

# Research note: Parliamentary approval of military deployments

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The purpose of this note is to outline a practical model for parliamentary approval of military deployments. My core proposition is that if you want to make military deployments contingent on parliamentary approval, it can only happen in a restricted category of cases, and with an adjustment to the powers of certain parliamentary committees.

The key to the model is to distinguish between ‘wars of necessity and ‘wars of choice’.

## Wars of Necessity

Wars of necessity refer to military actions taken in self-defence. If any part of Australia is attacked or threatened, the Executive must have the freedom to act without parliamentary involvement. It then notifies the United Nations Security Council, as provided for in Article 51 of the UN Charter.<sup>2</sup> A war of necessity is not restricted to circumstances when an attack on Australia has already occurred; it has long been understood that whoever fires the first shot is not always the aggressor. Under certain circumstances, self-defence may be justified even before an enemy has fired the first shot or sent its troops across the border. Australia cannot stand by idly whilst her enemies’ preparations result in an actual strike, preventing an effective defence. Wars of necessity can occur either on Australian territory or anywhere else in the world. No parliamentary approval would be required because the danger is ‘instant, overwhelming, leaving no choice of means, and no moment for deliberation.’<sup>3</sup>

Note, however, that an imminent threat is very different to actions taken for the general avoidance of danger. If every state acted merely for the general avoidance of danger, the prohibition of the use of force would become dependent on the subjective assessment of a

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<sup>1</sup> This research note is dedicated to the memory of the late Dr Andrew McNaughtan. It draws on a research project conducted under my supervision at UNSW Canberra.

<sup>2</sup> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

<sup>3</sup> This is the Caroline test, after the 1837 incident.

threat by individual states. In practice, the prohibition of the use of force would cease to exist.<sup>4</sup> That is, the general prohibition of the use of force would make way for a general entitlement to preventive use of force.

## **Wars of Choice**

Wars of choice refer to military actions taken for any reason other than self-defence of Australia. They include humanitarian operations, peacekeeping or peace enforcement missions, coalition operations, operations conducted with any country under a security treaty, routine patrols, and anything other than military actions taken in self-defence, which would require notification to the UN Security Council under Article 51. Parliamentary approval for such operations is warranted. The government must notify Parliament of the reasons for the deployment, the legal authority, the expected geographical extent, the expected duration, and the approximate number of ADF personnel involved. Parliament would vote yes or no, but would have no say in the conduct of actual military operations. It doesn't possess the relevant military expertise.

## **Time-sensitive wars of choice**

However, a war of choice may be time-sensitive. On certain occasions, although there is no direct threat to Australia, there may be a request for assistance from the legitimately constituted government of a state, with not enough time to recall Parliament for a debate. Sometimes, it's also conceivable that there may not be enough time to have parliament vote on whether to respond to a request by the United Nations to provide troops under Chapter VII of the UN Charter (threats to the peace, breaches of the peace, and acts of aggression).

In such circumstances, the Executive should have the freedom to deploy troops into action but must still notify Parliament of the reasons for the deployment, the legal authority, the expected geographical extent, the expected duration, the approximate number of ADF personnel involved, and a certification that an instantaneous response was needed. Parliament can then choose to persist with (or revoke) a deployment post facto. If it decides to revoke the

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<sup>4</sup> The mere possibility that Saddam Hussein might do something at some point did not suffice to establish an 'imminent threat' and thereby satisfy the criterion of immediacy.

deployment, the military would advise the government on how such a withdrawal should occur – exactly as it would if the government itself had decided to withdraw.

## **Security considerations**

By their very nature, submarine operations and hostage rescue operations by Australia's special forces must remain secret. No parliamentary approval would be needed.

## **Intelligence considerations**

Parliamentary approval must not compromise intelligence information. If such information is provided to the parliament, then hostile forces will also see it. Therefore such intelligence must be shared with a relevant parliamentary committee, or at least with key members of it, such as the Parliamentary Joint Committee on Intelligence and Security (PJCIS), or the Foreign Affairs and Defence Sub-Committees of the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT), or the Senate Committee on Foreign Affairs, Defence and Trade (SFADT).

## **US policy**

Such intelligence-sharing would put Australia in line with the USA, where the Intelligence Committees and Judiciary Committees in the Senate and House of Representatives are regularly briefed about all authorised intelligence collection programs, and relevant members of Congress receive detailed briefings prior to each re-authorisation. In addition, the US Executive is required to brief selected members of congress on specific types of operation before they take place. Members of the so-called Gang of Four, comprising the chairpersons and most senior opposition members of the House and Senate intelligence committees, receive briefings on 'sensitive non-covert action intelligence programs', such as highly sensitive intelligence collection programs.<sup>5</sup> Members of the so-called Gang of Eight (comprising the Gang of Four and the speakers and opposition leaders of the House and Senate) receive briefings from the Executive on forthcoming covert actions, without having the power to approve or veto Executive plans.<sup>6</sup> This preserves Executive freedom whilst also

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<sup>5</sup> Marshall Curtis Erwin, "Gang of Four" Congressional Intelligence Notifications. Congressional Research Service R40698, 16 April 2013. <https://www.fas.org/sgp/crs/intel/R40698.pdf> accessed 17 October 2016.

<sup>6</sup> Marshall Curtis Erwin, Sensitive Covert Action Notifications: Oversight Options for Congress. Congressional Research Service R40691, 10 April 2013. <https://www.fas.org/sgp/crs/intel/R40691.pdf> accessed 17 October 2016.

ensuring a check on Executive overreach. Furthermore, all members of the House and Senate intelligence committees and their key staffers are regularly provided with extended footage of completed operations involving, for example, drone strikes. No such provision exists in Australia.<sup>7</sup>

## **NATO states**

Such a system of oversight would also bring Australia up to the same standard as NATO states such as Norway and Germany.

The Norwegian Parliamentary Intelligence Oversight Committee<sup>8</sup> is responsible for external and independent control of the Norwegian secret services such as the Norwegian Intelligence Service (NIS), the Norwegian Police Security Service (PST), the Norwegian National Security Authority (NSM) and the Norwegian Defence Security Agency (FCA). The Enlarged Committee on Foreign Affairs and Defence<sup>9</sup> is a confidential committee that hears foreign and defence matters in secret. Following the meetings of the confidential committee, the Prime Minister, Foreign Minister and Defence Minister delivers briefings to parliament as a whole in an open session. And the presence of members of parliament on the confidential committee is an assurance that the intelligence in fact exists.

In Germany, too, NATO obligations do not prevent robust legislative oversight; Germany's Parliamentary Control Panel, G10 Commission and Confidential Committee of the Budget Committee are briefed at least once every six months about the activities of the intelligence services. The Confidential Committee can request documents and data and can conduct hearings with members of the intelligence services. The Committee's deliberations are kept secret. The Parliamentary Control Panel also appoints the four standing and the four deputy members of the G10 Commission, which serves as a permanent control body for intelligence activities.<sup>10</sup> The German Standing Committee of Defence is a departmental select committee that has access to all relevant security information in order to scrutinise defence-related matters. The committee has the power to act as an investigative committee, as well as analyse

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<sup>7</sup> Clinton Fernandes, Supplementary submission to the Independent National Security Legislation Monitor, 1 May 2015. <http://www.inslm.gov.au/submissions/section-35p> accessed 17 October 2016.

<sup>8</sup> (Stortingets kontrollutvalg for etterretnings-, overvåknings- og sikkerhetstjeneste (EOS committee)).

<sup>9</sup> Den utvidede utenriks- og forsvarskomiteen (DUUFK).

<sup>10</sup> G10 refers to the section of the German Constitution dealing with these matters.

any defence matter it chooses. The Committee works in conjunction with the Foreign Affairs Committee.<sup>11</sup>

## What about ANZUS?

As the above discussion shows, Australia's ANZUS obligations do not constitute a special case that makes parliamentary approval unworkable. Norway and Germany have much more demanding treaty commitments through NATO, and are perfectly able to ensure legislative involvement. ANZUS is not a Pacific NATO. It is much narrower, much smaller, and with fewer obligations.

Article I of NATO (on the left) and Article 1 ANZUS are identical, and largely inconsequential.

## Article I

- The Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.
- The Parties undertake, as set forth in the Charter of the United Nations, to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

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<sup>11</sup> House of Lords, Waging war, p. 31.

Article II of NATO is not replicated in ANZUS. It refers to international economic policy coordination, and reflects the postwar state-capitalist order in Western Europe.

## Article II (NATO)

- The Parties will contribute toward the further development of peaceful and friendly international relations by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded, and by promoting conditions of stability and well-being. They will seek to eliminate conflict in their international economic policies and will encourage economic collaboration between any or all of them.
- No such provision in ANZUS.

Article III of NATO corresponds to Article II of ANZUS.

## Article III NATO/II ANZUS

- In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack.
- In order more effectively to achieve the objective of this Treaty the Parties separately and jointly by means of continuous and effective self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack.

Article IV of NATO corresponds to Article III of ANZUS, with the caveat, ‘in the Pacific’. ANZUS is a regional treaty; what happens if Australia is attacked in the Indian Ocean, or Southeast Asia?

## Article IV (NATO)/III (ANZUS)

- The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened.
- The Parties will consult together whenever in the opinion of any of them the territorial integrity, political independence or security of any of the Parties is threatened in the Pacific.

Article IV of ANZUS shows the much lower level of obligation. ANZUS has ‘weasel words’ such as ‘recognise that an armed attack ... would be dangerous,’ and doesn’t specify measures ‘including the use of armed force,’ which is what NATO does. The US wants to hedge its bets, and not give commitments to Australia.

## Article V (NATO)/IV (ANZUS)

- The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.
- Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.
- Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.
- Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

Article VIII of NATO says that member states can't enter into international relations that conflict with NATO – since it's a treaty with real teeth. No such provision is found in ANZUS.

## Article VIII (NATO)

- Each Party declares that none of the international engagements now in force between it and any other of the Parties or any third State is in conflict with the provisions of this Treaty, and **undertakes not to enter into any international engagement in conflict with this Treaty.**
- No such provision in ANZUS.

Article V of ANZUS extends to the US Pacific territories of Guam, Hawaii, American Samoa, US ships in the South China Sea, aircraft in the Taiwan Strait, and wherever the US fleet goes in the Pacific. It doesn't cover an attack on an Australian ship in the Indian Ocean.

## Article VI (NATO)/V (ANZUS)

- For the purpose of Article 5, an armed attack on one or more of the Parties is deemed to include an armed attack:
- on the territory of any of the Parties in Europe or North America, on the Algerian Departments of France, on the territory of or on the Islands under the jurisdiction of any of the Parties in **the North Atlantic area north of the Tropic of Cancer.**
- on the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the **North Atlantic area north of the Tropic of Cancer.**
- For the purpose of Article IV, an armed attack on any of the Parties is deemed to include an armed attack on the metropolitan territory of any of the Parties, or on the island territories under its jurisdiction **in the Pacific** or on its armed forces, public vessels or aircraft **in the Pacific.**



## **What about the Constitution?**

High Court jurisprudence confirms that the scope of the Executive power is subject to control by the legislative branch of government:

‘Whatever the scope of the Executive power of the Commonwealth might otherwise be, it is susceptible of control by statute. A valid law of the Commonwealth may so limit or impose conditions on the exercise of the Executive power that acts which would otherwise be supported by the Executive power fall outside its scope’.<sup>12</sup>

## **Which House of Parliament?**

Unlike Canada or the United Kingdom, Australian Senators are directly elected. Thus, a joint sitting of Parliament would be a possible option.

Subject to the caveats listed above, parliamentary approval is workable and can take into account a variety of contingencies, keep Australia secure, protect the security of classified information, and deal with the time-sensitive nature of emergency military deployments.

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<sup>12</sup> Brown v West [1990] HCA 7; 169 CLR 195, 1 March 1990, High Court of Australia, [www.austlii.edu.au/au/cases/cth/HCA/1990/7.html](http://www.austlii.edu.au/au/cases/cth/HCA/1990/7.html)