J.F.Staples, 144Shepherd Road, Bywong 2621 Fon/fax 02 62 36 90 87 15 February 2003

THE HIGH COURT OF AUSTRALIA AND THE WAR ON IRAQ

The Australian Constitution contains the same substantial restraint upon war-making by the Commonwealth as does the Constitution of Japan limit that country to acts of self-defence.

A suit should be brought immediately by a State Labor Government in the High Court for a writ of prohibition and an injunction against the Howard Government on account of its expenditure of funds and allocation of public resources:

(a) to impose military pressure on Iraq to make it take certain decisions, and/or

a. attack, invade and in other ways to assault the territory and citizens of Iraq, and/or

b. to assist other nations to do either of these acts.

The Commonwealth Parliament and the Government are not sovereign law-making authorities in the making of war. The Commonwealth Parliament cannot control the limits of its own power. Its source of power is the Constitution. Whether an enactment falls within an area of power granted to the Parliament by the Constitution must ultimately be determined not by the Executive or the Parliament but by the High Court.

The Constitution Act 1900 has a single provision on this point:

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

(vi) the naval and military defense of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.

Suits in that behalf may be brought at once by an Attorney General of a State, and they may also be brought by persons directly affected by and involved in the illegality, for example, a serviceman ordered to Iraq contrary to law. He or she would appear to have standing (*locus standi),* and so would a person ordered to assist, to aid and abet an illegal mission.

Every single State of Australia has immediate standing in the High Court to put in issue the question whether what is being done in respect of Iraq, is authorised by a constitutional provision which speaks only of the "naval and military defence of the Commonwealth".

If Iraq is not attacking the territory of Australia and is it is not threatening to do so, what the Government is doing cannot be said to be for the naval and military defence of the Commonwealth, if plain language has any meaning at all.

The problem for the Commonwealth is not relieved if we offer mere military aid to the Americans and the British. Furthermore, I do not believe that the present personnel of the Court would hold that our constitutional provision, which shows an express limitation of its scope, can be overcome and be rewritten, as it were, by a Security Council resolution authorising military intimidation or invasion of Iraq taken under the treaty entitled *The United Nations Charter*, to which we have adhered.

Jim Staples

Rhonda,
I have this as email if
you want same for circulation
P

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Monday, March 17, 2003

AN OPEN LETTER TO THE PRIME MINISTER AND THE LEADER OF THE OPPOSITION

Gentlemen,

What is projected by you, the Prime Minister, and not clearly and firmly opposed by you, the Leader of the Opposition with your nimble footwork back and forth, and from side to side on the morality of the issue, is an act of aggression against the state of Iraq, its territory and its people.

Not only is an unprovoked act of war contrary to the law of nations, contrary to the United Nations Charter, it is an invasion of the Australian Constitution.

No Australian may lawfully act outside or over and above the Constitution, least of all the Governor-General, the Commander in Chief of our armed forces. And this is so whether or no he acts consistently with the advice of his Prime Minister, and other members of the Executive Council.

Nor can any deficiency, any hiatus in the provisions of the Constitution be made good by mere claims of politicians to relevant power or by understandings reached in the Parliament behind the Speaker's Chair. S. 51 of the Constitution does not provide the necessary authority for what is projected. Let me set out the one single provision in the Constitution Act which goes to the making of war:

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

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

To use the armed forces of Australia which have been constituted under appropriations of the revenues and moneys raised and received by the executive government of the Commonwealth for a purpose which is not a purpose of the Commonwealth identified in the Constitution is a wrong against Section 81 of the Act.

Appropriations of the Commonwealth Parliament for disposal by the Executive in this context must be deemed to be limited to the naval and military defence of the Commonwealth and of the States, unless authority for the application of those resources can be found under some other head of the law of the Constitution.

There is no relevant reserve power that can be identified to support the use of those military resources for the making of aggressive war. The question remains whether there is available to the Governor-General a component of the Royal Prerogative which suffices.

I assert that by reason of the enactment of the Australia Act 1986 (Cth) the Royal Prerogative, a quality of the Queen in the United Kingdom, is not available as a source of law. Moreover, I deny that any authority for initiating a war of aggression against a foreign state was available to the Governor-General at any time since the federation of the colonies into a new, over-arching polity.

To understand the law of war-making in the Australian context outside Section 51(vi) one must give account to a little history.

The Australian Constitution results from a draft prepared by colonial politicians and lawyers during the 1890s. At the end of that decade a draft constitution for a new polity was settled. It was determined by the draftsmen firstly, to obtain the approval of the citizens of the colonies by referendum and secondly, to submit the same to London for enabling legislation by the Parliament of the United Kingdom.

Those who prepared the draft were not concerned to challenge or qualify the overweening authority of the Crown in right of the United Kingdom or, if you like, of the Empire to have full control over the various components of the British Empire in the initiating by any of them of wars of aggression. Whilst in various ways, London was prepared to suffer, even to encourage, a high degree of local government and decision-making in domestic matters in any place, no one – not here in Australia, nor in any other subject place – ever entertained a claim to be free to make war other than in self-defence against a foreign power.

It was accepted that authority to embark upon wars of aggression was peculiarly within the province of the government at Westminster.

No one anywhere claimed or conceded at that time that a colony or component of the Empire not at Westminster could take an independent initiative for war, could declare war as an aspect of its capacity to conduct its own foreign relations. If war upon a foreign state was to be initiated, it was, by common consent a decision within the competence of the United Kingdom government alone and not for any colonial administration anywhere.

Upon that simple but fundamental qualification of whatever self-government was extended to any subject polity in the Empire there was unbridled consensus on every side.

Our Constitution was drafted, approved, submitted, received and enacted upon that common understanding. London baulked upon one point only when it received the draft. There was to be a full right of appeal to the Privy Council for litigants ultimately disappointed in any of the Supreme Courts having jurisdiction in the new Commonwealth.

Nothing sat more easily in the minds of those concerned than that the new federal legislature should have nothing more than power to make laws merely for the naval and military defence of the new polity. For war-making, nothing more was sought or conceded. In the new Commonwealth of Australia the Crown, acting upon the advice of ministers in the government of the United Kingdom, was to be the sole source of any initiatives or declarations for war affecting the Commonwealth of Australia not being a war within the contemplation of Section 51(vi).

Provision was made for an office of Governor-General. Section 2 of Chapter 1 provides:

> 1. A Governor-General appointed by the Queen...shall have...and may exercise ...subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

Letters Patent dated 29 October 1900, amended by Letters Patent dated 15 December 1920 and Letters Patent dated 30 October 1958 are the sole source outside the Constitution itself of the powers of the Governor-General. Nowhere within them is to be found a skerrick of power provided to the Governor-General, acting by and with the advice of the Executive Council, to undertake a war of aggression against a foreign state. The question is simply not raised, let alone disposed of, directly or indirectly, in any manner whatsoever.

The question arises, wherefrom do you, the Prime Minister, draw your authority to act against Iraq today. You cannot point to any source of lawful authority in the constitutional documents of this country. Your predecessors in office did not claim an independent authority for war-making beyond the naval and military defence of the Commonwealth at the commencement of our participation either in World War I or World War II. In 1914 there was never a doubt that due authority to declare war upon Germany and others resided in London or nowhere at all. On 3 December 1939, the Prime Minister, Mr. Menzies, in a radio broadcast to the people of Australia, took it as given that if the United Kingdom declared war upon Germany, Australia itself was automatically at war with Germany as well, by the very formalities of the matter. Australia fell into a state of war against Germany and Italy, in Menzies' view, by force of law. This was a circumstance which may have met his approval but it was not his point.

Thus Australia entered into the war. It engaged in military action at the side of the United Kingdom and for the defence of the values and assets of the British Empire. On 7 December 1941 Japan attacked Pearl Harbor, territory of a friendly power, the United States of America. And on the same day it attacked territories of the Empire, more particularly Hong Kong and Singapore to our north.

The next day, 8 December 1941, the King of England by Royal Instruments assigned to the Governor-General of the Commonwealth of Australia the power to declare a state of war with Finland, Romania and Hungary then engaged in a war upon an ally of the United Kingdom, namely, the Soviet Union. It did this at the request of the Soviet Union.

It was in this context, the situation in Europe and the new situation in the Pacific that a royal instrument authorized the Governor-General to declare war upon Japan. That country had not been up till then, either by its acts or declarations, in a state of war with Australia. Of this situation the Prime Minister, John Curtin, addressing the Parliament on 16 December 1941, said this:

'...the attacks made against Singapore and Pearl Harbor, against Great Britain and the United States of America are attacks which the Commonwealth of Australia accepts as constituting a direct attack upon itself.'

It was to these events that Curtin pointed in his government's claim of entitlement to commit Australia to war upon Japan. It was an act of self-defence, readily argued, one might think then and now. In the same debate Dr. H.V. Evatt, who had lately retired from the High Court of Australia to become Attorney-General and Minister for External Affairs in the Curtin government, said this of the Letters Patent addressed by the King to the Governor-General.

'As to the procedure adopted, it was important to avoid any legal controversy as to the power of the Governor-General to declare a state of war without specific authorization by His Majesty. I express no opinion as to whether specific authorization was necessary as a strict matter of law...the matter was too important and too urgent to invite any legal controversy. We therefore decided to make it abund- antly clear that there is an unbroken chain of prerogative authority extending from the King himself to the Governor-General. For that purpose we prepared a special instrument the terms of which were graciously accepted by His Majesty.'

Thus the government of the day did not assert and did not act upon an independent entitlement to make war upon Japan. Japan at that point of time had not attacked, nor was it immediately threatening the territory of the Commonwealth. S. 51 could not be invoked. London was not to be, was not and would not be by-passed upon the point. The United Kingdom was the fountainhead of authority for the making of war when the territory of the Commonwealth was not in direct danger.

Whatever role London might have been seen to possess over Australian affairs at that time, it was extinguished by the Royal Assent to the Australia Act. That legislation of the Parliament of the Commonwealth became law in December 1985. It asserted that the status of the Commonwealth of Australia was that of a sovereign, independent and federal nation. At that point of time and on that account all prospect of amplifying the powers of the Governor-General, hitherto set down expressly in royal instruments, so as to bestow upon the Governor-General authority hitherto retained in the United Kingdom, was passed up.

Thus, whatever authority exists in the Governor-General to make war upon a foreign state other than for the naval and military defence of the Commonwealth must be found in what had passed to the Governor-General before the Australia Act fetched assent. There is nothing to be found to support the claim of law now made by you, the Prime Minister, fit to permit an attack upon Iraq in the present circumstances. From what law, from what Instrument, from what Letters Patent, do you draw your entitlement? You cannot make good the incapacity of the Governor-General to assist you in your cause by silence in response to that question. Moreover, if there is a gap in the law, it cannot be made good by the Parliament, behind or in front of the Speaker's Chair. It can only be brought about by a relevant referendum. We have time for that. It cannot be said that the urgency of which Dr. Evatt spoke is in any way upon us at this time, and even it if were it would not be enough.

Your posture of lawful entitlement is the very antithesis of respect for the qualities of a parliamentary democracy. When Peter Andren, MP, moved a formal motion which called on the House 'to insist that, in the absence of specific, unambiguous and unanimous support of the Security Council, the defence forces not be involved in any military action in Iraq', you moved to close off the debate and Mr. Crean joined with you in doing so. There was no expression of the wishes of Parliament upon the question raised by Mr. Andren. Each of you feared the rats in your ranks. So, there has been no expression of a formal kind by the House of Representatives in favour of your cause. It would not cure the legal deficiency if there was, but you would not risk the mark of parliamentary disapproval. Nor would Mr. Crean. He supported you in closing off a vote on the proposal.

In England nothing may be done by the Crown in the making of war which is not in conformity with the wishes of Parliament. We have seen the Prime Minister of the United Kingdom fall into the greatest political difficulties as he has sought to win the compliance of the House of Commons in advance of a decision for war. Even so, we see there the colour of parliamentary democracy not evidenced in the record in Canberra.

In the United States authority to wage war is reserved expressly and unarguably to the Congress, to the House of Representatives and the Senate. There is no presidential prerogative available to which President George W. Bush may have recourse. He has not obtained an authority of the Congress to make war upon Iraq. He seeks to avoid the parliamentary controversies dogging Mr. Blair. He skirts around the plain lack of authority of the Congress for the making of war on Iraq. He argues a nexus between Iraq and

the terrorists of the Middle East, of September 11. Congress clearly empowered him to make war upon "terrorists" in the aftermath of 11 September 2001. To uphold his new and different initiative, which seeks the attack on Iraq long sought by some in his Administration for a decade, he postulates a nexus which has escaped the scrutiny of hundreds of millions of people throughout the world.

We can say this in favour of President Bush: there is some colour of parliamentary sovereignty acknowledged in his stance as well, leave of a kind was given to him in advance of the day. But to what can you, here in Australia, point that upholds the sovereignty of Parliament in this matter? Nothing, nothing whatsoever at all.

The Governor-General cannot assist you in your cause. He has no authority to do so: you have no prior parliamentary authority and, even if you had such, under the rules of the Australian Constitution, it could give you merely a mite of solace in your wrongdoing.
Yours faithfully,

J. Staples