

AUSTRALIA'S PROCESS FOR GOING TO WAR

The political process for Australia going to war (and making peace) was taken by the British cabinet up until 1942 and thereafter by the Australian cabinet with the relevant Prime Ministers playing a decisive role.

Until 1942, the legal process by which Australia went to war involved a declaration of war by the King under the 'prerogative' power; from 1942 the power passed to the Governor General who could declare war or agree to peace on advice from the Prime Minister, either exercising the prerogative or through the Federal Executive Council.

However, it appears that Australia's participation in the two Gulf Wars was legally authorized by the Defence Minister under a 1975 amendment to the Defence Act which vests "the general control and administration of the Defence Force" in the Minister and requires the military to exercise its powers "in accordance with any directions of the Minister".

ENHANCING THE PROCESS

For those who think this process inadequate for what many consider the most momentous decision a sovereign state has to take, there are a number of possible enhancements that have roots in our or other parliamentary systems, and their adoption would be in complete accord with the longstanding Westminster tradition of progress through incremental reform incorporating lessons learned in institutional practice.

Parliamentary approval

While there was no constitutional or legal requirement to do so in either country, parliamentary approval was sought in advance in the Lower House by Mr Blair for the 2003 Iraq war, and retrospectively by Mr Hawke for the 1991 Iraq War and by Mr Howard for the 2003 Iraq War.

The US presidential system involves a constitutional requirement for approval by the Congress. It should be noted that the latter did not stop the invasions of Canada in 1812, Mexico in 1846, Cuba/Philippines in 1898, and (most pertinently) Iraq in 2003.

If we are to require parliamentary approval, much depends on the quality of information which Parliament receives.

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Legal advice

PM Blair tendered advice from his Attorney General (Lord Goldsmith) to the UK Parliament. PM Howard tendered the advice of two less senior lawyers employed by DFAT and AGs, neither of whom was required to have practicing certificates. The advice of both PMs was much criticized, not least for representing a minority view among international lawyers and failing to make reference to that majority view of the likely outcomes if it went to court. Earlier advice from Lord Goldsmith did address these issues but Blair did not show it to Cabinet, let alone to Parliament.

In many jurisdictions the Attorney-General has a duty to act independently of Cabinet in giving legal advice. In the UK, this includes the provision of legal advice to Parliament as well as the government. In Australia, the AG has much greater administrative responsibilities. Given this background, the Australian parliament might consider a range of options:

- Securing a legal opinion from the Solicitor-General
- Securing independent legal opinion
- Establishing a standing panel of former judges or prominent international lawyers to provide advice.

Seeking and hearing such opinions could be given to a parliamentary committee which reported to Parliament. This action would give it the time and the ability to handle any confidential, privileged or secret information. There are many parliamentary and congressional committees which handle such matters with necessary security clearances. The presence of opposition members is no bar to their receiving such briefings as they could be ministers following the next election.

Military, intelligence and security advice

The same committee which heard legal advice could also receive confidential briefings on military and intelligence assessments. These assessments must, of course, be professional, independent, frank and fearless.

The Federal Executive Council

While the Iraq war was not brought before the Federal Executive Council, there is merit in doing so and it would appear procedurally superior to both the Governor-General acting (on advice) through the prerogative alone, or the Defence minister acting alone.

Under Cabinet Handbook procedures, the Attorney-General has to provide a certificate that the recommended action is, in his view, legal. The Governor-General can and sometimes does ask questions about the decisions he is asked to sign and delays approval until he is satisfied. This gives the Governor-General the opportunity to perform the role Bagehot identified for a constitutional monarch – to counsel, advise and warn – and to ask questions about the legal basis of a decision before signing-off on documents. Given the fact that Australia has agreed to extend the jurisdiction of the International Criminal Court to crimes of aggression and subject itself to that jurisdiction, the Governor-General and the Cabinet now have good reason to seek good legal advice rather than the advice they want to hear.

FOR FURTHER COMMENT:

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