power, if only to give the Commonwealth some much-needed breathing space.95 For good measure, and possibly in an attempt to pre-empt any legal manoeuvring by

91 See, eg, Secretary of the Association for the Protection of Native Races to J. A. Perkins, 16 August 1934, A1, 1936/4022, part 2, p. 200, NAA, Canberra.
93 F. G. Bateeman to Minister for the Interior, 15 August 1934, A432, 1934/1437, p. 97, NAA, Canberra.
94 Secretary of the Attorney-General’s Department to Secretary of the Department of the Interior, 27 August 1934, A1, 1936/4022, part 2, p. 169, NAA, Canberra.
95 Attorney-General’s Department minute, 30 August 1934, A1, 1936/4022, part 2, p. 119, NAA, Canberra; Secretary of the Attorney-General’s Department to Secretary of the Department of the Interior, 8 October 1934, A1, 1936/4022, part 2, p. 51, NAA, Canberra.
International Labour Defence, whose motives were decidedly suspect, Latham ordered the Chief Protector to appeal the sentence on Dhakiyarr's behalf.

On 29 October 1934, Dhakiyarr's government-paid counsel, Wilfred Fullagar, KC, advanced some 24 grounds of appeal in the High Court of Australia. The Court delivered its judgment on 8 November. In unanimously quashing Dhakiyarr's conviction, the Court gave Wells and Fitzgerald no quarter. In a joint judgment, four Justices described Fitzgerald's disclosure of privileged information as 'wholly indefensible.' For his part, Wells had erred in admitting evidence of McColl's good character and in his instruction to the jury that Dhakiyarr's silence was potentially incriminating. In an unwavering defence of the rights of the accused, whatever their descent, their Honours bluntly stated that 'the purpose of the trial was not to vindicate the deceased constable, but to inquire into the guilt of the living aboriginal [sic].' Justice Hayden Starke delivered the coup de grace. In a separate judgment, Starke condemned Fitzgerald for his failure to press self-defence and provocation, which were clearly open on the evidence. A retrial was out of the question; indeed, Fitzgerald's sensational revelation had made it nigh on

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96 See generally H. C. Brown to Secretary of the Attorney-General's Department, 8 August 1934, A432, 1934/1437, p. 269, NAA, Canberra; H. C. Brown to Secretary of the Attorney-General's Department, 22 August 1934, A432, 1934/1437, p. 96, NAA, Canberra.
97 Secretary of the Attorney-General's Department to Secretary of the Department of the Interior, 27 August 1934, A1, 1936/4022, part 2, p. 152, NAA, Canberra. See also The Bulletin, 8 August 1934, quoted in Egan, Justice All Their Own, pp. 154-155, which dismissed International Labour Defence as 'a body much given to defending people. It carries on a campaign against Fascism, Social Fascism, White Terror, War and Illegality, apparently with ample funds'.
99 Order of the High Court of Australia, 8 November 1934, A10074, 1934/47, pp. 127-128, NAA, Canberra.
100 Tuckiar v The King (1934) 52 CLR 335 ("Tuckiar"), p. 346 (Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ).
101 Tuckiar (1934) 52 CLR 335, pp. 344-45 (Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ).
102 Tuckiar (1934) 52 CLR 335, p. 345 (Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ).
103 Tuckiar (1934) 52 CLR 335, p. 351 (Starke J).
impossible to empanel an impartial jury.\textsuperscript{104} For good measure, Starke added that he presumed the Commonwealth would take immediate steps to escort Dhakiyarr back to his homeland.\textsuperscript{105} 

With the exception of northern publications such as The Bulletin,\textsuperscript{106} most broadsheets could hardly contain their glee: 'JUDGE CRITICISED', 'TUCKIAR IS FREE' and 'COUNSEL'S ACT "WHOLLY INDEFENSIBLE"' were emblazoned across lengthy articles that meticulously detailed the High Court's reasoning.\textsuperscript{107} Taking the hint, Cabinet soon announced an enquiry into Judge Wells' conduct of the case.\textsuperscript{108} Heeding Starke's thinly veiled directive, the new Minister for the Interior, Thomas Paterson, announced that Dhakiyarr would be granted safe passage to Arnhem Land.\textsuperscript{109} But he never made it home. Transported to Darwin's Kahlin Compound in preparation for his return to Arnhem Land, Dhakiyarr vanished on 10 November.\textsuperscript{110} Various commentators have opined that 'frontier justice' was finally served.\textsuperscript{111} According to Egan, the general consensus among Darwinites is that the Northern Territory police murdered Dhakiyarr and unceremoniously dumped his body in the harbour.\textsuperscript{112} Despite rumours that the Yolngu elder had 'gone bush',\textsuperscript{113} Donald Thomson, on a visit to Arnhem Land seven months later, discovered that no-one had seen Dhakiyarr since his release.\textsuperscript{114} In a sobering

\textsuperscript{104} Tuckiar (1934) 52 CLR 335, p. 355 (Starke J).
\textsuperscript{105} Canberra Times, 11 November 1934, A1, 1936/4022, part 2, p. 23, NAA, Canberra.
\textsuperscript{106} The Bulletin, 14 November 1934, extracted in Egan, Justice All Their Own, p. 191.
\textsuperscript{107} Melbourne Herald, 8 November 1934, A1, 1936/4022, part 2, p. 21, NAA, Canberra; Sydney Morning Herald, 9 November 1934, A1, 1936/4022, part 2, p. 22, NAA, Canberra.
\textsuperscript{108} Argus, 10 November 1934, A1, 1936/4022, part 2, p. 20, NAA, Canberra.
\textsuperscript{109} Quoted in Egan, Justice All Their Own, p. 188.
\textsuperscript{110} Northern Territory Administration to the Department of the Interior, 13 November 1934, A1, 1936/4022, part 2, p. 7, NAA, Canberra.
\textsuperscript{112} Egan, Justice All Their Own, p. 193.
\textsuperscript{113} Melbourne Herald, 20 November 1934, A1, 1936/4022, part 2, p. 1, NAA, Canberra; Sydney Morning Herald, 12 November 1934, A1, 1936/4022, part 2, p. 5, NAA, Canberra. In this context, to 'go bush' means to return to one's homeland unaided.
\textsuperscript{114} Canberra Times, 22 July 1935, A659, 1939/5250, p. 147, NAA, Canberra; Summary of results from Donald Thomson's Interim General Report of Preliminary Expedition to Arnhem Land, Northern Territory of Australia, 1935-36, A52, 572/99429 WEB, pp. 3-4, NAA, Canberra.
reminder that Tuckiar v The King was never really about one of its named parties, Dhakiyarr’s disappearance did not end the spin. Only five days later, the tragic case was already ripe for political point-scoring. Consider the following exchange on the floor of the Commonwealth Parliament:

MR BRENNAN: Has the Attorney-General familiarized himself with ... the judgment of the High Court ... in connexion with the trial of an aborigine [sic] named Tuckiar? ... Will he take whatever steps seem to him to be necessary to obviate the public danger of any other criminal trials at the hands of the judge concerned?

MR MENZIES: I have not yet perused the papers in connexion with this case, but I shall do so ... At the same time, I am sure the honourable member will agree that if every judge whose judgments are criticized on appeal were dealt with in the manner suggested, the country would be denuded of its judiciary within a fortnight.115

The overt politicisation of Dhakiyarr’s case is telling. It is timely to recall the observation of Wells’ successor, quoted in the epigraph of this essay. Dhakiyarr might as well have been absent from his own trial – not only because he could not comprehend it, but because the proceedings were anything but a fact-finding enterprise that dispassionately assessed the culpability of a single individual. Rather, a cut-and-dried criminal case was subsumed into a politicised discourse on indigenous policy, the merits of assimilation, the inviolable rights of an indigent defendant, and the sempiternal tensions between frontier justice and cross-cultural justice. Yet we cannot neatly characterise the parties to the debate. For all of Judge Wells’ cross-cultural insensitivity in the particular case before him, he was a fierce critic of the Commonwealth’s policy of assimilation and was, on occasions, abundantly fair to indigenous offenders. Moreover, the

proponents of cross-cultural justice were hardly disinterested parties; indeed, they treated Dhakiyarr as a means to an end. The paternalistic language in which missionaries, well-meaning whites and anthropologists framed the debate indicates that they had eschewed assimilation in favour of protectionism, not self-determination. Worse yet, individuals of considerable clout continued to champion assimilation. Professor Elkin’s justification of the policy, while consistently opposed by maverick colleagues such as Donald Thomson, gained formidable traction during and after Dhakiyarr’s trial. Nor was the Fourth Estate an indefatigable crusader for cross-cultural justice. The press’s voluntary suppression of exculpatory testimony is a blot on the journalistic integrity of the era. But from a consequentialist perspective, the media was an agent of reform in two respects. First, its exhaustive reportage on the cross-cultural justice movement was an important check on government power. It was doubtless a driving force behind the abandonment of a punitive expedition, the prospect of which was hardly fanciful in the wake of the Coniston Massacre. Second, the media exposed, albeit in a sanitised manner, the slipshod way in which an ill-informed jury dispensed ‘justice’ in Wells’ courtroom. Even with journalists of Litchfield’s ilk among its ranks, it continued to sow the seeds of public discontent.

Following on from these observations, Dhakiyarr’s case is emblematic of the volatile and often potent power play between the judiciary, the executive and civil society. The contours of government power, however rigid in theory, must adjust themselves in response to informal expressions of dissent that are widespread and consistent. From arrest to acquittal, Dhakiyarr’s case bore this out. Whereas the Administrator could hardly contain his excitement at the prospect of a time-honoured punitive expedition, the upper echelons of government, which were fully cognisant of the groundswell of support for cross-cultural justice, laid those plans to rest. We

might elaborate on that observation by saying that two adjudicative processes take place in the criminal justice system specifically. The overt one played out in Judge Wells’ kangaroo court. It was ostensibly concerned with ascertaining Dhakiyarr’s culpability, however much the actual conduct of the trial might lead us to believe otherwise. The other was extra-curial. Rather than prosecuting Dhakiyarr in the court of public opinion, this adjudicative process passed judgment on the propriety of the laws, procedures and policies used to indict him. It played out on a daily basis in newspapers, at makeshift venues of protest, in the academy, and in the endless stream of letters that graced the desks of lowly public servants and ministerial heavyweights alike. That the actors were unenlightened does not negate the efficacy of the advocacy. Admittedly, that conclusion is problematised by the trial proper. Indeed, the State reposed an extraordinary amount of power in an idiosyncratic jurist to the exclusion of civil society and even the government itself. But the proponents of cross-cultural justice were merely biding their time until the trial’s end. One might plausibly argue that the High Court, rather than civil society, was decisive in overturning Dhakiyarr’s conviction. But to what extent can we say that public opinion did not unconsciously influence the seven eminent jurists constituting its bench? Certainly, Justice Starke’s insistence that Dhakiyarr be returned to Arnhem Land at once hints at their indignation. Moreover, the Court has no mandate to rectify miscarriages of justice. It can only adjudicate upon those disputes that come before it. Had the Commonwealth not brought the appeal at the public’s behest, it goes without saying that the prison authorities at Fannie Bay Gaol would have dutifully carried out Wells’ sentence. And yet the mysterious circumstances surrounding Dhakiyarr’s disappearance, which ineluctably point to foul play, remind us that lone individuals can usurp the formidable power wielded by governmental institutions and civil society at large. It is therefore poignant that Dhakiyarr, whose cause was consistently misappropriated by well-intentioned but misguided parties, could not assert his own agency.
Justice Kriewaldt's observation is apt. Dhakiyarr was absent not only from his own trial, but also from the court of public opinion.
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