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The Hon. Michael Kirby AC CMG[*] and Richard d'Apice AM[**]

THE SHORT AND STRANGE AFTERLIFE OF KNIGHTHOODS

Australia is a constitutional monarchy. So much is made clear by the Australian Constitution; [2] the State Constitutions; [3] the self-government statutes for the Australian Capital Territory[4] and the Northern Territory of Australia. [5] The nature of the qualities that make up the Commonwealth has its roots in history dating back to the beginnings of the British settlements and the successive proclamations of British sovereignty.[6] An attempt to alter this feature of Australian constitutionalism to substitute a republican form of government was defeated in a referendum in 1999. [7] The proposed law for that purpose failed to secure a majority nationally and did not obtain a majority in a single state. A question may arise as to whether an alteration of a fundament feature of

[1] *A title suggested by the classic constitutional text by H.V. Evatt, The King and His Dominion Governors 2nd Ed. London, Frank Cass, 306. This was the title given by Justice H.V. Evatt of the High Court of Australia.*

[*] *Former Justice of the High Court of Australia (1996-2009).*

[**] Solicitor, Sydney. President of the Australian Heraldry Society.

[2] *Australian Constitution*, s . See also the Schedule with the oaths to be taken.

[3] *Constitution Act* 1901 (NSW), s . [add State Constitutions]

[4] The *Self-Government Act* 197 (Cth), which provided self-government in the Australian Capital Territory and created the Legislative Assembly, did not provide for a vice-regal office-holder. Nor did it provide specifically for the Queen to be part of the Assembly.

[5] The *Self-Government Act* 197 (Cth) which provided for self-government for the Northern Territory of Australia created a Legislative Assembly. The Administrator of the Northern Territory is treated as the representative of the Queen in that Territory.

[6] *Coe v The Commonwealth* (197) ALJR at .

[7] Amendment to the Constitution (establishment of a Republic) 1999. See M.D. Kirby, "Ten Lessons from the Referendum on an Australian Republic" (1999) *Journal of Political Science* .

the Constitution, affection all of the constituent parts of the Commonwealth can be changed by the double majority provided by s128 of the Constitution or require the concurrence of all participating parts of the Commonwealth is immaterial to this article. Queen Elizabeth II has repeatedly made it clear that the continued role of the monarchy in Australia is exclusively a matter for the decision of the Australian people. But how that decision is to be made and evidenced is a question that lies in the future.

A feature of British monarchy, dating back in Australia to colonial times, has been the role of the monarch as the font of grace and favour. From the beginnings of the British settlements in Australia, this attribute of the prerogative of the monarch was extended to British subjects in the Australian colonies. Although, rarely, Australians were elevated to the United Kingdom peerage,[8] the appointment of Knights (and eventually Dames) in the several imperial orders of chivalry occurred from the earliest times, both before and after Federation. In the 19th and 20th centuries up to nearly the end of the 20th century, it was not uncommon for leading Australian citizens to be created knights and dames. In particular, leading military, diplomatic, judicial, bureaucratic, academic and business figures regularly received such honours. During the long period of coalition governments from 1949-72, it became common for all justices of the High Court of Australia, on appointment, to be created Knights, Commanders of the Order of the British Empire. Governors-General, Prime Ministers and Premiers (often on demitting office) and other officials regularly received this honour. For most of the 20th century, political leaders of the Australian Labor refused to accept such

[8] As occurred in the cases of Baron Forest; Baron and Baron Casey of Berwick. Several Australians who enjoyed successful careers in the United Kingdom were elevated to the House of Lords but have retained links with Australia. See e.g. Lord Glendonbrook (formerly Sir Michael Bishop).

titles of distinction. They also declined to recommend such titles for others when they formed the Government of the Commonwealth or the States.

On the election of the Whitlam Government in 1972, steps were taken, in accordance with the Government's policy speech to create a local system of Australian honours, the Order of Australia. This was established substantially on the model of the Order that had been created in Canada. The Letters Patent for the Order of Australia were signed by the Queen, inferentially in the exercise of the Royal Prerogative of grace and favour. The original Letters Patent made no provision for the appointment of knights or dames; the highest rank being Companion of the Order of Australia. Various citizens who had objected on principle to pre-nominal honours that conferred titles (knight or dame) accepted appointments in the Order of Australia. Unlike the imperial honours which were conferred on the advice to the Queen of the Prime Minister or Premier as the case might be. Substantive appointments to the Order of Australia were made on the recommendation of an independent Council,[9] following an exhaustive process.

When the Whitlam Government was dismissed in 1975 and after the Fraser Government was returned to office, steps were taken to amend the Letters Patent of the Order of Australia to provide for Knights (AK) and Dames (AD) in the Order. The rank of Knight or Dame in the Order of Australia was, by consent of the Queen, based very high in the Order of precedents of British honours. As a tangible symbol of the fact that,

[9] An exception was Sir William McKell, Governor-General (1949-5) who was created GCMG on the recommendation of the Menzies Government when he was Governor-General.

although Australian honours, those granted in the Order of Australia remained linked to the Crown, the insignia of all ranks in the Order of Australia included the Crown of St Edward: the traditional symbol of British royalty. This was not incompatible with the intervening designation of Queen Elizabeth II as Queen of Australia and the adoption of a separate and different royal style and title for her in that respect.[10] The Constitution of the Commonwealth made it clear that the provision there appearing in very many sections of "the Queen" referred to the Queen of the United Kingdom as successor to Queen Victoria who had signed the Constitution into effect as one of the last royal acts of her lifetime in 1900.

Because of the very high rank of knighthoods and damehoods, relatively few appointments at that level were made during the Fraser Government (1975-83) at that time, British imperial honours continued alongside the Order of Australia. These included knighthoods in the Order of St Michael and St George, the Order of the British Empire and Knights Bachelor, conferred on the recommendations both of Commonwealth and State Governments.

With the election of the Hawke Government to federal office in 1983, it was reported that the Queen wished that the Order of Australia should entirely replace the appointments in the imperial honours list.[11] The fact that coalition governments recommended imperial honours, including knighthoods and ALP governments did not, highlighted the apparent political taint. As well, a number of notorious appointment shortly before 1983, made the royal request appear sensible and timely.

[10] The Order of Australia was established by the *Order of Australia Act* 1973 (Cth).
[11] The Council of the Order of Australia is provided for in s. of the *Order of Australia Act*.

Acting on the advice of the Hawke Government, the Queen revoked the provision in the Letters Patent for the Order of Australia providing knights and dames in that order. This left a curiosity to persist. In the earliest days of the Order the then highest rank of Companion (AC) was conferred on the Queen's husband, HRH the Duke of Edinburgh. Subsequently, when the rank of AK was provided in the Order of Australia, it was conferred on HRH Prince Charles, heir apparent to the throne and contingently the successor to Queen Elizabeth II as Australia's monarch. When the Prince of Wales was created AK, it would not have been unusual in the arcane world of high honours, for his father to have been promoted at or about the same time. But it did not happen. [12]

With the defeat in 1996 of the Keating Government which had succeeded to the Hawke Government in 199 no steps were taken by the government of John Howard to revive knighthoods or damehoods in the Order of Australia. Mr Howards, although a supporter of Constitutional Monarchy in Australia, did not, apparently, favour their revival after 13 years where there had been no such appointments in Australia. Mr Howards himself, upon demitting office in his election defeat in 2007, was later appointed by the Queen as a member of the Order of Merit, one of the highest ranks in the British honours systems; but one not carrying a prenominal title.[13]

There the matter rested during the ALP governments of Kevin Rudd, Julia Gillard (2007-2013). Two events then occurred. The first was the

[12] *Royal Styles and Titles Act* 1953 (Cth) as amended , with the Queen's consent, in 1973.
[13] The Hon. John Howard was appointed to the Order of Merit by personal decision of the Queen in 20 .

decision of the New Zealand Government of Prime Minister John Key to alter the Letters Patent of the Order of New Zealand, the so called equivalent to the Order of Canada and the Order of Australia. By reason of the change introduced by the Government of John Key, those persons who had previously received the highest rank in the New Zealand Order, and all future appointees to that rank, were to be provided with the option of receiving the prenominal title of Knight or Dame. Some appointees (such as the former Labor Prime Minister of New Zealand, Helen Clark) opted to retain the rank without the title. However, of the slightly more than 90 eligible recipients of the highest New Zealand honour all but a handful elected to accept the title of knight or dame. For many weeks the Governor-General of New Zealand (Sir Satur Anand) was kept busy creating new knights and dames. Although some opposition to the change was voiced, it was substantially accepted without demur. In New Zealand Labour governments in the past had not been as opposed to titles as their counter-parts in Australia had been. Former Prime Ministers and Ministers in Labor governments accepted knighthoods[14] both under the previous imperial system and as newly provided under the New Zealand system.

When in 2013, the second Rudd Government was defeated, the new Prime Minister of Australia, Tony Abbott, came to office as a convinced constitutional monarchist. During the early phase of the endeavour of Prime Minister Keating to secure the change that would make Australia a republic, Mr Abbott worked for a time as Executive Officer of Australians for Constitutional Monarchy (ACM). This was the body that successfully led the campaign against the republic. Ironically, as things

[14]E.g. Sir Geoffrey Palmer KCMG, past Labour Prime Minister of New Zealand.

were to turn out, Mr Abbott's opponent on that occasion was Malcolm Turnbull.

Not long after his appointment as Prime Minister, and apparently without consulting the Federal Cabinet, Mr Abbott announced that he would recommend to the Queen the amendment of the Letters Patent of the Order of Australia to restore, within that Order, the rank of knight and dame. Mr Abbott indicated that the Queen had accepted his advice. He suggested that provision of this special honour be an attribute of the "grace" flowing from the Monarch to persons of the highest distinction. He appeared to indicate, that in appointments to that rank, he would be restoring the tradition that had existed in the appointment of earlier Australian knights and dames of "captains pick". In short, he envisaged that he would select those few who were deserving of appointment, by recommending their names to the Queen.[15]

This proposal attracted opposition, including some within the Coalition Government addressed to the manner of the announcement. However, the resistance largely died away. The earliest appointees to the rank of AK and AD were generally accepted, being the Governor-General (Sir Peter Cosgrove AK) as Chancellor of the Order and his predecessor, Dame Quintin Bryce AD, as past Chancellor.

However, things became heated when, in the Australia Day Honours in 2014, HRC the Duke of Edinburgh was elevated to the highest rank in the Order, as an AK. This led to sharp criticism of the Prime Minister. He sought to nullify the criticism by accepting that, in future, knights and dames in the Order would be recommended, as all other ranks were, by

[15] Mr Abbott's announcement of 'Captain's Choice'.

the Council, not by the Prime Minister. The handling of this issue was one of the arguments the was repeatedly raised in criticism of the prime ministership of Mr Abbott. A mixture of objections of principle; arguments of egalitarianism; opposition to titles; and traditional hostility to the English combined to enflame opponents and ultimately to deprive Mr Abbott the leadership of the Liberal Party and thus the Office of Prime Minister. Many political considerations produced this outcome. But the knighthood issue did not help his cause.

Shortly after Malcolm Turnbull became Prime Minister of Australia on 15 September 2015, he indicated that the amendments to the Order of Australia providing for Knights and Dames would be revoked. The relegation was gazetted in November 2015. No further appointments were made after that time. In all, only five Knights and Dames were created in the short interval during which those honours were available for the second time. Australia returned to the egalitarian arrangements by which the highest rank in its honours system was Companion. That rank confers no prenominal title. It would appear most unlikely that the titles of Knight and Dame will return to Australia. Once again, Australians showed that, whilst prepared to tolerate the system of constitutional monarchy, they are basically uncomfortable with titles that draw distinction for citizens and signify different ranks amongst them. In this respect, Australia has proved closer to Canada than to New Zealand. In Australia's region small numbers of knighthoods and damehoods continue to be included in the imperial honours lists for other realms, including Papua New Guinea and Solomon Islands. The demise of titles in Australia looks to be forever.

THE ACCEPTANCE OF A NEW VICE-REGAL TITLE

The foregoing story of the attempted revival and swift revocation of the facility to confer knighthoods and damehoods on Australian citizens can be contrasted with another attempt to invoke the Royal Prerogative of grace and favour which unfolded, with ultimate uniform success at about the same time. This concerned the conferral on the Queen's representatives in vice-regal office throughout Australia of the title "The Honourable", where the officeholder was not otherwise entitled to it. At first, the proposal that this added honour should be extended to Governors-General, Governors and the Administrator of the Norther Territory where not otherwise entitled, meant opposition somewhat similar to that later heard in the attempted revival of knighthoods and damehoods. Specifically, when the matter was first raised during the Rudd Government with the relevant federal minister (Senator the Honourable John Faulkner) he responded to the proposal in the negative, expressing the view that the extension of such titles was not desirable in Australia.[16] However, as will be seen, during the Gillard Government, there was a change of heart and the provision of the new title was accepted for all past and future governors-general not otherwise entitled to it. It is necessary to examine the origins of this title; the inconsistency in its provision to vice-regal appointees in Australia; and why this change had such a swift and uniform path to success when the attempted revival of knighthoods and damehoods failed so swiftly and abjectly.

[16] Senator Faulkner's negative response to the proposed removal of the anomaly in respect of the entitlement of Governors-General to the title "the Honourable"

In the United Kingdom, from which the Australian system of honours originally derived, the title of “The Honourable” had a long and somewhat peculiar history.

In the United Kingdom, from which the Australian system of honours originally derived, the title of “The Honourable” had a long and somewhat peculiar history. Traditionally, all sons and daughters of Viscounts and Barons in England (including later holders of life peerages) as well as the younger sons of Earls (who did not succeed to the Earldom) were entitled to the title. Likewise, the wives of members of the nobility in England who were not themselves entitled to the designation “the Honourable” acquired it on marriage to a husband who was so entitled[17]. Judges of the High Court of Justice in England and of other superior courts of England were also entitled to the title upon appointment.

Although members of legislatures in the United Kingdom and throughout the Commonwealth of Nations commonly refer to each other in the parliamentary chamber as “The Honourable Member”, the personal title “The Honourable” (in written text usually abbreviated to “Hon” or “The Hon.”) has ordinarily been confined to those elected members who are or have been appointed Ministers, often called “Ministers of the Crown”. Ministers who served as members of the Queen’s Privy Council (in the United Kingdom or Canada) acquire thereby the title “The Right Honourable”; in Canada also in French “Le Très Honorable”. Those Ministers who are, or were, members of the Federal Executive Council in

[17] Gender parity has not yet been achieved for the husbands of Honourable wives or for same sex married couples when one partner is Honourable. Interestingly, in 2014 the Kings of Arms of England at the College of Arms in London issued an ordinance governing marshalling of the arms of individuals in same-sex marriages but there has been no change in the courtesy practice in relation to the title.

Australia commonly bear the title “The Honourable” in consequence of the royal prerogative. Equivalent arrangements apply in most Australian States. In the case of republics within the Commonwealth of Nations, local legislation, convention or practice governs the conferral of the title. However, it is very common and tends to survive as a continuance of the British honorific tradition.

In Australia, the role of the Crown as the ‘font of honour’ was underlined by the requirements, in many cases, upon demitting office, for a former officeholder who had enjoyed in office the title of “The Honourable” to apply for permission to retain the title. Retention of the title was treated, in cases where the title was not granted for life, as being a matter within ‘the Queen’s pleasure’. In practice, this meant that it depended upon the advice tendered to the Queen or her vice-regal representative, by the relevant Minister of the day, usually the Prime Minister or the State Premier as the case may be. Ordinarily, continuance of the designation after office, where that was requested, was treated as a formality.

Traditionally, in Australia, members of the Legislative Councils of the States were styled “The Honourable” for the duration of their terms of office. This practice is still followed in New South Wales, Western Australia, South Australia and Tasmania. However, in Victoria, the practice was abolished in 2003.

In all jurisdictions of Australia where Ministers serve on the Executive Council the officeholder is entitled, during service, to the designation “The Honourable”. In Victoria, that title is held for life upon the technical ground (followed in this respect from the practice of the Privy Council in the United Kingdom) that the Minister, even after demitting office,

remains “on call” for service, if that is required by the Crown. Which invariably it is not.

In the States other than Victoria, the practice is that the Governor, acting on advice, will ordinarily permit a former office-holder to retain the title of “The Honourable” for life, subject to various qualifying periods of service. In Western Australia, the title “The Honourable” is retained for life if the Minister has served at least 3 years as such. In New South Wales, Queensland, South Australia and Tasmania, retention of the title depends on the action of an incumbent Minister advising the Governor, as representative of the Queen in the State, to permit the retention of the title for life, after retirement from office.[18] In the Northern Territory of Australia, if a Minister has served for 5 years as a Member of the Territory Executive Council, or if a member has served as a presiding officer of the Territory Legislative Assembly, the Chief Minister may recommend to the Governor-General the grant of the title for life. When that recommendation is made, it is invariably agreed to and a notice to that effect is published in the *Commonwealth Gazette*.

It was against the background of these distinctive and not entirely consistent and not entirely consistent practices in Australia governing the use of the title “The Honourable” by senior political and judicial officeholders that the omission from the title of the Vice-regal representative of the Crown, not otherwise entitled to the title, in the several jurisdictions of Australia, came to appear anomalous. This was especially so when the position in Australia was contrasted with that in Canada. There, the Governor-General is designated “The Right Honourable” (in French, “Trés Honorable”) for life and The Lieutenant-

[18] This may not be correct if the **letter dated 12 March 2009 from Peter Rush DPMC** is correct.

Governors of the Provinces (being the approximate equivalent of State Governors in Australia) were all entitled to the title "The Honourable" (in French, "L'Honorable") for life[19].

Of recent Governors-General, Sir Ninian Stephen, (Governor-General 1982-1989) had assumed the Victorian title upon his appointment as a judge of the Supreme Court of Victoria in 1970 from which he retired in 1972 on his appointment to the High Court and assumed the Commonwealth title. In 1979, he was appointed a Privy Councillor during his service as a Justice, as was then common, and assumed the United Kingdom title "The Right Honourable"[20] which he took into Yarralumla, as earlier had done Sir Isaac Isaacs (Governor-General 1930-1936) who was appointed a Privy Councillor in 1921.

Upon his appointment, Bill Hayden had the Commonwealth title for life from his service as a federal minister.[21] Sir William Deane (Governor-General 1996-2991) first had the New South Wales title upon his short-lived appointment as a judge of the Supreme Court of New South in 1977. He took the title with him to the Federal Court of Australia later that year when he assumed the Commonwealth title. He retained both titles on his retirement from the High Court. Accordingly he already held the New South Wales title and the Commonwealth title when he was appointed Governor-General in 1996. However, Major General Michael Jeffrey (Governor-General 2003-2008), as a past Governor of Western Australia, did not have the title during his service in either of those offices because he had not brought it with him, his previous service

[19] The Governor General of Canada is entitled to the Canadian title "The Right Honourable" for life: http://www.pch.gc.ca/eng/1359387359874/1359387575355 accessed 22.06.2015.
[20] Which would have been additional to and not in substitution for his Commonwealth title.
[21] Cth.

having been in the Australian Army[22]. Sir Ninian Stephen, past Justice of the High Court (Governor-General 1982-1989) had been appointed in 1979 a Privy Councillor during his service as a Justice, as was then common. So he carried that title into Yarralumla, as earlier had done Sir Isaac Isaacs, who was appointed a Privy Councillor in 1921. Exceptionally, on his appointment as Governor-General, Sir Zelman Cowen (Governor-General 1977-82) did not hold the title by virtue of the prior holding of a qualifying office. He was appointed a United Kingdom Privy Councillor in 1980[23] whilst in office of Governor-General and sworn in 1981. He thus held the title of 'Right Honourable' upon demitting the vice-regal office. Similarly, Quentin Bryce[24] (Governor-General 2008-2014), whose background had likewise been in universities, did not hold the Commonwealth title "The Honourable" until 8 May 2013 when the Queen approved the granting of the title to her, her successors and her living predecessors for life.[25]By the time of Dame Quentin's appointment, the practice of appointing Ministers of the Crown in Australia, High Court Justices or other lawyers to the United Kingdom Privy Council had been long discontinued. No further such Australian appointments were made following the termination of the last avenues of appeal to the Judicial Committee of the Privy Council by the *Australia Acts* 1986 (Cth and UK). Sir Harry Gibbs (Chief Justice 1981-1987) was the last Chief Justice of Australia appointed to the Privy Council (1972). Chief Justice Mason (Chief Justice 1987-95) and all of his successors have enjoyed the title "The Honourable" by reason of their appointment to High Court or, previously, to other Australian superior courts. None have been appointed to the Privy Council.

[22] He first acquired the title in retirement as a result of the decision notified in the Australian Government Gazette C2013G00681 08.05.2013
[23] The London Gazette 30 December 1980, No. 48467, 1.
[24] Later Dame Quentin Bryce AD
[25] Australian Government Gazette C2013G00681 08.05.2013.

Famously, in his book the *English Constitution* (1867), the noted English writer and observer of the British monarchy Walter Bagehot defined the role of the monarch (and by analogy the monarch's vice-regal representatives) as being threefold: the right to be consulted; the right to encourage; and the right to warn. However, he also described the continuing prerogatives of the Crown. They extended (where not earlier abolished or replaced by statute) to include the prerogatives to do justice; to grant mercy and to exercise grace and favour[26]. It is that last feature of the residual prerogatives of the monarch, in her capacity as Queen of Australia, which has been treated as the general source of the prerogative over the granting of honours including the title "The Honourable". Clearly, the Queen of each State has the prerogative of honour and that prerogative is in active use in relation to the title, "The Honourable".

Armed with these anomalies in 2013, the present authors made a submission to the Government of New South Wales urging amendment to the then current practice in relation to the title of the Governor of that State. The submission proposed that steps be taken to add the title "The Honourable" so as confer it on the then already long serving and highly respected Governor, Professor Marie Bashir. The submission pointed out that, the differentiation of the honorifics of holders and former holders of Vice-regal office in Australia by reference to their previous occupation or service, could not be justified. In terms of the distinction belonging to the officeholder, serving as the local representative of the monarch (and the person who themselves

[26] Often referred to as the Prerogative of Honour.

appointed judges and ministers with the title of "The Honourable"), the differentiation appeared untenable.

By definition, and by office, those who were appointed to a Vice-regal position in Australia ordinarily had to assume a role of leadership, within conventions of restraint and dignity that are modelled on the traditions and practices of the monarch in the United Kingdom.

The Government of New South Wales agreed with this proposal. By notification in the *New South Wales Gazette*[27] it was signified that the Queen had given approval for the title of "The Honourable" to be accorded to State Governors in New South Wales. Professor Bashir, her successors in office and all living predecessors were to be accorded the title while in office and in retirement.

Concurrently with these representations to the New South Wales Government similar representations were made to the Federal Government. The proposal was likewise acceded to. On 8 May 2013, by notification in the *Australian Government Gazette*[28] the following announcement was made:

> *"The title 'the Honourable' for Governors-General*
>
> *The Queen has given approval for the title of 'the Honourable' to be granted to Australian Governors-General. Governors-General will now be styled 'Her/His Excellency the Honourable' while in office and 'the*

[27] *New South Wales Government Gazette*, 6 December 2013, p. 5716
[28] No. C2013G00681

Honourable' in retirement. This entitlement applies retrospectively as well as to the current and future holders of the office."

The notification, with effect in case of federal Australian Vice regal office-holders, was made by authority by the Department of the Prime Minister and Cabinet in Canberra.

The change to the title of the Vice-regal representative in the Commonwealth was supported on a bipartisan political basis. So it was also in the States. The New South Wales Government at the time of the change was a Coalition Government led by the Hon. Barry O'Farrell MP. The Federal Government at the time was led by the Hon. Julia Gillard MP, of the Australian Labor Party.

Following these changes, letters were sent by the authors to the Heads of Government in the remaining Australian States (Victoria, Queensland, South Australia and Western Australia) and to the Chief Minister of the Northern Territory of Australia (in respect of the Administrator of that Territory). These letters proposed that similar amendments should be effected in the case of the Vice-regal representative in those respective jurisdictions. In each case, the representation eventually received a positive outcome. However, three points should be noted concerning the amendments of the titles in relation to the foregoing jurisdictions.

ROYAL SUCCESSION ISSUE

First, there has been no uniform formulation. Each constituent part of the Australian Commonwealth has gone about effecting this change to the title of its Vice-regal representatives in its own particular way. The

States are the historical successors to the former British colonies in Australia. Each of them traces the history of its Vice-regal representative to the earliest colonial times. Thus Professor Bashir was the 39th Governor of New South Wales. She served in that office in an unbroken succession traced back to the first Governor, Captain Arthur Phillip RN. He assumed the office on his arrival in command of the First Fleet in January 1788.

Each colonial (now State) jurisdiction has been jealous of its own claim to alter the title of its Vice-regal representative for itself in the way that each severally decided. Thus, in some States the *Government Gazette* notice, by which the change was notified, followed the style of the Federal alteration. It thus provided for the new title to apply to the present and all future and past governors (in the case of Queensland, using the formulation "The Queen has approved the use of the title "The Honourable" in perpetuity by past, current and future State Governors of Queensland".)

On the other hand, other States (Western Australia and Tasmania) effected the change in a more limited way. In the case of Tasmania, the alteration was expressed to apply only to the incoming Governor (Professor The Honourable Kate Warner AM; later AC) and to all future holders of the office. In Tasmania, the title was not conferred on past Governors. Living former Governors of Tasmania at the time of the change so notified of the change so notified included Sir Phillip Bennett (Governor 1987-1995), the Honourable Sir Guy Green (Governor 1995-2003), Mr Richard Butler (Governor 2003-2004) and the Honourable William Cox (Governor 2004-2008). Given that, of the living former Governors of Tasmania only Sir Phillip Bennett and Mr Richard Butler

did not carry the title from former judicial office, it is reasonable to assume that the absence of general retrospectivity to the alteration constituted a deliberate decision on the part of the Tasmanian Government. Those with longer memories will remember the controversy that surrounded the service and resignation of Mr Richard Butler, AC, a distinguished Australian diplomat. However, there was no apparent reason for withholding the honorific from Sir Philip Bennett AC, KBE, DSO, a much decorated Australian general.

In Western Australia, the change was notified in *Western Australian Government Gazette*. It was expressed in terms: "…The Queen has accorded the title "the Honourable" to Governors of Western Australia. Governors will be styled "His/Her Excellency the Honourable" while in office and will be eligible to retain the title "the Honourable" on departure from office".

The expression "eligible to retain" indicates the need for the existing process of approval of the retention of the title to be followed. The requisite backfilling was carried into effect by notice in the *Gazette* of 15 August 2014 by which it was notified that the Administrator "on behalf of Her Majesty the Queen" had accorded the title, by inference exercising the Royal prerogative and acting on advice of the relevant Minister, to past named Governors, Lieutenant General John Sanderson AC; Dr Ken Michael AC; and Mr Malcolm McCusker AC, CVO, QC. The only living former Governor not included in the Western Australian notification was Major-General The Honourable Michael Jeffrey AC, CVO, MC who, by that date, had been granted the title retrospectively as a former Governor-General of Australia as notified in the *Australian Government Gazette* on 8 May 2013.

Secondly, in each case of the awarding of the title by a State, reference is made in the respective *Gazette* notices, to the action of the Queen in 'approving' the additional title. Whilst this underlines the traditional role of the monarch as the 'font of honour' in Australia, the apparent role of the several States in advising Her Majesty to approve the alteration and enlargement of the title of the Governor of the State raises possible questions under Section 7 of the *Australia Act* 1986 (Cth).

The *Australia Act* 1986 (Cth) had a parallel provision in the Act of the United Kingdom Parliament (1986, Chapter 2), passed in substantially identical terms. It may be of interest to note, in relation to the last-mentioned provision what was written by one of us in expressing a minority approach in relation to the *Australia Act* of the United Kingdom in the High Court decision in *Attorney-General of Western Australia v Marquet:*[29]

> As to the version of the *Australia Act* enacted by the Parliament of the United Kingdom of Great Britain and Northern Ireland, I deny the right of that Parliament in 1986 (even at the request and by the consent of the constituent Parliaments of Australia)to enact any law affecting in the slightest way the constitutional arrangements of this independent nation. 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, no arguments were advanced to defend this last purported Imperial gesture.

[29] ( ) CLR .

> Mention of the United Kingdom Act in the joint reasons appears to be descriptive not normative. That Act was something done, doubtless with 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.

The meaning and effect of the two versions of the *Australia Acts* may be different especially because of the care taken by the drafters in both the UK and Australian version of the Act to use the expression “Her Majesty”, as an abbreviation of “Her Majesty the Queen”. Inferentially, they were severally referring, in each case, to the Queen who was part of the Parliament enacting the particular Act. The following words appear in both Acts; yet they cannot possibly have the same meaning:

> *While Her Majesty is personally present in a State, Her Majesty is not precluded from exercising any of Her powers and functions in respect of the State that are the subject of subsection (2) above.*

In Australia, this can only be a reference to the Queen in light of each State being physically present in that State.

Section 11 in both Acts, which abolishes appeals to the Judicial Committee of the Privy Council, refers to it as “Her Majesty in Council”. In both the Australian and the UK Acts, this can only be a reference to the Queen of the United Kingdom in her UK Council (the Privy Council).

The *Australia Act* 1986 (Cth) was reserved for the approval of the Queen in accordance with the provisions of section 58 of the *Australian Constitution*. Moreover, the *Australia Act* 1986 (Cth) originated, as its Preamble indicates, after meetings in Canberra of the Prime Minister of the Commonwealth of Australia and the Premiers of the States held on 24 and 25 June 1982 and 21 June 1984. At those meetings, the participants all agreed 'on the taking of certain measures to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a "sovereign, independent and federal nation".

Pursuant to those meetings, each of the Australian States enacted the *Australia Acts (Request) Act* 1985 of each State. Those Acts, in turn, requested the Australian Federal Parliament to pass legislation in, or substantially in the terms set out in, Schedule 1. They also requested and consented to the Australian and UK Parliaments passing legislation in, or substantially in, the terms set out in Schedule 2. Such Request Acts were then acceded to by the Australian Federal Parliament. It passed the *Australia Act* 1986 (Cth) and supplemented the States' Request Acts by a request made, and consent given, by the Parliament and Government of the Commonwealth of Australia in the *Australia (Request and Consent) Act* 1986 (Cth). Relevantly, in Section 7 of the federal Act of this series, it is provided:

> 7(1) Her Majesty's representative in each State shall be the Governor.

(2) Subject to subsections (3) and (4) below, all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State.

(3) Subsection (2) above does not apply in relation to the power to appoint, and the power to terminate the appointment of, the Governor of a State.

(4) While Her Majesty is personally present in a State, Her Majesty is not precluded from exercising any of Her powers and functions in respect of the State that are the subject of subsection (2) above.

(5) The advice of Her Majesty in relation to the exercise of the powers and functions to Her Majesty in respect of the State shall be tendered by the Premier of the State.

At no time during the deliberations noted in the several *Government Gazettes* of the States of Australia, signifying the Queen's personal consent and approval to the change in the State Governor's titles described earlier in the article, was the Queen physically present in any of the States of Australia. On the contrary, in some cases (such as the *Tasmanian Government Gazette*) it is recited that the Queen in fact signified her Royal approval whilst present in the United Kingdom.

A question, admittedly one of esoteric law, arises out of the provisions of s.7(2) of the *Australia Act* (1986) (Cth). This is whether the approval of the new title for the Governors of the States of Australia was within the "powers and functions" of the Queen in respect of the State and

therefore “exercisable only by the Governor of the State” and not by the Queen personally, still less by the Queen as monarch of the United Kingdom whilst present in that realm. In that event, whilst the Queen’s action in respect of her vice-regal representative was doubtless made in each case on the advice and recommendation of the State Government and Premier concerned, a question is presented as to whether the legal formality of approval was reserved, in the law earlier assented to by the Queen, only to the Governor of the Sate because the Queen as not “personally present” in the State concerned at the time the law was made.

Of course, in the case of some States, this would have involved the Governor in approving a change to his own title. This could possibly have been viewed as embarrassing because of a perceived personal interest of the Governor as having a benefit from the outcome. On the other hand, procedures would have been available to permit the law in that particular case to be promulgated without any participation of the Governor personally. That could have been achieved by ensuring that the Vice-regal action was taken by the Lieutenant-Governor, as temporary Administrator of the State. These legal niceties seem to have been overtaken by an attitude on the part of State officials that the Queen personally should be involved in the grant of the title to her representative in the State concerned. And this was done despite the fact that Her Majesty was not actually present in the State, a prerequisite to her acting in her own capacity in the making of a law of an Australian State.

Perhaps it can be argued that the provisions of s.7 of the *Australia Act* 1986 were addressed to laws and functions generally and not to such a

special function as one granting an additional title to the monarch's own representative in a State of Australia: a topic conceivably viewed as intimately involving the personal prerogatives of the Crown, and thus not surrendered by an enactment in general terms such as in s.7.

Before this historical question passes into esoterica, it is appropriate to notice it. But not to attempt to resolve it. It is difficult or impossible to conceive that anyone would challenge the legislation and proclamations conferring the title of "the Honourable" on State Vice-regal office-holders in Australia. And if such a challenge were ever mounted by an intrepid litigant, it is difficult or impossible to conceive that he or she would enjoy the standing to advance the argument to judgment (with the possible exception of the two former Vice-regal office-holders in Tasmania who were denied the honour, neither of whom seems likely to do so

THE ROYAL SUCCESSION ISSUE

Thirdly, the issue last mentioned potentially arose once again in relation to the laws that have now been passed to alter, within Australia, the provisions of inherited imperial legislation governing the law of succession to the Crown. In the Commonwealth and in each of the Australian States, legislation lately has been enacted to alter the operation, in Australia, of the *Act of Succession* 1701 (Imp.). Provisions of that imperial statute (derived from the era following the 'Glorious Revolution' of 1688), favoured male heirs and disqualified anyone who is, or becomes, an adherent to the Roman Catholic Church or marries such an adherent. Such provisions as these are commonly seen today as out of keeping with modern notions of non-discrimination in matters of sex and religion and individual human rights.

Securing a change to the imperial law by concerted action of the several realms that still owe allegiance to the Queen (including Australia) has proved a complex task. This has especially been so in a federal country such as the Australian Commonwealth. In December 2014, the Federal Government announced agreement between itself and the Governments of the States of Australia on potential changes to their laws to consent to give effect, in Australia, to the alteration of the *Act of Settlement* by the Parliament of the United Kingdom. That alteration was effected in the United Kingdom in accordance with the Perth Agreement made by the Prime Ministers of the 16 Commonwealth realms at the 2011 Commonwealth Heads of Government Meeting (CHOGM) that coincided with the presence of Queen Elizabeth II in Perth at that time.

Here, once again, differing legislative conditions exist in the several Australian States not to say in the sixteen realms affected. It is beyond the ambit of this article to review the powers of the Australian legislatures to enact their own legislation or to adopt the legislation of others or to approve of legislation enacted elsewhere on such subjects. However, as with the question last mentioned concerning the different steps taken to provide the title “The Honourable” to Vice-regal representatives in Australia, the answer seems to be, that, if there is a will to achieve change, it can be given effect quite quickly. As the law of any country approaches what the German philosopher Hans Kelsen called the *Grundnorm* (the foundation for legal validity) it will often be seen as ultimately independent of the legal order, i.e. arising from facts or considerations outside the law, based on decisions at once practical and convenient.

The very obedience of courts and people in Australia towards the *Australian Constitution* itself rests ultimately upon an assumption and acceptance that it is binding accorded by the people of the Commonwealth, especially now that its ultimate legal source in an imperial statute is questioned by many Australians.

In the matter of the succession to The Crown, the Queensland Government asserted that it was for the Queensland Parliament alone to deal with succession to the Crown in Queensland. It introduced a State Bill to that effect. After negotiations between the Australian and Queensland Governments, that Bill was supplemented by request and consent provisions which satisfied the Australian Government. However, at the time, the Queensland Government made it clear that it regarded those additions as superfluous as far as concerned the legality of the State legislation of Queensland.

In the result, every jurisdiction in Australia enacted provisions to alter the royal succession in Australia so as to accord with the Perth agreement. First there were the statutes of the several States and of the Norther Territory which in one form or another contained a request and consent for federal legislation binding the States and Northern Territory and providing, in respect thereof for concurrence in the alteration to the 1701 *Imperial Act.* Thus this was done by New South Wales;[30] Queensland;[31] Victoria;[32] South Australia;[33] The Northern Territory of Australia;[34]

[30] *Succession to the Crown (Request) Act* (2013No.53). https://2225.austlii.edu.au/au/legis/nsw/num_act/sttca2013n53394.pdf.
[31] *Succession to the Crown Act* 2013 (Act No. 22 of 2013), https://www.legislation.qld.gov.au/LEGISLTN/ACTS/2013/13AC022.pdf.
[32] *Succession to the Crown (Requests) Act* 2013 (No. 60 of 2013) http://www.legislation.vic.gov.au/dominio/web_notes/ldms/pubstatbook.nsf/f932b66241ecf1b7ca256e92000e23be/CFB0A598F1F4DC14CA257C0C000CAEDC/$FILE/13-060A.docx.
[33] *Succession to the Crown Request Act* 2013 (2014 No. 3) – http://www.austlii.edu.au/au/legis/sa/consol_act/sttca2014367/

Tasmania;[35] and Western Australia.[36] These subnational statutes were then followed by the *Federal Act*: *Succession to the Crown Act* 2015 (No. 23, 2015).

The *Act of the United Kingdom* (*The Crown Act* 2013 (UK)) had finally be brought into force on 26 March 2015 altering the succession to the Crown for the United Kingdom. This outcome was achieved just before the Parliament of the United Kingdom was dissolved with the announcement by the then Deputy Prime Minister in the Coalition Government (Right Hon. Nick Clegg MP) in his capacity as Lord President on Friday 26 March 2015.[37] Most of the other European monarchies have altered their succession laws to abolish primogeniture.[38] Of the remaining monarchies in Europe only Lichtenstein, Monaco and Spain retain primogeniture favouring male heirs.

The Act also removed prohibition on succession by heirs married to Roman Catholics which was first introduced in 1689. Henceforth, marriage to a Roman Catholic will no longer be a bar to the succession of the royalty to the United Kingdom.

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[34] *Succession to the Crown (Request) (National Uniform Legislation) Act* 2013 – http://www.austlii.edu.au/au/legis/nt/num_act/sttcula201330o2013692/s1.html*Succession to the Crown Request Act 2013* (2014 No. 3) – https://www.slp.wa.gov.au/pco/prod/FileStore.nsf/Documents/MRDocument:27390P/$FILE/Succession%20to%20the%20Crown%202015%20-%20[00-00-01].pdf?OpenElement

[35] *Succession to the Crown (Request) Act 2013* - *http://www.austlii.edu.au/au/legi/tas/consol_act/sttca2013367/s1.html*

[36] *Succession to the Crown Request Act 2013* (2014 No. 3) – https://www.slp.wa.gov.au/pco/prod/FileStore.nsf/Documents/MRDocument:27390P/$FILE/Succession%20to%20the%20Crown%202015%20-%20[00-00-01].pdf?OpenElement

[37] United Kingdom, Record of Parliamentary Debates, House of Commons, Hansard HLWS483.

[38] Sweden (1980); the Netherlands (1983); Norway (1990); Belgium (1991); Denmark (2009) and Luxembourg (2011).

Of the 15 other Commonwealth realms of the Queen, six chose to legislate for the succession law changes. They were Australia, Barbados, Canada, New Zealand, St Kits and Nevis and St Vincent and the Grenadines. Nine took the view that their constitution effectively recognised the succession law of the United Kingdom automatically. They were Antigua and Barbuda, Bahamas, Belize, Grenada, Jamaica, Papua New Guinea, St Lucia, Solomon Islands and Tuvalu.

Amongst the reasons that were given in the United Kingdom for the delay in several Commonwealth states in the enactment of laws on the subject was, in the case of Australia, the fact that the individual states, claim anomalous links with the Crown.[39]

There remains a residual disqualification on succeeding to the Crown of the United Kingdom (and hence Australia and other realms). Only a person otherwise qualified who is in communion with the Church of England may do so. This is explained by reference to the role of the monarch of the United Kingdom as Supreme Governor of the Church of England which is established in England but not in the other parts of the United Kingdom. Accordingly, some discrimination continues to apply. But given that all member of the present royal family in line of succession are Anglicans and that the Heir Apparent, the Prince of Wales, wishes to become "defender of the faiths" on acceding to the Crown, it must be assumed that this tine residual anomaly can be borne by Roman Catholics, Trinitarians, Methodists and non-believers, with a small salute to history and realism rather than principle.

[39] Bob Morris, "The Succession to the Crown Act 2013 has landed", *The Constitution Unit*, United Kingdom, April 13 2015, p4.

CONCLUSIONS

The issues surveyed in this article show that the continuing link of Australia and its several jurisdictions to the monarchy of the United Kingdom has legal significance, quite apart from the issue of whether the link should be preserved or replaced with a republican form of government.

Republican and egalitarian attitudes in Australia appeared to play a part in the brief revival and rapid demise of the titles of knighthood and damehood that was played out in a few months in 2015.

On the other hand, despite the initial negative response of Senator Faulkner for the Rudd Government in 2013, the conferral of the title “the Honourable” upon vice-regal office-holders in Australia who did not otherwise enjoy that title, sailed smoothly to universal acceptance for past, present and future vice-regal personages (so long as they last) with the sole anomalous exceptions of two former governors of the State of Tasmania.

The same comparative speed in securing substantially identical legislation to give effect in Australia to the United Kingdom changes to the succession to the Crown of first born female children and those otherwise entitled who marry Roman Catholics continues to show the efficiency of legislative reform when there is a will to achieve reform. But it leaves still uncertain the exact role of the Queen personally (when not in an Australian state), at least in matters intimate to the Queen’s Royal Prerogative, the states have direct access to the Queen or not.

There is a mine of equal interest to constitution lawyers and historians in the relationships between Australia and the Monarchy and the Queen and her dominion governs [and governs-general]. In this article, we have touched only on a few of the issues that remain for the future.[40]

[40] There is, for example, the question of the use within the states of the heraldic symbols of the British Monarchy, carved with an eye to permanence upon many courthouses and other public buildings in colonial and early federal times. See *NSW Coat of Arms Act* 20 which forbids the display of the imperial royal coat of arms in State premise, which resulted in the removal of those traditional symbols in State courthouses and their replacement with the NSW Coat of Arms.