# No 36 (Autumn 2018)

**The newsletter of the Francis Forbes Society for Australian Legal History**

**History reports itself**

I am enjoying *The Invention of Tradition*, a 1983 collection of essays edited by Eric Hobsbawm and Terrence Ranger. The year marks a particular irony. The first essay is Hugh Trevor-Roper’s explosion of the myth of the kilt and the outright fraud and forgery which begat the Highland tale, yet it was 1983 that that great historian had the misfortune to add his name in support of the authenticity of Hitler’s diaries. Meanwhile the legal historian can reflect on Hobsbawm’s introduction:

‘Custom’ is what judges do; ‘tradition’ (in this instance invented tradition) is the wig, robe and other formal paraphernalia and ritualized practices surrounding their substantial action. The decline of ‘custom’ inevitably changes the ‘tradition’ with which it is habitually intertwined.

**David Ash, editor**

**The Women’s Legal Status Act 2018**

The Women’s Legal Status Act which gave women the right to practise as lawyers in New South Wales. To mark the centenary, the Hon Justice Virginia Bell AC delivered the 2018 Forbes Lecture on 30 May 2018.

On the afternoon of 21 July 2018, the Independent Scholars Association of Australia (NSW Chapter) in collaboration with the State Library of NSW has its annual seminar, *In the Aftermath of the First World War – Women’s Legal Status Act 1918*.

In this Seminar, prominent women in law, the legislature and local government will explore the contributions women have made to the law profession, to politics and legislation and to local government since the introduction of that Act.

Bookings are [essential](http://www.isaa.org.au/events/nsw-isaa-annual-seminar).

**Current tutorials**

If history is Hobsbawmian then NSW Supreme Court judge Geoff Lindsay has made the legal history tutorial part of that court’s custom. The series continues to benefit all of those interested in how the good and the bad of the rule of English law took hold in Australia. Remaining lectures for this year include:

* the Hon J Campbell QC, *History of Equity,* in two parts, on Wednesday 25 July and Wednesday 22 August 2018; and
* the Chief Justice, the Hon T F Bathurst AC, on Thursday 18 October 2018.

All tutorials are held at 5.15pm in Banco Court, the Law Courts Building, Queen’s Square, Sydney. Martin Place or St James is the nearest rail stop.

**J.M. Bennett,** [**Sir Alexander Onslow**](http://www.federationpress.com.au/bookstore/book.asp?isbn=9781760021696)

An effective definition of any human institution begs as many questions as it answers. The rule of law is often described as the administration of justice. That’s apt, so long as the rulers permit lawyers, historians and anyone else to keep asking “who is administering?” and “what is justice?”

Wikipedia’s definition of “Judicial independence” is “the concept that the [judiciary](https://en.wikipedia.org/wiki/Judiciary) needs to be kept away from the other branches of government.” It is effective precisely because it states without resolving Juvenal’s paradox, sed quis custodiet ipsos custodes? In the case of judicial independence who, precisely, is the person who decides what is needed and when?

On Australia Day 1808, NSW Governor Bligh found out the hard way that trying to stop rum ruling the guards was not possible. John Macarthur was the instigator of that rebellion, and his reputation remains to today very much at the whim of the politics of the particular historian. His presence remains as well, with his descendants still in occupation at Camden Park, near Sydney.

John’s granddaughter married the eldest son of Arthur Pooley Onslow. The Onslow name was already ancient. Arthur Pooley married one of the daughters of Alexander McLeay, a NSW public servant whose career was both highly distinguished and, through his affiliation with Governor Darling, often controversial.

The topic of Dr John Bennett’s latest contribution to his series of the lives of the Australian Chief Justices was Arthur Pooley’s fourth son, Alexander Campbell Onslow. The Alexander is obvious. I expect but do not know that the Campbell may have come from his mother’s sister’s married name. Her husband Pieter Laurentz Campbell had a close relationship with Governor Bourke but a more difficult time with Governor Gipps.

Whatever, the history of relationships on the east coast of the continent between Onslows and their relations on the one hand and governors on the other was, to say the least, complicated. And blood will show even on the west coast, as this tale tells.

For the meantime, Alexander Campbell Onslow was born on 17 July 1842 and educated at Westminster and Trinity College, Cambridge. He was a good sportsman, being – with a curious consequence for the tale – an enthusiastic cricketer.

After an unremarkable decade at the bar, he married Madeleine Emma Tottenham. Of the same class, it appears that this was a second round for both families: his first cousin Douglas Arthur (Onslow) had married one of Madeleine Emma’s elder sisters. Three years later, in 1877, Onslow opted as so many did for a career though colonial advancement.

Onslow’s first posting was to British Honduras, but it did not last long. He returned to England and by late 1880, he with his family and a servant sailed on RMS *Siam* for Albany where they arrived on 2 December. By Christmas Day one newspaper reported “the serious illness of the new Attorney-General, Mr Onslow, who is suffering from too great exposure to the sun [during a cricket game] at Albany”.

And it was this event that premises Onslow’s life in the colony and Dr Bennett’s record of the man as its chief justice. In particular, Onslow’s relationship with Sir Frederick Napier Broome, who described his lieutenant as “a confirmed official mischief maker and contriver of the worst type… so constitutionally irritable, and so affected by a sunstroke as to be hardly responsible for his actions.”

A colonial constitutional crisis between the local chief executive and the local chief justice is never an insignificant thing, still less when there is preparation for responsible government. There is no doubt that personality conflict was a cause but, and much of Bennett’s work is directed at this point, there can also be, in one or other of the officers, a misunderstanding of and, importantly, a misconception of the unwritten boundaries of, their own role.

It is a delight for any student of Australian history that another player in the crisis, the local chief legislator, went by the name of Malcolm Fraser. Onslow’s assessment of his was that he was little assistance to the cause of right (ie Onslow) but as the author of Fraser’s ADB entry notes:

An able administrator, especially during his early years in Western Australia, he merits notice as one of the few who were able to work in harmony with Sir Napier Broome, an achievement which his contemporaries in the colony found difficult to understand and his superiors in the Colonial Office quite amazing.

The reader also receives important glimpses of colonial life apart from political unrest. Onslow and his wife were deeply musical. Sir William Robinson, the younger brother of a NSW governor, served three separate terms as WA governor. He was a composer of some well-known songs. Onslow arrived during his second term and they didn’t get on. Things changed by the third term, and music was no doubt a large factor. On the other hand, the Onslows boycotted Perth’s annual performance of *The Messiah* while it was under Broome’s patronage. Which means they would have missed, and Broome doubtless loved:

|  |  |
| --- | --- |
| O death, where is thy sting? O grave, where is thy victory? The sting of death is sin, and the strength of sin is the law. |  |

Juvenal’s own statement of the paradox was in a patriarchal context no modern reader would respect. It was directed to protecting the morality of women; who will protect them from the protectors? Onslow’s approach to the problem was in a hierarchy no modern Australian would accept, the hierarchy of the Crown colony. But the paradox itself is timeless. Dr Bennett’s gives an effective glimpse of a man indubitably of his own time but able to impress real change for the benefit of those who followed.

The volume has the benefit of a foreword by Chief Justice Martin, well-suited to put Onslow’s own story in the wider theme. Also, the chief justice’s observations about Onslow friend John Forrest’s views on race form an appendix. For current purposes – a review in a journal dedicated to Australian legal history – the last paragraph of the foreword bears reprinting in full:

Dr Bennett tells me that he expects this book, the 16th, to be the last in the series. I am sure that I join his many readers in expressing the hope that his prediction of the future is less accurate that his recount of the past. But if this is the last of the series, it is fitting bookend to an exceptional body of work which spans all the then colonies of Australia, providing an extraordinary insight into colonial life through the lens of the law. Lawyers, historians and anybody with an interest in the development of Australia will join me in congratulating him upon the completion and publication of another excellent piece of literature.

**Margaret Cameron-Ash,** [**Lying for the Admiralty**](http://www.newsouthbooks.com.au/books/lying-admiralty/)

Margaret Cameron-Ash is a Sydney barrister whose work has been primarily in the academy. Long before the Uniform Civil Procedure Rules were promulgated, she promoted the amalgamation of NSW Supreme and District Court rules in her multi-volume Supreme and District Courts Practice, the forerunner of the local unofficial White Book, the NSW Civil Procedure Handbook.

For the sestercentennial of Captain Cook’s major discoveries, Mrs Cameron-Ash has turned to her interest in that monarch of procedure the rules of evidence, to examine three particular “errors” by the celebrated navigator. She states facts and draws inferences. She advances the proposition that Cook’s errors were a ruse de guerre.

For many Australians, Cook discovered Australia. In fact and even leaving aside debate about the incoherence of discovering occupied lands, it has been widely accepted for decades that Cook did no such thing. And as we have already seen and heard in this 250th year, where Cook stands in our continually evolving foundation myth – the most important tradition a state must invent – is up for grabs. But Mrs Cameron-Ash’s book is not about the timeless adventure of discovery and how a state can embrace that excitement in the forging of a national identity. It is about something else, the more immediate need of the state to hide discovery from the eyes of warrish neighbours. There may be debate about the legitimacy of the ruse de guerre. The author’s point is that in the pragmatic halls of the Admiralty, legitimacy was the aim and not the process.

Winston Churchill wrote that history is written by the victors. John Winston Howard’s premiership saw the History Wars. His critics hold that he oversaw them, securing with relentless Anglophilia the continued celebration of an Antipodean Aenied without proper deference to earlier arrivals. Whoever had the better of that debate, who better to deal with the accusation – or accolade – that wherever history treads, tradition becomes a province of the victor. Virgil’s Trojan horse remains the sine qua non of the ruse de guerre and so it is apt that Mr Howard has written the foreword to Mrs Cameron-Ash’s with that elusive quality of the enthused lawyer:

I can’t assert that the principal claims made by Margaret Cameron-Ash are correct. But I can say that she has cogently argued the case that strategic rivalry between Britain and other colonial powers so dominated Admiralty thinking and planning that previously accepted ‘errors’ on the part of Cook were deliberate fabrications designed to advance Britannia.

The reviewer has a multifarious conflict of interest. He contributes to the White Book and is a sibling of the author. He did pay for his copy.

**Supporting research projects supported by the Forbes Society**

One of the Society’s objects is to encourage and promote research into Australian legal history and it maintains a fund for that purpose to which donations may be made – the Francis Forbes Fund (donations of $2.00 or more are tax deductible). Members will recall that last year the Council of the Forbes Society approved a grant from the Fund to the University of Sydney to support the project of Professor Anne Twomey to publish of Pitt Cobbett's grand opus called ‘The Government of Australia’. Professor Twomey writes:

Professor Pitt Cobbett wrote his grand opus on *The Government of Australia* in his retirement, leaving it as an 'unfinished symphony' upon his death in 1919, with a request to his executors that it be finished, edited and published.  But the High Court handed down its judgment in the *Engineers Case* the following year, and the executors decided the manuscript was out of date.  It was instead donated to the University of Sydney and has sat quietly moulding there ever since.  It is now a work of great historic importance, showing how the Constitution was understood in the first twenty years of its existence.

The Forbes Society has kindly supported the project of finishing, editing and publishing this work.  The aim is to publish it upon the centenary of Pitt Cobbett's death, in 2019.  The Society donated $8300 to pay a PhD student to check the footnotes of the book and to help subsidise publication to make it viable.  Unfortunately, the full $8300 was spent on the footnote checking, as it turned out that as Pitt Cobbett's illness increased, the accuracy of his footnotes decreased and considerable work had to be undertaken to find the correct sources.  I am therefore hoping for some additional assistance from the Society later in the year to subsidise publication so that it can be published as a hardback book for libraries and scholars to consult for generations.  The support of the Society is essential for this type of work, which would otherwise not see the light of day and remain moulding away, unseen and forgotten.  We will not learn from our past unless our history is readily accessible.  The Francis Forbes Society ensures that it is.

The Society welcome further donations to enable support for such projects. A form for donations is available [here](http://www.forbessociety.org.au/wordpress/wp-content/uploads/2018/05/Forbes-Fund-Donation-Form.pdf).

**Membership for the 2018-2019 year**

If you have not done so, the Society urges you to consider membership for the current year. For a form, click [here](http://www.forbessociety.org.au/wordpress/wp-content/uploads/2013/11/FFS-Membership-application-renewal-18-19.pdf).