



# Forbes Flyer

THE NEWSLETTER OF THE FRANCIS FORBES SOCIETY FOR AUSTRALIAN LEGAL HISTORY

Summer 2005 - 2006

## History reports itself

In a week where Sydney's beachside riots have been reported around the world, I have finished reading John Bailey's *The White Divers of Broome*,<sup>i</sup> the story of twelve British Royal Navy-trained divers urged onto the pearl industry by a government caught up in the White Australia policy and keen to show that white divers were up with the best.

The story itself, and the picture the author paints of Broome, are enough reason to buy the book. However, the most interesting passage was a recitation of the Japanese consul's plea to the Australian prime minister, in protest against the 1901 *Immigration Restriction Act*:<sup>ii</sup>

The Japanese belong to an empire whose standard of civilization is so much higher than that of kanakas, negroes, Pacific Islanders, Indians, or other Eastern peoples, that to refer to them in the same terms cannot but be regarded in the light of a reproach, which is hardly warranted by the fact of the shade of the national complexion.

I say "the most interesting", as it is for me a timely reminder that racism – like any of our other human prejudices – is rarely a matter of extremes and only extremes.

How far the law ought be or can be effectively involved in policing attitudes is the stuff of centuries of debate and, for many, of suffering. One recurring theme is the extent to which attitudes toward the state itself ought be controlled.

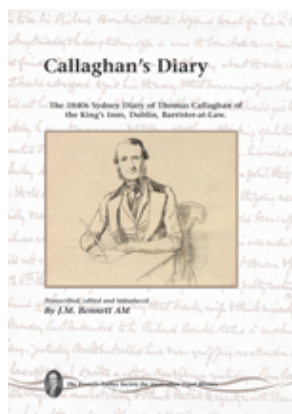
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Is it enough to commit a crime, to disparage the state? If one encourages violence against the state, ought there be a specific crime for this? Or is this too dangerous, too much of an incursion on other fundamental values, with the result that such people ought be left to the general criminal law?

In this issue, the *Flyer* looks at sedition. Sedition laws have been part and parcel of the Australian legal landscape since early days. For example, they were part of the battlefield between Governor Darling and his opponents, including elements of the Sydney press.<sup>iii</sup> This issue deals specifically with the provisions passed by the Commonwealth parliament in 1920, how they have changed, what the High Court has said about them, and where they stand today, immediately prior to significant amendments instigated by the current government in response to the "war on terror".

**David Ash**  
Editor



## Callaghan's Diary

The Forbes Society is pleased to announce the publication of *Callaghan's Diary*, the 1840s Sydney diary of Thomas Callaghan, barrister-at-law and later a foundation judge of the District Courts of New South

Wales.

Readers will know of the Society's recent works relating to Sir James Dowling, the colony's second chief justice, being *Dowling's Select Cases* and *The Dowling Legacy: Foundations of an Australian legal culture 1828 to 1844*. In *Callaghan's Diary*, we see Dowling's legal world through the eyes of a young advocate, struggling for income and recognition.

This fascinating insight into the legal Sydney of the 1840s is available through the efforts of the distinguished legal historian J M Bennett AM. Dr Bennett has transcribed and edited the original journal, and has provided notes and an index for readers.

Publication details of the Diary and the Society's other publications, and how to order, can be found at the Society's website, [www.forbessociety.org.au](http://www.forbessociety.org.au).

### Summer Quarters

#### In summer 1805-1806

On 18 December 1805, the first land grants are made in Van Diemen's Land. They include 10 acres to Reverend Robert Knopwood.<sup>iv</sup>

#### In summer 1855-1856

On 1 January 1856, the Dutch influence in the southernmost colony updates, and Van Diemen's Land becomes Tasmania.<sup>v</sup>

#### In summer 1905-1906

On 1 February 1906, the first US federal penitentiary building is completed in Leavenworth, Kansas.<sup>vi</sup>

#### In summer 1955-1956

On 1 December 1955, Rosa Parks, a black American, a 42-year-old seamstress and secretary of the Montgomery NAACP, was arrested in Montgomery, Alabama, as she sat in a section of a bus just behind the area reserved for whites. This spurred the civil rights movement in the US.

## Sedition

By David Ash

From 5 August 1914, the British Empire was at war. On 29 October 1914, assent was given to a Commonwealth Crimes Act. The power to enact such an Act – like the power to enact any Commonwealth legislation – must be found in our Commonwealth Constitution.

It is hardly surprising, then, that the Act did not attempt to cover the more familiar areas of crime – murder, robbery and the like – for these were the business of the states. Rather, the Act focused on offences clearly relevant to federal powers – such as offences relating to the coinage<sup>vii</sup> - or offences relating to the Commonwealth as a juristic beast, for example, impersonating a Commonwealth officer.<sup>viii</sup>

Equally, it is hardly surprising that Parliament took the opportunity to crystallize its attitude to those activities which, if engaged in, might be thought to endanger the nation itself, or at least its officers and its citizens. And so, in Part II, headed "Offences against the government", one finds seven offences proscribed: treason, inciting to mutiny, assisting prisoners of war to escape, unlawful drilling, interfering with political liberty, destroying or damaging Commonwealth property, and seizing goods in Commonwealth custody.<sup>ix</sup>

Although the first, treason, has gone, or more correctly in 1960 and with Cold War realities has morphed into the offence of treachery,<sup>x</sup> and the last has recently been absorbed into the Criminal Code,<sup>xi</sup> the rest remain. Apart from some offences relating to fraud against the Commonwealth which came in and then were also absorbed into the Criminal Code, the only further offences which the Parliament has seen fit to introduce as offences “against the government”, are in relation to that obscure beast known as sedition.

### *Sedition as a Commonwealth offence*

Sedition entered the Commonwealth statute books in 1920, along with oaths of allegiance and proscriptions for assemblies, by virtue of the *War Precautions Act Repeal Act*. Ironical, perhaps, as one might have thought that an Act with such a title might include the repeal of sedition laws, not their introduction. As T J Ryan, one of the vigorous opponents to the Little Digger’s legislation put it:<sup>xii</sup>

Seeing that the Act was passed for war purposes, why is it necessary, in repealing it, to re-enact drastic provisions of it and to incorporate in the repealing measure even more drastic provisions than those which the Act originally contained?

For the government’s part, and notwithstanding that the war was over, there was still the enemy within. In reply to the question, “Who are they?”, Sir Robert Best informed the House of Representatives:<sup>xiii</sup>

It is unnecessary for me to say who they are. They previously lurked in dark places, but the war brought them into the open, and they are still insidiously working towards the destruction of the best interests of Australia and the Empire.

...

No loyal and dutiful subject of Australia can be harmed to the extent of one hair’s breadth by this Bill; and if a man is not a loyal subject of Australia he has no right to be in Australia.

Also, as both the Prime Minister and the Minister for Works and Railways made clear, the legislation

was based on the (extant) Queensland Criminal Code, itself drawn from the work of Sir James Stephen.<sup>xiv</sup>

### *The terms of the sections*

Section 12 of the 1920 Act said:

After section twenty-four of the Crimes Act 1914-1915 the following sections are inserted:

24A(1) Subject to subsection (2) of this section an intention to effect any of the following purposes, that is to say –

- (a) to bring the Sovereign into hatred or contempt;
  - (b) to excite disaffection against the Sovereign or the Government or the Constitution of the United Kingdom or against either House of the Parliament of the United Kingdom;
  - (c) to excite disaffection against the Government or Constitution of any of the King’s Dominions;
  - (d) to excite disaffection against the Government or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth;
  - (e) to excite disaffection against the connexion of the King’s Dominions under the Crown;
  - (f) to excite His Majesty’s subjects to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Commonwealth established by law of the Commonwealth; or
  - (g) to promote feelings of ill-will and hostility between different classes of His Majesty’s subjects so as to endanger the peace, order or good government of the Commonwealth,
- is a sedition intention.

(2) It shall be lawful for any person –

- (a) to endeavour in good faith to show that the Sovereign has been mistaken in any of his counsels;
- (b) to point out in good faith errors or defects in the Government or Constitution of the United Kingdom or of any of the

King's Dominions or of the Commonwealth as by law established, or in legislation, or in the administration of justice, with a view to the reformation of such errors or defects;

(c) to excite in good faith His Majesty's subjects to attempt to procure by lawful means the alteration of any matter in the Commonwealth as by law established; or

(d) to point out in good faith in order to their removal any matters which are producing or have a tendency to produce feelings of ill-will and hostility between different classes of His Majesty's subjects.

24B(1) A seditious enterprise is an enterprise undertaken in order to carry out a seditious intention.

(2) Seditious words are words expressive of a seditious intention.

24C Any person who –

(a) engages in or agrees or undertakes to engage in, a seditious enterprise;

(b) conspires with any person to carry out a seditious enterprise;

(c) counsels, advises or attempts to procure the carrying out of a seditious enterprise, shall be guilty of an indictable offence.

Penalty: Imprisonment for three years.

24D(1) Any person who writes, prints, utters or publishes any seditious words shall be guilty of an indictable offence.

Penalty: Imprisonment for three years.

(2) A person cannot be convicted of any of the offences defined in this or the preceding section upon the uncorroborated testimony of one witness.

24E(1) An offence under either of the last two preceding sections shall be punishable either on indictment or summarily, but shall not be prosecuted summarily without the consent of the Attorney-General.

(2) If any person who is prosecuted summarily in respect of an offence against either of the last two preceding sections, elects, immediately after pleading, to be tried upon indictment, the Court

or Magistrate shall not proceed to summarily convict that person but may commit him for trial.

(3) The penalty for an offence under either of the last two preceding sections shall, where the offence is prosecuted upon indictment, be imprisonment for any period not exceeding three years, and, where the offence is prosecuted summarily, shall be imprisonment for a period not exceeding twelve months or a fine not exceeding One hundred pounds or both.

As at 12 December 2005, the sedition provisions remain in force. There has been amendment to the form of the provisions, obviously. And the wording of the offence provisions – sections 24C & 24D – has changed, to inject an additional element to the offences, an intention of “causing violence or creating public disorder or a public disturbance”.<sup>xv</sup> With the same amendments, in 1986, the types of intention were pared down to exclude intentions regarding foreign governments, so that only (a), (d), (f) and – still something of a catchall – (g), remain.

The defence of good faith – now found not in section 24C(2) but in its own section, section 24F, is substantially unchanged, although it now includes “anything in good faith in connexion with an industrial dispute or an industrial matter”.

### *The High Court*

There are two reported cases where the sedition provisions have been considered by the High Court. They involve prosecutions of members of the Communist Party: the judgments were delivered on the same day, 7 October 1949, and the reasons appear together in volume 79 of the Commonwealth Law Reports.

### *Burns v Ransley*<sup>xvi</sup>

On 15 September 1948, a public debate was held at the Temperance Hall in Edward Street, Brisbane. The topic was “That communism is not compatible with personal liberty”. The affirmative was put forward by two members of the Queensland

People's Party, while Gilbert Burns and a woman (whose name is unreported), both members of the Communist Party, took up the negative. It appears that everyone present – some two hundred – rose at the outset for the national anthem.

After each speaker addressed, the chairman opened the floor for thirty minutes of questions. As Communists go, Burns was comfortable and relaxed about the monarchy. When asked what would be its fate if the communists gained control, and perhaps mindful that Brisbane was a way from Ekaterinburg, Burns replied, "The monarchy is all right. We have nothing against it. But if the communists gained control in Australia, and it was found that the monarchy was in the way, the monarchy would have to go."

However, this was not Burns's downfall. Rather, it was his answer to another set of questions. "We all realize the world could become embroiled in a third world war in the immediate future between Soviet Russia and the Western Powers. In the event of such a war what would be the attitude and actions of the Communist Party in Australia?" Burns replied, "If Australia was involved in such a war it would be between Soviet Russia and American and British Imperialism. It would be a counter-revolutionary war. We would oppose that war. It would be a reactionary war." He was pressed for a more direct answer, and replied "We would oppose that war. We would fight on the side of Soviet Russia. That is a direct answer."

For his directness, Burns was summarily convicted under section 24D of uttering seditious words. The presiding magistrate then stated a case for the High Court.

Burns's grounds boiled down to two, first, that the legislation was invalid, and secondly, that the utterances were not expressive of a seditious intention. Each member of the Court – the Chief Justice Sir John Latham and Justices Rich, Dixon and McTiernan – found little difficulty in upholding the relevant parts of section 24A(1), which were (b) and (d), although Sir Owen Dixon

took time to explain a subtlety which doubtless continues to be an important qualification:<sup>xvii</sup>

In s 24A(1)(b), (c) and (d) I take the word "Government" to signify the established system of political rule, the governing power of the country consisting of the executive and the legislature considered as an organized entity and independently of the persons for whom it consists from time to time. Any interpretation which would make the word cover the persons who happen to fill political or public offices for the time being, whether considered collectively or individually, would give the provision an application inconsistent with parliamentary and democratic institutions and with the principles of the common law, as understood in modern times, governing the freedom of criticism and of expression.

However, the Court did divide on the second ground, whether there was the requisite intention. For Latham and Sir George Rich, Burns was an advocate,<sup>xviii</sup> and having advocated the position, was stuck with the consequences. For Dixon and for Justice McTiernan, the context was the key. Burns was in a debate; he was not actively attempting to change his listeners' minds; rather, he was in reply to questions expressing his own view.<sup>xix</sup> The Court being divided, the opinion of Latham, the Chief Justice, prevailed.<sup>xx</sup>

There is in Rich's reasons a hint that Burns had decided upon the martyr's role:<sup>xxi</sup>

The appellant appears to have considered that his utterances were seditious because in answer to a question "If you made a seditious statement in Russia such as you have made here tonight, would you walk out of here a free man as you most probably will do or would you be gaoled?", the appellant replied: "I think I will be a very lucky man if I do not see the inside of a capitalist gaol within the next ten years."

However, one commentator – in a detailed though partisan account – puts a strong case for the very opposite, that Burns was set up by the Queensland People's Party and hung out to dry by the Chifley

government.<sup>xxii</sup> The commentator saves especial criticism for the Acting Attorney-General, Senator McKenna of Tasmania:<sup>xxiii</sup>

An Attorney-General concerned to ensure that his authority to initiate prosecutions was exercised in a principled and fair way should have been alerted to the entrapment involved in the Burns case and should have focused on the hypothetical and innocuous nature of what Burns had said. At least on the latter element all the government's senior legal advisers spoke with a single voice. Burns was entitled to the Attorney-General's protection. Instead, he was victimised by the acting first law officer.

Burns was sentenced to six months imprisonment.<sup>xxiv</sup>

#### *The King v Sharkey*<sup>xxv</sup>

More unfortunate still was Laurence Louis ("Lance") Sharkey, the general secretary of the Australian party. In 1949, he was asked by a journalist from the *Sydney Daily Telegraph* to comment on a statement by French communist leader Maurice Thorez, in which Thorez said that if Soviet troops entered France in pursuit of an aggressor, the working class would side with the Soviet forces. The published words attributed to Sharkey were:

If Soviet Forces in pursuit of aggressors entered Australia, Australian workers would welcome them. Australian workers would welcome Soviet Forces pursuing aggressors as the workers welcomed them throughout Europe when the Red troops liberated the people from the power of the Nazis. I support the statements made by the French Communist leader Maurice Thorez. Invasion of Australia by forces of the Soviet Union seems very remote and hypothetical to me. I believe the Soviet Union will go to war only if she is attacked and if she is attacked I cannot see Australia being invaded by Soviet troops. The job of Communists is to struggle to prevent war and to educate the mass of people against the idea of war. The Communist Party also wants to bring the working class to power but if Fascists in

Australia use force to prevent the workers gaining that power Communists will advise the workers to meet "force with force".

For his troubles, Sharkey was given the maximum, three years imprisonment. The trial judge made it plain that he thought Sharkey was a traitor and that a more severe sentence would have been appropriate. The New South Wales Court of Criminal Appeal did not agree, and reduced the sentence to eighteen months.<sup>xxvi</sup> Meanwhile, Sharkey's legal team had made sure that the legal questions were got to the High Court and, after Sharkey was found guilty, they were.

The Court comprised the Court who had presided over Burns's case together with Sir Dudley Williams and Sir William Webb. It rejected Sharkey's case. To a distant eye, one struggles perhaps to see the words getting over the threshold of any of the categories in section 24A(1), and a closer reading of the judges' reasons suggests that some of them may have been inferring things that a later judge might query. Williams was able to glean that the words were capable of meaning to a jury:<sup>xxvii</sup>

... that in a war between the British Commonwealth and its allies and Soviet Russia, the former would be the aggressors and Australian workers would be on the side of the latter and would welcome Soviet troops if they entered Australia in pursuit of the troops of the British Commonwealth and its allies.

Webb had no hesitation in elevating a cold war to a somewhat warmer affair:<sup>xxviii</sup>

The jury... could attribute [the words] to happenings in Europe in and about March 1949 [the hearing was in August and judgment given in October], including the Berlin blockade and the airlift to counter it, and the joint operations and activities of the nations opposing Russia in Germany, including those of the British Commonwealth, and to the association of Australia with that opposition, stigmatized as aggression against the Soviet.



However, the judges were not unanimous in regards to the last of the proscribed intents, namely (g), “to promote feelings of ill-will and hostility between different classes of His Majesty’s subjects so as to endanger the peace, order or good government of the Commonwealth”. Bearing in mind that Commonwealth legislation must fall within some Commonwealth power, Dixon said:<sup>xxxix</sup>

Unless in some way the functions of the Commonwealth are involved or some subject matter within the province of its legislative power or there is some prejudice to the security of the Federal organs of government to be feared, ill-will and hostility between different classes of His Majesty’s subjects are not a matter with respect to which the Commonwealth may legislate. Such feelings or relations among people form a matter of internal order and fall within the province of the States. It was doubtless because this was seen to be the case that the curious words “so as to endanger the peace, order or good government of the Commonwealth” were added...

...

The words are in my opinion incapable of any definite meaning which would provide the necessary connection with the subjects of Federal power, with the administration of the Federal government or with the security of any of its institutions.

Thus, for Dixon, (g) was invalid. However, even he would only have ordered a retrial:<sup>xxx</sup>

I have hesitated as to an order for a new trial upon this indictment because it is confined to the utterance of the words orally to one man and he obtained the statement as a matter of business. But as matter for a jury remains, I suppose an order for a new trial is the regular course.

The use by the Chifley (Labor) and Menzies (Coalition) governments of the sedition legislation in the period from 1948 to 1953 is charted elsewhere, and it did not again reach the High Court. However, the offence of sedition – under

Queensland’s Criminal Code – came up in *Cooper v The Queen*.<sup>xxxi</sup> Brian Leslie Cooper was an early advocate of independence for Papua New Guinea. On the evidence, it was clear enough that he had though it would be a good thing if the locals rose up and expelled white people. He was convicted and sentence to two months’ imprisonment. However, a large amount of other extraneous material was admitted, and the High Court was derisory about its admissibility. The Court, of which only Dixon – now Chief Justice – had been a member in the earlier Communist cases, said:<sup>xxxii</sup>

But the bulk of the objectionable evidence was tendered to show that the accused was a communist or had communistic leanings and was an atheist and hostile to missionaries. To suggest that such evidence was in any way relevant is absurd, and no serious attempt was made before us to maintain that it was admissible. Evidence cannot be given which goes merely to show that an accused is the kind of man who is likely to have committed the offence charged. And, even if it could, the inference could not be drawn in the present case without some investigation of the habits and practices of communists and atheists and dislikers of missionaries. It was apparently hoped that the tribunal would judicially notice that people who dislike missionaries are likely to publish seditious words!

However, this did not save Cooper:<sup>xxxiii</sup>

We have found the case one of considerable difficulty. It is indeed to be regretted that so much inadmissible and prejudicial evidence was tendered and allowed to be given. But we have reached the conclusion that it did not really affect the result...

#### *The Gibbs Review*

In 1987, the Australian government established a Committee with a view to reviewing federal criminal law, under the chairmanship of Sir Harry Gibbs, former Chief Justice. Sedition is dealt with in the Fifth Interim Report.<sup>xxxiv</sup> After considering the position in the United Kingdom, Canada and

New Zealand and after inviting submissions, the Committee concluded that while the provisions were archaic and too wide, inciting the violent overthrowing of the government and related notions ought continue to be criminated, independently of other offences.<sup>xxxv</sup> The Committee had earlier said:<sup>xxxvi</sup>

[The Committee has] observed that, in actual practice, the offence might rarely be prosecuted, but the seriousness of its possible consequences was such that [the Committee's] provisional view was that an offence in this limited form should be retained.

After considering the additional issue of constitutionality, the Committee recommended that it be made an offence to incite by any form of communication:<sup>xxxvii</sup>

(a) the overthrow or supplanting by force or violence of the Constitution or the established Government of the Commonwealth or the lawful authority of that Government in respect of the whole or part of its territory;

(b) the interference by force or violence with the lawful processes for Parliamentary elections; or  
(c) the use of force or violence by groups within the community, whether distinguished by nationality, race or religion, against other such groups or members thereof.

Penalty: 7 years' imprisonment.

The Committee thought that the more specific nature of the proposed offence justified the greater maximum penalty.<sup>xxxviii</sup>

The recommendation was not adopted. The current amendments will be mentioned in a later issue.

## Membership

Become a member. Download a form from <http://www.forbessociety.org.au/documents/FFSMembershipapplic0905.pdf>.

<sup>i</sup> John Bailey, *The White Divers of Broome*, 2001, Pan.

<sup>ii</sup> Loc cit, page 47.

<sup>iii</sup> See eg under "sedition" & seditious libel" @ the Macquarie University database, Decisions of the Superior Courts of New South Wales, 1788-1899: [www.law.mq.edu.au/scnsw/html/subject\\_index\\_s-z.htm](http://www.law.mq.edu.au/scnsw/html/subject_index_s-z.htm).

<sup>iv</sup> From "The World Upside Down – Australia 1788-1830", National Library of Australia: <http://www.nla.gov.au/exhibitions/upsidedown/timeline/html-frameset.html>.

<sup>v</sup> *The Macquarie Encyclopedia of Australian Events*, revd ed, 1997, Macquarie Library, page 87.

<sup>vi</sup> timelines.ws.

<sup>vii</sup> Pt IV.

<sup>viii</sup> Section 75.

<sup>ix</sup> Sections 24-30.

<sup>x</sup> Section 24AA: for its legislative history, see Williams, Payne & McNaughton, *Federal Criminal Law*, [6-1730.5]. With section 24AA came section 24AB, which creates the offence of sabotage.

<sup>xi</sup> Section 30 was repealed by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000 (Cth)*.

<sup>xii</sup> Hansard, 23 November 1920, page 6827. Prime Minister & Attorney-General Billy Hughes had made the second reading speech the day before: see pages 6790-6792.

<sup>xiii</sup> Loc cit, pages 6845, 6846.

<sup>xiv</sup> Loc cit, page 6851.

<sup>xv</sup> Pt V of the *Intelligence and Security (Consequential Amendments) Act 1986 (Cth)*.

<sup>xvi</sup> (1949) 79 CLR 101.

<sup>xvii</sup> (1949) 79 CLR, 115.

<sup>xviii</sup> (1949) 79 CLR, 109, 112.

<sup>xix</sup> (1949) 79 CLR, 117, 120.

<sup>xx</sup> (1949) 79 CLR, 111.

<sup>xxi</sup> (1949) 79 CLR, 112.

<sup>xxii</sup> Maher, "The Use and Abuse of Sedition", (1992) 14 SydLR 287, 295-301. See more recently, Maher, "Why this law is a complete ass", *The Age*, 14 November 2005. See also for general background Douglas, "Saving Australia from Sedition: Customs, the Attorney-General's Department and the administration of peacetime political censorship" (2002) 30 Fed LR 135.

<sup>xxiii</sup> Maher, page 301.

<sup>xxiv</sup> Maher, page 296.

<sup>xxv</sup> (1949) 79 CLR 121.

<sup>xxvi</sup> Maher, page 302.

<sup>xxvii</sup> (1949) 79 CLR, 100.



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- xxviii (1949) 79 CLR, 165.  
xxix (1949) 79 CLR, 150, 154.  
xxx (1949) 79 CLR, 156.  
xxxi (1961) 105 CLR 177.  
xxxii (1961) 105 CLR, 184.  
xxxiii (1961) 105 CLR, 187.  
xxxiv Review of Commonwealth Criminal Law, Fifth Interim  
Report, June 1991, AGPS, chapter 32.  
xxxv Paragraph 32.15.  
xxxvi Paragraph 32.10.  
xxxvii Paragraph 32.18.  
xxxviii Paragraph 32.19.

## **Contacting the Forbes Society**

**The Francis Forbes Society for Australian Legal  
History**

**ABN 55 099 158 620**

**[www.forbessociety.org.au](http://www.forbessociety.org.au)**

**Basement**

**Selborne Chambers**

**174 Phillip Street**

**Sydney NSW 2000**

**Telephone 02 9232 4055**

**Fax 02 9221 1149**

**Email [enquiries@forbessociety.org.au](mailto:enquiries@forbessociety.org.au)**