



ACCOUNTABILITY
ROUND TABLE

SUPPLEMENTARY SUBMISSION TO

JSCFADF INQUIRY INTO INTERNATIONAL ARMED CONFLICT DECISION MAKING

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ART is delighted to provide a supplementary submission on issues raised in the December 9 hearing and specific questions we were asked to address. We stick by all the points that we make in our initial submission and our 'Opening Statement'. We are delighted to provide further submissions on other issues raised in the Committee hearing.

EPHIPHANY – WE NEED LEGISLATION WHETHER WE WANT TO CHANGE OR CONTINUE AS WE ARE

You don't get many epiphanies your fifth decade as a constitutional lawyer.¹ But I experienced one coming to Canberra for the December 9th hearing. Many of us have been calling for reform of the legal and political ways we go to war – wanting a prior parliamentary vote for wars of choice and a cross-partisan committee to receive confidential legal and military advice, to debate action and then bring their recommendations to their parliamentary colleagues. However, after reading the submission from Defence and their account of how we go to war, it is clear very clear that going to war in the way they say we do requires legislation.

When I researched the constitutional means by which Australia can and does go to war (see attached article provided as an Appendix²), it was very clear that there was one constitutionally 'bullet-proof' means: by the Governor-General exercising the prerogative under s61 of the Constitution acting on the advice of the Prime Minister. Legislation can duplicate, modify or override the prerogative by the creation of statutory powers. But for important long-standing elements of the prerogative (quintessentially the power to make war) this would have to be by legislation using clear words or by necessary implication. Section 8 of the Defence Act could provide an alternative might be a means of duplication – though it was clearly not intended as such and could not be interpreted as replacing the s61 prerogative.

We have a clear statement from the then Governor General that he was not asked to exercise his powers with regard to the Afghanistan and Iraq wars – and that no Governor General had been involved since Vietnam (see last page of the Appendix).

This would seem to leave section 8 as the only constitutional means by which we have been going to war. However, we now have a statement by Defence that section 8 was "a codification of the general principle of civil control of the military" and that "The position of the Attorney-General's Department, which is the authority of lawyers within government to speak on matters of constitutional law, is that such decisions are made under section 61."

How is this squared with the fact that fact that the Governor-General has not been involved? By writing the Governor General out of s61. Defence's evidence was that "the decision to commit the ADF to international

¹ I think I could count myself as one when I published my first article in a major peer reviewed journal (on constitutional change) in 1979

² Sampford and Palmer "The constitutional power to make war: domestic legal issues raised by Australia's action in Iraq" 18 (2) *Griffith Law Review* (2009)

conflict operations has long been a prerogative of the Executive exercisable under section 61 of the Australian Constitution. In practice, this decision-making power is exercised by the Prime Minister and the Cabinet.” But section 61 states that ‘The executive power of the Commonwealth is vested in the Queen and is *exercisable by the Governor-General* as the Queen's representative.’ It is true that, by convention, these powers are exercised on the advice of the Prime Minister with virtually no exceptions. But this does not mean that the PM³ can exercise that power independently of the GG. Any suggestion that it does fundamentally misunderstands (or misrepresents) the conventions of responsible government.

The formal legal power belongs to the GG. The convention is that the GG will almost always act on advice of a relevant minister.

In my writings on conventions I have distinguished between legal powers of the crown and the ‘conventional powers’ of the advising ministers. However, the conventional power is legally useless unless the GG is advised to exercise their legal power.

Because none of this transfers the legal power to the PM. The PM cannot just ignore the critical steps of advising the GG, addressing any questions by the GG and the GG formally acting as advised.

When I did my research with the assistance of Dr Margaret Palmer, I wondered if there is any in which legal powers of the UK or Australian monarchs could be transferred to ministers without legislation. We chased down every rabbit hole. Like most rabbit holes they all amounted to dead ends.

Recent events might make us wonder if a PM has been sworn in as GG so that he could advise himself to go to war! But the novelty of multiple ministries is more much more recent and is, happily, already dead. There are, in any case, many more constitutional problems with swearing in a PM as GG than swearing in a PM into the ministries of his colleagues.

This leaves us with the conundrum that the Defence say that s8 is not used to go to war while the s61 power is used but invalidly.

It could be that the defence minister issues instructions under s8 and the PM purports to exercise the GG's powers. This would mean that the PMs try, and fail, to go to war under s61 but the Defence Minister negligently goes to war under s8 – unintentionally validating the invalid attempt under s61!

The statements by Defence on this subject are not just cryptic and elliptic.⁴ They are wrong and downright misleading. If our military was as slapdash we might as well surrender now!

This is a mess and should be cleared up by legislation. Either give the PM the statutory power to go to war without consulting the GG or to bring others into the formal legal process. If the government wants the former, they may have to deal with those who want the latter.

³ From here, I will use PM and GG as recognized shorthand, meaning no disrespect to either office.

⁴ see G.K. Chesterton's essay <https://fullreads.com/essay/on-the-cryptic-and-the-elliptic/>

CONVENTIONS

Conventions are generally about how formal legal powers are exercised. They can emerge in a number of ways – over time (as in the rise and strengthening of conventions about the exercise of gubernatorial power) or by a formal statement by those who hold a legal power. One of the most frequently cited examples of the latter is in the convention for filling Senate vacancies after the introduction of Senate proportional representation. The then PM (Rt Hon Robert Menzies⁵) wrote to the state premiers and proposed that casual vacancies should be filled by the nominee of the party of the outgoing Senator.

There are various definitions of conventions but most emphasise a practice, a good reason for it and likely adverse political consequences of a failure to follow it. Frequency is relevant but not decisive. The Senate vacancy convention operated from its first use. Conventions are not legally enforceable as such but may lead political or legal consequences (most drastically in parliaments refusing to fund government).

Conventions may survive breaches. They may be weakened or strengthened depending on the political consequences of the breach.

The relevant conventions here are about the GG acting on advice to authorize the use of force and the GG's rights to ask questions about the advice given. There has been no breach of them. They have not been used!

DEVELOPMENT OF CONVENTIONS

It has been the Westminster way for conventions to emerge, develop, strengthen and vary over time. That is how we got to the current state where the crown retains the formal right to go to war and command of the armed forces but that power is exercised on advice of those who have the confidence of the lower house. The attempt to side-step this process and have the PM making these decisions would be a very big move. It ignores one of the great strengths of Westminster/parliamentary democracies over presidential systems.

One of the best descriptions of this is from the closing words of 'The Royal Family', a 1969 BBC documentary. As a life long republican, I see this as a virtue of parliamentary systems with apolitical heads of state generally rather than the minority of such systems still with monarchs.

“While the Queen occupies the highest office of the state, no one else can
While she is the head of the law, no politician can take over the courts
While she is head of state no generals can take over the government
While she is head of the services, no would be dictator can turn the army against the people

The strength of the monarchy does not lie in the power it gives to the sovereign but by the power it denies to anyone else.”

The Constitution denies a PM the legal power to wrap himself in the flag and take us off to war by his own decision. This is not sufficient, but it is a start. The UK has gone further by adopting a convention of prior parliamentary consent in wars of choice. Australia must go further.

⁵ He was not yet 'Sir Robert'

CODIFICATION

Codification is generally a process for bringing several pre-existing laws together in a single statute that covers the field – hopefully making it simpler, more consistent and easier to find. The pre-existing laws may be in statutes, the common law or a mixture. Codification of conventions generally involves their replacement by either a new statute or a change in the constitution. A classic case was the above-mentioned convention on filling senate vacancies. It was flouted twice in 1975 and was formally incorporated into the constitution via one of the successful 1977 referenda.

Many Commonwealth constitutions included formal and enforceable rules about the way Governors-General and Presidents should exercise their powers in appointing and dismissing governments. The UK has twice legislated to reduce the power of the House of Lords to veto bills passed by the House of Commons.

While codification usually ends up in formal legislation (and on some definitions requires it), there is an alternative. During the 1980s the constitutional conventions set up a process, led very ably by Prof Cheryl Saunders, to research various conventions and to 'recognize and declare'⁶

Something similar could be tried here. After a parliamentary committee or royal commission had found conventions about how the war prerogative had been used and the kinds of questions that have been asked, the findings could be included in a resolution of both houses, the cabinet handbook and/or in a ministerial code of conduct.

However, it could not and should not transfer a power of the GG into a power of the PM – but merely reinforce the requirement of acting through the GG.

It should be pointed out that the usual stimulus for codification of conventions is generally caused by someone flouting a convention. And the flouting of the convention usually means that trust can only be restored by legislation rather than informal declarations. For that reason, we recommend legislation.

VOTE PLUS

The ART submission and opening statement emphasise that a parliamentary vote is necessary but not sufficient. We have argued for:

1. A parliamentary committee involving security committee of cabinet, their shadows and some independents with security clearances to hear independent and contestable legal and military advice.
2. Australia's acceptance of the compulsory jurisdiction of the ICJ over any threat or use of force by Australia – regardless of how long countries seeking to sue us have accepted the compulsory jurisdiction.
3. Adoption of Kampala amendments to the Rome Statute to activate the ICC's jurisdiction over aggressive wars

We will not expand on the last two recommendations other than the role they play in the advice given to the Committee.

⁶ Sampford C. "Recognize and Declare' - an Australian Experiment in the Codification of Legal Conventions" 7 *Oxford Journal of Legal Studies* 369-422 (1987)

THE RECOMMENDED COMMITTEE – SOME FURTHER THOUGHTS

We have been arguing for a cross-partisan committee to hear all relevant legal and military advice which can make a recommendation for over ten years.⁷

Discussion at the December 9 hearing emphasises the value of such a committee. As an ongoing body it could be involved long before the final decision to deploy. It would hear and debate

- potential threats,
- force development,
- deterrence options,
- intelligence reports, and
- legal and military advice.

This would allow it to:

- be prepared for potential military action,
- make better decisions,
- give prior approval for defensive actions, and
- have a better chance of reaching consensus so that it can make a unanimous recommendation to parliament rather than a majority report and one or more minority ones.

We are pleased to note the synergies with Senator Molan's recommendations for a parliamentary committee with security clearance. This is that can 'debate the principles our country stands for and the costs we will pay to protect other states and ourselves' (quoting Carr p 21) as well as the kind of forces we need and how we try to deter and, if necessary, respond to potential threats. The necessity of executive accountability to parliament and the role of its committees in detailed and informed debate is well put and clearly articulates with the arguments in 'Integrity. Now!' that Parliament must be at the centre of the Integrity System. We go a bit further in suggesting that Security Committee of Cabinet and their shadows should be involved – at least when it comes to deployment of troops but more usefully much earlier. This builds on the model provided by the Advisory War Council in WW2.

Bi-partisanship

Molan rightly emphasizes the importance of bi-partisanship. We agree that we need bi-partisanship in outcome following rigorous debate in committee by those with full access to information. and process. He does not want bi-partisanship involving the opposition merely agreeing with government. This is the flip side of another problem – where the government makes a decision and demands that the opposition agree in the name of bi-partisanship.

LEGAL ADVICE

There is a temptation to seek, and a temptation to give, advice the client wants to hear. In normal circumstances, there are two constraints on that temptation – professional ethics (notably the requirement to give 'independent' advice) and judicial reckoning when the case comes to court.⁸ In international law the

⁷ Sampford, C. 'A better Westminster way to war?' In Bronowski, A. (ed) *Why did we go to war in Iraq? A call for an Australian Enquiry* Committee for an Iraq War Inquiry, Sydney, 2012

⁸ However much the client might like to hear the lawyer telling them what they want to hear, they are likely to be very angry if a judge says it is nonsense.

second is much weaker because the client can generally choose not to go to court.⁹ This puts a lot of strain on the professional ethics of legal advisors.¹⁰ We suggest that

- Australia activate the relevant ICC and ICJ jurisdictions to put legal advisors at the risk of judicial correction. (We also suggest that we extend ICJ coverage of ius ad bellam crimes and make this part of our pitch for UNSC membership)
- The parliament or the parliamentary committee is the client. (The Commonwealth considers that the Executive is the client. UK practice is not so clear and Lord Bingham has argued that the Parliament should be the client in advice on going to war.
- Advice should only be sought from those with practising certificates who will be subject to Bar Association disciplinary action if they breach legal ethics in giving unprofessional advice.

SECRECY

The use of classified information in decisions to go to war is given as a reason to exclude Parliament from debating and deciding on whether we go to war.

The case is often overstated.

- The UK House of Commons debated the conduct of the last world war in closed session.
- Most of what is included in intelligence warnings and conclusions is not classified.
- A country may choose to release classified information (e.g. in US warning of Russian plans for invading Ukraine).
- If there is so much concern among allies about Australian parliaments, then why are they not worried about their own processes. Indeed why are we not complaining about their committees having access to top secret information we share and provide.

However, it is an important issue. My father had access to all the secrets of the Pacific war and had a safe behind him for files he was working. Most of the contents of that safe would be invaluable information for our then opponents – not least the decrypts which demonstrated that we had broken their codes. While most of what is compiled is not classified, there are often classified gems that hold the assessment together and point which of the different ways a potential enemy may choose to go.

That is why we need the committee – to have access to all information and be able to debate it in camera and make recommendations to their colleagues for a parliamentary vote.

LARGER CONTEXT

The ART's recommendations for a set of mutually reinforcing integrity reforms is relevant ('Integrity Now').¹¹ 'Integrity Now' emphasises

- The importance of the rule of law in domestic and international affairs. This issue raises both – the legal means by which we go to war under our constitution and the legality of our subsequent actions under international law
- The centrality of Parliament to integrity, accountability and transparency – directly suggesting a greater role for Parliament in decisions to go to war

⁹ Provided they get out in time unlike the US in *Nicaragua v USA* and the Russian Federation in the *Ukraine v Russian Federation*.

¹⁰ Sampford C. 'Get New Lawyers' 6 *Legal Ethics* 2003, 185-205; "More and More Lawyers But Still No Judges" 8 *Legal Ethics* 16-22, 2005 and 'Goldsmith's Delinquent Client' in Sampford and Breakey *Law, Lawyers and Legal Education*, Routledge, London, 2017

¹¹ <https://www.accountabilityrt.org/rule-of-law-contents/>

SOCIAL 'LICENSE TO KILL'

Vice Admiral Johnson stated that “the support of the Australian community has always been and will always be essential for the ability of the ADF to be able to deploy. The social licence by which we employ lethal effects on behalf of our country and that relationship with the community is extremely important to us.

The Institute I lead has done a fair bit of work on social license (especially in blue economy and in banking). The term arose in discussions of community attitudes to industry operations affecting those communities. Social license is most often noted when it is 'lost'. Typically, a miner or other extractive industry operator has secured a legal license in the normal manner but the local community whose interests are affected by it is up in arms (sometimes quite literally). This is especially the case where the legal license has been secured by questionable means and members of the affected community have not had a say (whether through lack of democracy, captured institutions or central authorities failing to listen). This is exacerbated if proffered benefits fail to materialize and adverse effects multiply. Under these circumstances, the miners realize that the community can impose costs on the miner – possibly making mines non-viable.

Under these circumstances, relying on the legal license is morally dubious and economically risky – especially if there are doubts about the legitimacy of the legal authority that issued the relevant license. In these circumstances it is said that they need a 'social license' as well which was either never secured or later lost.

Applying this to the military, it suggests that the last thing they should do is advocate for, and rely on, decisions by governments reached behind closed doors with no input from the people or their representatives.

TWO CLARIFICATION POINTS

The rule of law in international affairs and the 'rules based international order'.

The former seemed to have dropped out of common Australian usage and the latter has appeared in the last few years. We hope that this alternative formulation is not intended as a weakening of the long standing concept of the international rule of law. It is the rule of law that the 2005 UN global leaders summit outcome document unanimously endorsed.

“Recognizing the need for universal adherence to and implementation of the rule of law at both the national and international levels, we: (a) Reaffirm our commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States; ... (f) Recognize the important role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States”

Nobody declares war any more

Some seem to think that none of this matters because declarations of war are so rare. However, the powers to use or threat of force are clearly a part of the war prerogative. The 'threat or use of force' is the relevant term in the UN Charter and the ANZUS treaty. The sub-committee's reference recognizes this in referring to 'international armed conflict' decision making.

ART uses 'war' to avoid euphemisms. A war of aggression is a war of aggression whether it is called a war or a 'special military operation'.

MEDIA

We would reiterate our last point: that Parliament should have a greater voice while foreign media owners should have less. We are happy to provide detailed submission on this – based on our recommendations for improvements in media integrity included in 'Integrity, Now!'



The constitutional power to make war: Domestic legal issues raised by Australia's action in Iraq

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THE CONSTITUTIONAL POWER TO MAKE WAR

Domestic Legal Issues Raised by Australia's Action in Iraq

Charles Sampford and Margaret Palmer¹

The legal power to declare war has traditionally been a part of a prerogative to be exercised solely on advice that passed from the King to the Governor-General no later than 1942. In 2003, the Governor-General was not involved in the decision by the Prime Minister and Cabinet to commit Australian troops to the invasion of Iraq. The authors explore the alternative legal means by which Australia can go to war — means the government in fact used in 2003 — and the constitutional basis of those means. While the prerogative power can be regulated and/or devolved by legislation, and just possibly by practice, there does not seem to be a sound legal basis to assert that the power has been devolved to any other person. It appears that in 2003 the Defence Minister used his legal powers under the Defence Act 1903 (Cth) (as amended in 1975) to give instructions to the service head(s). A powerful argument could be made that the relevant sections of the Defence Act were not intended to be used for the decision to go to war, and that such instructions are for peacetime or in bello decisions. If so, the power to make war remains within the prerogative to be exercised on advice. Interviews with the then Governor-General indicate that Prime Minister Howard had planned to take the matter to the Federal Executive Council for noting, but did not do so after the Governor-General sought the views of the then Attorney-General about relevant issues of international law. The exchange raises many issues, but those of interest concern the kinds of questions the Governor-General could and should ask about proposed international action and whether they in any way mirror the assurances that are uncontroversially required for domestic action. In 2003, the Governor-General's scrutiny was the only independent scrutiny available because the legality of the decision to go to war was not a matter that could be determined in the High Court, and the federal government had taken action in March 2002 that effectively prevented the matter coming before the International Court of Justice.

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Introduction

On 21 February 2003, an invasion of Iraq by the ‘coalition of the willing’ was pending. One of the authors was attending a conference that included virtually every senior constitutional lawyer in the country, and asked his colleagues about the legal mechanism by which Australia would go to war.² Everyone gave the standard answer, based upon a generally accepted interpretation of Australian constitutional law: as Australia had adopted the Statute of Westminster,³ the power to declare war (or to take actions that led Australia into war) would be a matter for the prerogative of the Crown in right of Australia, which would be exercised by the Governor-General on the advice of the Prime Minister unless a statute permitted an alternative procedure.

Australia officially commenced hostilities with Iraq on 22 March 2003. The then Prime Minister, John Howard, outlined the political means by which Australia went to war via a Cabinet decision followed by the optional extra of a vote in the House of Representatives.⁴ However, the announcement gave no indication of the formal legal means adopted to implement the decision. Decisions of Cabinet are not, of themselves, legally effective. To put them into effect, someone else will have to exercise a legal power.⁵

The three common constitutional and legal routes by which executive decisions are made are: individual ministers or civil servants exercising statutory powers conferred by legislation or executive powers delegated by the Governor-General; the Federal Executive Council exercising constitutional powers or statutory powers; and the Governor-General acting on advice to exercise executive powers conferred by section 61 of the Constitution. While a Cabinet decision would be expected as part of any process for taking Australia to war, Cabinet is not recognised in the Constitution and does not have legal or constitutional decisionmaking powers.⁶ It is the conventional body where the government makes collective decisions, but the decisions are implemented by other office-holders who ‘do the paperwork’.⁶ The

² The 2003 Annual Constitutional Law Conference at New South Wales Parliament House hosted by Professor George Williams, Director of the Gilbert and Tobin Centre for Public Law.

³ The *Statute of Westminster Adoption Act 1942* (Cth) came into operation on the day it was signed, 9 October 1942, but its provisions were made retrospective to 3 September 1939 ‘as from the Commencement of the War between His Majesty the King and Germany’.

⁴ House of Representatives (2003), p 12506.

⁵ Renfree (1984), p 147. See also Sawyer (1977), p 99.

⁶ ‘*The Cabinet itself has no legal powers and any executive decisions of the Cabinet require legally to be made by the Governor-General ... When the Constitution or a Royal prerogative or a statute authorizes the Governor-General in Council to do something, the approval of the Governor-General to an Executive Council Minute recommending that that thing be done operates as the legal authority for the thing to be done.*’ Renfree (1984), pp 192–93 (emphasis added). See also Sawyer (1977), p 99: ‘Thus provided the meeting has been called by the Governor-General or Vice-President, then effective, immediately operating *decisions* can be taken and Executive Council documents sufficiently executed to embody those decisions in legal form ...’ (emphasis in original). See for judicial support of this position, Bowen CJ in *Minister for Arts, Heritage and Environment v Peko-Wallsend Limited* (1987) 75 ALR 218, para 3. The

legislative vote in favour of the deployment of troops to Iraq was constitutionally irrelevant, as going to war is clearly an executive not a legislative power and, in any case, legislation to be validly enacted must pass the Senate and be formally signed into law by the Governor-General.

As neither the Governor-General nor Federal Executive Council was involved in the decision to commit troops to the Iraq invasion, the authors were curious to find out the alternative legal means by which Australia could go to war — the means the government in fact used — and the constitutionality of those means. The article will argue that the power to make war transferred from the King to the Governor-General during World War II as a prerogative power within section 61 of the Constitution. It will examine a possible argument for the later creation of a statutory power to make ‘war’ (whether using that word or a euphemism), and then discuss the interactions between the Governor-General and his ministers in early 2003. This article does not consider the legality of Australia’s actions under international law — something debated by many,⁷ including the authors.⁸ The fact of that debate is only relevant here because of the weight of published opinions about the legality of the proposed war that led the Governor-General to query the validity of the decision.

Commonwealth Executive Power

The Constitution vests Commonwealth executive power to the Queen, exercisable by the Governor-General under section 61, as well as more specific grants of executive power to the Governor-General or the Governor-General in Council (FEC). The latter powers are, by definition, statutory; however, the powers under

Cabinet Handbook is quite explicit: ‘The Cabinet itself is the apex of executive government. Meeting regularly, it sets the broad directions of government, takes the most important decisions facing a government and resolves potential conflicts within government. The outcome of some of the Cabinet’s deliberations requires action by the Governor-General, ministers or holders of statutory office to be put into effect: *Cabinet Handbook*, section 1.4.

⁶ The phrase used by a confidential source with regard to the matter under discussion.

⁷ For example, letters by 43 international legal experts in a letter to the *Sydney Morning Herald*, 26 February 2003 and by 16 even more eminent international lawyers led by James Crawford to *The Guardian* on 7 March 2003. These were never matched in number or quality by those expressing contrary views — and many of those writing public commentaries on the legality of the war were not international lawyers or not even lawyers at all. We now know that, days before this advice was presented, the British Attorney-General not only disagreed with the view put forward, but said that only the Americans held that view (see discussion in text later).

⁸ Sampford (2003, 2005). Howard and the advice he tendered claimed that UNSC resolution 678 (1990) authorised the use of force in 2003 for breach of resolution 687 (1991). One point made by Sampford, which Professor James Crawford found compelling, was that the Australian advice did not address resolution 686, which specifically addressed the question of when the right to use force would cease. This oversight makes some of the statements in the advice false and renders their interpretation of 678 and 687 untenable.

section 61 are more varied. They include prerogative powers,⁷ statutory powers and powers that are neither prerogative nor statutory,⁸ such as powers that the executive enjoys in common with ordinary people (such as entering into contracts), executive powers in areas where the Commonwealth could legislate but has not done so, and other areas which are likely to cause controversy⁹ (but do not need to be invoked in this quintessential prerogative power).

Most of the cases on executive power concern the extent of Commonwealth executive power, not who exercises it. This is hardly surprising. As the Governor-General almost invariably acts on ministerial advice, challenging an executive decision on the grounds that it should have been taken by the Governor-General rather than a minister would lead to ministerial advice to the Governor-General to act. Accordingly, there is no point mounting such a challenge unless there is a benefit in having the decision delayed. However, where there is doubt as to whether the power has to be exercised by the Governor-General or FEC, the Commonwealth will generally be cautious.

Nevertheless, it is uncontroversial that the power to make war is traditionally part of the royal prerogative which was not initially part of the executive power of the Commonwealth but was transferred to the Governor-General no later than 1942.

The Australian Constitution and the Power to Declare War: Section 61 or 68

The Australian Constitution does not specifically assign the power to declare war. Section 61 provides that:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Section 68 provides that:

The commander in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

Section 2 provides that:

A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

⁷ As confirmed by Mason in *Barton v Commonwealth* (1974) 177 CLR 477 at 498.

⁸ See Brennan J in *Davis v Commonwealth* (1988) 166 CLR 79 at paras 7–8.

⁹ See Barwick CJ in *Victoria v The Commonwealth* (the *AAP case*) (1975) 134 CLR 338 at 362.

The other relevant provision is section 51, which provides that:

Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (vi.) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth’.

Legislation under this head could create or regulate executive power to declare, wage and end wars.

The question is which of these provisions (sections 51 and 68) covers the war making power. Much has been made of the need to see the Commander-in-Chief role assigned to the Governor-General by section 68 as ‘purely titular’ in practice.¹⁰ In 1901, Quick and Garran (who are cited with approval by former High Court judge and Governor-General Sir Ninian Stephen) said of section 68 of the Constitution that:

The command in chief of the naval and military forces of the Commonwealth is, in accordance with constitutional usage, vested in the Governor-General as the Queen’s representative. This is one of the oldest and most honored prerogatives of the Crown ... All matters ... relating to the disposition and management of the federal forces will be regulated by the Governor-General with the advice of his ministry ...¹³

This appears to suggest that the war prerogative is encapsulated in section 68 (by referring to the command as ‘one of the oldest and most honored prerogatives of the Crown’). Arguably, this section is best seen as the ‘command and control’ provision, operable once the decision to go to war has actually been made. Professor George Winterton has suggested that the Governor-General’s exercise of the war power would be implemented under section 61 of the Constitution rather than section 68.¹¹

¹⁰ Sawyer (1977), pp 183–84, 230; Anon (1979), p 53: ‘Section 68 has to be construed and applied in the setting of responsible government in Australia, and it is merely a polite fiction, without substance, that the Governor-General is ‘Commander-in-Chief’. It is a designation of titular value only ... Beyond this, the 1901 concept of ‘Commander-in Chief’ has currently little, if any meaning or application in the context of the highly sophisticated structure of the present Australian defence system under the *Defence Act* 1903 (Cth), as amended in 1975.’ ¹³ Quick and Garran (1901), p 713.

¹¹ Personal communication, 2 September 2004. Professor Winterton suggests that section 68 ‘would empower command of the disposition of troops, but perhaps not (generally) the entry into hostilities — that is the role of s 61. (US commentary on the President’s power as Commander in Chief includes the power to repel sudden attack, and s 68 may include this.)’

The authors consider this interpretation to be the better view.¹² **The Australian Law and Practice of War-Making, 1901–41**

Prerogative Powers

The Australian legal framework arose from the British system and has included the Crown prerogative since its inception. The prerogative is defined as ‘the network of inherent common law powers, privileges and immunities of the Crown which have existed since time immemorial and exist by virtue of past de facto judicial recognition’.¹⁶ These prerogatives are arguably confined to those unique to the Crown — such as the making of treaties and declarations of war.¹³ Dicey viewed the prerogative as simply ‘the name for the residue of discretionary power left at any moment in the hands of the Crown’.¹⁴ The making of war and peace are prerogative powers of the Crown, and have long been acknowledged as such in British common law and academic commentary.¹⁵

As we will see, at Federation the power to make war was part of the royal prerogative exercised by the King on the advice of his British ministers. With the ratification of the Statute of Westminster backdated to 2 September 1939, the power to make war became a part of the royal prerogative exercisable by the Governor-General. Accordingly, British practice provides the only relevant precedents for its use until that date — and a very clear precedent was provided on that day of a royal proclamation of war. After that date, subsequent British practice is only relevant to the extent that it throws light on pre-World War II practice.¹⁶

¹² *Barton v The Commonwealth* (1974) 131 CLR 477 at 498, where Mason J stated that: ‘The Constitution conferred upon the Commonwealth power with respect to external affairs and, subject perhaps to the Statute of Westminster 1931 and the Balfour

¹³ Horan (2003), p 551.

¹⁴ For the purposes of this article, we use Dicey’s approach, whereby: ‘Every act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of this prerogative.’ (Dicey 1959, p 425), cited with approval in Winterton (1983), p 112. The High Court has said that: ‘The prerogative of the Crown [means] the power of the Crown apart from statutory authority.’ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 143.

¹⁵ For a more detailed analysis, see Lee (1984), Ch 3. One of the most famous cases on the exercise of the war power was *Burmah Oil Co v Lord Advocate* [1964] 2 All ER 348, which dealt with the consequences of what both parties eventually agreed was an exercise of the prerogative. However, this was very much the exercise of the prerogative *in bello* rather than the critical question here of decisions *ad bellum*. For a recent overview of the exercise of the war prerogative in the United Kingdom, see Bowers (2003). See also Public Administration Select Committee, House of Commons (2004). See also Jackson and Leopold (2001), pp 313, 321; Carroll (2003), pp 224–25; de Smith and Brazier (1989), p 128.

¹⁶ The controversy over Mr Blair’s decision to commit troops to Iraq has led to numerous calls within the United Kingdom for the statutory curtailment of the prerogative powers and the establishment of a House of Lords Constitutional Committee inquiry into the

Declaration, entrusted to it the responsibility for the conduct of the relationships between Australia and other members of the community of nations, including the conduct of diplomatic negotiations between Australia and other countries. By s 61 the executive power of the Commonwealth was vested in the Crown ... It enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution. It includes the prerogative powers of the Crown.’¹⁶ Blackburn (2004), p 546.

High Court Confirmation¹⁷

Early decisions by the High Court assumed that there were executive powers vested in the King which were not included in section 61.¹⁸ In relation to the war power, Isaacs J stated in 1916 that, while some aspects of the power were included in section 61, the power to create a state of war was not: ‘The creation of a state of war and the establishment of peace necessarily reside in the Sovereign himself as the head of the Empire.’¹⁹ Although not directly on the point, later decisions of the High Court appeared to retain this notion of limited Australian power. But they clearly assumed that the war prerogative, such as it was, would be exercised by the Governor-General — albeit on the advice of Executive Council or at least responsible ministers. Thus Higgins J stated that: ‘I certainly agree with the view that, if and so far as the royal prerogative as to war is exercisable by Australian authority, it has to be exercised, not by the State Ministers, but by the Governor-

Use of the Royal Prerogative Power by Government to Deploy the UK’s Armed Forces (Bennett, 2005). In October 2005, a Private Member’s Bill was initiated by Clare Short,

¹⁷ See Constitutional Committee, House of Lords (2006). The Blair government rejected an earlier recommendation in 2004 that the prerogative power to declare war and deploy armed forces without parliamentary consent be modified by statute, arguing that parliamentary scrutiny and accountability tailored to the circumstances of the armed conflict (the ‘pragmatic approach’) was a sufficient check on executive action. However, the subsequent allegations that the UK parliament was misled by the Prime Minister and senior government officials during the period, immediately prior to the decision to commit troops to Iraq, deprive this argument of much of its force. See Department for Constitutional Affairs (2004).

¹⁸ Zines (1977), pp 1, 25. Thus ‘[w]hen Britain declared war on 4 August 1914 all the Dominions assumed they were automatically at war, that is that the British declaration legally committed the whole Empire’ (p 27).

¹⁹ *Farey v Burvett* (1916) 21 CLR 433 at 452. In *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 230, Williams J held that: ‘The executive power of the Commonwealth at the date of the Constitution presumably included such of the then existing prerogative powers of the King in England as were applicable to a body politic with limited powers.’ In *Welsbach Light Co of Australasia Ltd v Commonwealth of Australia* (1916) 22 CLR 268 at 278, Isaacs J expressed it as follows: ‘No doubt, the supreme power of creating a state of war or of peace for the whole Empire resides in His Majesty in his right of his whole Empire, and does not reside in His Majesty in right of Australia or of any one of his overseas dominions. But when once a state of war is created, then His Majesty acting by his Australia Parliament and his Australian Government may, in respect of the Commonwealth, regulate the rights of alien enemies here resident ... The local right is, of course, subject to any paramount legislation by the Imperial Parliament.’

the former International Development Secretary who resigned in protest after the Iraq war. The Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill 2005 (UK) would have required the approval of both Houses of Parliament for participation by armed forces in any conflict and required the Prime Minister to table a report setting out the reasons and legal authority for the proposed participation. During second reading debates, the Bill failed to attract sufficient votes to proceed to the committee stage. See United Kingdom, Parliamentary Debates (2005), columns 1085–1162; Tempest (2005).

General and his Federal Ministers.²³ Evatt J stated of *Joseph* that: ‘There it was held that the royal prerogative as to war ... is exercisable by *the King’s representative*.’²⁰ Evatt J himself put it as follows: ‘[T]here are many royal prerogatives by virtue of which the *King or his representative* ... is entitled to act, e.g., to declare war, to make peace. Such prerogatives may be said to be ... “executive prerogatives”.’²¹

Towards Independent War-making

Australia’s war prerogative remained with the British Crown until the adoption of the Statute of Westminster by Australia in 1942. At the outbreak of World War I, Prime Minister Cook declared that ‘when the Empire is at war, so is Australia at war’.²² The need for an independent decision to go to war was apparently not contemplated — only a decision on the particular assistance which could be provided.²³ The extent of the prerogative powers exercisable by the Commonwealth government was apparently not entirely clarified by the 1926 or 1930 Imperial Conferences, nor by the Statute of Westminster in 1931.²⁴ Indeed, in 1939 when Britain declared war against Germany, the Commonwealth government again took

²⁰ *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 at 320 (emphasis added).

²¹ *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 at 320–21 (emphasis added).

²² *The Argus*, 1 August 1914. Opposition leader Andrew Fisher, shortly to become Prime Minister, stated that: ‘All, I am sure, will regret the critical position existing at the present time, and pray that a disastrous war may be averted. But should the worst happen after everything has been done that honour will permit, Australians will stand beside our own to help and defend her to our last man and our last shilling.’ Unidentified newspaper clipping, 1914, from ‘Press Clippings of WW1’ in *Papers of Atlee Hunt*, National Library of Australia, NLA MS 1100. See ABC TV, *Federation Story*, www.abc.net.au/federation/fedstory/ep5/ep5_culture.htm, 14 September 2004.

²³ This is consistent with the Isaacs J’s views in *Farey v Burvett* and general views about the limits of the war power in Australia outlined above. On 3 August, a special Cabinet meeting was held which decided to offer the mother country the assistance of the navy and army.

²⁴ Which affirmed the principles set out in the 1926 Balfour Declaration that the Dominions of the United Kingdom had equal status with the United Kingdom in all matters of internal

²³ *Joseph v Colonial Treasurer (NSW)* (1918) 25 CLR 32 at 51 (emphasis added). Similarly, Isaacs, Powers and Rich JJ, in holding that the Constitution assigns the defence power exclusively to the Commonwealth, state that ‘that power now rests in one hand *so far as Australian authority extends*’ (at 46, emphasis added).

the view that Australia was automatically at war.²⁵ Thus there was no separate formal declaration of war. The same attitude was taken when Italy declared war on Great Britain: Australia automatically assumed that it also was at war.

The Labor government took a different view when it took office in 1941. The government considered that the equality of status of the United Kingdom and its Dominions, expressed by the Balfour Declaration, allowed Australia to make its own declarations of war, and the government adopted the Statute of Westminster in 1942 retrospective to the outbreak of war in 1939. Australia made separate declarations against Finland, Hungary, Romania and Japan,²⁶ although to ensure that the declarations could not be challenged, Attorney-General Evatt advised that a formal delegation of the war-making power from the King to the Governor-General should be sought under section 2 of the Constitution.²⁷ The procedural involvement of the Governor-General was clearly assumed by the Attorney-General, Dr Evatt. For example, on 16 December 1941, he informed the House of Representatives that:

In view of Japan’s onslaught against the territories of the United States of America and Britain, the course to be taken by His Majesty’s Government in the Commonwealth was never in doubt. A full Cabinet meeting was held on ... 8 December, and it was unanimously decided that a declaration of war against Japan in relation to the Commonwealth and its territories should be made to operate from 5 o’clock on that date.²⁸

In view of doubts that the Commonwealth of Australia had the relevant power, Evatt informed parliament that:

and external affairs. The declaration expressed the opinion that the Governor-General of a Dominion was not the representative or agent of His Majesty’s Government in Great Britain or of any Department of that government. See Renfree (1984), p 147. Also see original documents at National Archives of Australia ‘Documenting a Democracy’,

www.foundingdocs.gov.au/text_only/places/cth/cth11.htm.

²⁵ Prime Minister Menzies, in his address to the nation, made this clear: ‘Fellow Australians, it is my melancholy duty to inform you officially that, in consequence of the persistence of Germany in her invasion of Poland, Great Britain has declared war upon her, and that, as a result, Australia is also at war.’ www.awm.gov.au/encyclopedia/prime_ministers/menzies.htm.

²⁶ Zines (1977), p 31.

²⁷ Twomey (1997), p 74.

²⁸ *Commonwealth Parliamentary Debates, House of Representatives*, 16 December 1941, vol 169, p 1088.

As to the procedure adopted ... First, it was important to avoid any legal controversy as to the power of the Governor-General to declare a state of war without specific authorization by His Majesty. I express no opinion as to whether specific authorization was necessary as a matter of strict law. Certainly the royal powers already exercisable under the Constitution by the Governor-General as the King's representative are extremely wide. However, the matter was too important and too urgent to invite any legal controversy. We, therefore, decided to make it abundantly clear that there was an unbroken chain of prerogative authority extending from the King himself to the Governor-General. For that purpose we prepared a special instrument, the terms of which were graciously accepted by His Majesty ... His Majesty assigned to His Excellency, the Governor-General, the power of declaring a state of war, first with Finland, Rumania, and Hungary, and, secondly, with Japan.²⁹

The Effect of the Adoption of the Statute of Westminster

It was to avoid any such uncertainty that Australia belatedly adopted the Statute of Westminster on 9 October 1942³⁰ — retrospectively to the outbreak of war. From that point on, it seemed clear that declarations of war would be made by the Governor-General on advice. This was the way the war prerogative was exercised at the moment of retrospective transfer. This understanding was underlined in 1951 by fact that it was the Governor-General who signed off on peace with Germany in 1951.³¹ This view of the prerogative is also the position that the assembled law professors assumed was correct on 21 February 2003.³² This power is to be exercised on advice, and that advice is expected to be followed. Refusal to follow advice was not generally

²⁹ *Commonwealth Parliamentary Debates, House of Representatives*, 16 December 1941, vol 169, pp 1088–1089.

³⁰ *Statute of Westminster Adoption Act 1942* (Cth)

³¹ The Solicitor-General, Sir Kenneth Bailey, advised the government that it could exercise all the prerogatives relating to war and peace, saying that he considered the delegation regarding the declaration of war in 1941 as legally unnecessary. This can be taken as evidence that section 61 can evolve over time, and may have done so even without the Statute of Westminster: Zines (1977), p 34. Nonetheless, given Mr Menzies' 1939 announcement, the delegation and adoption of the Statute of Westminster seem very sensible, indicating a preference for taking the constitutionally unimpeachable alternative.

³² 'Whatever the view as at 1900 of the source of the prerogative power, that understanding must now be considered in the light of Australian Independence; it came to be accepted that the federal government could exercise all royal prerogatives relevant to its powers and functions. It was a necessary consequence of Australian independence that "the executive power of the Commonwealth" came to include all of the prerogatives of the Crown applicable to the Commonwealth.' Selway (2003), p 504; also see Lee (1984), p 67, citing Campbell, 'Parliament and the Executive' in Zines (1977), p 88. For a discussion of how the Commonwealth has prerogatives in the twenty-first century, see Moens and Trone (2001), p 105.

considered to be an option and might even lead to instant dismissal.³³ The decision, however, was still one to be made by the GovernorGeneral.

Abrogating or Regulating the Prerogative Power by Statute: The Defence Act

Parliament may abrogate or suspend the prerogative or make its exercise subject to specific conditions.³⁴ It may also create a new statutory power in parallel to, or in

³³ Williams (2004).

³⁴ *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508, applied in Australia in *Barton v The Commonwealth* (1974) 3 ALR 70. See also *Brown v West* (1990) 169 CLR 195 at 202: 'Whatever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of control by statute.' (per Mason CJ, Brennan, Deane,

substitution for, a prerogative power. Indeed, it has been said that the prerogative ‘can be seen as merely an interim measure of executive power until Parliament regulates the subject by legislation’.³⁹ This is despite the fact that the Australian Constitution follows the US Constitution in providing for the legal separation of executive, legislative and judicial powers. There is still a debate about parliament’s power to regulate the executive government’s power to enter into treaties, and the regulation of the war power, being of a similar order to the treaty-making power, is likely to raise the same issues. In relation to treaties, government lawyers have expressed the view that:

It is clear that Parliament cannot itself assume the executive power to conclude treaties ... The more difficult question is the degree to which it can control the exercise of the power ...⁴⁰

Against this view, Professor Winterton distinguishes between a prerogative power, such as the power to enter into treaties, and those executive powers which are specifically conferred by the Constitution: prerogative powers could be subject to legislative control or even removed by parliament, while those executive powers specifically conferred by the Constitution could not be interfered with by parliament, although their use could probably be regulated.⁴¹ Likewise, Professor Zines concedes that:

it might be argued that, in so far as the Constitution confers executive power on the Governor-General in Council, parliament cannot remove or diminish that power any more than it can repeal, say, the High Court’s jurisdiction under s 75 of the Constitution. On this reasoning, as the Constitution by s 61 grants to the Governor-General the prerogative power of entering into treaties

Dawson and Toohey JJ). For a thorough analysis of the displacement of the prerogative by legislation, see Winterton (2003), p 421.

³⁹ See Winterton (2003), p 433.

⁴⁰ Senate Legal and Constitutional References Committee (1995), p 277. Sir Maurice Byers thought that the executive power to enter into treaties could not be taken away from the executive, but that it could be regulated by parliament: ‘No law of the Parliament could take away directly or indirectly the power that the executive possessed. However, the law under 51(xxxix) can say how that power is to be exercised and so it could lay down conditions relating to the manner in which treaties should be ratified by the executive or it could require things like reports to the parliament beforehand.’ (p 275) Professor Enid Campbell also thought that the separation of powers doctrine might inhibit parliament’s power to abrogate the treaty-making prerogative: ‘It is possible that the High Court would hold that the federal Parliament cannot enact legislation to invest itself, or either of its Houses, with powers of an executive character. If this is so, if follows that the federal Parliament could not, pursuant to its external affairs power, enact a statute which removes the treaty making power from the executive branch and transfers it to Parliament or one (or both) of its Houses.’ (p 276)

⁴¹ Senate Legal and Constitutional References Committee (1995), pp 275–76. See also Winterton (2003), pp 435–36.

or declaring war, an Act of parliament made ... could not control those prerogative powers.³⁵

It is clear in practice that not all executive power under section 61 is, in practice, exercised by the Governor-General. Dawson, Toohey and Gaudron JJ noted that:

Under s 61 the executive power vested in the Crown is exercisable by the Governor-General as the Crown's representative. The activities of the Commonwealth government are conducted formally on behalf of the Crown through the Governor-General acting on the advice of the Federal Executive Council ... In reality, the Crown acts in its day to day activities through the agency of its public service and through other institutions or instrumentalities created for the purpose. The Crown's functions nowadays extend beyond the traditional, or clearly, regal, functions of government to activities of an entrepreneurial or commercial kind which, in general, were previously engaged in only by subjects of the Crown.³⁶

An example is the making of contracts, which do not require the involvement of the Governor-General in order to be binding on the Crown.³⁷

What, then, of the war prerogative? Its exercise is hardly within the category of 'day to day activities of the Government'. Blackstone declared that the prerogatives of making war and peace were 'the principal prerogatives of the king respecting the nation's intercourse with foreign nations'.³⁸ They were described by Lord Coleridge CJ as 'perhaps the highest acts of prerogative of the Crown'.³⁹ This does not mean that the legislature cannot abrogate, limit or regulate the prerogative to make war. The Commonwealth parliament could do this under a number of heads of power, including the defence power in section 51(vi). However, the central and fundamental nature of this prerogative means we would assume any legislation that sought to do so would undertake such action clearly and unambiguously. That assumption is much stronger in Australia, where the courts have been less willing than their British counterparts to accept that the prerogative can be changed by anything other than the clear and unambiguous words of the parliament.

Words Required to Displace the Prerogative by Legislation

The Australian courts seem to have applied a stricter test than their British counterparts.⁴⁰ Barwick CJ has stated that 'the rule that the prerogative of the Crown

³⁵ Zines (1997), pp 262–63.

³⁶ *Re Residential Tenancies Tribunal of New South Wales: Ex Parte Defence Housing Authority* (1997) 190 CLR 410 (citing Jacobs J in the *Australian Assistance Plan (AAP) case* (1975) 134 CLR 338 at 406).

³⁷ *Re Residential Tenancies Tribunal of New South Wales: Ex Parte Defence Housing Authority* (1997) 190 CLR 410 at 438. See also McHugh J at 455.

³⁸ Blackstone (1783), Vol 1, pp 253, 257 and 261, cited in Lindell (2002), pp 46, 47.

³⁹ *Rustomjee v R* (1876) 2 QBD 69 at 73.

⁴⁰ For the British position, see *Attorney-General v de Keyser's Royal Hotel* [1920] AC 508, per Lord Parmoor at 576.

is not displaced except by a clear and unambiguous provision is extremely strong'.⁴¹ His Honour held that the relevant legislation did not displace the prerogative in that case, even though he thought that it had been the intention of the draftsman to do so. Jacobs J in the same case concluded that 'an intention to withdraw or curtail a prerogative power must be clearly shown and, as I have tried to show earlier, the right to communicate freely with a foreign state is an important prerogative power'. This ruling implies that the nature of the prerogative in question has a bearing on the standard of proof required. Similarly, recent statements by the Federal Court suggest that the prerogative, particularly where the power is an important one, is not easily displaced. The Full Court (Gummow, Hill and Lee JJ) 'accepted the proposition that it is presumed that the legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible'.⁴² Lindgren J referred to the possibility that the relevant extradition legislation might only result in a 'partial displacement' of the prerogative.⁴³ A majority in *Ruddock v Vadarlis*⁴⁴ (the *Tampa case*) found that the detailed legislative basis existing in the *Migration Act 1958* did not displace the prerogative power of the Commonwealth government to take measures to prevent refugees from landing on Australian shores. French J concluded that:

The greater the significance of a particular executive power to national sovereignty, the less likely it is that, absent clear words or inescapable implication, the parliament would have intended to extinguish the power. In such a case close scrutiny will be required of any contention that a statute, without express words to that effect, has displaced the operation of the executive power by virtue of 'covering the field' of the subject matter.⁴⁵

Relevant Legislation: The Defence Act 1903

The only Australian legislation that might be read as either extinguishing, varying or supplanting the war prerogative (apart from the Constitution itself) is the *Defence Act 1903*.⁴⁶ A pertinent provision is section 63:

1) The Governor-General may:

⁴¹ *Barton v The Commonwealth* (1974) 131 CLR 477 at 488.

⁴² *Ling v The Commonwealth* (1994) 123 ALR 65, citing with approval *Booth v Williams* (1909) 9 SR (NSW) 421 at 440.

⁴³ *Oates v Attorney-General* [2001] FCA 84.

⁴⁴ [2001] FCA 1329, para 185. Beaumont J concurred.

⁴⁵ Black CJ (dissenting) appeared to apply a more lenient test than the Australian courts, holding that the test was 'whether the legislation has the same area of operation as the prerogative'. Despite this, His Honour held that a 'very clear manifestation of an intention to abrogate will be required' for well-established prerogative powers. *Ruddock v Vadarlis* [2001] FCA 1329 at paras 34, 40.

⁴⁶ Note that the Democrats did introduce a Private Member's Bill in March 2003 to regulate the war power, but it did not get the numbers required. See Williams (2004), p 5.

(f) Subject to the provisions of this Act do all matters and things deemed by him to be necessary or desirable for the efficient defence and protection of the Commonwealth or of any State.⁴⁷

These words are identical to those in the 1903 Act.⁴⁸ They are very wide and would appear to cover declarations of war or decisions concerning troop deployments in 'warlike' service or in other forms of service, which could be made whenever the Governor-General, acting on the advice of the Executive Council,⁴⁹ deems them 'to be necessary or desirable for the efficient defence and protection of the Commonwealth or of any State'. Thus, even if section 63 does replace the prerogative power to declare war in section 61 of the Constitution, section 63 would still require the Governor-General's involvement in any decision concerning troop deployments of the kind under discussion in this article. The conferring of this broad power on the Governor-General rather than the minister would seem to confirm that, once the power to make war had passed to Australia in 1941, it would be exercised by the Governor-General on advice via the Executive Council.

Other executive powers are granted to the Minister of Defence. Following amendments made in 1975, section 8 provides as follows:

The Minister shall have the general control and administration of the Defence Force, and the powers vested in the Chief of the Defence Force, the Chief of Naval Staff, the Chief of the General Staff and the Chief of the Air Staff by virtue of section 9, and the powers vested jointly in the Secretary and the Chief of the Defence Force by virtue of section 9A, shall be exercised subject to and in accordance with any directions of the Minister.

Section 9(2) provides that: 'Subject to section 8, the Chief of the Defence Force shall command the Defence Force.' It might be argued that this is a source of executive power for the Defence Minister to take Australia to war by virtue of his or her powers to give directions to the Chief of the Defence Force (CDR) to command Australian forces to commence operations. This might be said to supplant, delegate or more likely supplement the power of the Governor-General under the prerogative powers incorporated in section 61.

There are three reasons to reject this interpretation. First, if the *Defence Act* were to either transfer or duplicate the power to make war, it is unlikely to be given to the Defence Minister acting alone. Second, it is very unlikely that such a shift would be made without any reference to the intended change. If the then Defence Minister (Mr Morrison) intended to grab the power to declare war, one would have thought that he might have the decency to make some mention in the second reading speech! Third,

⁴⁷ This means the Governor-General Acting on the advice of the Executive Council (section 16A of the *Acts Interpretation Act 1901* (Cth)).

⁴⁸ The other sections, which were repealed in 1991, covered matters such as building and arming boats, building fortifications, laying mines and running arms factories.

⁴⁹ Section 16A of the *Acts Interpretation Act 1901* would mean that the reference to the Governor-General would be a reference to the Governor-General in Council, so that the Governor-General is acting on the advice of the Executive Council.

and most importantly, the minister made an entirely different and more plausible interpretation of the sections based on the Tange Report that the government was implementing.

The Parliamentary debate on the Bill amending section 8 in 1975 made it clear that the intention was for the words ‘command and control’ to be limited to operational matters rather than the exercise of the war prerogative. ‘Command includes the authority and responsibility for effectively using available resources and for planning the employment of, organizing, directing, coordinating and *controlling military forces for the accomplishment of assigned duties*.’⁵⁰

The content of the Tange Report supports the view that the amendments to the *Defence Act* did not intend to alter the way in which the war power was exercised.⁵¹ The Tange Report states:

Parliamentary approval will be sought for vesting in the Minister for Defence *the direction of policy and for creating a new system of administration and command* of the Navy, Army and Air Force ... The principal purpose of this report is to suggest the structure of the organization and the inter-relationship of officers (military and public service) best calculated to effect [this] purpose.⁵²

It seems, therefore, that the government, in moving the amendments to the *Defence Act*, merely had in mind more effective strategic and defence policymaking and more efficient operational arrangements, despite the doubts raised by the opposition in relation to the role of the Governor-General under section 68.⁵³ This is borne out by the government’s contribution to the parliamentary debate, which stated that the Bill ‘brings about an integrated organization to replace 5 government departments and 3 boards of administration with a new structure’.⁵⁴

It certainly seems that the powers given to the minister, the chief of the armed forces and the service chiefs under sections 8 and 9 make very significant inroads into the policy and operational aspects of the ‘command in chief’ role enjoyed by the Governor-General under section 68 of the Constitution, to the extent that little is left to be covered by section 9(5) of the Act. At least on one view, the High Court would

⁵⁰ Tange (1973), cited in *Commonwealth Parliamentary Debates, House of Representatives*, 20 August 1975, pp 355–56 (emphasis added).

⁵¹ The report refers first to the Guiding Principles provided by the then Minister for Defence for the preparation of the report; these include the launching of the first stage of the reorganisation, in which the Defence Department ‘acting on behalf of its Minister, will be given greater authority in its direction of the *execution of defence policy*’ and greater control over administrative aspects of the military. Tange (1973), cited in *Commonwealth Parliamentary Debates, House of Representatives*, 20 August 1975, pp 1–3.

⁵² Tange (1973), cited in *Commonwealth Parliamentary Debates, House of Representatives*, 20 August 1975, p 9 (emphasis added).

⁵³ See the concerns of the Opposition (Mr Killen), *Commonwealth Parliamentary Debates, House of Representatives*, 20 August 1975, p 341.

⁵⁴ *Commonwealth Parliamentary Debates, House of Representatives*, 20 August 1975, p 343.

find such legislation valid, treating section 68 as subordinate to the legislative defence power in section 51(vi) of the Constitution.⁵⁵ But, based on the government's intentions as outlined in the Tange Report and the second reading speech, the 1975 amendments to section 8 do not appear to have had the intention of vesting the power to go to war on the minister. Nor do the amendments on their ordinary meaning have this effect. The Act simply has nothing to say about how this power is to be exercised. It merely authorises the minister to manage the defence forces within the constraints of whatever decisions the government may take under the war-making power. Thus the legislation, at most, regulates only that part of the executive power under s 68 of the Constitution which covers such operational matters. Section 9(5) of the *Defence Act* explicitly subjects the CDF's powers to section 68 of the Constitution.⁵⁶ This, along with the preservation of the broad powers of the Governor-General in Council in section 63(f), suggests that no change is intended in the formal position of the Governor-General in starting and fighting wars.

Delegating Prerogative Power

There is little doubt that the Governor-General can delegate much of his or her executive power (important exceptions would be specific powers granted to the Governor-General under the constitution). A central compendium of such delegations is found in the Administrative Arrangement Order, which lists for each department and minister 'matters dealt with by Departments' and 'legislation administered by the minister'. The latter provides quick reference to the statutory powers but could not be construed as varying those powers. The former do include delegations, but none of those under the Prime Minister or Defence Minister could be construed as delegating a power to make war or its modern equivalents.⁵⁷ The delegation of the power to make war is not something to be done casually and in the absence of clear words.

Alternative Bases for Legality?

There may be alternative bases for establishing that ministers have the power to make war without gubernatorial involvement or legislative sanction. We followed up on a number of suggestions from Australian, New Zealand and British constitutional lawyers — most notably under the doctrines of delegation deriving from the very act

⁵⁵ See Sawyer (1977): 'section 68 of the Constitution illustrates the likely use of historical convention in the interpretation of law. The High Court would certainly take judicial notice of the practices and understandings of 1900 governing the Queen's position as Commander-in-Chief, if called upon to decide how much authority new s 9(5) preserves to the Governor-General, and whether the vesting of "general control and administration" in the minister under s 8 without any reservation of the Governor-General's powers under s 68 is valid. I think the Court would, in the light of the history, treat s. 68 as subordinate to the legislative defence power in s 51(vi) of the Constitution.'

⁵⁶ *Defence Act*, Section 9(5).

⁵⁷ The closest of any delegated powers under the AAO are counter-terrorism policy coordination, national security policy coordination (both Department of Prime Minister and Cabinet) and international defence relations and defence cooperation (Defence Department).

of appointment,⁵⁸ by an extreme stretch of the implied delegation of prerogative powers found in the World War II case of *Carltona v Ministry of Works*,⁵⁹ by an argument relating to the processes for commissioning ministers that might have worked in New Zealand but would not in Australia or by looking to the willingness of the High Court to read in some powers that are non-statutory and non-prerogative. Space does not permit their discussion here, and they are almost certainly weaker than the *Defence Act*. One suggestion on which we will comment very briefly is that the High Court might read in a separate non-prerogative, nonstatutory power. Where there is already a prerogative power held by the Governor-General, we do not see why the High Court would suddenly recognise a parallel executive power for the Prime Minister.

Subsequent Wars

Just as Australia (and the Governor-General) gained the power to make war and peace, formal declarations of war went out of fashion. This is only partly explained by the UN Charter's prohibition on the use of force in international affairs except for self-defence or under the authority of the UN Security Council.⁶⁰ The assumption of the role of 'declaring' war by the Security Council may be another reason for avoiding declarations of war at the national level, at least in actions authorised by the United Nations.

The changing fashion concerns only the means by which the decision to go to war is announced. As a matter of international law, it does not prevent the ensuing activities being classified as war. As a matter of domestic law, it remains unchanged. Indeed, the prerogative power is to make war, not to declare it. The means for its announcement is an incident to the power, not its source.

War and Its Synonyms

The invasion of Iraq is generally and popularly recognised as a war and fits most definitions of it.⁶¹ It was clearly an exercise of the war-making power, although there

⁵⁸ Section 64 of the Constitution provides that the Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish. It might be argued that, in appointing ministers to administer departments, the Governor-General is formally delegating relevant prerogative powers. This suggestion carries no support in the judgments referred to above. There are also the practical difficulties as to which minister is delegated which power. One would not want any doubt about the delegation of war-making powers!

⁵⁹ *Carltona v Ministry of Works* [1943] 2 All ER 560.

⁶⁰ The Preamble of the Charter states that: 'We, the peoples of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind'; Article 2(4) provides that: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.' UN Charter, Art 2(4). One might presume that, when war is justified, states would go about their own internal constitutional processes for declaring that it has started. However, even though states have a right to use force in self-defence, they are also required to bring the matter to the

is some legislative skirting around the term. Section 4 of the *Defence Act 1903* (Cth) defines war narrowly to mean 'any invasion or apprehended invasion of, or attack or apprehended attack on, Australia by an enemy or armed force'. The Act defines 'Time of War' to mean 'any time during which a state of war actually exists, and includes the time between the issue of a proclamation of the existence of war or of danger thereof and the issue of a proclamation declaring that the war or danger thereof, declared in the prior proclamation, no longer exists'.

Other legislation recognises 'warlike service' in situations outside the *Defence Act's* definition of war. For example, the *Veterans' Entitlements Act 1986* (Cth) provides in section 5B that 'war to which this Act applies means World War I or World War II'. Later engagements are referred to as 'periods of hostilities' and include the periods of hostilities during Korea (1950–56).⁶⁸ More recently, Australia seems to have avoided calling a particular military engagement a 'war', or even a 'period of hostilities' (at least for the purposes of this Act), and the minister has simply made a determination that service in relation to that engagement constitutes

Security Council. Accordingly, the use of force is intended to be temporary and the hoped-for result is a decision by the Security Council rather than a war. Green offers a rationale for this, seeing the Security Council as effectively making the equivalent of declarations of war. Noting that enforcement action by the Security Council will only be resorted to after a refusal by the target country to comply with the Council's demand that it change its policies, he argues that 'this demand may be regarded as a type of ultimatum, and with the rejection of the demand the enforcement measures will be instituted without any declaration of war'. See Green (1993), p 71.

⁶⁸ Dinstein (2001), pp 14–15. Note that others suggest that war may include actions between non-state entities. Detter suggests that war should be defined as 'a sustained struggle by armed force of a certain intensity between groups of certain size, consisting of individuals who are armed, who wear distinctive insignia and who are subjected to military discipline under responsible command'. See Detter (2000), p 26.

⁶⁹ The distinction between hostilities and war is also reflected in the definition of 'enemy' in section 5C of the *Veterans' Entitlements Act*, where enemies can include any military force which Australia was opposed to in either 'war' or 'hostilities'. The war in Vietnam is similarly dealt with in s 5B(1)(e).

warlike service under section 6F.⁷⁰ Other determinations of warlike service have been made in respect of Afghanistan,⁷¹ East Timor⁷² and Iraq in 2003.⁷³

Australian Practice Since the 1950s

Australia's actions in Korea,⁶¹ Malaya, Malaysia, Vietnam,⁶² Somalia, Cambodia, East Timor and Iraq (1991 and 2003), Bougainville, Bosnia, Rwanda and

⁷⁰ For example, in the case of the first Gulf War, Schedule 2 to the Act defines Iraq and Kuwait during the hostilities from 1991 to 1991 as an 'operational area'. See also Schedule 2, Item 10, which defines a wider area, with a determination that some operations (e.g. Operation Slipper) constituted warlike service.

⁷¹ Operation Palate from 18 April 2003 in the area comprising Afghanistan.

⁷² One Ministerial Determination states that: 'I, Bruce Scott, Minister for Veterans' Affairs for and on behalf of the Minister for Defence ...

b. determine that service rendered as a member of the ADF on OPERATION STABILISE during the period 16 September 1999 to 23 February 2000 in the area of operations specified below is warlike service for the purposes of subsection 5C(1) of the *Veterans' Entitlements Act 1986*.

- The area of operations comprises East Timor and the sea area that on 16 September 1999 was the territorial sea of Indonesia adjacent to East Timor.'

⁷³ A determination of warlike service was made in the case of Operation Falconer (18 March to 22 July 2003) and for Operation Catalyst (16 July 2003 and ongoing) for the purposes of subsection 5C(1). The authors were unable to locate any determinations of warlike service in relation to the first Gulf War.

Afghanistan were not accompanied by formal declarations of war. Of these, only Afghanistan and the two Iraq wars appear to fit common sense definitions of war in

⁶¹ See O'Neill (1981), Vol 1. On 27 June 1950, the Security Council had passed a resolution that 'the members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area' (p 49). Commitments to provide the services of the Australian Navy were made by Menzies by cable to British Prime Minister Attlee on 29 June; the decision to commit ground troops was made after tortuous negotiations among ministers while the Prime Minister was overseas and a statement to this effect was hurriedly drafted by the External Affairs Minister Percy Spender (in order to beat the announcement of a British commitment to the US effort) in the name of the acting Prime Minister Arthur Fadden and telephoned to the Australian Broadcasting Commission to be announced 'to Australia and the world' (p 76). Here the importance of the US alliance to Australia played a key role in the speed at which events moved. We do not know what role, if any, the Governor-General played in that process. However, it would be surprising if a traditional royalist and constitutionalist such as Menzies would not have kept him fully informed and sought his verbal assent using at least the kind of processes involved in the United Kingdom at that time.

⁶² The Australian commitment was made in slow stages, in the initial context of a general economic aid program, then with barbed wire being supplied to protect villages from night attacks, followed by the provision of 30 military advisers in 1962 to train the South's resistance to the Communist North, then with a statement in 1965 by Prime Minister Menzies to parliament in April committing a battalion to South Vietnam supposedly in response to a request for aid from that country's government. There were three subsequent decisions under Harold Holt to increase Australia's military commitment, following encouragement by the United States. The United States, through

which there are hostilities between two or more states. (Indeed, without another state involved on the other side, it is hard to see against whom the declaration could be made.) The Korean War is an awkward fit because, at the time of the UNSC resolution, Korea was a single state with rival administrations ensconced in the areas set down for Soviet and US occupation in Potsdam in 1945. Except for Somalia (whose state was not functioning), other cases involved a request for, or at least formal consent to, Australia's action to deal with insurgencies or other law and order issues within the boundaries of the consenting state.⁷⁶ Apart from the two Iraq wars, and possibly Korea, none of these involvements would have counted as war in the past and none has required the Australian government to contemplate a declaration of war.

But even if a declaration of war is not required as a matter of international law, this cannot alter the constitutional procedures by which a sovereign state commits itself to war as a matter of its own domestic law. While the boundaries between domestic and international law are slowly eroding in some areas such as trade, few countries are prepared to cede such decisions to international agencies, and we know of none prepared to alter their constitutions to that effect. It is unlikely that either the United States or Australia would argue that UNSC resolutions declaring war have a domestic legal effect by themselves. Both would insist on the necessity for domestic legal procedures to be followed. This returns us to the question of the legal and constitutional means for such determination.

representations by its Secretary of State Dulles to Australian and New Zealand ambassadors, had made it clear that it expected military commitments by the latter two countries to save Indo-China from the communist threat as early as 1954. See Porter (1979), Vol 1, p 534. In his statement to parliament in 1965, Menzies was clearly thinking of wider regional implications if South Vietnam fell rather than a direct threat to Australia from the North; he also emphasised that 'our alliances, as well as providing guarantees and assurances for our security, make demands upon us'. The Prime Minister continued: 'it is our judgement that the decision to commit a battalion in South Viet Nam represents the most useful additional contribution which we can make to the defence of our region at this time. The takeover of South Viet Nam would be a direct military threat to Australia and all the countries of South and South-East Asia. It must be seen as part of a thrust by Communist China between the Indian and Pacific Oceans.' See *Commonwealth Parliamentary Debates, House of Representatives*, 29 April 1965, p 1061. The Prime Minister noted that his statement had been preceded in recent weeks by 'an important debate on foreign affairs' in the House, 'in which the situation in Vietnam was fully and anxiously discussed' (p 1060). However, no formal declaration of war was ever made. Other detailed diplomatic historical accounts of Australia's entry into the war do not mention the Governor-General. See Siracusa (2001). Works in politics and international relations, however, generally concern the decisions that were made and the reasons for them, rather than the legal means by which they were made.

⁷⁶ South Vietnam was recognised by Australia and another 86 countries at the time Australian troops went there to assist in dealing with what was, at the time, an insurgency. The last three listed (Bougainville, Bosnia and Rwanda) were classic peacekeeping operations, where the use of significant force was not considered at all likely.

As indicated, most of the above interventions would not count as ‘wars’, and would not have been expected to involve a declaration of war.⁶³ However, the two Iraq wars and Afghanistan are clearly wars in any sense of the word, and Australia’s participation in these commenced without the exercise of the war prerogative by the Governor-General or its delegation to the Prime Minister or other ministers. This would seem to involve a major shift in practice without any apparent debate or public consideration of its desirability, let alone constitutionality.

This shift was clearly a surprise to constitutional lawyers giving the standard reply in February 2003. It was also a surprise to the relevant Governors-General, who clearly expected to be involved. In 1992, Mr Hayden apparently made it clear that he would have had no trouble signing the relevant instruments but that he was the one to do so. The approved record of interview with Dr Peter Hollingworth indicated that he was more proactive, seeing it as his ‘duty to ask the government of the day what instruments, if any, were required to invoke such an action or to ratify the decisions of government’ (see Appendix).

Mr Howard’s response in the case of Afghanistan was that this was covered by the ANZUS treaty. This response, as recorded by Dr Hollingworth, seriously misses the point. The Governor-General was asking a question within domestic constitutional law. The ANZUS treaty does impose obligations on Australia — including the obligation to consult with the United States if it is attacked and to ‘act to meet the common danger [caused by an attack on one] in accordance with its constitutional processes’. However, it explicitly leaves the constitutional processes (presumably including the Governor-General’s role) untouched. Accordingly, Mr Howard was quite right to see the ANZUS treaty as relevant to our reasons for going to war with Afghanistan. But he was quite wrong to assume that it affected the procedural means by which we chose to do so. Indeed, if the content of the ANZUS treaty did become a part of domestic Australian law, it would also impose an obligation on Australia under its domestic law:

to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations (Article 1).

Of these three wars, the two Iraq wars seem to be the only cases where clear statements were made about the process. Both of them seem to exclude the Governor-General — though in both cases, the relevant Governors-General had expected to be consulted.

The Governor-General was not involved in any way in the decision to go to war against Iraq in 2003. The then Prime Minister John Howard made no mention of the

⁶³ The former Governor-General’s record of interview includes statements about the ‘deployment of troops’ from Vietnam onwards. With respect to whoever made this claim, which was outside of the experience of the Governor-General, there is a difference between the deploying of troops and the declaration of war. If there were not, then we would go to war many times a year – and mostly with ourselves!

Governor-General when he explained the means by which the decision to go to war had been made and effected:

Let me make it very clear to the House that if a decision is taken by the executive government of the day through a decision of cabinet, as is proper in our system of government, to commit the military forces of this country to a conflict involving Iraq, this decision, having been taken, will be presented to this parliament for debate with the minimum possible delay ... The constitutional processes were well set out by my predecessor but one, Bob Hawke, when he explained in 1991 in relation to the first Gulf War that a decision had been taken by the executive government of the day, as is appropriate under our constitutional arrangements.⁶⁴

Former Prime Minister Bob Hawke described the Australian government's process of committing troops to the first Gulf War and mentioned the Governor-General, but not in a decision-making capacity. Both statements are in stark contrast to Evatt's description of process reproduced above and that assumed by most constitutional lawyers and High Court judges, in which the Governor-General was assigned the *power* to declare war. Rather, in Hawke's view, Cabinet's decision was purportedly given legal effect by the Prime Minister himself. Ministers (not specified to be meeting as the Executive Council) were 'consulted' and the Governor-General was 'formally *notified*' — apparently in the same manner as the Leader of the Opposition:

The decision to commit Australian armed forces to combat is of course one that constitutionally is the *prerogative of the Executive*. It is fitting, however, that I place on parliamentary record the train of events behind this decision. On 4 December I informed the House that, *following a decision of Cabinet*, Australia was prepared to provide forces to participate in operations under United Nations Security Council resolution 678, should that become necessary. On 17 January, after *consulting* senior Ministers, I *gave effect to that decision* by authorising our naval task force in the Gulf to participate in such operations. I then formally *notified* the Leader of the Opposition (Dr Hewson) and the Governor-General of the Government's action.

I subsequently requested you, Mr Speaker, and the President of the Senate, to recall Parliament so that I can report to the Parliament and to the nation on this grave issue, and so that members of parliament can have the opportunity to express their views.

The passage of this motion will solemnly and forcefully underline — to Iraq, to the United Nations, to our partners in the multinational force, and to our fellow Australians serving in the Gulf — the strength of Australia's support for our armed forces there and for the role to which they have been committed under the authority of the United Nations. This is the most serious step any

⁶⁴ *Commonwealth Parliamentary Debates, House of Representatives*, 6 March 2003, p 1255.

government can take, just as, indeed, war is the most serious action on which any nation can embark.⁶⁵

This suggests that the exercise of the war-making power is now, in practice, entirely in the hands of Cabinet, with no involvement by the Governor-General or Federal Executive Council. This may be an accurate statement about the realities of the exercise of political power, but it does not state the legal process for its implementation and the validity of any process other than via the Executive Council is open to serious doubt or worse.

High Court Views

Certainly, the High Court has given no indication of such a radical change. Jacobs J, as late as 1975 (the year the *Defence Act* was amended as set out above) stated that:

If legislation were a prerequisite it would follow that the Queen would never be able to exercise the prerogative through the *Governor-General acting on the advice of the Executive Council*; she would always exercise executive power by authority of the Parliament. This cannot be suggested. It would, if correct, result in an inability of Australia to *declare war*, make treaties, appoint officers of State and members of the Public Service of the Commonwealth and do all the multitude of things which still fall within the Prerogative, unless there was a general or special sanction of an Act of Parliament.⁶⁶

Jacobs J continued:

It was always intended that, subject to the Constitution and its expression of the subject-matters of Commonwealth power, to a large extent the prerogative would be exercised on all matters of Australian concern by the Crown on the advice of Australian Ministers rather than on the advice of United Kingdom Ministers ... The prerogative is now *exercisable by the Queen through the Governor-General acting on the advice of the Executive Council* on all matters which are the concern of Australia as a nation ...⁶⁷

More generally, the High Court considered the exercise of the external affairs power (to which the war power must surely be analogous) to be a prerogative power: in 1975, Barwick CJ appeared to assume the involvement of the GovernorGeneral and the Executive Council by observing that ‘the Crown represents Australia

⁶⁵ *Commonwealth Parliamentary Debates, House of Representatives*, 21 January 1991, p 2 (emphasis added).

⁶⁶ *Victoria v The Commonwealth (The Australian Assistance Plan or ‘AAP’ Case)* (1975) 7 ALR 277 at 333.

⁶⁷ *Victoria v The Commonwealth* (1975) 7 ALR 277 at 333–34.

internationally. Its conduct in that connection is determined *by the advice of the Executive Council*.⁶⁸

Summary, February 2003

It would be fair to conclude that, as of early February 2003, the position was as follows:

- 1 In 1939, the power to make war on behalf of Australia resided legally in the King as part of his prerogative. This power was exercised on the advice of his ministers.
- 2 In adopting the Statute of Westminster, Australia transferred that power to the Governor-General under section 61 of the Constitution. This was affirmed when the Governor-General signed the peace treaty with Germany in 1951.
- 3 All academic and judicial opinion assumed this still to be the case unless the power was transferred to another official concurrently or exclusively by a clear statute (this being the preferred view to requiring a constitutional change).
- 4 Under the *Defence Act* amendments of 1975, the only candidate for such a transfer did not seem to be intended for this purpose.
- 5 Declarations of war are now unfashionable. However, that does not alter the realities of what constitutes war, nor the legality of the means of entering into a war. Most would presume that this meant that the Governor-General still authorised Australia's entry into war but that such authorisation was not made publicly.
- 6 Australia has since deployed troops on a number of occasions. The only two clear examples of wars prior to 2003 had been the 1991 Iraq war and Afghanistan.
- 7 In each case, the Governor-General had assumed that he would need to make the formal decision to implement a decision of Cabinet.

Yarralumla, 2003

Publicly, Iraq 2003 was a rerun of Iraq 1991. The decision was made by Cabinet, and the Governor-General was not involved. Privately, it was also a rerun in another sense: the Governor-General expected to be the one signing off on the action.

Interviews with the former Governor-General indicate that the then Prime Minister was prepared to take the matter to Federal Executive Council — though as a matter for 'noting', whatever that may mean.⁶⁹ He appears to have changed his mind after the Governor-General asked a very pertinent question of the AttorneyGeneral.

⁶⁸ *New South Wales v The Commonwealth* (1975) ALR 1 at 9 (emphasis added). See also Richardson (1977), pp 50, 57. For a similar statement, see Murphy J in *Koowarta v Bjelke-Petersen* (1982) 39 ALR 417 at 469 (emphasis added). See also Winterton (2003), p 210, n 136.

⁶⁹ We are unaware of precedents or procedures for such 'noting'. If this approach were to prevent questions being asked, it is not clear that it would be successful.

This exchange was revealed during one of a series of interviews which Dr Peter Hollingworth gave to one of the authors.⁷⁰ Dr Hollingworth said, *inter alia*:

I had previously read public statements made by some academics and international lawyers, and, on the advice of the Official Secretary, I sought clarification from the Attorney-General as to technical ramifications that could arise under international law.

The Attorney-General did not provide a response, but the Prime Minister did from 'available legal advice'. The Prime Minister told the Governor-General that his predecessors had not been involved in past decisions and that no involvement was necessary. The Governor-General himself notes that the Prime Minister had given an undertaking to bring the decision to go to war to the Federal Executive Council 'for noting'.

This exchange raises several factual questions, some normative questions (including overlapping legal, constitutional and ethical dimensions) and some hypothetical. First, as to the factual questions, what was the 'available legal advice' referred to by the Prime Minister? If, as is likely, he used the actual or draft decision presented to the Parliament, why was he using a minority view which did not address the powerful counterarguments on the public record by far more distinguished international lawyers? This raises further factual questions:

- 1 Were the Australian lawyers drafting the government's advice in contact with those drafting advice for the British and American governments? There are good reasons to believe that there was considerable exchange of legal views between British and Australian government lawyers — given the fact the final advices by the British and Australian government lawyers were as similar to each other as they were different from the views of the majority of international lawyers. (Indeed, one of the authors received a confidential report from an impeccable source that 'they were in touch all the time'.)
- 2 Was there an earlier, more equivocal advice concerning the international legality of the proposed action drafted for the Australian government, as there was for the British? Another confidential source told one of the authors that there was such an opinion in circulation.
- 3 Lord Goldsmith's confidential legal opinion to Mr Blair of 7 March 2003 refers purely to arguments put forward by the government of the United States and says that *no other country agrees with them*.⁷¹ This would seem to imply one of three things: (a) he was in error as to the views of the Australian lawyers, (b) he did not think that Australian views counted, or (c) the views of the Australian lawyers being discussed in private were in line with those of the British government lawyers and the vast majority of non-government lawyers. The last seems most likely. The senior international lawyer at the

⁷⁰ A summary was drawn up and a version was approved by Dr Hollingworth for publication (see Appendix).

⁷¹ The full text of Goldsmith's advice, which was subsequently leaked to the media, is available at *The Guardian*, <http://image.guardian.co.uk/sysfiles/Guardian/documents/2005/04/28/legal.pdf>.

Foreign Office, Elizabeth Wimshurst, resigned because she had been 'given to understand' that Lord Goldsmith shared her view that another UN Security Council vote was needed.

The normative questions centre around what the Governor-General could legitimately do and what he should do in such situations. Some of the most interesting normative questions centre on the Governor-General's request for advice and the Attorney-General's response to it. Ever since Sir John Kerr sought Sir Garfield Barwick's advice on the eve of his 1975 dismissal of Prime Minister Whitlam, gubernatorial legal advice has been a very sensitive issue and Governors-General have been cautious about seeking it.⁷² Given this caution, one might ask the following:

- 1 Should the Governor-General ask questions of ministers on issues that are not currently before the Federal Executive Council? Views might range from avoiding any questions dealing with controversial issues that are not on the agenda to a duty to ask key questions. Confidential sources indicate that this is common.
- 2 While the Governor-General regularly and legitimately asks questions to assure himself of the domestic legality of what he is asked to sign, should this extend to issues of international legality and matters brought or about to be brought to him for signing and/or noting?
- 3 Should the Governor-General in his formal position as Governor-General and/or Commander-in-Chief be entitled to seek the advice of the Attorney-General as to the international legality of a war which Australia is considering? Can he ask for the Attorney-General's own opinion as First Law Officer and, if the Attorney-General is unwilling to give it, is the Governor-General entitled to seek independent advice?⁷³
- 4 If the Governor-General is not expected to seek independent legal advice, does that impose any obligations on those tendering legal advice to provide legal advice of at least the quality and depth of that provided by Lord Goldsmith in his confidential memo to Mr Blair?
- 5 What should the Governor-General do if he is uncertain of the international legality of the war after receiving advice from the government — especially

⁷² In Australia, state Governors have been a little more willing to seek outside advice with or without the Premier's knowledge.

⁷³ The crime of waging aggressive war is part of customary international law ever since the Nuremberg trials and is recognised in Article 5 of the Rome Statute of the International Criminal Court 1998, but is not currently enforceable by the International Criminal Court. That does not prevent other forms of prosecution outlined in Lord Goldsmith's advice to Mr Blair on 7 March 2003. It is not at all clear that the fact that the Governor-General is expected to act on the advice of the democratically elected legislature would be any kind of defence. This is the kind of issue on which the Governor-General might consider himself entitled to receive high-quality legal advice and possibly independent advice. The Governor-General may also seek advice on the likelihood of prosecution, but the first question should always be the legality of an action, not whether someone can be brought to account.

if that advice is not from the Attorney-General whose advice he had requested?

The last question raises a number of hypothetical issues, depending on what action the Governor-General took and subsequent responses. Professor Williams has dealt with one hypothetical — a gubernatorial refusal to declare war on prime ministerial advice.⁷⁴ This hypothetical was based on the legitimate but incorrect assumption that the Governor-General would be involved in the decision to go to war. Williams suggested that a Governor-General would face dismissal if he refused to follow the Prime Minister's advice. If it were a straight out refusal without any basis, Williams is almost certainly correct. However, if the war were highly unpopular and the Governor-General asked for a clear statement by the Attorney-General and refused to give the authorisation until that statement was provided,⁷⁵ it is not clear that a Prime Minister would really be in a position to dismiss the Governor-General and put in place a more compliant replacement. The uproar would have been deafening.

However, involvement of the Governor-General in the formal decision allows for more subtle variations. The Governor-General might ask for the advice in writing and insist on having the Attorney-General's independent opinion as First Law Officer. He or she might insist that any such advice address the competing arguments,⁷⁶ or insist on the publication of advice. The Governor-General might even consider resignation on the grounds of not wishing to be exposed to criminal liability for the crime of aggression in some current or future court claiming universal jurisdiction.⁷⁷ Given Williams' comment about the likelihood that the Governor-General might be sacked if he or she refused to go along with a war that the majority of international lawyers considered illegal, it might even be suggested that the Governor-General could avail him or herself of the same argument as Sir John Kerr did for acting precipitately and dismiss the Prime Minister.⁷⁸ The authors and the majority of commentators are not in favour of such drastic gubernatorial interventions,⁹³ despite

⁷⁴ Williams (2003), p 5.

⁷⁵ Sir Michael Boyce, Chief of the British Chiefs of Staff, demanded a similar statement from Lord Goldsmith before he would move any troops into Iraq. See 'Interview: Admiral Sir Michael Boyce — Transcript of an interview conducted by Antony Barnett (AB) of the Observer with Admiral Sir Michael Boyce (MB) former British chief of the defence staff on April 29 2005', *The Observer* (London) 1 May 2005, <http://observer.guardian.co.uk>.

⁷⁶ A confidential source has suggested that this has happened on other occasions and that this might have even reached the point of becoming a protocol in one state.

⁷⁷ Some might even fantasise about the Governor-General seeking independent legal advice and dismissing the Prime Minister on the grounds that the proposed action was illegal under international law, but that its legality could not be resolved in a court of law. While there is limited commentary on this ground for dismissal and the even more limited examples, it is not clear that illegality must be confined to domestic legality. On 6 March 2003, Mr Howard himself had made international legality a necessary precondition for going to war in Iraq.

⁷⁸ Sir Paul Hasluck's comments on this theme are instructive. He argued that: 'It is not that the Governor-General (or the Crown) can over-rule the elected representatives of the people but in the ultimate he can check the elected representatives in any extreme

the temptation to point out that the then Prime Minister was a supporter and a direct beneficiary of the only previous such exercise.

In 2003, there was no indication that the Governor-General was going to refuse advice, only an indication that he took the advice of the Official Secretary and asked Australia's First Law Officer his advice on international legal issues arising from the war into which Australia was about to voluntarily enter. Whether or not he shared the expectation of most constitutional lawyers that he would be involved in the decision to go to war through the exercise of the prerogative on advice from the government, he was certainly acting in a way that was utterly consistent with the principles and practices of constitutional monarchy. His is entirely consistent with Sir Paul Hasluck's 'watchdog' model of Governor-Generalship that politicians have not sought to challenge.⁷⁹ This is in line with the expectations of the Governors-General Hayden and Hollingworth and constitutional lawyers referred to in the introduction to this article.

The Australian government did not go to war through the use of the prerogative. All the evidence that we have been able to assemble indicates that the purported legal means by which the Cabinet's decision to go to war in Iraq (together with other decisions made by the Security Committee of Cabinet to

attempt by them to disregard the rule of law or the customary usages of Australian government and he could do so by forcing a crisis.' Hasluck (1979), p 14.

⁹³ John Howard became Minister for Trade and Business following Whitlam's dismissal and the election of the conservative Fraser government.

⁷⁹ It is worth setting out Hasluck's views on the nature of the office in some detail: '[H]e occupies a position where he can help ensure that those who conduct the affairs of the nation do so strictly in accordance with the Constitution and the laws of the Commonwealth and with due regard to the public interest. So long as the Crown has the powers which our Constitution now gives to it, and so long as the Governor-General exercises them, Parliament will work in the way the Constitution requires, the Executive will remain responsible to Parliament ... a Governor-General is both a watchdog over the Constitution and laws for the nation as a whole and a watchdog for the Government considered as a whole (whatever Government may be in power). He does not reject advice outright but seeks to ensure that advice is well founded, carefully considered, and consistent with stable government and the established standards of the nation. Various steps are open to him. He can ask questions. He can seek full information. He can call for additional advice on any doubtful issue. In a matter of major importance he may suggest to the Prime Minister that an augmented meeting of Executive Council be held to consider all aspects of a question or, perhaps better still, suggest that perhaps the matter be discussed in Cabinet, if there has been no discussion already, so that the recommendation to Executive Council is certain to be the agreed view of his Executive Councillors. Conceivably, a Governor-General could be a cipher, do whatever he was told to do without question and have little influence on what happened. I have spoken on the assumption that the Governors-General will be active and I fervently hope that Australia in the future will never have the misfortune to have an inactive one ... His influence would disappear altogether if he were thought of as one who would do whatever he was told without asking the reasons why.' Hasluck (1979), p 14. For an apparently much more conservative view, see Craven (2004), pp 287–89. See also Porter (1993), Ch 11.

deploy troops and to commence the East Timor and Afghanistan actions) was implemented by action taken by the Defence Minister under the apparent authority of the *Defence Act*. We have already noted that it is difficult to give the *Defence Act* such a broad interpretation, particularly if one examines the original *Hansard* debates over the 1975 amendments and the continued presence in the *Defence Act* of section 63. In the concluding section, we argue that this outcome is unfortunate because there are a number of reasons for preferring the use of the prerogative.

Conclusion

Most discussions of the Iraq war have considered the international legality of the intervention by the ‘coalition of the willing’. A much smaller number, including this article, have dealt with domestic constitutionality. The future potential for interaction between domestic constitutional law and public international law has been increased by the tide of globalisation, particularly with the weakening of the theoretical and doctrinal walls around sovereign states, which create this distinction between sources of law.⁸⁰

The constructs of domestic constitutional law and public international law usually spin largely independently of each other, according to their own sources, texts and doctrines. When they do intersect, the results could vary from a slight touch that leads them to spin away from each other to a full-on collision in which one or both sources of law suffer massive damage. In Australia, they did touch, fleetingly and almost imperceptibly, some time in early 2003 when the then Governor-General asked the then Attorney-General the most pertinent question in the minds of many in anticipation of exercising the war prerogative on the advice of his ministers.

Prerogative or executive powers may be exercised by the Prime Minister or responsible minister — with the caveat that prerogative powers must be conferred on these members of the executive expressly or by necessary implication if these officials are to exercise them directly in place of the Governor-General (the latter acting on the advice of the Executive Council, or at least on the advice of responsible ministers). In the case of the war power, one of the most important prerogative powers, there should be a high standard of ‘proof’ for displacing the prerogative. The cases hold that the exercise of the prerogative is not easily displaced where important prerogative powers are concerned. Any argument that a central (perhaps *the* central) prerogative power has been vested in the Prime Minister (or maybe the Prime Minister with the support of parliament) would need to be a strong one, given the fact that section 61 of the Constitution formally vests prerogative powers in the Governor-General. Sections 8 and 63 of the *Defence Act* do not achieve the express or even implied delegation of the war prerogative to the Minister for Defence, Prime Minister or anyone else. There appears to be no other legislation that is relevant.⁸¹

⁸⁰ Sampford (2003, 2005), predicting that the distinction between the two might ultimately disappear and that, in the interim, public law principles might start to influence public international law and vice versa. See also Charlesworth et al (2005).

⁸¹ Lindell (2002), p 46. ‘The prerogative nature of the powers in question means that the powers may be exercised without parliamentary approval, subject only to the existence

Despite the use of different terms in legislation such as the *Veterans' Entitlements Act*, post-World War II commitments of Australian military forces to overseas actions come largely within the meaning of war, and thus the decisions to make those commitments come within the war-making power — still a prerogative power under section 61 of the Constitution. We submit that the words of Jacobs J in the *AAP case*, quoted above and made after the engagements in Korea and Vietnam, are still applicable. This view is strengthened by the fact that some commentators on British constitutional law hold that the foreign affairs prerogative extends not only to the making of war and peace, but to 'instituting hostilities that fall short of war (as with the Falkland Islands and the Gulf campaigns)'.⁹⁷ There does not seem to be any reason why this approach should not apply in Australia.

Therefore, in the absence of any statutory regulation, we argue that prerogative powers still be exercised by the Governor-General acting on advice through the Executive Council or at least responsible ministers. Australian practice suggests that no formal procedural steps have been taken to give the Prime Minister and/or Cabinet the power to, in effect, wage war by authorising the deployment of our troops overseas in a hostile action. If Australia's practice has legally altered the way in which the war power is exercised, this has been done without any public or parliamentary discussion. Unstated convention would be a poor instrument by which to change the way in which the decision to go to war is made. However, in view of Australia's written constitution, and the stringent tests applied by the courts even in relation to displacement of important prerogatives by *statute*, it seems unlikely that the few instances of parliamentary practice concerning the exercise of the war prerogative could legally alter the means by which the power is exercised.

It may be thought of little significance whether the Governor-General plays a role in the exercise of the war prerogative. After all, the decision to go to war is, as a matter of constitutional doctrine and political reality, taken by Cabinet. The Governor-General would not take such a decision on his or her own motion through reserve powers but on advice of the responsible ministers. However, the Queen's representative is entitled to ask questions about papers he or she is to sign. Asking pertinent questions is a legitimate function, particularly in the case of a power over which there is no parliamentary control. For better or for worse, Australia is still a constitutional monarchy. The Queen's role in the United Kingdom is to advise, warn and encourage ministers. Her representative in Australia plays a similar role — asking questions, especially as to the legalities of proposed action.⁹⁸ The practice

of any legislative provisions which regulate and control their exercise. The writer is not aware of any statutory provisions which regulate the power to declare war or limit the power to deploy military forces overseas.' (p 47) ⁹⁷ Bradley and Ewing (1997), p 352.

⁹⁸ Bradley and Ewing (1997), p 35. 'Although the Governor-General is obliged to act on advice, he or she stands in a similar position to a monarch with the right to be consulted, to encourage and to warn. Before acting, therefore the Governor-General can discuss, and test, advice. In the end, however, he or she must act in accordance with the advice formally tendered'. Brazier notes that, in the United Kingdom, the monarch's powers to advise, encourage and warn 'are routinely exercised and are generally welcomed by Ministers, so that the sovereign may have a marginal but beneficial influence on governmental decisions' (Brazier 1988, p 146).

of circumventing vice-regal consideration of the exercise of the war power has evolved with little apparent consideration or public discussion, is of uncertain legal validity and has removed an important voice in the debate prior to military action actually being taken (and perhaps *the* only effective voice, other than public opinion).

In 2003, it appeared that the Defence Minister used his legal powers under the *Defence Act* to implement decisions taken by Cabinet and/or its Security SubCommittee to give instructions to the service head(s) to take the actions which involved us in war. A powerful argument could be made that the relevant sections of the *Defence Act* were not intended to be used for the decision to go to war and that such instructions are for peacetime or *in bello* decisions. We do not expect that the High Court would take the drastic step of invalidating such an instruction after it had been implemented. Even if the High Court were not convinced by the phalanx of able legal minds that would be deployed to the shores of Lake Burley Griffin to argue the validity of the decision, there are questions of standing, justiciability and the orders the court would be prepared to make. However, given the gravity of the decision, it might seem surprising that the government did not choose the most obvious and constitutionally unimpeachable legal means to go to war.

If one of the consequences of doing so is that the Governor-General might ask questions about the effect and legality of such action under international law, as actually occurred in 2003, this is a reason in favour of following the gubernatorial path. While such scrutiny falls well short of the accountability provided by the potential of litigation before a court of competent jurisdiction, it can occur before rather than after Australia has gone to war. Following Australia's little-known and less-discussed decision to alter its acceptance of the compulsory jurisdiction of the International Court of Justice in March 2002 in a way that precluded Iraq from taking the matter to the most obvious and eminent court of competent jurisdiction, it may be the only independent scrutiny such decisions can receive.

The March 2002 change removed a major impediment to Australia's participation in the invasion of Iraq — the near certainty that Australia would be sued by Iraq in the ICJ following 1999 Yugoslavian example. If the ICJ had met as quickly as it did in 1999 and the decision went the way most international lawyers (including the lawyers who had just delivered their advice to the British Cabinet) thought it would, the war would have been declared illegal before the American forces were halfway to Baghdad and any credibility of the public legal opinions given by the belligerents would have been lost.⁸² While it is always possible that a further UN resolution for the use of force might have been secured (Blair's strategy), or the minority view might have prevailed, it was a risk too great for the alliance to take. If Australia were to take part in the war, it would have to change its recognition of the ICJ. We do not know whether the fact that they did so soon after the British Cabinet advice was a pure coincidence or not.

In early 2003, the Prime Minister decided that the matter of Australia's involvement in Iraq would not come before the Federal Executive Council and that

⁸² The 2002 change also created a temptation for the government to seek and lawyers to give advice that it wanted to hear rather than advice a potential litigant needed to have. See Sampford (2003).

the Attorney-General would not answer the Governor-General's questions. The Prime Minister provided His Excellency, the parliament and the public advice that was deeply flawed and at odds with the considered opinion of British legal advisers and the detailed advice by the British Attorney-General. (The Australian government lawyers have not been so open — all we know is that the Solicitor General was not asked.)⁸³ We do not know what might have happened if the Governor-General had persisted with the request. However, if he had secured advice more in line with the preponderance of academic opinion (itself a source of international law), it would have been very difficult for the British Attorney-General to issue his public legal advice which the British forces had demanded before moving. In any event, we hope that the above comments can function as a reminder of the significance, especially for those who have died and those who loved them, of what might otherwise be regarded as mere constitutional niceties.

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Appendix: The Responsibilities of the Governor-General as Commander-in-Chief of the Australian Defence Forces and the Deployment of Australian Troops Overseas

The question arises from time to time as to the role and responsibilities of the Governor-General as Commander-in-Chief of the Australian Defence Forces when Australian troops are deployed overseas for the purposes of war.

In my time, the matter arose on two occasions. The first related to the deployment of troops to Afghanistan and the second to Iraq. In each instance I saw it as my duty to ask the government of the day what instruments, if any, were required to invoke such an action or to ratify the decisions of government.

In the first instance the Prime Minister informed me that no order from the Governor-General was required. In that matter he cited the ANZAS Treaty as the basis for action by the government.

In the second instance I had previously read public statements made by some academics and international lawyers, and, on the advice of the Official Secretary, I sought clarification from the Attorney-General as to technical ramifications that could arise under international law. I had not requested it, but he immediately referred the matter to the Prime Minister who met with me to address the issues from available legal advice. He informed me that no recommendations were ever put to any of my predecessors in relation to troop deployments to places such as Somalia, Bougainville, Bosnia, Cambodia, Rwanda, the Persian Gulf, Vietnam or East Timor.

He had previously given an undertaking that in such circumstances he would in future request the Minister for Defence to recommend to the Governor-General in Council that the deployment of Australian forces overseas be noted by way of recognition of the position of Governor-General essentially as the titular Commander-in-Chief of the Australian Defence Forces.

I conclude from these observations that there is no formal action that either the Constitution or any particular law requires the Governor-General to take in such circumstances. The deployment of troops is entirely a matter for the government of the day and does not require an order from the Governor-General. Consistent with long standing practice there are mechanisms and arrangements in place to provide sufficient consultation and communication between the responsible ministers, the Prime Minister, the Australian Defence Force and the Governor-General in relation to the deployment of troops and any other matter of similar international sensitivity.