Australian Heraldic Law and Authority

A Quest for a Champion [1]

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1. Introduction

Australia is a country which had an indigenous population with systems of totems in existence at the time of its settlement by Great Britain. The nature and extent of those systems and their survival is as yet untested and unclear.

Australia is a constitutional monarchy whose sovereignty derives historically from, but is now completely independent of, that of the Queen of the United Kingdom of Great Britain and Northern Ireland — and consequently, is completely independent of her officers and servants. For reasons that I shall set forth below, the Law of Arms of Australia — subject to such rights and systems as exist in relation to the totems of our indigenous peoples — is the inherited Law of Arms of England as it existed in 1828 with such modifications as have been effected by any law of the UK which has paramount effect in Australia, by and in the process of the division of the Crown, by the practices and inactivity of the Australian sovereign, and by Australian legislation including that of the States.

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[1] Acknowledgements:
In relation to constitutional law: The Honourable Michael D Kirby AC, CMG, BA, LLM, BEc. (Univ. of Sydney), Justice, High Court of Australia 1996-2009. President, Court of Appeal of New South Wales 1984-1996, President, Court of Appeal of Solomon Islands 1995-1996, Deputy President, Australian Conciliation and Arbitration Commission and Chairman of the Australian Law Reform Commission 1976-1983.
In relation to legal history: The Honourable John K. McLaughlin BA, LLM (Univ. of Sydney), FSAG an Associate Justice of the Supreme Court of New South Wales.
In relation to indigenous issues: Mark McMillan LLM (ANU), LLM (Univ. of Arizona), a Wiradjuri man and lawyer.
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The Queen of Australia has not delegated her undoubted heraldic powers, and exercises them personally only on rare occasions. Furthermore, the Queen of Australia has not prohibited her Australian subjects from adopting arms, and she does not — unlike her predecessor and namesake — object to them being 'branded with another's marke'[2] (at least heraldically): whether of their own designs, or of designs either granted to them, or registered at their request by the heraldic authorities of other nations. These authorities include the heraldic officers of England, Scotland, and Ireland, who in practice have been the principal sources of both grants and registrations of arms and other armorial emblems for Australians. Nevertheless, in common with their sovereigns, the heraldic officers of England, Scotland, and Ireland have no heraldic jurisdiction over Australia or Australians and, with the exception of those of England, do not purport to exercise such jurisdiction.

Australian heraldic practice is therefore in need of a champion who will convince our political masters, the only advisers of our sovereign the Queen of Australia, to advise her to create the machinery necessary for the official exercise of her Australian heraldic prerogative power and jurisdiction and, until that happens, Australia will be lacking in one of the furnishings or trappings of independent sovereignty common to the United Kingdom and nations which derive their sovereignty from it — most notably Canada and South Africa.

2. Australian Prehistory and Indigenous Totems

The use of emblems in Australia began in the 'dreamtime' of our Aboriginal peoples: a time preserved in their oral history of themselves and the country with which they closely identified themselves. Long after European settlement commenced in 1788, the original peoples continued, in some parts of Australia, to be nomadic and maintained their connection with their country and their totems.

In the absence of an indigenous written language, we are dependent on the record made by the settlers and academics and the maintenance of the oral history by the peoples themselves. Simplistically stated, all indigenous persons were born into a complex set of arrangements which resulted in them identifying with — and being identified by others with — a particular totem. Such totems were and are intimately and inextricably bound up with the 'country' of the individual. As Spencer and Gillen described this relationship, 'each local group ... is composed largely, but not entirely, of individuals who describe themselves by the name of some one animal or plant. Thus there will be one area which belongs to a group of men who call themselves kangaroo men, another belonging to emu men, another to Hakea flower men, and

[2] William CAMDEN, *The Historie of the Life and Reigne of that Famous Princesse Elizabeth* (1634), p. 174

so on, almost every animal and plant which is found in the country having its representative amongst the human inhabitants.'[3]

Fig. 1. Aboriginal Totems, Australian Museum, Sydney N. S. W. (Photo by Tim in Sidney, http://www.everystockphoto.com/photo.php?imageId=568620

British settlement (or, as the Australian indigenous peoples see it, 'British invasion' or 'British dispossession') was swiftly followed by the devastating effects of smallpox and other introduced diseases to which the indigenous peoples had no resistance, and which severely diminished their number in the Sydney region well before 1800, as well as by the even more devastating effects of a legal system which ignored their undoubted rights and their laws. They suffered significant loss of access to their country and, with it, physical connection with their totems.

The pattern of disease, dispossession and (in places) deliberate killing accompanied the spread of British settlement throughout Australia during the 19th Century with a result that, especially in the south-east of the country, it is difficult, almost to the point of impossibility, to reconstruct the culture of the indigenous peoples at the time of their first contact with British convicts, military and settlers.

The culture of the indigenous peoples of the north-west of Australia remains more largely intact than that in other parts of the country, and there they identify various clan groupings and, as I understand it, land formations, with totems such as the emu, the kangaroo, the snake, etc. The indigenous peoples of other parts of Australia, including those of the south-east who were thought to have largely lost contact with their indigenous cultural heritage, have in recent years recovered memories of that cultural inheritance in a manner which

[3] Baldwin SPENCER and F. J. GILLEN, *The Native Tribes of Central Australia* (London: Macmillan and Co., Limited, 1899), 9

is unclear to me. They quite strongly identify themselves with what they see as their inherited totems. This we must and do respect.

I am constantly warned against the risks of attempting to make any correlation between the heraldic system of emblems introduced into Australia by the British (and common, with variations, to all European nations), and the totemic system peculiar to the Australian indigenous peoples. Making such a correlation is seen (with some justice) as attempting to impose alien cultural concepts on indigenous concepts with which they have no reference points. However, in a paper for heraldists, I must try to present the indigenous totemic concepts in our language, and it seems to me that the indigenous peoples of Australia have a relationship with visual totems that might in our language be regarded as akin to our own relationship with heraldic emblems.

On this level, conflict has arisen between indigenous Australians and the received legal system and its heraldic law and practices in relation to the use of what they regard as their totems and, in particular, in relation to the use of representations of the kangaroo and the emu. I will deal with this issue later in this paper.

2. British Settlement and Reception of English Law

Such was the state of Australia in 1770 when Cook commenced his voyage of exploration for and discovery of the Great Southern continent in the Endeavour[4].

Cook's instructions followed the principles of International Law in laying down two ways in which the country which he sought might be acquired for Britain:

> 'You are likewise to observe the Genius, Temper, Disposition and Number of the Natives, if there be any, and endeavour by all proper means to cultivate a Friendship and Alliance with them, making them presents of such Trifles as they may Value, inviting them to Traffick, and Shewing them every kind of Civility and Regard; taking Care however not to suffer yourself to be surprised by them, but to be always upon your guard against any Accidents. You are also with the Consent of the Natives to take Possession of Convenient Situations in the Country in the Name of the King of Great Britain: Or: if you find the Country uninhabited take Possession for his Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessors.'[5]

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[4] This and much of the subsequent material derives from Alex C. CASTLES, *An Australian Legal History* (1982), 21

[5] Transcription of Secret Instructions for Lieutenant James Cook Appointed to Command His Majesty's Bark the Endeavour 30 July 1768, National Archives of Australia, Documenting a Democracy at http://www.foundingdocs.gov.au/resources/transcripts/nsw1_doc_1768.pdf accessed on 24 December 2008. For an analysis of the position from a Canadian

While acknowledging that the territory might be acquired 'with the Consent of the Natives', Cooke's instructions effectively authorized him to conquer any inhabited land if consent could not be obtained. Peaceful occupation of a vacant land was to be the alternative method of acquisition of sovereignty only if the territory was unoccupied.

The opportunity for acquisition by consent of the indigenous peoples did not arise as there was only fleeting contact and no appreciation of the structures of their existence or their relationship with their country. Cook described them as seeming 'to have no fix'd abode but move on from place to place like Wild Beasts in search of food …'. They lived 'wholly by fishing and hunting, but mostly by the former for we never saw one Inch of Cultivated Land in the Whole Country'[6].

Cook laid claim to the eastern seaboard of the continent on the basis that it was to be treated as uninhabited territory and at Botany Bay he ran up the British colours and carved an inscription into a tree. On 22 August 1770 at Possession Island off Cape York he followed the appropriate forms of the day and recorded in his ship's log 'at six possession was taken of this country in his majesty's name and under his colours, fired several volleys of small arms on the occasion, and cheered three times, which was answered from the ship'[7]. As Castles records, 'Through this formal ceremony and supported by the other occasions when the British flag was hoisted on shore, Cook purported to take possession of the eastern coast of the Australian continent for the British Crown.'[8]

Cook having left, the occupier did not return until 1788 in the form of the First Fleet under the command of Captain Arthur Phillip. Phillip's instructions of 25 April 1787 made no provision for preserving the lands or the customs of the indigenous peoples but provided:

> 'You are to endeavour by every possible means to open an Intercourse with the Natives and to conciliate their affections,

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perspective, see C. S. T. MACKIE, 'The Reception of English Armorial Law into Canada', *The Coat of Arms*, Third Series 4.2.216 (Autumn 2008), 137-153, from a New Zealand perspective see Noel COX, 'The Law of Arms in New Zealand', originally published (1998) 18 (2) *New Zealand Universities Law Review* 225-256 at http://www.geocities.com/noelcox/Law_of_Arms.htm accessed on 19 January 2009 and from a British perspective see G. D. SQUIBB, 'Heraldic Authority in the British Commonwealth', *The Coat of Arms* 10. 76 (October 1968), 125-133. Not all of this instruction was mandated by International Law.

[6] Extract from the Journal of the First Voyage of Captain James Cook in Manning CLARK (ed), *Sources of Australian History* (OUP, 1977), 52; CASTLES, 22

[7] CLARK, 25-26; CASTLES, 22

[8] CASTLES, 22. The British Crown to which Castles refers was the Crown of the Kingdom of Great Britain which had come into existence in 1707 on the Union of the Kingdoms of England and Scotland. Ireland remained a separate kingdom until its union with Great Britain in the Kingdom of Great Britain and Ireland in 1801.

> enjoining all Our Subjects to live in amity and kindness with them. And if any of Our Subjects shall wantonly destroy them, or give them any unnecessary Interruption in the exercise of their several occupations. It is our Will and Pleasure that you do cause such offenders to be brought to punishment according to the degree of the Offence. You will endeavour to procure an account of the Numbers inhabiting the Neighbourhood of the intended settlement and report your opinion to one of our Secretaries of State in what manner Our Intercourse with these people may be turned to the advantage of this country.'[9]

The Instructions assumed that the whole of the territory belonged to and was at the disposition of the British Crown and authorised Phillip to make land grants to emancipated convicts.[10] As Castles describes the events:

> 'The ceremonies which followed the arrival of the First Fleet at Port Jackson confirmed that a new legal regime was being created in an area being regarded as otherwise unclaimed territory. On 26 January 1788 a simple, symbolic ceremony took place at what is now … Circular Quay in Sydney. In traditional fashion the Governor and his officials affirmed that the British Crown was asserting an independent right to control New South Wales. The British flag was unfurled.' [11]

On 7 February 1788 a more elaborate ceremony was carried out which Castles records in the following terms:

> 'Convicts and marines assembled in a clearing near Sydney Cove. The Governor and his chief officials marched to the centre of the clearing to strains of music from the maritime band. Phillips Commission was read out. The Act of Parliament[12] and the first charter of justice[13] which created the first courts were broadcast to

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[9] Transcription of Governor Phillip's Instructions 25 April 1787 National Archives of Australia, Documenting a Democracy at http://www.foundingdocs.gov.au/resources/transcripts/nsw2_doc_1787.pdf accessed on 24 December 2008

[10] *Ibid*.

[11] CASTLES, 24

[12] New South Wales Courts Act 1787 (UK), 'An Act to enable His Majesty to establish a Court of Criminal Judicature on the Eastern Coast of New South Wales, and the Parts adjacent '(27 Geo. III C.2) at National Archives of Australia, Documenting a Democracy at http://www.foundingdocs.gov.au/item.asp?sdID=69 accessed on 27 December 2008

[13] New South Wales (First) Charter of Justice, Letters Patent 2 April 1787, SRNSW: X24 at National Archives of Australia, Documenting a Democracy at http://www.foundingdocs.gov.au/item.asp?sdID=70 accessed on 27 December 2008.

> the convicts and their jailers. This second ceremony, like the first, was an assertion of independent British authority over New South Wales. It proclaimed, in effect, that Britain was now beginning to perfect its claim to New South Wales by occupying part of this new possession and setting up its first governmental administration.'[14]

Phillip's Instructions proclaimed that his colonial demesne extended from Cape York in the North to the southern trip of Van Diemen's Land (now Tasmania) and to the west to the 135th degree of longitude which is a line, for those who have any familiarity with the map of Australia, which runs from somewhat to the west of the Gulf of Carpentaria in the north to somewhat to the west of Spencer's Gulf in the south. It was an area considerably larger than that claimed by Captain Cook. The Instructions also declared authority over the adjacent islands. In fact, the actual area occupied in the initial period of colonisation was only a tiny fragment of the larger area over which sovereignty was claimed. Further settlements were established in Western Australia, South Australia, and Victoria over the succeeding years up till 1836.[15]

The law to be applied in such a possession was described by Brennan J in these terms:

> 'According to Blackstone, English law would become the law of a country outside England either upon first settlement by English colonists of a "desert uninhabited" country or by the exercise of the Sovereign's legislative power over a conquered or ceded country.' 'When "desert uninhabited countries" were colonised by English settlers, however, they brought with them "so much of the English law as (was) applicable to their own situation and the condition of an infant colony" (41) Commentaries, Bk I, ch 4, p 107'[16]

The entire continent was treated by Britain as *territorium nullius* under International Law[17] and became, as Evatt put it, 'one of the rare examples of a large tract of inhabited territory acquired peaceably by occupation without any consent from the native population.'[18] As Castles noted, 'Virtually without question it was assumed from the beginning that transplanted English laws would form a substantial part of the legal regime.'[19]

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[14] CASTLES, 25
[15] CASTLES, 27
[16] Brennan J (with whom Mason CJ & McHugh J concurred) in Mabo v Queensland (No 2) ("Mabo case") [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992), par 35
[17] CASTLES, 20
[18] H. V. EVATT, The Acquisition of Territory in Australia and New Zealand, Grotian Society Papers (1968) 16 at 18
[19] CASTLES, 378

The New South Wales Courts Act of 1787 and the First Charter of Justice assumed that British criminal statutes and British unenacted criminal law would be applied in the first colonial court[20] and provided:

> 'the said court shall be a court of record and shall have all such powers as by the laws of England are incident and belonging to a court of record.'[21]

In practice, the position remained rather chaotic in the absence of copies of statutes or law books of almost any nature.[22] This did not much matter when the vast majority of the European population were convicts subject to a military regime and a strong governor, and recourse to law was limited to the criminal law. But the position changed as the free population increased, both by releases of convicts on tickets of leave or pardons, and by immigration.

Various reforms were instituted by the Second Charter of Justice in 1823,[23] but these did not resolve the uncertainties and in 1828 the UK Parliament passed the Australian Courts Act 1828 which provided:

> 'all laws and statutes in force within the realm of England at the time of the passing of this act (not being inconsistent herewith or with any charter or letters patent or order in council which may be issued in pursuance hereof) shall be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land[24] respectively so far as the same can be applied within the said colonies and as often as any doubt shall arise as to the application of any such laws or statutes in the said colonies respectively it shall be lawful for the governors of the said

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[20] CASTLES, 378

[21] New South Wales Courts Act 1787 (UK), 'An Act to enable His Majesty to establish a Court of Criminal Judicature on the Eastern Coast of New South Wales, and the Parts adjacent '(27 Geo. III C.2) at National Archives of Australia, Documenting a Democracy at http://www.foundingdocs.gov.au/item.asp?sdID=69 accessed on 27 December 2008.

[22] CASTLES, 382

[23] Second Charter of Justice 13 October 1823 (State Records NSW: X22) at National Archives of Australia, Documenting a Democracy at http://www.foundingdocs.gov.au/item.asp?sdID=71 accessed on 27 December 2008

[24] Van Diemen's land had become a colony separate from New South Wales on 3 December 1825; Historical Records of Australia, Series I Volume 12 at http://www.foundingdocs.gov.au/resources/transcripts/tas3i_doc_1825.pdf accessed on 19 January 2009. With effect from 1 January 1856, the name of this colony was changed to Tasmania by Proclamation made on 21 July 1855: Hobart Town Gazette, 27 November 1855 at National Archives of Australia, Documenting a Democracy at http://www.foundingdocs.gov.au/resources/transcripts/tas6_doc_1855.pdf accessed on 3 January 2009

> colonies respectively by and with the advice of the legislative councils of the said colonies respectively by ordinances to be by them for that purpose made to declare whether such laws or statutes shall be deemed to extend to such colonies and to be in force within the same or to make and establish such limitations and modifications of any such laws and statutes within the said colonies respectively as may be deemed expedient in that behalf provided always that in the meantime and before any such ordinances shall be actually made it shall be the duty of the said supreme courts as often as any such doubts shall arise upon the trial of any information or action or upon any other proceeding before them to adjudge and decide as to the application of any such laws or statutes in the said colonies respectively' [25]

Thus the law of Australia was eventually settled as the law of England as in force on 25 July 1828; it is worth noting that the laws of Scotland and of Ireland, though constituent parts of the occupying power, did not rate a mention.

All of this is significant here because the Law of Arms of England clearly falls within the expression 'all laws and statutes in force within the realm of England'. Furthermore, the Law of Arms is not inconsistent with the Australian Courts Act 1828 or, as far as I have been able to ascertain, any charter or letters patent or order in council which was subsequently issued in pursuance of the Act; similarly, I have been unable to identify any ordinance made by a Governor of New South Wales or Van Diemen's Land to declare whether the Law of Arms was deemed to extend to those colonies; and, there has been no decision of the Supreme Court of either colony (or States as they became in 1901) of which I am aware as to the application of the Law of Arms in those colonies.

Whether law of arms of England was received into either colony, however, still depends upon a determination as to whether English heraldic law could 'be applied within the said colony'. This determination must be made because heraldic law in England is exceptional, even in that country. It derives from the Roman civil law, and was administered in the only civil law court remaining (if indeed it still exists) in England: namely, the High Court of Chivalry. There was no equivalent court in New South Wales, and if English heraldic law was introduced by the Australian Courts Act of 1828 (UK), it is arguable that

[25] Australian Courts Act 1828 (UK), 'An Act to provide for the Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof, and for other Purposes relating thereto.' (9 Geo. IV C.83) at National Archives of Australia, Documenting a Democracy at http://www.foundingdocs.gov.au/item.asp?sdID=72 accessed on 27 December 2008

under that Act that it did not lie within the jurisdiction of the Supreme Courts of New South Wales or Van Diemen's Land.[26]

Contrary to this argument, however, the Act provided that 'all laws and statutes in force within the realm of England at the time of the passing of this act ... shall be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land.' And even if the Supreme Court of New South Wales did not *initially* have jurisdiction in this area of law, the position was clarified by the Supreme Court Act 1970 (NSW), which declared that the Supreme Court has 'all jurisdiction which may be necessary for the administration of justice in New South Wales'.[27] This leaves no room for doubt that its jurisdiction extends to the administration of justice under the received Law of Arms. Nevertheless, it should be immediately admitted that there has been no case in the Supreme Court of New South Wales, or any other Australian court as far as I can ascertain, which has tested whether the law of arms of England fell, in 1828, within the category of laws which could be applied within the colony.

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[26] The jurisdiction of those Courts was 'cognizance of all pleas civil criminal or mixed and jurisdiction in all cases whatsoever as fully and amply to all intents and purposes in New South Wales and Van Diemen's Land respectively and all and every the islands and territories which now are or hereafter may be subject to or dependent upon the respective governments thereof as his majesty's courts of king's bench Common Pleas and Exchequer at Westminster or either of them lawfully have or hath in England and the said courts respectively shall also be at all times courts of oyer and terminer and gaol delivery in and for New South Wales and Van Diemen's Land and the dependencies thereof respectively and the said judges so appointed shall have and exercise such and the like jurisdiction and authority in New South Wales and Van Diemen's Land and the dependencies thereof respectively as the judges of the courts of king's bench common pleas and exchequer in England or any of them lawfully have and exercise and as shall be necessary for carrying into effect the several jurisdictions powers and authorities committed to the said courts respectively And be it further enacted that the said supreme courts in New South Wales and Van Diemen's Land respectively shall and may inquire of hear and determine all treasons piracies felonies robberies murders conspiracies and other offences of what nature or kind soever committed or that shall be committed upon the sea or in any haven river creek or place where the admiral hath power authority or jurisdiction or committed or that shall be committed in the islands of New Zealand Otaheite or any other island country or place situate in the indian or pacific oceans and not subject to his majesty or to any european state or power by the master or crew of any british ship or vessel or any of them or by any british subject sailing in or belonging to or that shall have sailed in or belonged to and have quitted any british ship or vessel to live in any part of the said islands countries or places or that shall be there living', Australian Courts Act (1828) (Documenting a Democracy)

[27] Supreme Court Act 1970 No 52 (NSW), section 23, at http://www.legislation.nsw.gov.au/scanview/inforce/s/1/?TITLE=%22Supreme%20Court%20Act%201970%20No%2052%22&nohits=y accessed on 3 January 2009

Unenacted British law has declined in importance as a source of law in Australian courts in the face of statute law-making in the past two centuries. However, it remains an important, sometimes a crucial, source of legal principles in some contexts.

The difficulties with the enforcement of unenacted law are described by Castles in these terms:

> 'At core, unenacted law was no more than a set of principles. They were not self-executing. They could only be brought into operation by the appointment of persons or bodies with authority recognised by law to do this. Thus, unenacted law could only be applied when courts or bodies were established with appropriate and recognised authority to do this.'[28]
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> 'In practice, however, Australian courts normally have shown little inclination to examine closely the suitability of unenacted law to Australian conditions.'[29]
>
> '... The principles of common law regulating the exercise of government power, including the prerogative power of the Crown, have become entrenched as an accepted feature of constitutional law applying to the States.'[30]
>
> 'As far as the working of the national government is concerned, unenacted law based on English precedents has also come to play a role in determining the application of the Commonwealth Constitution.'[31]

Certainly no heraldic authority has been created to grant and generally administer the machinery of heraldry. In view of the jurisdiction of the Supreme Court of New South Wales, however, it is irrelevant that no specialist court equivalent to the High Court of Chivalry was established in Australia to resolve disputes relating to heraldry.

The Crown of the United Kingdom is the fountain of all honour and dignity[32] for the United Kingdom and its dependencies, and has the right to confer all titles of honour, dignities and precedence[33] and to create and grant orders and awards. As part of that prerogative power, the Crown of the United Kingdom has the power to grant arms.[34] This aspect of the law of England was part of the law which was introduced into and was capable of exercise in the colonies of New South Wales and Van Diemen's Land in 1828. The British and later United Kingdom sovereigns

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[28] CASTLES, 495
[29] CASTLES, 507
[30] CASTLES, 509
[31] CASTLES, 512
[32] Prince's Case [1606] 8 Co Rep 1a at 18b quoted in *Halsbury's Laws of England* (4th edn. reissue) Vol. 8(2), par. 831
[33] 4 Co Inst 361, 363; Bl Com (14th edn.) 271
[34] *Halsbury's Laws of England*, Vol. 8(2), par. 834

provided seals of their arms for use by their Governors[35] and Supreme Courts[36] and, as conditions became more settled, their English Kings of Arms made grants of arms to Australian residents.[37] It is clear that the sovereign and his United Kingdom Government and his officers of arms believed that the Law of Arms of England, at least in some part, 'was applicable to the situation and the condition of an infant colony.'[38]

Fig. 2. The Armorial Achievement of the Queen and Commonwealth of Australia (1908, 1912)[39]

If it is accepted that the Law of Arms of England was received into the law of Australia, the next issues to be determined are the following: (1) the extent to which that law as it existed in 1828 was received; (2) the extent to which what was *not* at first received later became applicable as the situation and condition of the colony developed; and (3) the extent to which parts which *were* received later *ceased* to be applicable as the

[35] For New South Wales, Royal Warrant 4 August 1790 at http://www.heritage.nsw.gov.au/10_subnav_08_01_02.htm accessed on 19 January 2009

[36] For the Supreme Court of New South Wales, Second Charter of Justice at National Archives of Australia, Documenting a Democracy at http://www.foundingdocs.gov.au/resources/transcripts/nsw3iii_doc_1823.pdf accessed on 19 January 2009

[37] The first such grant was made to Thomas Icely on 21 December 1840, see SM SZABO, 'Thomas Icely (1797-1874) - The First Australian Grantee of English Arms', *Heraldry News*; *The Journal of Heraldry Australia* (now the Australian Heraldry Society) (July 2006) No. 42, 27

[38] William BLACKSTONE, *Commentaries: With Notes of Reference* … St. George Tucker (ed.) (1996), Bk. I, ch. 4, p 107

[39] This and the later figures (unless otherwise indicated) are published at the website Heraldry of the World – Australia (http://www.ngw.nl/int/aus/aus.htm)

constitutional development of the colony progressed to complete independent sovereignty. These issues, however, are beyond the scope of this paper.

3. The Developing Independence of Australia, 1931-1986

At its foundation, Australia was a direct possession of the Kingdom of Great Britain (later the United Kingdom of Great Britain and Ireland and still later Northern Ireland.) This remained the case until responsible government was granted to the eastern colonies in 1856.

The effective independence of the greater Dominions, combined with the desire of their governments to have that independence legally recognized, resulted in the Statute of Westminster (1931) (UK). This statute applied to the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State, and Newfoundland — but so far as concerns Australia, New Zealand, and Newfoundland, *only* when it was ratified by their respective parliaments. Australia finally ratified the Statute in 1942, backdating its application to 1939 so as to clarify Government war powers.[40]

Although the Statute of Westminster freed the National Government and the Parliament of Australia, and of the other Dominions, from a number of constraints exercisable by the Government and Parliament of the United Kingdom:

- the King of the United Kingdom of Great Britain and Northern Ireland remained the King in respect of the States,
- the States retained their previous status as dependencies of the UK,
- advice to the King on Australian State matters was provided solely by UK ministers rather than State ministers,
- the UK Parliament retained the power to pass legislation relating to the Australian States.[41]

As the separate national Australian Crown evolved, from at least 1920 the ministers of the Australian Government provided advice directly to the Sovereign (which is one *indicia* of a separate Crown in the context of the Australian federation) whilst the advice of the Premiers of the State of New South Wales was provided to the Secretary of State for the Colonies (later to the Secretary of State for the Dominions and still later to

[40] Statute of Westminster Adoption Act 1942 (Aust.) at http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/current%5Cbytitle/9DD3A398E7769C4DCA256F710050179F?OpenDocument&mostrecent=1 accessed on 3 January 2009

[41] Anne TWOMEY, *The Constitution of New South Wales* (The Federation Press, Leichardt, 2004), 601-603

the Secretary of State for Commonwealth Relations[42]), who in turn provided advice to the King or Queen of the United Kingdom.[43]

Fig. 3. The Armorial Achievement of the Queen in Right of the State of South Australia

Until the passing of the Australia Acts (UK and Australia) in 1986 which finally severed the constitutional links between Australia and its States and the United Kingdom[44], Australia was in the position of having

[42] Stanley MARTIN: *Perspectives on Honours of Australia,* in *Honouring Commonwealth Citizens* (Honours and Awards Secretariat, Ontario Ministry of Citizenship and Immigration, Toronto, 2007), 52.

[43] TWOMEY, 601

[44] Justice Kirby (High Court of Australia 1996-2009) believes that the severance had occurred well before 1986: "As to the version of the *Australia Act* enacted by the Parliament of the United Kingdom of Great Britain and Northern Ireland[210], I deny the right of that Parliament in 1986 (even at the request and by the consent of the constituent Parliaments of Australia[211]) to enact any law affecting in the slightest way the constitutional arrangements of this independent nation[212]. The notion that, in 1986, Australia was dependent in the slightest upon, or subject to, the legislative power of the United Kingdom Parliament for its constitutional destiny is one that I regard as fundamentally erroneous both as a matter of constitutional law and of political fact. Indeed, I regard it as absurd. Despite repeated challenges by me in these proceedings [213], no arguments were advanced to defend this last purported Imperial gesture. Mention of the United Kingdom Act in the joint reasons [214] appears to be descriptive not normative. That Act was something done, doubtless with

the Queen of Australia sovereign in relation to national matters while the Queen of the United Kingdom remained sovereign in respect of the States.

If, in the context of a federation such as Australia, you can discern the existence of a separate sovereign by the existence of a separate legislature, a government responsible to that legislature and advice to the sovereign being provided only by the leader of that government[45], then the Australia Acts did not merge the sovereignty of the United Kingdom in respect of the States into the sovereignty of Australia (as happened when the sovereignties of England and Scotland merged in 1707 on the creation of the Kingdom of Great Britain), but rather each State in Australia is — except in relation to the powers which are vested in the national sovereign — itself sovereign. On this basis, it is argued that each State has a separate sovereign and Australia has seven Queens.

Supportive of the argument that there is a single sovereign in all jurisdictions in Australia,[46] but not inconsistent with the argument that there are seven, both South Australia[47] and Western Australia[48] have Royal Styles and Titles Acts which follow the national Royal Style and Titles Act[49] in adopting the style and titles:

> 'Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth.'

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bemusement by the British authorities, at the request of their Australian counterparts. Unfortunately, the latter remembered their legal studies decades earlier but failed to notice the intervening shift in the accepted foundation of sovereignty over Australia's constitutional law. Sovereignty in this country belongs to the Australian people as electors. It belongs to no-one else, certainly not to the Government and Parliament of the United Kingdom elected in the House of Commons from the people of those islands and not elected at all in the House of Lords." Attorney-General (WA) v Marquet [2003] HCA 67 (at par 203); 217 CLR 545 per Kirby J.

[45] TWOMEY, 602

[46] But see contra, Michael STOKES, 'Are There Separate State Crowns?', (1998) 20 *Sydney Law Review*, 127

[47] Royal Style and Titles Act 1973 (SA) at http://www.legislation.sa.gov.au/LZ/C/A/ROYAL%20STYLE%20AND%20TITLES%20ACT%201973/CURRENT/1973.76.UN.PDF accessed on 28 December 2008

[48] Royal Style and Titles Act 1947 (WA) at http://www.slp.wa.gov.au/pco/prod/FileStore.nsf/Documents/MRDocument:1999P/$FILE/RoyalStyleAndTitlesAct1947_01-00-03.pdf?OpenElement accessed on 28 December 2008

[49] Royal Style and Titles Act 1973 (Cwth.) at http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/8FC5F0783FF76F5ECA25716B0024AD47/$file/RoyalStyleTitle73.pdf accessed at 28 December 2008

No other State or Territory has passed legislation on the Royal style and titles although, in 1974, the Queensland government attempted to seek the advice of the Privy Council as to whether the legislature of Queensland had the power to alter the Queen's style and titles in relation to Queensland to 'Elizabeth the Second, by the Grace of God Queen of the United Kingdom, Australia, **Queensland** (*emphasis added*) and Her other Realms and Territories, Head of the Commonwealth.'[50] The High Court held that the Queensland legislation under which the proposed referral to the Privy Council was sought to be made was unconstitutional as being in conflict with the Australian Constitution.[51] The right of the Queensland legislature to make such a change was not determined and the proposal has not since been taken up again.

Australia has evolved from a possession of the indivisible Crown of the Kingdom of Great Britain to a nation with one and, possibly, seven separate Crowns constitutionally and politically divided from the Crown of the United Kingdom, and there is no reason to doubt that the national crown and each separate State Crown, if they exist, is vested with the prerogative right in respect of honours including the right to grant and regulate arms, to create orders, decorations and awards, to create and regulate titles of honour, to create an heraldic authority and to appoint officers of arms. Even if separate State Crowns do not exist, there is no reason to doubt that the States have the power to create their own honours systems as the Canadian provinces (with a considerably lesser degree of sovereignty) have done.

4. Australian Heraldic Law and Legislation

Before the development of the English Parliament, all power was vested in the King. Dicey gives a standard definition of prerogative powers of the Crown as '… the remaining portion of the Crown's original authority, and it is therefore … the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his ministers.' [52] Dicey's definition owes much to that of Blackstone.

The power in relation to honours is part of the 'Royal prerogative'.[53] It makes more sense to refer to these powers not as 'Royal'

[50] This involved only the intrusion of the word Queensland into the existing style and titles under The Royal Style and Titles Act 1953 (Aust.)
[51] Commonwealth v Queensland [1975] 134 CLR 298
[52] A. V. DICEY, Introduction to the Study of the Law of the Constitution (10th edn. 1959), 424
[53] '… what is called the executive power is vested in the king alone, and consists of the royal prerogative.' F. W. MAITLAND, Legal Theory of the Constitution, (New Jersey, 2001, Reprint), 415; 'In my view, however, whether one characterises the Prime Minister's actions as communicating Canada's policy on honours to the Queen, giving her advice on Mr. Black's peerage, or opposing Mr.

prerogative powers but as 'ministerial executive' prerogative powers[54] as they are exercised by the Ministers in the name of the sovereign rather than by the sovereign herself.

Prerogative powers are then those powers which were, in previous times, the exclusive power of the sovereign and which have not been taken over by parliament by the enactment of legislation on the same subject matter. Once the parliament has taken over a particular subject matter by legislating on the subject, it ceases to be part of the prerogative powers of the Crown and ceases to be exercisable by the sovereign without the advice and authority of the parliament.

To the best of the writer's knowledge, the English/British/United Kingdom legislature has not interfered with any part of the Law of Arms of England, which accordingly remains part of the prerogative power of the Crown.

In Scotland on the other hand, various aspects of the heraldic power are subject to legislation, so that those aspects no longer form part of the prerogative powers of the Crown. Even in Scotland, however, the exercise of the prerogative power of granting arms has not been regulated by statute, and it accordingly remains a prerogative power and its exercise by Lyon, King of Arms of Scotland is not subject to review by the Courts.[55]

In Australia, the received Law of Arms has been affected by local legislation. The legislatures of Australia[56] and its various States and Territories[57] have entered the field of heraldic law to provide for use of the Royal arms of the UK[58], to protect the Royal arms of the UK from

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Black's appointment, he was exercising the prerogative power of the Crown relating to honours', Black v Chrétien and Attorney General for Canada, Court of Appeal for Ontario, Laskin, Goudge and Feldman JJA, 18 May 2001, C33887, para 35 per Laskin JA at http://www.ontariocourts.on.ca/decisions/2001/may/blackC33387.htm accessed on 27 December 2008

[54] Fourth Report of the Select Committee on Public Administration (UK), 4 March 2004

[55] Sir Thomas INNES OF LEARNEY, Scots Heraldry (London & Edinburgh, 1978), pp. 8-9

[56] Flags Act 1953 (No. 1 of 1954) (Cwth.)

[57] State Arms, Symbols and Emblems Act 2004 (No. 1 of 2004) (NSW).
Emblems of Queensland Act 2005 (No. 5 of 2005) (Qld)
Unauthorised Documents Act 1916 (No. 1242 of 1916) (SA)
State Flag Act 2006 (No. 22 of 2006) (WA)
Flag and Emblem Act (No. 24 of 1985) (NT)
City of Canberra Arms 1932 (No. 3 of 1932) (ACT). The arms are misnamed as there is no local government authority known as the City of Canberra and the arms are those used by the Government of the Australian Capital Territory.
Armorial Bearings Protection Act 1979 (No. 108 of 1979) (WA)

[58] Constitution Act 1975 (No. 8750 0f 1975) (Vic.)
Constitution Act 1935 (No. 2151 of 1934) (SA)

unauthorised use[59], to define and protect their State arms, flags, symbols or emblems and to provide for the use of their arms[60].

In 2004 the Parliament of New South Wales enacted the State Arms, Symbols and Emblems Act 2004 (NSW) by which the legislature supplanted the prerogative power of the Crown in respect of the arms of dominion and sovereignty of the State of New South Wales[61]. It is an example of the action of a State Government which was politically unwilling to exercise the prerogative powers of the Crown to define and protect the arms of dominion and sovereignty of the State, thus displacing the prerogative power of the Crown to that extent.

I am pleased to be the author of that Act which had its origins in what I saw as a totally inappropriate and anachronistic display of the Royal Arms of the United Kingdom of Great Britain and Northern Ireland above the judges in the Court of Appeal and the Supreme Court of New South Wales, above the Speaker in the Legislative Assembly and above the President in the Legislative Council. The whole of the legislative machinery of the State and its highest courts operated under the arms of dominion and sovereignty of what had been, at least since 1986, a foreign power.[62] This usage was not paralleled in the federal Parliament or in the federal courts where the armorial achievement of Australia is exclusively used as the emblem of dominion and sovereignty of the nation.

I made representations to State government ministers in an attempt to have the State Government advise the Governor to exercise of the prerogative power of the Crown to reinforce government policy that the State Arms of New South Wales were to be used on all occasions when the use of arms of dominion and sovereignty was appropriate. The Labour Government of New South Wales was disinclined to exercise the prerogative powers in relation to such a matter and was of the view that legislation was appropriate.

The principal section of the Act is section 4(1) which provides:

> 'Whenever after the commencement of this Act, in a Parliament building, a courthouse, an office or official residence of a governor

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[59] Unauthorised Documents Act 1958 (No. 6403 of 1958) (Vic.)
Unauthorised Documents Act 1916 (No. 1242 of 1916) (SA)
Armorial Bearings Protection Act 1979 (No. 108 of 1979) (WA)

[60] Land Titles Act 1980 (No. 19 of 1980) (Tas.), section 5

[61] State Arms, Symbols and Emblems Act 2004.(No. 1 of 2004) (NSW) at http://www.legislation.nsw.gov.au/scanview/inforce/s/1/?TITLE=%22State%20Arms,%20Symbols%20and%20Emblems%20Act%202004%20No%201%22&nohits=y accessed on 3 January 2009.

[62] 'At the very latest, the Commonwealth of Australia was transformed into a sovereign, independent nation with the enactment of the Australia Acts. The consequence of that transformation is that the United Kingdom is now a foreign power for the purposes of s 44(i) of the Constitution.' per Gaudron J in Sue v Hill [1999] 199 CLR 462 at http://www.austlii.edu.au/au/cases/cth/high_ct/1999/30.html accessed on 4 January 2009

> or a Government office, in any other building or place, or on any official seal or document, or in any other connection, arms representing the authority of the Crown or the State are to be used for any official purpose, the State arms or a State symbol is to be used, and not the Royal Arms of the United Kingdom.'

The State arms are defined by reference to a schedule, which sets out the blazon from the Royal Warrant assigning arms for the State in 1906 with an indicative monochrome depiction of the arms being provided. A note to the blazon records that 'At the commencement of this Act, the State arms were the armorial ensigns and supporters assigned for New South Wales by Royal warrant of His Majesty King Edward VII on 11 October 1906.' Regrettably, the legislative approach to the issue means that the legislature has supplanted the prerogative as the source of arms (as well as badges, flags and emblems) for the State of New South Wales.

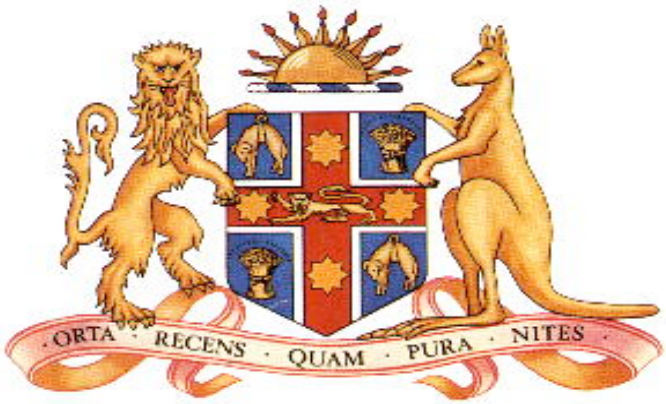

Fig. 4. The Armorial Achievement of the Queen in Right of the State of New South Wales (1906)

The act presupposes the application of a law of arms and section 4(4) further provides that the 'State arms may be used with such external ornaments as are consistent with their status as arms and symbols of dominion and sovereignty', a reference which, in a Westminster system of government, only has meaning in the context of a law of arms.

Gradually over the five years since the Act was passed, the Royal Arms of the United Kingdom as used in the Courts and the Parliament of New South Wales have been replaced with the State Arms of New South Wales which accurately may be described as the Royal Arms of New South Wales although there is still work to be done.[63]

The Act contains prescriptive conservation measures intended to ensure that sculpted arms or arms in any durable form that form part of a building are not to be removed and arms which are removed are to be

[63] Changes to the State seal and the Governor's seal are still awaited.

housed or otherwise dealt with in such manner as the Premier, after consultation with the Heritage Council of New South Wales, may direct to ensure their appropriate conservation, interpretation and display as part of the constitutional, legal, cultural and artistic heritage of the State.[64] Work also needs to be done in this area.

In addition to these State acts and the changes effected in the process of our constitutional evolution, at least one State has effected a substantive alteration to the received Law of Arms, if one assumes (which I do not) that the prohibition in the Law of Arms of England against the assumption of arms forms part of the received Law of Arms of Australia and if one also assumes that the Law of Arms of Australia is capable of amendment by State legislation for the purposes of that State which raises, again, the issue of whether Australia has one or seven Crowns.

Fig. 5. The Armorial Achievement of the Queen in Right of the State of Tasmania (1917)

The Tasmanian Local Government Act 1993[65] provides:

> '**336. Council arms**
> (1) A council may adopt arms [sic] in the form of a badge, crest or flag or a combination of these.
> (2) A council may display and use the arms in any manner it thinks fit.
> (3) A person must not use or display the arms of a council without its approval.
> Penalty:
> Fine not exceeding 10 penalty units.'

This is, in effect, the Law of Arms of Tasmania for local government councils — or it would be, if 'arms' could take the form of a badge, crest,

[64] State Arms, Symbols and Emblems Act 2004 (NSW), section 5 (5)
[65] Local Government Act 1993 (No. 95 of 1993) (Tas.), section 336

or flag. It must be assumed that by 'crest' the draftsmen of the Act meant either 'arms' or 'achievement', but his misuse of heraldic terminology is an indication of how little even the highest legal and political authorities of the State understand the heraldic emblematic code, and how much they have need for an heraldic authority of some kind to advise them.

5. Heraldic Authority in Australia

Part of the process leading to the enactment of the State Arms, Symbols and Emblems Act 2004 (NSW) was a reference to the New South Wales Legislative Council's Standing Committee on Law and Justice which canvassed widely for submissions, held a number of public hearings and reported extensively on the first Bill[66] and considered a number of submissions in support of the establishment of an Australian heraldic authority.

The Committee made two recommendations, neither of which have been taken up by the Government of New South Wales, as follows:

> 'The Committee recommends that the Premier consult with the Commonwealth Government with a view to promoting favourable consideration of the establishment of a Commonwealth heraldic authority to grant and register arms and to regulate heraldic usage in States and Territories in Australia.
> The Committee recommends that the Premier favourably consider the establishment of a New South Wales heraldic authority to grant and register arms and to regulate heraldic usage in New South Wales, until such time as any Commonwealth heraldic authority is established.'[67]

Heraldic authority over Australia was long exercised by the College of Arms[68] and, so long as the King or Queen of the United Kingdom was the sovereign of Australia or of the States, this was appropriate. However, possibly from the coming into force of the Statute of Westminster in 1939, probably no later than the enactment of the Royal Styles and Titles Act 1953 (Cwth.), and certainly since the Australia Acts of 1986 (UK and Cwth.), the Queen of Australia has been a separate legal personality from the Queen of the United Kingdom.

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[66] State Arms Bill 2002 (NSW)

[67] Report on the Proposed State Arms Bill, Report 23 (December 2002), Legislative Council, Standing Committee on Law and Justice, Parliamentary Paper Number 326, 98

[68] The first grant of arms to an Australian resident by the English Kings of Arms was made to Thomas Icely (1797-1874) on 21 December 1840; see footnote 37

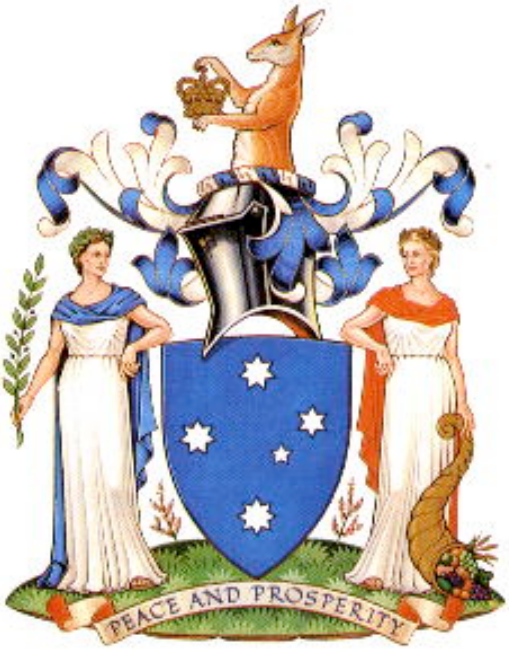

Fig. 6. The Armorial Achievement of the Queen in Right of the State of Victoria (1910)

Somewhat anachronistically, in 1982[69], the College of Arms altered its practice in relation to grants of arms to Australian citizens or bodies corporate and commenced to use the style and titles of the Queen of Australia in the dating clause so that, as in the case of a grant to the Law Society of New South Wales made on 27 May 2005, the grant was said to have been made 'in the 54th year of the reign of our Sovereign Lady Elizabeth II by the grace of God Queen of Australia and her other realms and territories, Head of the Commonwealth'[70] which is the royal style and titles of the Queen of Australia[71].

The present extent of the jurisdictional claims of the English Kings of Arms in relation to Australia is confusing. In October 2006, the Department of the Australian Prime Minister and Cabinet sought to rectify this anomalous misuse of our sovereign's name and authority. The Department wrote to Garter King of Arms:

> 'I understand that the College of Arms grants coats of arms under a delegation from Her Majesty the Queen of the United Kingdom,

[69] Letter dated 1 December 2006 from Peter Gwynn-Jones, Garter King of Arms to Peter Rush, Assistant Secretary, Awards and Culture Branch, Australian Government Department of the Prime Minister and Cabinet – copy in the possession of the author.
[70] Grant transcription in the possession of the author.
[71] Royal Style and Titles Act 1973 (No. 114 of 1973) (Cwth.), section 2

> rather than under a delegation from Her Majesty the Queen of Australia.'
>
> The issue that has come to attention is a case in which the College of Arms has made a grant of a coat of arms using the royal styles and titles of Her Majesty the Queen of Australia, which I understand is not correct.
> I believe a possible solution is for the College of Arms to use the royal styles and titles of Her Majesty the Queen of the United Kingdom in granting coats of arms to individuals and organisations in Australia in the future.'[72]

To this Garter responded in December 2006 in a letter which warrants extensive quotation:

> 'It is the case that in letters patent granting arms to Australian citizens and bodies corporate, the Queen's Australian style is recited. However, this appears only in the dating clause at the end of the document where the regnal year is given. This practice was introduced in 1982 as a courtesy to the recipients of such grants and I know that the gesture has been appreciated by Australian grantees.
> Nonetheless, the use of the style in the dating clause is not itself an assertion of heraldic authority or any particular delegation. In grants made by the King of Arms from the College of Arms to British citizens, the Queen's full United Kingdom style is recited in the dating clause, i.e. Queen 'of the United Kingdom of Great Britain and Northern Ireland and of her other realms and territories …'. However, the Kings of Arms based in the College of Arms have no jurisdiction in Scotland (which forms part of 'the United Kingdom of Great Britain and Northern Ireland') nor in Canada (which is one of 'her other realms and territories').
> In other words, the fact that these documents are dated by regnal year is not intended to define any area of jurisdiction of the Kings of Arms. Dating clauses are mere statements of fact. It is incontestable that we are now in the 55th year of the reign of Her Majesty the Queen as Queen of Australia, just as it is the 55th year of her reign as Queen of the United Kingdom. The inclusion of the Australian style is simply a reference to the fact that the grant concerned is being made to an Australian Citizen or to a corporate body situated in Australia. A similar formula is used for Citizens of 'other realms and territories'. This being so, there seems to me very little point in changing a well-established practice that has

[72] Copy letter dated 1 October 2006 from Peter Rush, Assistant Secretary, Awards and Culture, Australian Department of the Prime Minister and Cabinet to Peter Gwynn-Jones CVO, Garter King of Arms in the possession of the author.

> certainly been welcomed by those Australians who seek grants of Armorial Bearings.'[73]

So, the use of the style and titles of the Queen of Australia "is not *itself* an assertion of heraldic authority or any particular delegation." At the invitation of the Assistant Secretary of the Department, I followed up this response in November 2008[74] and received the following response from Garter:

> 'Following the Australia Act of 1986, discussions took place between this office and Government House in Canberra.
> A representative of the Governor General of Australia flew to London to discuss the matter of heraldic jurisdiction. Three available options were set out:
> (1) To maintain the status quo. That is to say the continued jurisdiction of the Kings of Arms.
> (2) To set up an office like that of New Zealand Herald.
> (3) To have an heraldic authority on the Canadian model.
> As no progress has been made with regard to either of the last two possibilities, the position as accepted by Government House and the Kings of Arms remains unchanged.'

I take this to mean that, immediately following the final act in the constitutional evolution of the Australia which had, in the eyes of the Australian Government and of the British Government and both legislatures, just been effected by the Australia Acts of the Australian and United Kingdom Parliaments, a representative of the Sir Ninian Stephen, Governor-General of Australia from 1982 until 1989 and previously one of Australia's most respected constitutional lawyers, agreed that the English Kings of Arms of the Queen of the United Kingdom retained an heraldic jurisdiction over Australia over which the Queen of the United Kingdom herself had no such jurisdiction of any nature.

Despite this view, the prerogative powers of the Crown in relation to all Australian matters (including the power to grant and regulate arms, create and grant orders and awards and create and regulate titles of honour[75]) are vested solely in the Crown of Australia.[76] No prerogative power in relation to Australia or its States remains in the Queen of the

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[73] Copy letter dated 1 October 2006 from Peter Gwynn-Jones CVO, Garter King of Arms to Peter Rush, Assistant Secretary, Awards and Culture, Australian Department of the Prime Minister and Cabinet in the possession of the author.
[74] Letter dated 10 November 2008 from the author to Peter Gwynn-Jones CVO, Garter King of Arms.
[75] The only titles of honour presently used in Australia are *Excellency* (used only at the federal level), *Honourable* (used at both federal and state levels) and *Worship* (used only at both federal and state levels.)
[76] Or vested jointly in the Crown of Australia and the Crowns of the States, if indeed there are separate Crowns.

United Kingdom capable of exercise by her or by her servants including the Kings of Arms. Notwithstanding Garter's views to the contrary, the ongoing use of the style and titles of the Queen of Australia by the English Kings of Arms is a public assertion of a jurisdiction in relation to Australia and Australians which does not exist. It is erroneous, to use a neutral term.[77]

The sovereign of Australia exercises the Royal prerogative in relation to orders and awards and titles of honour. The Australian Government has long resisted submissions for the establishment of an Australian heraldic authority upon the basis, *inter alia*, that Australians are free to approach the College of Arms and, whilst I regard this as an entirely inappropriate response by the Australian Government, some credence is given to it by the practice of the College of Arms in usurping the style and titles (and heraldic jurisdiction) of the Queen of Australia, in representing that the Queen of Australia is their Sovereign, and in purporting to make grants of arms on behalf of the Queen of Australia in an (in)effective exercise of her heraldic authority. This assertion is unique amongst all of the executive, legislative and judicial organs of governance and sovereignty in the United Kingdom, and is demonstrably wrong. Its assertion may arise from approaching the matter exclusively from a United Kingdom perspective, with an insufficient appreciation of the fact that 'at least since the Australia Acts 1986 (UK & Cwth.) came into operation, the law of Australia is entirely free of United Kingdom or "Imperial" control. The law which governs Australia is Australian law.'[78] The English Kings of Arms derive no authority under the Australian Law of Arms by virtue of their appointment as English officers of arms by the Queen of the United Kingdom and the Queen of Australia has delegated none of her heraldic authority to them.

6. Indigenous Totemic Law

Reverting shortly to the totems used by the indigenous peoples of Australia, a major landmark in Australian indigenous affairs was the Mabo Case which was decided by the High Court of Australia in 1992.[79] The effective result of the judgment was to make irrelevant all previous law which relied upon the assumption that Australia was terra nullius, or a land belonging to no-one, when sovereignty, possession, and ownership

[77] See footnote 44. The same misunderstanding of the constitutional position is apparent on the College of Arms website which states that 'The applicant body must be registered or situated in England or Wales, or in another territory or country of which The Queen is Head of State, e.g. New Zealand (the exceptions are Canada and Scotland which have their own heraldic authorities.)': College of Arms website at http://www.college-of-arms.gov.uk/About/08.htm accessed on 28 December 2008. "The Queen" (of the United Kingdom) is not Head of State of Australia.

[78] Brennan J (with whom Mason CJ & McHugh J agreed) in Mabo v Queensland (No 2) ("Mabo case") [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992), par. 29

[79] Mabo v Queensland (No 2) [1992] 175 CLR 1 (3 June 1992)

were claimed by the British Crown. It recognised a form of native title to land which could continue to exist where there was a continuing connection between the relevant indigenous community and the land and when that native title had not been extinguished by a sovereign act inconsistent with its continuance such as a grant of a freehold title by the Crown.

Brennan J. stated in Mabo in relation to land:

> 'The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country….'
> Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.'[80]

Whilst Mabo 'clearly stands as authority contrary to the proposition that there is some form of continuing sovereignty contrary to the sovereignty vested in the Commonwealth', it is possible that the long ignored claims of the indigenous people to their totemic emblems may ultimately be recognised by the courts. It is quite possible that there is and has always been something analogous to a law of arms of indigenous origin applicable to Australia which protects the rights of individual communities to their totems. Should such recognition occur, it would be necessary for the courts to determine how that indigenous law coexists with the law of arms which the British colonisers of Australia brought with them.

The first skirmish in this new Mabo battle was fought in the year 2002, when a number of Aboriginal elders and peoples of the Aboriginal Tent Embassy sought to issue a Statement of Claim out of the High Court of Australia,[81] claiming copyright or other exclusive intellectual property rights, moral rights, and cultural rights to the kangaroo and the emu and to their graphic representation. The Kangaroo and the emu have been used since 1908 as supporters to the arms of the Commonwealth of Australia by assignment and grant from the sovereign, and from at least 1806 in informal Australian achievements.[82] Thus, for just over a century

[80] Mabo Case paragraph 42
[81] The Statement of Claim was ultimately issued in the name of Wadjularbinna Nulyarimma representing the Aboriginal Tent Embassy v Commonwealth of Australia, (2002), High Court of Australia, Statement of Claim filed as C3/ 2002. It appears that this litigation was not pursued.
[82] Bowman Flag at State Library of New South Wales at http://libapp.sl.nsw.gov.au/cgi-

they have been, at least in their capacity as heraldic supporters, the property of the Crown of Australia and, in terms of Mabo concepts, it is arguable that any indigenous rights have been extinguished to the extent of that grant contrary to the rights of the indigenous peoples.

This action followed the removal by Kevin Buzzacott of the achievement of the Commonwealth of Australia from Old Parliament House for which act he was charged with theft by the Police.

In early 2003[83] and again in 2005[84] Buzzacott sought by summonses filed in the High Court orders that his trial not proceed on the basis that until a treaty has been entered into between the various indigenous peoples and the Commonwealth of Australia, all jurisdiction in Australia legally resides in the indigenous peoples and can be exercised only in accordance with their customs and law. In the first instance Justices Kirby and Heydon and later Justice Callinan were not prepared to grant such an order on an interlocutory basis in a criminal case and the substance of the claim was not then or subsequently pursued and, as far as I can ascertain, the matter has not been the subject of a substantive hearing. There that matter rests, although I suspect that it will not rest forever.

Informed consideration of the way in which the received law and indigenous rights to totems may be reconciled must await judicial (or, less likely, legislative) recognition of the nature and extent of those rights and the method by which they may have been extinguished in the past or may be extinguished in the future.

The High Court in both the Mabo judgment and the Wik judgment[85] contemplates, in relation to land, the extinguishment of native title by an action of the sovereign which is inconsistent with the continued enjoyment of native rights and also contemplates the continuance of native title if the enjoyment of the right created by the Crown is not inconsistent with the continued exercise of indigenous rights in respect of the land.

It is impossible to predict whether the High Court would adapt the land rights reasoning in Mabo and Wik to rights to indigenous totems. If it does adopt that reasoning, there is nothing in the usual form of assignment or grant of arms (such as that for the Commonwealth of

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bin/spydus/ENQ/PM/BSEARCH?SCP=&BS=bowman+flag&BS_TYPE=K accessed on 20 January 2009

[83] Transcript of application for removal of the matter to the High Court in Buzzacott v The Queen [2005] HCATrans 161 (21 March 2005) at http://www.austlii.edu.au/au/other/hca/transcripts/2003/C5/1.html accessed on 20 January 2009.

[84] Transcript of application for removal of the matter to the High Court in Buzzacott v Tait C5/2003 [9 May 2003] at http://www.austlii.edu.au/au/other/HCATrans/2005/161.html accessed on 20 January 2009

[85] Wik Peoples v Queensland [1996] HCA 40; (1996) 187 CLR 1; (1996) 141 ALR 129; (1996) 71 ALJR 173 (23 December 1996)

Australia or in any other assignment or grant of arms with which I am familiar) which purports to create exclusivity in the separate elements of the arms in favour of the grantee. The assignment and grant of the arms of the Commonwealth of Australia would not, on this reasoning, extinguish indigenous rights in the kangaroo and emu totems.

However, what Wadjularbinna Nulyarimma and Kevin Buzzacott were seeking to establish[86] was that their peoples had such rights in their totems as would enable them to prohibit the national government from using them in the Australian coat of arms. It seems to me that if the claimed indigenous right is a right to exclusivity in these totems, it would not have survived the assignment and grant by the Crown of arms for the Commonwealth of Australia which incorporate these totems. If, on the other hand, the indigenous right in these totems is found to be non-exclusive, there would be nothing in the usual form of assignment or grant which would be inconsistent with their continued enjoyment by the indigenous peoples. By way of analogy, there is nothing in the right of the Crown of the United Kingdom to the familiar arms of England which is inconsistent with the use of a lion rampant by anyone else unless it is used in a manner which implies a right to the arms of England which the user does not have.

Such speculation is sterile in the absence of some authorative pronouncement judicial or legislative statement on the subject.

7. Conclusion

The heraldists of Australia need the support of the world heraldic community in our attempts to arm our Sovereign with the machinery necessary to exercise her undoubted heraldic powers. This need is not satisfied by a purported exercise of those powers by the English Kings of Arms whose actions are fundamentally wrong both as a matter of constitutional law and of political fact. It confuses the issue and provides an excuse for inactivity by successive Australian governments.

The quest for the establishment of an Australian heraldic authority needs a champion who, it appears, must first convert St. George to an ally before getting to the dragon.

The cause of heraldry in Australia received great support from the first Chief Herald of Canada and I hope and expect that we will receive similar support from his successor. We also received the support of the last Lord Lyon King of Arms, and again there is no reason to think that we will not receive similar support from the current Lyon. It is to be hoped that the English Kings of Arms, to whom we owe so much, will realise the impropriety of their current practice and become some of our strongest supporters.

[86] See notes 81, 83 and 84

Figure 7. The Armorial Achievements of the Queen in the Right of Queensland (1893, 1977) and Western Australia (1969)

Sommaire en français

D'Apice traite des questions semblables à celles de Mackie dans le contexte d'une histoire et une situation constitutionelle quelque peu différente. Son sujet principal relève du fait que le gouvernement de l'Australie n'a jamais demandé la délégation formelle de la juridiction armoriale au Gouverneur-Général, ni établi une autorité héraldique australienne. Bien que le College d'Armes eût juridiction en Australie de 1828 à 1939, il constate qu'il ne l'a plus depuis cette date parce qu'il fait partie de la Maison de la Reine en tant que Reine de l'Angleterre et non en tant que Reine de l'Australie. Quoi que le Commonwealth de l'Australie soit souverain depuis 1939, c'est un trait distinctif de l'histoire légale australienne que les états sont restés des dépendences du Royaume Uni jusqu'en 1986. Donc, l'autorité légale se trouvait divisée pendant cette période entre la Reine de l'Australie et la Reine du Royaume Uni. D'Apice trace aussi le développement du droit anglais et de la pratique armoriale en Australie. Il observe que l'autorité armoriale en Angleterre fait partie du 'pouvoir de la prérogative' du souverain, et qu'on ne l'a jamais limité par acte du Parlement. En Australie par contre, les corps législatifs des états se sont intervenus d'une façon assez limité dans ce domaine, mais eux comme le gouvernement central ont refusé jusqu'ici d'établir une autorité héraldique comparable à celle du Canada pour la raison (spécieuse, à l'avis de l'auteur) que le Collège d'Armes d'Angleterre en retient une juridiction restante. D'Apice termine par une discussion des problèmes qui résulte des revendications discordantes à certains emblèmes d'état de la part des peuples indigènes.

Figure 8. The Armorial Achievement of the Queen of Australia (1908, 1912)
The Arms represents a union of emblems of the six states included in the Commonwealth of Australia in 1908:
1st **New South Wales** (*badge included in arms of 1906*),
2nd **Victoria** (*crowned constellation used as sole charge in arms of 1910*).
3rd **Queensland** (*central element of crest of 1893*),
4th **South Australia** (*badge used as principal element of arms*),
5th **Western Australia** (*badge used as principal element of arms of 1969*),
6th **Tasmania** (*principal figure of crest of 1917*)