



## The Francis Forbes Society for Australian Legal History

ABN 55 099 158 620 ACN 099 158 620

# ANNUAL REPORT 2019

## ESTABLISHMENT

As was noted in previous Annual Reports, the Society has its origins in the Centenary Celebrations of the NSW Bar Association in 2002. The Society is named for Francis Forbes (1784-1841), the first Chief Justice of the Supreme Court of NSW, 1824-1837. He was knighted in 1837.

The inaugural meeting of the Council of the Forbes Society was held on Monday 5 August 2002.

The 'founding' members of the Society were the inaugural members of its Council and its Honorary Executive Director.

The inaugural members of the Council were:

- Professor Bruce Kercher of Macquarie University (President);
- Justice Keith Mason AC of the NSW Court of Appeal (Senior Vice President);
- Wendy Robinson QC of the NSW Bar (Junior Vice President);
- Geoff Lindsay S.C. of the NSW Bar (Secretary);
- Carol Webster of the NSW Bar (Treasurer);
- Michael Sexton, S.C., Solicitor General of NSW; Laurie Glanfield AM, Director General of the NSW Attorney General's Department; Mark Richardson, Chief Executive of the Law Society of NSW and Stephen Toomey of Toomey Pegg Solicitors (Members).

The Honorary Executive Director of the Society is Greg Tolhurst (Executive Director of the NSW Bar Association).

The current members of the Council are:

- Chief Justice James Allsop AO (President)
- Justice Geoff Lindsay (Senior Vice President)
- Mark Lunney (Junior Vice President)
- Simon Chapple (Secretary)
- Carol Webster SC (Treasurer)
- Michael Tidball (CEO of the Law Society), Wendy Robinson QC, David Miller (Colin Biggers and Paisley) and Dr Ben Chen (University of Sydney Law School) (Members)

In accordance with the Society's constitution all Councillors retire at this Annual General Meeting and are eligible for re-election.

## **Advisory Board**

In early 2017 the Society established an Advisory Board consisting of academics and other closely involved Forbes members to be involved in the development of projects for the Society. The initial members of the Board were:

- Professor Mark Lunney from UNE as Chair;
- Justice Mark Leeming (of the NSW Court of Appeal);
- Philip Selth OAM, the founding Honorary Executive Director of the Society (and former Executive Director of the NSW Bar Association);
- David Ash; and
- Tony Cunneen.

On his retirement from Council, our former Senior Vice-President, the Hon Keith Mason QC AC agreed to join the Advisory Board.

With the election of two members of the Advisory Board as members of Council in 2017, Kathleen Morris also joined the Advisory Board. Kathleen was the tipstaff to Gleeson JA in 2014 and then Associate to Chief Justice Allsop in 2015-2016, and is now a solicitor at Clayton Utz. In 2014, with Allsop CJ, Kathleen delivered a tutorial in our series. We welcomed Mandy Tibbey to the Advisory Board in 2019.

## **CONSTITUTION**

The Forbes Society was registered as a public company, limited by guarantee, on 2 January 2002, and is authorised under section 150 of the *Corporations Act 2001* (Cth), to dispense with the word “Limited” from its title. The registered office of the Society is care of the Office of the NSW Bar Association, Basement Level, Selborne Chambers, 174 Phillip Street, Sydney.

“The Francis Forbes Fund” was established by Deed of Trust executed on 12 February 2002. Under the Deed the Society is trustee of the Fund. The Society and the Fund are endorsed as “income tax exempt charities”, and the Fund is endorsed as a “deductible gift recipient”, under the *Income Tax Assessment Act 1997* (Cth). The Society holds an “Authority to Fundraise” under the *Charitable Fund Raising Act 1991* (NSW) from NSW Fair Trading (formerly the Office of Liquor, Gaming and Racing).

## **ANNUAL FORBES LECTURE**

Since its foundation the Forbes Society has encouraged the study of the history of Australian law through an annual public lecture. The Forbes Lecture has become an important date in the legal calendar:

The 2017 Forbes Lecture, ‘An insight into appellate justice in New South Wales’, was delivered by Justice Margaret Beazley AO, President of the NSW Court of Appeal, on 28 September 2017. Justice Beazley spoke about the history of the NSW Court of Appeal.

The 2018 Forbes Lecture was delivered by the Hon Justice Virginia Bell AC, on 30 May 2018 and titled “By the skin of our teeth – the passing of the Women’s Legal Status Act 1918” to mark the Centenary of the Act.

The 2019 Forbes Lecture was delivered by Professor Anne Twomey of the University of Sydney, on 5 June 2019 and titled Pitt Cobbett - A Pre-Engineer's Ghost Speaks from the Grave, chaired by Chief Justice Allsop.

Further information about previous Forbes Lectures is available on the Society's website.

## **THE ANNUAL JH PLUNKETT LECTURE**

The lecture honours the memory of one of the State's pivotal Attorneys General. John Hubert Plunkett (1802-1869) arrived in NSW, from Ireland, in 1832. For more than 30 years thereafter he made a major contribution to colonial law and society, serving, inter alia, as Solicitor General and Attorney General. In 1835 he published *The Australian Magistrate*, the first Australian legal practice book. He was the first Australian lawyer to be granted a commission as Queen's Counsel. He led Roger Therry, another Irish-born barrister, in the conduct of the Myall Creek Murder trials.

The Sixth Annual JH Plunkett Lecture, 'John Hubert Plunkett QC and the Myall Creek murder trials' was delivered by Mark Tedeschi AM QC on 9 November 2017, chaired by the NSW Attorney General, the Hon Mark Speakman SC MP.

The Seventh Annual JH Plunkett Lecture on 'The Royal Prerogative of Mercy' was delivered by the NSW Attorney General, the Hon Mark Speakman SC MP on 29 October 2018, chaired by Tim Game SC, the Senior Vice-President of the NSW Bar Association.

The Eighth Annual JH Plunkett Lecture on "Attorneys-General in Eighteenth-Century England" was delivered on 13 November 2019 by Professor Wilfrid Prest (Professor Emeritus of History and of Law, University of Adelaide) chaired by the Hon Justice Andrew Bell, President of the Court of Appeal. Professor Prest spoke on the office of attorney-general in the 18<sup>th</sup> century, with particular reference to Sir Dudley Ryder (1691-1756), the second-longest serving holder of that office.

Further information about previous Plunkett Lectures is available on the Society's website.

## **TUTORIALS IN AUSTRALIAN LEGAL HISTORY**

Throughout 2018 and 2019 members and friends of the Forbes Society (including judges, tipstaves and research officers of the Supreme Court of NSW) have met, in Banco Court and Court 13A in the Law Courts Building in Sydney, for tutorials in Legal History styled "Understanding Australian Law through Legal History".

In 2017, presentations were made by:

- Emeritus Professor Wilfrid Prest (11 April 2017); Justice Black (2 May 2017); the Hon PW Young QC (23 May 2017); the Hon John Bryson QC (13 June 2017) and the Chief Justice, the Hon TF Bathurst AC (18 October 2017);

In addition, the Hon Keith Mason AC QC delivered a lecture (10 October 2017) titled "Sir Frederick Jordan's brushes with 'degenerate art'"

We note that the Hon Keith Mason's book *Sir Frederick Jordan: Fire under the frost* (published by Federation Press) will be launched by the Hon Justice Stephen Gageler AC in the Banco Court on 26 November 2019.

In 2018, presentations were made by:

- Emeritus Professor Wilfrid Prest "Lawyers and the law in the 'Glorious Revolution'" (24 April 2018);
- the Hon Acting Justice Arthur Emmett AO "The Roman Consensual Contracts: Sale, Hire and Partnership" (15 May 2018),

- Professor Mark Lunney “History of the law of tort” (19 June 2018);
- the Hon J C Campbell QC “The History of Equity” (in two parts: 25 July 2018 and 22 August 2018); and
- the Chief Justice, the Hon TF Bathurst AC “History of the Law of Commercial Arbitration” (18 October 2018).

In 2019, presentations were made by:

- Dr Simon Chapple “Introduction to Australian Legal History” (21 May 2019),
- Professor Mark Lunney, Dr Tanya Josev and Dr Susan Bartie “Legalism in the twentieth century: the chameleon concept”(3 September 2019),
- the Hon J C Campbell QC “The History of Equity” (in two parts: 6 August 2019 and 13 August 2019); and
- the Chief Justice, the Hon T F Bathurst AC “History of the legal profession in NSW” (18 September 2019).

The tutorials have produced a volume of research materials which the Society hopes will, in due course, provide a foundation for the publication of a work, or works, on the doctrinal history of Australia Law.

In addition to this series of tutorials:

- on 15 August 2019, in conjunction with Federation Press, the Society supported a public address by the Hon Michael Kirby AC CMG and Professor Stefan Petrow of the University of Tasmania on the life of Sir Francis Villeneuve Smith, the third Chief Justice of Tasmania, and the issues of colonial and postcolonial racism in Australia. The biography of Sir Francis Villeneuve Smith by Dr John Bennett together with Dr Ronald Solomon in the series *Lives of the Australian Chief Justices* was published in 2019 by The Federation Press. The Society helped fund the research that lead to the book.
- on 6 November 2019, the Hon John Bryson QC delivered a lecture co-sponsored by the Forbes Society and the Selden Society, titled “Henry VIII’s Will and the Politics of Succession” in Banco Court, introduced by the Hon Justice Lucy McCallum of the NSW Court of Appeal.

## **ANZLHS ANNUAL PRIZE IN LEGAL HISTORY**

Since 2014 the Society has, through The Francis Forbes Fund, supported the Australian and New Zealand Legal History Society Annual Prize in Legal History, an annual award for the best piece of legal history writing (book or article) by a member of ANZLHS about Australian / New Zealand history. The first award was announced in December 2014, to Janine Pizzetti for a paper titled ‘Judging Protection: “The Unintentional Errors of an Unlearned Magistracy”, British Guiana and Port Phillip, 1830s–40s’ published in *Law & History*, vol 3, 2016.

In December 2015 the second award was announced, to James Kirby for the best postgraduate paper presented at the ANZ Law and History Conference 2015. His paper was titled, “Conditional on a Bill of Rights”: The constitutional and political foundations of Botswana’s Non-Racial Democracy’, published as “Conditional on a Bill of Rights”: Race and Human Rights in the Constitution of Botswana, 1960-66’ in *Law & History*, issue vol. 4:1, 2017.

The 2016 prize was awarded to Dr Danielle Boaz for a paper presented at the December 2016 ANZ Law and History Conference Perth conference, which compared witchcraft suppression laws across three jurisdictions.

The 2017 prize was awarded to Mark Finnane & Andy Kaladelfos for a paper 'Race and Justice in an Australian Court: Prosecuting Homicide in Western Australia 1830-1954'. *Australian Historical Studies*, 47, 2016.

The 2018 prize was awarded to Shaunnagh Dorsett for her book *Juridical Encounters: Maori and the Colonial Courts 1840-1852* (Auckland University Press, 2017).

## **CURRENT RESEARCH PROJECTS – THE FORBES FUND**

One of the Society's objects is to encourage and promote research into Australian legal history and it maintains for that purpose the Francis Forbes Fund, to which donations may be made.

### **Pitt Cobbett's grand opus 'The Government of Australia'**

In 2017 and 2018 the Society made grants from the Fund to the University of Sydney for Professor Anne Twomey to support the publication of Pitt Cobbett's 'The Government of Australia'. William Pitt Cobbett was appointed to the Challis chair of law at Sydney University in 1890 and became the first Dean of the Law School in 1891, retiring in 1909. He completed a handwritten manuscript (of about 275,000 words) of 'The Government of Australia' before he died in October 1919. The manuscript was given to the University of Sydney by the trustees of his will.

Some extracts from an update received from Professor Twomey earlier in 2018:

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 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 book *The Constitution and Government of Australia, 1788 to 1919* by William Pitt Cobbett and edited by Anne Twomey (published by Federation Press in October 2019) will be launched later this year.

In 2019 the Council of the Society approved the following grants from the Fund:

- A grant of \$5,000 to support the digitisation of the notebooks of Sir Keith Officer and Sir Robin Sharwood in response to a proposal from Professor Lunney, Dr Tanya Josev (Melbourne Law School) and Ms Carole Hinchcliff (senior law librarian at Melbourne),
- A grant of \$2,800 to Peter Moore through the University of Adelaide to support the Biographical Dictionary of Barristers and Solicitors in Early NSW, 1824-1861,

- Providing \$1,000 to the Australian and New Zealand Legal History Society Annual Prize in Legal History, an annual award for the best piece (book or article) of legal history writing by a member of ANZLHS about Australian / New Zealand history.

### **Biography of Sir Francis Villeneuve Smith, the third Chief Justice of Tasmania**

'Sir Francis Villeneuve Smith, Third Chief Justice of Tasmania 1870 – 1855' by Dr J.M. Bennett and Ronald C Solomon, was published in early 2019 by Federation Press. It was the culmination of a research project supported, in part, by a grant of \$6,000 from the Fund in 2015. Sir Francis was Premier of Tasmania from 1857 – 1860, a judge of the Supreme Court from 1860 – 1870, and Chief Justice from 1870 – 1885.

### **The Select Cases Project**

The Society has yet to procure further funding for the Select Cases 1828-1863 Project. As noted in previous Annual Reports, the Society still hopes to be able to move towards publication of two volumes following upon Kercher and Salter (eds), *The Kercher Reports: Decisions of the New South Wales Superior Courts, 1788 to 1827* (Forbes Society, 2009/2010).

### **THE SOCIETY'S WEBSITE**

The Society's website ([www.forbessociety.org.au](http://www.forbessociety.org.au)) can be used as a means of publicising research projects, inviting comments on draft papers and publishing papers. Members and friends of the Society are invited to use it accordingly. We are indebted to Tony Cunneen for his work on the website.

Notable additions include Early Equity Cases in New South Wales – the first 14 of 37 of the first Supreme Court Equity Cases in the Colony of New South Wales collected by Hon Dr John Hamilton QC: "Supreme Court of Civil Jurisdiction Equity Cases 1817-1824" The cases give a fascinating insight into the legal and social landscape of the time.

### **THE AUSTRALIAN LEGAL HISTORY ESSAY COMPETITION**

In March 2007 the Society launched the inaugural Australian Legal History School Essay Competition. The Society awarded a prize to James Triggs, a Year 9 student at Doncaster College in Victoria. His essay (entitled "Authority, Democracy and the Rule of Law") was subsequently published in the *Australian Bar Review* at (2008) 30 Aust Bar Rev 221) and on the Society's website.

Since that time, the Society has conducted an essay competition each year. A list of the previous winners of the competition, along with the essay questions for each year, will be published on the Society's website ([www.forbessociety.org.au](http://www.forbessociety.org.au)).

The 2017 Competition was characterised by essays of high quality on a wide range of topics. The winners of the 2017 competition were:

- Damian Morris (in the tertiary student category) for an essay titled, "A brief legal history of the New South Wales monetary system".
- Sanjana Kumar (in the senior secondary category) for an essay titled, "Mandatory Minimum Sentencing: Australia's Achilles Heel".
- Sophie Yeeun Ku (in the junior secondary category) for an essay on Indigenous Land Rights

The 2018 Competition was characterised by essays of high quality on a wide range of

topics. The winners of the 2018 competition were:

- Sebastian Cassinelli (in the tertiary student category) for an essay titled, “The Constitutionally Implied Freedom of Political Communication: Australian Legal History’s Most Imperative Development”.
- Jinyoung Kim (in the senior secondary category) for an essay titled, “Distorted Narratives of Progress on Indigenous Land Rights”.
- Annette Kim (in the junior secondary category) for an essay on media coverage of Australian Women involved in law and order.

The deadline for submission of essays in this year’s competition is 5.00pm on Monday 23 December 2019. Essayists have been invited to address a theme, topic or question of their own choice on “Australian Legal History”. Possible questions for consideration suggested in the Conditions of Entry and Guidelines (found on the Society’s website) included:

- 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.
- Can Australian History teach us anything about the role of altruism and personal responsibility in the law?
- Does legal history have anything to teach us about whether, on a proper construction of the Australian Constitution, the national parliament’s “marriage power” should be interpreted as including a power to enact legislation defining marriage as including a same sex relationship?
- The use of litigation to restrain the excesses of Government, especially with respect to public policy.

## **PUBLICATIONS**

The Society’s first publication, in 2003, was the 2002 Francis Forbes Lecture, given by Ian Barker QC, *Sorely Tried - Democracy and Trial by Jury in New South Wales*, released in October 2003. It is now out-of-print, but published electronically on the Society’s website.

The Society has published five further books:

- The 2003 Francis Forbes Lecture, given by Philip Powell AM QC, *The Origins and Development of the Protective Jurisdiction of the Supreme Court of New South Wales*.
- *Dowling’s Select Cases 1828 to 1844*, edited by T D Castle and Bruce Kercher - the notebooks of Sir James Dowling, the second Chief Justice of NSW.
- The 2004 Francis Forbes Lecture, given by T D Castle and Bruce Kercher, *The Dowling Legacy - Foundations of an Australian legal culture 1828 - 1844*.
- *Callaghan’s Diary*, edited by J M Bennett AM, formally launched by Judge Greg Woods QC on 31 May 2006.

- *The Kercher Reports: Decisions of the New South Wales Superior Courts, 1788 to 1827*, edited by Bruce Kercher and Brent Salter.

In 2011/2012 the Forbes Society assisted with publication of two books:

- Professor John McLaren's *Dewigged, Bothered and Bewildered : British Colonial Judges on Trial, 1800-1900* (co-published with the Osgoode Society for Canadian Legal History); and
- Dr Paula J Byrne's *Judge Advocate Ellis Bent: Letters and Diaries, 1810-1821*.

## AVAILABILITY OF FORBES SOCIETY PUBLICATIONS

By an arrangement with The Federation Press, these publications can generally be obtained from that publisher.

Website: [www.federationpress.com.au](http://www.federationpress.com.au)  
 Email: [info@federationpress.com.au](mailto:info@federationpress.com.au)  
 Telephone: (02) 9552 2200  
 Fax: (02) 9552 1681

Several *Forbes Lectures* and entries in the Society's *Australian Legal History Essay Competition* have been published in the *Australian Bar Review* and the *Australian Law Journal*.

## THE FORBES FLYER

The Society's newsletter for members, the *Forbes Flyer*, is published quarterly via email and on the Society's web site.

The Editor, David Ash, has developed what has become an entertaining, regular publication reaching out beyond the legal profession, to academia and the general public. We are most grateful to David for all his work over many years to bring out the *Flyer*.

## THE OSGOODE SOCIETY

Membership of the Osgoode Society is open to all comers, as is membership of the Forbes Society. As is apparent from its website ([www.osgoodesociety.ca](http://www.osgoodesociety.ca)), the publications and programme of the Osgoode Society are worthy of both emulation and engagement.

## THE SELDEN SOCIETY

The Forbes Society continues to have a close, collaborative connection with the Selden Society. Like the Osgoode Society, it was an inspiration for establishment of the Forbes Society. Membership of the Selden Society too is encouraged.

The Australian Secretary of the Selden Society is the Librarian of the Supreme Court of Queensland Library. Contact details are:

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## **ACKNOWLEDGEMENTS**

The Society acknowledges the assistance it has received through the voluntary efforts of many people. Particular thanks are due to members of the Council and Tony Cunneen (Website Manager), David Ash (as Editor of the *Flyer*), Fiona Williams (Personal Assistant to Carol Webster SC) and Shari Williams (Associate to Justice Lindsay). We have also been assisted this year in organising lectures and tutorials by Kathleen Morris.

The continuing support of Greg Tolhurst as Honorary Executive Director of the Society, and the support of the Bar Association generally, is vital. Particular thanks go to Bali Kaur and Tiffany McDonald of the NSW Bar Association Professional Development Department and to Alastair McConnachie Deputy Executive Director of the NSW Bar Association for their assistance and support in the promotion of the Society's with the Society's programme of Lectures and Tutorials.

Special thanks are due to Tony Cunneen for all his work in maintaining the website.

**CAROL WEBSTER SC**

**SIMON CHAPPLE**

**Treasurer**

**Secretary**

**18 November 2019**