



GRIFFITH JOURNAL OF
LAW & HUMAN DIGNITY

GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY

Editor-in-Chief
Laurynn Williams

Executive Editors
Elizabeth Thomas
Emma Blake
Stephanie Chard

Editors
Anna Feng
Cameron Henderson
Charlotte Mitchell
Isaac Jeong
Jean Danielle Bernardino
Lia Hiron
Louise Sullivan
Luella Boyd
Luke Livesey
Moyosore Adesina
Natasha Kendall
Nicholas Drew
Nora Merralls

Consulting Executive Editor
Dr Allan Ardill

Volume 12 Issue 2
2024

Published on 29 July 2025, Australia by the *Griffith Journal of Law & Human Dignity*

ISSN: 2203-3114

Contents

SALLY WORLAND AND KIERAN TRANTER	<i>LOOT BOX REGULATION IN AUSTRALIA: CLASSIFICATION AND GAMBLING</i>	1
BRUCE BAER ARNOLD, WENDY BONYTHON AND TESS ROONEY	<i>EMOTION RECOGNITION TECHNOLOGIES AND DIGNITY IN AI-BASED SURVEILLANCE CAPITALISM</i>	29
SCOTT CALNAN	<i>INDIGENOUS RIGHTS TO LAND UNDER THE AUSTRALIAN HUMAN RIGHTS ACTS</i>	46
MICHAEL HEAD	<i>AUSTRALIAN WAR POWERS PROPOSALS RAISE CONSTITUTIONAL, LEGAL AND POLITICAL CONCERNS</i>	81
TAYLAH GRAY	<i>NATIVE TITLE AND DISPOSSESSION HAVE THE SAME ADDRESS: HOW WESTERN LANGUAGE HAS DIMINISHED ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES RIGHTS TO LAND</i>	109

AUSTRALIAN WAR POWERS PROPOSALS RAISE CONSTITUTIONAL, LEGAL AND POLITICAL CONCERNS

MICHAEL HEAD*

The issue of who has the political, constitutional and legal power to launch military operations acquires great importance in a period of rising global conflicts. In this context, the Australian government conducted a review of its war powers. In 2023, it welcomed the primary recommendation of a parliamentary committee that 'decisions regarding armed conflict are fundamentally a prerogative of the Executive', exercised by the prime minister and the national security committee of cabinet.

Past experiences demonstrate the dangers of leaving these powers in the hands of executive governments without genuine and effective democratic control. Notably, documentary evidence exists that both the Vietnam War and the 2003 invasion of Iraq were conducted on the basis of false information.

At the same time, the government adopted recommendations to give the appearance of greater parliamentary involvement in these decisions, primarily by holding a debate in parliament on a ministerial statement regarding a military operation—but only after the operation was already underway. This leaves Australia with a weak parliamentary role, according to the criteria proposed in a study of European parliamentary war powers.

Overall, this response leaves the issues of legality, compliance with international law and exposure to judicial review shrouded in uncertainty. Moreover, it leaves the war powers in executive hands, relying on the continued existence of what were once royal prerogative powers, without adequate parliamentary or public scrutiny or control.

* Professor Michael Head: Western Sydney University School of Law.

CONTENTS

I. INTRODUCTION	2
II. AUSTRALIAN GOVERNMENT UPHOLDS THE WAR PREROGATIVE POWER.....	3
III. PARLIAMENTARY MEASURES.....	9
IV. POLITICAL CONSIDERATIONS.....	12
V. A “WEAK” PARLIAMENTARY WAR POWERS MODEL	14
VI. RELEVANT UNITED STATES AND UNITED KINGDOM EXPERIENCES WITH CONGRESSIONAL OR PARLIAMENTARY APPROVAL.....	16
VII. VIETNAM AND IRAQ LEGACIES.....	20
IX. CONCLUSION.....	24

I. INTRODUCTION

Amid increasing global war tensions, the issue of who has the political, constitutional and legal power to launch overseas military operations that can involve or lead to war acquires great importance. Past experiences demonstrate the dangers of leaving these powers in the hands of executive governments without effective democratic control. Notably, documentary evidence exists that both the Vietnam War and the 2003 invasion of Iraq were conducted on the basis of false information.

In August 2023, the Australian government released its response to a parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry report on the power to send troops overseas for international armed conflict.¹ The government welcomed the committee’s primary recommendation that ‘decisions regarding armed conflict are fundamentally a prerogative of the Executive’, exercised by the prime minister and the national security committee of cabinet.² This review took place under conditions where, according to media and government commentary, war was becoming a greater

¹ Australian Government, Australian Government response to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into international armed conflict decision making*, (August 2023) (‘Response’)

<https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Armedconflict/Government_Response>; Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into international armed decision making* (March 2023) (‘Report’).

² Response (n 1) Recommendation 1 Response 2.

possibility, making it necessary to prepare for war, re-examine the war powers, prepare public opinion for wartime conditions and implement an “all-of-nation” military readiness.³ A war was already underway in Europe, in the US-NATO conflict with Russia over Ukraine, and the AUKUS military pact between the United States (‘US’), United Kingdom (‘UK’) and Australia signalled concerns about a possible war against China.⁴

At the same time, the government adopted recommendations to give the appearance of greater parliamentary involvement in these decisions. Deputy Prime Minister and Defence Minister Richard Marles said it was important, ‘that parliament has effective mechanisms to examine and debate such decisions’.⁵ The government accepted a proposal to require a debate in parliament on a ministerial statement regarding a military operation—but only after the operation was already underway. This leaves Australia with a weak parliamentary role, according to the criteria proposed in a study of parliamentary war powers in European countries.⁶ The proposed procedure would offer no real protection against decisions to launch wars without any effective public oversight or approval. Rather, it would seek to justify or politically legitimise military engagements already commenced.

II AUSTRALIAN GOVERNMENT UPHOLDS THE WAR PREROGATIVE POWER

In March 2023, the Defence Subcommittee of parliament’s Joint Standing Committee on Foreign Affairs, Defence and Trade released a report on how Australian governments should make decisions to send service personnel into international armed conflict. The report had been requested by Defence Minister Marles in September 2022.⁷

In the report’s foreword, Defence Subcommittee Chair Julian Hill wrote: ‘The power to declare war and send military personnel into conflict is arguably the most significant and

³ See Australian Government, *National Defence: Defence Strategic Review* (Review, 2023) <<https://www.defence.gov.au/about/reviews-inquiries/defence-strategic-review>>, discussed below.

⁴ See generally *ibid* and media commentary discussed below.

⁵ Richard Marles, ‘Government’s response to the inquiry into international armed conflict decision making’ (Media Release, 8 August 2023) <<https://www.minister.defence.gov.au/media-releases/2023-08-08/governments-response-inquiry-international-armed-conflict-decision-making>>.

⁶ Sandra Dietrich, Hartwig Hummel and Stefan Marschall, *Parliamentary War Powers: A Survey of 25 European Democracies* (Occasional Paper No 21, Geneva Centre for the Democratic Control of Armed Forces, 2010).

⁷ Parliamentary Joint Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into international armed conflict decision making* (March 2023) (‘Report’) 6 [1.25].

serious institutional power, and the gravest decision a government can make'.⁸ Having stated the enormity of such decisions, the committee recommended that the power remain 'fundamentally a prerogative of the Executive'.⁹

The report suggested a variation. It proposed that these prerogative powers be exercised preferably by giving 'advice to the Governor-General as Commander in Chief under section 68 of the Constitution,' rather than solely through section 8 of the *Defence Act 1903* (Cth) ('*Defence Act*'), 'particularly in relation to conflicts that are not supported by resolution by the United Nations Security Council, or an invitation of a sovereign nation given that complex matters of legality in public international law may arise in respect of an overseas commitment of that nature'.¹⁰

Evidently, this contemplated the possibility of joining or initiating military conflicts that are not approved by the UN Security Council or the result of an invitation by another government. The UN Security Council has not always proven an obstacle to unsanctioned military interventions, such as the 2003 US-led invasion of Iraq, for which no explicit Security Council resolution was obtained in advance.¹¹ Nevertheless, a war conducted without formal Security Council approval, could run the risk of exposing those responsible to accusations of violating international law.

The committee proposed utilising the combined powers of s 68 and s 61 of the Australian Constitution.¹² Section 61 vests the executive power of the Commonwealth in the monarch, exercisable by the Governor-General. Section 68 states: 'The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative'. The Report argued that this constitutional power would afford the government and military personnel a range of legal protections in domestic and international law.¹³ The committee's report cited the opinion of Professor Charles Sampford, whom it said suggested during a committee hearing that the use of s 68 of the

⁸ Ibid iii.

⁹ Ibid 31 [2.97].

¹⁰ Ibid 33 [2.106].

¹¹ Ronald Kramer and Raymond Michalowski, 'War, Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq' (2005) 45(4) *The British Journal of Criminology* 446-469.

¹² Report (n 1) 25 [2.7].

¹³ Ibid 32 [2.101].

Constitution was 'bulletproof, constitutionally', whereas s 8 of the *Defence Act* was less reliable as a source of authority.¹⁴

In an extensive *Griffith Law Review* article dealing with the war powers, on the contrary, Sampford and Margaret Palmer argued that a decision under s 61 that involved the Governor-General was preferable. They wrote: '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. The authors consider this interpretation to be the better view'.¹⁵

Clearly, by suggesting a combination of reliance on ss 61 and 68 of the Constitution, a focus of the committee's recommendation was to protect executive war-making decisions and subsequent military operations from constitutional or legal challenges. Such challenges could also generate public discussion and possibly help trigger political opposition to the dispatch of armed forces, although the report does not mention that.

Section 8 of the *Defence Act* provides that: '(1) The Minister has general control and administration of the Defence Force' and '(2) In performing and exercising functions and powers under this Part, the Chief of the Defence Force and the Secretary must comply with any directions of the Minister.' However, the section notes that: 'Command in chief of the Defence Force is vested in the Governor-General: see section 68 of the Constitution.'

In effect, the 1901 Australian Constitution retained the prerogative powers of the British monarchy, which include the power to declare war, and vested them in the hands of the Governor-General. In the UK, the courts have ruled that exercises of the prerogative to conduct military operations abroad are non-justiciable.¹⁶ A similar view is likely to prevail in the Australian courts. In her review of the prerogative powers and some

¹⁴ Ibid 12 [2.16].

¹⁵ Charles Sampford and Margaret Palmer, 'The Constitutional Power to Make War: Domestic Legal Issues Raised by Australia's Action in Iraq' (2009) 18(2) *Griffith Law Review* 350, 354.

¹⁶ *R (on the Application of Gentle and Clarke) v Prime Minister, the Secretary of State for Defence, and the Attorney General* [2007] QB 689, 26; *Campaign for Nuclear Disarmament v Prime Minister, Defence Secretary, and Foreign Secretary* [2002] EWHC 2777 (Admin), 47; *Evans v Attorney General* [2015] UKSC 21, [2015] 1 AC 1787, 52; *R (Miller and Others) v Secretary of State for Exiting the European Union* [2017] UKSC 5, 53.

'uncertainty' surrounding their exercise,¹⁷ Anne Twomey argued that while this power was given a constitutional source in s 68 of the Constitution, it remained a prerogative power and 'the nature and scope of the power is prerogative'.¹⁸

At the same time, citing previous authority, Twomey contended that the prerogative war power was subject to civilian control, via the government of the day. She wrote:

Section 68 of the Constitution provides that the command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General. In this regard, the Governor-General, pursuant to the system of responsible government, acts upon the advice of his or her responsible ministers. This means that the ultimate command of the Australian Defence Force ('ADF') is in civilian hands.¹⁹

For this proposition, Twomey cited an article by then Governor-General Sir Ninian Stephen and one by Margaret White, a Supreme Court of Queensland Justice and Commander in the Royal Australian Navy Reserve.²⁰

Reliance on the article by Stephen is problematic. On the one hand, he noted that constitutional scholars regarded as 'lacking in substance' the 'splendidly wide sweep of military power which the express words of s 68 exhibit'.²¹ Stephen also stated that it seemed clear that no question of any reserve power of the monarchy or its vice-regal representative lurked within the terms of s 68, and said practical considerations too indicated that s 68 conferred no independent discretion on the Governor-General.²² Quoting Professor Richardson, he argued that if the Governor-General exercised the command of the armed forces, vested in the Governor-General under section 68, without, or contrary to, ministerial advice, that

could result in the non-observance of an Act of Parliament dealing with defence or be rendered ineffective in appropriate instances because

¹⁷ Anne Twomey, 'The Prerogative and the Courts in Australia' (2021) 3 *The Journal of Commonwealth Law* 55.

¹⁸ *Ibid* 76, citing John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 713.

¹⁹ Twomey (n 17) 67–8.

²⁰ Sir Ninian Stephen, 'The Governor-General as Commander in Chief' (1984) 14(4) *Melbourne University Law Review* 563, 570–71; Margaret White, 'The Executive and the Military' (2005) 28(2) *University of New South Wales Law Journal* 438, 442–43.

²¹ Stephen (n 20) 564.

²² *Ibid* 570.

Parliament had not voted the necessary moneys under sections 81 and 83 of the Constitution to support the activity embarked on by the Governor-General.²³

On the other hand, these arguments contemplate a situation in which the Governor-General acts in a manner conflicting with ministerial advice, rather than one in which the government of the day relies upon the powers vested in the Governor-General under section 68 to enter military conflict. Moreover, Stephen asserted a 'quite special relationship' between the Governor-General and the armed forces. He concluded:

Purely titular my title of Commander-in-Chief may be, but it does reflect the quite special relationship that I believe exists between the Governor-General and the armed forces of the Commonwealth. It is a close relationship of sentiment, based neither upon control nor command but which in our democratic society expresses on the one hand the nation's pride in and respect for its armed forces and, on the other; the willing subordination of the members of those forces to the civil power.²⁴

The precise nature and extent of this 'quite special relationship', said to be based on 'sentiment', the nation's 'pride in and respect' for the armed forces, and the 'willing subordination' of the members of the armed forces to the 'civil power', seems inherently vague and uncertain. In particular, it could possibly be invoked, and tested, in the event of a controversial decision to enter a potentially catastrophic war.

Indeed, the other main concern of the committee's report was how to best justify and legitimise the executive exercise of the war power in the eyes of a worried and distrustful population. As discussed below, its report referred to two public opinion surveys that reflected these popular concerns. The report suggested that 'greater legitimacy' would arise 'from an open constitutional s 68 process invoking the duty of members of the ADF'.²⁵ This pointed to political considerations, in terms of generating acceptance and support in the public, and within the ADF itself, for the decision to enter armed conflict.

The committee said its recommended process would not prevent rapid military deployments by the government. It proposed that s 8 of the *Defence Act* could be used to

²³ Ibid, quoting Richardson in Leslie Zines, *Commentaries on the Australian Constitution* (1977) 52.

²⁴ Ibid 571.

²⁵ Report (n 1) 14 [2.25].

initiate a deployment, without the Governor-General's involvement, and then the s 68 constitutional power could be invoked to backdate the order.²⁶ The report noted that research had shown that in recent conflicts, including the 2003 invasion of Iraq, s 8 of the *Defence Act* had been more commonly relied upon.²⁷

Uncertainty remains about the precise decision-making processes involved in 2003 because the government's legal advice has not been released. The war prerogative has a contorted history. In the UK, it has evolved from being held by the absolute monarchy to being exercised by the executive government, in effect the prime minister and perhaps a cabinet sub-committee.²⁸ In Australia, reflecting the country's gradual evolution from British colonial status to an independent state, the major decisions to enter military conflict since Federation in 1901 have gone from being made in the name of the monarch via the Governor-General, as the constitutional commander-in-chief of the military forces, to the prime minister and cabinet, sometimes evidently without any consultation with the Governor-General.²⁹

In its response to the committee's report, the government insisted that any decision to deploy ADF forces into international armed conflict was 'a decision for the elected Government and not the Governor-General.'³⁰ Moreover, it reserved 'its right to determine the appropriateness of disclosures with respect to questions of international law and advice on questions of legality'.³¹ Furthermore, the government said the 'existing arrangements support timely and flexible decision making as well as the security of highly-classified information that is necessary for governments to make critical decisions' to enable the military to 'effectively and efficiently deploy into contested environments'.³² These 'existing arrangements' appear to be reliant on ministerial directions issued under s 8 of the *Defence Act*.

²⁶ Ibid 32 [2.102].

²⁷ Ibid 9 [2.1].

²⁸ Rosara Joseph, *The War Prerogative: History Reform and Constitutional Design* (Oxford University Press, 2013) 22-41; Veronika Fikfak and Hayley Hooper, *Parliament's Secret War* (Legal Studies Research Paper Series, Paper No 6/2018, January 2018) 1.

²⁹ Sampford and Palmer (n 15).

³⁰ Response (n 1) [Recommendation 2 Response].

³¹ Ibid.

³² Ibid [Introduction].

The Australian Greens had filed a dissenting report.³³ It urged support for a Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2020 requiring a joint sitting of parliament to approve military deployments overseas. That bill would still have allowed the Governor-General, 'by proclamation' to declare that an 'emergency' required a deployment beyond the territorial limits of Australia without parliamentary approval.³⁴ This bill was rejected by the Senate on 29 March 2023. It was the latest in a line of similar proposals, dating back to 1985, which have each failed to gain passage, as the majority report noted.³⁵ That indicates a consistent lack of support within the parliament for proposals that it must approve deployments in advance.

The government rejected recommendations made in the dissenting report for the release of any legal advice it has sought or received on its interpretation of s 8 of the *Defence Act* as an alternative to s 68 of the Constitution, and for the release of legal advice given to the Howard government for the invasion of Iraq in 2003. On both recommendations, the government stated that 'as a matter of convention' and 'a longstanding and fundamental practice in the Westminster system', governments do not publicly disclose the confidential deliberations of former governments.³⁶

Overall, this response leaves the issues of legality, compliance with international law and exposure to judicial review shrouded in uncertainty. Moreover, it leaves the war powers in executive hands, without adequate parliamentary or public scrutiny or control.

III PARLIAMENTARY MEASURES

The government accepted the committee's recommendation that once the ADF was 'engaged in major military operations,' a written statement be tabled in parliament setting out the objectives of the intervention, the orders made and its legal basis.³⁷ However, there was a significant caveat. The government insisted that it must be able to

³³ Report (n 1) 107-110.

³⁴ *Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2020* (Cth), s 29(3) of the proposed amendment to the *Defence Act 1903* (Cth).

³⁵ Report (n 1) 3 [1.14].

³⁶ Response (n 1) Response to Australian Greens additional comments.

³⁷ *Ibid* Recommendation 2 Response; Report (n 1) xiii[2.106].

withhold information about its legal advice, again stating that this was a principle of the Westminster system inherited from Britain.³⁸

No time frame was proposed for the process of tabling a statement in parliament, except that a debate be conducted in both houses of parliament 'not later than 30 days from the deployment of the ADF, subject to any considerations of national security or imminent threat to Australian territories or civilian lives.'³⁹ Thus, the 30-day timeline could be dispensed with, based on government assertions about 'national security' or imminent threats to Australian lives. As this author has discussed elsewhere, the expanded and contested concept of 'national security' can and has been used to justify decisions taken for political or geo-strategic reasons.⁴⁰

The committee's report recommended that the Cabinet Handbook require that parliament be recalled 'as soon as possible to be advised' of a deployment. This requirement could be set aside if 'not possible due to extenuating and appropriate circumstances.'⁴¹ Prior to a parliamentary debate, a formal ministerial statement would be made which explained the reasons for the operation, as well as a 'statement of compliance with international law and advice as to the legality of the operation.'⁴² These stipulations could be set aside as well. The Governor-General could 'approve deferral of any of these requirements in specific circumstances, such as high risks to national security or imminent threat to Australian territories or civilian lives.'⁴³

Moreover, the government did not agree that the Cabinet Handbook was the appropriate mechanism for codifying these practices. While publication in the Cabinet Handbook would not, by itself, be legally binding, and could allow for 'extenuating' circumstances, as the committee proposed, the government proposed a weaker, even less binding, alternative—to publish on the Department of the Prime Minister and Cabinet's website, alongside the Cabinet Handbook, a statement on international armed conflict decision making. No such statement appears with the 15th edition of the Cabinet Handbook,

³⁸ Ibid Response to Australian Greens additional comments.

³⁹ Ibid Recommendation 3 Response; Report (n 1) xiii-xiv [3.55].

⁴⁰ Michael Head, 'A critical response to "National Security and the Law"' (2022) 96(8) *Australian Law Journal* 595-613.

⁴¹ Report (n 1) xiv [3.55].

⁴² Ibid.

⁴³ Ibid.

published in 2022.⁴⁴ Annex G to the Handbook states that the Cabinet's National Security Committee (NSC), consisting of the prime minister and seven other ministers, 'considers the highest-priority, highest-risk and most strategic national security matters of the day' and declares that 'Decisions of the NSC do not require the endorsement of the Cabinet'.⁴⁵

The parliamentary committee further proposed that the government introduce standing resolutions of both houses of parliament to establish parliament's 'expectations in relation to accountability for decisions in relation to international armed conflict,' while 'providing for sensible exemptions to enable timely and flexible national security responses'.⁴⁶ No suggestions were provided as to what 'sensible exemptions' should entail. No such standing resolutions have been introduced. The report also proposed regular prime ministerial and ministerial statements and updates to parliament during a military conflict.⁴⁷ None of these standing resolutions would be legally binding, nor would the requirement for ministerial statements and updates.

The committee recommended that the government introduce legislation to establish a Parliamentary Joint Committee on Defence to 'supersede and enhance' the Defence-related functions undertaken by the Joint Standing Committee of Foreign Affairs, Defence and Trade ('JSCFADT').⁴⁸ An examination of that proposal, which the government accepted, and the role of such oversight committees is beyond the scope of this article. It should be noted, however, that as with the JSCFADT, the new committee's membership would likely be shared exclusively between the government and the official opposition, excluding parliamentary crossbenchers.⁴⁹ Its members would be sworn to not divulge any classified information to the public. The committee's access to intelligence and operational information would be restricted, and its staff would require security clearances, as is the case with the JSCFADT.⁵⁰

⁴⁴ Department of the Prime Minister and Cabinet, Australian Government, *Cabinet Handbook 15th Edition* (Handbook, 2022) <https://www.pmc.gov.au/sites/default/files/resource/download/cabinet-handbook_0_0.pdf>.

⁴⁵ *Ibid* Annex G.

⁴⁶ Report (n 1) xiv [3.60].

⁴⁷ *Ibid*.

⁴⁸ Report (n 1) 58 [3.97].

⁴⁹ Controversy had surrounded a 2023 bill to extend the JSCFADT's membership to potentially include parliamentary crossbenchers. See, eg, Justin Bassi, Bec Shrimpton and Alex Bristow, 'Government proposals on war powers strike the right balance', *The Strategist* (online, 18 August 2023)

<<https://www.aspistrategist.org.au/government-proposals-on-war-powers-strike-the-right-balance/>>.

⁵⁰ Report (n 1) 55 [3.85], 57 [3.91], 58-9 [3.97].

The government's *Defence Amendment (Parliamentary Joint Committee on Defence) Bill 2024* (Cth) was intended to establish such a committee, but failed to pass the Senate on 4 July 2024, after the government refused to rule out the prospect that Greens or crossbenchers could become members. The Liberal-National Coalition refused to support the bill without a guarantee that the committee's membership would be restricted to Labor and the Coalition, arguing that membership must not be open to anyone 'who do not represent Australia's best interests in defence and national security'.⁵¹ That reflects the view, embodied in the similarly restricted membership of the JSCFADT, that any consultation over war decisions must be confined to members of the two traditional governing parties, who arguably would be least likely to call into question actions and decisions taken in the name of 'defence and national security.' The Greens also refused to back the bill, arguing that two positions should be reserved for crossbenchers. The government had reportedly told the Coalition leaders it did not intend to appoint any crossbenchers to the committee in the current parliament, but refused to specifically rule out the prospect in the bill.⁵²

IV. POLITICAL CONSIDERATIONS

In proposing a role for parliament, the parliamentary committee was evidently seeking to have parliament function as a political instrument to build public support for a war decision and as a safety-valve for anti-war opposition. The committee was manifestly conscious of public concerns about being plunged into war. Its report referred to two surveys that at least partially measured these concerns. A 2021 Digital Edge poll found that 87% of Australians agreed with the proposition that 'war decisions should be subject to parliamentary approval always or unless there is immediate danger to Australia'. Roy Morgan research conducted in 2020 said 83% of respondents supported reforms to require parliamentary approval prior to any decision being taken.⁵³ The committee added: 'Witnesses also pointed to previous public demonstrations of public sentiment, particularly during the 2003 Iraq conflict, as examples of public opinion being misaligned

⁵¹ Ben Packham, 'Defence committee scuttled over Greens' membership prospect', *The Australian* (online, 4 July 2024) <<https://www.theaustralian.com.au/nation/defence/defence-committee-scuttled-over-greens-membership-prospect/news-story/ea206ece04e956a2fd071bc054af2d13>>.

⁵² *Ibid.*

⁵³ Report (n 1) 37 [3.11].

to the Executive's decision.'⁵⁴

A subsequent opinion poll, conducted in April 2023 by Essential Research, reported 90% support for the proposition that the prime minister should be required to get approval from parliament before making a decision to go to war.⁵⁵

Proposals for a parliamentary role in such decisions often cite a need to politically legitimise a war and seek to build popular support for it. The report noted that in a submission to the inquiry, Cameron Moore said community support, expressed via parliamentary engagement, can have a significant impact on the outcomes of operations by way of providing legitimacy for the operations.⁵⁶ The report also cited George Williams' view. He stated: 'One of the parliament's main functions is ... to build community confidence in contentious and difficult areas by demonstrating that the people's representatives have gone through a deliberative process and listened to the arguments publicly and transparently.'⁵⁷ He added: 'It's when there's the absence of that, as we've seen in Iraq, Vietnam, and other contexts—there are a number of them—that, in fact, sometimes it's much more difficult, I think, to actually sustain community confidence.'⁵⁸

A similar stance was taken by a submission and testimony by Australians for War Powers Reform ('AWPR'). The report noted that a AWPR submission said: 'Parliament served as a means for the Government to convince the Australian public regarding the necessity for the war'. At committee hearings, AWPR witnesses assured the inquiry that parliamentary disapproval would be implausible, 'due to Australia's general bipartisanship on matters relating to defence'.⁵⁹

Previous arguments in favour of introducing parliamentary checks have been motivated by similar concerns to provide war-making decisions with apparent democratic legitimacy, so as to generate or bolster public support for the military mobilisation. For example, in a treatise on the war prerogative, Rosara Joseph argued that legislation should require the UK government to obtain a vote in the House of Commons before

⁵⁴ Ibid 37 [3.12].

⁵⁵ Essential Research, 'Approval to go to war' (Web Page, 3 April 2023
<<https://essentialreport.com.au/questions/approval-to-go-to-war>>.

⁵⁶ Report (n 1) 39 [3.20].

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid 25 [2.68,2.69].

deploying armed forces. Joseph attributed to parliament four political functions.⁶⁰ The first was a ‘legitimation function’—the attachment of a ‘stamp of approval’ of ‘initiatives taken elsewhere’. Second, parliament performed a ‘mobilising consent function’ of building public acceptance of the war mobilisation and the ‘coercions placed on the citizen by the government’. A third function was a ‘scrutinising’ one, which Joseph described as parliament exerting influence on the conduct of an ongoing war, but without any power of veto. The fourth function was ‘expressive’—to express public opinion and sentiment. Joseph characterised this as a ‘tension-release’ function, with parliament essentially acting as a political safety-valve for opposition and dissent.⁶¹

Similarly, in a 2016 Australian essay, James Brown, a former military officer, argued that Australians were dangerously resistant to, or politically and psychologically unprepared for, war, particularly one against China. Having been twice deployed to Iraq since the 2003 invasion, he deplored the fact that the Iraq ‘disaster’ fuelled anti-war sentiment. One means of overcoming that problem was to seek to restore ‘public trust’ in war-making by involving parliament in the process.⁶²

V. A “WEAK” PARLIAMENTARY WAR POWERS MODEL

The committee’s proposals, even if fully implemented, would be classified as ‘weak’ according to the five-grade classification suggested by a 2010 study of the parliamentary war powers provisions in 25 European Union countries. The study detected a trend since the 1990s to reverse previous moves after World War II to strengthen parliamentary roles, ‘with the executive (re)gaining autonomous decision-making power over military deployments.’⁶³ The share of countries without parliamentary war powers lay between 53% (in 1990) and 65% (in 2004).⁶⁴ Notably, several Central and Eastern European states had abolished parliamentary prior veto powers in the process of NATO (North Atlantic Treaty Organization) accession.⁶⁵

⁶⁰ Rosara Joseph (n 28) 107-08.

⁶¹ *Ibid.*

⁶² James Brown, ‘Firing Line: Australia’s Path to War’ (2016) 62 *Quarterly Essay* 5.

⁶³ Wolfgang Wagner, Dirk Peters and Cosima Glahn, ‘Parliamentary War Powers Around the World, 1989–2004. A New Dataset’ (Occasional Paper No 22, Geneva Centre for the Democratic Control of Armed Forces, 2010) 25.

⁶⁴ *Ibid.* 23.

⁶⁵ *Ibid.* 25.

That study proposed the highest grade of 'very strong war powers' for political systems in which parliaments participate in each individual decision on the use of violence in foreign relations, and in which they have the power effectively to block or veto any war involvement, for example by deployment law, budgetary powers or neutrality provisions.⁶⁶

The second highest grade of 'strong' was attributed to parliaments which in principle must approve the deployment of armed forces in advance, but do not decide on each individual case of war involvement because of exception clauses that allow the government to bypass parliamentary decision-making under certain conditions. The third category of 'medium' covered parliaments that cannot veto war involvement before the event, but can terminate it ex post. The fourth grade of 'weak' referred to parliaments that the respective government is obliged to inform about the deployment of armed forces but which otherwise do not have the powers to veto, or terminate, war involvement. The lowest degree of 'very weak' marked parliaments that governments do not even have to inform about the deployment of armed forces.⁶⁷

The survey indicated that, as of 2003, no single European parliament scored a 'strong' ranking. No country could serve as a 'best case' prototype.⁶⁸ Nevertheless, the study found that the 2003 Iraq war showed that high parliamentary war powers were significantly correlated to low war involvement. That conclusion was somewhat tempered, however. 'Just about all countries with strong parliamentary war powers did not provide more than logistical support for the intervention', the study stated, but 'the Danish Parliament approved deployment of naval forces, disregarding overwhelming public opposition'.⁶⁹

It must be said that the study's correlation between parliamentary powers and war involvement was simplistic. It did not take into account the geo-strategic interests of the various governments involved in the Iraq invasion. It also did not consider the capacity of governments to camouflage those interests and deceive the public about the true nature of wars. Arguably, as reviewed below with the regard to the experiences of the US

⁶⁶ See Ibid 12-29.

⁶⁷ Ibid.

⁶⁸ Wolfgang Wagner, Dirk Peters and Cosima Glahn, 'Parliamentary War Powers: A Survey of 25 European Parliaments' (Occasional Paper No 21, Geneva Centre for the Democratic Control of Armed Forces, 2013) 71.

⁶⁹ Ibid 72.

and UK, and to the experiences of the Vietnam and Iraq wars, it is the underlying geo-strategic interests that determine decisions to enter military conflicts, rather than the existence or not of parliamentary scrutiny mechanisms.

VI. RELEVANT US AND UK EXPERIENCES WITH CONGRESSIONAL OR PARLIAMENTARY APPROVAL

In both the US and UK, congressional or parliamentary war powers have proven largely ineffective in preventing executive decisions to launch military interventions. Despite the US Constitution explicitly vesting the power to declare war in the hands of the Congress, US presidents since Harry Truman launched the three-year Korean War in 1950 have gone to war without Congressional approval.⁷⁰ In 1973, facing rising popular opposition to the wars in Vietnam, Cambodia and Laos, Congress passed the War Powers Resolution, purporting to place limits on presidential war-launching. It stated that only a congressional declaration of war, 'a national emergency created by attack upon the United States, its territories or possessions, or its armed forces' or 'specific statutory authorization' by Congress could legally sanction the deployment of the armed forces to any conflict. Without such sanction, presidential military deployments would be subject to a 60-day limit.⁷¹

This resolution, however, effectively allowed presidents to trigger wars by claiming to be responding to an attack upon the United States, its territories, or its armed forces. In terms of congressional enforcement, the resolution has proved mostly toothless. Every president since has found ways around the resolution. From 2001, successive administrations primarily relied for series of military interventions upon Authorizations for Use of Military Force obtained in 2001 and 2002 based on false assertions, such as that Iraq had the 'capability and willingness to use weapons of mass destruction against other nations and its own people'.⁷² These interventions included those in Afghanistan, Iraq, Syria, Libya and Niger. Attempts to mount legal challenges to these interventions were dismissed, including on grounds of non-justiciable political questions or lack of

⁷⁰ Michael Head and Kristian Boehringer, *The Legal Power to Launch War: Who Decides?* (Routledge, 2019) 65-104.

⁷¹ *Ibid* 83-85.

⁷² *Ibid* 66.

standing.⁷³

The tendency to presidential arrogation of war powers has long been recognised in many legal, media and political circles, yet it has only continued. One US legal scholar commented:

This type of presidential power is dangerous, especially when presidents act unilaterally, in secret, and on the basis of false, deceptive, and unreliable information. Beginning with President Truman's use of military force against North Korea in June 1950, presidents have systematically circumvented Congress, violated statutes and the Constitution, and undermined democratic government. Even before Truman, presidents invoked threats to national security—sometimes real, sometimes exaggerated—to justify emergency power.⁷⁴

In the UK, the exposure of the misinformation used to justify the invasion of Iraq led to attempts to constrain the war prerogative, including by requiring the House of Commons to vote on any decision to enter a war.⁷⁵ Each proposal to legislate along those lines, however, ultimately failed.⁷⁶ It was argued that Prime Minister Tony Blair's decision to obtain parliamentary approval of the Iraq operation established a convention that a prime minister must allow the House of Commons to debate the deployment of forces, obviating the need for legislation.⁷⁷ That convention was noted in the Cabinet Manual, which stated:

In 2011, the Government acknowledged that a convention had developed in Parliament that before troops were committed the House of Commons should have an opportunity to debate the matter and said that it proposed to observe that convention except when there was an emergency and such action would not be appropriate.⁷⁸

⁷³ Ibid 67.

⁷⁴ Louis Fisher, 'Foreword' in Chris Edelson, *Emergency Presidential Power, From the Drafting of the Constitution to the War on Terror* (The University of Wisconsin Press, 2013) ix.

⁷⁵ Head and Boehringer (n 70) 49-59, 108-119.

⁷⁶ Ibid 132-141.

⁷⁷ Ibid 133-35.

⁷⁸ HM Government, *The Cabinet Manual: A guide to laws, conventions and rules on the operation of Government* (The Stationary Office, 1st ed, 2011) 44 [5.38].

With the 2013 exception of an embarrassing defeat for Prime Minister David Cameron on a vote on unpopular proposed military operations in Syria, that convention has proved ineffective, not least because of the ambiguities surrounding the concept of 'emergency', as well as apparent exceptions for non-combat, Special Forces and drone operations.⁷⁹ The convention was essentially brushed aside by Prime Minister Theresa May in 2018 in the context of US and UK missile strikes on Syria, which were undertaken without parliamentary approval. May cited the Cabinet Manual and a 2016 defence secretary's ministerial statement that stated:

In observing the convention, we must ensure that the ability of our armed forces to act quickly and decisively, and to maintain the security of their operations, is not compromised... If we attempt to clarify more precisely circumstances in which we would consult Parliament before taking military action, we would constrain the operational flexibility of the armed forces and prejudice the capability, effectiveness or security of those forces.⁸⁰

In 2018, a briefing paper by the House of Commons Library concluded that: 'Despite the emergence of the Convention it remains the case that Parliament has no legally established role in approving the deployment of the Armed Forces'.⁸¹ The paper suggested that on the basis of recent deployments a nominal threshold for prior parliamentary approval appeared to have been established when 'the possibility of premeditated military action exists' or 'military forces are to be deployed in an offensive capacity'. Retrospective approval was required when 'emergency' military action was taken to 'prevent a humanitarian catastrophe' and/or 'protect a critical national interest'.⁸² Each of these terms and circumstances could be broadly interpreted, however.⁸³

⁷⁹ James Strong, 'The war powers of the British parliament: What has been established and what remains unclear?' (2018) 20(1) *The British Journal of Politics and International Relations* 19-34.

⁸⁰ United Kingdom, *Parliamentary Debates*, House of Commons, 17 April 2018, vol 639, col 200.

⁸¹ House of Commons Library (UK), *Parliamentary approval for military action: Debate to 2018* (CBP 7166, 2018) 6 <<https://researchbriefings.files.parliament.uk/documents/CBP-7166/CBP-7166.pdf>>.

⁸² *Ibid* 5.

⁸³ For further discussions of the legal uncertainties and political calculations in the UK see Teemu Hakkinen, 'Challenging the Royal Prerogative: The Decision on War against Iraq in Parliamentary Debates in 2002-3' (2016) 35(1) *Parliamentary History* 54; Ryan Patrick Alford, 'War with ISIL: Should Parliament Decide?' (2015) 20(1) *Review of Constitutional Studies* 118; Norman Hillmer and Philippe Lagassé et al, 'Parliament will decide: An interplay of politics and principle' (2016) 71(2) *International Journal* 328-337. For an examination of the impact of multilateral military deployments, under the auspices of the European Union's Common Security and Defence Policy on weaknesses in parliamentary scrutiny see

In her previously-mentioned treatise, Joseph argued, after a review of four centuries, that the UK House of Commons has played a 'varying, but influential, role in the exercise and scrutiny of' decisions to go to war.⁸⁴ She said this was contrary to the 'orthodox view', which asserted the executive's exclusive control over war. Nevertheless, she concluded that the effectiveness of parliament's involvement in the decision-making process leading up to the 2003 invasion of Iraq was 'questionable'.⁸⁵ As she recounted, the case that the British governments presented to parliament for deployment was not only 'selective and misleading' in relation to false claims of supportive legal advice, but was based on an intelligence 'dossier' that was subsequently discredited.⁸⁶ Moreover, the government had pre-empted parliament:

The timing of the Commons' debate and vote on a substantive motion of support for the deployment reduced the Commons' input to essentially a rubber stamp of a *fait accompli*: 40,000 British troops had already mobilised into the region. Britain could not withdraw without a massive loss of credibility and authority, a factor which influenced many of the MPs speaking in the debate.⁸⁷

It has been argued that the convention finally involved parliament in a meaningful manner on issues of war.⁸⁸ A study by Fikfak and Hooper, however, concluded: 'If the convention initially looked like it would level the playing field between Parliament and the Government, the analysis of practice since its codification in the Cabinet Manual reveals that this is simply not true'.⁸⁹ The authors stated: 'Precedent by precedent, dispute by dispute, successive governments have made use of both the timing and the "emergency argument" to avoid prior debates or votes in Parliament'.⁹⁰ Moreover:

additional exceptions to the operation of the convention have been created incrementally—first, by excluding the use of drones from parliamentary

Daniel Schade, 'Limiting or liberating? The influence of parliaments on military deployments in multinational settings' (2018) 20(1) *The British Journal of Politics and International Relations* 84-103.

⁸⁴ Joseph (n 28) 107.

⁸⁵ *Ibid* 105.

⁸⁶ *Ibid*.

⁸⁷ *Ibid*.

⁸⁸ For example, James Strong, 'Why Parliament Now Decides on War: Tracing the Growth of the Parliamentary Prerogative through Syria, Libya and Iraq' (2014) 17(4) *The British Journal of Politics and International Relations* 604.

⁸⁹ Fikfak and Hooper (n 28) 23.

⁹⁰ *Ibid*.

oversight and secondly, by exempting special forces embedded in other countries' military forces and their subsequent participation in military actions abroad under the public interest exception.⁹¹

And governments 'carefully managed public disclosure of claims based on classified information (secret intelligence)'.⁹²

VII. VIETNAM AND IRAQ LEGACIES

Some of the reasons for the public mistrust that the Australian parliamentary committee noted, and the dangers of leaving the war powers effectively solely in the hands of the executive, can be gauged from the experiences of the Vietnam and Iraq wars.

The 'Pentagon Papers' were officially released in 2011,⁹³ 40 years after they were initially leaked by Daniel Ellsberg, a former Pentagon and RAND Corporation official, and published in the *New York Times*. They showed that successive US governments repeatedly deceived the American people, carried out secret illegal operations in Vietnam, militarily intervened on false pretences and killed tens of thousands of Vietnamese civilians.

Commissioned by then-US Secretary of Defense Robert McNamara in 1967, the 7,000-page study, officially known as the 'Report of the Office of the Secretary of Defense Vietnam Task Force,' documented, for example, that at the end of World War II, President Truman had rejected urgent appeals from Vietnamese leader Ho Chi Minh for US assistance; while the 1954 Geneva peace conference was in session, the US was planning paramilitary operations against North Vietnam; President Kennedy's 'advisers' in Vietnam had participated directly in military operations; and the 1964 Gulf of Tonkin incident was misrepresented, giving President Johnson the pretext for obtaining a congressional resolution for US military intervention, falsely accusing North Vietnam of attacking a US warship.⁹⁴

The Chilcot inquiry into the role of the British government in the 2003 US-led invasion of

⁹¹ Ibid 23-4.

⁹² Ibid 24.

⁹³ 'Pentagon Papers', National Archives (Web Page, 2011)
<<https://www.archives.gov/research/pentagon-papers>>.

⁹⁴ Geoffrey Stone, *Perilous Times: Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism* (W W Norton, 2004) 500.

Iraq, released in July 2016, provided further evidence of how governments have misled their populations about the reasons for, and the need for, going to war. The 13-volume report showed that the UK government's decision to join the invasion was based on concoctions and geo-strategic calculations, not the publicly-stated justifications. Personal testimony, confidential documents and private memos demonstrated that Prime Minister Blair opted to support a US war for regime change in Iraq that was prepared at least from the start of 2002, all while publicly claiming there were no such plans. Chilcot's report stated that Blair decided to join the war knowing that 'President Bush decided at the end of 2001 to pursue a policy of regime change in Iraq'.⁹⁵

Chilcot summed up his report's central finding as follows: 'We have concluded that the UK chose to join the invasion of Iraq before the peaceful options for disarmament had been exhausted. Military action at that time was not a last resort'.⁹⁶ The inquiry concluded that Iraq's Saddam Hussein did not present an 'imminent' threat at the time, and claims that Iraq possessed weapons of mass destruction ('WMD') were 'not justified'.⁹⁷ The invasion was launched on the basis of 'flawed intelligence and assessments' that were not challenged when they should have been.⁹⁸

VIII. POTENTIAL WARS

The Australian parliamentary report and the government response were prepared against the backdrop of a war in Ukraine and media and government discussion of potential wars, notably with China. That was evident from the committee's references to scenarios posited by several submissions and witnesses. The report noted: 'Concerns were also raised that the likely reality of a future war may not lend itself to preauthorisation by the Parliament'.⁹⁹ Professor Moore gave the following example, which was cited in the committee's report:

If China blockaded Taiwan, as it practised doing in August, or if the ongoing incidents in the South China Sea turned deadly, or if civil war erupted again in the Solomon Islands—as it threatened to do only a year ago, and the ADF

⁹⁵ Committee of Privy Counsellors, *The Report of the Iraq Inquiry* (Her Majesty's Stationery Office, 2016) Executive Summary, 6 [24].

⁹⁶ John Chilcot, 'Statement by Sir John Chilcot' (The Iraq Inquiry, 6 July 2016) 1.

⁹⁷ *Ibid* 2, 11.

⁹⁸ *Ibid* 6.

⁹⁹ Report (n 1) 27 [2.77].

deployed there—these situations would pose a direct threat to Australia’s interests, but they would not need the direct defence of Australia. The government would have to make difficult decisions with limited time and with limited information.¹⁰⁰

The report’s release followed the government’s March 2023 announcement of the allocation of up to \$368 billion over 30 years for the purchase of nuclear-powered attack submarines, along with hypersonic missiles and other weaponry, as part of the AUKUS pact with the US and UK governments.¹⁰¹ That announcement came amid prominent media material highlighting the prospect of a war with China. An Australian Broadcasting Corporation (ABC) series reported that four former senior figures inside the military-intelligence community had warned of the political alarm if people in Australia suddenly found themselves at war with China.¹⁰² A March 2023 ‘Red Alert’ series in the *Sydney Morning Herald* and other Nine network newspapers and television outlets declared the need to be ready for a war against China within three years.¹⁰³ US Air Force General Michael Minihan had written, in a memo obtained by NBC news and seen by the *Financial Times*, that his forces needed to be prepared for a war by 2025.¹⁰⁴ The redacted public version of the Australian government’s Defence Strategic Review, released in April 2023, declared that China’s assertion of sovereignty in the South China Sea ‘threatens the global rules-based order in the Indo-Pacific’ and called for a ‘whole-of-government’ and ‘whole-of-nation’ military effort.¹⁰⁵

A potential war with China is generally presented by the media and the US and Australian governments as a response to alleged Chinese aggression. But American governments have designated China as the chief threat to the global power that America ultimately

¹⁰⁰ Ibid.

¹⁰¹ Prime Minister, Deputy Prime Minister, Minister for Defence, ‘AUKUS nuclear-powered submarine pathway’ (Media Release, 14 March 2023) <<https://www.pm.gov.au/media/aukus-nuclear-powered-submarine-pathway>>.

¹⁰² John Lyons, ‘What would war with China look like for Australia?’, *Australian Broadcasting Corporation* (online, 19 February 2023) <<https://www.abc.net.au/news/2023-02-20/what-would-war-with-china-look-like-for-australia-part-1/101328632>>.

¹⁰³ Peter Hartcher and Matthew Knott, ‘Australia faces the threat of war with China within three years—and we’re not ready’, *The Sydney Morning Herald* (online, 7 March 2023) <<https://www.smh.com.au/politics/federal/australia-faces-the-threat-of-war-with-china-within-three-years-and-we-re-not-ready-20230221-p5cmag.html>>.

¹⁰⁴ Demetri Sevastopulo, ‘Top US air force general predicts China conflict in 2025’, *Australian Financial Review* (online, 29 January 2023) <<https://www.afr.com/policy/foreign-affairs/top-us-air-force-general-predicts-china-conflict-in-2025-20230129-p5cg89>>.

¹⁰⁵ Australian Government, *National Defence: Defence Strategic Review* (Review, 2023) 23-4.

established through the defeat of Germany and Japan in World War II. The Biden administration's National Security Strategy, issued in October 2022, asserted that the United States remained 'the world's leading power' but China was 'America's most consequential geopolitical challenge'.¹⁰⁶ The unstated but clear implication of this statement was the need to prepare for war, if necessary, to defend and reassert US global hegemony.

In practice, whatever the formalities of invoking the powers of the Governor-General, any Australian decision to go to war would be largely determined by the actions of the United States government. If the US government entered a military conflict with China, Australia would be almost certainly involved in that confrontation, including as a target. Australia hosts vital US military and intelligence facilities, such as the Pine Gap communications and surveillance station in central Australia and other facilities across northern Australia that play a critical role in US military operations.¹⁰⁷ Australia is also a member of the Five Eyes intelligence network, alongside the US, UK, Canada and New Zealand, which supplies, among other things, military information.¹⁰⁸ It monitors shipping traffic passing through strategic maritime areas, foreign satellite deployments and the 'military activities of relevant air forces'.¹⁰⁹

Moreover since 2011, when US President Obama announced Washington's military and strategic 'pivot to Asia' on the floor of the Australian parliament, Australian governments have increasingly integrated the Australian armed forces into US military capacities and operations.¹¹⁰ The AUKUS alliance, announced in September 2021, involves Australia, the US and the UK in the joint development of submarines, missiles and other weaponry, and the associated training and interchange of military personnel, as well as enhanced US and

¹⁰⁶ The White House, *National Security Strategy* (October 2022) 7 & 11.

¹⁰⁷ Desmond Ball, Bill Robinson, and Richard Tanter, 'The Antennas of Pine Gap', *NAPSNet Special Reports* (Web Page, 22 February 2016) <<https://nautilus.org/napsnet/napsnet-special-reports/the-antennas-of-pine-gap/>>; Desmond Ball, *Pine Gap: Australia and the US geostationary signals intelligence satellite program* (Allen & Unwin, 1988).

¹⁰⁸ Jeffrey Richelson and Desmond Ball, *The Ties That Bind: Intelligence Cooperation Between the UKUSA Countries – the United Kingdom, the United States of America, Canada, Australia and New Zealand* (Allen & Unwin, 1985).

¹⁰⁹ J Vitor Tossini, 'The Five Eyes: The Intelligence Alliance of the Anglosphere', *UK Defence Journal* (online 14 April 2020) <<https://ukdefencejournal.org.uk/the-five-eyes-the-intelligence-alliance-of-the-anglosphere/>>.

¹¹⁰ John Garrick and Michael Hatherell, 'As Australia's military ties with the US deepen, the Top End becomes even more vital to our security', *The Conversation* (Online, 2 March 2023) <<https://theconversation.com/as-australias-military-ties-with-the-us-deepen-the-top-end-becomes-even-more-vital-to-our-security-199783>>.

UK access to Australian military bases and ports.¹¹¹ The defence and foreign ministers of the US and Australia affirmed in December 2022 that 'Australia and the United States would continue the rotational presence of U.S. capabilities in Australia, across air, land, and maritime domains'.¹¹²

IX. CONCLUSION

As the record of the Vietnam and Iraq wars underscores, serious dangers lie in the leaving the war powers solely in the hands of the executive. The decision of the Australian government to leave the powers shielded from public scrutiny as much as possible, regardless of the consequent legal uncertainty, is of grave concern. That is especially so under conditions of intensifying geo-strategic tensions and indications of preparations for conflicts that could involve nuclear weapons. Equally, measures or proposals to curtail these powers by parliamentary or congressional means have proven largely ineffective in the US and UK, as demonstrated by the evasions and misinformation utilised to initiate the disastrous Vietnam and Iraq interventions.

What this author would recommend to avert the threat of war lies beyond the scope of this article. Proposals have been made in the past, including in the US before World War II and on the eve of the first Gulf War of 1990-91, for referenda to allow the population to vote on war. Yet none have ever been conducted and there are doubts about their capacity to halt a war in any case.¹¹³ This author has argued elsewhere, drawing conclusions from these experiences, that the causes of war are rooted in the socio-economic structure and social relations of the capitalist profit system based on rival nation states.¹¹⁴

¹¹¹ Prime Minister, Deputy Prime Minister (n 101).

¹¹² 'Joint Statement on Australia-US Ministerial Consultations (AUSMIN) 2022' (Media Release, 6 December 2022) <<https://www.defense.gov/News/Releases/Release/Article/3238028/joint-statement-on-australia-us-ministerial-consultations-ausmin-2022/>>.

¹¹³ Head and Boehringer (n 70) 283-301.

¹¹⁴ *Ibid* 303-322.

REFERENCE LIST

A ARTICLES/BOOKS/REPORTS

Alford, Ryan Patrick, 'War with ISIL: Should Parliament Decide?' (2015) 20(1) *Review of Constitutional Studies* 118

Australian Government, Australian Government response to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into international armed conflict decision making* (August 2023)

Australian Government, *National Defence: Defence Strategic Review* (Review, 2023)

Ball, Desmond, *Pine Gap: Australia and the US geostationary signals intelligence satellite program* (Allen & Unwin, 1988)

Brown, James, 'Firing Line: Australia's Path to War' (2016) 62 *Quarterly Essay* 5

Committee of Privy Counsellors, *The Report of the Iraq Inquiry* (Her Majesty's Stationery Office, 2016)

Fikfak, Veronika and Hayley Hooper, *Parliament's Secret War* (Legal Studies Research Paper Series, Paper No 6/2018, January 2018)

Fisher, Louis, 'Foreword' in Chris Edelson, *Emergency Presidential Power, From the Drafting of the Constitution to the War on Terror* (The University of Wisconsin Press, 2013)

Hakkinen, Teemu, 'Challenging the Royal Prerogative: The Decision on War against Iraq in Parliamentary Debates in 2002-3' (2016) 35(1) *Parliamentary History* 54

Head, Michael, 'A critical response to 'National Security and the Law'' (2022) 96(8) *Australian Law Journal* 595

Hillmer, Norman and Philippe Lagassé, 'Parliament will decide: An interplay of politics and principle' (2016) 71(2) *International Journal* 328

Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into international armed decision making* (March 2023)

Joseph, Rosara, *The War Prerogative: History Reform and Constitutional Design* (Oxford University Press, 2013)

Kramer, Ronald C and Raymond J Michalowski, 'War, Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq' (2005) 45(4) *The British Journal of Criminology* 446

Parliamentary Joint Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into international armed conflict decision making* (March 2023)

Quick, John and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901)

Richelson, Jeffrey and Desmond Ball, *The Ties That Bind: Intelligence Cooperation Between the UKUSA Countries – the United Kingdom, the United States of America, Canada, Australia and New Zealand* (Allen & Unwin, 1985)

Sampford, Charles and Margaret Palmer, 'The Constitutional Power to Make War: Domestic Legal Issues Raised by Australia's Action in Iraq' (2009) 18(2) *Griffith Law Review* 350

Schade, Daniel, 'Limiting or liberating? The influence of parliaments on military deployments in multinational settings' (2018) 20(1) *The British Journal of Politics and International Relations* 84

Stephen, Ninian, 'The Governor-General as Commander in Chief' (1984) 14(4) *Melbourne University Law Review* 563

Stone, Geoffrey, *Perilous Times: Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism* (W W Norton, 2004)

Strong, James, 'Why Parliament Now Decides on War: Tracing the Growth of the Parliamentary Prerogative through Syria, Libya and Iraq' (2014) 17(4) *The British Journal of Politics and International Relations* 604

Strong, James, 'The war powers of the British parliament: What has been established and what remains unclear?' (2018) 20(1) *The British Journal of Politics and International Relations* 19

Twomey, Anne, 'The Prerogative and the Courts in Australia' (2021) 3 *The Journal of Commonwealth Law* 55

White, Margaret, 'The Executive and the Military' (2005) 28(2) *University of New South Wales Law Journal* 438

B CASES

R (on the Application of Gentle and Clarke) v Prime Minister, the Secretary of State for Defence, and the Attorney General [2007] QB 689

Campaign for Nuclear Disarmament v Prime Minister, Defence Secretary, and Foreign Secretary [2002] EWHC 2777 (Admin)

Evans v Attorney General [2015] UKSC 21, [2015] 1 AC 1787

R (Miller and Others) v Secretary of State for Exiting the European Union [2017] UKSC 5

C LEGISLATION

Commonwealth of Australia Constitution Act (The Constitution) 1901 (Cth)

Defence Act 1903 (Cth)

Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2020 (Cth)

D OTHER

Ball, Desmond, Bill Robinson and Richard Tanter, 'The Antennas of Pine Gap', *NAPSNet Special Reports* (Web Page, 22 February 2016) <<https://nautilus.org/napsnet/napsnet-special-reports/the-antennas-of-pine-gap/>>

Bassi, Justin, Bec Shrimpton and Alex Bristow, 'Government proposals on war powers strike the right balance', *The Strategist* (online, 18 August 2023) <<https://www.aspistrategist.org.au/government-proposals-on-war-powers-strike-the-right-balance/>>

Chilcot, John, 'Statement by Sir John Chilcot' (The Iraq Inquiry, 6 July 2016)

Department of the Prime Minister and Cabinet, Australian Government, *Cabinet Handbook 15th Edition* (Handbook, 2022) <https://www.pmc.gov.au/sites/default/files/resource/download/cabinet-handbook_0_0.pdf>

Dietrich, Sandra, Hartwig Hummel and Stefan Marschall, *Parliamentary War Powers: A Survey of 25 European Democracies* (Occasional Paper No 21, Geneva Centre for the Democratic Control of Armed Forces, 2010)

Essential Research, 'Approval to go to war' (Web Page, 3 April 2023) <<https://essentialreport.com.au/questions/approval-to-go-to-war>>

Garrick, John and Michael Hatherell, 'As Australia's military ties with the US deepen, the Top End becomes even more vital to our security', *The Conversation* (Online, 2 March 2023) <<https://theconversation.com/as-australias-military-ties-with-the-us-deepen-the-top-end-becomes-even-more-vital-to-our-security-199783>>

Hartcher, Peter and Matthew Knott, 'Australia faces the threat of war with China within three years—and we're not ready', *The Sydney Morning Herald* (online, 7 March 2023) <<https://www.smh.com.au/politics/federal/australia-faces-the-threat-of-war-with-china-within-three-years-and-we-re-not-ready-20230221-p5cmag.html>>

HM Government, *The Cabinet Manual: A guide to laws, conventions and rules on the operation of Government* (The Stationary Office, 1st ed, 2011)

House of Commons Library (UK), *Parliamentary approval for military action: Debate to 2018* (CBP 7166, 2018) 6
 <<https://researchbriefings.files.parliament.uk/documents/CBP-7166/CBP-7166.pdf>>

'Joint Statement on Australia-US Ministerial Consultations (AUSMIN) 2022' (Media Release, 6 December 2022)
 <<https://www.defense.gov/News/Releases/Release/Article/3238028/joint-statement-on-australia-us-ministerial-consultations-ausmin-2022/>>

Lyons, John, 'What would war with China look like for Australia?', *Australian Broadcasting Corporation* (online, 19 February 2023) <<https://www.abc.net.au/news/2023-02-20/what-would-war-with-china-look-like-for-australia-part-1/101328632>>

Marles, Richard, 'Government's response to the inquiry into international armed conflict decision making' (Media Release, 8 August 2023)
 <<https://www.minister.defence.gov.au/media-releases/2023-08-08/governments-response-inquiry-international-armed-conflict-decision-making>>

Packham, Ben, 'Defence committee scuttled over Greens' membership prospect', *The Australian* (Web Page, 4 July 2024)
 <<https://www.theaustralian.com.au/nation/defence/defence-committee-scuttled-over-greens-membership-prospect/news-story/ea206ece04e956a2fd071bc054af2d13>>

'Pentagon Papers', National Archives (Web Page, 2011)
 <<https://www.archives.gov/research/pentagon-papers>>

Prime Minister, Deputy Prime Minister, Minister for Defence, 'AUKUS nuclear-powered submarine pathway' (Media Release, 14 March 2023)
 <<https://www.pm.gov.au/media/aukus-nuclear-powered-submarine-pathway>>

Sevastopulo, Demetri, 'Top US air force general predicts China conflict in 2025', *Australian Financial Review* (online, 29 January 2023) <<https://www.afr.com/policy/foreign-affairs/top-us-air-force-general-predicts-china-conflict-in-2025-20230129-p5cg89>>

The White House, *National Security Strategy* (October 2022)

Tossini, J Vitor, 'The Five Eyes: The Intelligence Alliance of the Anglosphere', *UK Defence Journal* (online 14 April 2020) <<https://ukdefencejournal.org.uk/the-five-eyes-the-intelligence-alliance-of-the-anglosphere/>>

United Kingdom, *Parliamentary Debates*, House of Commons, 17 April 2018, vol 639, col 200

Wagner, Wolfgang, Dirk Peters and Cosima Glahn, 'Parliamentary War Powers Around the World, 1989–2004. A New Dataset' (Occasional Paper No 22, Geneva Centre for the Democratic Control of Armed Forces, 2010)