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The Secretary
Senate Standing Committee on Foreign Affairs, Defence and Trade
PO Box 6100
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By email: fadt.sen@aph.gov.au

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Dear Senate Standing Committee

RE: Inquiry into the Defence Legislation (Miscellaneous Amendments) Bill 2008

Thank you for the opportunity to make a submission to this inquiry. Relevantly to this inquiry, as an academic I research and teach in international humanitarian law. As a barrister, I advised defendants in a prosecution in the Northern Territory in 2007 involving breaches of the Defence (Special Undertakings) Act 1952 (Cth) in its application to the Pine Gap Joint Defence Facility (*The Queen v Bryan Joseph Law & Ors* [2007] NTSC 45; *The Queen v Law & Ors* [2008] NTCCA 4 (19 March 2008)). That advice involved constitutional questions concerning the validity of the application of that Act to Pine Gap, relevant extracts of which are appended at the end of this short submission. The defendants in that matter have authorised me to publicly release the substance of my advice.

1. New Red Crystal Emblem

Legislative recognition of the Third Additional Protocol is to be strongly supported and is a further illustration of Australia's proud historical tradition of developing and upholding international humanitarian law. Recognition of a non-denominational emblem in no way detracts from the use of the existing emblems, nor from the ability to elect to continue to use and protect the Red Cross or Crescent emblems, notwithstanding their religion connotations.

It is noted that article 7 of the Third Protocol contains a similar obligation on Australia as under articles 47, 48, 127 and 144 respectively of the four 1949 Geneva Conventions – that is, to disseminate the Protocol as widely as possible, to include study of it in military instruction and to encourage study of it by the civilian population. It is to be hoped that the Australian Parliament will continue to find meaningful ways to promote the education of all Australians, not just military personnel, about international humanitarian law.

2. Joint Defence Facility Pine Gap

To the extent that this Bill provides for the formal designation of Pine Gap as a special defence undertaking and prohibited area, it is to be welcomed in potentially removing doubts and uncertainty about the validity of its earlier gazettal as such, which arose in a recent prosecution in the Northern Territory in connection with the 1952 Act.

To the extent that the Bill inserts a purposive clause to clarify that a range of constitutional powers (not only the defence power, but also the external affairs power) support the Act, it attempts to meet concerns about the constitutional validity of the Act as it applied to the protection of certain possibly non-defensive activities at Pine Gap.

From a constitutional law point of view, it should be observed that the character of an Act is determined by its operation and effect: *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 186. The High Court disregards the motive or policy behind federal law when determining whether there is a sufficient connection between the law and a constitutional head of power. The statutory declaration of the object of an Act is relevant to the construction of a provision which would otherwise by ambiguous: *Acts Interpretation Act 1901* (Cth), s 15AA. However, 'the declaration is not sufficient by itself to affect the operation and effect of the Act. The Parliament cannot legislate a measure into power merely by declaring its measure to be enacted for a valid object': *Leask v Commonwealth* (1996) 187 CLR 579 (Brennan J, obiter).

The Bill's amendment of the Act cannot, therefore, be thought to automatically cure any deficiency in constitutional power which may (or may not) underlie the Act. Certainly there were real questions (see extracts from my legal advice further below) about whether all of the possible activities at Pine Gap could be seen as 'defensive' within a narrower conception of the defence power, if, for instance, it is accepted (for argument's sake) that Pine Gap supported the US-Australian invasion of Iraq in 2003 and (again, for argument's sake) it is further conceded that such invasion was not necessary in order to defend Australia against any imminent threat to its security posed by Iraq.

In recent years the High Court has, however, tended to expand the scope of the defence power to cover a wider range of non-conventional, even non-military activities (such as criminal acts of terrorism in peacetime as in *Thomas v Mowbray* [2007] HCA 33; see Ben Saul, 'Terrorism as Crime or War: Militarising Crime and Disrupting the Constitutional Settlement?' (2008) 19 *Public Law Review* 20-31), such that it might be thought doubtful that the High Court would take a narrow view of the defence power, particularly in the sensitive area of national security where the executive may enjoy special competence.

This amendment also seeks to indicate that the external affairs power (such as bilateral treaty arrangements between Australia and the United States in respect of Pine Gap, along with the ANZUS alliance) would likely support measures protective of the activities pursued at Pine Gap pursuant to those agreements. Again, there were previously some doubts about whether the external affairs power would support the Act adopted in 1952, *prior to later in time treaty commitments* such the 1966 Pine Gap Treaty. These doubts are set out in my advice below.

Separate policy concerns might be raised concerning the appropriateness of the ongoing application of the 1952 Act to Pine Gap, when the Act was originally enacted to secure a British atomic weapons test site at the Monte Bello Islands off Western Australia. Draconian penalties flow from a breach of that Act – and which were used by prosecutors against pacifist protesters in the recent Northern Territory case, not against genuine threats to national security – compared with the ordinary penalties applicable for trespass upon other Commonwealth property by demonstrators in a democratic society.

Please be in touch if I can assist you further.

Yours sincerely

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Centre Director

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EXTRACT OF ADVICE TO DONNA MULHEARN AND OTHERS

CONSTITUTIONAL ISSUES

1. There are three obvious constitutional bases for the Act: the 'defence power' (s 51(vi), 1901 Commonwealth Constitution), 'external affairs power' (s 51(xxix)), and 'territories' power (s 122).

Defence Power

2. There is a related argument that if the Act relies on the constitutional 'defence power', the meaning of the defence power should similarly be interpreted as only authorising *defensive* military measures. On this view, the Act can only support *defensive* undertakings if it is to be constitutionally valid. Any non-defensive undertakings are not authorised by the Act and are necessarily beyond power.

3. The scope of the constitutional 'defence' power is distinct from the statutory meaning of 'defence' under the Act considered above. While the issue has not been decided in the High Court, there is an arguable question whether the defence power only supports laws for *defensive* military activities by the Commonwealth, and does not support legislation enabling aggressive or offensive military action.

4. Many High Court decisions on the defence power concern laws enacted for plainly defensive purposes against aggression in the two world wars, or in transitional phases after those conflicts. The defensive nature of those laws was not at issue in light of imperial German, Nazi and Japanese ambitions.

5. As noted above, one ordinary textual meaning of 'defence' relates to defence against foreign attack. This view was shared by leading commentators on the drafting of the Constitution writing that the Commonwealth's reliance on the defence power is (J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901 ed, reprinted by Legal Books, Sydney, 1976) at 561):

   subject to limitation in the purpose for which it must be used. *It could not enter upon naval and military enterprises solely with a view to foreign conquest and aggression; its power is to be used for the defence of the Commonwealth* of the several States, and for the preservation of law and order within its limits. [emphasis added]

6. In establishing a constitutional system of representative government, evolving towards full sovereignty and independence under international law, it was never envisaged to give Parliament a power to pass laws to facilitate aggressive wars against sovereign States. It is significant that the restrictive term 'defence' was chosen rather than conferring a 'war' or general 'military' power on the Parliament.

7. Incidental comments in High Court decisions support this restrictive interpretation. In *Farey v Burvet* (1916) 21 CLR 433, Isaacs J spoke of the defence power protecting Australia 'from foreign aggression', 'maintaining its freedom', and 'preserving its very existence' in 'A war imperilling our very existence'. In the *Australian Communist Party* case (1951) 83 CLR 1, Dixon J in the majority stated that 'the central purpose of the legislative power in respect of defence is the protection of the Commonwealth from external enemies' and that it permits what is necessary and appropriate for that purpose. While the meaning of the power is 'fixed', what it enables 'at any given time depends upon what the exigencies of the time… warrant' (Dixon J) and it is necessarily widest in times of war. Fullagar J similarly spoke of the defence power as referring to the 'defence of Australia from external enemies'. The court did not follow the view of Latham CJ that it is exclusively for the executive to determine what is for 'defence'. In *Re Colonel Aird, Ex part Alpert* [2004] HCA 44, Gummow J stated at [61] that the power was primarily concerned with 'response to hostile activity, actual or potential, from external sources'.

8. A wide range of measures may be supported by the defence power in peacetime, from 'the raising, training and equipment of naval and military forces, to the maintenance, control and use of such forces, to the supply of arms, ammunitions and other things necessary for naval and military operations, to all matters strictly ancillary to these purposes, and to nothing more': *Farey v Burvet* (1916) 21 CLR 433 (Gavan Duffy and Rich JJ); see also *Australian Communist Party* case (1951) 83 CLR 1 at 254 (Fullagar J). But those measures must be preparing for defence, not aggression.

9. The defence power authorises measures for the defence of the Commonwealth against external (and some internal) threats. It cannot enable a law authorising the use of Pine Gap for US or Australian military operations in Iraq, which are not related to the defence of the Commonwealth from any identifiable or real threat from Iraq. Official investigations in the US, UK and Australia confirmed that Saddam Hussein's Iraq did not possess 'weapons of mass destruction' capable of threatening any other State, let alone a country as geographically remote as Australia.

10. The Act itself appears constitutionally valid since it provides for special defence undertakings for the defence of Australia or partly for its defence and the defence of another.

11. The Act arguably cannot, however, authorise or protect undertakings which are non-defensive, such as participation in aggression against Iraq in March 2003. A clear majority of States and international jurists agree that the invasion of Iraq in 2003 was internationally unlawful, violating prohibitions on the use of force, intervention, and aggression. In 2003, there was no evidence that Iraq threatened, or had the capacity to threaten, Australia.

12. The fixed meaning of the defence power is not subject to developments in international law after 1900, such as the UN Charter or the ANZUS Treaty. Their concepts of collective self-defence and collective security cannot be invoked to widen the defensive purpose of the defence power, or to bring within its scope alternative legal bases for Australia's participation in military missions which are not in self-defence (such as Security Council's authorisation of a multinational force in Iraq after October 2003).

External Affairs Power

13. The Act may also be supported by the external affairs power, which, *inter alia*, empowers the Parliament to implement obligations arising under international treaties to which Australia is a party: *Victoria v Commonwealth* (1996) 187 CLR 416 at 476. The critical date for evaluating whether the Act implements or relates to a treaty obligation is the date of royal assent to the Act, which is in 1952.

14. In 1952, Australia had not yet entered into the 1966 Pine Gap Treaty with the United States, article 5 of which provides that the Australian authorities must prescribe appropriate measures to control access to the land and the facility. The declaration of prohibited areas and associated criminal penalties in the Act cannot, therefore, be supported as an implementation of a treaty not in existence in 1952.

15. Australia had, however, ratified the 1951 ANZUS Treaty and the Charter of the United Nations [1945] ATS 1 (entered into force for Australia on 1 November 1945), both of which establish obligations in relation to collective or multilateral security. Relevantly, article 2 of the ANZUS Treaty provides that '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'.

16. Nonetheless, neither treaty specifically requires Australia to provide for a regime of special defence undertakings, related prohibited areas or criminal penalties. Such specificity is arguably necessary for the Act to be a valid law with respect to 'external affairs'. To be valid, the Act 'must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states': *Victoria* at 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

17. The aspirational obligation of collective self-defence in the ANZUS Treaty is not sufficiently particular to support the regime of special defence undertakings and prohibited areas under the Act. The Act similarly cannot be supported by the generalised obligations of individual or collective self-defence and collective security under the UN Charter, which do not require a regime of special defence undertakings.

18. To be valid, the Act must also 'be reasonable capable of being considered appropriate and adapted to implementing the treaty': *Victoria v Commonwealth* (1996) 187 CLR 416 at 487. This necessarily means that the Act must conform to the treaty in the sense that it gives effect to obligations under the treaty. In particular, the ANZUS Treaty is solely defensive ('to resist armed attack') and could only support a *defensive* understanding of undertakings 'for or in relation to the defence of Australia'. It could not support the use of Pine Gap for aggressive military purposes in circumstances where Iraq does not pose any genuine threat to Australia, however distant.

19. While Australia's participation in Iraq after October 2003 was specifically authorised by the Security Council under the UN Charter, the constitutional validity of the Act depends on whether its provisions related to 'external affairs' in 1952, and not to some unforseen Security Council measure deriving from the 1945 Charter but arising only in 2003. In any event, nothing the relevant Security Council resolution authorises or requires national legislation providing for special defence undertakings.

Territories Power

20. The Act does not expressly purport to rely on any particular head of power. Even if the preceding arguments on the defence and external affairs powers succeed, the territories power might be invoked to support the valid application of the Act even to non-defensive undertakings such as Pine Gap, located in the Northern Territory. The territories power is 'plenary in quality and unlimited and unqualified in point of subject matter': *Teori Tau v Commonwealth* (1969) 119 CLR 564 at 570 (Barwick CJ).

21. Nonetheless, it is arguable that since the Act applies throughout Australia, it has a dual characterisation in terms of the defence and territories powers: see *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 (Toohey, Gaudron, Gummow and Kirby JJ). The territories power must be read with, and not disjoined from, other relevant constitutional provisions (Gummow J). A law with respect to external affairs is not disengaged from that power because it is also a law for a territory (Gummow J).

22. Thus reliance on the territories power to support the Act is arguably conditioned by the limitations on the defence power (which supports the Act generally), precluding aggressive military activities. This argument is unlikely to succeed, since *Newcrest* involved a more express constitutional limitation.

23. In the alternative, the Act is not a law 'for the government of' a territory. As Gummow J suggested in *Newcrest*, a law for defence recruitment in a Territory would not be a law for the government of the Territory, but a law for the defence of the Commonwealth under the defence power. Similarly, 'It is unlikely that an Act of general application throughout the Commonwealth will also be a law passed pursuant to s 122': *Newcrest* at 567 (Gaudron J).