



Why an Australian Heraldic Authority

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Introduction

In order to clarify the need for an Australian Heraldic Authority (AHA) we need to look at the present situation and identify those aspects that pose disadvantages to Australian applicants for arms. The need for an AHA proceeds from the premise that the Commonwealth of Australia is an independent sovereign state recognised by the Statute of Westminster of 1931 and at international law. Inherent in the concept of sovereignty is the power to adopt, display, alter and protect the arms, flags and other symbols of sovereignty. The Commonwealth has the undoubted power to adopt, display, alter and protect such arms, flags and other symbols as it chooses to represent its sovereignty in and over Australiaⁱ. The Commonwealth also has the legislative power to establish an AHA as provided by Section 51(xviii) of the Australian Constitution, the so-called intellectual property head of powerⁱⁱ.

In British Commonwealth countries the following situation prevails. In England, the Kings of Arms are authorised by the Monarch, in their Letters Patent of Appointment, to grant arms subject to the prior consent of the Earl Marshallⁱⁱⁱ. In Scotland, the Lord Lyon King of Arms grants arms by Letters Patent while exercising the Sovereign's Armorial Prerogative^{iv} and unlike England his authority is backed by, not established by, legislation. In Canada on 4 June 1988, by way of Letters Patent, the Governor-General was authorised and empowered to "exercise or provide for the exercise of all powers and authorities lawfully belonging to Us as Queen of Canada in respect of granting armorial bearings in Canada". On the same date the Canadian Governor-General authorised the creation of the Canadian Heraldic Authority^v.

To date the Queen has not delegated any part of her Royal Prerogative concerning matters armorial to the Governor-General of Australia. This omission may be the consequence of the English and Scottish officers of arms exercising the Royal Prerogative on her behalf within their respective jurisdictions and, with the general indifference to matters heraldic in political circles, nothing further being done. Given the doubt about the legal exercise of heraldic jurisdiction within Australia, it can be argued that there is a legal vacuum that needs to be filled. Consequently, any submission for a Parliamentary Inquiry should be on the basis that, as a first step, the Prime Minister be requested to approach the Queen to delegate to the Governor-General exclusively, the exercise of the Royal Prerogative in relation to all things armorial. The question of the necessary legislative powers can be tackled later.

Disadvantages of the present situation

Still a colony

The Statute of Westminster rendered Australia's heraldic position somewhat anomalous; this has not been noticed until recent times. The Crown in right of Australia and the Crown in right of the United Kingdom are two different legal and political entities. In the absence of an AHA we are, in heraldic terms, still a colony. This is because Australians still need to go to London, Edinburgh or Dublin for a grant or devisal of arms that will be universally recognised and accepted. It is a simple fact of life that these three centres are regarded as the repository of heraldic knowledge and expertise and are lawfully established within their own respective territories.

Question of jurisdiction

There has been considerable debate in recent years about the respective jurisdictions of the English Kings of Arms, the Lord Lyon King of Arms and the Chief Herald of Ireland in relation to heraldry in Australia. The English Kings of Arms claim that they have jurisdiction generally on the grounds that they have the right to grant arms to the Queen's subjects in those Commonwealth countries where there is no indigenous heraldic authority. The Lord Lyon claims the right to grant or devise arms to those Australians of proven Scottish ancestry; and the Chief Herald of Ireland claims a similar right to those Australians of proven Irish ancestry. The English heralds dispute both of these claims.

There is a growing consensus that while these three authorities may have the right to grant, or devise arms for Australians they do not have jurisdiction, especially since 1986. Whatever jurisdiction the English Kings of Arms or the Lord Lyon may have had previously over Australians was certainly and finally extinguished when, in 1986, the UK, Commonwealth and State Parliaments passed the Australia Acts^{vi}. This situation has been reinforced by a recent Australian High Court decision that the United Kingdom is a foreign power^{vii}. Given the current legal uncertainty in heraldic matters Australians (individuals and institutions) may adopt arms as a voluntary act, as is the case in other countries where the sovereign does not exercise heraldic authority but does not expressly prohibit the use of arms^{viii}. A possible unfortunate consequence of this may well be that those who adopt arms may infringe on the rights of existing armigers and so discredit themselves and lawfully established heraldic institutions, thus leading to the possible danger of litigation.

Application of foreign rules

The English, Scottish and Irish heraldic authorities grant arms according to the law and practice applying within their respective jurisdictions. These three heraldic authorities will, in general, not have any detailed knowledge of the laws and practices pertaining to Australia and its citizens, nor are they expected to do so. There is no obligation on them to treat overseas applicants for arms any differently to applicants from their own countries. Consequently, there have been cases where grants of arms have been inconsistent with prevailing Australian attitudes in relation to gender, religion and ethnic origins.

Question of gender

Traditionally, the law of arms has been largely a male province and the grant of arms for women has been subject to many restrictions. However, today women occupy traditionally male positions, and arms are being developed for women in these roles^{ix}. For example, many women serve in the Australian Defence Force in combatant roles and, in civilian life, women now work in professions

previously considered to be a male preserve. Given this situation, an AHA would be starting with a 'clean slate'; it would be non-discriminatory in its approach towards gender and would comply with our non-discrimination laws. It would not be bound by ancient usage and custom that seems to inhibit heraldic jurisdictions in the Northern Hemisphere in devising new and appropriate rules for arms for women.

Separation of church and State

The English Kings of Arms do not recognise that Catholic Sees can be granted Arms, and rebuffed a request for Arms by the Roman Catholic Archdiocese of Melbourne in 1974^x. This is an extraterritorial application of a law that applies in England only^{xi}. It should not apply beyond the boundaries of England, where the Church of England is not the established church. It does not apply in Scotland and the Lord Lyon does not see any problem in granting (as he has done) Arms to Scottish Roman Catholic Sees, in spite of the fact that the Church of Scotland (Presbyterian) is by Scottish Law the established Church in Scotland. In this context it should be noted that the English Kings of Arms have seen fit to grant arms to 22 sees (Diocese) of the Anglican Church of Australia. The English attitude is inconsistent with Australian law and practice and needs to be remedied. In Australia there is no established Church and all religious bodies are treated equally. This is consistent with the concept of separation of Church and State and is implied by the Australian Constitution^{xii}. An AHA would treat all religious entities (natural or legal) on an equitable basis.

Question of multiculturalism

Australia is a multi-cultural society with citizens from many ethnic backgrounds other than Anglo/Celtic. At present there seems to be some confusion in relation to the right of Australians of non-Anglo/Celtic background to apply for arms. Given that the English Kings of Arms claim the right to grant arms to all subjects of the Crown resident overseas as part of "its imperial jurisdiction", then in theory it would appear that all Australian citizens, even those from non-Anglo/Celtic background, may apply for arms.

Because of the Anglo/Celtic emphasis in most heraldic publications it is not surprising that many Australian citizens of non Anglo/Celtic ancestry do not consider themselves eligible to apply for arms. This unfortunate belief robs Australian heraldry of its rightful place as part of the unfolding Australian cultural experience. An AHA would clear up this confusion and make it plain that all Australian citizens in good standing are eligible to apply for arms.

No legal protection for Australian armigers

Currently there is no universal legal protection for Australian armigers, who have arms lawfully granted or self assumed, against their misuse or misappropriation. The proliferation of purveyors of 'bucket shop heraldry' in shopping malls and on the Internet illustrates the lack of regulation within all Commonwealth, State and Territorial jurisdictions. The only apparent recourse an Australian armiger has is to register the arms with either IP Australia (formerly the Patents Office) at the federal level or with each of the relevant state/Territorial offices dealing with deeds and titles. This is an unnecessary impost and, if the arms were to be registered in each jurisdiction within Australia, could become a very costly exercise in duplication. An AHA, with its own heraldry register recognised by the courts, would grant an Australian armiger legal protection throughout the Commonwealth.

Civic authorities

When civic authorities or municipalities apply for arms public moneys are sent as fees to the Queen's English and Scottish officers of arms for grants that are not protected. Many local government authorities pay large sums of tax-payers' moneys for the design of logos of dubious relevance, and which have no meaning to the general public. The logos tend to be ephemeral and do not generally have a life beyond the current administration. In short they tend to become political symbols and do not have the apolitical and enduring, timeless appeal of coats of arms. An AHA would conduct the appropriate research to ensure that all the arms, flags and badges of civic authorities are relevant to the history of the locality and are of such as nature that the local residents can relate to.

Military vacuum

There appears to be no central authority within the Australian Defence Force (ADF) covering the regulation of flags, pennants, badges and other emblems used by its various constituent components. In recent months the Heraldry and Genealogy Society of Canberra (HAGSOC), through its Heraldry Special Interest Group, has given heraldic advice to three units of the ADF that wanted new badges for use and display. It is clear that there are no agreed procedures within the ADF, nor is there any consensus as to who is the final approving authority. Indeed it appears that some badges may be self-assumed without any approval from the relevant Chief of Staff. One tri-service unit, on HAGSOC's advice, obtained the Governor-General's approval for its badge on the recommendation of the Chief of the Defence Force. Whether the other units will follow this procedure remains to be seen. Given that the ADF, through its uniforms, flags, pennants, badges and other emblems and insignia, represents Australia as a sovereign independent nation, such a lack of central authority and regulation on their use and display is unfortunate. An AHA would fill this vacuum.

Little use of Australian flora and fauna

Given that overseas authorities devise most arms granted to Australians, it is not surprising that the use of Australian flora, fauna and other emblems has been limited. Australia has a wide diversity of animal, avian, marine and plant life (in addition to the internationally recognised Australian icons - kangaroo, emu, wattle, Southern Cross, etc.) which, if suitably painted, could be used as charges, crests and supporters and thus give a distinctly Australian flavour to Australian arms. An AHA would encourage this development, possibly along the same lines as is being done in Canada.

Indigenous symbolism

The arms of the Northern Territory appear to be the only prominent example to date of incorporating aboriginal designs in armorial bearings. An aboriginal person is the dexter supporter in the arms of the corporation of the city of Darwin. The rarity of aboriginal motifs is not surprising as those individuals and institutions with aboriginal ancestry or connections have not applied for arms, possibly because they consider European-style heraldry irrelevant to them. Heraldic Law lends itself to the concept of perpetual intellectual ownership by well defined groups, such as various groups of aboriginal peoples^{xiii}. While heraldry, as we know it, is not known to traditional indigenous culture, it is nevertheless rich in totems and design styles, which have religious, cultural and traditional significance.

An AHA would, after suitable consultation with indigenous peoples, help promote and incorporate aboriginal styles and designs into an Australian system of heraldry. While it is likely that these may

be restricted to those who have aboriginal ancestry or connections, it would certainly enrich our heraldry and honour our native peoples, contributing to the process of reconciliation. Canada has shown how this can be done^{xiv}. Consequently it is possible to look after the interests of all Australians in heraldic forms.

Financial considerations

Given the level of fees being charged by London, Edinburgh and Dublin, and taking into account the exchange rate, it is clear that considerable amounts of money are being transmitted overseas for arms which have no legal protection in Australia. This is in addition to any additional moneys armigers may have to pay for such protection. The establishment of an AHA would remove the need for overseas purchase of arms. An AHA would be a revenue collection agency (and be self supporting) through the setting of fees at a reasonable level for services provided. In this context it should be noted that in Scotland the misuse or misappropriation of arms is a very serious offence and is subject to court action and severe penalties. This is because individuals and corporations have paid fees to the national Treasury for the exclusive right and use of armorial bearings. Given this situation and the financial interests of the Treasury, in any prosecution the armorial offender is viewed in the same light as a taxation evader^{xv}. There is no reason why the same situation could not apply with an AHA.

Positive advantages

An Australian Heraldic Authority will establish, administer and regulate an indigenous Australian system of heraldry. In doing so it will:

- a) provide a mechanism for granting new coats of arms to Australian communities, corporations, associations and individuals on a non-discriminatory basis: In so far as individual natural persons are concerned grants of arms will be available to all Australian citizens in good standing regardless of their gender or ethnic origins;
- b) provide protection to Australian armigers (both natural and legal persons) through the establishment of a Heraldry Register which will be recognised in Australian law and thus discourage the misuse and abuse of arms;
- c) encourage the greater use of Australia's indigenous flora and fauna and other symbols familiar to Australians as well as recognising that Australia is a multi-cultural society: In doing so it will honour the symbols of Australia's aboriginal peoples and ethnic groups;
- d) be a self supporting revenue collection agency through the collection of fees, set at an appropriate level for services provided; and ensure that monies presently going overseas will remain in Australia;
- e) establish heraldic scholastic standards for an acceptable system of arms in relation to:
 - (i) arms legitimately granted previously by lawfully established heraldic authorities (England, Scotland and Ireland);
 - (ii) arms granted previously by other authorities or traditions no longer existing (France);
 - (iii) arms granted by some Australian authority or previously self assumed (provided there is no infringement on the pre-existing rights of others);
- f) assist in the long-term establishment of an Australian identity through the granting of arms, flags and badges to:
 - (i) the Crown in right of Australia and its agencies;
 - (ii) State, Territorial and Local Governments, their agencies and other civic bodies;
 - (iii) the Australian Defence Force and its constituent components and units;

- (iv) civilian uniformed services such as the various police forces, ambulance services and the like;
 - (v) institutions and corporations; and
 - (vi) individuals.
- g) establish and maintain a comprehensive database of heraldic information, systematically collected, collated and catalogued and available to academics and the general public as part of the Australian heritage.

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ⁱ Submission by R.J.W. d'Apice to the House of Representatives Standing Committee on Legal and Constitutional Affairs, October 1994.

ⁱⁱ S.51 states that "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:- (xviii) Copyrights, patents of inventions and designs, and trade marks:".

ⁱⁱⁱ *The Oxford Guide to Heraldry* by Thomas Woodcock and John Martin Robinson, Oxford University Press 1988, ISBN 0-19-211658-4, page 142.

^{iv} *Scots Heraldry* by Sir Thomas Innes of Learney, Revised by Malcolm R Innes of Edingight, John & Bacon, 1978, ISBN 0-7179-4224-7, page 8.

^v *The Canadian Heraldic Authority*, Rideau Hall December 1988, page 11.

^{vi} *Heraldic Jurisdiction in Australia* by Richard d'Apice AM, LLB, *Heraldry News*, March 2001, No.25, page 9.

^{vii} *Sue v Hill* (1999), 199 CLR 462.

^{viii} Richard d'Apice, page 10.

^{ix} *Scotland's Heraldic Heritage- "The Lion Rejoicing"* by Charles J Burnett & Mark D Dennis, The Stationery Office, ISBN 0 11 495784 3, page 44.

^x *An Armorial of the Hierarchy of the Catholic Church in Australia* by Michael Francis McCarthy, Thylacine Press 1998, ISBN 0-646-36350-6, page 8.

^{xi} In the 1985 edition of AC Fox-Davies *A Complete Guide to Heraldry*, JP Brooke-Little in footnote 271 comments: "As the law stands it seems that arms cannot be granted to Roman Catholic Sees, as the bishops are not recognised as corporations sole and their use of territorial titles is contrary to certain provisions contained in the Catholic Emancipation Act 1829. Arms can, however be granted to most Roman Catholic institutions, and to prelates and clergy as individuals".

^{xii} Section 116 of the Australian Constitution states that "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

^{xiii} e-mail from Richard Num, July 2003.

^{xiv} *A Canadian Heraldic Primer* by Kevin Greaves, The heraldry Society of Canada, ISBN 0-9693063-4-2, page 47.

^{xv} *Ibid. Scots Heraldry*, page 8.