



## AUSTRALIANS FOR WAR POWERS REFORM

Including the CAMPAIGN FOR AN IRAQ WAR INQUIRY

### **Howard's War: a continuation of politics by other means**

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In March 2003 Prime Minister John Howard triggered Australian participation in the US-led invasion of Iraq. The invasion was illegal under international law, and Australian participation in it was not authorised by the Governor-General as required by the Australian Constitution. There was no strategy, no end-state that the Australian Government wished the Australian Defence Force (ADF) to achieve: the Government's reasons for participating were political, not military. This presentation will argue that we must reform the way we mobilise the ADF so that our elected representatives in the Parliament are fully involved and fully accountable. It will respond to the arguments that are usually advanced in defence of the existing arrangements, under which Executive Government can take us to war without consulting Parliament.

### **Introduction**

Most Australians would be startled to discover how easy it is for the Government to take Australia to war, by which I mean launching Australia into international armed conflict. This morning I want to talk to you about three things:

1. How Australia goes to war. This has changed markedly over the century and a bit since Federation.
2. The risks to which the current system exposes us, as illustrated by an examination of how we came to join in the March 2003 invasion of Iraq.
3. My proposed solution, and why the arguments against that solution don't in my view stand up to scrutiny.

### **How Australia goes to war**

Australian practice in relation to the power to declare war has its roots in British practice. In Britain, as legislative and judicial powers were detached from the sovereign over the centuries and given to Parliaments, the power to make war remained clearly within the executive power of the English sovereigns. Today's practice is a residue of the once theoretically absolute power of the sovereign, but in modern times would only be exercised on the advice of the Government of the day.

The Commonwealth Constitution does not say expressly who is responsible for declaring war or deploying troops, and for many years after Federation it was uncertain whether Australia even had the power to declare war.

At Federation Australia did not gain full independence. Although section 61 of the Constitution vested executive power in the monarch, exercisable by the Governor-

General, this did not include the power to make war. In both world wars, when the King declared war on the advice of his UK advisers, Australia was automatically at war as well.

In 1942 Australia adopted the 1931 Statute of Westminster, became independent and hence transferred the war power to the Governor-General. The operation of the statute was made retrospective to the start of the War. Acting on the advice of the Australian Cabinet, the Governor-General declared war against four belligerents.

To put the matter beyond doubt, Attorney-General HV Evatt arranged for a formal delegation of war-making power from the King to the Governor-General under Section 2 of the Constitution.

The point of all this detail is to illustrate that we were meticulous about the law in those days. We formally declared war, and were scrupulously careful to ensure that the declaration would be legally effective.

We have not declared war since World War II; it is an oddity of history that the last country on which we ever declared war was Thailand, in July 1942. Nevertheless, until the start of the 21<sup>st</sup> Century the understanding had been that the formal power to authorise the deployment of the Australian Defence Force into warlike activity lay with the Governor-General, who under our constitution is not only the monarch's delegate but the Commander-in-Chief of the ADF.

So it was that in 2003 most constitutional lawyers expected that the political decision to invade Iraq would be taken by Cabinet as a whole or its National Security Committee, but legally authorised by the Governor-General on advice from the Prime Minister, either exercising the royal prerogative or through the Federal Executive Council.

This is not in fact what happened. Notwithstanding direct inquiries from the Governor-General of the day, Peter Hollingworth, as to when he would be consulted, the Prime Minister fobbed him off, and it appears that the decision was effected through a statutory power vested in the Defence Minister under a 1975 amendment to the Defence Act, which vests "the general control and administration of the Defence Force" in the hands of the Minister for Defence and requires the military to exercise its powers "in accordance with any directions of the Minister".

This does not sound to me like a delegation to the Defence Minister of the power to make war. There is no hint of such an intention in the Tange Report which recommended the amendment, and in the Parliamentary debate that accompanied it there were assurances that the Governor-General's powers would be unaffected.

There is no sign that Tony Abbott went anywhere near the Governor-General in relation to the latest deployment to Iraq, and the ALP asks Government no difficult questions about the legal basis for deploying the ADF, so it seems settled bipartisan policy that all that is required to exercise the Executive's power to deploy the ADF into international armed conflict is resort to the Minister for Defence's power of "general control and administration of the Defence Force" under s.8 of the Defence Act.

This has profound consequences for the deployed troops and potentially for the Defence Minister and the military chiefs who sit at the top of the command chain. In the event of any questions of war crimes arising, the first question which would be asked would be whether the service personnel in question were in the theatre of operations pursuant to lawful orders. In the absence of an authorisation from the Governor-General it would be very difficult for anyone to argue that they were.

Regarding the current system, the citizen in the street probably takes comfort in an assumption that the Government would take its responsibility in committing to any military operation extremely seriously, and that any deployment would be the outcome of a robust and thorough debate in Cabinet.

On that I would have to say:

- Debates in Cabinet are rarely if ever robust or careful, and whatever care or passion is on display is usually directed to the politics and how any decision is to be presented, rarely to the content.
- No national security matter would come to full Cabinet other than for pro-forma ratification. Such deliberations as take place would be in the National Security Committee, which is attended by the CDF and Service Chiefs and relevant officials. In my experience NSC debates under John Howard's chairmanship were in fact fairly careful and thorough, on the aspects he wished to discuss.
- It needs to be borne in mind, however, that Cabinet has neither constitutional status nor legal power. Political decisions reached there are legally executed by Ministers, officials, the Governor-General or the Federal Executive Council.
- This means that there is no need to take a matter to Cabinet or a Cabinet Sub-Committee at all if a strong or wilful Prime Minister does not wish to do so, and Cabinet discussion can be limited by the Prime Minister to matters which he/she wishes to discuss.
- The evidence in relation to the 2003 Iraq invasion indicates that the threshold question – is it a good idea to invade Iraq? – was never put to Cabinet at any level. Former Defence Deputy Secretary Hugh White wrote later words to the effect “They didn't ask us and we didn't tell them”, a position which was confirmed to Paul Kelly by three departmental heads he interviewed for his 2009 book *The March of the Patriots*. The discussions started from the position that we would be participating in the invasion, and were directed to modalities and intelligence.

So whatever the citizen in the street might think, deployment of the ADF into international armed conflict can be initiated on the basis of a “captain's call” by the Prime Minister of the day, followed by a formal direction from the Defence Minister to the CDF.

The fact that the power to deploy the ADF rests with the executive, with or without reference to the Governor-General, exposes the nation and especially the members of the ADF to extraordinary risks of capricious and/or ill-considered decision-making, which I think has been evident on several occasions: Vietnam, Afghanistan (twice) and Iraq (twice).

### **Case study: Howard's War, Iraq 2003**

I turn now to the question of how Australia came to participate in the 2003 invasion of Iraq.

The March 2003 invasion of Iraq was presented to the Australian public as a regrettable necessity resulting from the dire threat presented by Iraqi possession of Weapons of Mass Destruction (WMD), a threat rendered more dire by the impression that was created in the United States and Australia that these WMD might fall into the hands of terrorists. In fact, this representation of the threat from Iraq was part of a calculated strategy to market a war which had been long planned.

For anyone paying attention there was abundant evidence in the late 1990s that in the event of a Republican being elected in 2000 to succeed President Bill Clinton, the overthrow of Saddam Hussein by military force would be very much on the cards. There was a very strongly held view amongst the neocons that the United States should use its power and influence to spread its own freedom-oriented values, including open politics and free-enterprise economics, and for them Iraq became a sort of test case for their much larger ideas about US power and leadership worldwide.

Pursuit of this agenda saw the establishment in 1997 of the neoconservative-dominated Project for the New American Century (PNAC). Among the foundation principles of PNAC was the “need to accept responsibility for America's unique role in preserving and extending an international order friendly to our security, our prosperity, and our principles”. Several leading members of PNAC, such as Donald Rumsfeld, Paul Wolfowitz, John Bolton and Richard Armitage, were to become prominent members of the defence and foreign policy establishment in the Bush Administration.

In January 1998 PNAC published an open letter to President Bill Clinton calling for a new strategy to remove Saddam Hussein from power; the letter made explicit that this meant a willingness to undertake military action. On 31 October 1998 President Clinton signed into law the Iraq Liberation Act, the central purpose of which was regime change. This legislation provided almost \$100 million in military assistance to anti-Saddam forces in Iraq.

Not surprisingly against this background, the preoccupation with Iraq and the removal of Saddam Hussein was high on the agenda of the incoming George W. Bush Administration. Ten days after becoming president in 2001, Bush met for the first time with his national security principals, with “Mideast policy” as the advertised subject. The principal outcome of the meeting was that Secretary of Defense Rumsfeld and the Chairman of the Joint Chiefs of Staff, General Hugh Shelton, were to examine “our military options” and “how it might look” to use U.S. ground forces to challenge Saddam Hussein. This, you will note, was eight months before 9/11.

From this time on, the Administration was building both the plans and the case for war.

In the first eight months of the Bush Administration the case for war against Iraq had not yet been adequately built, and there would not have been sufficient support among the American public for the drastic step of launching an offensive war. All that changed abruptly on 11 September 2001, not because Iraq was working with those responsible for the terrorist attack, but because 9/11 drastically changed the mood of the American public.

Even so, a proposal to topple Saddam Hussein forthwith, brought forward by Deputy Secretary of Defense Paul Wolfowitz, was rejected. Other senior members of the Bush Administration realised that, even in the suddenly more militant climate in America, an invasion of Iraq would have been seen as a very contrived response to a terrorist attack by a group based in Taliban ruled Afghanistan. A year-long effort to condition public opinion, based on the notion that invading Iraq would be part of a global “war on terror”, would be needed to make the Iraq War sellable. The rhetorical themes for selling the war (terrorism and WMD) were established by President Bush in his January 2002 State of the Union Address, with its famous reference to the Axis of Evil consisting of Iraq, Iran and North Korea, the latter two being added to the draft on the recommendation of Condoleezza Rice to reduce the chance of planning for the war against Iraq being discovered.

For the purpose of this campaign administration officials sought during 2002–03 to redefine Hussein as not an ordinary regional despot careful to protect his power, but an evil madman bent on the destruction of the United States and willing to run virtually any risk to himself or his country to fulfil this goal. The Bush administration used its control of intelligence information to present to the public and the world a false picture of U.S. information about Iraqi threats. Analyses that supported the administration’s inflated claims were publicised, while those that contradicted pro-war claims remained classified. Further, at least some of the favourable analyses were produced by coercion of intelligence agencies and analysts.

While publicly constructing the case for war, throughout 2002 President Bush maintained the deception that he was not preparing for it, saying repeatedly in press conferences and in private conversations with members of his cabinet that there were no war plans on his desk.

By mid-year, however, the British were well aware of what was afoot. The head of the British Secret Intelligence Service, Sir Richard Dearlove, told Prime Minister Tony Blair and his senior national security advisers at a meeting on 23 July, ‘Military action [is] now seen as inevitable. Bush wanted to remove Saddam, through military action, justified by the conjunction of terrorism and WMD’. He went on to say that ‘the intelligence and facts were being fixed around the policy’, the Bush Administration ‘had no patience with the UN route’, and ‘there was little discussion in Washington of the aftermath after military action.

In any examination of the specifics of how, when and on what terms Australia became committed to the invasion of Iraq, the central question is whether John Howard was, like Tony Blair, an ‘eyes open’ participant in the Bush Administration’s machinations, or whether he was duped by them. In either case, the unwisdom of leaving the power to commit the ADF to armed conflict in the hands of just one or two people is plain.

If the Howard Government did not know what the Blair Government knew, it should have, both directly from the Americans and indirectly from the British. That is the reason Australia maintains diplomatic missions abroad, and why it has very senior and well-connected people at the helm in the most important of them.

In fact there is good reason to believe that the Howard Government was in on the game. Cheney had visited Canberra in 1998, as Chief Executive of Halliburton, but it would have been remarkable if he did not talk to the Prime Minister about the Republicans' plans for Saddam Hussein. He was in Washington on 9/11 and would have been fully briefed by the Americans. While still in Washington he said, on 14 September, that Australia 'stands ready to cooperate within the limits of its capability concerning any response that the United States may regard as necessary in consultation with her allies'. Given the likely state of Howard's knowledge of US intentions, use of the word 'any' is regarded by well-informed observers as signifying that he had by that time given the Americans an indication that Australia would join them in an assault on Iraq if they decided to proceed with it.

It is the view of other well-informed observers that Australia committed itself to participate in the war at an early stage. Former Defence Deputy Secretary Hugh White argued that the decision to invade Iraq was taken not in early 2003 as represented by the Government, but the year before:

*In the weeks after George Bush put the invasion on the agenda with his 'axis of evil' speech in January 2002, Australia clearly indicated it would be willing to join. Of course no formal commitments were made until the eve of battle - they never are. But the key political decision had already been taken.*

The commitment to participate in a 'war of choice' in Iraq required the Australian Government to perpetrate deceptions on the Australian Parliament and public similar to those with which the Bush Administration was deceiving the Americans. Like President Bush, John Howard maintained throughout 2002 that no decision had been taken, a fiction he maintained right up to the eve of war.

Similarly to the Americans, Howard had to market to the Australian public the notion that Saddam Hussein had WMD and that these constituted an unacceptable threat. On 4 February 2003 he told the House of Representatives, 'The Australian government knows that Iraq still has chemical and biological weapons and that Iraq wants to develop nuclear weapons. We share the view of many that, unless checked, Iraq could, even without outside help, develop nuclear weapons in about five years'.

More generally, as summarised by the December 2003 Report of the Parliamentary Committee which inquired into intelligence on Iraq's weapons of mass destruction:

The case made by the government was that Iraq possessed WMD in large quantities and posed a grave and unacceptable threat to the region and the world, particularly as there was a danger that Iraq's WMD might be passed to terrorist organisations. This is not the picture that emerges from an examination of all the assessments provided to the Committee by Australia's two analytical agencies.

John Howard dealt with that lamentable disconnect between the sober assessments of the Australian intelligence agencies and what he needed to justify the war by reference to the much more aggressive UK and US assessments, to the effect that Iraq had a useable chemical and biological weapons capability, that it continued to work on developing nuclear weapons, that it had extended range Scud ballistic

missiles, and that Iraq's military planning specifically envisaged the use of chemical and biological weapons.

This enabled him to conclude, 'The intelligence material collected over recent times, to which Australia has contributed, points overwhelmingly to Saddam Hussein having acted in systematic defiance of the resolutions of the Security Council, maintained his stockpile of chemical and biological weapons and sought to reconstitute a nuclear weapons program'.

In spite of the certainty with which Howard declared that Saddam Hussein had WMD, the subsequent inquiry conducted by former DFAT Secretary Philip Flood to be "thin, ambiguous and incomplete".

There is not time to recount today all the machinations of the Howard Government in the period leading up to the war, and there is much that remains to be discovered. Much of this can be surmised by experienced observers who know the personalities involved, but we need an independent inquiry so that the full story can be told, on the basis of sworn evidence and access to all the documents. Thanks to the published report of the Chilcot Inquiry the people of the UK, and the international community, now know who said what, to whom, and when, what went on inside the British Government, what advice it was receiving from its officials, its military and its intelligence agencies, its interactions with other governments, what matters it took into account in its decision-making, and the quality of its planning. It is now in a position to consider not only the actions of individuals but also the systemic issues that precipitated this disaster, the lessons to be learned, and the measures to avoid similar disasters in the future.

The Australian public has no such knowledge. We need it to expose how we came to be involved in this disaster, and to be sure that when we set out to redesign the system we do so with a clear understanding of its faults.

What is clear, however, is that leaving the power to take Australia to war in the hands of one person, the Prime Minister, is far too fragile a basis upon which to rest the gravest decision a nation can take – the decision not only to put young members of the ADF in harm's way but also to visit death and destruction upon the soldiers, citizens and infrastructure of another country.

Those who believe that the collective decision-making of our Cabinet system provides protection against Prime Ministerial wilfulness need to remember that the Prime Minister decides who is a member of Cabinet, when Cabinet meets, what it considers, and what information is provided to it. Determined Prime Ministers always get their way. The Chilcot Inquiry specifically identified eleven occasions in the UK on which there "should have been collective discussion by a Cabinet Committee or small group of Ministers on the basis of inter-departmental advice agreed at a senior level between officials" – collective discussion that did not take place.

### **The reforms we need**

An important part of the solution to this problem is to involve the Parliament in any future decision to deploy the Australian Defence Force into international armed

conflict. This is something that both the Coalition and the ALP will resist, as each likes when in office to have in its back pocket the right to make and announce decisions on war and peace. Indeed, on 1 September 2014, following Prime Minister Abbott's 31 August announcement that we would be transporting military stores to Iraq, the two parties combined in both the House of Representatives and the Senate to prevent moves by The Greens and Independent MP Andrew Wilkie to have the matter debated in Parliament.

This insistence on the status quo is driven by considerations of party political advantage, not the national interest. A Prime Minister who had to put a motion to the Parliament would be in a much stronger position to demand answers from the United States about what the aims and objectives are, what end-state is to be achieved, and what are the prospects for success.

A Private Member's Bill to relocate the so-called "war powers" in the Parliament, the *Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 [No. 2]*, was introduced into the Senate in 2009 by Greens Senator Scott Ludlam, but it was treated with scant respect by the major parties.

Four principal arguments against Parliamentary involvement are raised by those who wish to preserve the status quo.

The first of these is the argument that **minor parties might block the necessary resolution in the Senate**. For the negative vote of a minor party to be effective, however, it would be necessary that there also be a negative vote from the major Opposition party: the combined votes of Government and Opposition would make the views of the minor parties irrelevant (see above). As it is difficult to conceive of a major (or indeed a minor) party voting against deployment of the ADF at a time when the nation is genuinely under threat, this sounds more like a concern that the involvement of the Parliament would make it more difficult for the Government of the day to inject the ADF into wars of choice – which is of course the whole point of the exercise.

Another argument is that **the Parliamentary process will take too long**. This reveals a lack of understanding of the readiness levels at which most of the Australian Defence Force is held. Apart from the Ready Reaction Force at Townsville most combat elements of the ADF are held at a low state of readiness. Quite properly, most units are not maintained in a battle-ready state, and before they can be deployed a major investment in both personnel training and materiel is required in order to bring them up to the required standard.

A third argument – one often regarded as the supreme card to play – is that **the Government might have access to information or intelligence which it cannot reveal**.

This is an argument that simply cannot be accepted within the framework of a Westminster-style Parliamentary system. While it is certainly true that a government may be in possession of information that cannot be used in Parliamentary debate, it is fundamental to our system that today's Opposition Leader could be tomorrow's Prime Minister – even without an election. All that is required for the government to fall is for it to fail to win a confidence motion on the

floor of the House of Representatives, at which point the Prime Minister of the day will normally advise the Governor-General to prorogue Parliament and call a general election, but the Governor-General would have the alternative of giving the Opposition Leader an opportunity to test the confidence of the House – as happened in 1975.

This being the case, it is fundamental to our national security that at the very least relevant leading members of the opposition not only be cleared to deal with national security classified information, but that at times of looming threat they be made privy to the available intelligence so that both government and opposition can conduct themselves in relation to the matter in an informed way.

That this is normal procedure is borne out by the fact that, in its uncritical support of the Abbott Government's 2014 deployment to Iraq, the Opposition made much of the fact that it has received briefings from Government.

Finally, there is the argument that **the process would be nugatory because everyone would simply vote on party lines**. This may be so, but cannot be assumed to be so. Certainly the history shows that on the occasions when deployments have been debated in Parliament, members have voted on party lines. Historically, however, these debates have taken place against the backdrop of a decision already taken. This brings into play two dynamics. First, there is the feeling of obligation towards the members of the ADF who are being put into harm's way, the feeling that we should not undermine the morale of the troops by suggesting that they should not be participating in the conflict.

Second, there is the defensive shield: "It doesn't matter what I think, the decision has already been taken by Cabinet and my job now is to support it and to support the young men and women of the ADF".

I believe, however, that if Parliament itself were to be the place where the matter is decided, quite a different dynamic would come into play. If the matter is to be put to a vote in both houses, each and every member of Parliament would have to participate in that process knowing that their vote would be recorded and would be a matter of history for all time, no matter how the matter turned out. People who felt strongly about it could not absolve their consciences with the thought that the matter had been taken out of their hands; the matter is very much in their hands, and we may see what looks very much like a conscience vote.

If it turns out that the matter is decided on party lines and the government of the day wins the day, one can hardly complain that there has been a failure of the democratic process.

If we persist with the current system in which the Executive clings to the ancient prerogative of the sovereign, we will continue to face the risks of this small group decision making set out so eloquently by distinguished military historian Robert O'Neill in the final paragraph of his submission to the Senate Foreign Affairs, Defence and Trade Committee on the *Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 [No. 2]*:

In the past, especially in the cases of the Vietnam, Iraq and Afghanistan wars, the decision to commit forces was taken by a small group of ministers, in which the Prime Minister played a dominant role. In such a small group, inhibitions based on concerns about the major ally's capacity to fight effectively and win within a period of a year or two (if perceived at all) can be easily swept aside by the desire of the Prime Minister, Foreign Minister or the Cabinet at large to remain close to whoever is the US President at the time of deciding. Also in this system of decision-making, broader issues such as the morality of the commitment, which was clearly a major public issue in the cases of Vietnam and Iraq, are relatively easy for the Government to ignore or set to one side. The small group setting also makes it easier to believe faulty intelligence reports, or even to dismiss them where they are inconvenient for the government's preferred policy. Australia's decisions on commitment to any of these three conflicts would almost certainly have been improved had the proposal been debated in both Houses of the Parliament.

The Australian public needs to be much more vigilant about the circumstances in which the Australian Government deploys the Australian Defence Force and for what purpose. This vigilance is unlikely to become habitual while a decision to send troops remains the prerogative of the executive — that is, Cabinet, meaning in practice the Prime Minister and a very small group of key ministers — an arrangement which means that a decision, once taken, can be acted upon without significant debate. Vigilance is much more likely to develop if we embrace the republican notion, one which seems fitting also for a constitutional monarchy, that the power to make war should be vested in the legislature. In any polity founded on the principle that power flows from the people to the state, rather than from the state to the people, the spectacle of the executive clinging to the ancient privileges of the sovereign is both an anachronism and an anomaly.

In the UK, Prime Minister Cameron submitted the proposed 2014 deployments to Iraq and Syria for debate in the House of Commons, which both authorised the deployment of UK forces and restricted its geographical scope – no authorisation for operations in Syria. We are increasingly out of step with countries to which we like to compare ourselves, and it is high time we made the change to requiring Parliamentary approval for deployment of the ADF into international armed conflict.

## **Conclusion**

To conclude:

- It is far too easy in Australia for the government of the day to commit the ADF to armed international conflict. What can be done so easily can be done without due care, or consideration of the consequences.
- John Howard took the nation to war on a lie – or a series of lies – and we need an independent inquiry into who knew what, and who did what, and when.
- Australia needs to reform the way we authorise the commitment of the ADF to international armed conflict. There are many ways in which this could be done. The minimalist position would be the situation which now obtains in the UK: that the Government will not commit the armed forces to war without an affirmative vote in

the Lower House. My preferred position would be a requirement that a motion in favour be passed by both the House of Representatives and the Senate, and that these votes would take place after the tabling and consideration of

- A security cleared all-party parliamentary standing committee established for the purpose
- A statement by the Solicitor-General as to the legality of the proposed deployment

Above all, we must insist that the Government of the day abides by the existing law and the Constitution – that there be no deployment into warlike activity without the authorisation of the Governor-General or the Governor-General-in-Council.