Mr Neal’s Invasion: Behind an Indigenous Rights Case

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On 10 May 1982 the Queensland Court of Criminal Appeal sentenced Percy Neal to imprisonment for six months. Neal had been convicted in the Magistrate’s Court at Cairns in October 1981 of assaulting a white man at Yarrabah Aboriginal community, and had been sentenced by Magistrate Spicer to two months imprisonment. But the Court of Criminal Appeal decided that this was too lenient. Justice Andrews, one of the three Court of Criminal Appeal Judges, commented that the incident in question was “a most frightening situation, as well as being offensive and grossly humiliating”, and that it needed to be remembered “that it was an offence which was committed by an intrusion into Mr. Collins’s residence during the night at a time when he was entitled to expect that he could enjoy the comfort and security of his own home, in the company of his wife and small child”. Justice Connolly found that the assault had occurred when Neal “invaded the premises of [Collins], who had done absolutely nothing to provoke him”, and that Neal committed the assault when he was “backed by a mob and, in the presence of [Collins’s] wife and small daughter”.

These comments suggest a very physical confrontation or some sort of armed attack. It remains extraordinary to think that the assault that took

1 We would like to thank Percy Neal for allowing us to spend a couple of days with him at Yarrabah, and we thank James Cook University for a grant, without which we would not have been able to conduct this research. Though he did not request it, Mr Neal was paid a small fee to cover out of pocket expenses.

2 Unpublished transcript of Court of Criminal Appeal judgment in Queen v Percy Neal, 10 May 1982.
place here, which the Court of Criminal Appeal thought warranted imprisonment for six months, boiled down to the allegations that Neal had used threatening and rude language and had spat at Daniel Collins, a white store owner at Yarrabah. The simple message Neal had wanted to deliver to Collins was for him to leave Yarrabah along with all other white people living there.

This case became famous in September 1982 when the High Court upheld Neal’s appeal against the Court of Criminal Appeal decision. While the success of the appeal was limited and was based on something of a legal technicality (which we shall discuss shortly), the case was made famous by the judgment of Lionel Murphy, one of the four High Court Judges who heard the appeal. Murphy decided that the case was clearly a race relations one, and he was very critical of the Magistrate, whose comments in the original trial indicated to Murphy “that anyone who agitated for change ... in the Aboriginal communities, would be under a disadvantage in that Magistrate’s Court”. Murphy also criticised the Court of Criminal Appeal which had “a duty to see that racism is not allowed to operate within the judicial system” and which “should have disapproved of the unjudicial manner in which the magistrate dealt with sentence”. Murphy then made the following famous remarks:

That Mr. Neal was an “agitator” or stirrer in the magistrate’s view obviously contributed to the severe penalty. If he is an agitator, he is in good company. Many of the great religious and political figures of history have been agitators, and human progress owes much to the efforts of these and the many who are unknown. As Wilde aptly pointed out in *The Soul of Man under Socialism*, “Agitators are a set of interfering, meddling people, who come down to some perfectly contented class of the community and sow the seeds of discontent amongst them. That is the reason why agitators are so absolutely necessary. Without them, in our incomplete state, there would be no advance towards civilisation.” Mr. Neal is entitled to be an agitator ...

This case has received mention in virtually every book that discusses the life and career of Lionel Murphy, and Murphy’s statement that “Mr Neal is entitled to be an agitator” became the title of a documentary film on Murphy’s life.³

³ *Neal v The Queen*, (1982) 149 CLR 305 at 316-17.

⁴ See, for example, J Hocking, *Lionel Murphy: A Political Biography*, Cambridge
The purpose of this article is not further to glorify Murphy’s association with the case, but to re-examine the significance of this case two decades after it was decided. It is our argument that the case remains an important signpost on Queensland’s and Australia’s path towards the recognition of Indigenous rights.

Background

Yarrabah Aboriginal community, located about 40 kilometres south of Cairns, was established as an Anglican mission in 1892. In 1960 the Queensland government, through its Department of Native Affairs, took over control of the reserve. It was not until 1986, four years after the High Court decision in *Neal v Queen*, that the Yarrabah Council took possession of Deeds of Grant in Trust, enabling it to have a substantial degree of autonomy in the running of its community.5

In 1981 Percy Neal was in his mid twenties, and the Yarrabah community was under the strict control of the Department of Native Affairs. Neal was elected chairman of the Yarrabah Council in the late 1970s, and the Council was trying in vain to establish some degree of autonomy for the community. While the Commonwealth had legislated in 1976 to enable large tracts of land to be returned to Aboriginal groups in the Northern Territory, there were no comparable developments in Queensland. Indeed the situation in Queensland remained so oppressive that the Commonwealth was forced to use the power it acquired in the 1967 referendum to pass two Acts specifically directed at Queensland recalcitrance: the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* and the *Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978*. The latter Act, when it was debated in the Commonwealth parliament, was spoken about in this way:

This Bill will guarantee the right of Aboriginal and Torres Strait Island communities on Aboriginal and Island reserves in

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6 Interview of Percy Neal by John Chesterman and George Villaflor, 25 August 2000; see further Clarke, above, n 4, p 139.
Queensland to manage their own affairs. Its provisions are all directed to ensuring that, if the communities have chosen not to be administered by officials of the Queensland Department of Aboriginal and Islanders Advancement, they will not have official management foisted upon them.7

Percy Neal remembers that:

When I got on the Council there the first thing we [did] was to make application to the federal government to ... use their power in the 1967 referendum ... to take over the reserve in Yarrabah.8

This did not however eventuate, due in part to Commonwealth administrative obstruction and inertia.9 Such was the lack of autonomy exercised by Indigenous people on reserves that as late as in 1981 Garth Nettheim was identifying the following types of “rules” that existed on Queensland Aboriginal reserves:

A person shall not use any electrical goods, other than a hot water jug, electric radio, iron or razor, unless permission is first obtained from an authorised officer.10

Neal, now in his late forties, describes the political climate at Yarrabah in the early 1980s in the following way:

There was a feeling of self-determination ... around about that time, there was a lot of talk about the Northern Territory getting their land rights ... that gave us the opportunity to turn the wheel a bit ... Very few people around that time would actually speak up ... You were still under the Act ... The authority still had the law ... to send you to Palm Island. That still existed ... That ... was pretty horrific ... This sounds silly, but [you were restricted as to] how many electrical appliances you [could] have in your house ... We lived under threat. No question.11

9 See further Clarke, above, n 4, p 139.
The Case

According to the High Court judgment, the circumstances that gave rise to the case were that on 28 June 1981, at around 7.15pm, Neal and one other Yarrabah resident had knocked on the front door of Collins’s house, while a group of around 10 other Aboriginal people had remained outside the property in a truck. According to Justice Brennan’s judgment, after Collins opened the door:

Mr Neal then opened the fly-screen door, and abused Mr Collins using foul language to him in front of his wife and daughter, telling him that he was a racist and that Mr Collins, his wife and children were to get out of Yarrabah. Mr Neal put his fist under Mr Collins’ chin, stepped back and, after further abuse, spat in Mr Collins’ face and on the floor of his dining room.

Neal then, according the High Court, told the person next to him to have his “turn”, and called out to the others in the truck to do likewise, though none did. After Collins told Neal he disagreed with him, the fly-screen door was closed, whereupon Neal spat again, this time through the fly-screen door, at Collins. Neal and the others then left.12

Neal remembers the incident rather differently:

We [decided to] go around to all the staff at Yarrabah and just ask them if they could leave peacefully and just leave us alone to live and determine our own lifestyle ... As a matter of fact a lot of the staff, they agreed with us ... [I remember] one lady saying to her husband: “Look, we’ve got to leave these people alone” ... We spoke to about four or five different staff members ... Collins ... was the fourth bloke we spoke to ... the fourth or fifth.13

Neal maintains, as he has all along, that while some spittle may have come from his mouth through the fly-screen door during what turned out to be a heated exchange with Collins, he did not open the door and spit at Collins. That was done by the man standing next to him, who remains a Yarrabah resident. Neal had expected this fact to come out at his trial, but two flat tyres prevented the man from attending court to testify to this effect, and

Neal refused to name him in court. Indeed the evidence before the Magistrate was that Mrs Collins heard but did not see anyone spit, and no evidence was tendered about whether her daughter saw anyone spit.

When Neal appealed the Magistrate's decision his lawyers presumably told him that he did not need to be present at the Court of Criminal Appeal, since he was merely trying to reduce an obviously excessive sentence. But the Court of Criminal Appeal thought otherwise, and opted to utilise (incorrectly, as the High Court would later decide) an obscure section of the Criminal Code which gave it the power to increase the penalty imposed by the Magistrate. Typically, when Magistrates' Court decisions were considered too lenient, the Attorney-General would appeal them to a higher court. But in this case, with no appeal having been set in train by the Attorney-General, the Court of Criminal Appeal relied on section 668E (3) of the Criminal Code to increase the sentence. Justice Andrews stated that the facts of the case:

... portrayed a most frightening situation, as well as being offensive and grossly humiliating. I think that the Stipendiary Magistrate's view of the matter, in that a custodial sentence was justified, was perfectly correct; but, speaking for myself, I think that he has dealt altogether too leniently with the applicant.

The severity of the Court of Criminal Appeal's decision was extraordinary, and did not go unnoticed. Brisbane's Courier-Mail newspaper gave it front-page attention under the headline "Court Triples Black Leader's Jail Term".

When the case went before the High Court one of the principal considerations of the four judges was the inappropriate procedure followed by the Court of Criminal Appeal regarding the use of its power to increase a sentence. By not following the strict procedure required by the Criminal Code for the increase of a sentence on appeal, the Court had given Neal no notice that his sentence might actually have been increased, and had thus given him no opportunity to withdraw his appeal. It was on this basis that the High Court invalidated the Court of Criminal Appeal's finding. A majority

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15 Neal v Queen (1982) 149 CLR 305 at 312.
16 Unpublished transcript of Court of Criminal Appeal judgment in Queen v Percy Neal, 10 May 1982.
17 Courier-Mail, 13 May 1982, p 1
of the High Court could not agree, however, to overturn the original Magistrate’s decision. Justice Murphy would have done so, and would have imposed a fine of $130 for the assault, and Justice Brennan would have returned the matter to the Court of Criminal Appeal to rehear the original appeal. But Justices Gibbs and Wilson were unable to categorise the Magistrate’s decision as amounting to a “gross violation of sentencing principles”, and considered themselves therefore unable to overturn it. Thus the final decision of the High Court was that the Magistrate’s decision stood, and appeal against it to the Court of Criminal Appeal was (retrospectively) refused.18

The Politics

Although the result of the High Court appeal was that the original Magistrate’s decision was reinstated, the case remains significant because it was an occasion when the emerging Indigenous right of self-determination came squarely into conflict with mainstream Australian law. The question confronting each court, whether the courts admitted it or not, was how to deal with the fact that the case engaged these competing factors. Magistrate Spicer was under no illusion about how he thought he should treat burgeoning self-determination on Indigenous communities. He told Neal that:

Your actions in taking unto yourself the task of removing all whites from Yarrabah cannot be condoned from any angle from which you may view community affairs ...

Violence is something in recent times which has crept into Aboriginal communities. I blame your type for this growing hatred of black against white. You are not giving true representation as a leader to the people who voted you their leader. As a magistrate I visit four to five communities, and I can say unequivocally that the majority of genuine Aboriginals do not condone this behaviour and are not desirous in any shape or form of having changes made. They live a happy life, and it is only the likes of yourself who push this attitude of the hatred of white authority, that upset the harmonious running of these communities.19

18 Neal v Queen (1982) 149 CLR 305 at 306, 308-310 (per Gibbs CJ); 310-11, 319-20 (per Murphy J); 320-1 (per Wilson J); 322, 326 (per Brennan J). The case became something of a precedent regarding the power of an appellate court to increase a sentence where no appeal against sentence has been made by the prosecution. See, for example, R. H. McL v Queen, [2000] HCA 46, para 113.

19 These comments were quoted in the judgment of Murphy J in Neal v Queen (1982)
As Murphy later commented, the remarks of the Magistrate showed “if it were not already apparent, that this was a race relations case, intimately related to the politics of Aboriginal communities and the system under which Aboriginals live in the communities”.20

The Magistrate thought it relevant that Collins “had done nothing at all, no words, no actions, no gestures, which would give [Neal] … any … reason to even approach him”.21 Likewise, in making its determination, the Court of Criminal Appeal referred to the fact that Collins had done nothing personally to Neal to warrant the incident, Justice Connolly saying that Collins “had done absolutely nothing to provoke him”.22

Thus the fact that Neal’s actions were politically inspired rather than personal weighed heavily against him. Neal’s actions, however spur of the moment, were attributable to a principled political position, and this, according to the Magistrate and the Court of Criminal Appeal, clearly operated to his detriment. Just as Neal’s actions were driven by a political desire for self-determination, so the various court decisions were political in the varying degrees to which they sought to dissuade Indigenous communities from agitating for the power to be self-determining.

To be sure, if Neal’s actions had had no political foundation, it is fair to surmise that he would have received a lesser penalty, and he may very well not even have been charged at all. One little known fact about this case is that even the charging of Neal was political. After the incident with Collins had taken place, a message was relayed to Neal through a friend of his, who was then a baker at Yarrabah, that there was a way in which Neal could avoid being charged. Neal continues:

What they wanted me to do was to actually stand down [from the Yarrabah Council and] dissolve the Council and they would drop all charges against me.23

Moreover, one of the white people Neal had seen earlier that night – a New Zealander known to Neal as “Pakeha Bill” and about whom Neal remains affectionate – had injured himself after Neal’s visit when he fell down a

149 CLR 305 at 315-6.
Neal v Queen (1982) 149 CLR 305 at 316.
Quoted by Murphy J in Neal v Queen (1982) 149 CLR 305 at 312.
Unpublished transcript of Court of Criminal Appeal judgment in Queen v Percy Neal, 10 May 1982.
gully trap. He had been on his way to tell Collins that Neal was going to come and visit him. Bill, according to Neal, was encouraged to “press charges” against Neal, even though Neal was not present when he injured himself. Bill declined to do this on the basis that his injuries were all his own fault.24

Straight after the Court of Criminal Appeal decision, Neal’s lawyer, according to the Courier-Mail, announced his intention to take the case to the High Court. His view was that Queensland courts, in a case like this, should view as a mitigating factor the “oppressive racial discrimination which exists on the reserve”.25 This issue was put before the High Court by Counsel for Neal, Mr Pincus, in the following manner. Pincus referred to the Queensland Supreme Court decision in the Alwyn Peter case, where an Aboriginal man had drunkenly killed a black woman in Weipa. Peter, who had already been in jail for 21 months prior to the hearing, was sentenced in 1981 to 27 months’ imprisonment, with the recommendation that he be eligible straight away for parole. In that case Justice Dunn said the Court “made allowance for the fact that special problems exist in Aboriginal communities”. Drawing on this, Pincus told the High Court on behalf of Neal:

The awkward point, in our respectful submission, is really whether [this kind of allowance] applies generally or only in offences as between black people. Because, if it applies, generally, it is very difficult to see how twenty-one months could be right for killing someone and six months for spitting on someone.26

The Queensland Supreme Court did not elaborate in the Alwyn Peter case about what it meant by “special problems”.27 But when Neal’s case went before the High Court, Lionel Murphy was concerned that the political situation at Yarrabah be taken into account by all the Justices. As the transcripts of the High Court hearing show, Murphy articulated this concern very well to Counsel for the Crown, Mr Vasta. Vasta had told the High Court the Magistrate had been able to “see no justification whatsoever for the actions of this man, Neal, against this man, Collins. There was no history at all of provocation – there was no history at all of Collins even uttering a word”. Murphy then asked in response:

27 Wilson, above n 26, p 115.
Well, where is the balancing by the magistrate or the Court of Criminal Appeal of ... the fact that the man was the leader of a community in a reserve where he was really frustrated and deprived of the leadership because of ... what he claimed was ... the paternalistic attitude displayed by the whites there towards the blacks on the reserve?28

When it came to making their decisions two of the High Court judges directly, though differently, took account of the political situation at Yarrabah. Justice Brennan said:

[It appears that the magistrate was influenced by his view that Mr Neal was seeking a change in the control of the reserves and that he ought not to be seeking that change or inducing others to seek it. While conduct of the kind engaged in by Mr Neal is both an unlawful and an unacceptable means of seeking political or administrative changes, he was entitled lawfully to advocate political or administrative changes without penalty. The magistrate not only condemned the fomenting of hatred – and in that he was right – but he condemned also the legitimate exercise of political rights – and in that he was wrong.29

In his judgment Murphy, like Brennan, argued that the situation at Yarrabah needed to be seen as relevant to the offence. But while Brennan took into account the context in terms of the impact it had directly on Neal’s state of mind, Murphy looked more broadly to the political situation that had given rise to the case.30 Murphy thought it a relevant consideration “that Mr Neal and his fellow Aborigines at the Yarrabah Community have a deep sense of grievance at their paternalistic treatment by the white authorities in charge of the Reserve, including Mr Collins”. Neal and the Council had no say over what Collins sold in his store, which according to Neal included rotten meat. Murphy continued:

Mr Neal had been elected to the Aboriginal Council on a platform of self-management; he had made continuing representations to the Federal and State Governments in an endeavour to obtain self-management for his community,

29 Neal v Queen (1982) 149 CLR 305 at 325.
30 On this point see further Clarke, above, n 4, pp 140-1.
without success; and the Yarrabah Council, chaired by Mr Neal, had made application to the Federal Government to have the Yarrabah Community declared a self-managing community ...

Aboriginal sense of grievance has developed over the two hundred years of white settlement in Australia ... Aborigines have complained bitterly about white paternalism robbing them of their dignity and right to direct their own lives ...

That Aborigines have a right to participate in and direct their own policies has been reiterated by Aboriginal representatives speaking for themselves and for their people ...

Taking into account the racial relations aspect of this case, the fact that Mr Neal was placed in a position of inferiority to the whites managing the Reserve should have been a special mitigating factor in determining sentence.\footnote{Neal v Queen (1982) 149 CLR 305 at 317-19.}

By taking the broad view that he did in \textit{Neal v Queen}, Murphy enabled the case to be seen in its political context, as an instance of conflict between the concept of self-determination and mainstream Australian law. Now, 20 years on, self-determination is a much more politically acceptable concept in Queensland than it was in 1981. While there remain many more battles to be fought, and difficulties to be negotiated, on this complex subject, self-determination is now a much more institutionally accepted part of political life in Australia. While the case of \textit{Neal v Queen} may not have led directly to these significant changes for Indigenous people, it remains an important signpost on that path.