

The Forbes Flyer

The newsletter of the Francis Forbes Society for Australian Legal History

Winter 2009

History reports itself

The law can treat the apprehension of something just like the thing itself. There is, most obviously, “apprehended bias”. The reasonable feeling by a party that a judge might be biased is as good a reason to ask him/her to stand aside as a demonstration by that same judge of actual bias. “Constructive notice” is another example. If you should have known about something, then in certain cases the law will say that you did.

Is it important that the law itself, as a source of entertainment, is portrayed accurately? Or at least fairly? That is a big question, and I think the only answer I would give for now is that it would be a pity if the entertainment industry were doing down the legal industry for the sake of a misconceived dollar.

Since the last issue of the Flyer, one of Australia’s pre-eminent legal figures – in the entertainment world – has died. Bud Tingwell will be long remembered as the QC from the film “The Castle”. Older readers will remember him as an archetype of tough law, as one of the “Homicide” team. He is also one of our last links with Australia’s only treason trial. Read on, below.

David Ash
Editor

Membership 2009 and 2010

You will soon receive details for membership over the next year. Please send your renewal as soon as you can, and welcome aboard for the next year. Help make history.

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The 2009 Forbes Lecture

Associate Professor Mark Lunney of the University of New England will deliver the 2009 Forbes Lecture on 5 November 2009 in the common room of the New South Wales Bar Association. The theme is “Federation and Beyond: What the History of Australian Tort Law Can Tell Us”. Whilst some work has been done on the development of private law in the colonial period, little study has been undertaken of the post-Federation period. As Bruce Kercher has noted, it has traditionally been assumed that Australian law simply followed English law.

This lecture will evaluate the traditional view by considering three leading cases in Australian tort law from three different periods - *Balmain New Ferry Co Ltd v Robertson* (1906), *Australian Knitting Mills Ltd v Grant* (1933) and *Hargrave v Goldman* (1963). It reveals that Australian courts were confronted with novel legal issues that could not be resolved by mere reference to

English authority. Moreover, an analysis of the historical context of the cases reveals peculiarly Australian contexts to these decisions and demonstrates the contribution that studies of the history of tort law can make to wider Australian history.

Attorneys-General

A most excellent compilation is online at our parliamentary library. Patrick O'Neill has compiled a list of Australian Attorneys-General, commonwealth, state and colonial. The introduction says:

This guide lists Attorneys-General for each jurisdiction in Australia. The first Attorney-General was Saxe Bannister who was appointed in the colony of New South Wales in 1823. Links to authoritative biographical information are given for federal Attorneys-General. For an overview of the role of the Attorney-General see the 1997 Report on the Review of the Attorney-General's Legal Practice. Chapter 3. Role of the Attorney-General. Further material may be found in the Library's guide to the Legal Profession and the Courts.

The guide is at www.aph.gov.au/library/intguide/law/attorneys-general.htm. Congratulations to Mr O'Neill.

The Herald, high treason (and Bud Tingwell)

The death of Charles "Bud" Tingwell removes from us a link with one of Australia's more enigmatic characters, 2GB announcer, early Channel 7 newsreader, self-taught Urdu speaker, avid Herald reader and accused traitor, Charles Hughes Cousens.¹

Tingwell himself was Australian as could be, playing out roles in *The Desert Rats*, *Smithy*, *The Shiralee*, and the like. The closest he got to any capital crime was solving them, as the lead detective in *Homicide*. The closest he got to unAustralian activities was prosecuting them, as the iconic advocate in *The Castle*.²

Yet it wasn't any heroic persona which made Tingwell an actor. It was his voice. More particularly, its clarity. It wasn't posh. It wasn't strine. It was clear. And while it was his own, he later gave as a reason it hadn't altered his meeting Cousens in the 1930s, at a time when Cousens was a star announcer with 2GB.

In a 2002 interview with Robin Hughes for the Australian Biography project, Tingwell confided that Cousens had passed on a number of tips, one of which was to read the leader article in the *Herald* aloud every day.³

"Not because you agreed with it or anything" Tingwell was quick to add. "But usually that language was not normally meant to be read aloud so it was probably more difficult to read but it was perfect English. Or it had gone through several processes before it was printed. So you knew you were reading very good English and well-constructed sentences."

Tingwell must have taken the advice to heart. Still at school, he won a 2GB drama competition and was given a lead in a radio serial with Jack Davey. (He also won the "Spoken English" prize in his final school year.)⁴

Meanwhile, the war was underway. And, although Tingwell had to wait because of his age, he would become a real life hero, an RAAF Spitfire pilot.⁵ Cousens, on the other hand, was soon a captain in the AIF and was posted to the 2/19th battalion. He had two days to enjoy his promotion to temporary major, before the fall of Singapore on 15 February 1942.⁶

But it was not in Changi or on the Burma Rail or at Sandakan that Cousens fought his war. It seems that the AIF headquarters inadvertently revealed to the enemy his broadcasting background, a revelation which resulted in him being sent to Japan. From there, he wrote propaganda scripts, coached other announcers, and made his own broadcasts. Most famously, he discovered and produced broadcasts for the woman who would become known as Tokyo Rose.⁷

Cousens would later say that he was under threat and fear of torture and death. Supreme Commander General Douglas MacArthur⁸ was unimpressed. Macarthur saw him as something of a Lord Haw Haw of the Pacific theatre, and so the Australian authorities moved.⁹

But Cousens couldn't be charged under Commonwealth law, as it only covered treason in Australia or its territories. In one of the more bizarre examples of federal-state co-operation, the NSW government agreed to charge Cousens under a law first enacted by Edward III in 1351¹⁰ (and still in 2009 preserved by the Crimes Act).¹¹

The comittal was something of a cause célèbre. The legal wordsmiths included Garfield Barwick¹² and Bill Dovey,¹³ four years into being the father-in-law of Barwick's later opponent Gough Whitlam.¹⁴ The Crown was successful, but in November of 1946, state attorney-general C E Martin dropped the charge.¹⁵

For Cousens, the events had taken their toll, but his career recovered. 2GB had kept a place, and he later made the transition from radio to television. In 1949, he was a defence witness for Tokyo Rose in her own treason trial.¹⁶

Unlike Cousens, she was convicted, although she would become the beneficiary of one of President Gerald Ford's less controversial pardons, in 1977.¹⁷

The army was not impressed with the law's failure. With the insouciance that marks any good bureaucracy, it resisted a court-martial, lest it be seen to be persecuting Cousens, but in January 1947 stripped him of his commission and his decorations.¹⁸

Perhaps better equipped to judge what treason meant than any lawyer, staff officer or politician were members of the 2/19th, a battalion with a hard war. At Anzac Day some four months later, Cousens's comrades pressed him, successfully, to lead them in the march.¹⁹

A colleague of Cousens later wrote a treatment for a miniseries about him. Ironically, it was done for Crawfords, the production house which had made such a mark with *Homicide* those years before.²⁰ Cousens died in 1964, itself almost a half century ago.²¹ Now, one of the links with his golden years has gone, too.

Speeches of a Chief Justice

Between editing Sir James Dowling's cases with Bruce Kercher and publishing his "Capital Punishment Database" (at research.forbessociety.org.au/) and generally running a busy life, Tim Castle has found time to compile a collection of the speeches of one of our most erudite jurists, NSW Chief Justice Jim Spigelman.

The book contains a decade's worth of speeches over nine chapters. Only the last – "Historical reflections" – expressly averts to history, although the collection is infused by an awareness of its delightful manifestations. On 15 April 2005, for example, Spigelman opened his words to the Sydney University Faculty of Law Graduation Ceremony with the observation:

For those of us who make a living from words today is quite a momentous anniversary. It was on this day precisely 250 years ago, 15 April 1775, that there was published in London the first edition of Samuel Johnson's Dictionary.

The legal historian will enjoy all of Spigelman's observations of our past legal luminaries, from Wentworth, Wardell and Dowling to Dixon. Sir Frances Forbes, first Chief Justice of NSW and for whom the Society is named, has a prominent place in the work.

Few who have read Philip Ayres' biography of Owen Dixon will disagree with what Spigelman observed in his launch of the work, that "To some degree Dixon's depth came at the expense of breadth." Spigelman does not risk

the same being said of himself, and the work demonstrates this.

The book usefully comes with a detail of endnotes, a list of all speeches for the period, tables of cases and statutes, and an index. For those wishing to purchase or merely to sample, information is available at www.cs2n.com.au/contact.html.

An intolerance of intolerance

New South Wales Chief Justice Jim Spigelman – a collection of whose speeches is reviewed immediately above – said recently that he had an intolerance for intolerance.²² An admirable quality in a chief justice, and one that makes us ask what we want our laws to be.

Lawyers can't get out of bed without arguing a definition of waking up, but most of them accept that the law is something about the administration of justice.

It's a useful definition, because it carries its own tension. Too much administration and there's no time for justice. Too much focus on what Spigelman's predecessor Murray Gleeson termed the "holy grail" of individualised justice, and you get, ironically, no justice either. The system sinks under its own weight.

Defining law as the administration of justice also serves the eminently useful purpose of keeping lawyers out of what is essentially a moral or policy debate, namely what is justice itself.

That's not to say that lawyers, conservative, radical or moderate, don't have something to contribute to a debate about justice. As practitioners they clearly do, like doctors on health or teachers on education and so on. Just as long as they do in fact remember what Gleeson was fond of reminding them, that the rule of law is not the rule of lawyers.

Does defining law as an intolerance for intolerance tell us anything we don't already know? Does it help us – not just lawyers but all of us – administer a better justice? And what is tolerance, anyway?

For some, tolerance is a demonstration of weakness, an acceptance that one's own view may be incorrect. For this reason, tolerance is rarely a hallmark of regimes whose premise for existence is a belief in their own greatness.

In fact, etymologists tell us that tolerance demonstrates the very opposite. Tolerance is a sign of strength. And while it has always suggested endurance, it has from the 16th century also carried the sense of permitting or of

licensing the actions of another. That victim of intolerance (and lawyer) Sir Thomas More was one of the first to use the word in this way.

If we use this idea – the idea of permitting without interference – can we test whether a given law is a good law? One can test the English parliament's Act of Tolerance in 1689. It henceforth tolerated – or permitted without interference – non-Anglican Protestantism. To this extent, it was within the definition. On the other hand, it said nothing of the ongoing bars against Catholics, and never mind Jews, Muslims or the rest. To this extent, it was a law which did not go far enough.

Fast forward to 2001, when the Victorian government enacted the *Racial and Religious Tolerance Act 2001* in an attempt to outlaw vilification on the ground of race or religion.

The law was to be tested after 9 March 2002, when two men spoke at a seminar concerning Islam sponsored by "Catch the Fire Ministries". The seminar was attended by three Muslims, who, with the Islamic Council of Victoria, used the Act to allege that the intention of the speech was to vilify Muslims, not to discuss Islam.

Does the 2001 Act pass the test? Perhaps too well. The case became one where the listeners' claim was founded on the intolerance of the speakers and the speakers' defence was founded on the intolerance of the listeners. (Coincidentally, the speakers were aided in their defence by the US-based Becket Fund for Religious Liberty, named for another victim of intolerance (and lawyer) Sir Thomas a Becket.)

But perhaps the 2001 Act does not meet the test at all. It seems to have little to do with the central idea of tolerance, the idea of permitting without interference. Rather than not tolerating intolerance, it is arguable that the Act is enforcing or imposing tolerance, an altogether different thing.

The 2009 Australian Legal History Essay Competition – The topic

The question for the 2009 Australian Legal History Essay Competition is:

Who owns this land, anyway? ... Discuss whether Australian history has any lessons for us, today, about the meaning or significance of 'land ownership'. Do so by reference to one or more of: (a) Australia as a 'settled' or 'conquered' territory, and Aboriginal Land Rights; (b) the land titles system (known as the 'Torrens System') devised by Robert Richard Torrens; and/or (c) debate about whether Australia should, as a modern sovereign nation, be a republic.

Details of the competition are on the Society's site.

Advance notice

The Society proudly announces that *The Kercher Reports* (edited by Bruce Kercher and Brent Salter) will soon be published by the Forbes Society in conjunction with Macquarie University and Federation Press. The Reports will provide an edited version of 18th and 19th century NSW case law presently found on the website of the Division of Law of Macquarie University (www.law.mq.edu.au/scnsw).

They will be published as the second volume in the *NSW Select Cases* series of law reports, the first volume in which was *Dowling's Select Cases* (2005). This project has been supported by funding from the Public Purpose Fund and the Council of Law Reporting for NSW. A research program for the preparation of a third volume in the *NSW Select Cases* series is presently being pursued by Brent Salter (of Macquarie University) and Dr Lisa Ford (of the University of NSW) in conjunction with Professor Kercher and Professor Andrew Buck of Macquarie University.

Winter Quarters²³

In winter 1809

On 8 June 1809, Thomas Paine, author of the *Rights of Man*, dies in obscurity.

In winter 1859

On 6 June 1859, Queensland opens for business, as a separate colony.

In winter 1909

On 30 July 1909, C Northcote Parkinson is born. He will pronounce Parkinson's Law, "Work expands so as to fill the time available for its completion."

In winter 1959

On 17 July 1959, Tibet abolishes serfdom.

Endnotes

1. The ADB entry is at:
www.adb.online.anu.edu.au/biogs/A130571b.htm
(author Ivan Chapman).
2. See generally Charles 'Bud' Tingwell with Peter Wilmoth, *Bud – A Life*, 2004, Macmillan.
3. www.australianbiography.gov.au/subjects/tingwell/interview1.html.
4. Tingwell and Wilmoth, pages 19 and 20.
5. Tingwell and Wilmoth, chapter 2.
6. Cousens's ADB entry.
7. Cousens's ADB entry.
8. en.wikipedia.org/wiki/Douglas_MacArthur.
9. www.smh.com.au/news/world/life-and-death-on-the-air/2006/10/05/1159641462849.html
(author Lachlan Colquhoun).
10. Cousens's ADB entry.
11. www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s16.html.
12. Cousens's ADB entry.
13. The ADB entry is at
www.adb.online.anu.edu.au/biogs/A140027b.htm
(author Malcolm D Broun).
14. en.wikipedia.org/wiki/Whitlam.
15. Cousens's ADB entry.
16. Cousens's ADB entry.
17. en.wikipedia.org/wiki/Iva_Toguri.
18. Lane, *The Golden Age of Australian Radio Drama 1923-1960*, 1994, MUP, page 335.
19. Lane, page 335.
20. Lane, page 335.
21. Cousen's ADB entry.
22. www.smh.com.au/national/his-brother-is-one-of-our-most-celebrated-judges-but-mark-spigelman-has-an-even-more-extraordinary-tale-he-survived-the-nazis-by-dressing-as-a-girl-20090522-bibl.html.
23. Usually, the *Flyer* draws the references from timelines.
ws/.



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