



Forbes Flyer

THE NEWSLETTER OF THE FRANCIS FORBES SOCIETY FOR AUSTRALIAN LEGAL HISTORY

Winter 2005

History reports itself

Welcome to the winter 2005 edition of the *Flyer*. Thank you to founding editor Catherine Douglas, for your work and for agreeing to stay on the *Flyer's* editorial board.

The *Flyer*, as the above header indicates, is the "newsletter" of the Francis Forbes Society for Australian Legal History. The word is significant. A newsletter is not just a means of imparting information. It is also a means of inviting information. In short, it is a forum.

In the first issue, Catherine set out the aims of the Society. In the context of this publication as a forum, I think it worth repeating them. They are:

- encouraging the study and advancing the knowledge of the history of Australian law;
- publishing and promoting, for the benefit of the public, books, journals, periodicals and other literary publications;
- arranging and promoting, for the benefit of the public, continuing education; and
- promoting the compilation of authentic records relating to Australian and Indigenous law.

The main "users" of Australian legal history in a narrow sense, will more often than not be academics and lawyers. But the aims are explicit: it is to the public that the Society must reach. It is my hope that lay people – by which I mean people who have the advantage of being free from constraints of academe and legalese – accept an

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ongoing invitation to participate in this forum. We are all the students of its subject.

And, whether we are debating the place of monarchy, or the place of a primarily white nation in an Asian landscape, or by corollary the interaction of Indigenous and later "Australians", or the place of privacy or of free speech in a society where security is so much in the news, how can we be otherwise?

A century ago, readers of the *Bulletin* magazine received regular and highly partisan inundation on each of these things. The partisanship I would like to see in the *Flyer* is a clear bias to our past, as a means of reminding ourselves that these things did not invent themselves yesterday; they have been around, in one guise or another, for a long time.

Legal history is a particularly searching spotlight. We can read about opinions, opinions expressed today, or in 1955, or in 1805, but to discover and to compare what was actually done; to determine

how the legislature, or the executive, or the judiciary, actually responded to the issues of the day, is to tap something far richer.

A forum is a dialogue. The first thing I would like to encourage is letters. Letters about something raised in a past issue, and letters about an aspect of Australian legal history of currency in the wider media, are two examples. Letters suggesting a new range of inquiry for legal historians would be gratefully received.

The second thing I would like to encourage, is the *Flyer* as an opportunity. An opportunity for readers to make other readers aware of upcoming events or publications. The *Flyer* issues quarterly; if there is something coming up, tell us. In this issue, we flag Justice Keith Mason's upcoming Cable Lecture in Sydney. If there is a book in the works, please send us publication details. Reviews are welcome. So too are advertisements for websites or other resources which may be of interest to readers.

None of which is to encourage a triumph of forum over substance. While the *Flyer* is an "issue" and not a "tome", and – on the other hand – while, despite the luxury of web publishing, there must be a limit to an issue's word count, I would like to be able to get up one or two substantial pieces for each.

They may be, as in this issue, in the form of an article. Alternatively, they may be, as has been used successfully in previous issues, excerpts from recent or forthcoming publications. If you have authored or edited something, and provided there are no copyright issues, contributions in this form are welcome.

Which brings me to the last matter for this editorial. I am named underneath as "editor". In truth, I can only be a subeditor. I have to rely on contributors to work up their pieces. Readers who have had work published will be familiar with a publisher's "style guide". That is not something I

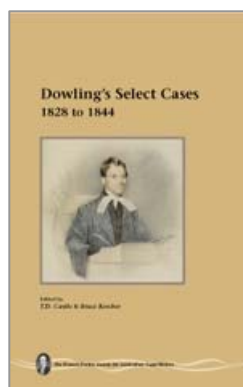
wish to have here. Equally, something which is cogent, something which explains its sources, by endnotes or otherwise, and something which remembers to include its author's contact details, will necessarily be at the top of the pile. Wider issues, such as avoiding defamatory statements and getting in any copyright consents, need only be mentioned once.

David Ash
Editor

Dowling's Select Cases

The Forbes Society is pleased to announce the publication of *Dowling's Select Cases, 1828 to 1844: Decisions of the Supreme Court of New South Wales*.

At his death in 1844, Dowling left behind about 250 judicial notebooks from his time on the NSW



bench. Among them was a collection that he called 'Select cases'. Dowling had intended to publish these as the first law reports in any Australian colony. Now, after a delay of 160 years, the Society has published them in conjunction with the Council of Law Reporting for New South Wales.

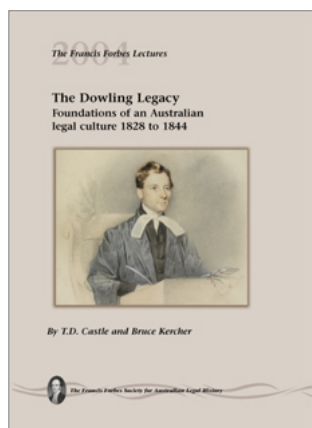
Edited by barrister Tim Castle and Macquarie University professor Bruce Kercher, the publication is a single hard cover volume of over a thousand pages containing 465 cases and a detailed introduction about the work of the court and the judges.

Each decision reported in *Dowling's Select Cases* is formally cited by reference to the year in which it was made and its page reference in the text, using the citation '(year) N.S.W Sel.Cas. (Dowling) (page)'.

Publication details, and how to order, can be found at the Society's website, www.forbessociety.org.au.

Readers interested in *Dowling's Select Cases* and *The Dowling Legacy* – below – may also be interested in a companion volume, *Callaghan's diary*, edited for the Forbes Society by Dr J M Bennett and due for publication in August 2005.

The Dowling Legacy: Foundations of an Australian legal culture 1828 to 1844



The third annual Francis Forbes Lecture was presented by the authors of *Dowling's Select Cases*, under the chairmanship of Andrew Tink MP, Shadow Attorney General for NSW, in the Common Room of the New South Wales Bar Association on Thursday, 14 October 2004.

The advertised title for this lecture was: 'Bringing the Supreme Court to Order, 1828-1844'. The lecture concluded with a presentation to the chairman and lecturers by Wendy Robinson QC, the junior vice president of the Francis Forbes Society for Australian Legal History.

The transcript of the lecture has now been revised to incorporate references to *Dowling's Select Cases* as published.

Again, publication details, and how to order, can be found at the Society's website, www.forbessociety.org.au.

The Second Annual Cable Lecture

The Cable Lectures are named for the distinguished historian and Anglican scholar Dr Kenneth Cable AM, who was long associated with St James' Church in King Street, Sydney.

The Second Annual Cable Lecture is to be given at 6.30 pm on Friday 9 September 2005 in the Church, by the Honourable Justice Keith Mason AC, President of the Court of Appeal of the Supreme Court of New South Wales, a member of the Appellate Tribunal of the Anglican Church, and Chancellor of the Diocese of Armidale, who represented various parties seeking the ordination of women in proceedings in the Appellate Tribunal and the Supreme Court of New South Wales in the period 1985 to 1992.

The lecture will examine intra-Church disputes involving the Diocese of Sydney that spilled into the public domain of civil litigation. The earliest case (involving St James' Church) occurred in 1828. The latest is *Scandrett v Dowling* (1992), involving an attempt to prevent Bishop Dowling from ordaining women priests in his diocese.

The survey will include a reflection on the theological issues involved in litigation in the secular court between fellow believers and consideration of the social and other costs of such litigation.

For further details, contact:

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Winter Quarters

In winter 1805

On 5 July 1805, New South Wales Judge Advocate Atkins states as colonial law that, as the Aboriginal people are believed to have neither religion nor morals, they cannot give evidence in a case of law.

In winter 1855

On 21 July 1855, Victoria's *Constitution Act* – setting up a Legislative Council and a Legislative Assembly – receives assent.

In winter 1905

On 5 July 1905, Australia's second Prime Minister, Alfred Deakin, forms his second ministry.

In winter 1955

On 24 June 1955, the High Court upholds the privilege of each federal house of parliament to commit for contempt by warrant: *R v Richards; Ex parte Fitzpatrick & Browne* (1955) 92 CLR 157.

Legislating away the press: A case study

By David Ash

I do not make confidentiality pledges lightly, but when I do, I must honour them. If I do not, how can I expect people to accept my assurances?" So spoke Judith Miller, a reporter for *The New York Times*, immediately prior to being found in contempt of court and being ordered to remain behind bars unless she changed her mind. The *Sydney Morning Herald* called the event "a dramatic turn in a case with widespread implications for the way journalists collect information.ⁱ

Certainly, the case is dramatic: Iraq, the CIA, the White House, all the big picture items of our day. But the issue is not new. One extraordinary episode occurred in this country, in 1953. It was not the CIA, or even ASIO. Certainly, no foreign country was involved. Rather, it was the Sydney City Council. The council's historian tells the tale:ⁱⁱ

[The NSW State Labor government's] democratic protestations [about its voting changes to the council] were undermined by the fact that the government was pushing through its infamous City of Sydney (Disclosure of Allegations) Act... In November 1953 the city election campaign hotted up with allegations in parliament and the press about bribery and intimidation by Labor aldermen. According to [a] joke of the moment, "even the palms in the Botanic Gardens were starting to itch". Unwisely, the state government responded with sledgehammer legislation to compel anyone making allegations to produce their evidence or disclose their sources.

The sledgehammer eventually went onto the books as the *Sydney City Council (Disclosure of Allegations) Act 1953*. This article looks at the legislation itself, the debates in the state's Legislative Assembly and Legislative Council, and the one reported case of its operation. Bar one proviso, there is no consequence in the political identities; it is no discourtesy to the current Council's members or staff to note the notorious fact that for over a century, the Council was from time to time inundated with allegations of corruption, which inundations were dealt with or ignored by the state government of the day, according to the expediciencies of the day.

The proviso is this. While Labor was in power in Macquarie Street, the Coalition held Canberra. In 1951, the Menzies government had failed in what many regarded as an attack on free speech, the anti-Communist referendum. More than one speaker from the Labor side, perhaps embarrassed at having to support a bill such as the one

considered here, deftly used the irony that the opposition was now defending what its federal colleague had sought to muzzle.

The legislation

The legislation itself was brief, with only five sections. The key provision was section 3(1), which provided:

Where, before or after the commencement of this Act, any statement, report or matter relating to the Council or any member or servant of the Council in his capacity as such has been made or published and such statement, report or matter alleges, suggests or implies that an offence against the Secret Commissions Prohibition Act 1919, or section one hundred and one of the Local Government Act 1919, as amended by subsequent Acts, has been committed either by such member or servant or by any other person, a Judge of the Supreme Court may, upon the affidavit of a superintendent or inspector of police showing reasonable grounds for believing that any person or body of persons, corporate or unincorporated, named in the affidavit has in his or its possession any documents upon which such statement, report or matter was based, or has within his knowledge or control any information upon which such statement, report or matter was based, order such person or body of persons to produce such documents or disclose such information to such superintendent or inspector of police.

Under section 4, an application was to be made to the judge taking non-contentious matters in private chambers. In other words, an application for an order that a person disclose information, was made in the first place *ex parte* and away from the public gaze. By sections 3(3) and 3(4), failure to comply was punishable, in the case of a body corporate, by a fine of up to £1,000, and in the case of a natural person, by a fine up to £500 or to imprisonment for up to 12 months. Or both.

The Legislative Assembly

The bill came before the house on 25 November 1953, by way of a motion of urgency that it be brought “forthwith and passed through all its stages in one day”.ⁱⁱⁱ The motion was carried, 52 to 33. This in turn required a motion that so much of the standing orders as would preclude this, be suspended.

The motion was put by Premier J J Cahill, and the leader of the opposition and QC, Mr Vernon Haddon Treadwell, spoke to it from 2.38 pm.

The tone was soon set, with the leader saying that “[g]overnment action analogous to this is to be found only in countries where communism and fascism prevail”. After the second motion was carried, just prior to 2.59 pm, Mr Treadwell returned to the theme, saying that the bill was “the most degrading measure ever presented to this House”. The Gestapo soon received the first of numerous mentions, and the first firm basis of the opposition was laid, namely that the bill was nothing more or less than an attempt by the government to interfere with the freedom of the press.

The opposition persistently urged that there was but one method for getting at the truth, one that had stood the test of time and experience, a royal commission. It would have been perhaps importunate for a premier to say what a significant proportion of the population might have thought – and might still think – so it was left for the Minister for Local Government^{iv} to state the government’s position on this aspect, and he did so in straightforward terms: “History has shown that, in general, royal commissions are futile, expensive and rarely bring anyone to book.”

The Minister also put the issue in context, the allegations being squarely in respect of Labor aldermen:

Next Saturday [ie Saturday week, 5 December 1953], the people of the City of Sydney will have their opportunity of dealing with this matter. If they consider that any candidate who is contesting a seat in the Sydney City Council is not a fit and proper person to be elected, they will be able to deal with him at the ballot box, irrespective of his politics.

The Minister's observations were prescient. As the Council's historian observes:^v

This "Gag the Press Act" became an international scandal but, not for the first time, the citizens failed to match journalists' concern for civil liberties. They followed their own interests and traditional loyalties... the Labor candidate for Lord Mayor was elected without going to preferences and Labor elected eleven aldermen to Labor's six. The new system did benefit one minor party but as it was the Communist party, this was little comfort to the conservatives. Two years after Menzies' attempt to ban the party by referendum, the Communists got two seats on the City Council.

It was for the Minister to flesh out the theme of the bill for the house. He advanced the argument that the penalties were purposely severe, because the government took "a serious view of any form of any form of corruption". Although this point was made a number of times, the nexus between a severe penalty under the bill and the punishment of the corrupt never really emerged. In response to this, it was for the leader of a conservative party to draw the house's attention to the Declaration of Human Rights, in particular article 19, which provided:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

A while after, at 5.22 pm, the Leader of the Opposition passed the baton to the Leader of the Country Party, Lieutenant Colonel Bruxner DSO. Here emerged a more strident and ideological stand. By his third paragraph, the speaker was referring to "the sorry breed of communists that have been in the Labour Party ever since 1920". The bill was "something right out of the communist box", while "[t]he history of the British race [was] one of struggle against suppression and coercion by those in authority".^{vi}

By 5.41 pm, it was time for the nuts and bolts, the job falling to the Attorney-General, Mr Sheehan. After acknowledging "a typical Bruxnerian speech", the minister rejected emphatically that the bill was totalitarian. Instead, he said, special attention had to be had to section 6 of the *Official Secrets Act* of Great Britain, which provided a not dissimilar mechanism in respect of certain specified offences.

Further, the Attorney-General stressed, it was the bounden duty of a newspaper to pass on information "indicative of wrongdoing"; what possible objection could it have to making the information available?

In fairness, it cannot be said that the Attorney-General shied from the political, as distinct from legal, consequence of the bill, illustrated in the following exchange, after the House had resumed at 7.30 pm:

Mr Sheahan: ... a newspaper, if it keeps, for the purposes of political propaganda, information of the commission of a felony for the benefit of itself or of the political party whose cause it espouses is, in my humble opinion—and it is only a humble opinion—

Lt.-Colonel Robson: Hmm!

Mr Sheahan: The hon. Member for Vacluse may smile.

Lt-Colonel Robson: I did not say a word. One cannot yet be hanged for thinking!

The Minister for Labour and Industry and Minister for Social Welfare, Mr Landa, arose at 8.09 pm. He, like the Attorney-General before him, was frank about the newspapers:

At the last election every newspaper advised the people of New South Wales to vote against the Government, but the people made up their own minds.

Mr Landa soon proved to be one of the government speakers referred to above, able to turn deftly the cries of totalitarianism back onto the opposition:

To-day democracy is being challenged throughout the world... It is being challenged not by sincere citizens who wish to protect democracy, but by muck-rakers^{vii}...

In recent weeks, [the press] have so abused their freedom that they have earned public contempt. I have in mind especially a recent court case, which was reported in a disgraceful fashion that I doubt would be equalled in the lowest American journal...

I remind hon. members that the pernicious system known as McCarthyism, which, by a smear campaign, undermines public men until the people lose confidence in the democratic system, is just as dangerous as is communism or nazism...

The Federal Government... placed before the people by referendum a proposition that was completely opposed to the Declaration of Human Rights about which members on the Opposition have had so much to say in recent days.

While *Hansard* does not record what was meant by "the lowest American journal", it is interesting to note that members on both sides of the House spoke of the values of British or English law. Mr Landa, for example, said of the latter that "we are justly proud". Indeed, more than a half century

after the individual colonies had agreed to become states of the Commonwealth, there remained two ministers whose titles bore a distinctly imperial flavour, the Colonial Treasurer and the Colonial Secretary.^{viii}

Soon after, Mr Landa conceded on behalf of the government that the press had the right to express its opinion, "as long as it gives the public impartially the side that does not accord with its opinions, so that members of the public can judge the issues for themselves".

By about 8.40 pm, the question that the bill be read a second time was resolved in the affirmative, 54 to 33. The opposition leader returned to the fray, proposing an amendment that the Act be known instead as the *Sydney City Council (Suppression of Allegations) Act 1953*. The amendment was defeated. Mr Treatt also pointed out that the British Act was directed at a somewhat different offence, being one "as near treason as it is possible for an offence to be without actually being treason".

But it was over. The committee's report was carried, and, at 10.48 pm, Mr Renshaw proposed that the bill now be read a third time. There was only one further comment before the division, by the member for Mosman, Mr Morton, "Is this the Australian way of life?"

The bill cropped up in the House again on 1 December 1953, first when the member for Manly presented a petition that, inter alia, the bill be withdrawn, which petition was promptly dispatched, by the Premier and Mr Renshaw, during Questions without Notice, and secondly to consider an amendment from the other place, whose debate is now considered.

The Legislative Council

At 4.35 pm on 30 November 1953, Mr Downing, the Minister of Justice and Vice-President of the Executive Council, moved the second reading in

the Legislative Council. Mr Downing moved quickly to buttress the government's position by asserting that there would be no muzzling of the press; after all, article 19 had "never been construed as extending to the libelling or defaming of others".

In the Legislative Council, in fact, the debate at times moved from rights to the narrower concept of privilege. Mr Downing, for example, referred to the High Court's decision in *McGuinness v Attorney General of Victoria*.^{ix}

In this context, the Minister advanced the proposition that, as newspapers would have to disclose the information to a royal commission anyway, the reasonable inference was that the press's opposition to the bill and its support for such a course was because of "the news value of a royal commission"; it would be able "to reap a profit from its own disclosure".

One particular bugbear of the minister's was the assertion by one newspaper that "[t]his pernicious retrospective legislation makes of crime of actions which were not a crime when those actions were committed". "Nothing is further from the truth", the Minister declared, calling in aid words of Fullagar J in *The King v The Commonwealth Court of Conciliation and Arbitration*.^x

In a narrow sense, of course, the Minister was quite right. However, as the opening of the key provision set out above makes clear, the Act was to apply to information whensoever got.

At 5.12 pm, Sir Henry Manning began to outline the opposition's case. For Sir Henry, the minister's reference to privilege was utterly irrelevant, as – as noted above – the press accepted that, were there a royal commission, the information would have to be disclosed. He also addressed the clandestine nature of the measure's operation: if he were having a scrap with a newspaper proprietor, he "would jump at the opportunity of getting a non-

contentious matter before a judge in private chambers".

Sir Henry spoke through to and after the evening break, before yielding to Mr Colborne for the bill:

There is no question of persons, being fearful of the consequences of disclosing their identity. Nobody will be shot or hanged.

Mr Colborne was particularly offended that the press had taken its concerns abroad, presumably fermenting the "international scandal" referred to above. The press, it seemed, "had the temerity to approach the Trade Union Congress in England". In contrast to the more ecumenical approach of Messrs Cahill, Sheahan and Landa in the other place, for Mr Colborne England had little to offer: "Those who do not understand the position should keep their noses out of Labour politics in New South Wales".

In another example of turning the Declaration of Human Rights back on the opposition, Mr Colborne referred to the basic dignities in articles 1, 2 and 29. The press were trashing people's reputations, and, yes, Mr Colborne did cite Othello on the filching of a good name. In short, the press's position was "the coward's castle of anonymity".

At 8.24 pm, Colonel Clayton for the opposition returned to the legal matters, in particular the comparison with the British *Official Secrets Act*. He spoke of the difficulties of conscience that Labour itself had had, in passing such a measure, and urged on the government the "almost Churchillian words from a fine representative of Labour in the British House of Commons", Mr Wedgwood Benn.

Finally, at 9.51 pm, Mr Bridges for the opposition rose to name names. This had been announced by the press that day, and indeed the preceding speaker, for the bill, said that he would be pleased to hear it. Mr Bridges did name names, concluding that the bill was "ill-conceived, dangerous,

undemocratic, unduly hurried and thoroughly bad”.

If Mr Bridges thought that any criticism of his naming under parliamentary privilege the alleged miscreants, would be muted by his advice through the press, he was soon to be disappointed. Immediately after he had resumed his seat, Mr Kenny rose, at 10.24 pm, and contended in his opening:

I did not believe that this House would ever have presented to it such an exhibition of cowardice as was just given by the Hon A D Bridges. If ever there was a coward in the City of Sydney, there he sits to-night...

Mr Maloney’s speech in support of the bill, begun at 11.25 pm, was a return to class rhetoric, perhaps intended to be antidotal to the speech by the leader of the Country Party in the other place:

If the interests of the public cut across the newspapers’ financial interests, that is too bad. No one in his sane senses would argue that newspapers constitute a democracy...

However one looks at the press it is capitalistic. It has all the viciousness of capitalism, but though it has all the bad forms of capitalism it seeks the protection of Parliament whenever it is threatened with the least censure...

To-night [Mr Bridges] stooped to the depths of the gutter in order to use the privilege of the House in an attempt to wreck individual members of the Labour Party and, as he himself admitted in his concluding remarks, the prestige of the Labour Party itself...

I have little faith in British justice... I have passed the half century mark, and for fifty years I have been searching for British justice. I am aware that there is British law and that there are law courts, but I have yet to find any courts of justice...

Legal practitioners like the Hon Sir Henry Manning and Colonel the Hon H J R Clayton give the measure legal interpretations that were never intended and could never be construed, and they attempt to distort justice by the application of legal nonsense.

In immediate reaction, the next speaker, Mr Ahern, described the bill as “symbolic of the socialist on the run and in despair”. For his part, Mr Ahern drew on a range of sources, including Professor Hayek, Thomas Jefferson, and C P Snow. He finished with a riposte from a late journalist and premier, Sir Henry Parkes, who had in 1851 written that “[i]t seems to be acknowledged on all hands that there can be no lower step in our society than a seat in the City Council”.^{xi}

Things must have been tense at 12.25 am, when Mr O’Dea rose. Earlier, Mr Ahern had asked from Mr O’Dea an explanation:

... for certain extraordinary occurrences in recent years. During the Easter recess of the Sydney City Council in 1951, [Mr O’Dea], then Lord Mayor of Sydney, created thirteen new barrow licences. No reason was given for that action.

But the speech was short, a mere five minutes, a complete repudiation of the charges. Soon afterwards, some levity was restored when Mr Williams for the bill, presumably with tongue firmly in cheek, asserted:

That gracious lady, Her Majesty the Queen, is drawing nearer every day to these shores, yet for the last week she has been relegated to the fourth page in the newspapers. I believe that one reason for the present press campaign is that somebody is feeling aggrieved that a Labour alderman, the Lord Mayor of Sydney, which is the most progressive council under Labour rule in the southern hemisphere, is to have the privilege of meeting Her Majesty when she arrives in Australia.

But perhaps it wasn't tongue in cheek. Certainly, at least one member felt sufficiently concerned to show – in what must be a rare event in Australian parliamentary debate – that the conservative parties were just as loyal to the Queen as the Labor Party:

This talk about members on this side raising these matters because Her Majesty the Queen is coming to New South Wales is the greatest poppycock I have ever heard. We are loyal citizens, just as loyal as members on the Government side, and I assure the hon members on that side, if they need any such assurance, that we are just as anxious as anyone to see a successful royal tour. Indeed, we are perhaps more anxious.

That member also suggested another name for the bill, "The Grafters' Protection Bill". Which perhaps provided some of the encouragement for one of the last speakers, Mr Cochrane for the bill. Just after 2.13 am, he had no difficulty in articulating a position on the press:

... hoist with its own petard, [it] might be likened to a dirty, yellow, louse-ridden, mongrel animal that is a cross between a dingo and a rodent.

One of the last speakers was Mr Alam, in support of the bill. He rose at 2.58 am, after having withdrawn an allegation that that Mr Bridges had forged a letter from which he had read allegations, or at least that it was a fake.

After a marathon effort, it only remained for Mr Downing, who had brought the bill to the House, to advise of an amendment, to the effect that the bill when enacted would cease on a date to be proclaimed. This, presumably, was a concession upon the controversy the bill had generated, although as Colonel Clayton noted:

Legislation is the function of Parliament and an Act should not be repealed by proclamation...

[The Government] feels that it has bitten off more than it can chew, and wishes to rid itself of the encumbrance as soon as possible. By this method it can do so without publicity or debate in this Chamber, and without giving hon members the opportunity of examining its effect, the results of which it has achieved and what has followed from its introduction. The Government hopes to put the measure in the family cupboard where the skeletons are buried, there to leave it to remain and rot, and it wants to do it almost immediately.

The bill was returned to the other place with the amendment, and, at 4.20 am, it seems that the house adjourned, rather than face the next business. That business, it seems, was the price of newsprint.

The court case

The bill returned to the Legislative Assembly and the amendment adopted, and the bill received assent on 2 December 1953. On 3 December 1953, an application was made to Owen J upon an affidavit dated the same day. The affidavit stated that on 17 November 1953, the *Herald* had referred to allegations of corruption by two Labour aldermen.

On that day, the judge directed that the matter be argued after the *Herald* had been served, and, it seems, the matter was argued on the following day, with Sir Garfield Barwick leading for the *Herald*.^{xii} The decision was handed down on 13 or 15 December 1953 – the report is not clear – a date after the date of the elections, which had already gone Labor's way.

It will be recalled that section 3(1) was directed to two sources of material, first, documents in the possession of the recipient of an order, and secondly, information within knowledge or control. Significantly, the affidavit in question concluded:^{xiii}

I believe that John Fairfax and Sons Pty Limited has within its knowledge or control information upon which the statement mentioned in paragraph two hereof was based and I respectfully request that it be ordered to disclose such information to me.

In this light, it is not surprising that Owen J found himself without jurisdiction, as information lies only in the mind of a natural person; had the affidavit evidenced documents in the *Herald's* possession, an order would doubtless have been made.^{xiv}

In any event, the result was no doubt welcomed by all, and the Act ceased to have effect, by proclamation, on 12 March 1954.^{xv} In a footnote of finality, the state's Law Reform Commission recommended in 1971 that a number of Acts including the subject of this article, be repealed;^{xvi} in 1976, it was.^{xvii}

Conclusion

Big issues come in all sizes. Corruption in respect of municipal barrow licences, though harsh for its victims, is not genocide. Equally, though, the very size of the issue throws the government's hasty and high- and heavy-handed reaction into sharp relief. And there is still the knowledge that the public was unmoved by these machinations, and voted as they had before.

On the day the author completed this article, he read another, in no less an organ than the one at the centre of the above debates, *Sydney's Herald*. That article is about the reopening of Sydney's Hilton Hotel, in passing comparing Melbourne and Sydney building codes of yore. While that article is neither an epitaph on the bill nor even legal history, it is interesting to note that the above council, the above premier, and the above opposition leader all feature, though the events described are years later.^{xviii} Posterity affords more than one hat:

In Sydney, by contrast [to Melbourne], the constellations took a different shape, with the architects pushing Joe Cahill to lift the latch on building heights in 1957 and Bob Askin [a subsequent premier], bless him, opening the gates – wide.

So the Askin decade, 1965-75, became the decisive one for Sydney. Particularly frenetic were the 22 months between 1967 and 1969 when, after one of the government's ritual council sackings, the third city commission rampaged through the town. The commission, chaired by Sydney barrister and former Liberal Party leader Vernon Haddon Treatt and derided in Parliament as pro-development puppets, simply approved "whatever was put in front of them", recalled architect-planner George Clarke.

ⁱ Michael Kranish & Kaitlin Bell, "Journalist jailed for refusing to talk", *Sydney Morning Herald*, 8 July 2005.

ⁱⁱ Dr Hilary Golder, "A Short Electoral History of the Sydney City Council 1842-1992", p 24, www.cityofsydney.nsw.gov.au/historical_sydney.asp. The Act was, in fact, the *Sydney City Council (Disclosure of Allegations) Act 1953*. The author of the current article only became aware of the legislation when a correspondent to the *Herald's* "Column 8" of 24 May 2005, asked whether New South Wales had ever repealed the Act.

ⁱⁱⁱ *Hansard*, 25 November 1953, 2167. All *Hansard* references in the article are from one of 25 November 1953, 2167-2218 (Legislative Assembly); 30 November 1953, 2319-2401 (Legislative Council); and 1 December 1952, 2440-2443 and 2479-2481 (Legislative Assembly).

^{iv} Mr Renshaw, also Secretary for Public Works.

^v Dr Hilary Golder, "A Short Electoral History of the Sydney City Council 1842-1992", p 24, www.cityofsydney.nsw.gov.au/historical_sydney.asp.

^{vi} *Hansard*, 25 November 1953, 2190.

^{vii} The word "muckraker" is one of those words which means something noble or something bad, depending on who uses

it. It was popularized in speech by President Theodore Roosevelt, alluding to a character in Bunyan's *Pilgrim's Progress*, who seeks worldly gain by raking filth. "The men with the muck-rakes are often indispensable to the well-being of society, but only if they know when to stop raking the muck": T Roosevelt, quoted in the *Cincinnati Enquirer*, 15 April 1906: see the Online Entomology Dictionary, www.etymonline.com/index.php?term=muckraker.

^{viii} See page iii of the *Hansard* referred to in these endnotes.

^{ix} (1940) 63 CLR 73.

^x *Hansard*, 30 November 1953, 2324. The citation is (1950) 81 CLR 229.

^{xi} *Hansard*, 30 November 1953, 2373.

^{xii} Reported as *Re Calman & John Fairfax & Sons Pty Ltd* (1953) 54 SR(NSW) 86.

^{xiii} 54 SR(NSW), 89.

^{xiv} 54 SR(NSW), 94-95.

^{xv} *New South Wales Government Gazette*, 12 March 1954, 732.

^{xvi} First Report of the Law Reform Commission on Statute Law Revision, LRC 10, 1971.

^{xvii} *State Law Revision Act 1976*, s 2 and Sch 1.

^{xviii} Elizabeth Farrelly, "Storeys with a happy ending", *The Sydney Morning Herald*, 16-17 July 2005.

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