Committee Secretary
Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT)
PO Box 6021
Parliament House
Canberra ACT 2600

1. Attached is my submission to the PFAS Sub-Committee of the JSCFADT. The response from the NSW Government from this same submission did not address the issues raised. Indeed, any reasonable thinking person would form the same view.

2. I am not a party to the Class Action, nor do I live in the Red Zone, but I do have friends who do live in that zone.

3. I have been motivated to make this submission because of the **Federal Government's miserable treatment of the PFAS victims**.

4. Our Australian Democracy is based on the Jeffersonian Principle that requires the Federal and State Governments to **secure the rights of the governed** from whom they obtain their powers to govern.

5. The PFAS contamination in the Greater Williamtown Area, and in other places in Australia that are adjacent to Defence properties, was clearly caused by the actions of the Commonwealth, albeit not intentionally, at least not up until about five years ago.

6. Unfortunately, the Defence (Commonwealth) way of dealing with this matter for about the last five years has been to do nothing of substance to address compensation for the PFAS affected landowners and their families. Their **'do nothing'** approach has been both unfair and unjust. An example of this **'do nothing'** approach occurred on 22 December 2015 when a Defence Deputy Secretary was asked by a member of a Senate Committee if Defence accepted liability for the PFAS contamination. He replied: **'It is too early for formal acceptance of liability'**. Such an inane response from a senior Commonwealth representative clearly demonstrated a complete lack of concern or genuine desire to assist the PFAS affected victims. To date the Commonwealth has still not accepted liability.

7. During a public meeting shortly after the PFAS matter arose, a RAAF Air Commodore stated the obvious with words to the effect that: 'Defence has caused the problem and therefore Defence needs to remedy the problem'. That officer gained enormous respect from the local community, but he was publically criticised by Defence official(s). The role of the Australian Defence Force (ADF) is to defend and support the Australian people, and to not cause them harm of any kind. Therefore, most past and serving members feel uncomfortable that the Commonwealth is not compensating its neighbours for the damage it has caused to them.

8. The Federal Government regularly provides financial relief to victims of floods, fires, earthquakes, droughts and wind, both in Australia and in other countries, when clearly it has not caused these natural disasters and therefore has no responsibility to make such recompense. By way of example, in 2005 Prime Minister Howard provided Indonesia with a one billion dollar aid commitment for Tsunami reconstruction which is about the cost for proper compensation of PFAS victims. Moreover, the PFAS contamination has clearly been

caused by the actions of the Commonwealth, and yet it has taken no action to compensate the victims. Its actions are clearly inconsistent. Citizens of this country who have paid their taxes over decades should not have to launch legal proceedings against the Commonwealth in a case where the Commonwealth is so clearly at fault. **Self evidently, it has not secured the rights of the governed, but has in fact, completely ignored them.**

9. A fair and just outcome would be for the Commonwealth to do the following:

a. Establish a Voluntary Acquisition Scheme whereby all PFAS affected landowners can decide when they wish to sell their properties to the Commonwealth. (Note: All Acquisitions of property by the Commonwealth have to be on just terms as mandated by Section 51 (xxxi) of the Australian Constitution.)

b. Establish a Consequential Loss Scheme to compensate all businesses for losses incurred on PFAS affected land.

c. Provide compensation to all PFAS victims for the stress, pain and suffering that they have endured due to the uncaring attitude of the Commonwealth over the past five years.

d. Provide compensation to all PFAS victims now and in the future for all consequential mental and physical health ailments.

e. Pay all legal costs and payments due to the Litigation Funder(s) and others, such that each PFAS affected landowner pays a nil amount for such costs.

10. Adoption of the foregoing recommendations will solve the PFAS problem. Elderly landowners would be able to relocate at a time of their choosing. The Commonwealth would benefit from deferred acquisitions as that would allow the cost of acquisitions to be spread over a period of about 15 years. Furthermore, PFAS affected landowners with young children would have sufficient funds to relocate as soon as possible. (This will not occur if the current proposal for compensation is adopted.) Moreover, the Commonwealth would be acting irresponsibly if it paid compensation to PFAS affected land owners, and then let those same PFAS affected lands remain inhabited for the foreseeable future.

11. For human health reasons, PFAS affected land is no longer suitable for Residential and Rural Residential usage. In the Greater Williamtown Area, the Commonwealth, using Defence Housing Australia to work with the State Hunter and Central Coast Development Corporation would then be able to rezone the newly purchased Residential and Rural Residential land to either, Heavy Industrial, Industrial, or Commercial Zoning as appropriate. Such Zonings allow a higher subsoil PFAS contamination level than for Residential land. A high probability exists that the Commonwealth will make a profit after acquisition, rezoning and sale of subdivided land over a period of about 15 years. Moreover, an added benefit for the community and for Defence will be the removal of many residences from those areas that are contained within the 25 Australian Noise Exposure Contour (ANEF). The applicable Australian Standard, AS 2021, only allows Residential dwellings to be sited outside of the 25 ANEF Contour.

12. Adoption of the foregoing recommendations would ensure that **the Federal Government used its powers to secure the rights of the governed**.

Yours faithfully

John Donahoo FIE(Aust)
Group Captain (retd)

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Attachment:

The NSW EPA Must Prosecute the Commonwealth of Australia for its PFAS Pollution at RAAF Base Williamtown

THE NSW EPA MUST PROSECUTE THE COMMONWEALTH OF AUSTRALIA FOR ITS PFAS POLLUTION AT RAAF BASE WILLIAMTOWN

VERSION 5 - 4 MAY 2020

Executive Summary

1. For about five years, the Department of Defence, which is a part of the Commonwealth of Australia has knowingly polluted with impunity, the lands of others adjacent to RAAF Base Williamtown, and at other sites in NSW and elsewhere in Australia. It has refused to compensate the affected landowners via a **Voluntary Acquisition** (VA) scheme, or to compensate the affected business owners via a consequential loss scheme.

2. The NSW EPA was requested to prosecute the Commonwealth, but refused, citing their belief that the Commonwealth is not bound by **'NSW State Regulations'**. This is a falsehood, and both the EPA and the Commonwealth are aware of this fallacy. In recent years the Second Law Officer of the land, the Commonwealth Solicitor General, Stephen Donaghue QC, specifically acknowledged that State law **does apply** on **Commonwealth Places** as dictated by **Section 4(1)** in the **Commonwealth Places (Application of Laws) Act 1970** (CP Act). **Section 52** of the **Australian Constitution** defines a **Commonwealth Place** as land acquired by the Commonwealth. Over the last year or so, the NSW Premier, Gladys Berejiklian, the EPA and the Commonwealth have all been invited to provide **detailed** advice of any errors in fact, law or logic of the proposal contained herein, and none of them have provided such advice.

3. In NSW, the **'Polluter Pays Principle'** is embodied in the **Protection of the Environment Operations Act 1997** (PEO Act), and it provides the EPA the unfettered right to prosecute polluters in the NSW Land and Environment Court. Upon a successful prosecution, **Section 246** of that Act empowers the Court to order the polluter to pay compensation to affected persons. Self-evidently, the law to follow is the law that applies at the site of the source of pollution. Therefore the **PEO Act** is the Act that applies on RAAF Base Williamtown. That Act is binding on a **'person'**. The **NSW Interpretation Act 1997** defines a **'person'** as an individual, a corporate entity or a body politic. The Commonwealth is a body politic and therefore the **PEO Act** applies to the Commonwealth on **Commonwealth Places**. Moreover, **Section 315** of that Act binds the Crown in right of New South Wales and, in so far as the legislative power of the NSW Parliament permits, the Crown in all its other capacities.

4. **Section 109** of the **Australian Constitution** and **Section 4(14)** of the **CP Act** allow the Commonwealth to claim immunity from a State law on Commonwealth Places if there is a conflicting Commonwealth law. However, a law that provides the Commonwealth with the power to pollute the lands of others with impunity does not exist. Moreover, **Sections 51** and **52** of the **Australian Constitution** only allow the Federal Parliament to make laws for peace, order and good government. Accordingly, the making of a draconian and an unconscionable law would not be good government, and therefore the Federal Parliament would never make a law that provides the Commonwealth with such immunity.

5. The EPA Prosecution Guidelines allow for prosecutions to proceed on public interest grounds. In this case, such grounds are overwhelming. **The Premier, the EPA and our local politicians need to either, support the application of the law without fear or favour, or by their silence, be seen to aid and abet the Commonwealth in their polluting the lands of others with impunity, and also be seen to display a lack of genuine concern for the welfare of the PFAS affected persons.**

6. The **PEO Act** allows the EPA to act independently in initiating prosecutions. However, such action against the Commonwealth may not be well received by the NSW State Government. Furthermore, to be consistent, the EPA may need to prosecute the State of NSW if they do not compensate PFAS affected landowners whose land is adjacent to some State fire stations. Therefore, the Premier needs to publically reaffirm her government's support for the independence of the EPA to prosecute, and she should also affirm that the tenure of EPA Board members will not be affected by their independent actions.

7. If the EPA continues to refuse to prosecute the Commonwealth, then as allowed by the **PEO Act**, the State of NSW must seek leave from the Land and Environment Court to initiate such a prosecution.

8. The Commonwealth has clearly broken the law, and therefore it must be prosecuted. A successful prosecution will then provide a pathway to compensation for the PFAS affected landowners and business owners.

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THE NSW EPA MUST PROSECUTE THE COMMONWEALTH OF AUSTRALIA

FOR ITS PFAS POLLUTION AT RAAF BASE WILLIAMTOWN

VERSION 5 - 4 MAY 2020

Introduction

1. The PFAS contamination issue in the greater Williamtown area has been ongoing for about five years and the Federal government has made no meaningful progress to resurrect the ruined lives of about 2,000 PFAS affected citizens, and clearly it has no intention of so doing. The government's response has been to insult the affected residents with propaganda by stating that there is no consistent evidence that ***the*** ingestion of PFAS ***causes*** adverse health conditions to humans. Such a statement is intended to create the impression that all is well. However, there is no consistent evidence that it does not. Moreover, in the late 1950s, there was no consistent evidence that thalidomide caused birth defects in the unborn.

2. PFAS affected lands have been stigmatised and consequently their valuations have been slashed in half. Moreover, the banks will not lend money if these lands are offered as collateral. **There is clearly a direct causal link between the financial hardship suffered by the PFAS affected land owners and the actions and inactions of the Federal Government who has polluted and is still polluting their lands**.

3. The PFAS affected landowners and their families have not been provided with economic justice, which is a subset of social justice. Their lives have been put on hold for an indefinite period of time as they have been denied doing things that the rest of society take for granted, such as transitioning from one area to another as their needs and circumstances change. Some elderly landowners are at a stage in their lives where they would like to sell their land and move to a retirement village, or to make other plans for their future. Consequently, through no fault of their own, they have been prevented from making these normal lifestyle changes.

4. At a Defence walk-in session at Murrock on Wednesday 24 July 2019, some local residents were so distressed that their suffering and depression were clearly evident. After five years of being ignored by both major political parties and bureaucrats, they received no answers to their questions at that session. They are clearly in a state of **HOPELESSNESS**. Action needs to be taken to provide these people with some **HOPE** for the future. The Federal Government has clearly not provided peace, order and good government to these affected people, and the only other agencies that may be able to meet this need are the EPA, the State of NSW, and the Port Stephens Council. **The Federal government has not taken positive action thus far to facilitate the provision of a genuine solution to the PFAS problem, and that is the establishment of a voluntary land acquisition (VA) scheme, and a consequential loss scheme for those landowners who use their lands for business purposes. To date, the Federal Government has just treated the symptoms of the problem and not the cause.**

Relevant Commonwealth and State of NSW Laws

5. Relevant Commonwealth Laws are as follows:

a. Commonwealth Places (Application of Laws) Act 1970

b. Environment Protection and Biodiversity Conservation Act 1999

c. National Protection Council Act 1994

d. National Environment Protection Measures (Implementation) Act 1998

6. Relevant State of NSW Laws are as follows:

a. Protection of the Environment Operations Act 1997 (as amended in 2017)

b. Contaminated Land Management Act 1997

Application of State Laws to the Commonwealth

7. If a State, Territory, corporation or a person polluted the lands of others, they would be required by law to pay compensation. Strong arguments and precedence exist that in the absence of a Commonwealth law that allows the Commonwealth to pollute with impunity, then State law that embodies the **'Polluter Pays Principle'** applies. The article by **Catherine Penhallurick** at **Attachment A** has cited several High Court cases where the Court has rejected the immunity from State law claimed by the Commonwealth. Unfortunately, to date the High Court has not yet fully addressed the issue of Commonwealth immunity to State law. Moreover, the article by **Karen Middleton** at **Attachment B** describes the frustration of Bret Walker SC at the tardiness of the High Court in not fully resolving the application of State law to the Commonwealth. He also provides cogent argument to support the primacy of State law in the absence of inconsistent Commonwealth laws. **At the bottom of the first page of the article, Karen Middleton alludes to the State of NSW opposing the Commonwealth's arguments that based on previous cases it insists it has the right to ignore State law**. Moreover, the article by **James Prest** at **Attachment C** illustrates that the High Court has come some way towards resolving the foregoing matter, and he discusses the Dr Henderson case where the High Court ruled that the Commonwealth had to comply with a judgement ruling by the **NSW Residential Tenancy Tribunal** (NSWRTT).

8. Where State law applies to the Commonwealth, there are still caveats on how far the State law applies. The following is a list of known caveats:

a. Any part of a State law that is inconsistent with any part of a Commonwealth law does not apply (See **Section 109** of the **Australian Constitution** -The Inconsistency Provision).

b. The Commonwealth and the States cannot tax each other's property. Therefore, a State should avoid fining the Commonwealth as it may be seen to be a property tax (See **Section 114** of the **Australian Constitution**).

c. The State law must be a law of general application. Presumably, this provision applies because a State law should not discriminate against the Commonwealth.

d. The State law must bind the Crown in right of the State and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities. Presumably, this provision applies because if a State law does not bind the Crown in right of the State, it cannot bind the Crown in right of the Commonwealth.

9. There may be other caveats of which the author is unaware. When considering the application of State law to the Commonwealth, two propositions need to be considered and they are as follows:

a. **The Commonwealth Places (Applications of Laws) Act 1970** (CP Act) mandates that, inter alia, NSW State environmental laws apply to the **Commonwealth** on **Commonwealth Places**, as inconsistent Commonwealth laws covering the same matter do not exist. **Section 109** of the **Australian Constitution** and **Section 4(14)** of the **CP Act** allow the Commonwealth to claim immunity from a State law on Commonwealth Places if there is a conflicting Commonwealth law. However, a law that provides the Commonwealth with the power to pollute the lands of others with impunity does not exist. Moreover, **Sections 51** and **52** of the **Australian Constitution** only allow the Federal Parliament to make laws for peace, order and good government. Accordingly, the making of a draconian and an unconscionable law is clearly not good government, and therefore the Federal Parliament would never make a law that provides the Commonwealth with such immunity. Perusal of the Commonwealth Acts listed at subparagraphs 5b, 5c and 5d and Regulations issued pursuant to those Acts did not reveal any inconsistencies. The Commonwealth may be tempted to pass a law that allows it to pollute with impunity the lands of others from **Commonwealth Places**, but such a law would be unconscionable and clearly not good government as required by **Section 52** of the **Australian Constitution**. Therefore such a law would most likely be declared invalid. The Commonwealth is discharging pollutants from a **Commonwealth Place** onto the lands of others and is therefore acting contrary to State law **from which it has no immunity**, as a specific Commonwealth law dictates that State law will apply to **Commonwealth Places**. **Section 52** of the **Australian Constitution** defines a **Commonwealth Place** as land acquired by the Commonwealth. **Non-Commonwealth Places** in NSW are therefore places that are not **Commonwealth Places** which covers most of that State.

b. NSW State environmental laws should also apply to the **Commonwealth** on **Non-Commonwealth Places** as inconsistent Commonwealth laws covering the same matter also do not exist. The Commonwealth is causing pollution at a **Non-Commonwealth Place** and is therefore acting contrary to State law. However, the Commonwealth could argue that it has immunity from State law that would provide it with grounds for appeal to the High Court if an action based on State law was successful.

10. **The first of the foregoing propositions is valid, and the second proposition is likely to be valid**. The EPA has therefore **erred** in their advice sent to the author at **Attachment D** where they stated that they do: **'not have regulatory power over Defence'**. Clearly they do on **Commonwealth Places** and they most likely do on **Non-Commonwealth Places**. Other parts of their letter include statements that are just lame excuses for not wanting to do anything substantial to assist the long suffering PFAS affected land owners. Moreover, some statements appear to be inconsistent with the NSW **Protection of the Environment Operations Act 1997** (PEO Act). Furthermore, the EPA did not address the issues raised with it despite being provided with a copy of the **James Prest** article. The EPA is clearly unwilling to take on the Commonwealth, unlike the **NSWRTT** who did so successfully in the Dr Henderson case. Additionally, the EPA position is in apparent contradiction with the State of NSW view illustrated at that part of paragraph 7 above that refers to the **Karen Middleton** article. Moreover, to ensure that there is no doubt about the application of State law on **Commonwealth Places**, the following is a quote from the current Commonwealth Solicitor General, Stephen Donaghue QC where in an address to a seminar on Statute and Common Law at the Queen Elizabeth Courts of Law in Brisbane on 17 August 2017, he stated: ***'the Commonwealth Places (Application of Laws) Act 1970 (Cth), in which the Commonwealth Parliament responded to the fact that the Commonwealth has exclusive legislative power under s 52 of the Constitution with respect to Commonwealth places by providing in s 4(1), that:***

The provisions of the laws of a State as in force at a time (whether before or after the commencement of this Act) apply, or shall be deemed to have applied, in accordance with their tenor, at that time in and in relation to each place in that State that is or was a Commonwealth place at that time.'

The foregoing essentially states that:

The provisions of the laws of a State apply to each place in that State that is a Commonwealth place.

The foregoing was only included to demonstrate beyond all doubt that State Laws do apply at **Commonwealth Places**.

11. An example of the application of State law that was not appealed by the Commonwealth was the conviction of the Base Commander at RAAF Base Laverton in Victoria circa 1990 for: 'Operating a common gaming house'. He, like many of his predecessors organised a 'casino night' to raise funds for charity in the Officers' Mess in the mistaken belief that State law did not apply. During the handover parade to his successor he presented him with his 'Good Behaviour Bond' and advised him that: 'This goes with the job'.

12. During the author's time in the RAAF, he had several discussions over the years with RAAF Legal Officers on the **CP Act**. Their view was that State law applied as long as it did not dictate how the Commonwealth was to conduct its business. Accordingly, the author believes that the Commonwealth is comfortable with passive State laws, but it will most probably lodge an appeal if any State Court orders it to do something that it opposes. However, the State of Victoria has dictated to the Commonwealth on how to conduct some of its business. Therefore, while the States cannot dictate to the Commonwealth on how it operates its naval and military forces, and how it manages other exclusive Commonwealth functions, it can dictate to the Commonwealth on how to conduct its business on matters that are constitutionally and legally within the purview of the States.

Jurisdiction

13. Consider two contiguous properties, one in NSW and the other in South Australia (SA). If the owner of the NSW property contaminates that land and the contamination spreads to the SA property, what law should the SA landowner pursue to ensure that the 'polluter pays'? The application of SA environmental law would be inappropriate as the NSW land is outside the SA jurisdiction. Therefore, NSW environmental law must apply. Therefore, the Act that applies at the site of the source of the contamination is the Act that must be followed. For the greater Williamtown area, the contamination source is at RAAF Base Williamtown which is a **Commonwealth Place**. The **CP Act** mandates that State law is to apply at that Commonwealth Place. The appropriate State Act is the NSW **PEO Act** as it incorporates the **'Polluter Pays Principle'**.

Application of NSW State Environmental Law to the Commonwealth

14. The NSW **PEO Act** meets all four caveats listed at paragraph 8 as there is no Commonwealth law that covers the same matter, fines can be avoided in its application, it is a law of general application, and, at **Section 315** it binds the crown. The Act refers to **'persons'** throughout and does not refer to corporations. The **NSW Interpretation Act 1997** defines a **'person'** as an individual, a corporate entity or a body politic. The Commonwealth is a body politic and therefore the **PEO Act** applies to the Commonwealth on **Commonwealth Places**. **Attachment E** contains 16 relevant Sections of the Act.

The following table summarises the extent of the application of State laws to the Commonwealth.

APPLICATION OF NSW STATE LAW THAT BINDS THE CROWN		
	PERSON	
	INDIVIDUAL, CORPORATE ENTITY & STATE OF NSW	COMMONWEALTH (BODY POLITIC)
COMMONWEALTH PLACE	YES	YES
NON-COMMONWEALTH PLACE	YES	MAYBE ?

DEFINITION OF A 'PERSON' IS PROVIDED IN SECTION 21 OF THE NSW INTERPRETATION ACT 1987

15. Offences. Offences under the **PEO Act** are classified as Tier 1, Tier 2 or Tier 3 at **Section 114**. The Commonwealth has allegedly committed Tier 2 and Tier 3 offences and possibly Tier 1 offences, the latter being subject to General Defence provisions at **Section 118**. Whilst the Commonwealth could argue that it was unaware of the original contamination which occurred many years ago over a lengthy period, it has allegedly committed Tier 1 offences in recent times as Department of Defence witnesses have advised two Federal Parliamentary Committees under oath that Defence was still polluting its neighbours' properties. Very detailed advice was provided to Defence from the author at the time of the first Parliamentary Committee hearing of a way to stop the pollution from leaving the RAAF Base. Defence did not pursue this proposal, presumably for cost reasons, and therefore it knowingly continued to pollute the property of others when that could have been prevented. It has itself to blame, as it wanted to have its cake and eat it too. It rebuffed the proposal for **VA** of polluted land that would have **then** contained the pollution to Commonwealth land only, but it continued to knowingly allow pollutants to flow from Commonwealth land to the lands of others. The Commonwealth therefore should not be able to use the General Defence in **Section 118** as it has allegedly knowingly committed a Tier 1 offence. The Commonwealth has also allegedly committed offences detailed in **Sections 116, 120 and 142A**.

16. Proceedings for offences. **Section 214** states that Tier 1 offences can be dealt with by the Land and Environment Court or on indictment before the Supreme Court. **Section 215** states that Tier 2 and Tier 3 offences can be dealt with by the Local Court or by the Land and Environment Court.

17. Time Limits. **Section 216** states that generally proceedings should commence within three years after the date the offence is alleged to have been committed. The fact that at least five years have passed since the EPA became aware of an alleged offence should not be an issue as the Commonwealth has continued to pollute, even after they were advised how to stop that pollution from migrating to the lands of others.

18. Institution of Proceedings. **Section 217** states that the EPA may institute proceedings against this Act to the Local Court, the Land and Environment Court or the Supreme Court as appropriate. The EPA is independent in its decision making on prosecutions. The Act does not include a

provision for the responsible Minister to compel the EPA to prosecute. However, **Section 219** allows others to **seek leave** to institute proceedings and these others who have the capacity to cover legal costs include inter alia, the State of NSW and the Port Stephens Council. Moreover, the Port Stephens Council could institute proceedings **without seeking leave** under **Section 218** as it is the Local Authority. However, the Commonwealth could under **Sub-section 6(4)** dispute that RAAF Base Williamtown lays within the Local Authority's area.

19. Orders for Compensation. **Section 244** allows a court to make orders without imposing a penalty or fine. **Section 246** allows a court to order the offender to pay compensation to affected persons for loss and damage suffered, and, **Section 247** deals with the provision of compensation following an offence being proven. The Article at **Attachment F** by the **Honourable Justice Brian J Preston** on the **'Polluter Pays Principle'** also refers to **Section 246** of the Act with respect to compensation.

State of NSW Submission to a Commonwealth Parliamentary Inquiry

20. The State of NSW provided a submission numbered 61 to the 2018 **Joint Standing Committee on Foreign Affairs, Defence and Trade** (JSCFADT) Inquiry into the Management of PFAS Contamination in and around Defence Bases. Parts of that submission are as follows:

a. Part Section 3f. *'The NSW Government firmly believes that the 'polluter pays' principle must apply to the off-site PFAS contamination from Commonwealth owned or operated facilities such as Defence Bases.'*

b. Part Section 3f. *'The NSW EPA were advised by Defence early in the Williamtown PFAS contamination response that they would favourably consider reimbursement of costs incurred by the NSW Government. The NSW EPA formerly requested reimbursement of $3.5million from Defence on numerous occasions in 2017 and was unsuccessful.'*

c. Part Section 3g. *'The Australian Government Expert Health Panel for PFAS Report was released on 7 May 2018. In response to the Expert Health Panel's finding, the Australian Government has stated that it is not considering a land purchase program as a result of PFAS contamination. The NSW Government believes this is inconsistent with the 'polluter pays' principle.*

d. Part Section 3g. *'The Australian Government should consider appropriate compensation for property impacted by PFAS contamination emanating from Defence lands where remediation of the contaminated sites is not possible or is unviable.'*

Potential Commonwealth Liability

21. If the NSW Land and Environment Court ordered that compensation be paid to PFAS affected landowners, some may prefer **VA** of their land and some may prefer compensation. Compensation paid to PFAS affected landowners would not solve the problem. The only way forward is for the Court to order the Commonwealth to establish a **VA** scheme and a consequential loss scheme to cover business losses. Such an order would prevent young children from playing in the mud in PFAS contaminated land. By making use of its considerable liquid assets and borrowing capacity, **Defence Housing Australia** (DHA) would be a suitable vehicle to purchase, and over the next 15 years, to develop the existing PFAS affected residential, rural residential and farming land into commercial, industrial and possibly heavy industrial subdivisions. Defence would of course have to contribute to the cost of acquisitions but their funds input could be delayed for several years. After about 5 to 10 years, **DHA** may be able to make a profit and return it to Defence.

22. The Federal and NSW Governments would need to work together to facilitate the redevelopment of the PFAS contaminated area. The NSW Government has a suitable entity to assist with this proposed endeavour, and that is the **Hunter and Central Coast Development Corporation**. It has developed the

Honeysuckle area in Newcastle, overseen large-scale remediation and environmental programs on former BHP steelworks land at Mayfield and Kooragang Island, and is involved in other projects. The Corporation is also responsible for overseeing the delivery of the Hunter Regional Plan 2036. They may be a suitable entity to take over the NSW Government role of overseeing the remediation of PFAS affected land in the Williamtown area from the EPA, as the latter is a regulatory organisation, while the former is a project delivery organisation.

23. Order of Cost for VA of the Williamtown Red Zone. Costing information for **VA** for the Williamtown Red Zone is not readily available and therefore an attempt to calculate a ballpark figure is provided in the following. Telephone advice obtained on 9 July 2018 from the Port Stephens Council Rates Section on 'Red Zone' properties is as follows:

a. Primary Red Management Zone: 32 properties with a current total **VG** land valuation of $8.2m.

b. Secondary Red Management Zone: 173 properties with a current total **VG** land valuation of $38.3m.

c. Broader Red Management Zone: 267 properties with a total **VG** land valuation of $57.9m.

Therefore the total number of affected properties is 472 and the total NSW **Valuer General** (VG) land valuation is $104.4m. These only include rural, rural residential and residential properties. About 40 properties have not been included as they are commercial properties or properties owned by government agencies. The number of properties listed in the foregoing is based on treating contiguous lots owned by the same landowner as one property. The foregoing information is clearly insufficient to accurately predict the market valuation of affected properties. However, following discussions with local residents, an average valuation of one million dollars per property is considered to be in the right ballpark. As the Commonwealth caused the contamination, then to ensure ***'just terms'*** for acquisition as mandated by the **Australian Constitution** at **Section 51 xxxi**, the valuation of each property must be determined as if it was not affected by PFAS contamination.

24. Order of Cost for VA at all PFAS Affected Defence Bases. Adopting the foregoing average property valuation for land and improvements in the 'Red Zone' of one million dollars, then the cost estimate for VA in the Williamtown and surrounding area is about $500 million dollars for the 472 affected properties. Defence has advised that there are 23 Defence sites with PFAS contamination in Australia and they are as follows:

a. NSW: RAAF Bases Williamtown, Richmond and Wagga, HMAS Albatross and Holsworthy Barracks.

b. VIC: RAAF Base East Sale, HMAS Cerberus and Bandiana Military Area.

c. QLD: RAAF Bases Amberley and Townsville, Army Aviation Centre Oakey and Lavarack Barracks.

d. WA: RAAF Base Pearce (including Gin Gin airfield), RAAF Base Learmonth, HMAS Stirling and two sites at Harold E Holt Naval Communication Station.

e. SA: RAAF Base Edinburgh

f. ACT: Jervis Bay Range

h. NT: RAAF Bases Darwin and Tindal, and Robertson Barracks.

The estimate for the **VA** of the other 22 Defence sites is difficult to assess but an educated guess is 1.5 billion dollars, and that brings the total cost to about two billion dollars.

25. Proposed VA Finance Model. Any proposed finance model to fund the proposed two billion dollar **VA** Scheme is dependent on the required cash flow of that scheme. Many PFAS affected landowners at Williamtown have advised that they would not wish to sell their land now, but would like a guarantee from the Australian Government that they could sell at some time within the next 15 years, and at that time they would want to be paid market value for their property as if it was not affected by PFAS contamination. Landowners in other PFAS affected Defence Bases would likely have similar needs. Such a proposal would greatly assist the Australian Government with cash flow requirements for the **VA** Scheme. One possible cash flow scenario showing annual expenditure and percentage of the total expenditure is as follows:

a. Year 1: $600m - 30%

b. Year 2: $400m - 20%

c. Year 3: $400m - 20%

d. Year 4: $200m - 10%

e. Years 5-10: $200m - 10%

f. Years 10-15: $200m - 10%

g. Total: $2 billion

26. Proposed DHA Cash Flow. The 2018-19 estimated **DHA** Balance Sheet shows that on 30 June 2019, DHA had about 1.8 billion dollars of assets from which it could borrow against to obtain a loan of one billion dollars for **VA**. Defence would also need to provide one billion dollars over the life of the **VA** Scheme. **DHA** also have about $300m in cash, some of which could be used to finance industrial and commercial land developments. If the foregoing cash flow scenario meets the demands of the **VA** Scheme, then Defence would not need to allocate funds until Year 3 for **VA** and loan interest.

Conclusion

27. The Federal Government clearly believes that it can **pollute the lands of others with impunity**. Their actions have been **unconscionable**, **draconian, indecent, immoral, unfair and unjust**. This right it has assumed is not prescribed in any Commonwealth law. To negate the application of State environmental law, the Federal Parliament would need to make a law that provides such a right. However, both **Sections 51** (the main powers of the Parliament) and **Section 52** (the exclusivity provision) of the **Australian Constitution** provide the Parliament with the power to make laws for the: *'good government of the Commonwealth'*. Clearly, the Parliament could not make a law that gives the Federal Government the right to pollute the lands of others with impunity, as such a law would also be **unconscionable**, **draconian, indecent, immoral, unfair and unjust,** and would therefore not provide: *'good government'*.

28. As deduced in paragraph 13, the State Act that applies at the site of the source of the PFAS contamination is the Act that must be followed. The appropriate State Act is the NSW **PEO Act**. This Act allows the EPA, and with leave, the State of NSW to take action against the Commonwealth in the NSW Land and Environment Court. Part of the State's **JSCFADT** submission that is cited at paragraph 20 demands that the polluter must pay for remediation and/or compensation.

29. If the foregoing proposed legal action in the NSW Land and Environment Court and potential actions in Courts in other States are successful, the overall Commonwealth liability to provide PFAS compensation in all its forms in the Williamtown area and elsewhere in Australia for Defence establishments alone would amount to about two billion dollars. The Commonwealth could then either roll over and acquiesce (pigs might fly!), or immediately seek leave to appeal to the High Court. The latter would be the more likely outcome.

30. The foregoing illustrates that the Federal Government has not provided: *'good government'* to about 2,000 PFAS affected citizens in the greater Williamtown area and to others elsewhere in NSW and Australia. If the State of NSW really cares enough about its citizens to right a wrong, and if it genuinely supports the content of its own JSCFADT Inquiry submission, then it or the EPA must institute proceedings in the NSW Land and Environment Court to seek appropriate compensation for PFAS affected landowners, and to also seek reimbursement of its own expenses. Moreover, any compensation ordered by the NSW Land and Environment Court on the Commonwealth should be in the form of a VA scheme and a consequential loss scheme to allow PFAS contaminated residential land and rural residential land to be rezoned for heavy industrial, industrial and commercial uses, thus preventing young children now and in the future from playing in the mud on PFAS contaminated land.

Recommendations

31. Recommendations are that the NSW EPA institutes legal proceedings as described in the foregoing, or if it is unwilling which appears to be the case, then the State of NSW should take such action in lieu.

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Attachments:

A. Catherine Penhallurick Article - Commonwealth Immunity as a Constitutional Implication - 2001

B. Karen Middleton Article in the Saturday Paper - 4 August 2018

C. James Prest Article - 1997

D. EPA Letter of 23 August 2018

E. Sections 6, 114, 116, 118, 120, 142A, 214, 215, 216, 217, 218, 219, 244, 246, 247 & 315 of the NSW **Protection of the Environment Operations Act 1997**

F. The Polluter Pays Principle; The Honourable Brian J Preston - 7 April 2009