AUTHORITY FOR WAR

The decision to send Australian troops into combat in Iraq has generated debate about the role of the federal parliament in relation to such decisions. Professor Geoffrey Lindell provides a detailed analysis of the issues.

It has been said that probably the most striking achievement of the framers of the Australian Constitution was "the successful combination of the British system of parliamentary government containing an executive responsible to the legislature with American federalism".[1] Unlike its American counterpart, it is a constitution that was founded upon *trust* rather than the *mistrust* of governmental power. The decision of the Australian government to commit our military forces in the Coalition War against Iraq without *prior* parliamentary approval, presents an interesting and striking illustration of these observations.

The motion subsequently passed by the House of Representatives, and moved by Prime Minister John Howard on 18 March 2003, asked the House to "endorse the government's decision to commit Australian Defence Force elements" to the war in Iraq. Significantly the Prime Minister sought endorsement of a decision already made. The absence of a *legal* need for the prior consent highlights one of the basic legal differences between the British and American systems of government. In that regard the Australian system follows the British model of parliamentary government.

In the United States the power to declare war is vested in Congress by reason of Article I Section 8 Clause 11 of the United States Constitution. This has not been taken, however, as precluding the President, as Commander in Chief, to commit troops to battle without Congressional authorisation in some circumstances eg to respond to an invasion. The requirement for Congressional approval is supplemented by the *War Powers Resolution* in 1973 which was passed by both houses of Congress in the wake of differences that had occurred with successive presidents in relation to the Vietnam War. Whether or not it was strictly necessary from a legal point of view, President George W Bush obtained in October last year authority from Congress "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to defend the national security of the United States against the continuing threat posed by Iraq". The same Congressional resolution enabled the United States to go to war with or without the further approval of the United Nations Security Council.

It is true that, unlike the constitutions of many other countries, the Australian Constitution fails to explicitly refer to the powers of the executive to declare war and peace and also to deploy the armed forces. However, those powers are now taken to form part of the "executive power of the Commonwealth" which is vested in the Governor-General as the Queen's representative under s 61 (and possibly also s 68) of the Constitution. The modern view is that the provisions of s 61 now include all the so called "prerogatives" of the Crown under the English common law.

This may not have been so in 1901 when the Commonwealth was established since those prerogatives, along with the prerogative powers with respect to foreign relations (eg to enter into treaties and receiving or sending ambassadors), may have been more properly regarded as falling within the executive power of the British Imperial Government when Australia was part of the British Empire. However the application of s 61 was taken to encompass these powers once Australia lost its colonial status and attained its independence.[2]

The existence of these prerogatives has long been recognised. After indicating that the King's prerogatives included the power to make treaties with the governments of other countries, and also to receive and send ambassadors, Sir William Blackstone wrote during the eighteenth century: "Upon the same principle the king has also the sole prerogative of making war and peace."[3]

The prerogative nature of the powers in question means that the powers may be exercised without parliamentary approval, subject only to the existence 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.

A formal declaration of war was not thought to be necessary in this case, with the Australian government being content to rely on its interpretation of pre-existing resolutions passed by the UN Security Council. The announcement of Australia's participation in the war against Iraq was made by the Prime Minister at a press conference and in the House of Representatives later on the same day. A formal announcement involving the Governor–General was also thought to be unnecessary, despite the position occupied by the Governor–General as Commander in Chief, as provided in s 68 of the Constitution. The relevant decision was made by Cabinet and then passed on to the Chief of the Australian Defence Forces through the legal chain of command provided in ss 8, 9 and 9A of the *Defence Act 1903* (Cth).

Even though parliamentary approval was not legally required, the Australian government, like its counterpart in the United Kingdom, had to be assured that its decision enjoyed the support of the lower house of parliament. This was required as a matter of political reality and also for reasons related to the British system of

Continued page 24

Continued from page 23

responsible government, which requires a government to enjoy the confidence of the lower house. If the government did not enjoy that support in relation to the deployment of military forces in a military engagement it would have run the risk of defeat on a motion of no-confidence. Such a defeat would have required the government to resign as a matter of constitutional convention.

Australia has not followed the procedure used by Canada when it declared war against Germany in 1939 and also approved the sending of Canadian military forces in the first Gulf War pursuant to UN Security Council resolutions in 1990-1991. The decision to go to war and to deploy the military forces overseas was taken by the executive with the *prior* approval of the Canadian parliament. This is significant because that country also does not require such approval as a matter of *law*. Modern Canadian practice casts doubt, however, on the suggestion that this procedure has the status of a 'strong constitutional convention'.[4]

A measure of parliamentary accountability does, nevertheless, exist in other ways. First, it is clear that under the Westminster system of government the parliament may legislate to regulate and limit the exercise of prerogative powers. It is likely that the Australian parliament possesses such powers under, for example, the power to make laws with respect to defence under s 51(vi) of the Constitution.

Secondly, any expenditure of public funds needed to facilitate the deployment of the armed forces must be authorised by the parliament because of the provisions of s 83 of the Constitution. Such authority is usually expressed in generally worded items of parliamentary appropriation. It does not seem to have been suggested that there was a lack of authority to spend the money required for the present deployment of the military forces in Iraq. This is so even though the Appropriation Acts that may have contained that authority may have been framed without having the conflict in Iraq specifically in mind.

Thirdly, each house of the Australian parliament has the power to hold inquiries under s 49 of the Constitution. Such inquiries could investigate and report into the deployment of the military forces and the conduct of their operations.

Finally, and depending on the scale of the hostilities involved, legislation may be required to govern civilian life and a variety of matters associated with the preparation and conduct of military operations, such as authority to conscript civilians into military service. Legislative authority for conscription was sought and obtained in the Second, but not the First, World War in the last century.

It is no longer assumed that the exercise of all prerogative powers lies beyond the scope of judicial review. But the nature of the subject matter of some of those powers, such as the prerogatives in relation to war and the deployment of troops, makes it most unlikely that they are subject to legal limitations which restrict their exercise. In this case the institutional competence of the executive to assess what may be required to defend the country from external threats makes it almost certain that a court would not wish to second guess the judgment of the executive on these matters.

In the same connection, there has been some debate on whether the deployment of military personnel in Iraq without additional approval of the UN Security Council breached the rules of public international law and the provisions of the United Nations Charter. The High Court has yet to formally rule on whether the executive powers of the Commonwealth must be exercised in conformity with the rules of public international law. However *legislative* powers are not so limited and it is unlikely that the court would entertain a legal challenge based on an alleged breach of those rules. In the view of the writer, the grant of executive powers to the Commonwealth is likely to encompass the immunities from legal action which flowed from another branch of the English common law and known as the doctrine of the "Act of State".[5]

These considerations seem to preclude the success of any legal challenge in the domestic courts of this country whatever may be the position with challenges in international courts and forums.

There remains the question whether, as some have suggested, the legal position should be changed to make prior parliamentary approval a legal condition for a declaration of war or the deployment of armed forces in any military engagement. The change could of course be achieved by a constitutional amendment. But this would require a referendum and experience shows that the chances of success are very low especially when, as can be expected, there is likely to be a difference of public opinion in relation to such a proposal.

It would be more realistic to achieve the change by the passage of ordinary legislation under s 51(vi) of the Constitution (possibly in conjunction with the power to enact legislation that is incidental to the execution of powers vested in the government of the Commonwealth under s 51(xxxix)). Similar proposals have been advanced, but yet to be accepted, in relation to requiring parliamentary approval to authorise the executive to enter into treaties and other international agreements.[6]

It is true that serious doubts have been raised regarding the constitutional ability of the parliament to control the exercise of prerogatives which form part of the executive power of the Commonwealth under s 61. In the view of the writer, however, the better view is that, consistent with the traditional understanding of the British system of government, legislation can be enacted to strengthen parliamentary control over the executive branch of government in the exercise of its prerogative powers.[7] This is supported by the statement by the High Court in *Brown v West* to the effect that: "Whatever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of control by statute."[8]

This does not, however, determine whether such legislation should be enacted. Proponents of the proposal would no doubt argue that the present power of the executive means that it can be exercised against the wishes of the peoples' representatives in both houses of the Australian parliament, even where the military involvement appears to lack popular support. The fact that the public decides to support such involvement

Continued page 36

AUSTRALIAN CONSTITUTION

s 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

(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 …

s 61. 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.

s 68. The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

s 83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

Between a rock and a hard place - Continued from page 22

"In Western Australia there have been seven determinations recognising native title, which cover a substantial area of land. The Native Title Act requires that, once native title is determined, it must be managed by a body corporate—these are more commonly called 'prescribed bodies corporate'. These bodies corporate are expected to handle the processing of future act notices and to represent the interests of native title holders in negotiations with governments and third parties over land use.

"Yet there is no funding—not even seed funding to purchase a telephone, let alone to buy the sort of equipment and expertise that it takes to negotiate a land access agreement. They are already not funded sufficiently to undertake their statutory functions, let alone to take on additional roles such as assisting prescribed bodies corporate after a determination of native title."

The Commonwealth Attorney-General's Department said it has funding under constant review. "The government recognises that it is important that all parties are adequately resourced and have access to the skills and expertise necessary to be able to participate actively in the native title process," the Attorney-General's Department said in its submission to the inquiry. "The government therefore keeps the resourcing of the native title system as a whole under regular review."

WA's Ms De Soyza said the Commonwealth should also undertake a more fundamental review of the native title processes.

"More fundamentally, the Commonwealth could also consider whether it is in fact desirable or even workable to create a whole new level of bureaucracy involving the establishment of scores of small corporations which are charged with very complex tasks, instead of using what is already in place in the representative bodies system," she said.

The inquiry has received submissions from more than 100 organisations and individuals, including major resource companies (BHP Billiton, Rio Tinto, Woodside Energy, Newcrest Mining, ExxonMobil, ChevronTexaco, Newmont Australia), green groups (the Australian Conservation Foundation and Greenpeace), Aboriginal groups such as the Central and Northern Land Councils, state and federal government departments, research agencies and a range of representative bodies.

Submissions and transcripts of hearings appear on the inquiry website. *About the House* will report on more evidence from the inquiry in future editions.

Links and contacts

Inquiry into impediments to resources exploration

Visit: www.aph.gov.au/house/committee/isr/resexp
Tel: (02) 6277 4594
Email: ir.reps@aph.gov.au

Authority for war - Continued from page 24

once the armed forces have been committed into action does not necessarily disprove the initial lack of support since some members of the public may, however reluctantly, feel obliged to support the action for fear of showing disloyalty to the armed forces.

It is true that these matters have generated considerable tension in the United States between the President and Congress where the interpretation of the *War Powers Resolution* has not been free from difficulty. Nevertheless it has been said that the "post-Vietnam years have underscored the need for the President to reach an accommodation with Congress in foreign policy and national defense".[9] Furthermore, the system of seeking prior approval, at least for a declaration of war, is not confined to the United States but is followed in a number of European countries.[10]

Opponents of the proposal might well stress that the difference between the present position and the system proposed to be introduced is not as great as might first appear. In the first place, as Canada shows, the requirement of prior approval can be followed as a matter of *practice* and, although less clearly, even *convention*, without the attendant inflexibility created by legislation. Furthermore even in the United States, apart from the difficulties already mentioned, the requirement of prior approval can be undermined by the President. The President has the potential to use his authority as Commander in Chief to commit the troops in advance of the necessary parliamentary approval in such a way as to effectively force the hand of Congress to grant the necessary approval.

More basic, however, is the argument that only the executive has the institutional ability and information required to make an informed judgment on whether war should be declared or military forces should be deployed. There may be cases where all that information cannot be made public—a problem that may not be wholly overcome by parliament meeting in secret session. The need for parliamentary approval, and the delay that may result, may also compromise the ability to take speedy military action.

Ultimately, the answer to the question whether the change should be made will depend less on whether the change fits with some ideal or universal system of constitutional governance. As is the case with the proposal to seek parliamentary approval for the executive to enter into treaties and other international agreements, it is more likely to depend on the value and importance which each country chooses to attach to the use of a legislature as a check on executive action in such important matters. The system of prior approval need not necessarily make the decision making process in this area unacceptably cumbersome—as was illustrated by the relative ease with which the current United States President obtained Congressional authority in relation to the current war with Iraq. A different outcome might, however, have resulted in Australia if the decision to deploy military forces was proposed by a government that lacked a majority in the Senate at a time when the community was opposed to such military action. ■

Geoffrey Lindell is Adjunct Professor of Law at the Adelaide and Australian National Universities, and Professorial Fellow at Melbourne University.

1. *Reg v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at p 275.
2. *Constitutional Commission*, Final Report (1988) vol 1 paras 2.129 and 5.176.
3. W Blackstone, *Commentaries on the Laws of England* (1783) Book 1 at pp 253, 257 and 261.
4. For a useful account of Canadian practice see M Rossignol, 'International Conflicts: Parliament, The National Defence Act, and the Decision to Participate' (August 1992) - a paper prepared for the Canadian Parliamentary Library http://www.parl.gc.ca/informatiion/library/PRBpubs/bp303-e.htm. The suggestion was advanced in K Wheare, *Legislatures* (2nd ed, Oxford University Press, 1968) at p 129.
5. G Lindell, "Judicial Review of International Affairs" in B Opeskin and D Rothwell, *International Law and Australian Federalism* (1997) 160, at pp 188-189.
6. Senate Legal and Constitutional References Committee Report, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, Nov. 1995, Chapter 16.
7. As argued by L Zines, *The High Court and the Constitution* (4th ed, 1997) at pp 262-263, 267 and 269-270.
8. (1990) 169 CLR 195 at p 202.
9. L Fisher, *Constitutional Conflicts between Congress and the President* (4th ed, 1997) at p 292.
10. Wheare (see point 4 above) at pp 128-9. France is a case in point because of Article 35 of the French Constitution.