Supplementary Submission No 33

Inquiry into Australia's Maritime Strategy

Organisation: Australian Maritime Defence Council

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QUESTION - AMDC

MEMBER: The Hon. Roger Price

HANSARD: Page 95 (25 February 2003)

Whilst one would commend MOUs in enabling a process of sitting down and working these issues out – it is obviously infinitely the preferred method of operation – is there anything in the Defence Act that allows you to insist on having Berth A at Townsville, or Berth 2 at Darwin?

What do you mean by a declared emergency?

We have 2,000 troops pre-deployed on war and terrorism, and there is nothing in force in Australia. That is why I am interested to know what the mechanics of 'declared' mean. You can see, for example, Darwin may very well be required but there may not necessarily be a declared emergency. Please take that question on notice. I am interested in what the mechanics are and what the legal position and processes are that we are required to go through.

RESPONSE:

There is no statutory basis for the expression 'declared emergency'. Although such a declaration may be made, its effect is administrative and relates to the operation of executive agencies, and usually refers to the activation of emergency plans. As such, the term is not relevant to any appropriation of private property in a time of emergency.

There is nothing in the *Defence Act 1903* (Cth) which enables Defence to insist on having a berth at a port as a priority. The only provision in the *Defence Act* specifically addressing wharf facilities is s. 70 which provides that a State may not impose a toll or due with respect to the use of any wharf. Notably, this provision does not guarantee a right to use, merely to use on a fee free basis.

However, s. 124 of the *Defence Act 1903* enables the government to make regulations:

> not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for securing the good government of the Defence Force, or for carrying out or giving effect to this Act

When read with s. 63 of the *Defence Act* this could allow the making of regulations in times of war, which provide for the priority of RAN vessels at designated ports. This reflects the fact the scope of the defence power expands in times of war.

During times of conflict, social and economic matters which are primarily the concern of the states, can be brought within the defence power of the Commonwealth: see *Attorney –General (Vic) v Commonwealth* (1935) 52 CLR 533 at 558. However, during peace time the defence power is not interpreted broadly, affording greater priority to economic and commercial interests of the states; see *Illawarra District County Council v Wickham* (1959) 101 CLR 467 at 502. Hence, the Commonwealth's power to regulate the use of ports for defence purposes during peacetime would be questionable.

Outside a time of war, under current defence legislation there are two available options where the ADF requires priority (and potentially exclusive) access to port facilities and infrastructure:

a. Access negotiated through the use of an MOU or contract; and.

b. Declaration of the relevant area as Defence Land or Naval Waters, under the gazettal procedures set out in the *Land Acquisition Act (Cth) 1989* or the *Control of Naval Waters Act (Cth) 1918*.

A pre-arranged MOU or contractual arrangement is the preferable approach. Any action under the *Land Acquisition Act (Cth) 1918* or the *Control of Naval Waters Act (Cth) 1918* is subject to the general provisions of Section 51(xxxi) of the Australian Constitution, which requires payment of compensation 'on just terms' where there is an 'acquisition of property'.