THE UNIVERSITY OF
NEW SOUTH WALES

FACULTY OF LAW

GEORGE WINTERTON

22 August 2001

Hon. Andrew Thomson, M.P.
Chairman
Joint Standing Committee on Treaties
Parliament House
Canberra ACT 2600

Dear Mr Thomson,

The Committee has sought my advice on the question whether the Commonwealth Parliament's implementation of the *Rome Statute of the International Criminal Court* would face any constitutional impediment derived from Ch. III of the Commonwealth Constitution. As this letter explains, I believe that it may.

As Christopher Pearson noted in the *Australian Financial Review* on 30 July 2001 ('We should not ratify ICC') p. 54, implementation of the Statute has been opposed on its merits by, *inter alia*, Professor Richard Wilkins of Brigham Young University, Utah, and Sir Harry Gibbs, former Chief Justice of the High Court of Australia. In my opinion, both critiques have merit. Wilkins criticizes the Statute's 'sweeping' language which, he remarks, is 'limited largely by the imaginations of international lawyers and the judicial restraint (or lack of it) that will be exhibited by the judges' on the ICC. The ICC, he believes, 'has the potential to become … a tool for radical social engineering'. Like Sir Harry Gibbs, he regards the Statute as detracting from the right of national self-determination. Sir Harry bluntly condemns it as a surrender of part of our sovereignty. Of course, all treaties involve some surrender of 'sovereignty' (in the sense of national power to act autonomously), but the Statute would do so to a greater degree than most because it would potentially subject Australian citizens to the jurisdiction of an international court *in respect of acts performed in Australia* (see art. 12(2)(a)). Notwithstanding the force of these objections, I favour ratification insofar as policy is concerned, essentially on the ground of reciprocity. We cannot expect other nations to accede to the Statute unless we do so ourselves, and I believe that international justice requires an International Criminal Court. Moreover, to adapt the observations of Bill Richardson, a former United States Ambassador to the United Nations, in yesterday's *New York Times* in urging United States ratification of the Statute notwithstanding some of the concerns noted above, Australia 'will not be able to affect the outcome if it is not involved in the process of establishing [the ICC]'. Although the Committee has sought my advice only on the constitutional issue, I considered it appropriate to note that my concerns regarding the latter are not motivated by any objection to Australia's accession to the ICC as a matter of policy.

The Statute provides for trial by the ICC pursuant to a policy of 'complementarity' (see art. 1), whereby national courts are the primary fora for trial of defendants charged with a crime specified in art 5. Pursuant to arts. 17 and 20(3), trial before the ICC will arise only if a state with jurisdiction has been unwilling or unable genuinely to prosecute, or whose trial of a defendant was not independent and impartial or was conducted for the purpose of shielding him or her from

SYDNEY 2052 AUSTRALIA
Email: G.Winterton@unsw.edu.au
Facsimile: +61 (2) 9385 1175
Telephone: +61 (2) 9385 2245

Location: Library Tower, Room 1127
Enter Gate 11, Botany St, Kensington

responsibility. The Statute is not to apply to conduct committed before it comes into effect: arts. 11 and 24.

The Commonwealth Parliament has power to implement the Statute pursuant to its 'external affairs' power, s. 51(xxix) (*Tasmanian Dam* case (1983) 158 CLR 1), which is 'subject to this Constitution', including, of course, Ch. III thereof. While no definite conclusion can be reached before seeing its terms, in my opinion, Commonwealth legislation implementing the Statute may contravene Ch. III in two respects.

First, the power to try a person for a criminal offence is an exercise of judicial power: see, e.g., *Chu Kheng Lim v Commonwealth* (1992) 176 CLR 1, 27 per Brennan, Deane and Dawson JJ. With very few exceptions, the judicial power of the Commonwealth can be vested only in courts contemplated by s. 71 of the Constitution; *viz.* federal courts, including the High Court, and State courts invested with federal jurisdiction pursuant to s. 77(iii) of the Constitution. If the ICC's power to try offences under the Statute is an exercise of the judicial power of the Commonwealth for the purposes of Australian law, it would contravene Ch. III because the ICC is neither a State court nor a federal court constituted in compliance with s. 72 of the Constitution: *Brandy v HREOC* (1995) 183 CLR 245. Subject to exceptions such as the Commonwealth Parliament's power to punish contempt of Parliament pursuant to s. 49 of the Constitution and military tribunals constituted pursuant to s. 51(vi) (see *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 626-7 per Deane J), the High Court has long regarded Ch. III as 'an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested': *Boilermakers* case (1956) 94 CLR 254, 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ, approved recently in *Re Wakim, Ex parte McNally* (1999) 198 CLR 511, 575 per Gummow and Hayne JJ (Gleeson CJ and Gaudron J concurring). However, these observations were made without any allusion to (or, presumably, contemplation of) the exercise of judicial power by an international tribunal over matters occurring within Australia. That is likewise true of a seemingly more apposite *dictum* of Jacobs J (McTiernan J concurring) in the 'Queen of Queensland' case:

> '[Covering Clause 5] and Ch. III of the Constitution proceed upon the basis that *judicial functions within the Commonwealth* will be exercised by State courts and by federal courts with rights of appeal as therein provided.'

Commonwealth v Queensland (1975) 134 CLR 298, 328. (Emphasis added.) When the ICC tries a person charged with having committed an offence in Australia, it is arguably exercising 'judicial functions within the Commonwealth' because it is exercising judicial functions in respect of acts which occurred in Australia. However, if that phrase applies only to bodies physically located in Australia, it should be noted that, while the ICC's usual venue will be its seat at The Hague, it could decide to sit in Australia (arts. 3(3) and 62). Concerns similar to those noted here were raised in evidence in United States congressional hearings in 1998: see S.W. Andreasen, 'The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?' (2000) 85 *Iowa Law Review* 697, 726-27.

To my knowledge, the only judicial consideration of an international tribunal's compatibility with Ch. III is that of Deane J in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 627 in which his Honour remarked (*obiter*) that Ch. III would not apply to such a tribunal because it would be exercising the judicial power of the international community, not that of the Commonwealth. This is, of course, a plausible opinion which might commend itself to some current justices of the High Court, especially Kirby J, who generally favours an international perspective and has argued strongly for a flexible, adaptive interpretation of Ch. III: see, e.g., *Gould v Brown* (1998) 193 CLR 346, 476-77 [276]; *Re Wakim* (1999) 198 CLR 511, 609-11 [207]-[210]. (Indirect support for Deane J's view may also be derived from the more flexible and purposive United States approach to the separation of judicial power in *Commodity Futures Trading Commission v Schor* (1986) 478 US 833, 851: see A.I. Benison, 'International Criminal Tribunals: Is There a Substantive Limitation on the Treaty Power?' (2001) 37 *Stanford Journal of International Law* 75, 104-7, 115.) However, Deane J appears to adopt a single characterization approach to

judicial power which seems inappropriate in this context. Once the Commonwealth has implemented the Statute, it is surely arguable that the ICC would exercise *both* the judicial power of the international community *and,* insofar as it applies to offences committed in Australia, as a matter of Australian domestic law, the judicial power of the Commonwealth. Insofar as Australian law is concerned, the ICC would be exercising jurisdiction conferred by Commonwealth legislation implementing the Statute, just as would an Australian court trying a defendant for a crime specified in art. 5 of the Statute. The latter would be exercising power pursuant to ss. 76 or 77 of the Constitution and would, therefore, be exercising 'federal judicial power': *Gould v Brown* (1998) 193 CLR 346, 379 [15] per Brennan CJ and Toohey J. It would seem anomalous for two tribunals exercising the same jurisdiction pursuant to the same legislation to be regarded as exercising the judicial power of different polities *for the purposes of Australian domestic law*. Hence, in my opinion, it is quite possible that the High Court would differ from Deane J on this issue.

Secondly, as noted above, the ICC could decide to try a person who has been acquitted of the same or a similar offence by an Australian court if it concludes that the Australian trial was not conducted independently and impartially or was undertaken for the purpose of shielding the defendant from criminal responsibility for crimes within the jurisdiction of the ICC (art. 20(3)). In that event, the Australian authorities could be required to arrest and surrender the defendant to the ICC (art.59 and Part 9). However, such action by Australian executive officers may contravene the separation of judicial power which requires executive compliance with lawful decisions of courts exercising the judicial power of the Commonwealth. It would seem to be a contravention of Ch. III of the Constitution for the executive to arrest a person acquitted by a Ch. III court and surrender him or her for further trial by another court exercising authority derived from Commonwealth law (insofar as Australian law is concerned) for essentially the same offence. The same may apply also to a person who has been convicted by a Ch. III court, for the arrest of such a person on substantially the same charge amounts to an interference with the exercise of judicial power, pursuant to which the appropriate penalty is that prescribed by the court. (Double jeopardy as between Commonwealth and State offences is distinguishable.) However, two caveats should be entered: first, that the legal position will depend upon the specific terms of the legislation; and, secondly, that there is no direct authority on this second Ch. III issue (and very little on the first), so that the above observations are necessarily somewhat speculative.

If the Committee concludes that Commonwealth legislative implementation of the Statute may contravene Ch. III of the Constitution, what should it advise? Art. 120 of the Statute prohibits reservations to ratification. However, since it is extremely unlikely under foreseeable circumstances that the ICC would be called upon to exercise its jurisdiction in respect of an art. 5 offence committed in Australia, the Committee may well conclude that the risk that Ch. III would be successfully invoked is minimal. Hence, ratification may be appropriate, even though a successful Ch. III challenge in the Australian courts could render Australia unable to fulfil its obligations under the Statute and, consequently, liable therefor under international law.

Yours sincerely,

George Winterton
Professor of Law