THE SECTION 51(vi) DEFENCE POWER IN THE
AUSTRALIAN CONSTITUTION:
THREATS TO HUMAN RIGHTS DURING THE
‘WAR ON TERROR’ AND SUGGESTED REMEDIES

A thesis submitted to Charles Sturt University for the degree of
Doctor of Philosophy

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CERTIFICATE OF AUTHORSHIP

I hereby declare that this submission is my own work and to the best of my knowledge and belief, understand that it contains no material previously published or written by another person, nor material which to a substantial extent has been accepted for the award of any other degree or diploma at Charles Sturt University or any other educational institution, except where due acknowledgment is made in the thesis. Any contribution made to the research by colleagues with whom I have worked at Charles Sturt University or elsewhere during my candidature is fully acknowledged.

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ABSTRACT

There is currently limited protection of human rights in Australia, with one of the most fundamental rights, the right to liberty of the person, primarily stemming from the separation of judicial power contained in the *Australian Constitution*. Notably, there are no express rights to habeas corpus or due process – two key aspects of the right to liberty of the person – although there is an argument that such are implied by virtue of *Constitution* Ch III. This is unlike overseas jurisdictions including the United States of America, Canada and South Africa, which have explicit constitutionally entrenched bills of rights to protect such essential rights.

In the absence of substantial rights protection, the use of the s 51(vi) defence power to enact security legislation poses a significant threat to the right to liberty of the person. Historically, during periods falling short of ostensible peace, such as periods of increasing international tension and wartime, the defence power has been interpreted broadly, and the judiciary has deferred to the legislature and the executive on matters concerning the defence of the Commonwealth. Following the terrorist attacks of September 11, 2001, in the United States, Australia introduced anti-terrorism legislation which increased the power of the executive through allowing the imposition of control orders and detention orders, with minimal scope for judicial involvement or review. The legislation also contains far-reaching terrorism offences and imposes restrictions on federal criminal and civil court proceedings. In the absence of a constitutionally entrenched bill of rights, the current human rights protections in Australia are not sufficient in the age of the ‘War on Terror’, and additional protections are required.

Noting the threat posed by terrorism and the need to strike a balance between protecting the community and protecting individual rights, this thesis posits two strategies. The first proposes a modified proportionality test for use when the validity of defence legislation and executive actions that infringe express and implied constitutional rights, including the implied right to due process, are challenged. This would see the survival only of defence measures that are the *least restrictive* means available to serve the defence interest. Noting the elasticity of the defence power, the defence interest served by the measure must be proportionate to the level of threat faced.
The second strategy proposes that the rights to habeas corpus and due process be explicitly inserted into the *Australian Constitution*. Express rights would put it beyond doubt that the judiciary is empowered to quash legislation and executive actions which infringe those rights. That being said, the right to due process cannot be absolute. Therefore a limitations clause would see the right not to be arbitrarily detained or imprisoned, and the right to be afforded due process of the law, subject only to such reasonable limits prescribed by law as can be demonstrably justified as being the least restrictive of those rights as is necessary in a free and democratic society. This would incorporate the modified proportionality test posited in the first strategy.
INTRODUCTION

Historically, governments throughout the world have been reactive to new threats as they emerge. This has often resulted in the introduction of measures that are progressively more restrictive of human rights, particularly the right to liberty of the person. The legislative response to the September 11, 2001 terrorist attacks in the United States is one such example. In Australia, the Parliament enacted anti-terrorism legislation which restricts individual rights on the basis that such is justified for community protection purposes during this current climate of increased international tension. However, under Australia’s current constitutional arrangements there is limited protection of human rights, which has significant implications for the right to liberty of the person. This is particularly given the broad legislative power that can be derived from the s 51(vi) defence power, which has been interpreted as being of elastic scope; expanding and contracting according to the extant threat.

Chapter I of this thesis discusses the limited protection of human rights under current arrangements at the federal level in Australia. It discusses the protections offered through limitations on the legislative power of the Commonwealth, the separation of judicial power, the entrenched original jurisdiction of the High Court under Constitution s 75(v), and statutory rights protection. It also outlines the limited express and implied constitutional rights, including the implied right to due process which has been recognised in a number of cases – although this right is tenuous at best. While comment is made throughout this thesis on the protection and violation of human rights generally,¹ the primary focus is on the right to liberty of the person,² given its significance as one of ‘the most elementary and important’ human rights in a democratic society.³ Clark and McCoy argue that ‘[i]f someone is in detention his or her ability to exercise all other human rights is severely restricted or virtually non-

¹ For the purposes of this thesis, consistent with s 3 of the Australian Human Rights Commission Act 1986 (Cth), ‘human rights’ is defined as the rights and freedoms contained in specific international instruments that are scheduled to, or declared under, that Act, including the International Covenant on Civil and Political Rights.
² This encompasses the right to control by a court of the legality of any detention and the right to an effective remedy where the individual claims to be deprived of their liberty: Human Rights Committee, General Comment No 8: Right to Liberty and Security of Persons (Article 9), 16th sess, UN Doc CCPR/C/GC/8 (30 June 1982) [1].
existent'. \(^4\) Therefore the right to liberty, which can be vindicated through an entitlement to due process and habeas corpus, is a central human right that demands protection. This thesis does not purport to argue for a bill of rights more broadly and therefore is limited in its discussion of human rights theory.

The limited protection of human rights in Australia is of particular relevance in the context of the defence power, which is the focus of this thesis because of its significant potential to be used to infringe civil liberties. Chapter II of this thesis analyses how the High Court has interpreted the defence power pre-September 11, including during periods of ostensible peace, periods of increasing international tension, wartime and the aftermath of war. The unique ‘elasticity’ of the defence power according to the extant political and international climate, the propensity of the High Court to defer to the Parliament on defence matters during periods falling short of ostensible peace, allows the Parliament at times to regulate on a broad range of topics that affect individuals. This includes detention without being charged with a criminal offence. In 1953 Sawer argued that once the High Court elected to give s 51(vi) a meaning more extensive than the raising and equipping of defence forces, it began a course of judicial legislation which makes it impossible to lay down any precise definition or limitations on the power, or to predict the course of decisions with reasonable certainty. \(^5\) While there is scope for human rights abuses under all constitutional powers, the defence power has the potential to give rise to the greatest human right abuses.

Chapter III analyses the legislative response to September 11, when the Parliament introduced anti-terrorism legislation granting the executive powers to restrict the right to liberty of the person with minimal judicial oversight. The Parliament enacted legislation including *Criminal Code Act 1995* (Cth) pt 5.3 which establishes certain terrorism offences and enables control orders and preventative detention orders to be issued against individuals whether or not they have been charged or are suspected of criminal activity, and *Australian Security Intelligence Organisation Act 1979* (Cth) pt III div 3 which grants the Australian Security Intelligence Organisation the power to obtain questioning and detention warrants in order to gather intelligence regarding


terrorist acts. Also enacted was the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth), which protects classified and sensitive information in certain criminal and civil court proceedings. These regimes have realigned the barriers between the functions of the executive and the legislature, on the one hand, and the judiciary on the other. This has a significant effect on the substantive and procedural aspects of an individual’s rights to due process and habeas corpus. Significantly, in Thomas v Mowbray, the majority concluded that the anti-terrorism legislation was indeed supported by the primary conception of the defence power.\(^6\) In the post-September 11 ‘War on Terror’ – a period of increased international tension – the future use of the defence power is even more unpredictable.\(^7\) In protecting the public, Dame Mary Arden said of the government that ‘they will inevitably seek ways to qualify the normal rules of criminal procedures, immigration and other laws to protect the public’,\(^8\) and the anti-terrorism legislation is no exception.

Chapter IV of this thesis draws together the issues identified in Chapters I to III that arise in relation to the defence power, the anti-terrorism legislation and the limited protection of human rights. While it argues for the need for greater protection of human rights in Australia, it also identifies the need to strike a balance between the protection of individual rights and the protection of the community. As stated extra-judicially by Justice von Doussa, since the codification of human rights in 1948 through the Universal Declaration of Human Rights, international law has recognised the need to limit, in appropriate circumstances, the enjoyment of individual human rights in the name of national security, but the difficulty has always been identifying the proper balance.\(^9\) The originality of this thesis and its contribution to constitutional law literature lies in its identification and analysis of the risks the defence power poses to the right to liberty of the person in this post-September 11 era and its strategies for achieving this necessary balance.

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\(^6\) (2007) 233 CLR 307, 324 (Gleeson CJ) 363 (Gummow and Crennan JJ), 503-4 (Callinan J), 525 (Heydon J).

\(^7\) The phrase ‘War on Terror’ is generally used to describe the military campaign that was initiated against terrorist organisations such as al-Qaeda following the September 11 attacks.


Chapters V and VI of this thesis posit strategies for achieving greater protection of the rights to due process and habeas corpus. The first strategy proposes a modified proportionality test for use when the validity of legislation and executive actions which infringe express and implied constitutional rights, including the implied right to due process, are challenged. This would see the survival only of defence measures that are the least restrictive means available to serve the defence interest, and where the defence interest served by the measure is proportionate to the level of threat faced. The strength of this strategy is that it applies to all implied and express constitutional rights and could be expanded to apply to all constitutional heads of power. However, it is subject to judicial revision over time and also relies on the right to due process being implied in the Constitution, which is currently tenuous at best.

The second strategy proposes that the rights to habeas corpus and due process be explicitly inserted into the Australian Constitution, with the right to due process only being subject to such reasonable limits prescribed by law as can be demonstrably justified as being the least restrictive of those rights as is necessary in a free and democratic society. The strength of this strategy is that express rights would put it beyond doubt that the judiciary is empowered to quash legislation and executive actions that infringe those rights. It is argued that constitutional entrenchment of rights is the best way to guarantee rights at a time when the Parliament is relying on extraordinary measures to protect the community, at the expense of individual liberty.
I THE LIMITED PROTECTION OF HUMAN RIGHTS IN AUSTRALIA

A Introduction

As a general principle, a Constitution should limit the State’s power in order to serve democratic values such as liberty and protection of human rights.¹ One doctrine which is often incorporated in constitutions to achieve this end is that of the separation of powers, whereby the legislative, executive and judicial powers of the State are dispersed among three independent branches or arms. The rationale is that through the demarcation or separation of power among three branches, individuals will be protected from breaches of their human rights, because their rights will not repose in the hands of a single arbitrary decision-maker ‘whose decisions [are] then regulated only by their own opinions, and not by any fundamental principles of law’.² From a theoretical perspective, dispersing power ‘substantially checks and restrains government and provides significant institutional protection for human rights’.³

The Australian Constitution incorporates the doctrine of separation of powers by creating and distributing power between the legislature, the executive and the judiciary. The Constitution regulates the power exercisable by these branches by defining and setting limits to their powers. The extent to which the Constitution vests the judicial branch with the capacity to protect fundamental rights, both express and implied, is the subject of this Chapter. In R v Quinn; Ex parte Consolidated Food Corporation Jacobs J stated that ‘we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive’.⁴ However, because the Constitution contains only a handful of rights against which the judiciary can test the validity of the legislation, and because administrative review under Constitution s 75(v) does not encompass substantive review, the extent to which rights are protected, including the right to liberty of the person, is limited. As such, unlike overseas jurisdictions including the United

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⁴ (1977) 138 CLR 1, 11.
States, Canada and South Africa which have constitutionally entrenched bills of rights, the Australian constitutional order lacks substantive limitations on executive action. As Galligan states, the defence of the adequacy of Australia’s system in protecting human rights relies on the efficacy of responsible government and the common law, however this is not sufficient in light of the dominance that the Parliament is capable of exercising. Indeed, Australia’s status as an English-speaking democracy without a judicically enforceable constitutional or statutory bill of rights is lamented by bill of rights advocates and used as evidence of the grave deficiency in rights protection.

This Chapter provides an outline of the current mechanisms for human rights protection in Australia at the federal level. It commences with a discussion of the protection offered by the express and implied constitutional rights in the exercise of legislative power. It then examines the rationale for the doctrine of separation of judicial power and the two elements of this power, including the limited extent to which the rights to due process and habeas corpus are currently protected. The Chapter then analyses the scope of Constitution s 75(v) in the context of review of executive decisions, and considers whether it allows the High Court to undertake merits review. Finally, the Chapter contains a brief discussion of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth).

B Legislative Power of the Commonwealth Parliament and Limited Rights Protection in the Australian Constitution

The Australian Constitution is the source of the legislative power of the Commonwealth Parliament: Section 1 vests the Parliament with this legislative power and lists the topics or ‘heads of power’ upon which the Parliament can legislate. Although the doctrine of legislative supremacy does not operate to the extent that it does in the United Kingdom, given that the Parliament does not enjoy plenary legislative capacity, it is true to say that, within the confines of the heads of power conferred on it, once

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6 Galligan, above n 3.
Parliament has enacted a law it cannot be reviewed on substantive grounds. That is, on the ground that the content of the legislation is, for example, unfair, prejudicial or discriminatory. As Dawson J articulated in *Kruger v Commonwealth*:

> Those who framed the *Australian Constitution* accepted the view that individual rights were on the whole best left to the protection of the common law and the supremacy of parliament. Thus, the *Constitution* deals, almost without exception, with the structure and relationship of government rather than with individual rights.

That being said, although the *Constitution* does not contain a bill of rights, it does contain a limited number of express and implied rights which limit the legislative power. The following section considers the limited bases upon which legislation may be reviewed and invalidated by the judiciary. These bases include that the legislation is ultra vires the relevant head of power, that it is not procedurally valid or that it infringes one of the express or implied constitutional rights. The current formulation of the proportionality test is also outlined.

1 **Requirement for Legislation to be within a Head of Power and Procedurally Valid**

The heads of power which form the basis of the Parliament’s legislative power are largely contained in *Constitution* s 51. One ground upon which the judiciary may invalidate legislation is on the ground that a law is ultra vires the constitutional head of power. Similarly, the judiciary may quash legislation which does not comply with the procedural requirements contained in the *Constitution*.

If the validity of legislation is challenged on the basis that it is beyond the scope of the particular head of power under which it was enacted, an assessment must be made as to whether the subject matter of that law is consistent with the subject matter of the relevant head of power. Once it has been determined that the legislation is intra vires the power, and does not infringe certain rights as discussed on page 18, no further inquiry may be undertaken. This principle arises from the doctrine of parliamentary supremacy. This doctrine establishes the legislature as the supreme law-making body

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8 *Edinburgh & Dalkeith Rly Co v Wauchope* (1842) 8 CI & F 710; 8 ER 279. See also *Herald and Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418, 437.
9 See, eg, *Cheney v Conn* [1968] 1 All ER 779.
10 (1997) 190 CLR 1, 61.
with almost unfettered legislative powers,\footnote{11} and serves to protect the legislature from interference, particularly from the judiciary.\footnote{12} According to Patmore and Thwaites, ‘[p]arliamentary sovereignty means that Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes’.\footnote{13} This applies irrespective of whether the legislation infringes human rights standards or is otherwise oppressive.

In the context of laws enacted under the s 51(vi) defence power this means that, as illustrated by cases such as 	extit{Reid v Sinderberry}\footnote{14} and 	extit{Little v Commonwealth},\footnote{15} the High Court is limited in its review role to simply determining whether the legislation is for defence purposes. It cannot review the substance of legislation and its potential effect on human rights. Judicial review is ‘not intended to take away from [government] authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions’.\footnote{16} As discussed in detail in Chapters II and V of this thesis, the High Court is thus constitutionally required to defer to the legislature on policy aspects regarding the most appropriate action to defend the Commonwealth.

The absence of substantive grounds of review has proven challenging in situations where legislation may be more widely viewed as being inconsistent with accepted human rights standards. For example, in 	extit{Kartinyeri v Commonwealth},\footnote{17} the High Court held that it could not question an Act that legislated for different races on the grounds that it was discriminatory. This is because ‘[i]n the administration of the judicial power ... there are points at which matters of degree seem to bring forth arguments in relation to justice, fairness, morality and propriety, but those are not matters for the judiciary to decide upon’.\footnote{18} Similarly, McHugh J stated in 	extit{Leask v Commonwealth} that ‘[i]f there

\begin{itemize}
  \item \footnote{12} Bede Harris, \textit{Essential Constitutional Law} (Cavendish Publishing Pty Ltd, 2000) 30. It should be noted that, in Australia, the doctrine of parliamentary supremacy does not operate with full effect at the federal level because the Commonwealth Parliament has legislative authority only in respect of defined powers.
  \item \footnote{13} Patmore and Thwaites, above n 11, 6.
  \item \footnote{14} (1944) 68 CLR 504.
  \item \footnote{15} (1947) 75 CLR 94.
  \item \footnote{16} \textit{Chief Constable North Wales Police v Evans} [1982] 3 All ER 141, 145 (Lord Hailsham).
  \item \footnote{17} (1998) 195 CLR 337, 378 (Gummow and Hayne JJ).
  \item \footnote{18} \textit{Burton v Honan} (1952) 86 CLR 169, 179 (Dixon CJ).
\end{itemize}
is a sufficient connection between a subject of federal power and the subject matter of
a federal law, it matters not that the federal law is harsh, oppressive, or inappropriate or
that it is disproportionate or ill adapted to obtain the legislative purpose’. 19 Thus the
judiciary cannot invalidate on substantive grounds legislation which is oppressive or
otherwise inconsistent with established human rights standards. The rationale for the
broad powers of the Parliament was defended by Sir Owen Dixon in an address to the
American Bar Association in 1942:

The framers of the Australian Constitution were not prepared to place fetters upon
legislative action ... [O]ne view held that these checks on legislative action were
undemocratic, because to adopt them argued a want of confidence in the will of the
people. Why, asked the Australian democrats, should doubt be thrown on the wisdom
and safety of entrusting to the chosen representatives of the people sitting either in the
federal Parliament or in the State Parliaments all legislative power, substantially
without fetter or discretion. 20

It should be mentioned that although the courts do not have a power of substantive
review (except in relation to the express and implied rights discussed on page 18), they
may invalidate legislation not enacted in accordance with constitutionally-prescribed
procedures. 21 For example, in Victoria v Commonwealth (the Petroleum and Minerals
Case), 22 it was alleged that legislation was not a ‘proposed law’ within the meaning of
Constitution s 57 due to certain procedural requirements not having been met before it
received Royal assent. Barwick CJ stated that the High Court ‘not only has the power
but, when approached by a litigant with a proper interest so to do, has the duty to
examine whether or not the law-making process prescribed by the Constitution has been
followed’ and to invalidate the legislation where it has not. 23 This offers protection to
the extent that the Parliament must ensure that the democratic process contained in the
Constitution with respect to the process for passing legislation is followed. It is
therefore open to the judiciary to determine whether a law properly falls within the
scope of a particular head of power and is procedurally valid.

20 Quoted in Keyzer, Clarke and Stellios, above n 1, 1157.
22 (1975) 134 CLR 81.
23 Ibid 118.
In addition to the above requirements, legislation must not infringe one of the express or implied constitutional rights. The *Constitution* contains a small number of guarantees of individual rights, and the judiciary is permitted to invalidate legislation that is inconsistent with these rights. It is in this context that the courts are able to undertake a more substantive review of the effect of legislation on human rights. However, as Fitzgerald identifies, these rights are not absolute and are all subject to regulation for a legitimate objective.\(^{24}\) In instances where the judiciary must consider whether legislation infringes an express or implied right, it has developed a proportionality test whereby the interest served by the legislation is balanced with the degree of limitation of the freedom.

While judges and commentators have debated how many ‘rights-protective’ limitations exist in the *Constitution*,\(^{25}\) the following are generally identified. Legislation enacted by the Parliament must not infringe one of these rights, and so even if the legislation falls within a constitutional head of power and is procedurally valid, the judiciary may still invalidate it:

- Section 51(xxxi) which grants the Commonwealth the power to acquire property, but qualifies that the acquisition must be on ‘just terms’.
- Section 80 which provides that the trial on indictment of any offence against any law of the Commonwealth shall be by jury.
- Section 92 which provides that customs, trade, commerce and intercourse among the States shall be free.
- Section 116 which provides that the Commonwealth shall not make any law for establishing any religion or prohibiting the free exercise of any religion, nor impose any religious test for a public office.
- Section 117 which provides that individuals shall not be subject to any disability or discrimination on the basis of their State residence.
- An implied freedom of political communication.\(^{26}\)
- An implied right to vote.\(^{27}\)

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\(^{25}\) Keyzer, Clarke and Stellios, above n 1, 1159.

\(^{26}\) This was developed in cases including *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

\(^{27}\) This was considered in *Roach v Electoral Commissioner* (2007) 233 CLR 162 where the majority held that a law which prevented all prisoners from voting, regardless of the offence committed or the duration of imprisonment, was invalid.
• An implied right to due process pursuant to Constitution Ch III, as discussed in further detail on page 34.

When assessing whether legislation infringes one of the above rights, and is therefore ultra vires and unconstitutional, the judiciary uses a ‘proportionality test’. This test operates by balancing the interest served by the legislation with the degree of limitation of the freedom; with the freedom only being permitted to be limited to an extent that is reasonably necessary to serve the interest.28 This approach allows the judiciary to review the substance of the legislation to determine whether the interest necessitates the limitation of a right. However it is important to note, despite the contrary view,29 that it has not yet developed in Australia to the point where it requires that the measure be the least restrictive means to serve the interest. This is a significant weakness of the current test, as discussed throughout this thesis. In any event, as Fitzgerald points out, in Australia the scarcity of constitutionally guaranteed rights means that the proportionality test can only be activated in rare instances where these specific constitutional legal rights are at issue.30

In terms of the development of the proportionality test, early consideration of the interaction of the concepts of rights and proportionality in Australia occurred in 1943 in the context of the s 116 constitutional freedom of religion. In Adelaide Company of Jehovah’s Witnesses Incorporated v Commonwealth, which is discussed in detail on page 101, Starke J referred to competing interests that needed to be balanced in determining whether s 116 had been infringed.31 While his Honour did not refer explicitly to the term ‘proportionality’, he stated that the critical question is whether the particular law was reasonably necessary for the protection of the community and in the interests of social justice.32 More recently, the proportionality test has commonly been applied in relation to legislation which is alleged to have infringed the implied freedom

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29 See Claire Macken, ‘Preventative Detention in Australian Law: Issues of Interpretation’ (2008) 32 Criminal Law Journal 71, 87, where she described the proportionality test as requiring ‘an assessment as to whether the measure in question is the least restrictive means to achieve a legitimate end’.
30 Fitzgerald, above n 24, 271.
31 (1943) 67 CLR 116, 155.
32 Ibid.
of political communication. Again, while the term ‘proportionality’ may not have been used extensively, it is implicit in the ‘reasonably and appropriately adapted’ test.\(^{33}\)

In 1988 in *Davis v Commonwealth*,\(^ {34}\) Mason CJ and Deane and Gaudron JJ made the following statement outlining how the proportionality test applied to legislation regarding bicentennial celebrations. Fitzgerald argues that with this decision, proportionality consolidated its position in Australian constitutional jurisprudence.\(^ {35}\)

[The legislation] reaches far beyond the legitimate objects sought to be achieved and impinges on freedom of expression by enabling the Authority to regulate the use of common expression ... Although the statutory regime may be related to a constitutionally legitimate end, the provisions in question reach too far. This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power.\(^ {36}\)

This general ‘appropriate and adapted’ test was again used in 1992 in *Australian Capital Television Pty Ltd v Commonwealth*.\(^ {37}\) Here, the Court considered the application of the freedom to the *Political Broadcasts and Political Disclosures Act 1991* (Cth) which regulated the broadcasting of political advertisements in order to prevent potential corruption and undue influence of the political process. Mason CJ accepted that regulating broadcasting to achieve these aims would necessarily involve some restrictions on the dissemination of information, however his Honour explained that whether those restrictions are justified requires a balancing of the public interest in free communication against the competing public interest which the restriction is designed to serve:

If the restriction imposes a burden on free communication that is disproportionate to the attainment of the competing public interest, then the existence of the disproportionate burden indicates that the purpose and effect of the restriction is in fact to impair freedom of communication.\(^ {38}\)

In this instance, the restrictions were held to be disproportionate. Thus, as Fitzgerald summarises, while the legislative objective was accepted as legitimate, the means to achieve that objective represented an unacceptable intrusion on the political

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\(^{33}\) The High Court has stated that there is thought to be no basic difference between the ‘reasonable proportionality’ and ‘reasonably capable of being considered appropriate and adapted’ tests: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562, 567 (fn 272) and *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 252 (Kirby J).

\(^{34}\) (1988) 166 CLR 79.

\(^{35}\) Fitzgerald, above n 24, 283.

\(^{36}\) *Davis v Commonwealth* (1988) 166 CLR 79, 100.

\(^{37}\) (1992) 177 CLR 106.

\(^{38}\) Ibid 143-4.
communication of individuals and were therefore disproportionate.\(^{39}\) McHugh J identified that there were less drastic means available to eradicate the ‘evil’ that the provisions of the legislation were seeking to address,\(^{40}\) although his Honour stopped short of specifically requiring that the means must be the least restrictive on human rights available.

A consistent approach was taken in *Nationwide News Pty Ltd v Wills*,\(^ {41}\) which was handed down the same day. Here, action was brought against the applicant newspaper publisher under *Industrial Relations Act 1988 (Cth)* s 299(1)(d)(ii) which made it an offence to bring a member of the Industrial Relations Commission into disrepute. Section 299(1)(d)(ii) was held invalid because the invasion of the freedom was disproportionate to the need to protect the Commission.\(^ {42}\) Mason CJ stated that ‘the concept of reasonable proportionality is now an accepted test of validity on the issue of ultra vires’.\(^ {43}\) His Honour surmised that in determining whether a law is reasonably and appropriately adapted, it is material to ascertain to what extent the law goes beyond what is reasonably necessary or conceivably desirable for the achievement of the legitimate objective and causes adverse consequences that are unrelated to the achievement of that object.\(^ {44}\) While preserving public confidence in the Commission would enhance the prevention and settlement of interstate industrial disputes through conciliation and arbitration, the means chosen to achieve this were far too restrictive.\(^ {45}\)

In the absence of a bill of rights, Brennan J held that it was not permissible to read down an express grant of legislative power in order to prevent the possibility of its abuse: ‘the court cannot deny the validity of an exercise of a legislative power expressly granted merely on the ground that the law abrogates human rights … which, in the court’s opinion, should be preserved’.\(^ {46}\) His Honour was adamant that ‘[t]he courts are concerned with the extent of legislative power but not with the wisdom or expediency of its exercise’, and warned that if the courts were to assert such a position there would

\(^{39}\) Fitzgerald, above n 24, 274.

\(^{40}\) *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 238.

\(^{41}\) (1992) 177 CLR 1.

\(^{42}\) Ibid 91 (Dawson J).

\(^{43}\) Ibid 29. It is important to note that this comment is confined to the rights limitation context, rather than the characterisation of non-purposive powers more broadly. This is discussed further on page 69.

\(^{44}\) Ibid 30-1.

\(^{45}\) Ibid 31.

\(^{46}\) Ibid 43.
be no logical limit to the grounds on which legislation might be invalidated. As discussed above, this limits the extent to which the High Court can review the merits of a law and invalidate it on substantive grounds. Brennan J discussed ‘the practicability of protection by a less severe curtailment of the freedom …’, but again stopped short of requiring that the means be the least restrictive to human rights to serve the interest.

The proportionality test was further developed in 1997 in the defamation case Lange v Australian Broadcasting Corporation. Here, the High Court set out the following test for when a law is alleged to infringe the constitutional freedom of political communication:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end ... If the first question is answered ‘yes’ and the second is answered ‘no’, the law is invalid.

This test was applied in Levy v Victoria, where the Wildlife (Game) (Hunting Season) Regulations 1994 (Vic), which prohibited entry into an area used for duck hunting without a licence, was held not to be a disproportionate invasion of a protestor’s freedom of political communication on the basis that the restrictions were a reasonable and justifiable limitation to protect the public’s safety. Applying the above test, Dawson J held that while the Regulations did burden the freedom of communication, in that the applicant was prevented from being able to protest about hunting, they were appropriate and adapted to serve the legitimate end of ensuring public safety.

The above cases lead to the development of the current formulation of the proportionality test set out in 2004 in Coleman v Power. In this seminal case, the appellant was charged, among other offences, with using insulting language contrary to the Vagrants, Gaming and Other Offences Act 1931 (Qld) following an altercation with a police officer. He challenged the validity of certain provisions on the basis that they infringed the implied freedom of political communication. Referring to Lange v

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47 Ibid 44.
48 Ibid 51. Significantly, his Honour specifically listed defence and national security as circumstances which may affect the extent to which the freedom can be curtailed.
49 (1997) 189 CLR 520.
50 Ibid 567-8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
51 (1997) 189 CLR 579.
52 Ibid 608-9.
Australian Broadcasting Corporation,\textsuperscript{54} it was held that any limitation on a constitutional right must be reasonably proportionate (or reasonably appropriate and adapted) to serve a legitimate end in a manner that is consistent with the maintenance of the system of representative and responsible government prescribed in the Constitution.\textsuperscript{55} The majority read down the provisions of the legislation to hold that it did not infringe the constitutional right.

Fitzgerald argues that the High Court is willing to critique the legitimacy of a legislative objective, and so the balancing of an individual’s constitutional guarantee against the welfare of the collective is a process that the Court will undertake.\textsuperscript{56} ‘If the government objective does not trump the sanctity of the guarantee, then the objective is not legitimate and any measures pursuing that objective, even though they may be necessary and suitable, are invalid – that is, they are disproportionate in the strict sense’.\textsuperscript{57} Justice Ronald Sackville argues extra-judicially that the case law has resulted in an increase in judicial power over the Parliament.\textsuperscript{58} While he argues that the test of whether a law is ‘reasonably appropriate and adapted to serve a legitimate end’ opens the way for the High Court to apply its own values in determining whether impugned legislation should survive,\textsuperscript{59} as discussed throughout this thesis it is appropriate for the High Court to undertake such an exercise. The Parliament must be held to account when human rights that are as fundamental to a democracy as the right to liberty of the person are at issue.

However, a deficiency of the current proportionality test is that it does not impose a requirement that any limitation on rights be the least restrictive to achieve the objective. As Harris identifies, the words ‘a manner’ in the current test from Coleman v Power\textsuperscript{60} signaled a move away from a requirement that the method used to limit the right be the least invasive available.\textsuperscript{61} Instead, it imposes a far less onerous requirement that the method be just one of any possible methods that might be consistent with the system of

\textsuperscript{54}(1997) 189 CLR 520.
\textsuperscript{55}Coleman v Power (2004) 220 CLR 1, 86 (Kirby J).
\textsuperscript{56}Fitzgerald, above n 24, 273.
\textsuperscript{57}Ibid.
\textsuperscript{59}Ibid.
\textsuperscript{60}(2004) 220 CLR 1, 86 (Kirby J).
government, regardless of whether it was least restrictive.\(^\text{62}\)  This approach has been justified by Heydon J:

The inquiry into whether a law is reasonably appropriate and adapted to achieving a legitimate end does not call for a judicial conclusion that the law is the sole or best means of achieving that end. Apart from the fact that that would be an almost impossible task for which the judiciary is not equipped, this Court has not said anything of the kind ... This Court has only called for an inquiry into whether the law was reasonably appropriate and adapted to serve a legitimate end. This implies that, in a given instance, there may be several ways of achieving that end. It also implies that reasonable minds may differ about which is the most satisfactory.\(^\text{63}\)  

His Honour referred to previous decisions including *Australian Capital Television Pty Ltd v Commonwealth* where it was said that ‘[i]n weighing the respective interests involved and in assessing the necessity for the restriction imposed, the Court will give weight to the legislative judgment on these issues’,\(^\text{64}\)  and *Rann v Olsen* where it was said ‘it is not for the Court to substitute its judgment for that of Parliament as to the best or most appropriate means of achieving the legitimate end’.\(^\text{65}\)  His Honour concluded that ‘[t]he question is not “Is this provision the best?”’, but “Is this provision a reasonably adequate attempt at solving the problem?”’.\(^\text{66}\) Obiter dicta in some recent cases have indicated support for a least invasive limitation of rights requirement. For example, in 2008 in *Betfair Pty Limited v Western Australia*, six members of the High Court held that a limitation on the s 92 freedom of inter-state trade would be disproportionate where it failed a test of necessity - that is, where it went further than was necessary to achieve a legitimate object.\(^\text{67}\)  Similarly, in 2013 in *Attorney-General (SA) v Corporation of the City of Adelaide* Crennan and Keifel JJ pointed to previous formulations of the proportionality test to assert that if the means employed go further than is reasonably necessary to achieve the legislative objective, they will be disproportionate and invalid.\(^\text{68}\) Nevertheless, the proportionality test set out in *Coleman v Power*,\(^\text{69}\)  which does not impose such a requirement, remains the current formulation. Indeed while the approach in *Betfair Pty Limited v Western Australia*\(^\text{70}\)  was discussed

\(^{62}\) Ibid.  
\(^{63}\) Coleman v Power (2004) 220 CLR 1, 123.  
\(^{64}\) (1992) 177 CLR 106, 144 (Mason CJ).  
\(^{65}\) (2000) 76 SASR 450, 483 (Doyle CJ).  
\(^{68}\) (2013) 249 CLR 1, 84. Although, doubt was cast on the development of the principle due to the ambiguity that surrounds it, see, eg, 58-9 (Hayne J).  
\(^{69}\) (2004) 220 CLR 1, 86 (Kirby J).  
as recently as 2014 in *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales*, there was ultimately a rejection of the proposition that the application of the reasonably appropriate and adapted test requires the identification of less restrictive alternatives.\(^{71}\)

The use of the proportionality test in relation to the express and implied constitutional rights is well-established. Lee argues that the application of the proportionality concept in this fashion is similar to that which prevails in jurisdictions where there is an express document of rights,\(^ {72}\) such as those jurisdictions discussed in Chapters V and VI of this thesis. However, unlike in these jurisdictions, Australia’s proportionality test does not require that any limitation on rights be the least restrictive to achieve the objective. Additionally, while the proportionality test is used in relation to legislation alleged to have infringed express and implied constitutional rights, it has limited utility in relation to constitutional interpretation more broadly. ‘If no such right is at stake then proportionality in the strict sense could have no operation, as the legitimacy of any particular government measure or objective outside the constitutional guarantees context is a political question’.\(^ {73}\) Given the limited topics covered by Australia’s constitutional rights, this is a significant weakness. Allan optimistically argues that rights can be derived from the common law:

> The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction. The common law, then, has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal.\(^ {74}\)

This is correct to the extent that some rights, including the right to due process discussed in the following section, have been implied in the *Australian Constitution* by virtue of Australia being a democracy and the requirements of the separation of powers. However, these are tenuous and the absence of explicit constitutionally entrenched rights means that these rights are still subject to some level of control by the legislature.

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\(^{71}\) [2014] HCA 35 (8 October 2014), [46] (French CJ), [152] (Gageler J).


\(^{73}\) Fitzgerald, above n 24, 271.

The need for additional protections for human rights, particularly the right to liberty of the person, is discussed throughout this thesis.

C Rights Protection through the Separation of Judicial Power

Ch III of the Australian Constitution separates judicial power from the legislative and executive powers of the Commonwealth, and ensures that disputes concerning legal rights and obligations are determined by independent judges who are free from control or influence. In the absence of an explicit constitutional right, this separation provides protection of liberty of the person by restricting the circumstances in which a person may be detained without a court order. The separation of judicial power encompasses two elements: that Ch III courts have the exclusive authority to exercise judicial power, and that Ch III courts may only exercise judicial power and so must not discharge non-judicial functions.

The following section discusses the rationale for judicial independence in the context of human rights. This is followed by a discussion of the two elements of the doctrine of separation of judicial power and an analysis of the extent to which it protects a right to due process.

1 Rationale for Judicial Independence

According to Hammond, ‘since the law is for all, the question of whether it has been broken must be objectively and impartially inquired into’. The role of the judiciary, as the branch of the Commonwealth vested with the judicial power, is to undertake that inquiry. The 1915 decision of New South Wales v Commonwealth (The Wheat Case) was the first significant decision to address the separation of judicial power. Here, the High Court recognised the importance of judicial impartiality, and that the object of the constitutional separation of powers would be frustrated through control or interference from the Parliament. Three years later in Waterside Workers’ Federation of Australia
v JW Alexander Ltd, Isaacs and Rich JJ declared that judicial power was concerned with ascertaining, declaring and enforcing existing rights and liabilities. Following these cases, the High Court has been firm in defending the independence of the judiciary and its function in scrutinising legislative and executive actions to ensure that powers exercised are intra vires. It is what Deane J describes as ‘the Constitution’s only general guarantee of due process’. The core meaning of ‘judicial power’ has been said to involve a decision settling for the future a question between identified parties as to the existence of a right or obligation. In 1909 in Huddart Parker and Co Pty Ltd v Moorehead, Griffith CJ described judicial power as being

the power which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

Given that judicial power has often included settling a controversy which relates to human rights, the courts have been described as ‘guardians’ of the Constitution, and indeed of human rights. Thus while on some levels separation between the legislature and executive does not strictly exist in Australia due to the doctrine of responsible government, as famously stated in Montesquieu’s L’Esprit des Lois ‘there is no liberty if the judicial power is not separated from the legislative and executive power’. Holdsworth described the rationale for judicial independence as follows:

The judiciary has separate and autonomous powers as truly the King and Parliament, and in the exercise of those powers, its members are no longer in the position of servants of the King and Parliament in the exercise of their powers ... The judges have powers of this nature because, being interested in the maintenance and supremacy of the law, they are and always have been regarded as a separate and independent part of the constitution.

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79 (1918) 25 CLR 434.
80 Ibid 463.
81 Re Tracey; Ex parte Ryan (1989) 166 CLR 518, 580.
82 R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361, 374 (Kitto J).
83 (1909) 8 CLR 330, 357.
Dickson CJ of the Supreme Court of Canada saw judicial independence as having two purposes: to confer individual judges complete liberty to hear and decide cases, and to enable the courts to fulfil their constitutional role as an independent branch of government charged with protecting the Constitution. In terms of the first purpose, Hammond argues:

Judges are to be removed from the scene of conflict below them; distanced from other sources of power; impartial in their identification of the legal issues at controversy; articulate in their reasoned elaboration of the outcome of the lawsuit before them; and resolute and forthright in their decisions.

Such sentiments have been repeated on many occasions. In R v Kirby; Ex parte Boilermakers' Society of Australia, Viscount Simonds famously acknowledged the importance of the judiciary being free from influence, stating ‘in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive’. It is for this reason that the High Court has insisted on the maintenance of its independence and struck down legislation which purported to infringe on its role, particularly in instances involving deprivation of liberty as discussed in the following section.

2 The Two Elements of Judicial Power

The separation of judicial power encompasses two elements: that Ch III courts have the exclusive authority to exercise judicial power, and that Ch III courts may only exercise judicial power and so must not discharge non-judicial functions. Such principles derive from Constitution s 71 which confers upon Ch III courts the exclusive power to exercise the judicial power of the Commonwealth. These elements seek to reach a balance between maintaining the independence of the judiciary, and ensuring that the executive is protected from judicial interference in relation to particular administrative decisions which are properly made by the executive. According to Winterton, ‘[t]he vital constitutional role of the judiciary as an independent, co-equal branch of government would be compromised if the judicial process were interfered with by

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88 Hammond, above n 76, 88.
89 (1957) 95 CLR 529, 540.
90 Winterton, above n 75, 188.
legislative or executive action …’ 91 These elements are significant as they give rise to the constitutional protection of the right to due process.

(a) **Exclusive Power to Exercise Judicial Functions**

It is a well-established and uncontroversial constitutional law principle that any attempt by the Parliament to vest judicial power or functions in a body other than a Ch III court is invalid.92 This includes a prohibition on the Parliament itself exercising judicial power. This is because ‘[t]o vest in the same body executive as well as judicial power is to remove a vital constitutional safeguard’.93 To this end, Ch III courts enjoy the exclusive authority to exercise the judicial power of the Commonwealth. There have been many instances where the High Court has held attempts by the Parliament to interfere with the exercise of judicial power, or to vest judicial power in non-judicial bodies, as unconstitutional. Some of the most controversial cases have related to executive detention.

In *New South Wales v Commonwealth (Wheat Case)*,94 the *Inter-State Commission Act 1912* (NSW) purported to confer power on the Commission to determine complaints, declare State laws invalid, impose penalties, award damages and grant injunctions. This was considered to be an exercise of judicial power, and since the Commission was not a court established under *Constitution* s 71, the Act was unconstitutional. The application of this principle was more recently demonstrated in *Lane v Morrison*,95 where the High Court held the Australian Military Court to be unconstitutional on the same grounds. Just as the judiciary must remain independent, so too must it retain exclusive control over matters for judicial determination.

The High Court has similarly invalidated legislation which purported to interfere with the judiciary’s exercise of its judicial power. This has included where the legislature has attempted to limit the judiciary’s power to hear particular matters, or where it sought to direct the judiciary to exercise its power in a particular way. In *Australian

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91 Ibid 193.
93 A-G (Commonwealth) v The Queen; Ex parte Boilermakers’ Society of Australia (1957) 95 CLR 529, 540-1.
94 (1915) 20 CLR 54.
Communist Party v Commonwealth,\textsuperscript{96} a seminal case analysed in detail on page 86, the High Court invalidated a law which empowered the Governor-General to make conclusive determinations to ban an organisation. Only the judiciary had the power to conclusively determine whether, based on the facts before it, an organisation satisfied the specific criteria set out in the legislation.\textsuperscript{97} Similarly, in Cormack v Cope, while the Parliament insisted that the passage of certain legislation was in accordance with s 57, the High Court invalidated the legislation and concluded that it, not the Parliament, has the exclusive authority to determine the constitutional validity or otherwise of legislation.\textsuperscript{98} This issue also arises in the context of privative clauses, as discussed on page 53.

Significantly in the context of this thesis, the exclusive power of the judiciary to exercise judicial functions also means that only the judiciary has the power to adjudicate guilt and determine punishment. In 1967 in Liyanage v The Queen,\textsuperscript{99} hearing an appeal from Sri Lanka the Privy Council held that emergency legislation which provided for the special trials of individuals involved in an attempted coup d’etat was invalid. It was held that the process of the appointment of the judges, the rules of evidence governing the trials, and the intent of the legislation to ensure convictions, infringed the separation of judicial power.\textsuperscript{100} Similarly, in 1991 in Polyukhovich v Commonwealth,\textsuperscript{101} the War Crimes Act 1945 (Cth), which retrospectively criminalised war crimes that had been committed outside Australia during WWII, was challenged. The High Court upheld the validity of the legislation, however it did note that a Bill of Attainder which declares a person guilty of a crime and imposes a sanction, or a Bill of Pains and Penalties which imposes a penalty on a person without them having been convicted, would amount to an exercise of judicial power and therefore infringe the separation of powers.\textsuperscript{102} In Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs, Brennan, Deane and Dawson JJ made it clear that:

\textsuperscript{96} (1951) 83 CLR 1.
\textsuperscript{97} Ibid 272-3 (Kitto J).
\textsuperscript{98} (1974) 131 CLR 432, 466 (Gibbs J).
\textsuperscript{99} [1967] 1 AC 259.
\textsuperscript{100} Ibid 277-78 (Lord Pearce)
\textsuperscript{101} (1991) 172 CLR 501.
\textsuperscript{102} Ibid 536 (Mason CJ), 612 (Deane J), 647 (Dawson J), 721 (McHugh J).
the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.\(^\text{103}\)

On this basis, any attempt by the Parliament to authorise detention for punitive purposes, which is not consequent upon the adjudgment of criminal guilt by a court, would be unconstitutional.\(^\text{104}\) However, it is where detention is for non-punitive purposes that this line becomes blurred. In particular, Williams states that there remains ambiguity as to whether the defence power in times of war will support an executive power to make detention orders.\(^\text{105}\) To this end, it can merely be said that in times of peace individuals enjoy constitutional immunity from being imprisoned except where a Ch III court has granted such an order in the exercise of judicial power.\(^\text{106}\) This should extend to the current climate, given that Australia is not at war. The issue of an implied constitutional right to due process is discussed on page 34.

\((b)\) \textit{Restrictions on Courts Exercising Non-Judicial Functions}\(^\text{107}\)

Key to the vesting of the judicial power of the Commonwealth in the judiciary is that the judiciary is restricted to determining ‘matters’ prescribed in \textit{Constitution} Ch III. The judiciary must therefore not discharge non-judicial functions such as giving advisory opinions.\(^\text{107}\) Although, in some cases discussed in this section members of the judiciary were permitted to act in a \textit{persona designata} capacity.

In \textit{Attorney-General (Commonwealth) v The Queen; Ex parte Boilermakers' Society of Australia},\(^\text{108}\) a seminal case on the doctrine of separation of powers, the High Court determined that the only powers the Parliament may vest in the judiciary are those functions that form part of or are incidental to the judicial power of the Commonwealth. According to Winterton, the purpose of this principle is ‘to protect the independence of the federal judges, who must determine the legality of action by the political branches, by freeing them from the supposedly contaminating influence of involvement with

\(^\text{103}\) (1992) 176 CLR 1, 27.
\(^\text{107}\) Re \textit{Judiciary Act 1903 and Navigation Act 1912 (Advisory Opinions Case)} (1921) 29 CLR 257.
\(^\text{108}\) (1957) 95 CLR 529.
government policy and other non-judicial issues’. It follows that vesting non-judicial functions in courts is invalid. For example, in *Kable v Director of Public Prosecutions (NSW)* the majority held that the *Community Protection Act 1994* (NSW), which conferred on the Supreme Court of New South Wales the power to order the preventative detention of the appellant, was invalid because the function of issuing such an order without adjudication of criminal guilt was incompatible with the judicial power of the Commonwealth, which that court exercises from time to time.

It has been recognised that there are exceptions to this general principle. Specifically, in 1985 in *Hilton v Wells*, it was held that a judge is permitted to discharge non-judicial functions when they are acting *persona designata*. In this case, the *Telecommunications (Interception) Act 1979* (Cth) conferred upon ‘a Judge of the Federal Court of Australia’ the power to issue warrants authorising the interception of telecommunications on behalf of the executive. Gibbs CJ and Wilson and Dawson JJ determined that while this was an administrative power, unlike in *Kable v Director of Public Prosecutions (NSW)*, conferral was not on the Court itself but on an individual judge personally. Their Honours endorsed the following statement of Bowen CJ and Deane J:

> There is nothing in the *Constitution* which precludes a justice of the High Court or a judge of this or any other court created by the Parliament under Ch III of the *Constitution* from, in his personal capacity, being appointed to an office involving the performance of administrative or executive functions including functions which are quasi judicial in their nature. Such an appointment does not involve any impermissible attempt to confer upon a Ch III court functions which are antithetical to the exercise of judicial power.

Ten years later in *Grollo v Palmer* the High Court affirmed this principle but held that there were limits to a judge’s ability to act *persona designata*, including that ‘no function can be conferred that is incompatible either with the judge’s performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities’.

For example, it was held in *Wilson v Minister for Aboriginal and

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109 Winterton, above n 75, 188.
110 (1996) 189 CLR 51, 98 (Toohey J), 107 (Gaudron J), 109 (McHugh J), 127-8 (Gummow J).
112 (1996) 189 CLR 51.
113 (1985) 157 CLR 57, 73.
Torres Strait Islander Affairs\textsuperscript{116} that the appointment of a Federal Court judge as a reporter was incompatible with the Federal Court’s responsibility to exercise the judicial power of the Commonwealth given that it was essentially a political position. This rule was applied in the motorcycle gang case \textit{Wainohu v New South Wales},\textsuperscript{117} which concerned the capacity of Supreme Court judges to declare an organisation a ‘declared organisation’ for the purposes of the \textit{Crimes (Criminal Organisations Control) Act 2009} (NSW) and subsequently make control orders against members. The legislation was held invalid on the basis that the performance of roles by State judges personally was incompatible with or repugnant to the institutional integrity of the court.\textsuperscript{118}

The general principle has been criticised judicially and in academia as being no more than a charade, given that a judge is requested to undertake that function because he or she is in fact a judge. According to Mason and Deane JJ:

\begin{quote}
To the intelligent observer ... it would come as a surprise to learn that a judge, who is appointed to carry out a function by reference to his judicial office and who carries it out in his court with the assistance of its staff, services and facilities, is not acting as a judge at all but as a private individual. Such an observer might well think, with some degree of justification, that it is all an elaborate charade.\textsuperscript{119}
\end{quote}

Such arrangements also put at risk the separation of powers through blurring the lines between the roles of those that create, administer and interpret the laws. Zines argues that decisions such as \textit{Hilton v Wells}\textsuperscript{120} seem to have missed the major point from \textit{Attorney-General (Commonwealth) v The Queen; Ex parte Boilermakers' Society of Australia},\textsuperscript{121} about the dangers to the standing, independence and impartiality of the courts arising from the mixture of judicial and non-judicial powers in the same person.\textsuperscript{122} Hammond quotes Bayda CJ of the Supreme Court of Canada:

\begin{quote}
To the extent that the courts make law [or, it might be interpolated, assert fundamental rights] judges will be incorporated into the ruling coalition, the ruling elite, the responsible representatives of the people, or however else the political regime may be expressed. In most societies this presents no problem at all because judging is only one of the many tasks of the governing cadre. In societies that seek to create independent
\end{quote}

\textsuperscript{116} (1996) 189 CLR 1.
\textsuperscript{117} (2011) 243 CLR 181.
\textsuperscript{118} Ibid 228-9 (Gummow, Hayne, Crennan and Bell JJ).
\textsuperscript{119} \textit{Hilton v Wells} (1985) 157 CLR 57, 83-4.
\textsuperscript{120} Ibid.
\textsuperscript{121} (1957) 95 CLR 529.
\textsuperscript{122} Leslie Zines, \textit{The High Court and the Constitution} (Butterworths, 4th ed, 1997) 263-4.
judiciaries, however, this reintegration will nonetheless occur, even at substantial costs to the proclaimed goal of judicial independence.\textsuperscript{123}

Lynch and Reilly make the interesting argument that while there may be a positive motivation for using the judiciary to make orders, ‘the more often the executive uses judicial independence to bolster the legitimacy of its actions, and the more often the judiciary participate in processes that are not judicial in nature, the more eroded judicial independence becomes’.\textsuperscript{124}

By contrast, the Hon Tim Carmody, writing extra-judicially, states that individual judges have a right, and maybe even a duty, to act in their private capacities for the benefit of the community, provided that their conduct is not incompatible with their judicial role and function.\textsuperscript{125} Such a proposition that a judge may have a duty stretches the \textit{persona designata} concept too far, given that any function would be secondary to the judge’s primary role as a judicial officer and permissible in very limited circumstances. This issue is relevant in the context of judges issuing orders under the anti-terrorism legislation on a \textit{persona designata} basis, as discussed in Chapter III of this thesis.

3 \textit{Due Process and Executive Detention}

As detailed above, part of the judiciary’s exclusive power to exercise judicial functions is the power to adjudicate guilt and determine punishment, and this is significant in terms of human rights protection to the extent that this gives rise to a general guarantee of due process.\textsuperscript{126} The exclusive power is fundamental in a democracy and can be traced back to the Magna Carta which was inherited by Australia through the common law and still applies today.\textsuperscript{127} However, Lynch and Reilly argue that while authorities in the mid-1990s suggested that the strict separation of judicial power in Ch III provides fairly clear limits on powers of detention, more recent decisions have cast doubt on the extent to which the constitutional implication restricts the power to detain outside of normal criminal law processes of trial and punishment.\textsuperscript{128} Most commonly, the High

\begin{itemize}
\item \textsuperscript{123} Quoted in Hammond, above n 76, 90.
\item \textsuperscript{124} Lynch and Reilly, above n 5, 109.
\item \textsuperscript{125} Tim Carmody, ‘Rethinking Federal Sentencing Aims and Options for Terrorists’ (2006) 80 \textit{Australian Law Journal} 839, 841.
\item \textsuperscript{126} \textit{Re Tracey; Ex parte Ryan} (1989) 166 CLR 518, 580 (Deane J).
\item \textsuperscript{128} Lynch and Reilly, above n 5, 109.
\end{itemize}
Court has considered attempts by the Parliament to interfere with its exclusive power in the context of the detention of unlawful non-citizens under the migration legislation.\textsuperscript{129}

Australia does not have an express right to due process in its \textit{Constitution}.\textsuperscript{130} Indeed, during the Conventions for the drafting of the \textit{Constitution}, then Tasmanian Attorney-General Andrew Inglis Clark proposed the inclusion of a constitutional guarantee that a State not be able to ‘deprive any person of life, liberty or property without due process of law’.\textsuperscript{131} However, during the 1898 Convention in Melbourne, there was opposition to rights guarantees which would affect the legislative powers of the State, particularly the due process guarantee.\textsuperscript{132} Despite this, the right to due process is said to arise from ‘silent constitutional principles’ that are part of Australia’s heritage, including the Magna Carta.\textsuperscript{133} According to McClelland, unquestionably the most significant clause of the Magna Carta is contained in Article 39 which has been interpreted as saying: ‘No freeman shall be taken or imprisoned or disseised, or outlawed, or exiled, or in any wise destroyed, nor shall we go upon him, nor send upon him, but by the lawful judgement of his peers or by the law of the land’.\textsuperscript{134} It follows that, as provided by Deane J in \textit{Kiowa v West}, ‘[n]either public officer not private person can physically detain or deal with his or her person or property without his or her consent except under and in accordance with the positive authority of the law’.\textsuperscript{135} When used in conjunction with the writ of habeas corpus, which is discussed in detail in Chapter VI of this thesis, it is significant in terms of protection from arbitrary actions by the executive.

In terms of its modern application, according to Bateman, early attempts to establish a constitutional due process principle relied upon the separation of judicial power and

\begin{footnotesize}
\begin{enumerate}
\item[129] Generally, the detention of unlawful non-citizens by the executive is considered a valid exercise under the s 51(xix) aliens power in the \textit{Constitution}. A number of key cases, including \textit{Polyukhovich v Commonwealth}, (1991) 172 CLR 501, \textit{Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs} (1992) 176 CLR 1; \textit{Al-Kateb v Godwin} (2004) 219 CLR 562, have addressed the precise scope of this power in light of the right to due process which Ch III guarantees.
\item[130] In \textit{Kruger v Commonwealth} (1997) 190 CLR 1, 68, Dawson J (with whom McHugh J agreed) stated that the \textit{Constitution} contains no general guarantee of due process of the law.
\item[132] Ibid.
\item[134] Ibid.
\item[135] (1985) 159 CLR 550, 631.
\end{enumerate}
\end{footnotesize}
operated within the doctrinal framework provided by *Attorney-General (Commonwealth) v The Queen; Ex parte Boilermakers’ Society of Australia*. 136 Speaking extra-judicially, the Hon Tim Carmody states that arbitrary punishment, including confinement without conviction in ordinary judicial proceedings, infringes the separation of power by substituting a legislative judgment of guilt for the judgment of the courts exercising federal judicial power. 137 It is therefore not available as a social control mechanism. 138 While the High Court has recognised an implied guarantee of due process in a number of cases during the past two decades, 139 opinions about the content of this principle have varied. 140 The right can be seen in the decision that the separation of judicial power prevents any Bill of Attainder or Bill of Pains and Penalties, the discretion of courts to stay proceedings where it would otherwise result in an unfair trial, and in the restrictions on legislation which permit executive detention for the purpose of punishment when guilt has not been judicially determined. 141 The Hon Michael McHugh, writing extra-judicially, argues that over time the interpretation of Ch III has revealed a number of procedural and substantive due process rights. 142

In relation to procedural due process, a procedural right is a right of access to a method of enforcing substantive rights and duties. 143 Procedural due process is generally understood as relating to issues that are relevant in the conduct of proceedings such as the requirement that an adversarial trial ‘is conducted by an independent and impartial tribunal’. 144 In *Dietrich v The Queen*, which concerned a plaintiff’s right to legal representation, Gaudron J stated that ‘the requirement that a trial be fair is not one that impinges on the substantive law governing the matter in issue’ but instead ‘on evidentiary and procedural rules’. 145 However, Bateman argues that attempts to

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137 Carmody, above n 125, 841-2.
138 Ibid 841.
141 McClelland, above n 133, 8.
143 Ibid 35.
develop a concept of judicial power that includes a minimum standard of procedural fairness ‘has failed to gain significant doctrinal traction, and the status of procedural due process principles under the Commonwealth Constitution remains unsettled’.  

Notably, there remains debate as to whether there is an implied constitutional right to a fair trial in Australia at a federal level, although in Barton v The Queen there are references to the right to a fair trial and the inherent jurisdiction Australian courts possess to stay proceedings which are an abuse of process. The Hon Michael McHugh extra-judicially argues that apart from the s 75(v) right to obtain prerogative relief against Commonwealth officers, which is discussed in the following section, these procedural rights may be legislatively restricted without contravening Ch III.

Nevertheless, perhaps a more important aspect of any right to due process relates to the right of an individual to not be subject to executive detention for the purpose of punishment other than by an order of a court following a determination of guilt. Such is a more substantive right and derives from one or both of the elements of judicial power outlined in the previous sub-section. As Keyzer discusses, the exclusive power of the judiciary to judge and punish criminal guilt is a mechanism for ensuring due process. It follows that ‘[i]t is when the legislature itself, expressly or impliedly, determines the guilt or innocence of an individual that there is an interference with the process of the court’. It is submitted that no procedural or substantive due process right is more significant than the substantive right of freedom from detention except pursuant to judgment by a court. It is this substantive right that is the primary focus of this thesis, although comment is also made, in the context of the anti-terrorism legislation, on other procedural rights such as the right to legal representation.

The notion of ‘due process’ in the context of executive detention in Australia can be seen in cases such as Adler v District Court of NSW, where the Court rejected the argument that the applicant could be imprisoned ‘without being brought in answer by

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146 Bateman, above n 136, 411.
148 (1980) 147 CLR 75, 104-7 (Stephen J).
149 McHugh, ‘Does Chapter III of the Constitution Protect Substantive as well as Procedural Rights?’, above n 142, 35.
151 Polyukhovich v Commonwealth 172 CLR 501, 649 (Dawson J).
due process of law’. 152 Similarly, in Re Tracey; Ex parte Ryan, discussed on page 84, Deane J stated that the judicial power of trial and punishment of a person must only be undertaken by a Ch III court, subject to limited exception including, in this instance, the military justice system. 153 His Honour discussed how the power to adjudge guilt and determine punishment for a breach of law, and to decide controversies about existing rights and liberties, all fall within the concept of judicial power. 154 To this end, despite the fact that the judiciary does not enjoy a general power of review, as a general proposition the judiciary almost exclusively has the power to determine the guilt and punishment of individuals. Recognised exceptions relate to detention for non-punitive purposes where detention is unrelated to a finding of guilt. For example, in cases of bail pending trial, mental illness or infectious diseases where the purpose is protection of the community and is not necessarily reliant on the exercise of judicial power. 155

Despite this, Winterton argues that the reasoning of the justices in some decisions regarding the validity of executive detention is quite weak because it is based on the assumption that all involuntary detention, apart from the recognised exceptions, is necessarily punitive. 156 Winterton refers to the comments of Gaudron J in Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs, where she stated that she was

not presently persuaded that legislation authorising detention in circumstances involving no breach of the criminal law and travelling beyond presently accepted categories is necessarily and inevitably offensive to Ch III. 157

In this case, the plaintiffs were Cambodian nationals who were detained as ‘designated persons’ for not having valid entry permits. Migration Act 1958 (Cth) s 54P required removal of a designated person ‘as soon as practicable’ if the person asked to be removed from Australia. Section 54L required designated persons to be kept in custody and only released if they were to be removed under s 54P or given an entry permit. The

154 Ibid 580.
155 Carmody, above n 125, 842. In Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1, 28 (Brennan, Deane and Dawson JJ), it was stated that ‘[s]uch committal to custody awaiting trial is not seen by the law as punitive or as appertaining exclusively to judicial power … Involuntary detention in cases of mental illness or infectious disease can also legitimately be seen as non-punitive in character and as not necessarily involving the exercise of judicial power.’
156 Winterton, above n 75, 192-3.
157 (1992) 176 CLR 1, 55.
High Court considered that these provisions were valid in their application to the plaintiffs and did not infringe Ch III. In summary, it was accepted that the s 51 ‘aliens’ power authorised laws for the expulsion and deportation of aliens by the executive and for the executive to detain aliens in order to make the deportation effective. The object of custody was non-punitive because the purpose of detainment was to ensure that designated persons were supervised until the person’s application could be received, investigated and determined.\(^\text{158}\) However, Brennan, Deane and Dawson JJ restricted this principle, stating that the provisions are limited ‘to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered’.\(^\text{159}\) If it is not so limited, ‘the authority which they purportedly confer upon the executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien’.\(^\text{160}\) Gaudron J went on to state that a law cannot allow detention by the executive that is ‘not appropriate and adapted to regulating entry or facilitating departure as and when required’.\(^\text{161}\) Thus if detention is punitive in nature, in that it goes beyond what is reasonably necessary (or appropriate and adapted) to achieve a non-punitive objective, it will be unconstitutional.\(^\text{162}\) This case is discussed further on page 56 in the context of privative clauses.

In a narrow majority comprising McHugh, Hayne, Callinan and Heydon JJ, the High Court reached the same conclusion on this issue in Al-Kateb v Godwin,\(^\text{163}\) although revised wording of the legislation resulted in different reasoning. Here, the applicant was a Palestinian born in Kuwait. His application for a temporary protection visa was rejected and he was consequently classified as an unlawful non-citizen. Migration Act 1958 (Cth) s 196 provided that unlawful citizens could only be released from immigration detention if they were granted a visa, deported or removed from Australia. The applicant declared that he wished to return to Kuwait or Gaza, however no country would take him due to his Palestinian background. He was subsequently detained under the mandatory detention policy of stateless persons. The applicant applied to the Federal Court, demanding that immigration officials comply with s 198, which required

\(^{158}\) Ibid 32 (Brennan, Deane and Dawson JJ).
\(^{159}\) Ibid 33.
\(^{160}\) Ibid 33.
\(^{161}\) Ibid 57.
\(^{162}\) Ibid 71 (McHugh J).
that officials ‘remove as soon as reasonably practicable an unlawful citizen’. The Federal Court rejected his application, despite concluding that ‘removal from Australia is not reasonably practicable at the present time as there is no real likelihood or prospect of removal in the reasonably foreseeable future’.164 The applicant appealed again when a case with substantially identical facts, Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs165 resulted in the release of the detainee, and Al-Kateb’s appeal was removed to the High Court.166

The applicants argued that ss 196 and 198 only permitted the detention of unlawful non-citizens while their removal was a practicable possibility, and if removal was not practically possible, they should be released. The Minister argued that the effect of the provisions were that unlawful non-citizens should be kept in detention as long as necessary to remove them, and that this did not cease just because it was not practicable in the foreseeable future to carry out that purpose. It was held that the provisions did permit indefinite detention and as such was not unconstitutional. McHugh J, while acknowledging that the outcome for the applicant was ‘tragic’, held that the Act was clear in expressing the Parliament’s intention for detention to continue until one of the conditions is satisfied, being removal, deportation or the grant of a visa.167 Looking to the construction of the provisions, Hayne J considered that the phrase ‘as soon as reasonably practicable’ assumes that the event concerned can happen and therefore the issue is when, not whether, it will happen:

What follows is that the most that could ever be said in a particular case where it is not now, and has not been, reasonably practicable to effect removal, is that there is now no country which will receive a particular non-citizen whom Australia seeks to remove, and it cannot now be predicted when that will happen. Nor is it to say that the time for performing the duty imposed by s 198 has come. The duty remains unperformed: it has not yet been practicable to effect removal. That is not to say that it will never happen.168

On the issue of the constitutionality of the provisions, McHugh J did not consider that the continued detention of a person who cannot be deported immediately infringes Ch III and is therefore unconstitutional:

As long as the purpose of the detention is to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community, the detention

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166 This occurred following an application by the Attorney-General under Judiciary Act 1903 (Cth) s 40.
168 Ibid 639.
is non-punitive. The Parliament of the Commonwealth is entitled, in accordance with the power conferred by s 51(xix) and without infringing Ch III of the Constitution, to take such steps as are likely to ensure that unlawful non-citizens do not enter Australia or become part of the Australian community and that they are available for deportation when that becomes practicable.169

Hayne J described the purpose of the detention as not being for an offence, but rather for the purpose of excluding that person from the community which he or she sought to enter.170 Despite the potential for the detention to be indefinite, detention on such grounds was non-punitive and within the power of the executive.

The outcomes of the above cases support the proposition that only the judiciary may adjudicate guilt and impose a punishment on individuals, so that any attempt by the legislature or executive to do so will constitute an invalid exercise of judicial power. Lynch and Reilly argue that ‘there is, and must be, an inherent constitutional limit to the type of detention that can ever be sanctioned in a constitutional democracy such as Australia’.171 However, the above cases also demonstrate the limitations of the current concept of a right to due process where detention is for non-punitive purposes, such as for migration or community protection purposes. Zines argues that attempts by the Parliament to effectively impose punishment administratively or legislatively by imposing harsh prospective liabilities or duties without determination of guilt can be ‘disguised’.172 Perhaps most pessimistically, Chief Justice French notes extra-judicially that while the right not to be deprived of liberty exists at common law, it can be modified or extinguished by the Parliament.173 Thus there is an indeterminate and vulnerable basis on which the High Court can invalidate legislation and administrative decisions which infringe the due process rights of individuals. The risks posed by this are discussed further in Chapters III and IV of this thesis in the context of the anti-terrorism legislation. In Chapter V, while an implied constitutional right to due process is used as the basis for a proposal for a modified proportionality test, the tenuous nature of this right is recognised as a weakness of this strategy in protecting the right to liberty of the person. A more in-depth discussion of due process is contained in Chapter VI, where a constitutional amendment is proposed in order to address such issues.

169 Ibid 584.
170 Ibid 650.
171 Lynch and Reilly, above n 5, 111.
172 Zines, above n 122, 283.
Even if legislation is sufficiently within a constitutional power, decisions made by members of the executive under that legislation may nevertheless be judicially challenged, including through the entrenched jurisdiction offered by Constitution s 75(v). Executive decision-making necessarily involves the identification of facts and interpretation and application of the law; all of which comprise an element of discretion. It is therefore appropriate for the judiciary to review such actions. However, the purpose of the review is not to usurp the powers of decision-makers but to merely supervise their exercise. This is because judicial review ‘is not an appeal from a decision, but a review of the manner in which the decision was made’. There are thus restrictions on the basis upon which the judiciary can review the merits of a decision and invalidate it on substantive grounds, such as on the basis that it is unfair or discriminatory. According to Creyke and McMillan, merits review can involve a review of the facts and policies that support a decision, and these are not functions of the judiciary which is tasked with only looking at whether government decisions are lawfully taken.

The following section outlines the scope of s 75(v), including the extent to which it grants the judiciary the power to review and invalidate administrative decisions. It addresses whether the writ of habeas corpus is available under s 75(v) and the extent to which s 75(v) permits review of decisions on the basis of unreasonableness. Finally, it discusses the High Court’s approach to privative clauses where the legislature has attempted to limit judicial review of administrative decisions.

Section 75(v) of the Constitution and Jurisdictional Error

Section 75(v) is of great significance in Australia’s federal structure as an ‘entrenched minimum provision of judicial review’, and guarantee of the rule of law. It confers original jurisdiction on the High Court in respect of ‘all matters in which a writ of

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175 Chief Constable North Wales Police v Evans [1982] 3 All ER 141, 155 (Lord Brightman).
Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth’. Its object is to prevent officers of the Commonwealth from exceeding federal power and to ensure that administrative decision-makers act within the limits of the power conferred upon them.178

Section 75(v) is significant in terms of the power to judicially review executive decisions. In Bank of New South Wales v Commonwealth Dixon J explained that the purpose of the inclusion of s 75(v) was ‘to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding their power’.179 Section 75(v) is important in guaranteeing adherence to the rule of law, with Gleeson CJ stating in Plaintiff S157/2002 v Commonwealth, that it ‘is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them’.180 Gleeson J went on to describe how under the Constitution the High Court is the ultimate decision-maker in all matters in which there is a dispute, and to this end s 75(v) limits the powers of the legislature and the executive to avoid, or confine, judicial review.181 ‘Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted’.182 In the context of the doctrine of separation of powers, s 75(v) requires that only the courts may finally determine the legal rights and duties of an individual, but must not exercise legislative or executive power in doing so.183

Section 75(v) allows an individual to seek remedy through requesting that the High Court issue a constitutional writ. It specifically refers to the writs of mandamus, prohibition and injunction which all aim to control unlawful action in a different way.184 Mandamus compels a public official to perform a public duty while an injunction can

179 (1948) 76 CLR 1, 370.
181 Ibid.
182 Ibid 483.
184 Creyke and McMillan, above n 176, 41.
either compel or restrain certain conduct. Prohibition prevents a body from engaging in conduct which is outside its jurisdiction. Additionally, while s 75(v) does not refer to the writ of habeas corpus, which is discussed in detail in Chapter VI of this thesis, Chief Justice French has indicated extra-judicially that in his opinion ‘[t]he power to grant all necessary remedies in the exercise of the jurisdiction conferred by s 75(v) may be implied from the grant and extends to remedies other than those which define the jurisdiction provided that they are ancillary to it’. 185 Indeed, during the second constitutional convention in 1898, Barton sought to alleviate concerns regarding its omission by stating ‘[a] writ of habeas corpus is a common law writ, in regard to which you have no trouble as to its service’. 186 Finally, s 75(v) has been held to extend to certiorari in instances of jurisdictional error. 187 Certiorari is a process by which a superior court supervises the acts of an inferior court or tribunal, and enables that superior court to quash a decision where there has been failure to observe procedural fairness, fraud, error of law on the face of the record or jurisdictional error. 188

Jurisdictional error relates to the question of whether the decision-maker had the legal authority to make a decision. It does not embrace in any broad sense a review of whether a decision is correct or preferable on the facts, which is the focus of merits review. 189 It arises ‘if the decision-maker makes a decision outside the limits of the function and power conferred on him or her, or does something which he or she lacks power to do’. 190 Jurisdictional error was described by Lord Reid in Anisminic Ltd v Foreign Compensation Commission in the following well-known passage:

there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decide some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under

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185 French, ‘Constitutional Review of Executive Decisions’, above n 178, 11. The power to order habeas corpus has been conferred on the High Court by Judiciary Act 1903 (Cth) s 32.
186 Official Record of the Debates of the Australasian Federal Convention, Melbourne, 4 March 1898, vol 2, 1884 (Edmund Barton).
188 Craig v South Australia (1995) 184 CLR 163, 175-6 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).
189 Creyke and McMillan, above n 176, 41.
190 Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82, 141 (Hayne J).
the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.191

Thus, generally speaking, jurisdictional error may include a failure to observe a requirement of procedural fairness,192 or acting in excess of the powers conferred by the enabling legislation. As Dixon J indicated in *Shrimpton v Commonwealth*, complete freedom from legal control is a quality which cannot be given under the Constitution to a discretion, because its exercise may go outside the power from which the law or regulation conferring the discretion derives its force.193 Thus according to French CJ in *Minister for Immigration v Li*, every statutory discretion, however broad, is constrained by the subject matter, scope and purpose of the legislation under which it is conferred.194 Consistent with Lord Reid’s statement, key cases on this issue confirm that invalidating a decision on the grounds of jurisdictional error falls short of constituting substantive review of the merits of a decision.

In *Craig v South Australia*,195 the appellant had been successful in an order to stay criminal proceedings against him until he could be provided with legal representation at public expense. South Australia sought an order in the nature of certiorari to quash the order staying the proceedings and an order in the nature of mandamus to compel the trial judge to try the matter. In finding for the respondent, the High Court stated that if the trial judge fell into error in assessing the effect of a previous decision or in concluding that the appellant’s inability to obtain legal representation was through no fault of his own, that error was within jurisdiction and did not constitute jurisdictional error for the purposes of certiorari.196 This is consistent with Lord Reid’s statement above that a decision-maker is as entitled to decide a question wrongly as it is to decide it rightly. To this end, the judiciary restrained itself from considering the merits of the decision and undertaking substantive review. As explained by Gleeson CJ, jurisdiction under s 75(v) ‘does not exist for the purpose of enabling the judicial branch to impose

192 This includes the requirements that a person adversely affected by a decision must be given the opportunity to respond, and that the decision-maker must be impartial.
193 (1945) 69 CLR 613, 629-30.
196 Ibid 186.
upon the executive branch its ideas of good administration’. The issue of the judiciary reviewing the merits of a decision is discussed at length in this thesis.

An important principle in the context of jurisdictional error and the protection of human rights is the principle of legality, which has the effect of setting limits on the power of the executive to make decisions which interfere with human rights where the law does not explicitly permit such interference. In *Coco v The Queen*, Invasion of Privacy Act 1971 (Qld) s 43 made it an offence to use a listening device except where inter alia a Supreme Court had issued an ‘approval’. Police officers posing as telephone line workers installed a listening device on the applicant’s premises, and the applicant was subsequently convicted of a crime on the basis of evidence obtained through that device. The High Court looked to whether the approval granted to the police officers by the Supreme Court involved jurisdictional error. In a joint judgment, Mason CJ and Brennan, Gaudron and McHugh JJ recognised that the right to exclude others from private property is a fundamental common law right and therefore ‘[s]tatutory authority to engage in what would otherwise be tortious conduct must be clearly expressed in unmistakable and unambiguous language’. Their Honours stated that

> it has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorize what would otherwise have been tortious conduct. But the presumption is rebuttable and will be displaced if there is a clear implication that authority to enter or remain upon private property was intended (footnotes omitted).

This approach, which is known as the principle of legality, is not new, but can be traced from the writings of philosophers and jurists including Montesquieu, Beccaria, Blackstone, Feuerbach and Dicey. In 1805 in *United States v Fisher* it was said that ‘[w]here rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects’. In *Coco v The Queen*, the High Court held that there was no clear expression of unmistakable and unambiguous intention in the legislation to confer the Supreme Court with the power to authorise conduct which would otherwise amount to

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197 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 12.
199 Ibid 436.
200 Ibid.
201 6 US (2 Cranch) 358, 390 (1805).
This was particularly given that the legislative regime intended to protect persons from invasions of privacy. Such an approach was confirmed in *Plaintiff S157/2002 v Commonwealth*, where it was said that when reviewing legislation to determine the intention of the legislature, courts will look for ‘a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment’. The rationale is that there is a risk that the full implications of ambiguous words may not have been anticipated during the legislative process. To this end, while the judiciary does not have the power to invalidate legislation which is inconsistent with accepted human rights standards, it will invalidate decisions where the enabling legislation does not clearly express its intention to infringe liberties. Requiring the legislation upon which the decision is made to meet a higher threshold when rights are infringed offers limited protection of human rights.

The need to consider human rights has been the subject of jurisprudence in recent decades. In *Evans v New South Wales*, it was said that ‘[w]hatever debate there may be about particular rights there is little scope, even in contemporary society, for disputing that personal liberty ... is regarded as fundamental subject to reasonable regulation for the purposes of an ordered society’ However, while the judiciary may have shown willingness to take notice of human rights issues when reviewing decisions, s 75(v) still does not permit substantive review of the merits of legislation and decisions made under it. As discussed above, it is the function of the Parliament, not the judiciary, to determine issues of policy. Judicial review is generally seen as ‘neither more nor less than the enforcement of the rule of law over executive action’ and as ‘the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law’. Lacey discussed the benefits of the principle of legality, including that it draws attention to the process of justification and accountability that the Parliament must participate in if it wishes to interfere with common law freedoms. However, if the Parliament is clear in its intentions to restrict freedoms,
then the principle of legality offers no protection. Davis correctly argues that judicial subservience to the will of the executive is problematic in this context because it sanctions present abuses of civil liberties and sets a dangerous precedent for the future. However, despite these arguments, under the present system the judiciary has no choice. In the context of the anti-terrorism legislation, as discussed further in Chapter III of this thesis, while s 75(v) review may be available, its effectiveness is limited.

2 ‘Unreasonableness’ as a Ground of Substantive Review

While review on the basis of jurisdictional error under s 75(v) does not strictly amount to merits review, there are instances where s 75(v) review does arguably extend to focus on matters of substance where review is based on an error within jurisdiction – where the decision-maker did have the authority to make the decision, but it is alleged that the decision was unreasonable. In 1948 in Associated Provincial Picture Houses Ltd v Wednesbury Corporation, the seminal case on this issue, Lord Greene of the English Court of Appeal (with Lord Justice Sumervell and Singleton J concurring) determined that decisions could be ultra vires if they were ‘so unreasonable that no reasonable authority could have ever come to it’. This approach has been confirmed by the High Court of Australia, however it has been careful to distinguish review on the grounds of unreasonableness with merits review. According to Mason J in Minister for Aboriginal Affairs v Peko-Wallsend Ltd, when reviewing decisions on the grounds of unreasonableness ‘a court should proceed with caution... lest it exceed its supervisory role by reviewing the decision on its merits’.

In Associated Provincial Picture Houses Ltd v Wednesbury Corporation, a condition was attached to the licence of a cinema owner that prevented the admission of any child

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209 The principle of legality is also discussed on page 59 in the context of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth).
211 In Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82, 163. Hayne J described the difference between jurisdictional error and error in the exercise of jurisdiction (including unreasonableness) as the former involving a decision-maker making a decision outside their power, and the latter involving the decision-maker incorrectly deciding something which he or she is authorised to decide.
212 [1948] 1 KB 223, 234.
213 (1986) 162 CLR 24, 42.
214 [1948] 1 KB 223.
under 15 years of age. The plaintiff argued that such a condition was ultra vires and unreasonable. The plaintiff referred to *R v Burnley Justices; Ex parte Longmore* where a condition attached to a licence that stated that no film was to be exhibited to which objection was taken by any three of the licensing justices was held to be ‘so uncertain in its operation that it is invalid’. The English Court of Appeal found in favour of the plaintiff, with Lord Greene proposing that ‘if a decision on a competent matter is so unreasonable that no reasonable authority could ever come to it then the court can interfere’. It has been argued by commentators that through this statement Lord Greene meant unreasonableness to be an independent substantive ground of review. However, Lord Greene was careful to emphasise that in order to establish unreasonableness, it is necessary for a decision to be manifestly absurd. As such, his Honour was careful to limit the availability of such a ground of review to extreme cases.

Australian courts have generally adopted Lord Greene’s definition, although the High Court has been careful to distinguish unreasonableness from merits review. Unreasonableness as a ground of review has been the subject of extensive discussion in the context of decisions made under the *Migration Act 1958* (Cth). In 1989 in *Chan v Minister for Immigration and Ethnic Affairs*, a Chinese national challenged the decision of the Minister to not grant him an entry permit. The Act empowered the Minister to grant a permit if an applicant had ‘a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’. While the Minister acknowledged that the plaintiff may have been discriminated against to a limited degree, he was not satisfied that this constituted a well founded fear of persecution for the purposes of the Act. In the circumstances, the High Court concluded that it was unreasonable for the Minister to determine that the plaintiff should not be granted refugee status. Mason CJ reiterated that although it was not the function of the Court to review the delegate’s decision on the merits, the Court was bound to set aside the decision if it was ‘so unreasonable that no reasonable

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215 (1916) 85 Lj (KB) 1565, 1569.  
216 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230.  
218 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229.  
220 Ibid 389 (Mason CJ).
person could have come to it’.\footnote{Ibid 288.} The High Court concluded that discrimination of the kind that the plaintiff would face did amount to persecution for the purposes of the Act:

In essence the delegate concluded that while the appellant had a fear of persecution, that fear was not well-founded. However, the delegate had accepted that there may have been ‘discrimination’ against the appellant. Given the circumstances of that discrimination, no reasonable delegate could have concluded that it did not amount to persecution. Nor could a reasonable delegate have concluded other than that there was a real chance of imprisonment or exile if the appellant returned to China.\footnote{Ibid 408 (Toohey J).}

This issue was also addressed in 1999 in \textit{Minister for Immigration and Multicultural Affairs v Eshetu}.\footnote{(1999) 197 CLR 611.} Here, an application by an Ethiopian national for a protection visa was rejected on the same ground. On appeal, unlike in \textit{Chan v Minister for Immigration and Ethnic Affairs},\footnote{(1989) 169 CLR 379.} the High Court focused on the reasoning adopted and the scope of unreasonableness as a ground of judicial review, rather than the facts of the case per se. The High Court emphasised Lord Greene’s argument that there must be ‘something overwhelming’ in order to find a decision unreasonable.\footnote{Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611, 627 (Gleeson CJ and McHugh J).} It was determined that the decision to reject the application ‘was not based on findings or inferences of fact which were not supported by some probative material or could not be supported on logical grounds … That other decision-makers may have reached a different view, and have done so reasonably, is not to the point’.\footnote{Ibid 657 (Gummow J).} Therefore, it can be concluded that ‘unreasonableness’ must be more than merely a divergence of opinion.

This decision was affirmed in \textit{Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002}.\footnote{(2003) 198 ALR 59.} This case concerned an appeal of a decision of the Refugee Review Tribunal to not grant a visa. A critical part of the Tribunal’s reasoning was that the appellant thoroughly lacked credibility and had misled the Tribunal. The appellant argued that the Tribunal’s determination, and in particular its consideration of evidence provided by witnesses, was irrational, illogical and not based upon findings or inferences of fact supported by logical grounds. The majority of the High Court held that the approach of the Tribunal in reviewing the evidence before it was not illogical and dismissed the appeal. Gleeson J noted that ‘to describe reasoning as illogical, or
unreasonable, or irrational, may merely be an emphatic way of expressing disagreement with it’.  

Aronson, Dyer and Groves conclude that the effect of this decision is that, whether under a statutory review scheme or in the constitutional writ jurisdiction, unreasonableness review does not allow challenges to fact finding or statutorily mandated conclusions, but rather it applies only to decision-makers’ discretionary decisions.

Unreasonableness is a problematic concept. Varuhas argues that a judge considering the reasonableness of a decision entails a challenge as to the substance of the decision, not merely the procedure gone through. Thus by determining that an administrative decision is invalid on its substance instead of the way in which the decision was made, the courts may be seen to be usurping the authority of the Parliament. Aronson, Dyer and Groves accept that unreasonableness is inescapably qualitative because it requires a qualitative assessment of the impugned decision, however they note that this is not to equate unreasonableness and merits review. Sidebotham raises concerns with the constitutional and practical limitations of judicial power when exercising this ground of review, because unreasonableness is difficult to define with any certainty or clarity.

She identifies the risk that when reviewing on the basis of unreasonableness ‘the courts may come dangerously close to reviewing the merits of the decision under review, and so intervene or not based on their opinion of the reasonableness of this decision, rather than its legality. Whether a decision is ‘manifestly absurd’ would necessarily involve the reviewer forming an opinion as to what the decision should have been. Frequently cited is the reasoning of Brennan J in Attorney-General (NSW) v Quinn:

The duty and jurisdiction of the Court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power. If, in so doing, the Court avoids administrative injustice or error, so be it, but the Court has no jurisdiction simply to cure administrative

228 Ibid 61.
232 Aronson, Dyer and Groves, above n 229, 339.
233 Sidebotham, above n 217, [1].
234 Ibid.
injustice or error. The merits of administrative action, to the extent to which they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.\(^\text{235}\)

In light of the above, the High Court has taken a narrow approach to the interpretation of unreasonableness as a ground of review and has been careful to explain that it must not be used as a guise for judicial review of the merits of a case whereby the decision of the executive is substituted for that of the Court.\(^\text{236}\) Indeed, successful challenges on the basis of unreasonableness are a rarity, with the High Court prepared to accord a very wide margin to the decision-maker.\(^\text{237}\) Given that unreasonableness is the most likely ground of review to stray into merits review,\(^\text{238}\) the High Court has restricted its development to ensure that only decisions which are manifestly absurd are caught. In a more recent case, *Minister for Immigration and Citizenship and Li*, there were hints at the further development of the concept of unreasonableness, where an administrative decision was found to be unreasonable for lacking ‘an evident and intelligible justification’.\(^\text{239}\)

Therefore one must conclude that to the extent to which unreasonableness constitutes merits review, its availability is limited to cases where irrationality in the sense of absurdity can be demonstrated, and that therefore review on grounds of unreasonableness under s 75(v) offers limited human rights protection. The Hon James Spigelman, speaking extra-judicially, surmised:

> The central proposition remains that there is a distinction between ensuring that powers are exercised for the purpose, broadly understood, for which they were conferred and in the manner in which they were intended to be exercised, on the one hand, and the reasonableness or appropriateness of the decisions made in the exercise of such powers on the other hand. Reasonable minds can and will differ as to where the line is to be drawn.\(^\text{240}\)

\(^{235}\) (1990) 170 CLR 1, 35-6.

\(^{236}\) Sidebotham, above n 217, [2].

\(^{237}\) Aronson, Dyer and Groves, above n 229, 339.


\(^{239}\) (2013) 249 CLR 332, 367 (Hayne, Keifel and Bell JJ).

Given this, unreasonableness is often viewed only as a ‘safety net’ to catch wholly absurd decisions not covered (as they mostly will be) by some other more specific ground.\textsuperscript{241}

That being said, many statutes explicitly introduce concepts of reasonableness through requiring that the decision-maker only exercise their discretion where they are ‘reasonably satisfied’ or ‘satisfied on reasonable grounds’ as to the existence of particular facts. This includes the anti-terrorism legislation discussed further in Chapter III of this thesis. However, reasonableness in this context bears its popular or dictionary meaning and so is to be distinguished from reasonableness in the far narrower \textit{Wednesbury} sense.\textsuperscript{242} Thus these concepts are dealt with separately in this thesis.

3 \hspace{0.5cm} \textit{Privative Clauses}

Given that s 75(v) is entrenched in the \textit{Constitution}, the jurisdiction granted by it to the High Court cannot be removed by legislation. The High Court confirmed this principle as early as 1914.\textsuperscript{243} However, a key issue of contention has been the extent to which the Parliament can, through the enactment of a ‘privative’ or ‘ouster’ clause, limit the scope of judicial review that can be instituted pursuant to s 75(v). In a series of cases the High Court has set constitutional limits on the ability of the Parliament to immunise administrative decisions from judicial scrutiny.\textsuperscript{244}

A key case which set the parameters of privative clauses is the 1945 decision of \textit{R v Hickman; Ex parte Fox and Clinton}.\textsuperscript{245} Here, the \textit{National Security (Coal Mining Industry Employment) Regulations 1941} (Cth) empowered a tribunal to make certain decisions regarding employers and employees in the coal mining industry. Regulation 17 contained a privative clause which stated that the tribunal’s decision ‘shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever’. The High Court determined that legislation could not ‘affect the jurisdiction of this Court to grant a writ of prohibition against officers of the Commonwealth when the legal

\begin{footnotesize}
\begin{enumerate}
\item Aronson, Dyer and Groves, above n 229, 339.
\item Creyke and McMillan, above n 176, 841.
\item \textit{R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd [No I]} (1914) 18 CLR 54.
\item Sackville, above n 58, 12.
\item (1945) 70 CLR 598.
\end{enumerate}
\end{footnotesize}
situation requires that remedy’.\textsuperscript{246} Ultimately the High Court held that the privative clause did not exclude it from reviewing the tribunal’s decision and that, contrary to the tribunal’s decision, a certain organisation was not part of the coal mining industry for the purposes of the legislation.\textsuperscript{247} Dixon J sought to reconcile the conflict arising from the limited powers granted to the tribunal under legislation, and the exclusion of judicial review of executive decisions. In doing so, his Honour developed a three part test for the validity of reg 17 which, as discussed below, has been held to refer to privative clauses generally:

Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that the decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body’.\textsuperscript{248}

A fourth condition established in subsequent cases is that a decision must not contravene ‘inviolable limitations or restraints upon the jurisdiction or powers of the Tribunal’.\textsuperscript{249} On this basis, there is an argument that, assuming that the above conditions are satisfied, a decision subject to a privative clause is protected from invalidity ‘merely on the ground that it was in truth made in excess of the statutory powers conferred’.\textsuperscript{250} Dixon J’s approach has been the subject of criticism by commentators and the High Court. Kirk argues that the approach represented a wrong turning point in Australian law, because the privative clause here was indeed directly inconsistent with a provision of the \textit{Constitution}, and as such was invalid.\textsuperscript{251}

The validity of privative clauses, and the \textit{Hickman} principle, have been considered in the context of migration legislation. In 2001, certain amendments were made to the \textit{Migration Act 1958} (Cth) which included the insertion of a privative clause in s 474 in an obvious attempt to limit the operation of s 75(v). Section 474(1) provides that a privative clause decision (a) is final and conclusive; (b) must not be challenged,

\begin{itemize}
\item \textsuperscript{246} (1945) 70 CLR 598, 614 (Dixon J).
\item \textsuperscript{247} Ibid.
\item \textsuperscript{248} Ibid 614-15.
\item \textsuperscript{249} \textit{R v Coldham; Ex parte Australian Workers’ Union} (1983) 153 CLR 415, 419 (Mason CJ and Brennan J).
\item \textsuperscript{250} \textit{O'Toole v Charles David Pty Ltd} (1991) 171 CLR 232, 275.
\end{itemize}
appealed against, reviewed, quashed or called in question in any court; and (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account. Subject to some exceptions, ‘privative clause decision’ is defined in s 474(2) as inter alia a decision under the Act. In *Plaintiff S157/2002 v Commonwealth*,252 after his application for a protection visa was rejected by the Minister’s delegate and the Refugee Review Tribunal, the plaintiff applied to the High Court challenging the validity of, among other clauses, s 474 on the basis that but for these provisions he would have applied to the High Court for judicial review under s 75(v).

On the application of the Hickman principle, Gaudron, McHugh, Kirby and Hayne JJ concluded in a joint judgment that in his passage Dixon J was speaking of privative clauses generally.253 However, their Honours did qualify that Dixon J’s observations were confined to ‘decision[s] ... in fact given’ and that, consistent with *R v Coldham; Ex parte Australian Workers’ Union*,254 the expression ‘reasonably capable of reference to the power given to the body’ means that it must ‘not on its face go beyond ... power’.255 That is, a privative clause cannot protect against a failure to make a decision required by legislation, or against a decision which exceeds jurisdiction.256 It was concluded that the Hickman principle is simply a rule of construction allowing for the reconciliation of apparently conflicting statutory provisions.257 Their Honours noted that it was previously said that where there is an inconsistency between a privative clause and another statutory clause:

> The inconsistency is resolved by reading the two provisions together and giving effect to each. The privative clause is taken into account in ascertaining what the apparent restriction or restraint actually signifies in order to determine whether the situation is one in which prohibition lies.258

Their Honours noted that the High Court was the ultimate decision-maker where there is a contest and therefore ‘pursuant to s 75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review’.259 They

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252 *(2003) 211 CLR 476.*
253 Ibid 500.
254 *(1983) 153 CLR 415.*
256 Ibid.
257 Ibid 501.
258 Ibid 501-2, quoting *R v Coldham; Ex parte Australian Workers’ Union* *(1983) 153 CLR 415, 418* (Mason ACJ and Brennan J).
therefore confirmed that privative clauses that purported to exclude the s 75(v) jurisdiction would be unconstitutional. However, here s 474(1) did not oust the jurisdiction of the High Court because it did not extend to a decision affected by jurisdictional error which would be ‘regarded, in law, as no decision at all’. The privative clause only applied to decisions made ‘under the Act’, and a decision made following a jurisdictional error could not be properly described as a ‘privative clause decision’ for the purposes of s 474(2). Therefore when the Act was construed as a whole s 474 did not purport to oust the High Court’s s 75(v) jurisdiction.

While the High Court in the above cases interpreted the privative clauses so as not to restrict judicial review, it has demonstrated its willingness to invalidate privative clauses in other instances. In 1992 in _Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs_, the facts of which were discussed on page 39, the plaintiff contested that _Migration Act 1958_ (Cth) s 52R, which provided that ‘a Court is not to order the release from custody of a designated person’, was invalid because it purported to derogate from the direct vesting of judicial power in the courts and remove ultra vires acts of the executive from the control of the court. The majority concluded that s 54R was invalid as a direction by the Parliament to the Court as to the manner in which it was to exercise its jurisdiction. In a joint judgment Brennan, Deane and Dawson JJ stated:

> A law of the parliament which purports to direct, in unqualified terms, that no court, including this Court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires acts of the Executive from the control of this Court. Such a law manifestly exceeds the legislative powers of the Commonwealth and is invalid ... It is one thing for the parliament, within the limits of the legislative power conferred upon it by the _Constitution_, to grant or withhold jurisdiction. It is a quite different thing for the parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the _Constitution_, including Ch III itself, entrusts to the parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates.

The issue of privative clauses is relevant to this thesis to the extent that the Parliament may seek to limit judicial review of decisions made under defence legislation (among

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260 Ibid 506.
261 Ibid.
263 Ibid 36 (Brennan, Deane and Dawson JJ).
264 Ibid 36-7.
other powers). While in its current form the anti-terrorism legislation does restrict judicial review, as discussed in Chapter III of this thesis it does not explicitly purport to exclude the s 75(v) jurisdiction of the High Court. Nevertheless, the attempted use of private clauses represents another way in which the right to liberty of the person can be restricted.

F Rights Protection through the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)

In addition to constitutional protection, statutory protection of human rights has recently been provided through the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) (‘HRPS Act’). The HRPS Act came into effect in early 2012 and implements the legislative elements of Australia’s Human Rights Framework that was announced by the Government in April 2010.\textsuperscript{265} However, the Act is not entrenched so can be repealed at any time, and it does not empower the judiciary to invalidate legislation and administrative decisions which are inconsistent with human rights standards. It also does not permit the judiciary to issue declarations of incompatibility.

The following section provides an outline of the key elements of the HRPS Act, including its limitations and the significant effect that the decision in Momcilovic v The Queen\textsuperscript{266} had on the framing of the Act. Here, the High Court made obiter statements that a declaration of incompatibility was not a judicial remedy, and therefore empowering the federal judiciary to issue such declarations would be to confer a non-judicial function on the courts contrary to the doctrine of separation of powers. The section concludes that the capacity of the HRPS Act to protect human rights is limited.\textsuperscript{267}


\textsuperscript{266} (2011) 245 CLR 1.

\textsuperscript{267} These limitations can also be seen in a report by the Parliamentary Joint Committee on Human Rights (‘the Committee’) which considered role of the HRPS Act in the context of a package of legislation regarding Indigenous Australian welfare and land issues. The Committee concluded that while the legislation contains measures which impose significant limitations on human rights, those limitations should be further monitored and evaluated rather than the legislation be repealed: Parliamentary Joint Committee on Human Rights, Parliament of Australia, Examination of legislation...
Key Elements of the Legislation

The two key features of the *HRPS Act* are the establishment of the Parliamentary Joint Committee on Human Rights (‘the Committee’) to examine Bills and Acts for compatibility with certain human rights, and the requirement for a statement of compatibility to be prepared in respect of each Bill introduced into a House of Parliament.

In relation to the latter, ss 8(1) and (3) provide that a member of the Parliament who proposes to introduce a Bill must cause a statement of compatibility to be prepared in respect of that Bill, which must include an assessment of whether the Bill is compatible with human rights. ‘Human rights’ is defined in s 3 as meaning the rights and freedoms recognised or declared by certain international instruments. However, ss 8(4) and (5) provide that the statement of compatibility is not binding on any court or tribunal and a failure to comply with this requirement in relation to a Bill which becomes an Act does not affect the validity, operation or enforcement of the Act or any other Commonwealth law. Section 9 contains similar requirements and limitations in relation to disallowable legislative instruments.

The Explanatory Memorandum provides that ‘[s]tatements are intended to be succinct assessments aimed at informing Parliamentary debate and containing a level of analysis that is proportionate to the impact of the proposed legislation on human rights’. It provides that ‘[c]onsistent with current rules of statutory interpretation, a statement of compatibility and a report of the Joint Committee on Human Rights could be used by a court to assist in ascertaining the meaning of provisions in a statute where the meaning is unclear or ambiguous’. Thus the intention is for the statements to inform parliamentary debate as well as any later statutory interpretation by the judiciary.

Unlike the *Human Rights Act 1998* (UK) which permits the United Kingdom courts to issue a declaration of inconsistency, the *HRPS Act* does little in the way of providing a role for the courts to consider the substantive effect of legislation on human rights, and

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268 Including inter alia the *International Covenant on Civil and Political Rights*.


270 Ibid 5.
thereby creating a dialogue between the Parliament and the judiciary. The role of the courts is merely to interpret legislation, where possible, consistently with human right standards. This does little more than confirm the well-established principle of legality outlined in *Coco v The Queen* discussed above on page 46 that requires that the intention of the legislature to infringe human rights must be in unmistakable and unambiguous language.\(^{271}\) Conversely, it may even limit the ability of the courts to protect human rights, as the court may no longer be able to read ambiguity into legislation in order to protect human rights because the intention of the Parliament to infringe human rights would be made clear in the statement of compatibility. Additionally, while the Parliament must take steps to consider the effect that the legislation may have on human rights, the statement does not affect the validity of the legislation. Thus even where a statement recognises that legislation is offensive to human rights, the legislation is nevertheless valid.

While the *HRPS Act* was the first generally applicable legislation to address the issue of the compatibility of legislation with a wide scope of human rights standards, several States and Territories have enacted human rights legislation which aim to confer express rights on individuals. While this thesis is confined to consideration of human rights at the federal level, the decision in *Momcilovic v The Queen*,\(^{272}\) which addressed the effect of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘*Charter*’), is relevant to the extent that it shaped the development of the federal legislation.

2  \textbf{The Effect of the Momcilovic Case}

The development of the *HRPS Act* was significantly influenced by the decision in *Momcilovic v The Queen*.\(^{273}\) This case essentially prevented the Commonwealth Parliament from being able to introduce legislation at the federal level which imposed on the judiciary the power to issue declarations of incompatibility akin to the *Human Rights Act 1998* (UK). In this case, the validity of certain provisions of Victoria’s *Charter*, which was similar to the United Kingdom’s Act, was challenged after the

\(^{271}\) (1994) 179 CLR 427, 436 (Mason CJ, Brennan, Gaudron and McHugh JJ).
\(^{272}\) (2011) 245 CLR 1.
\(^{273}\) Ibid.
Victorian Court of Appeal made its first declaration of inconsistent interpretation under the *Charter*.

Section 32(1) of the *Charter* requires that statutory provisions be interpreted in a way that is compatible with human rights so far as possible, and s 36(2) authorises the Supreme Court to make a declaration where it considers that a statutory provision cannot be interpreted consistently (although s 36 (5) clarifies that the declaration does not have any legal effect). In *Momcilovic v The Queen*,\(^\text{274}\) the appellant was convicted of trafficking offences under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) after prohibited drugs were found in an apartment she shared with her partner. Section 5 of the Act provided that a person was in possession of a prohibited substance if the substance was upon premises occupied by them, and imposed a reverse onus of proof. The Court of Appeal made a declaration under *Charter* s 36 that s 5 could not be interpreted consistently with the presumption of innocence under *Charter* s 25(1). On appeal to the High Court, the declaration was ultimately set aside on the basis that either the declaration was invalid or should not have been made.

In relation to the validity of *Charter* s 32(1), while members of the majority had different reasons, they ultimately held that s 32(1) merely operated as a rule of statutory interpretation, which is a function that could be conferred upon courts. ‘It requires statutes to be construed against the background of human rights and freedoms set out in the *Charter* in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms’.\(^\text{275}\)

In relation to s 36, French CJ and Bell, Crennan and Keifel JJ held that it was valid, but disagreed in their approach to the declaration. French CJ, with whom Bell J agreed, did not consider that the High Court had the jurisdiction to set aside the declaration because s 36 validly conferred a non-judicial function on the Court of Appeal that was not incidental to the exercise of its judicial function.\(^\text{276}\) As it was a non-judicial function, it could not be characterised as a judgment, decree, order or sentence which fell within the appellate jurisdiction of the High Court.\(^\text{277}\) While Crennan and Keifel JJ agreed that s 36 was valid, they held that the declaration should not have been made in the

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\(^{274}\) Ibid.
\(^{275}\) Ibid 50 (French CJ).
\(^{276}\) Ibid 31.
\(^{277}\) Ibid 70.
circumstances.\textsuperscript{278} Their Honours stated that the making of the declaration placed the Court of Appeal in a position where it acknowledged that the trial process involved a denial of the appellant’s rights, even though it upheld the conviction.\textsuperscript{279} Gummow J held that s 36 was invalid and therefore the declaration should be set aside.\textsuperscript{280} His Honour considered that the practical operation of s 36 was incompatible with the institutional integrity of the Supreme Court: ‘It is no part of the judicial power … formally to set in train a process whereby the executive branch of government may or may not decide to engage legislative processes to change existing legislation’.\textsuperscript{281} This approach was confirmed by Hayne and Heydon JJ, with Heydon J stating that a declaration is merely advisory in character, and since the work of the Supreme Court is limited to the judicial process the power to make a s 36 declaration is outside the constitutional conception of a ‘court’.\textsuperscript{282}

Significantly, although this case concerned State judicial power, the High Court made obiter statements regarding the availability of the dialogue model at the Commonwealth level. While four of the seven judges held that s 36 was an available remedy under State law, as it is a non-judicial remedy such a power could not be conferred on a federal court due to \textit{Constitution} Ch III and the doctrine of separation of powers. As French CJ stated, when a power is conferred by a law of the Commonwealth upon a court exercising federal jurisdiction, that power must be referable to a ‘matter’ in respect of which federal jurisdiction can be conferred under \textit{Constitution} Ch III.\textsuperscript{283} It was held that the power to make a ‘declaration’ did not involve a ‘matter’ as it did not establish any right, duty or liability, nor provide a legal remedy.\textsuperscript{284} It is for this reason that the Parliament could not include such a function in the \textit{HRPS Act} as present in Victoria’s \textit{Charter} and the \textit{Human Rights Act 1998 (UK)}.

The approach of the High Court has been criticised, with Debeljak arguing that through its decision it

sanctioned a rights-reductionist method to the statute-related \textit{Charter} mechanisms, undermined the remedial reach of the s 32(1) interpretation obligation, sidelined the

\textsuperscript{278} Ibid 218, 228
\textsuperscript{279} Ibid.
\textsuperscript{280} Ibid 123.
\textsuperscript{281} Ibid 96.
\textsuperscript{282} Ibid 185.
\textsuperscript{283} Ibid 61.
\textsuperscript{284} Ibid 222-3 (Crennan and Kiefel JJ).
core issue of justification for limitations on rights, and considerably muted the institutional dialogue envisaged under the Charter.\(^{285}\)

This, it is argued, is despite clear parliamentary intent to the contrary.\(^{286}\) Speaking extra-judicially, Justice Ronald Sackville argues that the judgments demonstrate varying degrees of deference to legislative choices and seem to reflect different attitudes towards the desirability of legislative measures like Victoria’s *Charter*.\(^{287}\) Irrespective of the merits of such arguments, this case clearly demonstrates the limitations of legislative mechanisms in protecting human rights. Given that such a model of protecting human rights has been held to be incompatible with *Constitution* Ch III, greater protection must occur through other means, such as those discussed in Chapters V and VI of this thesis.

G  **Concluding Remarks regarding Human Rights Protection in Australia**

In 2009, the National Human Rights Consultation Committee asserted that ‘[t]here appears to be general consensus that Australia measures well against many other countries in terms of its human rights protection’.\(^{288}\) However, in terms of legal protections the overview presented above reveals that, apart from a handful of express and implied rights and Ch III, the *Constitution* offers little protection for fundamental human rights such as the right to liberty of the person. Specifically, while there are views that s 75(v) includes the right to habeas corpus and that the separation of judicial power gives rise to an implied right to due process, these are not express and the latter right in particular is tenuous. This provides limited bases upon which the judiciary can undertake substantive review of the merits of legislation and executive decisions which infringe these rights.

This vulnerability is particularly disconcerting in the age of the War on Terror, with the anti-terrorism legislation providing a clear example of how the right to liberty of the person can be infringed under current arrangements. As discussed in the following chapters, the inability of the judiciary to invalidate legislation and executive decisions made pursuant to the defence power on substantive grounds poses a threat to the right


\(^{286}\) Ibid.

\(^{287}\) Sackville, above n 58, 21.

\(^{288}\) National Human Rights Consultation Committee, above n 265, 97.
to personal liberty and other human rights. This thesis argues that the elastic scope of the defence power, coupled with the absence from the *Australian Constitution* of explicit and unambiguous protection of due process, poses a risk to individuals which only a stricter approach to judicial interpretation or a constitutional amendment can remedy. As Williams discusses, ‘we lack a domestic reference power on the basic rights attaching to Australian citizenship and do not have the mechanisms, judicial or otherwise, for determining whether rights have been unduly undermined by national security laws’. 289

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II  THE ELASTICITY OF THE DEFENCE POWER AND ITS EFFECT ON HUMAN RIGHTS
PRIOR TO SEPTEMBER 11, 2001

A  Introduction

In *Farey v Burvett* it was recognised that the scope of the defence power contained in *Constitution* s 51(vi), unlike any of the other enumerated powers, expands and contracts according to the extant international and political climate.¹ During peacetime, the High Court has been restrictive in its interpretation of the defence power, while during wartime it historically adopted a broader approach to provide governments a wide discretion to enact legislation that it considers necessary for the successful prosecution of the war. This elastic defence power, coupled with the s 61 executive power and the s 51(xxxix) incidental power, is viewed as essential to ensure the maintenance of the Commonwealth. According to Lee:

> In the life of every nation there will arise occasions when peace and tranquillity may be disrupted by natural or economic disasters or threatened by internal disension or external aggression. Unless effectively contained such aberrant conditions will reach such a critical stage that a nation’s constitutional and legal framework is shattered.²

In terms of the specific scope of the defence power, in *Australian Communist Party v Commonwealth*, the High Court recognised three stages of expansion and contraction: those core aspects of the defence power which are obviously defence-related and therefore are available generally, including during peacetime; an intermediate power which is available during periods of increasing international tension and the aftermath of war; and an expanded power which is available during wartime.³ All apply in response to both internal and external threats.⁴ In the absence of constitutionally entrenched ‘emergency powers’, the Parliament has relied on the defence power to take protective measures to preserve the community during crises. Isaacs J discussed how the *Constitution* primarily contemplates peace, but does foresee its interruption:

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¹ (1916) 21 CLR 433, 441 (Griffith CJ).
³ (1951) 83 CLR 1, 222-3 (Williams J). For the purposes of this thesis, periods of profound peace in Australia include the early years of Federation prior to WWI, and the post-Cold War period in the late 1980s through to the September 11 attacks. Periods of increased international tension include the years leading up to WWI and WWII, the Cold War period following WWII and, as discussed in Chapter IV, the current post-September 11 era. Periods of war include WWI (1914 to 1918) and WWII (1939 to 1945). The aftermath of war / transition to peace includes those periods immediately following WWI and WWII.
The defence power may be exerted in times of peace; but so far only by way of preparation. Actual defence, and all that it connotes, comes only when we are at war. War creates its own necessities, proportioned to the circumstances, and not measurable in advance of the occasion; and defence is only complete when it meets those necessities, whatever they may prove to be. While peace prevails, the normal facts of national life take their respective places in the general alignment, and are subject to the normal action of constitutional powers.\(^5\)

The expansion of the Parliament’s power during times of crises threatens human rights in Australia, particularly the right to liberty of the person. There is a risk that where such a broad approach to the defence power is adopted, the unprotected rights of individuals are left open to infringement. This Chapter commences with an outline of the source of the defence power and a comparison to other constitutional heads of power. This is followed by an analysis of the decisions of the High Court during peacetime, periods of increasing international tension, wartime and the aftermath of war prior to September 11, 2001.

B  \textit{The Defence Power of the Commonwealth}

Lee argues that ‘exceptional times may be best governed by exceptional means and that exceptional powers to make laws should be made available in these times’.\(^6\) In Australia, the \textit{Constitution} does not confer emergency powers at the federal level, however common law prerogatives, constitutional powers that relate to defence and the general powers of the Commonwealth have been relied upon to enact legislation covering a broad range of defence-related issues. This includes the s 51(vi) defence power, which is a purposive power and so is interpreted differently compared to other non-purposive constitutional heads of power. A complicating factor is the extent to which the judiciary is permitted to consider defence policy issues and essentially evaluate the justification for legislative measures introduced by the Parliament.

The following section provides an outline of the source of the Commonwealth’s powers with respect to defence. It then discusses the approach of the judiciary in interpreting the s 51(vi) defence power compared to other non-purposive heads of power, and its consideration of policy issues and extrinsic materials. This section demonstrates how the approach of the judiciary in interpreting legislation enacted pursuant to the defence

\(^5\) \textit{Farey v Burvett} (1916) 21 CLR 433, 453.

\(^6\) Lee, above n 2, 1.
power poses a greater risk to human rights compared to non-purposive powers. This justifies why greater protection is required.

1. **Source of the Commonwealth’s Defence Power**

The Commonwealth derives power with respect to defence from both the common law and the Constitution. Under the common law, it has long been accepted that the Crown enjoys a prerogative power in relation to war, and this prerogative was passed to the Commonwealth of Australia upon its formation. The s 61 executive power in the Constitution has also been given considerable weight with respect to defence to the extent that a particular measure is necessary for the ‘maintenance of the Constitution’. As well as these implicit powers, the Constitution also contains explicit powers which relate to defence, principally s 51(vi), but also others as detailed below.

Under the common law, the prerogative power of the Crown relating to war includes prerogatives associated with defence, including the power of the Crown to control and order the disposition of the armed forces. According to Lord Reid, ‘the prerogative certainly covers doing all those things in an emergency which are necessary for the conduct of war’. In terms of legislative powers relating to defence, there was initially some debate as to whether the s 61 executive power incorporated all the common law prerogative powers. Jurisprudence gradually developed on this and the matter was finally settled in 1974 in **Barton v Commonwealth**. Here, the High Court held that a request to extradite an Australian citizen living abroad (an action generally considered a common law prerogative) fell within s 61. In his judgment Mason J stated of the executive power:

> It enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution. It includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law.

As well as accepting the incorporation of the prerogative powers, the High Court has gradually expanded the scope of s 61 when used in conjunction with the s 51(xxxix)

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12. Ibid 498.
incidental power. The effect of this is that the words ‘maintenance of the Constitution’ are no longer words of limitation. In *Pape v Commissioner of Taxation*, Gummow, Crennan and Bell JJ held that s 61 confers on the Parliament the power ‘to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation’. While s 51(33) does not mean that the Parliament may use s 61 to legislate in aid of any subject which the Parliament regards as of national interest or concern, some matters have been treated as lying within the inherent legislative power of the Commonwealth because they are peculiarly adapted to the government of a nation. For example, in *R v Sharkey*, the executive power was held to extend to the protection of the government against subversion and sedition. Section 61 (coupled with the s 51(33) incidental power) is an important power when used in conjunction with the defence power.

Section 51(vi) confers an express power on the Commonwealth Parliament to legislate on defence:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.

Prima facie, the scope of the defence power appears to be quite restricted. For example, the natural meaning of the words ‘naval and military’ would appear to limit the measures which can be justified by the defence power. However, the defence power has generally been interpreted more broadly than this, even during peacetime. Specifically, in *Farey v Burvett*, which is discussed in detail on page 95, it was held that the words ‘naval and military’ are not words of limitation. Additionally, when read together with s 61, it has been held to include the ‘power to protect the nation’. That said, the defence power is, unlike any other constitutional head of power, elastic in scope and so expands and contracts according to the current political climate. This feature is discussed in detail throughout this Chapter.

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14 *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 87-8 (Gummow, Crennan and Bell JJ).
15 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187-9 (Dixon J).
16 (1949) 79 CLR 121, 148 (Dixon J).
17 (1916) 21 CLR 433, 440 (Griffith CJ).
There are also a number of other provisions in the Constitution which address defence-related issues and therefore support the defence power. These include:

- Section 68 which provides that the command in chief of the naval and military forces of the Commonwealth is the Governor-General as the Queen’s representative.
- Section 114 which provides that a State shall not, without the consent of the Commonwealth Parliament, raise or maintain any naval or military force.
- Section 119 which provides that the Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.
- Section 51(xxxii) which allows the Commonwealth to legislate with respect to the control of railways for transportation for naval and military purposes.
- Section 51(xxxix) which allows the Commonwealth to legislate with respect to incidental matters.

The focus of this thesis is s 51(vi), although it will feature some discussion of s 61 to the extent that it is used in conjunction with s 51(vi) for defence purposes. Significantly, while it has been accepted that some activities of the executive pursued through an exercise of prerogative power are justiciable, activities pursued through an exercise of the prerogative relating to defence are generally considered intractably political and therefore non-justiciable. This would include control of the armed forces and the power to wage war as discussed on page 66, as well as some decisions relating to national security or international relations. However, the scrutiny of the defence power in this thesis relates to its use to create statutory powers, with those statutes containing criteria for the exercise of power and, in many instances, the diminishment of a person’s rights. It is therefore appropriate for such to be justiciable.

2 Interpreting the Defence Power as a Constitutional Head of Power

Judicial review of the constitutionality of legislation generally stems from an allegation that the legislation is beyond the scope of the particular head of power under which it was enacted and is therefore ultra vires the Constitution. Over time, the High Court has established general principles of interpretation to characterise challenged laws in order

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19 See, eg, Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 410 (Lord Diplock); Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, 227-9 (Bowen CJ).
22 Aronson, Dyer and Groves, above n 20, 143.
to determine validity.\textsuperscript{23} However, a different approach has been taken in relation to non-purposive powers compared to purposive powers such as the defence power (that is, powers defined in terms of their purpose). Indeed, the principles that apply to the interpretation of the defence power allow for a much broader scope of topics to fall within power. The effect of this is that, compared to other constitutional powers, the defence power poses a greater risk to human rights as it can support the infringement of the right to liberty of the person in a variety of contexts. This is particularly given that the High Court has been cautious in assessing policy issues and other extrinsic material on the basis that such matters are not appropriate for judicial scrutiny.\textsuperscript{24} Although, when constitutional rights are at issue, such are matters suitable for consideration by the judiciary as independent arbiter.

(a) \textit{Principles of Interpretation of the Defence Power Compared to Non-Purposive Constitutional Heads of Power}

Generally speaking, when the High Court is required to determine the validity of a particular law enacted pursuant to a non-purposive power, it analyses the subject matter of the legislation with a view to determining whether it was enacted \textit{upon}, or in relation to, the relevant head of power.\textsuperscript{25} By contrast, when scrutinising the validity of legislation enacted pursuant to the defence power, which is a purposive power, the High Court has adopted an approach whereby the subject matter of the legislation is analysed to determine whether it is \textit{for} defence purposes,\textsuperscript{26} either directly or incidentally, according to the extant ‘needs’ or threat that existed at the time. The High Court has recognised two aspects of the defence power: the ‘primary’ aspect which includes matters directly related to the raising, equipping and conduct of the armed forces, and the ‘secondary’ aspects which are indirectly related to those primary aspects. The approach to the defence power is a wider test than the subject matter test for non-


\textsuperscript{24} See, eg, \textit{A-G (Vic) (At the Relation of the Victorian Chamber of Manufacturers) v Commonwealth} (1935) 52 CLR 533; \textit{Marcus Clark & Co Ltd v Commonwealth} (1952) 87 CLR 177, which are discussed further in this section.

\textsuperscript{25} Most heads of power are not purposive. From Dixon J in \textit{Stenhouse v Coleman} (1944) 69 CLR 457, 471: ‘In most of the paragraphs of s.51 the subject of the power is described either by reference to a class of legal, commercial, economic or social transaction or activity (as trade and commerce, banking, marriage), or by specifying some class of public service (as postal installations, lighthouses), or undertaking or operation (as railway construction with the consent of a State), or by naming a recognized category of legislation (as taxation, bankruptcy).’

\textsuperscript{26} P H Lane, \textit{Some Principles and Sources of Australian Constitutional Law} (Law Book Company, 1964) 26.
purposive powers, because legislation need not relate to matters that directly affect defence but may also include matters that, for example, indirectly contribute to a war effort. Similarly, unlike in the case of non-purposive powers, the proportionality test is available in the characterisation of purposive powers such as the defence power. That said, comparisons can be drawn between the High Court’s approach to the defence power and other non-purposive heads of power in relation to issues incidental to the primary purpose or power, as well as limitations imposed by the Constitution itself.

The most recent comprehensive formulation of the characterisation method for non-purposive powers occurred in 2000 in *Grain Pool of Western Australia v Commonwealth.*27 Here, the High Court held that laws relating to plant breeders rights were intra vires the s 51(xviii) copyright power. The majority set out five principles to be applied to determine whether a law is with respect to a head of legislative power:28

1. The constitutional text is to be construed with all the generality which the words used admit;
2. The character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges which it creates;
3. The practical as well as the legal operation of the law must be examined to determine if there is a sufficient connection between the law and the head of power;
4. ‘In a case where a law fairly answers the description of being a law with respect to two subject-matters, one of which is and the other of which is not a subject-matter appearing in s 51, it will be valid notwithstanding that there is no independent connexion between the two subject-matters’;29 and
5. If a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice.

Zines emphasises that it has been usual for judges to refer to what the law ‘does’, and its connection with the power can be ascertained not merely from its legal terms but from its practical effect.30 This approach was adopted as early as 1908 in *R v Barger*, where Griffith CJ and Barton and O’Connor JJ stated that ‘for the purpose of determining whether an attempted exercise of legislative power is warranted by the Constitution regard must be had to substance – to things, not to mere words’.31

28 Ibid 492 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan J).
29 Ibid, quoting *Re F; Ex parte F* (1986) 161 CLR 376, 388 (Mason and Deane JJ).
31 (1908) 6 CLR 41, 75.
By contrast, in considering the validity of legislation enacted pursuant to the defence power, the High Court has adopted a broader approach through assessing whether the legislation is for defence purposes. In *Stenhouse v Coleman*, the High Court described the defence power as a purposive power, so that legislation enacted pursuant to it must have a particular purpose; being the defence of the Commonwealth.32 Lee argues that this involves forming a view as to whether the legislation is sufficient to attain a desired end, as opposed to whether the legislation is designed to attain a desired end.33 The purpose of the law must be conducive to the efficient prosecution of the war or the defence of the Commonwealth.34 This principle was illustrated in *Farey v Burvett*, where it was held that fixing the price of food was capable of contributing to the war effort.35 By contrast, in *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth*, legislation which inter alia allowed the property of organisations deemed prejudicial to the war effort to be seized was invalid because the Commonwealth failed to establish an adequate connection between the defence power and the seizure of property.36 The legislation did not make it necessary, for example, for the property to have been used in a manner that compromised the war effort.

Further, the High Court has recognised that legislation enacted for defence purposes may be in relation to ‘primary’ and ‘secondary’ aspects. The primary aspects include matters directly related to the raising, equipping and conduct of the armed forces.37 The secondary aspects are what Sawer describes as ‘conditions in the community which are in turn relevant to such “direct” activities, but only as the general background for them – such as peace in industry, monetary inflation etc’.38

[In time of international tension short of war, the Commonwealth may validly establish economic controls under the “secondary” defence power in a manner which leaves not only the general appropriateness of the control for helping defence, but its application in particular cases, to the decision of the Executive, provided that the opinion of the Executive is shown to be honest and not unreasonable.39

32 (1944) 69 CLR 457, 464 (Latham CJ), 466 (Starke J).
33 Lee, above n 2, 14.
34 Ibid 36.
35 (1916) 21 CLR 433, 441 (Griffith CJ).
36 (1943) 67 CLR 116, 154 (Starke J).
38 Ibid 220.
39 Ibid 223.
For example, in *Attorney-General (Vic) (At the Relation of the Victorian Chamber of Manufacturers) v Commonwealth*, where legislation was challenged which permitted the Commonwealth to maintain a factory producing clothing for sale to military personnel and civilians, the High Court accepted that retention of specially trained staff may not be possible unless the factory was always fully engaged as it would be during wartime, and so sales to civilian organisations was merely incidental to the maintenance of the factory for war purposes. It is therefore accepted that during times falling short of war, legislation can be enacted in relation to these secondary aspects.

Another point of difference between non-purposive powers and purposive powers such as the defence power relates to the availability of the proportionality test (or the ‘appropriate and adapted’ test) in determining ultra vires. In *Herald and Weekly Times Ltd v Commonwealth*, Kitto J made the oft-quoted statement in relation to the extremity of the challenged provisions in ensuring freedom of competition between television services:

> How far they should go was a question of degree for the Parliament to decide, and the fact that the Parliament has chosen to go to great lengths - even the fact, if it be so, that for many persons difficulties are created which are out of all proportion to the advantage gained - affords no ground of constitutional attack.

Lee argues that the scope of this decision is not altogether clear, and queries whether Kitto J’s remarks were intended to provide a general rule concerning the role of the High Court regardless of whether the characterisation issue related to a purposive or non-purposive power. Nevertheless, this issue received some clarification in 1992 in *Nationwide News Pty Ltd v Wills*, particularly by Dawson J. His Honour stated that the question was whether there was a sufficient connection between the law and the subject matter of the non-purposive power, not whether the means adopted to achieve the end was appropriate or desirable. His Honour concluded that little assistance could be derived from the concept of reasonable proportionality:

> No doubt a law which is inappropriate or ill-adapted for the purpose of achieving a legitimate end may fail for want of a power. But it fails not because the Court considers

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40 (1935) 52 CLR 533, 558 (Gavan Duffy CJ, Evatt and McTiernan JJ).
41 It should be noted that the use of the proportionality test in this characterization context is distinct from the use of the proportionality test in the context of express and implied rights, as discussed on page 18.
42 (1966) 115 CLR 418, 437.
43 Lee, above n 2, 127.
44 (1992) 177 CLR 1.
the law to be inappropriate or ill adapted but because the very fact that the law is inappropriate or ill adapted prevents there being a sufficient connection between the law and a relevant head of power. The question is essentially one of connection, not appropriateness or proportionality, and where a sufficient connection is established it is not for the Court to judge whether the law is inappropriate or disproportionate.  

This approach was confirmed in *Cunliffe v Commonwealth*, where Brennan J stated that it was immaterial to inquire into whether the means adopted by the *Migration Act 1958* (Cth) were proportionate to the protection of aliens as this was a political, not a legal question.  

The effect of this is that the proportionality test is not available in determining whether legislation falls within the scope of a non-purposive head of power.

By contrast, it has been held that the proportionality test is available where a purposive power is involved:

Then the question is what the legislation operates *for*, not what it operates *upon*. That is to say, purpose rather than connection with any particular subject-matter must then be the test. When a power is not purposive (and most of the powers in s.51 are not) the ultimate question is not whether the law is reasonably adapted to the achievement of a purpose, but whether it has a sufficient operation upon - a sufficient connection with - something forming part of the subject-matter of the power. For that reason, the concept of reasonable proportionality is of limited assistance where purposive powers are not involved and the danger in employing it is that it invites the Court to act upon its view of the desirability of the impugned legislation rather than upon the connection of the legislation with the subject-matter of the legislative power.  

The effect of this is that for purposive powers the judiciary is empowered to invalidate legislation where there is a lack of proportionality between the purpose of the measure and the legislative means for achieving that purpose. In *Commonwealth v Tasmania (Tasmanian Dam Case)*, which concerned the purposive treaty implementation aspect of the external affairs power, Deane J argued that while the question of what is the appropriate method of achieving a desired result is a matter for the Parliament, the law must be capable of being reasonably considered to be appropriate and adapted to achieving what is said to impress it with the character of a law with respect to external affairs. Implicit in this requirement ‘is a need for there to be a reasonable

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48 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 89 (Dawson J).  
49 (1983) 158 CLR 1  
50 In this case it was held that an analogous approach may be taken in relation to the defence power and the treaty implementation aspect of the external affairs power whereby the validity of the challenged law is tested by reference to its purpose (see decision of Deane J).  
51 *Commonwealth v Tasmania (Tasmanian Dam case)* (1983) 158 CLR 1, 259.
proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it’. Deane J provided the example that a convention which required Australia to take safeguards to protect sheep from disease would not support a law requiring that all sheep in Australia be slaughtered, as the absence of any reasonable proportionality between the law and the purpose of discharging the obligation under the convention would preclude characterization as a law with respect to external affairs: ‘In that regard, the “peculiar” or “drastic” nature of what the law provides or the fact that it pursues “an extreme course” is relevant to characterization’. Quirk argues that here Deane J was warning against unnecessary measures. Fitzgerald argues that Deane J quietly, yet forcefully, changed the focus of the ‘appropriate means’ test by bringing in the positive ethic that ‘means must be proportionate to ends’. Such can be contrasted with the approach taken in the characterisation of non-purposive powers, where such matters are not relevant.

That being said, while this does give the impression that there is a greater scope for the judiciary to consider the ‘propriety’ of a defence measure compared to non-purposive powers, the availability of the proportionality test in relation to the defence power still varies according to the extant threat. Thus the presence of proportionality will be more easily ascertained when the threat is higher. During periods falling short of war, in applying the proportionality test the High Court has focused on the purpose of measures and their capacity to assist defence generally. Given that the threat is less than during times of war, the extent to which a measure which侵犯s human rights will fall within the scope of the defence power is more limited. For example, in Polyukhovich v Commonwealth, Brennan J held that although the retrospective offence provisions of the War Crimes Act 1945 (Cth) could be capable of having a relevant deterrent effect and may, on that account, be said to be ‘appropriate and adapted’ to serve defence purposes

the validity under s.51(vi) of a law enacted in a time of peace depends upon whether the Parliament might have reasonably considered the means which the law embodies for achieving or procuring the relevant defence purpose to be appropriate and adapted to that end, a question of reasonable proportionality … In times of war, laws abridging

52 Ibid 260.
53 Ibid 260-1.
the freedoms which the law assures to the Australian people are supported in order to ensure the survival of those freedoms in times of peace. In times of peace, an abridging of those freedoms - in this case, freedom from a retrospective criminal law - cannot be supported unless the Court can perceive that the abridging of the freedom in question is proportionate to the defence interest to be served. What is necessary and appropriate for the defence of the Commonwealth in times of war is different from what is necessary or appropriate in times of peace.56

By contrast, during wartime the High Court focused on the nature of the hostilities and the threat faced in order to determine whether a measure was proportionate. In WWII, Dixon J explained:

The existence and character of hostilities ... against the Commonwealth are facts which will determine the extent of the operation of the power. Whether it will suffice to authorize a given measure will depend upon the nature and dimensions of the conflict that calls it forth, upon the actual and apprehended dangers, exigencies and course of the war, and upon the matters that are incident thereto.57

For example, in 1953 in Marcus Clarke & Co Ltd v Commonwealth, McTiernan J stated that ‘the defence power authorises the Parliament to take such measures as are proportionate to the end for which the Constitution created the defence power. The end is the protection of Australia against invasion and the dangers of war’.58 In this case, as discussed further on page 79, the controls on the issue of capital were found to be proportionate in light of the threat faced. Similarly, in Stenhouse v Coleman, Starke J stated that the setting up of a licensing authority was valid because it was a means appropriate and adapted to the regulation of the manufacture and supply of bread for securing public safety and the defence of the Commonwealth.59 While the proportionality test does give rise to a greater capacity of the judiciary to consider more substantive issues when compared to non-purposive powers, the elasticity of the defence power means that there is scope for abuse by the Parliament during periods falling short of ostensible peace.

Notwithstanding the above, there is a level of uniformity between the interpretation of the defence power and other constitutional heads of power in relation to the High Court’s willingness to accept legislation that addresses issues incidental to a particular

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56 (1991) 172 CLR 501, 592-3. Note that, as discussed in Chapter I of this thesis, the legislation was also alleged to infringe constitutional rights – the proportionality test can therefore be used both in the characterisation of legislation and in the context of the limitation of a constitutional right. However, this will not always be the case.
57 Andrews v Howell (1941) 65 CLR 255, 278.
58 (1952) 87 CLR 177, 266.
59 (1944) 69 CLR 457, 467.
power. The High Court has generally considered that the Constitution should be construed with all the generality that the words used admit according to the ordinary and material meaning, read in the light of its history, with such necessary implications as derived from its structure. The Court should ‘always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose’. For example, in 1908 in Jumbunna Coal Mine NL v Victorian Coal Miners’ Association, which concerned an industrial relations dispute, Higgins J determined that even if the words of s 51(xxxv) are not sufficient of themselves to enable the Parliament to legislate with respect to the registration of an industrial association, the Parliament is empowered to make laws as to ‘matters incidental to the execution of any power vested by this Constitution in the Parliament’.

This approach has been adopted even in instances where the High Court has been adamant not to apply purposive principles in relation to non-purposive powers. In Murphyores Inc Pty Ltd v Commonwealth (‘Fraser Island Case’), regulations were introduced under the Customs Act 1901 (Cth) which required the Minister’s permission to export minerals, but such permission was dependent on the outcome of environmental inquiries regarding the proposed projects. Stephan J emphasised that while the s 51(i) trade and commerce power is not a purposive power, so that legislation will only be valid if it addresses the subject matter of the prohibition of exports, a regulation or administrative decision implementing that prohibition will also be within the subject matter so long as that is the nature of the decision. Thus although the Commonwealth did not have the direct power to legislate with respect to environmental matters, the legislation was still within the scope of s 51(i) because the Parliament was permitted to legislate in respect of incidental matters. McTiernan J relied on the decision in Herald & Weekly Times Ltd v Commonwealth, where it was held that while the Postmaster-General had the authority under s 51(v) to administer a television licensing system, the Postmaster-General was also permitted to impose conditions on

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60 See, eg, R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd (1964) 113 CLR 207, 225 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ); McGinty v Western Australia (1996) 186 CLR 140, 230 (McHugh J).
61 Jumbunna Coal Mine NL v Victorian Coal Miners’ Association (1908) 6 CLR 309, 368 (O’Connor J).
62 Ibid 320.
64 Ibid 12.
those licenses even though it was for another purpose other than that envisaged by s 51(v). The broadness of this approach therefore does give rise to some level of uniformity in interpretation between purposive and non-purposive powers.

Additionally, like other constitutional heads of power, the High Court has recognised that the defence power is still subject to the Constitution, and therefore subject to its limitations. This general principle was addressed in Nationwide News Pty Ltd v Wills, where it was recognised that the legislature’s enumerated powers are subject to any express or implied constitutional limitations. ‘Each provision of the Constitution should be regarded, not as operating independently, but as intended to be construed and applied in the light of other provisions of the Constitution.’ In a similar guise, in the context of the capacity of a defence measure to override the s 116 freedom of religion, Latham CJ in Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth stated that ‘no law can escape the application of s 116 simply because it is a law which can be justified under ss 51 or 52, or under some other legislative power. All the legislative powers of the Commonwealth are subject to the condition which s 116 imposes.’ Although, as noted above, there are few constitutionally entrenched rights which provides limited protection from potential abuse. Ultimately, the scope of the defence power depends on the prevailing political conditions. While some comparisons exist between the characterisation of legislation with respect to defence and legislation enacted under other constitutional heads of power, the power of the legislature with respect to defence is far broader. The effect of this is that while there is scope for human rights abuses under all constitutional powers, the principles that apply to the interpretation of legislation enacted pursuant to the defence power has the potential to give rise to the greatest human right abuses. This is particularly in relation to infringements of the right to liberty of the person, such as restrictions on an individual’s access to due process.

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66 (1992) 177 CLR 1, 69, 76 (Deane and Toohey JJ).
67 Bank of New South Wales v Commonwealth (1948) 76 CLR 1, 185 (Latham CJ).
68 (1943) 67 CLR 116, 123. As discussed further on page 103, s 116 was ultimately held not to have been infringed in this case.
(b) **Extrinsic Material and Policy Considerations**

Historically, the High Court has deferred to the legislature on the most appropriate methods to defend the Commonwealth on the basis that the Parliament is best placed to determine what is best for the maintenance of the Commonwealth.\(^{69}\) However, as discussed on page 69, the purposive nature of the defence power still requires the judiciary to determine whether a demonstrable connection can be established between the legislation and the purpose of defence. As the defence power’s scope is dependent on the prevailing international conditions, this connection must generally be determined by reference to extrinsic material.\(^{70}\) That is, the court must determine whether the prevailing conditions warrant the purported exercise of the defence power through considering evidence and taking judicial notice or knowledge of notorious facts. This may include whether a country is engaged in hostilities, the existence of a threat, or prevailing economic conditions. However, for the judiciary there is a fine line between determining whether legislation is for a defence purpose and making or evaluating policy decisions.

The High Court has emphasised that it is not the function of the judiciary to analyse the suitability of a particular measure for the defence of the Commonwealth. Its role is to merely determine whether the purpose can be said to be for the defence of the Commonwealth.

> Questions of legislative policy are determined by the Legislature, not by the courts. If it can reasonably be considered that there is a real connection between the subject matter of the legislation and defence, the court should hold that legislation is authorized by the power to make laws with respect to defence.\(^{71}\)

However, given that the scope of the defence power is dependent on external factors, including the prevailing international conditions, extrinsic material must necessarily be considered when determining whether there is a connection between the legislative measure and defence. While this may be relatively easy in a wartime context, as Lee argues ‘in a period of a less critical nature and when the challenged law does not ex facie relate to military matters how is the court to go about its duty of finding the linkages between the law and the defence power?’\(^{72}\) How, for example, can a court

\(^{69}\) Cases addressing this issue are discussed further in the following section.

\(^{70}\) Bede Harris, *Essential Constitutional Law* (Cavendish Publishing Pty Ltd, 2000) 151.

\(^{71}\) *Dawson v Commonwealth* (1946) 73 CLR 157, 173 (Latham CJ).

\(^{72}\) Lee, above n 2, 14.
determine the validity of legislation which dissolves an organisation on the basis that the government believes it poses a threat to security and defence? In such instances, the judiciary is required to consider economic, international and defence policies in determining whether the legislation is justified in light of the extant international and political climate.

In many cases, evidence has been led by the Commonwealth to support the connection between the legislation and a defence purpose. For example, during WWII in *Sloan v Pollard*, legislation introduced under the defence power imposed controls on the sale of cream. The legislation was upheld after evidence was presented on the arrangements between Australia and the United Kingdom regarding the supply of butter and how this necessitated controls on the sale of cream. Similarly, in *Attorney-General (Vic) (At the Relation of the Victorian Chamber of Manufacturers) v Commonwealth*, there were mutual admissions of fact which supported the proposition that there was a greater convenience in maintaining a factory producing uniforms at full capacity even during peace time. Gavan Duffy CJ and Evatt and McTiernan JJ acknowledged the opinion of the Governor-General, and then accepted that there was a connection between those measures and the defence of the Commonwealth:

We think it is clear that the Governor-General deemed it necessary for the efficient defence of the Commonwealth to maintain intact the trained complement of the factory, so as to be prepared to meet the demands which would inevitably be made upon the factory in the event of war ... Consequently, the sales of clothing to bodies outside the regular naval and military forces are not to be regarded as the main or essential purpose of this part of the business, but as incidents in the maintenance for war purposes of an essential part of the munitions branch of the defence arm. In such a matter, much must be left to the discretion of the Governor-General and the responsible Ministers.

A key contention in the practical aspects of determining a connection in light of the prevailing international conditions is the issue of whether it is the role of the judiciary or the executive to determine and evaluate the existence or extent of the danger. In 1952 in *Marcus Clarke & Co Ltd v Commonwealth*, the Commonwealth was of the opinion that ‘there exists a state of international emergency in which it is essential that preparations for defence should be immediately made to an extent and with a degree of

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73 Ibid.
74 (1947) 75 CLR 445.
75 Ibid 462-3 (Latham CJ).
76 (1935) 52 CLR 533.
77 Ibid 558.
urgency not hitherto necessary except in time of war.\textsuperscript{78} Consistent with this position, Webb J took judicial notice of the notorious fact that there was considerable international tension and a distinct possibility of war.\textsuperscript{79} In light of these facts, the High Court accepted that the control of capital issues was the most effective means of ensuring that resources were diverted to defence-related industries. While Zines observes that the Court in such instances is not concerned with the actual wisdom or effectiveness of the measure to aid defence,\textsuperscript{80} such may be an inevitable by-product in determining a connection.

The above cases can be distinguished from \textit{Commonwealth v Australian Commonwealth Shipping Board},\textsuperscript{81} where the High Court was not presented with evidence that might have shown that the manufacture and sale of equipment was reasonably incidental to maintaining the dockyards for the purpose of the Board’s shipping line. Arguably, had evidence been led, the High Court may have found the legislation to be within the scope of the defence power. Similarly, in \textit{Marcus Clarke & Co Ltd v Commonwealth},\textsuperscript{82} Webb J distinguished this case from \textit{Australian Communist Party v Commonwealth},\textsuperscript{83} where the conduct or objectives of the Australian Communist Party could not be judicially noted, and so ordinary evidence was required to show that their conduct or objectives, in peace and war, were such as to bring them within the scope of the defence power.\textsuperscript{84} Dixon CJ distinguished the cases through identifying that the legislation in \textit{Marcus Clarke & Co Ltd v Commonwealth} ‘does afford objective tests by which its connection, or want of connection, with the defence power may be seen or ascertained’.\textsuperscript{85}

The High Court has on occasion cautioned against taking notice of evidence which has not been led. In \textit{Farey v Burvett}, Higgins J looked to the purposes of industrial legislation that had been passed in Germany regarding the regulation of food.\textsuperscript{86} However, his Honour was careful to explain that

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\textsuperscript{78} (1952) 87 CLR 177, 219. \\
\textsuperscript{79} Ibid 245. \\
\textsuperscript{80} Zines, above n 30, 304. \\
\textsuperscript{81} (1926) 39 CLR 1. \\
\textsuperscript{82} (1952) 87 CLR 177. \\
\textsuperscript{83} (1951) 83 CLR 1. \\
\textsuperscript{84} (1952) 87 CLR 177, 246. \\
\textsuperscript{85} Ibid 216. \\
\textsuperscript{86} (1916) 21 CLR 433, 458.
\end{flushright}
[w]e have no evidence before us of the facts which, in the opinion of Parliament, rendered the present Act expedient for the purpose of the War, and for the term of the War; but there may have been such facts. I am not entitled to use as facts in this case matters which I have learnt aliunde.\textsuperscript{87}

However, an exception to this principle is where, even in the absence of evidence being led as to the prevailing international conditions, the doctrine of judicial notice can apply so that the judiciary takes notice of matters that are so notorious that evidence of its existence is not necessary. For example, while no evidence was led in \textit{Australian Communist Party v Commonwealth} regarding then prevailing international conditions, the High Court did accept that given that the secondary aspect of the defence power may be exercised during periods of increasing international tension or imminent danger, the Court must take judicial notice of the current climate.\textsuperscript{88} Similarly, in \textit{Farey v Burvett}, Griffith CJ took judicial notice of the abundance of the previous season’s harvest, that there was a surplus of wheat awaiting export, and that export facilities were limited.\textsuperscript{89} His Honour said that ‘the Court cannot shut its eyes to the fact that what could not rationally be regarded as a measure of defence in time of peace may be obviously a measure of defence in war time’\textsuperscript{90} Griffith CJ recognised that for economic as well as other reasons, the export of surplus wheat to allied nations may be highly desirable for the more efficient prosecution of the war, and therefore controls over certain exports were justified.\textsuperscript{91} His Honour did not analyse those facts further, other than to acknowledge that they existed.

This raises a contentious issue as to how the judiciary can determine whether legislation is for defence purposes without making a judgment on defence policy. As discussed in Chapter I of this thesis, the doctrine of parliamentary supremacy means that once legislation has been found to be intra vires a legislative power, the legislation cannot be invalidated, irrespective of whether the legislation unnecessarily infringes human rights or the defence policy basis is not defensible. The following section provides case examples of judicial deference. In any case, the restriction on analysis of defence policy issues may also be attributed to the fact that often evidence cannot be led publically to support a particular argument for security reasons. The international situation may be

\textsuperscript{87} Ibid 459.
\textsuperscript{88} (1951) 83 CLR 1, 254-6 (Fullagar J).
\textsuperscript{89} (1916) 21 CLR 433, 422-3.
\textsuperscript{90} Ibid 442.
\textsuperscript{91} Ibid 443.
such that the Commonwealth is of the opinion that certain measures are warranted for its defence, but to release information publically may prejudice defence. Difficulties may also arise because those security concerns may be based on facts which are not able to be presented as evidence due to the rules of evidence excluding hearsay. This position has been taken to the extreme in the anti-terrorism legislation which provides, for example, that the summary of the grounds on which a control order is issued need not contain information if it is likely to prejudice security. These issues are discussed further in the following Chapters.

Despite the above, determination of a connection between legislation and a defence purpose must necessarily involve some consideration of government defence policy. As can be seen in the following section, in considering whether a particular measure is for defence purposes, the High Court has been required to take notice of the prevailing international and political climate in order to determine what ‘phase’ the Commonwealth is in so that it may consider what aspects of the defence power apply. In any case, Chapter I of this thesis discussed the rationale for judicial independence, including how it is the Constitution’s only general guarantee of due process. In undertaking its role as guardian of the Constitution, as discussed throughout this thesis there is a place for the judiciary in considering policy issues, at least when constitutional rights are at issue. It is now useful to examine how the defence power has been interpreted during the different phases of expansion and contraction.

C Interpretation of the Defence Power during Peacetime

There were periods of profound peace in the early years of Federation prior to WWI, and during these periods the High Court was reluctant to permit the Parliament to enact legislation pursuant to the defence power where a strong connection between that legislation and the defence of the Commonwealth was not demonstrable. According to Lee, during periods of profound peace there is no material threat to the security of the nation and so the defence power is at its narrowest; only authorising legislation which has, as its direct and immediate object, the naval and military defence of the Commonwealth and of the several States. ‘While peace prevails, the normal facts of

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92 Criminal Code Act 1995 (Cth) s 104.3(2A).
93 Lee, above n 2, 30.
life take their respective places in the general alignment, and are subject to the normal action of constitutional powers. As Fullagar J summarised in *Australian Communist Party v Commonwealth*, during peacetime the focus is on the ‘primary aspects’ of the defence power, which includes measures such as the enlistment and training of military members, the manufacture of weapons, the erection of fortifications, and the prohibition and punishment of activities obstructive of such preparations.

The early 1920s was considered to be a period of profound peace. In 1926 in *Commonwealth v Australian Commonwealth Shipping Board*, the High Court was required to consider whether the Board transgressed the powers set out in its enabling legislation through entering into a contract to supply, erect and maintain steam turbo-alternators. The Board argued that the dockyard and workshops it was required to establish were necessary for the defence of the Commonwealth, and that it was impracticable to maintain them efficiently for that purpose unless it could enter upon general manufacturing and engineering activities. While the High Court recognised that there may be practical difficulties in maintaining the works, such as costs and worker experience, it was satisfied that ‘the power of naval and military defence does not warrant these activities in the ordinary conditions of peace, whatever be the position in time of war or in conditions arising out of or connected with war’.

This case can be contrasted with the 1935 decision of *Attorney-General (Vic) (At the Relation of the Victorian Chamber of Manufacturers) v Commonwealth*, some ten years later, the facts of which were discussed on page 72. Rich J identified that the requirements of the clothing factory was of a fluctuating character, and given that ‘all things naval and military have the possibility of war in view’, the nature of the factory could not be determined in accordance with peacetime requirements. The Court accepted that the retention of specially trained staff may not be possible unless the factory was fully engaged as it would be during wartime. It was therefore ‘necessary for the efficient defence of the Commonwealth to maintain intact the trained complement of the factory, so as to be prepared to meet the demands which would

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95 (1951) 83 CLR 1, 254.
96 (1926) 39 CLR 1.
97 Ibid 9-10 (Knox CJ, Gavan Duffy, Rich and Starke JJ).
98 (1935) 52 CLR 533.
99 Ibid 562.
inevitably be made upon the factory in the event of war’. The High Court distinguished this case from *Commonwealth v Australian Commonwealth Shipping Board* on the ground that in the earlier case it was required to have regard to the supply of electrical equipment as a trade ‘wholly unconnected with any purpose of naval or military defence’, although Sawer argues that the difference between these cases is trivial.

In a more recent peacetime case, in 1989 in *Re Tracey; Ex parte Ryan*, the High Court confirmed the validity of a separate judicial system for the enforcement of military discipline. Here, a defence force member charged with offences under the *Defence Force Discipline Act 1982* (Cth) objected to the jurisdiction of a Defence Force Magistrate to hear his case on the basis that the hearing and determination of the charges involved an exercise of Ch III judicial power, which the Magistrate was not qualified to exercise. Mason CJ and Wilson and Dawson JJ conceded that ‘a service tribunal has practically all the characteristics of a court exercising judicial power’. However, the unique nature of the defence force allowed the defence power to be used to impose a system of discipline which is administered judicially, not as part of the judiciary under Ch III but as part of the defence force organisation itself. To this end, ‘the power to make laws with respect to the defence of the Commonwealth contains within it the power to enact a disciplinary code standing outside Ch III and to impose upon those administering that code the duty to act judicially’. Mason CJ and Wilson and Dawson JJ agreed that although the *Constitution* did not expressly provide for the disciplining of the forces, such is necessarily comprehended by s 51(vi) because the military defence of the Commonwealth demands the provision of a disciplined force. This includes subjecting its members to penalties for service offences as well as offences against the civil law, even though the only connection between the offences and the defence force is that the offender is a member. Brennan and Toohey JJ stated

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100 Ibid 558.
101 (1926) 39 CLR 1.
104 (1989) 166 CLR 518.
105 Ibid 537.
106 Ibid 540-1.
107 Ibid 541.
108 Ibid 540.
109 Ibid 543 (Brennan and Toohey JJ).
that ‘[g]ood order and military discipline, upon which the proper functioning of any defence force must rest, are required no less at home in peace-time than upon overseas service or in war-time’.  

From the above, it is clear that the judiciary places a relatively high level of scrutiny on defence measures introduced during times of peace. The effect of this is that during times of peace the High Court may place a greater focus on non-defence issues such as the rights of individuals. This can be contrasted with wartime where, Sawer argues, the High Court treated parliamentary opinion as conclusive and the consequential parliamentary and executive action as justified by the defence power. This line becomes blurred during periods falling between war and peace, and this is relevant to the extent that, as discussed further in Chapter IV of this thesis, Australia is currently in such a period and is unlikely to revert back to peacetime in the near future.

D Interpretation of the Defence Power during Periods of Increasing International Tension

In the lead up to both World Wars and during the Cold War, the climate was one where war had not been declared, but nor could it be said that it was a time of peace. There was apprehended emergency, so that while Australia was not embroiled in a crisis, the crisis was obvious elsewhere and there was a fear that it might soon spread to Australia. Military forces were used in execution of political objectives through actual or threatened application of military power. During such periods, the High Court was more liberal in its interpretation of the defence power, and accepted that a wider interpretation was necessary in order to prepare for war. According to Williams J, ‘[a]ny conduct which is reasonably capable of delaying or of otherwise being prejudicial to the Commonwealth preparing for war would be conduct which could be prevented or prohibited or regulated under the defence power’. ‘[A] mounting danger of hostilities before any actual outbreak of war will suffice to extend the actual operation of the defence power as circumstances may appear to demand.’

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110 Ibid.
114 Australian Communist Party v Commonwealth (1951) 83 CLR 1, 225.
115 Ibid 195 (Dixon J).
the High Court has still established limits to the power during such periods. The connection between the legislation and the particular purpose of defence needed to at least be established ‘with reasonable clearness’. However, while it can be surmised that the connection between the legislation and the defence power is generally a matter of degree, the elasticity of the defence power has meant that, generally speaking, the greater the extant threat or tension, the greater the power and therefore the greater the potential for infringement of the right to liberty of the person.

During the Cold War tensions in the period following WWII, came one of the most significant cases addressing the defence power: *Australian Communist Party v Commonwealth*.

This case drew enormous interest due to the so-called efforts of the Commonwealth to ‘arrogate to itself conclusive power to determine the justification for legislation in the interests of defence and internal security’, and the implications that the legislation subsequently had in respect of members of the Australian Communist Party. In a 6-1 judgment (Latham CJ dissenting), it was held that the *Communist Party Dissolution Act 1950* (Cth), which inter alia purported to declare unlawful the Australian Communist Party and confiscate its property, was invalid as not being within the defence power of the Commonwealth. Sawer argues that in this case the High Court was ‘up against a formidable array of wartime decisions in which this fundamental rubric of judicial review was disregarded’. This case is significant from a human rights perspective in that had the majority validated the legislation, the defence power would have potentially been deemed limitless and simply exercisable on the subjective opinion of the executive. As Lindell recognises, it is ‘an example of the High Court’s potential to protect civil liberties and the rule of law through its authority to interpret the extent of Commonwealth legislative power’.

The preamble to the Act contained nine recitals which, inter alia, described the Australian Communist Party as a revolutionary party using violence, fraud, sabotage,
espionage and treasonable or subversive means for the purpose of bringing about the overthrow or dislocation of the established system of the government of Australia. Key clauses included s 4, which declared unlawful, dissolved and forfeited the property of the Australian Communist Party. The Governor-General was granted the power to declare unlawful associated bodies if they fell within one of the descriptions set out in s 5(1). Section 5(2) required that the Governor-General be satisfied that the body was one to which the section applied and that the continued existence of that body was prejudicial to defence or to the execution or maintenance of the Constitution or the law. Sections 5(4), (5) and (6) provided for an application to a court to set aside the declaration on the ground that the body in question was not a body to which the section applied, but did not permit judicial review of the Governor-General’s decision itself that the existence of the body was prejudicial to defence. Section 9 contained corresponding provisions in respect of individuals who had an association with communism.

The plaintiffs asserted, inter alia, that apart from the preamble there was nothing that demonstrated that the existence of the Australian Communist Party and its associates had any relation to defence or to the maintenance of constitutional government. Further, the plaintiffs asserted that

when it is sought to support legislation under the defence power, before a court can hold the legislation to be valid, the court first must be satisfied upon legally admissible evidence as to the existence of the “actual or objective facts” relied upon as a basis for the legislation; secondly, the Court must be satisfied that those facts constitute a danger to the Commonwealth; and thirdly, the Court must be satisfied that the legislation is reasonably necessary for the alleged defensive purpose; that is … the legislation must not “go too far” or “be incommensurate” or “be too drastic”.122

Ultimately, the majority of the High Court held that the legislation was invalid. Five of the justices (Dixon, McTiernan, Williams, Fullagar and Kitto JJ) unanimously held that through declaring whether a person or association threatened the Commonwealth, the Governor-General, as a member of the executive, was essentially making a declaration as to the application of the defence power, which is contrary to the doctrine of separation of powers. Webb J held the legislation invalid on other grounds, and while Latham CJ agreed with some of the propositions of the majority, he was ultimately in dissent.

122 Australian Communist Party v Commonwealth (1951) 83 CLR 1, 146 (Latham CJ).
Dixon J accepted that matters relating to defence are the responsibility of the executive, which has the benefit of accessing information that cannot be made public to inform its decisions.  

His Honour conceded that ‘the reasons why [the defence power] is exercised, the opinions, the view of facts and the policy upon which its exercise proceeds and the possibility of achieving the same ends by other measures are no concern of the Court’.  

However, Fullagar J stated that during times falling short of war, a law cannot be made under the defence power that imposes legal consequences on a legislative or executive opinion which itself supplies the only link between the power and the legal consequences of the opinion.  

Here, the effect of the legislation was that the Governor-General was left to judge the reach and application of the ideas expressed by phrases such as ‘security and defence of the Commonwealth’, ‘maintenance of the Constitution’ and ‘prejudicial to’, and that declaration by the Governor-General was conclusive.  

Dixon J concluded that while matters ancillary to the defence power could be dealt with by the Commonwealth, here ‘no opinion of the Parliament as to the actual existence or occurrence of some matter or event which would provide a specific relation of the subject of a law with power can suffice to give the law that relation.’  

McTiernan and Kitto JJ both asserted that despite the views expressed in the preamble, the duty is cast upon the judiciary to determine whether laws are within the scope of the legislature’s power.  

‘The Constitution does not allow the judicature to concede the principle that the Parliament can conclusively “recite itself” into power.’  

Williams J described the Act as being, in effect, an assertion by the Parliament that it can decide whether facts exist which are sufficient to create a nexus between legislation and the defence power.  

His Honour considered that in order for the legislation to be valid, it must be proved that upon its enactment facts existed which made it reasonably necessary for the Australian Communist Party to be dissolved and its property forfeited, and this could not be done through the inclusion of recitals.  

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123 Ibid 198.  
124 Ibid.  
125 Ibid 261.  
126 Ibid 179.  
127 Ibid 200.  
129 Ibid 206.  
130 Ibid 221.  
131 Ibid 224.
there were notorious public facts during the war of which the Court could take judicial notice, and while this justified the *National Security Act 1939* (Cth) during actual hostilities, there were no relevant facts (notorious or otherwise) sufficient to bring the Act within the scope of the defence power on the day it was enacted.\(^{132}\) Thus winding up bodies, disposing of their assets and depriving individuals of their civil rights or liberties on the mere assertion of the executive that they were conducting themselves in a manner prejudicial to security and defence, was not authorised by the defence power in the prevailing climate.

Relevantly, McTiernan J commented on the extent to which the defence power could be used to limit civil liberties generally:

> In a period of grave emergency the opinion of Parliament that any person or body of persons is a danger to the safety of the Commonwealth would be sufficient to bring his or their civil liberties under the control of the Commonwealth; but in time of peace or when there is no immediate or present danger of war, the position is otherwise because the *Constitution* has not specifically given the Parliament power to make laws for the general control of civil liberties and it cannot be regarded as incidental to the purpose of defence to impose such a control in peace time. To decide that the present Act is good under the defence power would radically disturb the grant of legislative power made by the *Constitution* to the Commonwealth Parliament.\(^{133}\)

His Honour went on to note that ‘the general control of civil liberty which the Commonwealth may be entitled to exercise in war time under the defence power is among the first of war-time powers that would be denied to it when the transition from war to peace sets in’.\(^{134}\)

Interestingly, the majority judges, with the exception of Kitto J, indicated that they would have accepted a general policy of judicial restraint with respect to the defence power in times of actual war. On this basis, Sawer concludes that it is likely that had this case been decided during wartime, the High Court would have treated the Parliamentary opinion as conclusive and therefore the legislative actions of the Parliament would have been within the scope of the defence power.\(^{135}\) However, as discussed below, this approach was criticised in the post-September 11 decision of *Thomas v Mowbray*,\(^{136}\) where it was held that the primary aspects of the defence power

\(^{132}\) Ibid 226.
\(^{133}\) Ibid 207.
\(^{134}\) Ibid 207.
\(^{135}\) Ibid 207.
\(^{136}\) Ibid 207.

could apply outside wartime in response to internal threats. The Act has since been described as ‘one of the most draconian and unfortunate pieces of legislation ever to be introduced into the Federal Parliament’. 137

Concerns arose following the decision in Australian Communist Party v Commonwealth, 138 with some arguing that the High Court’s approach had the effect of inhibiting the efforts of the Commonwealth in preparing for war. 139 However, such concerns were dispelled in Marcus Clark & Co Ltd v Commonwealth, 140 where the High Court demonstrated its support of defence measures introduced prior to any official declaration of war. Here, the Defence Preparations (Capital Issues) Regulations 1951 (Cth), made pursuant to Defence Preparations Act 1951 (Cth) s 4, required that companies and individuals who borrowed above a certain amount, other than from certain entities, seek the Treasurer’s approval. Regulation 17(i) stated that the Treasurer’s consent is not to be refused ‘except for purposes of or in relation to defence preparations’. The plaintiff challenged the scheme after the Treasurer rejected its application. Ultimately, the majority held the legislation to be valid on the basis that restrictions regarding the raising of money did amount to a law with respect to defence, and that there was no sufficient reason for concluding that the Treasurer exercised his discretion inconsistently with the Regulations.

Unlike in Australian Communist Party v Commonwealth, 141 here the Defence Preparations Act 1951 (Cth) contained detail regarding the international situation and thus why essential defence preparations needed to be undertaken with haste. Section 4(1) gave the Governor-General the power to make regulations ‘for or in relation to defence preparations’ and while this phrase was not defined, the preamble provided guidance as to what it was intended to include. 142 Specifically, Dixon CJ considered that the description of ‘defence preparations’ was governed by the preamble

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138 (1951) 83 CLR 1.
139 Lee, above n 2, 24.
140 (1952) 87 CLR 177.
141 (1951) 83 CLR 1.
142 This included ‘preparations for defence ... to an extent, and with a degree or urgency, not hitherto necessary except in time of war’, ‘the raising, equipping and provisioning of the armed forces of Australia in increasing numbers’ and ‘measures to secure the maintenance and sustenance of the people of Australia in the event of war and to contribute towards the maintenance and sustenance of the people of countries associated with Australia in defence preparations’.
words ‘in the event of war’. His Honour adopted a broad approach and held that there was ‘little or no question’ concerning the scope of the defence power: ‘measures that tend or might reasonably be thought to be conducive to such an end are within the power provided that the tendency to the end is not tenuous, speculative or remote’. Webb J also adopted a broad approach, and in quoting from *Farey v Burvett* argued that the Regulations might “‘conceivably, even incidentally, aid the effectuation of the powers of defence” by diverting some men or materials to war preparations, and so have the necessary real connection with defence, and therefore... are within power and valid’. His Honour was satisfied that despite war having not yet been declared, the Act and the Regulations were justified:

> That international situation warranted, I think, preparation for war on the scale authorised by the Act, involving the employment by the Commonwealth Parliament and Executive of the defence powers to their fullest extent, both in their primary and secondary aspects ... I am unable to hold that while the defence powers in their secondary aspect can be employed in times of peace, whether real or ostensible, to rebuild a city bombed during war ... they can never be employed to meet an international situation short of war, even when there is a distinct possibility of war with powerful enemies using weapons unprecedented in range and destructiveness.

In finding a strong link between the defence power during war time and in the lead up to war when defence preparations were being made, McTiernan J considered that ‘[d]efence preparations, as the term implies, are necessarily relative to a possible war’ and described the power as carrying a wide discretion to authorise action by the Parliament to protect Australia against aggression. The practical effect of this position is that if there is a real possibility of war, then any legislation conceivably or incidentally related to defence will be valid.

Lee argues that this case indicates that the Parliament ‘has ample legislative flexibility encompassing a wide range of subject-matters to put the nation on a war footing, provided the court will accept the need for preparation’. In establishing whether such a need existed, and therefore in establishing a connection between the legislation and the defence power, Webb J took judicial notice of the notorious fact that, during this Cold War and Korean War period, there was considerable international tension and a

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143 Marcus Clark & Co Ltd v Commonwealth (1952) 87 CLR 177, 215.
144 Ibid 219.
146 Marcus Clark & Co Ltd v Commonwealth (1952) 87 CLR 177, 246 (Webb J).
147 Ibid 226-7.
148 Lee, above n 2, 32.
distinct possibility of a third world war.\textsuperscript{149} However, Sawer is critical of the outcome on the basis that the legislation fell short of vesting in the judiciary the power to decide whether a sufficient connection existed between the refusal of capital and the expansion of the armed forces.\textsuperscript{150} The most the legislation permitted was to allow the Court to satisfy itself that the Treasurer was bona fide of the opinion that the connection existed and had acted on relevant consideration.\textsuperscript{151} As will be seen in the following section, where the defence power is at its widest, this approach places a significant limit on the extent to which the judiciary is in fact able to undertake a subjective review of the appropriateness of a particular measure where that measure limits the rights of individuals.

E Interpretation of the Defence Power during Wartime

The defence power has been given its broadest interpretation during times of war. The terms ‘naval and military’ in s 51(vi) have been interpreted not as words of limitation, ‘but rather of extension, showing that the subject matter includes all kinds of warlike operations’.\textsuperscript{152} During such periods, the Commonwealth has introduced ‘extensive and detailed controls on the community of a kind that, in time of peace, would ordinarily be thought to fall under some other heads of legislative power and to have nothing significant to do with the defence power of the Commonwealth’.\textsuperscript{153} The High Court tended to defer to the Parliament on what measures it considered necessary for the successful prosecution of the war, although as Zines points out judicial control is not entirely absent during such periods.\textsuperscript{154} During WWI and WWII, the power was held to extend to legislation addressing not only defence necessities such as war service and supply, but also to industry in general such as price regulation, economic controls, and the provision of housing and food. The implications of this broad approach have been significant in terms of human rights. This is particularly where the legislative measures were dependent on the opinion of a member of the executive, as this limited the extent to which the judiciary may undertake a substantive analysis of that measure. Australian

\textsuperscript{149} Marcus Clark & Co Ltd v Commonwealth (1952) 87 CLR 177, 246.
\textsuperscript{151} Ibid.
\textsuperscript{152} Farey v Burvett (1916) 21 CLR 433, 440 (Griffith CJ).
\textsuperscript{153} Lee, above n 2, 10.
\textsuperscript{154} Zines, above n 30, 305.
Established the principle that during times of war, the opinion of a designated person can indeed supply the only link with constitutional power. As Lee argues, the powers available to authorities in times of crises should be amplified, but there is still a need for safeguards to constrain that power.

1 The World War I Cases

WWI was the first major war that Australia had been involved in since Federation. The conflict began when the United Kingdom and Germany went to war in August 1914, and Australia’s involvement commenced shortly after when the then Prime Minister Andrew Fisher declared full support for the United Kingdom. It continued for a period of four years, during which time there were few elements of life which remained untouched by the war effort. At the outbreak, Australia enacted, among other legislative measures, the War Precautions Act 1914 (Cth). Sections 4 and 5, respectively, enabled the Governor-General to make regulations for securing the public safety and defence of the Commonwealth, and to issue an order which made provision ‘for any matters which appear necessary or expedient with a view to the public safety and the defence of the Commonwealth’. The Act thus conferred wide powers to facilitate Australia’s successful participation in the war effort. As discussed in this section, the Act was used to introduce regulations on a broad range of subjects, many of which were challenged.

One of the most controversial measures during WWI were the internment provisions which permitted the detention of a person who was not formally charged with an offence, who would not be entitled to an ordinary court hearing and who may not be made aware of the grounds upon which they were detained. In 1915 in Lloyd v Wallach, the respondent was arrested and detained under a regulation enacted pursuant to War Precautions Act 1914 (Cth) s 4, which provided that where the Defence Minister had reason to believe that any naturalized person was disaffected or disloyal, he could order him to be detained in military custody during the continuance of a state

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155 (1951) 83 CLR 1.
157 Lee, above n 2, 1.
160 (1915) 20 CLR 299.
of war. In considering the authority of the Court to review the Minister’s actions, Griffith CJ made the following observation:

I think that his belief is the sole condition of his authority, and that he is the sole judge of the sufficiency of the materials on which he forms it. If this be so, the only inquiry which could possibly be made by the Court ... would be whether the Minister had in fact a belief arrived at in the manner I have indicated. That belief is a matter personal to himself, and must be formed on his personal and ministerial responsibility. It is quite immaterial whether another person would form the same belief on the same materials, and any inquiry as to the nature and sufficiency of those materials would be irrelevant. Further, having regard to the nature of the power and the circumstances under which it is to be exercised, it would, in my opinion, be contrary to public policy, and, indeed, inconsistent with the character of the power itself, to allow any judicial inquiry on the subject in these proceedings.161

Such an approach was confirmed by Issacs J, who stated that the Minister ‘is the sole judge of what circumstances are material and sufficient to base his mental conclusion upon, and no one can challenge their materiality or sufficiency or the reasonableness of the belief founded upon them’.162 Griffith CJ narrowly accepted that if it could be proved that the Minister had not formed such a belief, then an aggrieved person might have a redress against him.163 However, it would be difficult to establish such an argument, given that the Minister’s opinion was subjective and he was not required to establish a basis for that opinion. Griffith CJ also accepted that the Minister could not be called upon to answer any question on the issue, because the disclosure of any evidence would be injurious to the public interest.164 As such, his statement had to be treated as conclusive.

The following year in Welsbach Light Company of Australasia v Commonwealth,165 pursuant to the Trading with the Enemy Act (No. 9 of 1914) the Governor-General proclaimed inter alia that any transaction with a company which the Attorney-General declared to be managed or controlled for the benefit of persons of enemy nationality, was trading with the enemy and was prohibited. In considering the validity of the provision, Griffith CJ applied the rule that ‘the intention of a legislative authority is to be ascertained, not by any technical rules applicable to proceedings in criminal cases, but by having regard to the subject matter, the evil to be remedied, and the nature of the

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161 Ibid 304-5.
162 Ibid 308.
163 Ibid 305.
164 Ibid.
165 (1916) 22 CLR 268.
remedy’. His Honour considered that it was sufficient for the Attorney-General to declare that in his opinion a company fell within a prohibited category, and did not consider that he had to ‘hold the Attorney-General’s hand’ in making such an investigation. Barton J concurred, stating that the proclamation related to an opinion declared by the Attorney-General, not an accusation or finding. The issue of judicial review of decisions based on the opinion of a member of the executive is discussed further in Chapter III of this thesis, where a comparison is drawn between these decisions and the anti-terrorism legislation.

Also in 1916, in *Farey v Burvett* the Governor-General made a regulation under the *War Precautions Act 1914* (Cth) that declared that areas within a certain radius of General Post Offices in stated areas were ‘proclaimed areas’ in which the Governor-General could set maximum prices for the sale of bread and flour. The appellant, who was convicted of selling bread above the maximum price, contested that the Act was ultra vires the defence power. He argued that the word ‘defence’ must bear a single and uniform meaning at all times, and given that an attempt by the Parliament to fix the price of food would not be permitted during times of peace, the approach should equally apply during times of war. The majority of the High Court refused to accept such a restrictive interpretation and dismissed the appeal. Griffith CJ held that the scope of the defence power must be considered in the light of the prevailing circumstances, stating that the power

includes preparation for war in time of peace, and any such action in time of war as may conduce to the successful prosecution of the war and defeat of the enemy. This is the constant and invariable meaning of the term. It is obvious, however, that the question whether a particular legislative act is within it may fall to be determined upon very different considerations in time of war and time of peace.

Griffith CJ held that the power to legislate with respect to defence could extend to any law ‘which may tend to the conservation or development of the resources of the Commonwealth so far as they can be directed to success in war, or may tend to distress the enemy or diminish his resources’. The test his Honour set out for determining whether legislation was for defence purposes was: ‘Can the measure in question

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166 Ibid 276.
167 Ibid.
168 Ibid 277.
169 (1916) 21 CLR 433.
170 Ibid 441.
171 Ibid.
conduce to the efficiency of the forces of the Empire, or is the connection of cause and effect between the measure and the desired efficiency so remote that one cannot reasonably be regarded as affecting the other?" 172 In relation to the Regulations, Griffith CJ stated that given that the Governor-General was required to form an opinion based on the facts available to him, how could the Court assume the function of revising his opinion? 173

Barton J was also careful to distinguish between the roles of the judiciary and of the legislature, including the basis on which the judiciary is permitted to objectively review defence measures:

If the thing is capable, during war, of aiding our arms by land or sea, here or elsewhere, we are to say so, but we say no more. It may be wholly beside the mark in peace, and, if it be so, we are to say so upon due occasion. But the necessity is not for us, when facts of which we take judicial notice establish that the thing is capable of aiding directly the execution of the power. If it is thus capable, then the question of the necessity, or the wisdom or expediency, of invoking such aid, is for Parliament or its duly delegated authority. 174

In terms of the subject matter of defence legislation, Barton J accepted that almost any resource can be used to ensure a nation’s success in war, regardless of whether the resource was mental or material. 175 The control of food supplies is a legitimate means of defence in time of war, and whether these means are necessary in the prevailing circumstances is a question for the Parliament which has ‘the best knowledge of the facts relating to the strategy of the War and the conditions under which the people can be victorious’. 176

Isaacs J focused on the scope and construction of the Constitution itself in the context of the defence power; recognising that in exercising its duty to defend itself and the States, the Commonwealth has the legislative power to do whatever is advisable in relation to defence. 177 While his Honour did accept that this power is one that ‘is commensurate with the peril it is designed to encounter, or as that peril may appear to the Parliament itself …’, 178 his Honour contended that the Constitution ‘is not so

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172 Ibid.
173 Ibid 444.
174 Ibid 449.
175 Ibid 447.
177 Ibid 455.
178 Ibid.
impotent a document as to fail at the very moment when the whole existence of the
country it is designed to serve is imperilled’. On this basis, the test his Honour adopted
is as follows. This test appears to be more deferential to the legislature in determining
the most appropriate measures to be taken, compared to the test set out by Griffith CJ
which did look to the efficiency of the particular measure.

If the measure questioned may conceivably in such circumstances even incidentally aid
the effectuation of the power of defence, the Court must hold its hand and leave the rest
to the judgment and wisdom and discretion of the Parliament and the Executive it
controls—for they alone have the information, the knowledge and the experience and
also, by the Constitution, the authority to judge of the situation and lead the nation to
the desired end ... As to the desirability or wisdom of the Regulation complained of, it
is not my province to speak; but as a matter of law I have no hesitation in holding that
such a Regulation is one which, as a defence Regulation, is within the competency of
the Legislature in the condition of affairs that now exist.

Lee queries whether this broad approach can be maintained in light of Australian
Communist Party v Commonwealth, given that such a test ‘would leave the
Parliament with an almost uncontrolled discretion’. It does not require the legislature
to establish that the ‘desired end’ justifies the measure and the effect it has on
individuals’ rights. This appears to be the concern of the dissenting justices. Gavan
Duffy and Rich JJ could not accept the proposition that the defence power enables the
Parliament to make such laws as it chooses, provided they are, in its opinion, conducive
to the defence of the Commonwealth. Despite this, it must be remembered that these
were wartime measures and therefore were interpreted in accordance with the broadest
scope of the defence power. As such, the approach in Australian Communist Party v
Commonwealth would likely not be the preferred approach by the judiciary in such
circumstances.

After the decision in Farey v Burvett, the High Court upheld all defence measures
that were challenged during WWI. For example, in Pankhurst v Kiernan, Unlawful
Associations Act 1916 (Cth) s 4 provided ‘[w]hoever advocates or
encourages, or incites or instigates to the taking or endangering of human life, or the

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179 Ibid 451.
180 Ibid 455-6.
181 (1951) 83 CLR 1.
182 Lee, above n 2, 13.
183 Farey v Burvett (1916) 21 CLR 433, 462.
184 (1951) 83 CLR 1.
185 (1916) 21 CLR 433.
186 Lee, above n 2, 28.
187 (1917) 24 CLR 120.
destruction or injury of property, shall be guilty of an offence’. The applicant, who was imprisoned under s 4 for trying to induce window-breaking in a speech to 2000 people, challenged the validity of this section. Barton J was satisfied that ‘it is competent to Parliament to pass such legislation as may prevent any hampering or dislocation of the work of effectively prosecuting the War, that is, the defence of the country’. Isaacs J went so far as to say that ‘no one can ever say that anything is useless for war purposes, even in the narrowest sense’. Therefore even though the Parliament did not have the power to make laws with regard to the protection of property, on the basis that the section was designed for the preservation of Australian life and property, which are essentials for national defence, the majority upheld its validity.

In August 1918, only months prior to the end of WWI, was the case of Ferrando v Pearce and another. The Minister ordered the plaintiff’s deportation under an order issued pursuant to War Precautions Act 1914 (Cth) s 5, which allowed the Defence Minister to order the deportation of any alien. Barton J said of the validity of the order:

It is obvious that deportations must in many cases be expedient with a view to public safety and defence. That they are capable of being so is enough. Being thus capable, whether they are so in fact is a matter which legislative authority, or authority delegated by the Legislature, alone can determine.

The plaintiff claimed that the purpose of the order was to compel him to return to Italy so that he could render compulsory military service. Regardless, Isaacs and Rich JJ queried how such a purpose could be inconsistent with the defence of the Commonwealth: ‘Would not that advance, and therefore be expedient in, the interests of our public safety and the defence of this Commonwealth?’ Gavan Duffy J referred to the British case of R v Home Secretary; Ex parte Duke of Château Thierry, which established that such a motive does not in itself make the order invalid. His Honour concluded that ‘[i]f the power of deportation were given as ancillary to the effecting of some purpose, it could only be used for the effecting of that purpose, but here the power is given to be exercised at the Minister’s discretion, and the purpose which he hopes to

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188 Ibid 129.
189 Ibid 132.
190 (1918) 25 CLR 241.
191 Ibid 253.
192 Ibid 258.
193 [1917] 1 KB 552.
194 Ferrando v Pearce and Another (1918) 25 CLR 241, 263.
attain by its exercise is immaterial’. In light of this, the majority confirmed the validity of the order.

Within months of this decision came Burkard v Oakley, and Sickerdick Informant v Ashton. In the former, War Precautions (Enemy Shareholders) Regulations 1916 (Cth) reg 11(2) empowered the Attorney-General to declare that certain shares were transferred to the Public Trustee. The High Court confirmed that such could be considered a reasonable precaution for public safety and the defence of the Commonwealth. Similarly, in the latter case, the defendant was charged with having printed a publication in which statements were made which were likely to prejudice the recruiting of military forces. Again, the relevant regulation was accepted as a regulation for securing the safety and the defence of the Commonwealth. Barton J stated that the wisdom or otherwise of any regulation is a matter for the legislature, and the Court is not concerned with such matters. Both cases confirmed the validity of the broad principles outlined in Farey v Burvett.

2 The World War II Cases

Australia’s involvement in WWII commenced in September 1939 with an announcement by the then Prime Minister Robert Gordon Menzies on every national and commercial radio station in Australia. Australia was better prepared for WWII than it was for WWI, although specialist legislation, including the National Security Act 1939 (Cth), was still widely litigated before the High Court. Section 5 allowed the Governor-General to make regulations for securing public safety and the defence of the Commonwealth and for prescribing all matters which were necessary or convenient to be prescribed for the more effectual prosecution of any war in which the King was engaged. The Act was significant in terms of the right to liberty of the person.

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195 Ibid.
196 (1918) 25 CLR 422.
197 (1918) 25 CLR 506.
198 Enacted pursuant to War Precautions Act 1914 (Cth) s 4.
199 Burkard v Oakley (1918) 25 CLR 422, 524 (Knox CJ).
200 Sickerdick Informant v Ashton (1918) 25 CLR 506, 512-3.
201 (1916) 21 CLR 433.
During the six year war, there were 17 major cases in which the High Court considered the scope of the defence power and legislation enacted pursuant to it. There were challenges to regulations that purported to control the price of goods, employment and even admission to universities. According to Rich J:

It is notoriously essential, for the effective prosecution of such a war as is now being waged, a war in which the continued existence of the Commonwealth and its constituent States is at stake, that the whole resources of the nation, whether of men or of things, should be marshalled and concentrated upon war effort.

However, the High Court did not repeat the same liberal approach it adopted in WWI where it had provided wide latitude to the Parliament. These cases had varying outcomes, with the High Court not convinced in some instances that certain regulations could be said to deal with matters associated with the prosecution of the war. In these decisions, the Court drew a distinction between matters which might relate to the general well-being of a community at war, and matters which have a specific connection with defence. According to Sawer, the High Court ‘can claim with justice that ... its decisions have shown a statesmanlike approach to the problems of total war’.

Significantly, the High Court showed more concern for the human rights of individuals when considering the validity of infringing legislation.

In 1941 in *Wishart v Fraser*, the applicant was charged with an offence against *National Security (General) Regulations 1939-1940* (Cth) reg 41 for disseminating a document with the intent of causing disaffection among Australian soldiers. The appellant argued, inter alia, that the *National Security Act 1939* (Cth), and therefore the Regulations, were invalid because the Act purported to delegate legislative power to the Governor-General contrary to the *Constitution*. This argument was rejected on the basis that the distribution of powers in the *Constitution* does not prevent the legislature from delegating its power to the executive. ‘The defence of a country is peculiarly the concern of the Executive, and in war the exigencies are so many, so varied and so urgent that width and generality are a characteristic of the powers which it must exercise.’

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204 *South Australia v Commonwealth (Uniform Tax Case)* (1942) 65 CLR 373, 437.
206 (1941) 64 CLR 470.
207 Ibid 485 (Dixon J).
Dixon J considered that the Act was clearly directed to the prosecution of the war and was a valid exercise of the defence power.\(^{208}\)

Also that year, in *Andrews v Howell*,\(^{209}\) the validity of the *National Security (Apple and Pear Acquisition) Regulations 1939* (Cth) was challenged. The Regulations made it an offence to move apples and pears from one place to another, and the plaintiff was subsequently convicted for moving 27 cases of apples. The majority rejected the plaintiff’s argument that the Regulations merely established a marketing scheme to provide economic protection for growers affected by conditions arising out of the war. Dixon J stated of the defence power:

> though its meaning does not change, yet unlike some other powers its application depends upon facts, and as those facts change so may its actual operation as a power enabling the legislature to make a particular law. In the same way the operation of wide general powers conferred upon the Executive by the Parliament in the exercise of the power conferred by s 51(vi) is affected by changing facts. The existence and character of hostilities, or a threat of hostilities, against the Commonwealth are facts which will determine the extent of the operation of the power. Whether it will suffice to authorize a given measure will depend upon the nature and dimensions of the conflict that calls it forth, upon the actual and apprehended dangers, exigencies and course of the war, and upon the matters that are incident thereto.\(^{210}\)

In 1943 in *Adelaide Company of Jehovah’s Witnesses*,\(^{211}\) the Governor-General declared a Jehovah’s Witnesses organisation unlawful under *National Security (Subversive Associations) Regulations 1940* (Cth) reg 3, on the basis that, in his opinion, the organisation was prejudicial to the defence of the Commonwealth or the efficient prosecution of the war. Following the declaration, the organisation was dissolved under reg 4 and its property confiscated under reg 6A. It challenged the validity of these laws on the basis that the Regulations were not authorised by the *National Security Act 1939* (Cth) or alternatively that the Act was ultra vires the defence power. A key question was whether the s 116 constitutional freedom of religion prevented the Parliament from legislating to restrain the activities of a religious organisation, the activities of which the Governor-General considered to be prejudicial.

In relation to the capacity of the legislature to interfere with personal freedoms during times of war, Starke J stated that laws are not within power if ‘arbitrary or capricious’:

\(^{208}\) Ibid.
\(^{209}\) (1941) 65 CLR 255.
\(^{210}\) Ibid 278.
\(^{211}\) (1943) 67 CLR 116.
In other words, if the regulation involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, then a court might well say: “Parliament never intended to give authority to make such rules.” A regulation of that character would not be a law or regulation “with respect to defence” or for securing the public safety or defence of the Commonwealth.212

That being said, the majority accepted that a state of war justifies defence legislation which places temporary restrictions on personal freedoms which would otherwise not be legitimate during times of peace. On this basis, s 116 could not prevent the Commonwealth from making laws which prohibited the promotion of religious doctrines where they were prejudicial to the war effort.213 In justifying interference by the legislature with personal liberties during times of war, Latham CJ stated:

No organized State can continue to exist without a law directed against treason. There are, however, subversive activities which fall short of treason (according to the legal definition of that term) but which may be equally fatal to the safety of the people ... Examples are to be found in obstruction to recruiting, certainly in war-time, and, in my opinion, also in time of peace. Such obstruction may be both punished and prevented. So also propaganda tending to induce members of the armed forces to refuse duty may not only be subject to control but may be suppressed.214

It is clear from this case that the High Court showed its willingness to accept that an infringement of human rights could be justified where war necessitated such. Indeed, Starke J acknowledged that s 116 is subject to limitations and ‘[t]herefore there is no difficulty in affirming that laws or regulations may be lawfully made by the Commonwealth controlling the activities of religious bodies that are seditious, subversive or prejudicial to the defence of the Commonwealth or the efficient prosecution of the war’.215 According to Rich J, the freedom of religion is not absolute, but ‘[i]t is subject to powers and restrictions of government essential to the preservation of the community’.216 In justifying the infringement of human rights in the interests of the war effort, Williams J provided the example that the detainment of a person on mere suspicion without trial for the duration of the war because the Minister is of the opinion that their liberty is prejudicial to safety, would be a valid exercise of a plenary administrative decision.217 His Honour even went so far as to say that in many instances it would be contrary to the public interest for the Minister to have to disclose to a court

212 Ibid 151-2.
213 Ibid 149 (Rich J)
214 Ibid 132-3.
215 Ibid 155.
216 Ibid 149.
217 Ibid 162.
the confidential information upon which he acted.\textsuperscript{218} Such a position is consistent with WWI decisions such as \textit{Lloyd v Wallach}.\textsuperscript{219}

Nevertheless, ultimately it was held that while the Regulations did not infringe s 116, the legislature did exceed the defence power. Latham CJ held that reg 6A was ultra vires on the basis that the Act did not require any connection between the continued use or continued risk of the premises by the unlawful body.\textsuperscript{220} Starke J was of the opinion that while the Parliament is responsible for national security and must be the best judges of what national security requires, the Regulations were arbitrary, capricious and oppressive and had little, if any, real connection with the defence of the Commonwealth or the efficient prosecution of the war.\textsuperscript{221} Williams J held that the effect of the Regulations on shareholders, creditors and third parties were so ‘drastic and permanent in their nature that they exceed anything which could conceivably be required in order to aid, even incidentally, in the defence of the Commonwealth’.\textsuperscript{222} To this end, while the High Court accepted that the Commonwealth had the power to suppress subversion, unlike the above cases the Regulations here went beyond the defence power.

The following year in \textit{Reid v Sinderberry},\textsuperscript{223} the respondents were convicted under \textit{National Security (Man Power) Regulations 1942} (Cth) reg 15 which made it an offence under \textit{National Security Act 1939} (Cth) s 13A to comply with a direction to engage in employment under the direction and control of an employer specified in the direction. Among other arguments, the respondents challenged the validity of s 13A on the basis that it was unconstitutional to allow the Governor-General to enact regulations simply where he holds the opinion that it is necessary for defence. On this issue, Latham CJ and McTiernan J stated

\begin{quote}
A regulation, though complying in terms with the section as being necessary for defence purposes in the opinion of the Governor-General, could nevertheless not be held to be valid if it was shown that the Governor-General could not reasonably be of opinion that the regulation was necessary or expedient for such purposes. It was not the intention of Parliament when it enacted s. 13A to authorize the making of regulations upon the basis of an opinion which no reasonable man could hold. Accordingly the question which the Court has to determine is that which has so frequently arisen in this Court during the present war—‘Is the regulation really a law with respect to securing
\end{quote}

\begin{itemize}
\item \textsuperscript{218} Ibid.
\item \textsuperscript{219} (1915) 20 CLR 299.
\item \textsuperscript{220} \textit{Adelaide Company of Jehovah's Witnesses Inc v Commonwealth} (1943) 67 CLR 116, 141.
\item \textsuperscript{221} Ibid 154.
\item \textsuperscript{222} Ibid 166.
\item \textsuperscript{223} (1944) 68 CLR 504.
\end{itemize}
the public safety, the defence of the Commonwealth, or the efficient prosecution of the war?²²⁴

Given that ensuring the production of food for civilians so that the population does not become starved and disordered is sufficiently connected with defence, s 13A was valid.²²⁵ The fact that the opinion of the Governor-General was an element in the conditions which had to be satisfied before a regulation could be made under the section was not an objection to the regulation’s validity.²²⁶ Zines argues that the test adopted by the High Court was whether the measure can reasonably be regarded as a means towards attaining an object which is connected with defence, but notes that the Court was not concerned with the actual wisdom or effectiveness of the measure.²²⁷

This decision was followed later that year in *Stenhouse v Coleman*.²²⁸ Here, the plaintiff was charged for infringing the *Bread Industry (New South Wales) Order* which provided that ‘a person shall not carry on the business of a master baker or bread distributor in contravention of this Order’. The Order was made under *National Security (General) Regulations* reg 59, which provided inter alia that the Minister, so far as appears to him to be necessary in the interests of the defence of the Commonwealth or the efficient prosecution of the war, may by order provide for regulating, restricting or prohibiting the production, movement, distribution, sale, or purchase of essential articles.²²⁹ The plaintiff argued that the production of goods for civilian use fell outside the defence power but, based on *Farey v Burvett*,²³⁰ this argument was rejected.²³¹ The maintenance of essential supplies and services was found to be ‘plainly and necessarily a matter having the most direct connection with the war’ and that ‘[i]f the life of the community cannot be maintained the armed forces cannot be maintained’.²³² The plaintiff also argued that reg 59 was too wide because its application depended upon the opinion of the Minister. Latham CJ referred to *Reid v Sinderberry*,²³³ and confirmed that reg 59 did not authorise the making of any orders

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²²⁴ Ibid 512.
²²⁵ Ibid 512-3 (Latham CJ and McTiernan J).
²²⁶ Ibid 511.
²²⁷ Zines, above n 30, 304.
²²⁸ (1944) 69 CLR 457.
²²⁹ ‘Essential articles’ was defined as articles ‘appearing to a Minister to be essential for the defence of the Commonwealth or the efficient prosecution of the war, or to be essential to the life of the community’.
²³⁰ (1916) 21 CLR 433.
²³¹ *Stenhouse v Coleman* (1944) 69 CLR 457, 462 (Latham CJ).
²³² Ibid.
²³³ (1944) 68 CLR 504.
which, in the opinion of the Minister, might be necessary for the purposes mentioned in the Regulation, but only authorised the making of orders which had a real connection with the subject of defence.\textsuperscript{234} To this end, in both cases the High Court limited its role of review to simply determining whether a connection between defence and the legislation exists, rather than reviewing the merits of the legislation. This places great power in the hands of the Parliament.

A similar issue was addressed in 1947 in \textit{Little v Commonwealth},\textsuperscript{235} where the plaintiff sought to recover damages from the Commonwealth for false imprisonment after being detained in custody for two different periods of 10 days and four months in 1942. The orders were made under \textit{National Security (General) Regulations} regs 25-26, which stated that the Minister could exercise the powers conferred if satisfied that to do so would prevent the person acting in any manner prejudicial to the public safety or the defence of the Commonwealth. Among other arguments, the plaintiff contested that the Minister was not, and could not have been, so satisfied in this case. Dixon J referred to the position in \textit{Lloyd v Wallach},\textsuperscript{236} and reiterated that theoretically the existence of the Minister’s opinion was examinable, but that as the Minister was the sole judge of the truth, reliability, relevance and sufficiency of the information before him and of the reasonableness of his conclusion, no practical challenge to his opinion could be made.\textsuperscript{237} In fact, Dixon J went so far as to say that ‘an erroneous opinion is none the less an opinion, and ... the proper source of any Minister’s information is the reports of his officers and the foundation upon which he forms an opinion must be their advice’.\textsuperscript{238} On this basis, Dixon J considered that unless he could show that the order was invalidly made or that it was unlawful, the plaintiff had no redress for his arrest or detention.\textsuperscript{239} Thus even though there was no evidence which justified any suggestion against the plaintiff’s loyalty to the allied cause, there was still no evidence that the Minister was mistaken in his opinion, and therefore the plaintiff’s action was dismissed.

Zines argues that in instances involving an order or instrument made on the opinion of a member of the executive, the High Court is not empowered to examine de novo the

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\textsuperscript{234} \textit{Stenhouse v Coleman} (1944) 69 CLR 457, 464.
\textsuperscript{235} (1947) 75 CLR 94.
\textsuperscript{236} (1915) 20 CLR 299.
\textsuperscript{237} \textit{Little v Commonwealth} (1947) 75 CLR 94, 103.
\textsuperscript{238} Ibid.
\textsuperscript{239} Ibid 102.

\end{footnotes}
\end{footnotesize}
factual findings and discretions of the administrator, but is limited to such matters as relevant considerations, proper purposes and errors of law.\textsuperscript{240} He concludes that this falls short of the degree of control that the Court has insisted on in cases involving other heads of constitutional power.\textsuperscript{241} In relation to orders on the basis of the opinion that such was necessary for the defence of the Commonwealth, ‘[t]here could be no more striking illustration of the exceptional status of the defence power’.\textsuperscript{242} The powers of the executive during times of war have thus been interpreted very broadly.

F \textit{Interpretation of the Defence Power in the Aftermath of War / Transition to Peace}

During the aftermath of war when the nation was transitioning from war to peace, such as the periods immediately after WWI and WWII, the High Court accepted that the defence power still operates with an expanded scope. Extended powers during this period are based on the premise that an official declaration of the end of the war does not necessarily mean that the prevailing financial, economic and social conditions automatically revert back to that of peacetime. Clarke and McCoy surmise that the duration of the broader powers depends on the termination of the emergency, rather than the cessation of the underlying conflict that gave rise to the declaration of war in the first place.\textsuperscript{243} ‘The upheavals thrown up by war in the various industrial, social and economic spheres must be tackled by a government armed with sufficient powers conferred by Parliament.’\textsuperscript{244} The defence power therefore extends to allow the Commonwealth to legislate to ensure a successful transition from war to peace. However, there is a question as to how long this transition period continues. Generally speaking, the extent to which defence measures are permitted during the aftermath of war depends on the nature of the measure. Petrol rationing or preferential employment of ex-servicemen, as discussed in this section, reach a point when they can no longer be considered incidental to a winding up process. Where the state of war has been

\begin{footnotesize}
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\item [240] Zines, above n 30, 306.
\item [241] Ibid.
\item [242] \textit{Australian Communist Party v Commonwealth} (1951) 83 CLR 1, 257 (Fullagar J).
\item [243] Clark and McCoy, above n 112 , 88.
\item [244] Lee, above n 2, 29.
\end{enumerate}
\end{footnotesize}
lifted, the courts will intervene where the Parliament is continuing to employ laws that should only be used during the currency of the war.\textsuperscript{245}

There was a raft of decisions in the years following the end of WWI in which the High Court was supportive of the Parliament’s post-war measures. In 1920 in \textit{Attorney-General (Commonwealth) v Balding},\textsuperscript{246} the \textit{Australian Soldier’s Repatriation Act 1917} (Cth) made continuing provision for the welfare of returned soldiers. The High Court held the provisions valid on the basis that it was ‘a matter so intimately connected with the defence of the Commonwealth as manifestly to be included within the scope of the power’.\textsuperscript{247} Also that year, the High Court confirmed the continuing validity of the \textit{War Precautions Act 1914} (Cth) and its associated regulations in \textit{Jerger v Pearce}.

Here, the Minister for Defence authorised the deportation of the plaintiff but the plaintiff argued that as the war had ended, the defence power could no longer support the legislation. Referring to the decision in \textit{Ferrando v Pearce},\textsuperscript{249} the High Court determined that despite the hostilities ceasing, a state of war technically continued.\textsuperscript{250} Given this, the legislation, and therefore the deportation, was valid.

In the aftermath of WWII, the High Court adopted a similar approach. In 1945 in \textit{Shrimpton v Commonwealth},\textsuperscript{251} \textit{National Security (Economic Organization) Regulations 1942} (Cth) reg 6 prohibited the transfer of land unless the Treasurer’s consent was provided. After the Treasurer refused to give the plaintiff consent unless she complied with certain conditions, the plaintiff contended that reg 6 was invalid on the basis that the power of the Treasurer to provide consent ‘in his absolute discretion’ and ‘subject to such conditions as he thinks fit’ without requiring a connection with defence, was an excess of power. The majority (Latham CJ, Starke, Dixon and McTiernan JJ) held that the Regulations were intra vires the defence power. Latham CJ confirmed previous decisions that the \textit{National Security Act 1939} (Cth) authorised the making of regulations fixing the prices of goods and services,\textsuperscript{252} which could

\textsuperscript{245} Clark and McCoy, above n 112, 89.
\textsuperscript{246} (1920) 27 CLR 395.
\textsuperscript{248} (1920) 28 CLR 588.
\textsuperscript{249} (1918) 25 CLR 241.
\textsuperscript{250} \textit{Jerger v Pearce} (1920) 28 CLR 588, 592-4 (Starke J).
\textsuperscript{251} (1945) 69 CLR 613.
\textsuperscript{252} See, eg, \textit{Victorian Chamber of Manufacturers v Commonwealth (‘Prices Regulation case’) (1943) 67 CLR 335.}
include regulations relating to the purchase of land. Additionally, the Treasurer’s discretion was not arbitrary and unlimited, despite being described as absolute, as it must have been exercised bona fide and for the purposes of the Regulations. Ultimately, the majority held that while the Regulations were valid, the conditions imposed by the Treasurer were not authorised by the Regulations as they did not have a relation to the purchase or disposition of land.

Regulation 6 was again challenged in 1946 in *Dawson v Commonwealth*. Here, the applicant agreed to buy a block of land for £200, however the Treasurer’s delegate advised the applicant that he would only provide approval if the selling price did not exceed £150. The applicant argued that the *National Security Act 1939* (Cth) was no longer valid given the surrender of the Japanese. The High Court was divided equally and accordingly the view of Latham CJ, who followed the decision in *Shrimpton v Commonwealth*, prevailed. His Honour considered the contrast between war and peace, and accepted that it could not be said that overnight the Commonwealth turned from being engaged in war to not being engaged in war. The allied forces were in occupation of enemy countries by virtue of conquest, and such a state of affairs could not be described as a state of peace. The defence power does not cease instantaneously with the termination of hostilities, and the defence power must extend to the wind up after war and to restore conditions of peace. Zines argues that this case demonstrates that judicial control is not entirely absent in cases involving the defence power.

In 1946 in *Real Estate Institute of NSW v Blair*, the defendant was a ‘protected person’ for the purpose of the *National Security (War Service Moratorium) Regulations 1940* (Cth) and applied to take possession of an unoccupied house owned by the plaintiff. Latham CJ identified the difficulties that the war brought about, including a shortage of houses which made it very difficult for members of the forces to procure suitable accommodation. Consistently with his approach in the preceding case,
Latham CJ stated that legislative provisions dealing with these conditions were clearly within the scope of the defence power, and that the termination of hostilities did not bring such a power to an end.\(^{262}\) His Honour reaffirmed the position in *Attorney-General (Commonwealth) v Balding*\(^ {263}\) that the defence power included the re-establishment in civil life of persons who have served in the defence forces when they are discharged from such service.\(^ {264}\) Rich J similarly stated that ‘the function of the defence power does not, of course, begin when the first shot is fired nor end with the last’.\(^ {265}\)

Similarly, in 1947 in *Morgan v Commonwealth*,\(^ {266}\) the plaintiff was prosecuted for supplying certain meat products other than in accordance with the applicable Rationing Orders and Price Regulation Orders. The plaintiff argued that the varying application of the Orders among different States infringed the s 99 constitutional prohibition on the Commonwealth giving preference to one State over another. In a joint judgment, Latham CJ and Dixon, McTiernan and Williams JJ were of the opinion that the Regulations were intra vires the defence power and did not infringe s 99. In discussing the nature of the restriction imposed by s 99, their Honours stated that:

> It would, indeed, be a remarkable thing for a Constitution to provide that laws for the defence of a country, at a time possibly of the most critical threat to national existence, should be limited by a requirement that they should not have the effect of giving some commercial preference to parts of the country over other parts.\(^ {267}\)

The High Court determined that 1949 was ultimately the cut off point where an expanded scope of the defence power could no longer be applied. This came about in *R v Foster; Ex parte Rural Bank of NSW*,\(^ {268}\) where four years after hostilities had ended the ‘aftermath of war’ argument was finally rejected, even though peace treaties had not been signed. Here, the validity of certain regulations providing for the employment of women during the war, the rationing of liquid fuel, and housing for discharged servicemen and their dependants, was challenged. The High Court accepted that in order to make the re-adjustments to restore a community ravaged by war to conditions of peace, it might be necessary to continue some wartime controls for a certain period

\(^{262}\) Ibid.
\(^{263}\) (1920) 27 CLR 395.
\(^{264}\) *Real Estate Institute of NSW v Blair* (1946) 73 CLR 213, 221.
\(^{265}\) Ibid 225.
\(^{266}\) (1947) 74 CLR 421.
\(^{267}\) Ibid 453-4.
\(^{268}\) (1949) 79 CLR 43.
of time. Repatriation and rehabilitation of soldiers, and the rebuilding of a city destroyed by a bombing, were listed as obvious examples. However, the High Court reiterated that the wide scope of the defence power does not continue indefinitely: ‘it does not place within Federal legislative authority every social, economic or other condition that might not have arisen except for the war’, as this would allow legislation on almost any subject matter on the basis that almost no aspects of life were untouched by the war.

The effects of the past war will continue for centuries. The war has produced or contributed to changes in nearly every circumstance which affects the lives of civilized people. If it were held that the defence power would justify any legislation at any time which dealt with any matter the character of which had been changed by the war, or with any problem which had been created or aggravated by the war, then the result would be that the Commonwealth Parliament would have a general power of making laws for the peace, order and good government of Australia with respect to almost every subject. Nearly all the limitations imposed upon Commonwealth power by the carefully framed Constitution would disappear and a unitary system of government, under which general powers of law-making would belong to the Commonwealth Parliament, would be brought into existence notwithstanding the deliberate acceptance by the people of a Federal system of government upon the basis of the division of powers set forth in the Constitution.

Ultimately, the legislation was held invalid on the basis that the Regulations were not obviously connected with the prosecution of the war, were not incidental to any winding-up process, and were not incidental to any endeavour to restore conditions which might be regarded as part of the peacetime organisation of industry. Sawer argued that the decision of the High Court in this final ‘unwinding’ case amounted in substance to a policy decision that the Commonwealth had been given sufficient time for post-war reconstruction. It was not an arbitrary decision in the sense of having no support at all in reason, but it was arbitrary in the sense that the arguments for treating the Commonwealth’s transition power as ending in about December 1949 were no better than the arguments for ending them, say, in December 1948 or December 1950.

There also appears to be a disjoint between the Court stating that it is unable to query the opinion of a member of the executive in undertaking a particular course of action,

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270 Ibid 83.
271 Ibid 85.
272 Ibid 83.
but being comfortable in determining that an extended scope of the defence power no longer existed.

Following this case, in 1951 in *Queensland Newspapers Pty Ltd v McTavish*, the continued validity of *National Security (War Service Moratorium) Regulations* regs 28A, 30, which made provision for the accommodation of returned servicemen, was challenged. The High Court acknowledged that regs 28A and 30 concerned a situation that arose out of the course of war and the termination of hostilities, and therefore related to conditions that were incidental to the conduct of the war and the necessity of raising, maintaining and demobilising armed forces. However, apart from their application to servicemen, the Regulations here did not ‘appear to have any present connection with the power to make laws with respect to defence’. Fighting had ceased more than four years prior to that Act being introduced, and four years should have been sufficient to overcome the shortage due to war conditions. Although the High Court accepted that it was possible for the power to be used to make laws for the purpose of conferring certain benefits and privileges upon former servicemen, the Regulations here went beyond this and attempted to prolong a regulation in ‘an attempt to exercise a power incidental to defence after the conditions to which the regulation was incident have passed’. This was particularly given that the Regulations affected the property rights of house owners who were required to provide housing to the returned servicemen.

G  **Concluding Remarks regarding the Interpretation of the Defence Power**

As a purposive power which expands and contracts according to the extant political climate, the s 51(vi) defence power is clearly unlike any other constitutional head of power. Its elasticity and status as a purposive power means that it is interpreted broadly during times falling short of ostensible peace which, in the absence of constitutionally protected rights, can lead to an acceptance of measures which unnecessarily infringe human rights such as the right to liberty of the person. The above cases demonstrate how during such times prior to September 11, 2001, the judiciary often deferred to the

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275 (1951) 85 CLR 30.
277 Ibid.
278 Ibid 51.
279 Ibid 48.
Parliament and members of the executive on the most appropriate way to defend the Commonwealth. In doing so, it arguably did not fulfil its role as the Constitution’s only general guarantor of due process. This body of precedent demonstrates how the defence power can be used to infringe human rights more so than any other head of power.

As discussed in Chapter IV of this thesis, Australia is currently in a period of increased international tension, and therefore the defence power operates at an expanded scope. This is particularly disconcerting in light of the anti-terrorism legislation that was introduced following September 11. The High Court must be careful, now and in the future, not to take a narrow view of the problems with which the government must deal ‘when it is entrusted with the supreme responsibility of the defence of the country’. However, it must ensure that the law strikes a correct balance between protection of the nation and protection of individual liberty.

\[280\] R v Foster; Ex parte Rural Bank of NSW (1949) 79 CLR 43, 83 (Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ).
III THE EFFECT OF THE WAR ON TERROR AND THE INTRODUCTION OF THE ANTI-
TERRORISM LEGISLATION FOLLOWING SEPTEMBER 11, 2001

A Introduction

The terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, signalled the commencement of the War on Terror. Days after the attacks, Australia’s then Prime Minister John Howard acknowledged that Australia has had tragedies of a national and international kind before, but ‘none matches in depth, scale and magnitude the consequences of what the world must now do in response to the terrible events in the United States’.¹ Consistent with the binding commitment created by United Nations Security Council Resolution 1373,² in an effort to prevent and punish terrorist activity many Western countries introduced legislation containing new terrorist offences and providing for the imposition of restrictions on the liberty of individuals and organisations suspected of involvement in terrorist activities. Australia’s legislative response included the enactment of Criminal Code Act 1995 (Cth) pt 5.3 (‘Criminal Code’) which sets out various terrorist offences and enables control orders and preventative detention orders to be issued against individuals whether or not they have been charged or are suspected of criminal activity; the expansion of Australian Security Intelligence Organisation Act 1979 (Cth) (‘ASIO Act’) pt III div 3 which grants ASIO the power to obtain questioning and detention warrants in order to gather intelligence regarding terrorist acts; and the enactment of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) (‘NSI Act’) which protects classified and sensitive information in federal criminal and civil court proceedings.

Prior to the introduction of this legislation there were no laws in Australia (except for in the Northern Territory) dealing specifically with terrorism.³ Executive powers to detain individuals without charge were limited to detention for non-punitive purposes

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² SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1373 (28 September 2001). This calls on States to work together urgently to prevent and suppress terrorist acts, including through full implementation of the relevant international conventions relating to terrorism and ensuring that terrorist acts are established as serious criminal offences in domestic laws.
(as discussed in Chapter I of this thesis) and evidence could only be suppressed at trials under the evidentiary rules governing public interest immunity. The anti-terrorism legislation sought to address the perceived inadequacies of the existing law to deal with the threat of terrorism through not only punishing terrorists but also preventing the commission of terrorist attacks through making preparatory and associated activities criminal offences and allowing the liberty of individuals and organisations to be restricted and monitored. As explained by former Attorney-General Philip Ruddock, ‘[t]he law should operate as both a sword and a shield – the means by which offenders are punished but also the mechanism by which crime is prevented’. However, the anti-terrorism legislation has given rise to considerable controversy in Australia. There is concern that Australia overreacted to the threat of terrorism, particularly given the limited human rights protection existing in Australia. In some respects, such as the process for issuing and reviewing control orders and preventative detention orders, the anti-terrorism legislation purports to do away with procedural and substantive due process rights. This instils fear that the laws may be applied in a way that disproportionately infringes on fundamental rights and freedoms.

According to McGarrity, Lynch and Williams, ‘[t]he sacrifices that these countries have been prepared to make to the liberty of their citizens in order to achieve, or, more accurately, pursue, security raises alarm bells about the health of the democratic project itself’. Saul argues that there was ‘no public emergency threatening Australia which could justify suspending basic human rights’.

This Chapter first discusses the terrorism offences and control order regime in Criminal Code pt 5.3 divs 100-104. It then discusses the preventative detention regimes in Criminal Code pt 5.3 div 105 and ASIO Act pt III div 3, followed by the special trial procedures in the NSI Act. Throughout, it identifies the risks these legislative measures pose to human rights and compares the post-September 11 approach to defence matters with the pre-September 11 approach discussed in Chapter II of this thesis. This leads

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6 Nicola McGarrity, Andrew Lynch and George Williams, 'The Emergence of a 'Culture of Control'' in Nicola McGarrity, Andrew Lynch and George Williams (eds), Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11 (Abingdon, Oxon Routledge, 2010) 3, 3.
into Chapter IV which discusses the need for greater protection of human rights in this post-September 11 era of the War on Terror, and Chapters V and VI which posit two strategies for greater human rights protection.

B  **Terrorism Offences under the Criminal Code**

Part 5.3 of the *Criminal Code* entitled ‘Terrorism’ was introduced in 2003 and, generally speaking, was the first substantial terrorism-related legislation introduced at the federal level in Australia.\(^8\) In an effort to eliminate the risks associated with the constitutional issues discussed in Chapter II of this thesis that arose pre-September 11, it was introduced under a ‘patchwork’ of constitutional powers comprising the defence power, the external affairs power and the State referral power.\(^9\) Part 5.3 divs 101 and 102 set out terrorist offences by individuals and terrorist offences relating to terrorist organisations respectively, and div 103 creates offences in relation to financing terrorism. While the term ‘terrorism’ is not defined in pt 5.3 (or indeed in any of the anti-terrorism legislation),\(^10\) the term ‘terrorist act’ (discussed on page 116) is defined and is broad enough to cover all steps in the planning and execution of a terrorist act. As McCulloch and Pickering argue, ‘[t]he bulk of the counter-terrorism laws are targeted at future crimes that have not occurred, have not been attempted and for which there is no specific plan’.\(^11\) Given the broad scope of the offence provisions and limited overarching protection, the public is required to place a great deal of trust in the executive that it will not apply them arbitrarily.

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\(^8\) The terrorist offences were originally inserted in pt 5.3 through *Security Legislation Amendment (Terrorism) Act 2002* (Cth); *Suppression of the Financing of Terrorism Act 2002* (Cth).

\(^9\) These risks include whether legislation introduced solely pursuant to the defence power was ultra vires that power. In any case, as discussed on page 134 this issue was addressed in *Thomas v Mowbray* (2007) 233 CLR 307, 324 (Gleeson CJ) 363 (Gummow and Crennan JJ), 503-4 (Callinan J), 525 (Heydon J) where the majority concluded that the legislation was supported by the primary conception of the defence power.

\(^10\) Terrorism was described by the government as ‘the use of violence by group or individuals pursuing political objectives’: Department of the Prime Minister and Cabinet, *Counter-Terrorism White Paper* (2010) 3. It has been defined by commentators as ‘the use or threat of violence, directed at civilians and not overly conducted by an official arm of State, as part of a strategic campaign aimed to induce a state of fear for the purpose of gaining political advantage’: Gregory Rose and Diana Nestorovska, 'Australian Counter-Terrorism Offences: Necessity and Clarity in Federal Criminal Law Reforms' (2007) 31 *Criminal Law Journal* 20, 22.

The inclusion of pre-emptive measures in pt 5.3 is based on the same logic as the military concept of pre-emption set out by former United States President George W Bush. Following September 11, Bush argued ‘if we wait for threats to fully materialise, we will have waited too long ... we must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge’. Generally speaking, ‘prevention has supplanted deterrence as the rationale for broad criminal offences and civil orders that aim to control individuals before they are able to wreak harm on the community’. The following section outlines the offence provisions contained in divs 101, 102 and 103 and the threats these pose to individuals. This is followed by an analysis of key cases addressing these offence provisions. This analysis will be used to support the argument for the need for greater protection of human rights.

1 **Offences by Individuals**

Section 101.1 provides that a person commits an offence if they engage in a terrorist act, with the penalty being imprisonment for life. This primary offence section is followed by associated offences, such as providing or receiving training connected with terrorist acts, possessing things connected with terrorist acts, collecting or making documents likely to facilitate terrorist acts, and other preparatory acts. This clearly demonstrates the intention to not only punish offenders, but to also prevent such conduct through arresting suspects before they have formed a definite plan to commit the criminal act. ‘Terrorist act’ is defined in s 100.1 as:

(1) an action or threat of action where:

(a) the action falls within subsection (2) and does not fall within subsection (3); and
(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
(c) the action is done or the threat is made with the intention of:

(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

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14 McGarrity, Lynch and Williams, above n 6, 5.
15 Criminal Code s 101.2.
16 Ibid s 101.4.
17 Ibid s 101.5.
18 Ibid s 101.6.
19 Lynch and Williams, above n 4, 19.
(ii) intimidating the public or a section of the public.

(2) Action falls within this subsection if it:

(a) causes serious harm that is physical harm to a person; or
(b) causes serious damage to property; or
(c) causes a person’s death; or
(d) endangers a person’s life, other than the life of the person taking the action; or
(e) creates a serious risk to the health or safety of the public or a section of the public; or
(f) seriously interferes with, seriously disrupts, or destroys, an electronic system

(3) Action falls within this subsection if it:

(a) is advocacy, protest, dissent or industrial action; and
(b) is not intended:
   (i) to cause serious harm that is physical harm to a person; or
   (ii) to cause a person’s death; or
   (iii) to endanger the life of a person, other than the person taking the action; or
   (iv) to create a serious risk to the health or safety of the public or a section of the public.

The terrorist provisions have a wide application, with s 100.4 providing inter alia that pt 5.3 applies to all actions or threats of action that constitute terrorist acts, and all preliminary actions that relate to terrorist acts, no matter where those threats or actions occur or would have occurred. Each step in planning, preparing and carrying out a terrorist act therefore potentially falls within the offence sections in div 101. This is far broader than the existing criminal law ‘attempt’ or ‘conspiracy’ offences, with Spigleman CJ in Lodhi v R recognising that preparatory acts are not often made criminal offences, but that here it was ‘the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do’.20 The broad reach of the definition was also raised as a concern by Kirby J in Thomas v Mowbray, the facts of which are discussed on page 134:

Numerous examples spring to mind that fall within the statutory definition of a “terrorist act” but which demonstrate the overreach of Div 104 in this respect. Any number of actions that have hitherto been lawful and would be regarded as non-terroristic might be done with the intention of “intimidating the public or a section of the public”. Moreover, drawing a line between acts designed to coerce or intimidate an Australian government for a political, religious or ideological cause (thus falling within the definition) and pure advocacy, protest, dissent or industrial action (falling outside of the definition) could be difficult. In the latter case, such acts nevertheless remain “terrorist acts” if they are intended to “endanger the life of a person” or “create a serious risk to the health or safety of the public or a section of the public”.21

Lynch and Williams argue that through empowering the authorities in this way, ‘there is a real risk that they may define liability too broadly so that otherwise innocent behaviour may lead to a person being charged despite the absence of criminal intent’.\footnote{Lynch and Williams, above n 4, 28.} For example, downloading a document on how to create a bomb for academic purposes or simply innocent curiosity may fall within s 100.1.\footnote{Ibid.} While it would still be necessary to prove that the action was done with the intention of, for example, intimidating the government, a lobby group for human rights could satisfy this, as ‘intimidation’ is itself an elastic term and to some extent depends on the subjective effect on the person receiving the allegedly intimidatory communication. Additionally, the legislation is drafted in favour of prosecutors to the extent that it puts the onus on the defendant to establish that they do not have sinister intentions. For example, in relation to the s 101.4 offence to possess a thing connected with terrorist acts, it is not an offence if possession of the thing was not intended to facilitate or assist in the commission of a terrorist act, however the evidential burden is placed on the defendant to establish this.\footnote{Criminal Code s 101.4(5).} Such an approach is a departure from the existing criminal law position where the onus is ordinarily on the prosecution to establish the requisite mens rea beyond reasonable doubt.\footnote{Although, it would appear that the legal burden of proof still lies with the prosecution. That is, if the accused points to evidence tending to show that he or she did not have such intentions, the legal burden would still rest with the prosecution to prove beyond reasonable doubt that the accused did have such intentions. The distinction between legal and evidential burden was addressed in \textit{Momcilovic v Queen} (2011) 245 CLR 1, 187 (Heydon J).} While some commentators argue that courts are unlikely to find that the legislative purpose was to impose liability irrespective of mens rea,\footnote{Rose and Nestorovska, above n 10, 29.} such is still a possibility. This has disturbing implications for the presumption of innocence.

Despite the above, some limitations have been included in div 101 in an attempt to avoid legitimate activities falling within its scope. For example, as Rose and Nestorovska identify, the damage caused must be ‘serious’, although this term is not defined.\footnote{Ibid 27.} Similarly, s 100.1(3) sets out what is not a terrorist act, in an attempt to distinguish terrorism from other legitimate activities such as protesting. According to Gummow and Crennan JJ, such limitations avoid the stifling of legitimate dissent because ‘it is the political, religious or ideological motivation and the intention to
intimidate governments or the public (ie elements of the body politic) which
distinguishes the acts in question’. Nevertheless, the broad scope of the definition is
still capable of broad interpretation. For example, providing support for a liberation
movement would fall within the definition, such as the protests against the apartheid
regime in South Africa. While the African National Congress was engaged in an armed
struggle opposing the oppressive party that ruled at the time, the political or human
rights justifications for such action would not exempt the protests from the definition
of a terrorist act given that some actions were intended to cause physical harm or death.
Rose and Nostorovska even argue that due to the extraterritorial application of the
legislation by virtue of s 100.4, Australian military action undertaken overseas could
fall within the definition. This is because while the defence of lawful authority may
apply, military action overseas could still cause death, harm or damage. The
criminalisation of liberation movements is comparable to some wartime offences in
Australia, where the Defence Minister was able to detain a person where he had reason
to believe that they were disaffected or disloyal, or where it was an offence to
disseminate a document with the intent of causing disaffection among Australian
soldiers. The difference here is that Australia is not in a time of war. Further, Joseph
argues that the provisions criminalise actions that fall far short of the catastrophic
attacks that were the original motivation for the legislative changes.

2 **Offences Relating to Terrorist Organisations**

Division 102 sets out offences relating to terrorist organisations. It creates offences
such as directing the activities of a terrorist organisation, being a member of a terrorist
organisation, recruiting a person to join or participate in the activities of a terrorist
organisation, training or training with a terrorist organisation, getting funds to, from

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29 Rose and Nestorovska, above n 10, 27.
31 See *Lloyd v Wallach* (1915) 20 CLR 299.
32 See *Wishart v Fraser* (1941) 64 CLR 470.
33 Sarah Joseph, 'Australian Counter-Terrorism Legislation and the International Human Rights
34 *Criminal Code* s 102.2.
35 Ibid s 102.3.
36 Ibid s 102.4.
37 Ibid s 102.5.
or for a terrorist organisation,\textsuperscript{38} providing support to a terrorist organisation,\textsuperscript{39} or associating with a terrorist organisation.\textsuperscript{40} Lynch and Williams argue that many of these offences are problematic. For example, to be found guilty of providing or receiving training from a terrorist organisation, the person must simply know or be reckless as to the nature of the organisation – there is no requirement for the training itself to be connected to a terrorist activity, but in theory could include instructions on the use of office equipment.\textsuperscript{41} Similarly, a person need not be an active member of a terrorist organisation and be vocal in professing the doctrines of that organisation to commit an offence. Nor, as Rose and Nestorovska identify, is it apparent what the indicators of membership are.\textsuperscript{42} Again, this demonstrates how an act with innocent intentions can constitute an offence, and therefore how the legislation has the potential to interfere with human rights. To address issues relating to training, in 2012 the Council of Australian Governments Review of Counter-Terrorism Legislation (‘COAG Review’) recommended that the offence provisions be amended to include specific exemptions where the purposes of the training is unconnected with the commission of a terrorist act.\textsuperscript{43} This has not been progressed.

In terms of what constitutes a ‘terrorist organisation’, s 102.1(2) allows organisations to be specified as terrorist organisations in the regulations where the Attorney-General is satisfied on reasonable grounds that the organisation: (a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or (b) advocates the doing of a terrorist act. Sections 102.1(3) and 102.1(4) provide, respectively, that the listing of an organisation ceases after three years or where the Attorney-General believes that the organisation is no longer a threat. However, there are no restrictions on an organisation being re-listed. This approach of effectively declaring an organisation a terrorist organisation based on the reasonable opinion of a member of the executive has significant implications, given the low threshold under which individuals can be charged with associated criminal offences. The Senate Legal and Constitutional Legislation Committee recommended including criteria to clarify

\begin{footnotesize}
\begin{enumerate}
\item Ibid s 102.6.
\item Ibid s 102.7.
\item Ibid s 102.8.
\item Lynch and Williams, above n 4, 24.
\item Rose and Nestorovska, above n 10, 32.
\end{enumerate}
\end{footnotesize}
the circumstances in which an organisation may be considered to have advocated terrorism, although this was not adopted.\textsuperscript{44}

In relation to the issue of the specification of a terrorist organisation, Zines surmises that the power of the Commonwealth to confer authority on members of the executive is restricted by the doctrine that no law can give power to any person (other than a court) to determine conclusively any issue on which the constitutional validity of the law depends – that is, the ‘stream cannot rise above its source’.\textsuperscript{45} This is the basis upon which the \textit{Communist Party Dissolution Act 1950} (Cth), which granted the Governor-General an unfettered and unreviewable power to declare an organisation to be unlawful, was invalidated in \textit{Australian Communist Party v Commonwealth.}\textsuperscript{46} However, this differs from div 102, in that while the specification of a terrorist organisation is still a decision of a member of the executive, the offences are attached to activities associated with the terrorist organisation. Nevertheless, given that it is an offence to simply be a member of a terrorist organisation, specification effectively results in a member committing an offence at that point in time and so the effect is the same. Williams correctly observes that there is a ‘disturbing similarity’ between the two approaches.\textsuperscript{47} Joseph argues that the speculative nature of many ‘national security’ decisions lacks judicial character,\textsuperscript{48} however this is no justification to disproportionately limit the rights of individuals.

In relation to the ‘satisfaction on reasonable grounds’ criteria in s 102.1, according to Creyke and McMillan, the word ‘reasonableness’ is used commonly in legislation to qualify the opinion or belief that a decision-maker is required to reach before taking action.\textsuperscript{49} Section 102.1 is not drafted as broadly and arbitrarily as legislation in some of the wartime cases, which imposed tests based on the subjective opinion of a member of the executive. For example, as discussed on page 93, in \textit{Lloyd v Wallach}\textsuperscript{50} detention was based on the subjective ‘belief’ of the Minister that an individual was disaffected.

\begin{thebibliography}{9}
\bibitem{45}Leslie Zines, \textit{The High Court and the Constitution} (Butterworths, 4th ed, 1997) 300.
\bibitem{46}(1951) 83 CLR 1.
\bibitem{47}Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 8 April 2002. 42 (George Williams, Professor).
\bibitem{48}Joseph, above n 33, 438.
\bibitem{50}(1915) 20 CLR 299.
\end{thebibliography}
or disloyal. While an aggrieved person would have redress if they could prove that the Minister had not formed such a belief, it would be difficult to establish such an argument. By contrast, it has been established in several key cases that the term ‘reasonable’ introduces an objective test, which increases the rigor expected of a decision-maker.\(^{51}\) Thus through requiring the Attorney-General’s satisfaction on reasonable grounds, s 102.1 imposes an objective test, which theoretically exposes the decision to specify an organisation as a terrorist organisation to a greater level of scrutiny compared to the subjective tests of the wartime cases.

That being said, the facts of which the Attorney-General must be satisfied on reasonable grounds limits the extent to which individuals can seek judicial review. In *George v Rockett*,\(^{52}\) legislation provided that a Justice of the Peace could issue a search warrant if it appeared to them that there were reasonable grounds for believing that an item within the premises would afford evidence as to the commission of an offence. In a unanimous judgment the High Court stated that where a statute prescribes that there must be ‘reasonable grounds’ for a state of mind, including suspicion and belief, ‘it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person’.\(^{53}\) While the Court was careful to clarify that this does not require establishment on the balance of probabilities that the subject matter in fact occurred or existed, the objective circumstances need to be sufficient to show reason to believe.\(^{54}\) The facts that the Attorney-General must be satisfied of in s 102.1 are very limited. They relate back to the broad definition of a terrorist act, and merely require some kind of connection to a terrorist act. As such, it would be a relatively simple task for the Attorney-General to point to reasonable grounds on which to specify an organisation as a terrorist organisation. For example, if there are reasonable grounds to establish the fact that a business is providing administrative services to a terrorist group, this could be said to be assisting in the doing of a terrorist act and therefore be grounds for specifying that business. Thus while s 102.1 does impose an objective test which, as indicated by Creyke and McMillan, demands greater rigor on the part of the decision-maker, the broad facts on which the ‘reasonable grounds’ for specifying an organisation

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\(^{51}\) Creyke and McMillan, above n 49, 428.
\(^{52}\) (1990) 170 CLR 104.
\(^{53}\) Ibid 112 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
\(^{54}\) Ibid 116.
are based means that there is the potential for organisations to be listed as terrorist organisations on as arbitrary bases as existed in the wartime cases.

In terms of judicial review, as discussed in Chapter I of this thesis, the High Court could review under *Constitution* s 75(v) a decision to specify an organisation as a terrorist organisation on the basis of jurisdictional error, or error within jurisdiction (that is, *Wednesbury* unreasonableness). To provide an example of the former ground of review, if the Attorney-General were to specify an organisation as a terrorist organisation for reasons of trade or for political reasons, this would be outside the scope of div 102, and would therefore constitute a jurisdictional error. In relation to the latter ground of review, apart from the ‘reasonable grounds’ criteria imposed by s 102.1 itself, the High Court would separately have the constitutional basis to review a decision so manifestly unreasonable that no reasonable decision-maker could have come to it.\(^5^5\) However, practically speaking it would still be difficult for an organisation to obtain such review given the broad facts of which the Attorney-General must be satisfied (as discussed above) and the fact that there is no legislative obligation on the Minister to provide reasons for his or her decision at the time it was made. Additionally, access to evidence in subsequent proceedings can be limited through the *NSI Act*, as discussed later in this Chapter. In any case, as discussed in Chapter I of this thesis, unreasonableness under s 75(v) is a problematic concept and does not extend to review of the merits of a decision. Therefore, individuals have limited capacity to challenge judicially the listing of an organisation. Joseph argues that the exclusion of judicial involvement may deprive the proscription process of proportionality and queries why proscription could not take place on the basis of a judicial declaration sought by the Attorney-General.\(^5^6^\) Judicial involvement, it would seem, would go against the apparent intention of the Parliament to minimise judicial interference to the greatest extent possible.

Division 103 relates to financing of terrorist organisations. Section 103.1 provides that a person commits an offence if that person provides or collects funds and is reckless as to whether the funds will be used to facilitate or engage in a terrorist act, whether or not

\(^{55}\) Indeed, judicial review of the specification of a terrorist organisation is permitted under *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5, including review on the basis that an exercise of power is so unreasonable that no reasonable person could have so exercised the power.

\(^{56}\) Joseph, above n 33, 437.
the act occurs. The penalty for infringement, like other terrorism offences, is significant, being imprisonment for life. Given the low threshold required to commit an offence against this section, the penalty is disproportionate when compared to other criminal offences. The COAG Review has recommended that these penalties be reduced.\textsuperscript{57}

3 \textit{Response of the Judiciary}

The judiciary has been conscious of the wide scope of the offences provided in divs 101 and 102 and in key cases has expressed concerns regarding the human rights implications. Such an approach can be distinguished from some of the wartime cases, where the judiciary appeared to be more content with deferring to the Parliament. The difference is presumably attributable to the fact that Australia is not currently at war.

In December 2003, Zeky Mallah became the first person charged under the new anti-terrorism legislation. After his application for an Australian passport was refused, Mallah made a video setting out his plans to kill members of ASIO or the Department of Foreign Affairs and Trade, and sold it to a police officer posing as a journalist. At trial, Mallah argued that his actions were simply to gain attention and make a profit, and that he had no intention of carrying out the plans. He was acquitted by the jury of two counts of doing an act in preparation for or in the planning of a terrorist act under s 101.6(1), and pleaded guilty to one count of recklessly making a threat to cause serious harm to a Commonwealth public official under s 147.2.\textsuperscript{58} In his sentencing remarks, Wood CJ of the Supreme Court of New South Wales acknowledged the offences that could have been committed by those Mallah was involved with, which demonstrates the wide reach of the provisions:

\begin{quote}
It is not to be overlooked that had the Prisoner’s plan in this case been genuine, the journalists dealing with him, and indeed any police officer doing so without a controlled operations certificate, risked committing offences themselves, under the widely crafted terrorism laws, for example, under s 101.4 or 101.5 of the \textit{Criminal Code} if they obtained possession of, or collected, documents connected with the preparation for a terrorist act by him; or under s 103.1 if they paid monies to him and were reckless as to whether they might be used by him to facilitate or engage in such an act.\textsuperscript{59}
\end{quote}

\textsuperscript{57} COAG Review Committee, above n 43, 32.
\textsuperscript{58} \textit{R v Mallah} [2005] NSWSC 358.
\textsuperscript{59} Ibid [35].
Three years later, in June 2006, Faheem Lodhi became the first person convicted of a terrorist offence under pt 5.3. Lodhi was sentenced to 20 years imprisonment for offences relating to preparations he had made that could have led to the bombing of Australian Defence Force bases and the Sydney Electricity Grid. Such preparations included seeking information about explosives, possessing a ‘terrorism manual’ and buying maps of the Grid. In his sentencing remarks, Judge Whealy of the Supreme Court of New South Wales made it clear that it was Lodhi’s intention to advance the terrorist act that gave rise to the offences, even though Lodhi himself did not necessarily intend to carry out the plan.\(^{60}\) Interestingly from a human rights perspective, Judge Whealy was critical of an article in the Daily Telegraph that expressed no sympathy for Lodhi in relation to the harsh treatment he was alleged to have received while imprisoned:

> This somewhat vengeful attitude is a sorry reflection of the recent inroads made into our normally tolerant and decent society. The Court reflects no doubt, or it should do so, the attitudes of society when it imposes sentence on a serious offender. Our society, a free and democratic one, allows for a variety of attitudes in such a situation. No doubt, the Telegraph editorial reflects one such attitude. But it seems to me that, no matter how much we may deplore and disapprove of a particular offender, no matter how repulsive we may find his or her actions, we sacrifice our essential decency if we fail to treat him or her as a fellow human being.

> If the vengeful attitude to which I have referred is allowed to override our traditional values, the war against terror will be over and we will have lost.\(^{61}\)

Significantly, this case also dealt with the application of the *NSI Act*. This aspect is discussed further on page 163.

Another particularly controversial case was *R v Ul-Haque*.\(^{62}\) Here, Ul-Haque was charged with offences against s 102.5(1) for training with a terrorist organisation. A key issue of contention was the admissibility of evidence obtained by ASIO officers. In March 2003, when returning to Australia from Pakistan, Customs seized material in Ul-Haque’s possession including documents referring to weapons, oil and gas pipelines in central Asia, articles about events in Afghanistan, and a letter from him addressed to his family in which he stated that he was going to Kashmir for ‘jihad’ and that he intended to join Lashkar-e-Taiba. In November 2003, ASIO officers approached Ul-Haque in a train station and took him to a park and interviewed him, despite not having


\(^{61}\) Ibid 380.

\(^{62}\) [2007] NSWSC 1251.
a warrant to do so, nor informing Ul-Haque of his rights. The ASIO officers then took Ul-Haque to his home, searched it under a warrant, and questioned him further. Judge Adams of the Supreme Court of New South Wales ultimately held that these and other interviews were inadmissible at Ul-Haque’s trial. In response to the initial approach by the ASIO officers, his Honour stated that ‘any citizen of ordinary fortitude would find a peremptory confrontation of the kind described by the ASIO officers frightening and intimidating’. His Honour considered that Ul-Haque was intentionally given the impression that he was under an obligation to accompany the ASIO officers and answer their questions. His Honour expressed his disapproval for the conduct of the ASIO officers:

To my mind, to conduct an extensive interview with the accused, keeping him incommunicado, under colour of the warrant, was a gross breach of the powers given to the officers under the warrant. The courts have, for over two hundred years, been jealous and rightly jealous, of the use which might be made of search warrants to interfere with the liberty of the citizen and the right of the citizen to his or her own privacy and to maintain the integrity of their personal possessions including, of course, their home.

Judge Adams went so far as to state that the ASIO officers committed the criminal offences of false imprisonment and kidnapping. ‘Their conduct was grossly improper and constituted an unjustified and unlawful interference with the personal liberty of the accused.’

Notwithstanding the above, while the judiciary may have expressed its lack of support and concerns regarding the measures contained in pt 5.3, in the absence of express constitutional rights, the judiciary is still powerless to prevent breaches of human rights where such is authorised under the legislation. That is, even if conduct is innocent or relates to a liberation movement against an oppressive government, it is still capable of falling within the scope of the terrorist offences and there is little the judiciary can do to assist.

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63 Ibid [19].
64 Ibid [27].
65 Ibid [44].
66 Ibid [62]
67 Ibid.
C  Control Orders under the Criminal Code

Control orders are unique when compared to other areas of criminal law in that rather than punishing offenders, and thus being reactive, they are preventative through purporting to restrict ‘would be’ offenders. A control order allows a person to have their movements restrained or ‘controlled’ where they have not been found guilty or even charged with a criminal offence. They ‘place restrictions on an individual before he commits an offence with which he can be charged in order to prevent the commission of acts connected with terrorism’. 68 While control orders do not involve imprisonment in the way preventative detention orders do, depending on the severity of the restrictions imposed, a control order may effectively amount to house arrest. The extent to which control orders may deprive the subject of their liberty arguably amounts to punitive punishment without conviction.

In Australia, the control order regime is contained in Criminal Code pt 5.3 div 104. According to then Prime Minister John Howard, div 104 (as well as div 105 discussed on page 141) aim to ‘further strengthen Australia’s counter-terrorism laws’ and equip Australia to ‘better deter, prevent, detect and prosecute acts of terrorism’. 69 Divisions 104 and 105 were added to pt 5.3 in 2005 amid concerns of a terrorist attack in Australia following the bombing of the London public transport system in July 2005. 70 Section 104.1 states that the object of div 104 is to ‘allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act’. The regime is problematic from a human rights perspective on a number of fronts. While courts still have a role in the issue of orders, the broad definition of ‘terrorist act’, as discussed above, means that burdensome restrictions may be placed on a person’s liberty without the need for evidence to be gathered to establish that a criminal activity has occurred to the satisfaction of a particular standard. As Justice von Doussa argues extra-judicially, ‘[c]ontrol orders are extraordinary powers which displace the long-held principle that deprivation of liberty should only occur as a result of criminal conviction’. 71 To date, only two control orders have been issued; these were in respect of Jack Thomas and David Hicks. In 2012, the

70 Divisions 104 and 105 were added to pt 5.3 by the Anti-Terrorism Act (No 2) 2005 (Cth).
71 von Doussa, 'Reconciling Human Rights and Counter-Terrorism', above n 5, 114.
COAG Review recommended the retention of the control order regime with additional safeguards and protections against abuse and to ensure that a fair hearing is held.\textsuperscript{72}

The following section outlines the process for issuing interim and confirmed control orders under div 104. It then discusses the types of conditions that may be imposed, including the potential for a control order to effectively amount to punitive punishment without criminal conviction. The section concludes with a discussion of the decision in \textit{Thomas v Mowbray},\textsuperscript{73} which addressed the constitutional validity of div 104 after Australia’s first control order was issued.

1 \textit{Issue of Interim and Confirmed Control Orders}

Division 104 sub-div B sets out the procedure for making an interim control order. In summary, a senior AFP member may seek the consent of the Attorney-General to request an interim control order (although retrospective consent is permitted in urgent circumstances) from an issuing court. Subdivision C then sets out the process for making a confirmed control order.

In relation to the first steps for the issue of an interim control order, s 104.2(2) provides that a senior AFP member may seek the Attorney-General’s consent if the member:

(a) considers on reasonable grounds that the order in the terms to be requested would substantially assist in preventing a terrorist act; or

(b) suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation.

Once the AFP member is so satisfied, s 104.2 lists what must be contained in the draft request to the Attorney-General including, inter alia, a draft of the interim order requested, a statement of facts relating to why (and why not) the order should be made, and details of previous requests and orders. However, s 104.2(3A) clarifies that information is not required if disclosure of that information is likely to prejudice national security within the meaning of the \textit{NSI Act}. To this end, and as discussed further below in the context of special trial procedures, deprivation of liberty may ensue based on ‘intelligence’ not publically disclosed, rather than evidence which is subject to scrutiny in accordance with the rules of evidence.

\textsuperscript{72} COAG Review Committee, above n 43, 54.
\textsuperscript{73} (2007) 233 CLR 307.
While the AFP member is required to be satisfied on reasonable grounds of the existence of specified facts, div 104 does not specify what matters the Attorney-General must consider in deciding whether to consent to the order. This absolute discretion on the part of a member of the executive is unlike detention orders issued under ASIO Act div 105, or indeed the executive detention powers conferred during wartime in cases such as Lloyd v Wallach\textsuperscript{74} or Little v Commonwealth,\textsuperscript{75} where at least the relevant Minister’s satisfaction of certain matters was required prior to the exercise of such discretion. The discrepancy here may be due to the fact that the judiciary’s final approval is required prior to the issue of a control order, as well as the view that a control order falls short of detention so does not represent such a great deprivation of liberty, theoretically at least.

Once the Attorney-General’s consent has been obtained, s 104.3 provides that the AFP member may request the interim control order from an issuing court. An issuing court includes the Federal Court of Australia, the Family Court of Australia or the Federal Circuit Court of Australia, and the exercise of this power was considered in Thomas v Mowbray,\textsuperscript{76} as discussed below. Sections 104.4(1)(c) and (d) provide that the issuing court may make an order if:

(c) the court is satisfied on the balance of probabilities:

(i) that making the order would substantially assist in preventing a terrorist act; or

(ii) that the person has provided training to, or received training from, a listed terrorist organisation; and

(d) the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

Subsection 104.4(2) requires that in determining s 104.4(1)(d) above, the court must take into account the impact of the obligation, prohibition or restriction on the person’s financial and personal circumstances. Through requiring the court to consider what is reasonably appropriate and adapted, the legislation entrenches a proportionality test and so empowers the court to balance competing interests which, as discussed in Chapter I of this thesis, it would otherwise be unable to do in the absence of constitutionally

\textsuperscript{74} (1915) 20 CLR 299.
\textsuperscript{75} (1947) 75 CLR 94.
\textsuperscript{76} (2007) 233 CLR 307.
entrenched rights. However, s 104.4(1)(d) does not require the prohibitions and restrictions to be the least restrictive to protect the public from a terrorist act and so, as discussed in Chapter V of this thesis, is limited in its effectiveness. Additionally, the burden of proof that is imposed is the civil burden of the ‘balance of probabilities’ rather than the criminal burden of ‘beyond reasonable doubt’. Lynch and Williams argue that ‘[g]iven the serious consequences that an order may have for an individual’s freedom, it is debatable whether this lower standard is appropriate’. The use of civil standards was defended in Senate hearings about the new laws on the basis that control orders are akin to search warrants, however Lynch and Williams correctly point out that search warrants are a step in the criminal investigation process which may lead to a person being charged, while a control order is an end in itself. As Kirby J argues, binding orders for preventative justice are not analogous because such are made on the basis of the past conduct of the subject and what they may do in the future, while orders under div 104 may be directed at what third parties not subject to the order might do.

Subdivision D deals with the procedures for confirming an interim control order. Section 104.12A(2) provides that if the AFP member elects to confirm an interim control order, they must serve personally on the subject, inter alia, a copy of the notification and other details required to enable the subject to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order. Section 104.14(1) provides that if an election has been made to confirm an interim control order, then a number of persons may adduce evidence or make submissions to the issuing court. These include AFP members, the subject, or representatives of the subject. The court may then revoke, vary or confirm the order.

There are a number of protective safeguards built into the legislation; however these safeguards are limited in their application. For example, the subject and their lawyer can obtain a copy of the order which contains the summary of the grounds for the order. However, ss 104.13(2) and 104.21(2) state that this does not entitle the lawyer

77 Lynch and Williams, above n 4, 45.
78 Ibid.
80 Criminal Code s 104.5(2).
81 Ibid s 104.14(7).
82 Ibid ss 104.13, 104.21.
to see a document other than the order, and so the subject may not be able to obtain fully informed legal representation. Similarly, information is not required to be served or given to the subject if disclosure is likely to prejudice national security within the meaning of the *NSI Act*, be protected by public interest immunity, put at risk ongoing operations by law enforcement or intelligence agencies, or put at risk the safety of the community or law enforcement or intelligence officers. This has the effect of blurring the line between evidence and intelligence, and makes it difficult for persons subject to control orders to defend themselves. It is certainly restrictive when compared to the rights persons would otherwise be afforded under the standard criminal law, where material must meet a certain evidential standard. It is also inconsistent with modern administrative law principles, which require that individuals be given reasons for a decision. The COAG Review recommended a minimum standard be included, requiring that the subject be given sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations.

Control orders do not come into effect until the person is notified. While s 104.12(1) requires the AFP member to serve the order personally and ensure that the person understands the information provided, ss 104.12(3) and (4) provide that there is no need to ensure that they understand if it is impractical to do so, and failing to do so does not make the control order ineffective. In relation to the term, while ss 104.5(1)(f) and 104.16(1)(d) provide that interim and confirmed control orders must not end more than 12 months after the day on which the order is made, ss 104.5(2) and 104.16(2) state that this does not prevent the making of successive control orders. A person could therefore, in theory, have their liberty continuously restricted for years or even decades.

That being said, div 104 does contain scope for judicial review of confirmed control orders. Section 104.18 provides that the subject of a confirmed control order may apply to an issuing court to revoke or vary the order under s 104.20. The issuing court may revoke the order if it is not satisfied on the balance of probabilities that the order...

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83 Ibid s 104.12A.
84 McGarrity, Lynch and Williams, above n 6, 5.
85 Ibid.
86 While there is no duty at common law that requires decision-makers to provide reasons (see *Public Service Board of NSW v Osmond* (1986) 159 CLR 656), the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and the *Administrative Appeals Tribunal Act 1975* (Cth) both impose a reasons requirement.
87 COAG Review Committee, above n 43, 59.
substantially assists in preventing a terrorist act or that the subject has provided training to or received training from a terrorist organisation.\textsuperscript{88} Alternatively, the court may vary the order if it is not satisfied that each of the obligations, prohibitions and restrictions to be imposed are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.\textsuperscript{89} While this attempt to protect liberties through permitting judicial review is a positive feature, there are nevertheless limitations to review due to the restrictions imposed by the \textit{NSI Act}. 

2 \quad \textit{Conditions of Control Orders}

Section 104.5(3) contains a list of the types of conditions that an interim or confirmed control order may impose. These range from minor intrusions on an individual’s freedom to extreme of deprivation of liberty.\textsuperscript{90} Conditions include a prohibition or restriction on the subject being at specified areas or places, communicating or associating with specified individuals, accessing or using specified forms of telecommunication or other technology, possessing or using specified articles or substances, or carrying out specified activities (including in respect of his or her work or occupation). The control order may also include a requirement that the subject remain at specified premises between specified times each day, or on specified days, wear a tracking device, report to specified persons at specified times and places, allow himself or herself to be photographed, allow impressions of his or her fingerprints to be taken, or participate in counselling or education.

Restricting the use of forms of communication, possession of certain items and association with others has the potential to severely restrict the liberty of the subject. As Lynch observes, although div 104 stops short of permitting total detention, an order requiring that a person remain at a specified premises between specified times may well amount to ‘detention’ in all but name.\textsuperscript{91} This is particularly given that a control order may be in force for consecutive 12 month periods. Indeed, it has been recognised in the context of habeas corpus that the detention of a person need not involve total

\begin{thebibliography}{99}
\bibitem{88} Criminal Code s 104.20(1)(a).
\bibitem{89} Ibid s 104.20(1)(b).
\bibitem{90} Andrew Lynch, ‘Case Note – Thomas v Mowbray: Australia’s War on Terror Reaches the High Court’ (2008) 32 \textit{Melbourne University Law Review} 1182, 1184.
\bibitem{91} Ibid 1185.
\end{thebibliography}
restraint, but relates to curtailment of a person’s freedom of movement. Nesbitt argues that the control order regime has given rise to a parallel system of criminal justice where liberty can be restricted without a finding of criminal guilt. To provide an example, making an order which effectively amounts to detention on the basis that the person has trained or trained with a terrorist organisation could amount to punishment without charge. Similarly, in the event that there is not sufficient evidence to secure a criminal conviction, imposing a control order to restrain the liberty of the subject could be used as an alternative method to impose punishment. As discussed in Chapter I of this thesis, such is contrary to the right to due process that stems from Constitution Ch III (again, noting that this is a tenuous right). According to Kirby J, the possibility of loss of liberty under div 104 not by reference to past conduct but based on a prediction as to what is reasonably necessary to protect the public is ‘a vague, obscure and indeterminate criterion if ever there was one’.

Additionally, while the issuing court is required to determine whether each of the obligations, prohibitions and restrictions in the order are reasonably necessary and reasonably appropriate and adapted to protect the community, imposing long term restrictions on the liberty of a person on the basis that they may commit an offence has the potential to go well beyond what is reasonably necessary or appropriate and adapted to achieve this objective. This is particularly given that there need not be compelling evidence of the threat that the person poses, but merely intelligence which suggests their knowledge of terrorist activity. Instead, the obligations, prohibitions and restrictions should be the least restrictive to achieve the objective. Indeed, the COAG Review recommended that the legislation be amended to require that any obligations, prohibitions and restrictions to be imposed constitute the least interference with the person’s liberty that is necessary in all the circumstances. The flaws of the control order regime were considered by the High Court in 2007.

92 Minister for Immigration and Multicultural Affairs v Vadarlis (2001) 110 FCR 491, 547 (French J).
95 COAG Review Committee, above n 43, 63.
In 2007 in *Thomas v Mowbray*, the High Court considered the validity of div 104 after Australia’s first control order was issued. The case was significant in several respects, as the Court contemplated the constitutional validity of control orders with respect to the defence power, and also the wider implications of permitting the executive to impose restrictions on liberty in the absence of criminal charge. Although the interim control order regime was held to be valid, the High Court did note the human rights issues, which is a step in the right direction compared to many pre-September 11 cases. That being said, as Justice von Doussa argues extra-judicially, an interesting question is whether the outcome in this case would have been different had the question been whether control orders are compatible with human right standards.

Here, the plaintiff had been convicted of a terrorist act, however the conviction was overturned by the Victorian Court of Appeal on the basis that his confession was inadmissible because it was obtained under duress. Within a week of his release from custody the defendant, a Federal Magistrate, placed an interim control order on the plaintiff at an ex parte hearing. This has been referred to as the executive having a ‘second bite at the apple’; punishing suspected terrorists when there is insufficient evidence to prosecute. The order was made on a number of grounds including that the plaintiff had admitted training with al-Qaeda and that there were good reasons to believe that he was an available resource that could be used to commit terrorist acts on behalf of al-Qaeda or related terrorist cells. The defendant also relied on the confession, which he deemed admissible at the ex parte hearing as it was an interlocutory civil case. The restrictions and obligations contained in the order included, inter alia, a curfew confining the plaintiff to his home between midnight and 5am, a requirement that he report to police three times per week, and restrictions from using certain communication technology and communicating with a list of persons identified as

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99 Nesbitt, above n 93, 90.
100 See Jabbour v Thomas (2006) 165 A Crim R 32, 34.
terrorists. It was considered that the controls ‘would protect the public and substantially assist in preventing a terrorist act’.  

Prior to it being confirmed, the plaintiff commenced proceedings to have the interim order quashed on the basis that div 104 was wholly invalid. Key questions asked of the Court included whether div 104 was within the legislative power of the Commonwealth and whether it invalidly conferred on a federal court non-judicial power. As Lindell noted, the Constitution does not contain specific powers to deal with the threat of terrorism or the general criminal law, and these are ordinarily topics that would otherwise come within State legislative power. The High Court ruled by a 5:2 majority that interim control orders were not unconstitutional. Lynch argues that although the Court did not expressly confirm or deny the validity of div 104 in its entirety, it may be assumed that the Court’s decision confirms the entire scheme.

The majority, comprising Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ (Kirby and Hayne JJ dissenting), accepted that the legislation was indeed supported by the primary aspect of the defence power. The proposition in Australian Communist Party v Commonwealth that the purpose of the power was to respond to ‘external enemies’ was rejected on the basis that the defence power is not limited to meeting the threat of foreign aggression. Callinan J in particular was critical of the majority in that case for not paying sufficient attention to the threat from internal sources during periods falling short of war. According to Gleeson CJ the defence power

is not limited to defence against aggression from a foreign nation; it is not limited to external threats; it is not confined to waging war in a conventional sense of combat between forces of nations; and it is not limited to protection of bodies politic as distinct from the public, or sections of the public.

In a joint judgment, Gummow and Crennan JJ described the interim control order system as ‘directed to apprehended conditions of disturbance, by violent means within the definition of “terrorist act”, of the bodies politic of the Commonwealth and the

103 Ibid, above n 90, 1186.
104 Thomas v Mowbray (2007) 233 CLR 307, 324 (Gleeson CJ) 363 (Gummow and Crennan JJ), 503-4 (Callinan J), 525 (Heydon J).
105 Ibid 362, 511 (Callinan J), citing Australian Communist Party v Commonwealth (1951) 83 CLR 1, 194 (Dixon J).
107 Ibid 324.
States’ and determined that ‘restrictions aimed at anticipating and avoiding the infliction of the suffering which comes in the train of such disturbances are within the scope of federal legislative power’. 108 Their Honours concluded that it is the definition of ‘terrorist act’ that necessarily engages the defence power, rather than whether a connection exists between the defence power and the interim control order system. 109 Additionally, their Honours held that the defence power was not confined to waging war in a conventional sense, or the protection of bodies politic as distinct from the public. 110 Lindell concludes that the effect of this case is that the defence power now encompasses terrorist acts and threats of such directed at both the Australian governments and its people, at least where such acts and threats are undertaken for ‘political, religious or ideological’ purposes. 111

There were also intimations in this case that Australia is in a period of increased international tension (or at least a period falling short of ostensible peace) which has implications for the scope of the defence power. Kirby J compared the current threat of violence faced by Australia to the types of activity that the defence of Australia has traditionally involved, and stated that ‘[a]ll of these elements represented potential dangers to Australia’s constitutional system which, in given circumstances, this country would be entitled to protect and defend itself from’. 112 Similarly, Callinan J stated that ‘[t]here will always be tensions in times of danger, real or imagined. They were present throughout the serious armed conflict of the Second World War … They will no doubt continue while terrorism of the kind proved here remains a threat’. 113

On the issue of judicial power, the Court considered separation of powers matters arising from div 104. Gleeson CJ summarised the plaintiff’s contention that div 104 conferred non-judicial power on a federal court because it conferred the power to deprive a person of liberty on the basis of what that person might do in the future, rather

108 Ibid 362.
109 Ibid.
110 Their Honours also considered that through the prevention of terrorist acts done or threatened with the intention of coercing or influencing by intimidation the government or the public of a foreign country, the interim control order system is a law with respect to a ‘matter or thing’ which lies outside the geographical limits of Australia, and is therefore supported by the external affairs power: Thomas v Mowbray (2007) 233 CLR 307, 365.
111 Lindell, above n 102, 9
113 Ibid 506.
than on the basis of a judicial determination of what that person has done.\textsuperscript{114} It was argued that the power exercised when control orders are made are peculiarly or distinctively legislative or executive, and therefore (as discussed in Chapter I of this thesis) is not a power that may be conferred upon the judiciary.\textsuperscript{115} His Honour rejected these arguments because the power to restrict or interfere with a person’s liberty on the basis of what they might do in the future is a power that is exercised by the judiciary in a variety of circumstances such as bail applications or apprehended violence orders.\textsuperscript{116}

Similarly, Gummow and Crennan JJ determined that the jurisdiction to bind over does not depend on a conviction and it can be exercised in respect of a risk or threat of criminal conduct against the public at large.\textsuperscript{117} In fact, Gleeson CJ stated ‘the exercise of powers, independently, impartially and judicially, especially when such powers affect the liberty of the individual would ordinarily be regarded as a good thing, not something to be avoided’.\textsuperscript{118} This is an interesting perspective which may indicate the willingness of the High Court to be involved in assessing human rights issues. Nevertheless, the Court’s conclusion has been criticised on the basis that detention in these circumstances is non-punitive.\textsuperscript{119} In \textit{Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs,}\textsuperscript{120} when discussing examples of non-punitive detention which the executive was permitted to impose, preventative measures such as those encompassed by div 104 was not envisaged by the High Court.

The majority rejected the argument that div 104 purports to require judicial power to be exercised in a manner inconsistent with the essential character of a court or with the nature of judicial power.\textsuperscript{121} Gleeson CJ referred to the process by which control orders are issued, including that applications are made in open court, the subject is given the relevant documents, and the rules of evidence apply.\textsuperscript{122} Gummow and Crennan JJ also recognised that the ex parte nature of the application process is not unique to this legislation, and that the choice of the lower burden of proof may be fixed by the

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\textsuperscript{114} Ibid 327.  
\textsuperscript{115} Ibid 327-8.  
\textsuperscript{116} Ibid 328.  
\textsuperscript{117} Ibid 357.  
\textsuperscript{118} Ibid 329.  
\textsuperscript{119} Nesbitt, above n 93, 91.  
\textsuperscript{120} (1992) 176 CLR 1.  
\textsuperscript{121} \textit{Thomas v Mowbray} (2007) 233 CLR 307, 335 (Gleeson CJ).  
\textsuperscript{122} Ibid.
\end{flushleft}
Parliament without it being repugnant to *Constitution* Ch III. Gummow and Crennan JJ did acknowledge the exclusion from disclosure of information which is likely to prejudice national security within the meaning of the *NSI Act*. However, their Honours did not deem it necessary to consider the validity of the provisions in the *Criminal Code* which pick up the definitions in that Act. In doing so, it is respectfully submitted that their Honours failed to recognise the implications of the subject not being able to access evidence being used against him or her as the basis for the control order.

In relation to the criteria for the making of a control order and the proportionality test in s 104.4, Gleeson CJ discussed how the role of the Court here involved determining ‘whether the relevant obligation, prohibition or restriction imposes a greater degree of restraint than the reasonable protection of the public requires’. His Honour referred to the use of the proportionality test in many different areas of the law and concluded that predictions as to danger to the public are regularly ‘part of the business of courts’. Macken argues that the High Court endorsed the principle of proportionality in this decision. In response to the plaintiff’s argument that the task required by s 104.4 of balancing the need to protect the public with the circumstances of the individual is not governed by objective standards or criteria, Gummow and Crennan JJ provided case examples where broadly expressed standards had been accepted to conclude that the standards here were not inadequate. Unlike Kirby J who hinted at the least restrictive proportionality test, the majority stopped short of stating that the test requires the least incursion upon civil liberties. In future cases, it will be interesting to see how the use of the proportionality test in this context is interpreted, noting the modified proportionality test proposed in Chapter V of this thesis in cases involving constitutional rights.

Finally, the plaintiff contested that the criteria in s 104.4 is concerned with subjects and political questions better suited for determination by the executive and unsuited for

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123 Ibid 357-8.
124 Ibid 358.
125 Ibid.
126 Ibid 332.
127 Ibid 334.
130 Ibid 417.
determination by the judiciary. Gummow and Crennan JJ held that the statement in *Australian Communist Party v Commonwealth* that ‘[t]he courts have nothing to do with policy’ was too broad.\(^{131}\) This is a notable departure from the previous restraint exercised by the High Court in assessing defence measures and has the potential to give rise to greater consideration of human rights issues in the future.

Where legislation is designed to effect a policy, and the courts then are called upon to interpret and apply that law, inevitably consideration of that policy cannot be excluded from the curial interpretative process. No principle of the separation of the judicial power from that of the other branches of government should foreclose that activity, for it is apt to lead to the just determination of controversies by the courts.\(^{132}\)

Their Honours identified that ‘[c]ourts are now inevitably involved on a day-to-day basis in the consideration of what might be called “policy”, to a degree which was never seen when earlier habits of thought respecting Ch III were formed’ although they cautioned that ‘[c]are is needed in considering the authorities in this field’.\(^{133}\) The appropriateness of the judiciary in assessing defence policy is discussed in further detail in Chapter V of this thesis.

Kirby J dissented on the basis that div 104 lacked an established source in federal constitutional power and that it breached the requirements of Ch III.\(^{134}\) In relation to the latter, Kirby J expressed his concern with how the scheme may undermine the position of the federal courts which the doctrine of separation of powers serves to defend: ‘If the courts are seen as effectively no more than the pliant agents of the other branches of government, they will have surrendered their most precious constitutional characteristic.’\(^{135}\) Kirby J also discussed the human rights implications of restricting the liberty of an individual on the basis of what another individual has or might do.\(^{136}\)

To uphold the validity of that type of control order for which Div 104 of the *Code* provides would be to erode the well-founded assumption that the judiciary in Australia under federal law may only deprive individuals of their liberty on the basis of evidence of their past conduct. It would seriously undermine public confidence in federal courts for judges to subject individuals to any number of “obligations, prohibitions and restrictions” for an indeterminate period on the basis of an estimate that some act, potentially committed by somebody else, may occur in the future. To do this is to deny persons their basic legal rights not for what they have been proved to have done (as established in a criminal trial) but for what an official suggests that they might do or

\(^{131}\) Ibid 348, quoting *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 277 (Kitto J).


\(^{133}\) Ibid 350.

\(^{134}\) Ibid 366.

\(^{135}\) Ibid 436.

\(^{136}\) Ibid 425.
that someone else might do. To allow judges to be involved in making such orders, and
particularly in the one-sided procedure contemplated by Div 104, involves a serious
and wholly exceptional departure from basic constitutional doctrine unchallenged
during the entire history of the Commonwealth. It goes far beyond the burdens on the
civil liberties of alleged communists enacted, but struck down by this Court, in the
Communist Party Case. Unless this Court calls a halt, as it did in that case, the damage
to our constitutional arrangements could be profound.\(^{137}\)

D Detention Orders

Division 105 of the *Criminal Code* and *ASIO Act* pt III div 3 contain Australia’s
preventative detention regime with respect to terrorism. Orders under these schemes
can be issued by members of the executive arm of government (such as AFP members)
or judges acting *persona designata* and so, when compared with the control order
regime, moves further away from principles of independent judicial review. Again, the
purpose of the regime is to improve the capacity of intelligence organisations to better
respond to terrorist acts before or after they occur. However, the regime is extremely
controversial because through allowing persons suspected of involvement in (or
knowledge of) terrorist activity to be detained by the executive without being charged
with an offence, there is a strong argument that it provides for punitive detention. This
represents a re-balance of power between the executive and the judiciary, and therefore
poses risks to the right to liberty. Rose and Nestorovska query the utility of such orders,
given that a person might simply be arrested on suspicion under extant laws\(^ {138}\) however
the focus of the anti-terrorism legislation is on prevention. McDermott describes
internment during a conflict as occurring because of the decision of the executive that
it is in the interests of the State that the freedom of a person is taken away.\(^ {139}\) Spender
J argued in 2010 that ‘[i]f the Executive, in wartime, made a decision to intern the
nationals of countries with which Australia was at war, that decision, in my opinion,
could not be justiciable’.\(^ {140}\) However such detention in times of rising international
tension is not acceptable.

The following section outlines the process for the issue of interim and continued
preventative detention orders under the *Criminal Code* and the issue of questioning

\(^{137}\) Ibid 432.
\(^{138}\) Rose and Nestorovska, above n 10, 42.
\(^{139}\) Peter M McDermott, ‘Internment During the Great War - A Challenge to the Rule of Law’ (2005)
28(2) *University of New South Wales Law Journal* 330, 335.
\(^{140}\) Aye v Minister for Immigration and Citizenship [2010] FCAFC 69, [13]
warrants, and questioning and detention warrants under the *ASIO Act*. It considers the restrictions that may be imposed on detainees, the rights of detainees and the role of the issuing authority. Throughout, it discusses the human rights implications, and identifies the need for additional protections.

1 *Preventative Detention Orders under the Criminal Code*

Section 105.1 provides that the object of div 105 is to allow a person to be taken into custody and detained for a short period of time in order to prevent an imminent terrorist act from occurring or to preserve evidence relating to a recent terrorist act. The regime is questionable from a human rights perspective, particularly in relation to due process and the limitation of the right to judicial review. Despite the significance of div 105 in terms of its potential effect on the right to liberty of the person, when introduced the enabling Bill received only six and a half hours of parliamentary debate.\textsuperscript{141} The COAG Review recommended the repeal of the Commonwealth, State and Territory preventative detention regime on the basis that, among other things, ‘the concept of police officers detaining persons ‘incommunicado’ without charge for up to 14 days, in other than the most extreme circumstances, might be thought to be unacceptable in a liberal democracy’.\textsuperscript{142} To date, no preventative detention orders have been made under div 105.

(a) *Issue of Initial and Continued Preventative Detention Orders*

A preventative detention order allows an individual to be deprived of their liberty on the basis that there are reasonable grounds to suspect that the person will commit a terrorist act in the future or that such is necessary to preserve evidence in relation to a terrorist act that has already occurred. To this end, as Macken highlights, deprivation of liberty is based on an ‘educated guess’, a suspicion, the evidence of experts or by reference to set guidelines or criteria.\textsuperscript{143} Dershowitz argues:

\begin{quote}
[Preventative detention] does not require the commission of any specifically proscribed past act as a condition to intervention. A person may be confined because it has been predicted that he may commit a dangerous or harmful act at some future time. Most
\end{quote}

\textsuperscript{141} Macken, ‘Preventative Detention in Australian Law’, above n 128, 71-2, referring to the debate regarding the *Anti-Terrorism Bill (No 2) 2005* (Cth).
\textsuperscript{142} COAG Review Committee, above n 43, 68.
such predictions will, in fact, be based on suspicion that the person committed past acts, but these acts generally need not be proved; nor need they have been prohibited by law.\textsuperscript{144}

From a human rights perspective, such an approach is concerning, as it has the potential to result in the deprivation of liberty of the person where traditional criminal law and human rights standards have not been satisfied.

Section 105.4 provides that an AFP member may only apply for, and an issuing authority (the definition of which is discussed on page 147) may only make, a preventative detention order if the requirements of sub-s (4) or (6) are met. Unlike control orders, no preliminary consent is required from the Attorney-General. Lynch and Reilly argue that abundance of caution in an environment of heightened concern over national security may mean that the criteria are easily satisfied.\textsuperscript{145} Subsection (4) relates to the prevention of a terrorist act, and provides that an issuing authority may issue an order if satisfied that:

- (a) there are reasonable grounds to suspect that the subject:
  - (i) will engage in a terrorist act; or
  - (ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
  - (iii) has done an act in preparation for, or planning, a terrorist act; and
- (b) making the order would substantially assist in preventing a terrorist act occurring; and
- (c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

For the purposes of sub-s (4), a terrorist act must be imminent and expected to occur within 14 days.\textsuperscript{146} Alternatively, sub-s (6) relates to after a terrorist act has occurred and is therefore concerned with preventing the destruction of evidence. It provides that an issuing authority may issue an order if satisfied that:

- (a) a terrorist act has occurred within the last 28 days; and
- (b) it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act; and


\textsuperscript{146} \textit{Criminal Code} s 105.4(5).
(c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

The application by the AFP member must specify inter alia the proposed detention period, contain information regarding previous preventative detention and control orders, and set out a summary of the grounds on which the AFP member considers that the order should be made.\(^{147}\) As in the case of control orders, s 105.7(2A) contains a qualification that information is not required to be included if disclosure is likely to prejudice national security within the meaning of the NSI Act. That said, s 105.4(7) does grant the issuing authority the discretion to request further information, and to refuse to issue an order where that information is not provided. Following the issue of an initial preventative detention order, s 105.11 allows an AFP member to apply to an issuing authority for a continued preventative detention order. Section 105.11(2) contains similar requirements regarding the content of the application. While div 105 does impose a ‘reasonable grounds’ requirement, as discussed on page 123 in the context of the specification of terrorist organisations, the facts that the issuing authority is required to be satisfied of are very broad.

In terms of restrictions on the issuing of preventative detention orders, s 105.5 provides that an order cannot be made in relation to a person who is under 16 years of age. There are also special requirements regarding persons who are under 18 years of age or who are incapable of managing their affairs,\(^ {148}\) and persons with inadequate knowledge of English or a disability.\(^ {149}\) In relation to the duration of orders, s 105.8(5) provides that an interim order must not exceed 24 hours, while s 105.12(5) which relates to continued orders provides that the maximum time a person may be held must not exceed 48 hours. That said, at the expiration of that period, a person may be detained for up to an additional 14 days under relevant State or Territory legislation.\(^ {150}\) This process is how Dr Mohamed Haneef was detained for 12 days without being charged with a criminal offence.\(^ {151}\) Section 105.6 also sets out restrictions on the issue of multiple preventative detention orders in relation to the same situation, which purports to limit to some extent

\(^{147}\) Ibid s 105.7(2).

\(^{148}\) Ibid s 105.8(7).

\(^{149}\) Ibid s 105.5A.

\(^{150}\) See, eg, Terrorism (Police Powers) Act 2002 (NSW) s 11(3)(a) or Terrorism (Preventative Detention) Act 2005 (Qld) s 12(2).

\(^{151}\) Dr Haneef was detained at Brisbane Airport in July 2007 on suspicion of aiding terrorists following the terrorist attacks at the Glasgow International Airport in June 2007.
persons from being subject to consecutive orders.\textsuperscript{152} Although, as Macken points out, the effectiveness of such a restriction is limited given that a person may be the subject of an order before and after a terrorist act occurs, even though they relate to the same alleged terrorist act.\textsuperscript{153}

There is a strong argument that detention in these circumstances is punitive, and therefore infringes the strict separation of judicial power entrenched in \textit{Constitution} Ch III. As discussed in Chapter I of this thesis, detention for non-punitive purposes arises where detention is unrelated to a finding of guilt. Here, a preventative detention order is issued where there are reasonable grounds to suspect that the subject will engage in a terrorist act or is otherwise involved in the preparation of a terrorist act. As discussed on page 115, the terrorism offences are extremely broad, and preparatory acts are criminal offences. As such, in making an order on reasonable grounds that the subject is somehow involved in such activities or intends to commit an offence, the issuing authority is making a determination that the subject is of a ‘guilty mind’. This is particularly given, as identified in the COAG Review, the emphasis on the ‘preventative’ aim of the scheme and the involvement of judicial officers in a \textit{persona designata} capacity, as discussed on page 147.\textsuperscript{154} This type of detention can be contrasted with, for example, migration detention where the purpose of detention is merely to supervise the person until their visa application can be considered – detention here is not dependent on a view as to whether the detainee is involved in criminal conduct as it is in the case of div 105.

\textit{(b) Restrictions on Contact and Rights of Detainees}

Subdivision E details the requirements with respect to the treatment of persons being detained under div 105, including the restrictions on contact with other persons. This was one of the most controversial aspects of the preventative detention regime due to the tension between the need to prevent terrorist suspects from communicating with their co-conspirators and ensuring transparency and accountability in relation to the

\textsuperscript{152} Eg. s 105.6(3) provides that another initial preventative detention order cannot be made in relation to the same person on the basis of assisting in preventing the same terrorist act occurring within that period.
\textsuperscript{153} Macken, ‘The Counter-Terrorism Purposes of an Australian Preventative Detention Order’, above n 143, 33.
\textsuperscript{154} COAG Review Committee, above n 43, 66.
operation of the scheme. Nevertheless, in its current form sub-div E is problematic from a human rights perspective due to its inconsistency with the rights to due process and habeas corpus.

Section 105.34 provides that, subject to certain explicit exceptions, while a detainee is being detained they are not entitled to contact another person. According to s 105.41(1), a detainee commits an offence if they disclose the fact that a preventative detention order has been made in relation to them, the fact that they are being detained, or the period for which they are being detained. Exceptions include that the detainee is permitted to contact, for example, a family member or their employer solely for the purpose of letting that person know that they are safe but cannot be contacted for the time being. As identified extra-judicially by the Hon Michael McHugh, such communication is likely to warn other members of a terrorist group in any case, thereby defeating the purpose of the restrictions against disclosure. Additionally, s 105.37 provides that a detainee may contact a lawyer for limited purposes including, inter alia, obtaining advice about their treatment, or to arrange for the lawyer to act for them in relation to Federal Court proceedings for a remedy relating to the order or their treatment. However s 105.38(1) provides that the contact may take place only if the contact and communication can be effectively monitored by a police officer. Similarly, a detainee’s lawyer commits an offence if they disclose details regarding the person and the order when the disclosure is not made for the permitted purposes. Again, special contact rules apply in relation to persons under the age of 18 or who are incapable of managing their own affairs.

Section 105.33 provides that a detainee must be treated with humanity and must not be subjected to cruel, inhuman or degrading treatment. A breach of this section is punishable by up to two years imprisonment. Section 105.36 allows a detainee to contact the Commonwealth Ombudsman or a particular representative of the AFP for the purpose of making a complaint or providing information. Through explicitly

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155 Lynch and Williams, above n 4, 51.
156 Criminal Code s 105.35.
158 Criminal Code s 105.38(5) restricts any communication between a person and a lawyer from being admissible in evidence against the person in any court proceedings.
159 Criminal Code s 105.41(2).
160 Ibid s 105.39.
including the requirement for detainees to be treated in accordance with certain recognised human right standards, the Parliament has demonstrated an intention to ensure that the human rights of detainees are preserved while they are being detained. Although, this does not include the right to due process.

In terms of judicial review, s 105.51(1) provides that, subject to sub-ss (2) and (4), proceedings may be brought in a court for a remedy in relation to a preventative detention order, or the treatment of a person in connection with the person’s detention under an order. However, sub-s (2) provides that a State or Territory court does not have jurisdiction while the order is in force, which prevents detainees from applying to State and Territory courts for a writ of habeas corpus. Similarly, s 105.51(4) prohibits review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) of a decision made under div 105. Subsection 105.51(5) provides that an application may be made to the Administrative Appeals Tribunal for review of a decision to make or extend an order and s 105.51(7) allows the payment of compensation where a decision is declared void. However, this body is a creature of the executive, and in any case the application cannot be made while the order is in force so it will not assist a detained person. To this end, judicial review is limited and administrative review is restricted to review for the purpose of providing a remedy after the fact, rather than seeking to prevent a violation of the right to liberty from occurring in the first place.

Notwithstanding the above, judicial review may be possible through the High Court’s original jurisdiction under Constitution s 75(v). Division 105 does not attempt to exclude or limit s 75(v) review, and so it would theoretically be possible for a detainee to apply for a writ of habeas corpus against the Commonwealth officer responsible for the administration of his or her detention, and then seek review of the decision to issue an order (where the issuing authority was a Commonwealth officer). However, as discussed in Chapter VI of this thesis, habeas corpus merely assists in obtaining judicial review of the lawfulness of the detention, rather than review of whether the detention is reasonable or excessive in the circumstances. If div 105 does not infringe Constitution Ch III, given the wide grounds for issuing an order in div 105 and the limited bases on which infringement of the right to liberty of the person can be challenged, it would be difficult for a detainee to establish that their detention was anything but lawful for the purposes of habeas corpus. Conversely, as discussed on
page 42, strictly speaking s 75(v) does not permit substantive review of the merits of a decision, and unreasonableness as an error within jurisdiction provides only a limited basis for review. Such limitations could be overcome through a modified proportionality test which relies on recognition of an implied constitutional right to due process, or otherwise an explicit entrenched constitutional right to due process. These strategies, which are discussed in Chapters V and VI of this thesis, would allow detention to be challenged on substantive grounds where the right to liberty of the person has been unjustifiably infringed, even where the legislation itself would otherwise authorise the detention.

Concerns have been raised regarding the adequacy of the procedural and substantive due process protections that are contained in div 105 regarding the rights and restrictions imposed on detainees. Specifically, the restrictions on judicial review, the power of the executive to restrict contact, the monitoring of communication between a detainee and their lawyer, and the freedom from unlawful and arbitrary detention other than following a fair trial are inconsistent with the procedural and substantive rights to due process discussed in Chapter I of this thesis. Nevertheless, the AFP has justified these measures on the basis that it must be able to protect the community in instances where there is not sufficient evidence to arrest and charge a suspected terrorist but there is a reasonable suspicion that terrorist activities may be imminent or have occurred: ‘Terrorism is different from other offences that the AFP investigates in that its outcomes are much more unpredictable and potentially catastrophic.’ While it is accepted that there is a need to protect the community from terrorism, if there is insufficient evidence for a person to be charged with an offence and appear before a court, that person should not have their rights suspended without the availability of judicial review.

(c) Issuing Authority

A senior AFP member may act as an issuing authority for an initial preventative detention order. For continued preventative detention orders, s 105.2 provides that

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162 Ibid.
163 Evidence to Senate and Legal Constitutional Affairs Committee, Parliament of Australia, Canberra, 17 November 2005, 77 (J Lawler).
164 Criminal Code s 101.1.
the Minister may appoint as an issuing authority a person who is a Judge, a judge of a State or Territory Supreme Court, a person who has served as a judge in one or more superior courts for a period of 5 years but no longer holds that commission, or the President or a Deputy President of the Administrative Appeals Tribunal who has been enrolled as a legal practitioner for five years. Thus both currently serving and former judicial officers may act as issuing authorities.

Section 105.18 provides, inter alia, that an issuing authority that makes a continued preventative detention order has, in the performance of his or her duties, the same protection and immunity as a Justice of the High Court. Additionally, s 105.18(2) provides that the function of making, revoking or extending a continued preventative detention order that is conferred on a judge or member of the Administrative Appeals Tribunal is conferred in a personal capacity and not as a court or a member of a court. Through conferring such power persona designata, the Parliament sought to avoid offending the separation of judicial power. Division 105 has been described as conferring power on issuing authorities as species of executive rather than judicial power.

This concept that judges are acting in their personal capacity raises significant concerns. As discussed in Chapter I of this thesis, judicial power under Constitution Ch III is traditionally limited to ordering detention and other forms of punishment after a person has been found guilty of a crime, and so issuing a preventative detention order where guilt has not been established clearly falls outside the exercise of judicial power.

That being said, as detailed in Chapter I of this thesis in Hilton v Wells the High Court held that a judge could act persona designata, and in Grollo v Palmer the High Court clarified that such is only permitted where the function conferred is not incompatible either with the judge’s performance of his or her judicial functions, or with the proper discharge by the judiciary of its responsibilities. On this basis, div 105 is not invalid for conferring the function of issuing preventative detention orders on judges in their personal capacity, as long as this function is not incompatible.

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167 Lynch and Williams, above n 4, 48.
JJ confirmed the constitutional validity of such a judicial function with respect to the issue of control orders in *Thomas v Mowbray* on the basis that it involved an independent determination of adequate legal standards or criteria.<sup>170</sup> It is arguable that the High Court would adopt the same approach in relation to div 105, given that the general processes for issuing orders (including the application of specified criteria) are similar.

Nevertheless, extra-judicially the Hon Michael McHugh has expressed doubt as to whether the High Court will continue to endorse this fiction, explaining that the non-judicial power of the kind invested in an ‘issuing authority’ is different from the power to issue warrants which was held constitutionally valid in *Hilton v Wells*<sup>171</sup> and *Grollo v Palmer*.<sup>172</sup> McGarrity, Lynch and Williams state that the courts are ill-suited to fulfilling such tasks independently of the information presented to them by the executive.<sup>173</sup> According to Lynch and Reilly, when the judiciary is employed to exercise non-judicial power, its independence is necessarily compromised.<sup>174</sup> *Wainohu v New South Wales*<sup>175</sup> illustrates the limits of the High Court’s willingness to accept the *persona designata* doctrine, as the legislation here involved the Court giving orders curtailing individual liberty simply on the basis of allegations made by the executive and because, in the absence of reasons, there was no way in which a person subject to an order could challenge it. Given the rationale for the separation of judicial power in protecting human rights, assisting the executive to detain an individual without charge, in some cases without having access to information which justifies why such is necessary, is a function which is incompatible with the judiciary’s function. Indeed, the COAG Review identified that the use of judges in a retired or personal capacity, among other arguments, might result in the detention being considered punitive in nature and therefore unconstitutional.<sup>176</sup> Taken with the arguments raised earlier in this subsection, this provides a convincing argument that detention under div 105 is punitive. In any case, Lynch and Williams refer to the *persona designata* doctrine as a ‘precarious fiction’: ‘Using judicial office as a means of identifying potential issuing

<sup>171</sup> (1985) 157 CLR 57.
<sup>173</sup> McGarrity, Lynch and Williams, above n 6, 7.
<sup>174</sup> Lynch and Reilly, above n 145, 138.
<sup>175</sup> (2011) 243 CLR 181.
<sup>176</sup> COAG Review Committee, above n 43, 66.
authorities and then claiming the power is conferred on them as private individuals has an air of artificiality. At the very least, the scheme could be seen to diminish public confidence in the judicial institution as a whole.

2 Detention and Questioning under the ASIO Act

The most controversial aspect of the immediate response to September 11 was the Parliament’s conferral of extraordinary powers on ASIO. Part 3 div 3 of the ASIO Act sets out the functions and powers of ASIO, including the issue of questioning warrants under sub-div B and the issue of questioning and detention warrants under sub-div C. These provisions grant ASIO officials the power to detain, monitor and question for up to seven days individuals who are not necessarily suspected of any involvement with terrorism but who might have information of use to the government. Subdivision D does set out certain obligations and protections, however these are fairly limited from a human rights perspective. The Australian Human Rights Commission remains concerned that this legislative framework does not provide adequate protection against arbitrary detention. According to Williams, ‘[t]here are grave dangers in allowing a government to bypass the courts, especially where a secret government organisation is involved’.

(a) Issue of Questioning Warrants and Questioning and Detention Warrants

Subdivisions B and C of the ASIO Act provide the power for the issue of two types of warrants; questioning warrants and questioning and detention warrants. These subdivisions set out the process the Director-General and the Minister must follow to request and consent to the warrants, as well as the circumstances in which an issuing authority may issue a warrant. To date, no one has been detained under the new powers, but 16 questioning warrants have been issued against 15 people.

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177 Lynch and Williams, above n 4, 48.
180 Williams, Submission to the Senate Legal and Constitutional References Committee, above n 3, 5.
Subdivision B addresses the process for the issue of questioning warrants. Section 34D provides that the Director-General may seek the Minister’s consent to request the issue of a questioning warrant under section 34E. In seeking that consent, the Director-General must give the Minister certain information including a statement of the facts and other grounds on which the Director-General considers it necessary to issue the warrant.\(^{182}\) Subsection 34D(4) provides that the Minister may provide consent if satisfied that:

(a) there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence,
(b) relying on other methods of collecting that intelligence would be ineffective, and
(c) there is in force under section 34C a written statement of procedures to be followed in the exercise of authority under warrants issued under this Division.

Following receipt of the Minister’s consent, the Director-General may request that an issuing authority issue a questioning warrant. Section 34E provides that an issuing authority may issue the warrant if, among other procedural requirements, he or she is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence. Like the control order and preventative detention order regimes in the *Criminal Code*, the issue of warrants is subject to a reasonableness test. Subsection 34E(4) requires that the warrant authorise ASIO, subject to any restrictions or conditions, to question the person before a prescribed authority by requesting the person to give information or produce records that are or may be relevant to intelligence that is important in relation to a terrorism offence. Subsection 34E(5) provides that the duration of a questioning warrant must not be more than 28 days. A penalty of five years imprisonment is imposed for failing to appear before a prescribed authority for questioning.\(^{183}\)

Subdivision C sets out the process for the issue of a questioning and detention warrant. Section 34F(3) provides that in seeking the Minister’s consent, the Director-General must give the Minister a draft request that includes, inter alia, a statement of the facts and other grounds on which the Director-General considers it necessary to issue the

\(^{182}\) *ASIO Act* s 34D(3).
\(^{183}\) Ibid s 34L.
warrant. Section 34F(4) provides that the Minister may provide consent if satisfied as to the three matters listed above, and that:

(d) there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:

(i) may alert a person involved in a terrorism offence that the offence is being investigated,

(ii) may not appear before the prescribed authority, or

(iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.

Section 34G provides that an issuing authority may issue a warrant if, among other procedural requirements, he or she is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence. This approach appears to be wider than that of similar intelligence agencies in the United States and the United Kingdom because ASIO has the power to obtain a warrant for the detention of a person who is not suspected of a terrorism offence. While there are no restrictions on issuing multiple warrants, and therefore imposing subsequent detentions, s 34G(2) provides that if a person has already been detained under earlier warrants, the issuing authority may only issue the new warrant if it is justified by additional or materially different information than that known at the time consent was sought for the earlier warrants. This is the closest sub-div C comes to requiring that the interests of the individual be taken into account in obtaining a warrant. Through requiring the warrant to be ‘justified’, it arguably imposes a balancing-type test where the interest served by the issue of the warrant is balanced against the need to avoid issuing multiple warrants against the same individual. In terms of the content of a questioning and detention warrant, s 34G(5) provides that the warrant may identify a lawyer or family member whom the subject is permitted to contact, and s 34G(6) provides that it may specify times when the subject is permitted to contact their lawyer while in detention and after they have been brought before a prescribed authority for questioning. Like Criminal Code div 105, warrants issued in relation to persons under the age of 16 are not effective, and there are special rules for persons between 16 and 18 years old.

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185 ASIO Act s 34ZE(1).
186 Ibid s 34ZE(4).
From ss 34G(3) and (4), the warrant authorises the person to be taken into custody immediately by a police officer, brought before a prescribed authority for questioning, and detained for 168 hours. Section 34G(7) provides that the warrant must authorise ASIO, subject to any restrictions or conditions, to question the person before a prescribed authority by requesting the person to give information or produce records that are or may be relevant to intelligence in relation to a terrorism offence. Subdivision D sets out certain offences, such as failure to give information, making a false statement, and failing to produce a record. There are defences, although, like Criminal Code pt 5.3 divs 101-102, the defendant bears an evidential burden. There are also offences regarding the disclosure of the existence of a warrant. While it is accepted that the nature of ASIO activities must necessarily be concealed to some extent, there still must be a level of public scrutiny to ensure accountability. This is particularly given that ASIO is an intelligence gathering agency performing what are essentially law enforcement functions.

In analysing the detention order scheme, Williams asserts that ‘Australians should not be detained except as a result of a judicial decision or as an adjunct to the judicial process (such as being held in custody after arrest pending a bail hearing)’. He argues that subject to well known exceptions, neither the legislature nor the executive should be given the power to detain Australians without a proper judicial process, and given that the ASIO detention scheme breaches this basic principle, it is constitutionally suspect. Williams also identifies that while the High Court in Lim did not decide whether the defence power in times of war will support an executive power to make detention orders, the Court would be unlikely to view the current climate as a time of war. The Hon Michael McHugh, speaking extra-judicially, similarly expresses doubt over the constitutional validity of the legislation if the reasoning in Lim (discussed on page 39) is applied on the basis that the detention of non-suspects may in substance

187 Ibid s 34L(2).
188 Ibid s 34L(4).
189 Ibid s 34L(6).
190 Ibid s 34ZS.
191 Williams, Submission to the Senate Legal and Constitutional References Committee, above n 3, 5.
192 George Williams, Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD, ASIO Legislation Amendment (Terrorism) Bill 2002, 30 April 2002, 1.
193 Ibid.
195 Williams, Submission to the Parliamentary Joint Committee, above n 192, 1.
be punitive.\textsuperscript{197} The argument that detention in these circumstances is punitive is strong, given that involvement in, or knowledge of, a terrorism offence (and therefore a suspected ‘guilty mind’) is a pre-requisite for issuing a warrant. The scheme is contrary to guidance from the United Nations, which states that if ‘so-called preventative detention’ is used for reasons of public security it must be controlled by those same provisions, including that it must not be arbitrary.\textsuperscript{198} However, as discussed further in Chapter IV of this thesis, even if detention in these instances is considered punitive, the right to due process currently offered by Constitution Ch III is tenuous at best.

\textit{(b) Restrictions on Contact and Rights of Detainees}

The ASIO Act sets out certain restrictions on detainees from contacting other persons. Additionally, sub-div D contains certain protections relating to warrants. However, from a practical perspective, again these protections are limited.

Sections 34K(10) and (11) provide that a detainee is not permitted to contact anyone at any time while in detention, other than a person listed in their warrant or where the contact is for the purposes of making a complaint. There are even limitations on a person’s ability to engage with their lawyer, with s 34ZO giving the prescribed authority the power to prevent a person from contacting a particular lawyer if they are satisfied that if the subject is permitted to do so, a person involved in a terrorism offence may be alerted to the investigation, or a record may be destroyed, damaged or altered. Additionally, all contact between the person and their lawyer must be monitored,\textsuperscript{199} and the lawyer must not intervene in the questioning of the subject except to request clarification of an ambiguous question,\textsuperscript{200} although they must be given reasonable opportunity to advise the subject during breaks in the questioning.\textsuperscript{201} Significantly, the prescribed authority may direct that the lawyer be removed if it considers the lawyer’s conduct is ‘unduly disrupting’ the questioning,\textsuperscript{202} and the absence of a lawyer does not prevent the person from being questioned.\textsuperscript{203}

\textsuperscript{197} McHugh, ‘Terrorism Legislation and the Constitution’, above n 157, 126.
\textsuperscript{198} Human Rights Committee, \textit{General Comment No 8: Right to Liberty and Security of Persons (Article 9)}, 16\textsuperscript{th} sess, UN Doc CCPR/C/GC/8 (30 June 1982).
\textsuperscript{199} ASIO Act s 34Q(1).
\textsuperscript{200} Ibid s 34Q(6).
\textsuperscript{201} Ibid s 34Q(5).
\textsuperscript{202} Ibid s 34Q(9).
\textsuperscript{203} Ibid s 34ZP.
Michaelsen argues that these arrangements constitute a departure from fundamental principles of due process.\textsuperscript{204} He quotes Griffith, who states:

\begin{quote}
The function of the qualified legal representation is limited to that of an excluded onlooker, confined merely to ensuring that the questions asked are understandable, and at risk of removal from the interrogation process for any interruption. Such truncated rights of legal representation are of such nominal content that it would make little difference if the Act said plainly what it does, and provide that there be no right of legal representation. Such is its real operation and effect.\textsuperscript{205}
\end{quote}

Williams expresses his surprise to find a law in Australia which provides for the possibility of the detention of adults and children incommunicado without access to legal advice.\textsuperscript{206} Nevertheless, while this may compromise the legal position of a subject through inhibiting a lawyer’s ability to protect and promote their interests, there are protections against self incrimination, including a restriction on the use of evidence obtained under the warrant in other criminal proceedings.\textsuperscript{207} This goes some way to protecting the procedural due process rights of subjects, although there is still the prospect of that evidence being used against the individual in further investigations.

There are time limits regarding detention and questioning, although there are exceptions to these limitations. Specifically, s 34R(1) provides that a subject may not continue to be questioned if they have been questioned for a total of 8 hours. Section 34R(2) allows this to be extended by the prescribed authority if he or she is satisfied that there are reasonable grounds for believing that the continuation will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and the original questioning was undertaken properly and without delay. Section 34R(6) imposes a maximum questioning period of 24 hours, and once this time has been reached, the subject must be released from custody.\textsuperscript{208} The total period of detention must not exceed a continuous period of more than 168 hours.\textsuperscript{209} The detention of persons who are not terrorist suspects for up to seven days is excessive, and indeed is far longer than the period contained in the \textit{Criminal Code}, which is capped at 24 hours.

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\textsuperscript{204}Christopher Michaelsen, 'The Proportionality Principle, Counter-Terrorism Laws and Human Rights: A German-Australian Comparison' (2010) 2 City University of Hong Kong Law Review 19, 38.
\textsuperscript{205}Gavan Griffith, Submission No 235 to the Senate Legal and Constitutional References Committee, 12 November 2002, 11, quoted in ibid 38.
\textsuperscript{206}Williams, Submission to the Parliamentary Joint Committee, above n 192, 3.
\textsuperscript{207}ASIO Act s 34L(8) and (9).
\textsuperscript{208}Ibid s 34R(7).
\textsuperscript{209}Ibid s 34S.
\end{flushright}
Although, as discussed on page 156, this is balanced with the availability of judicial review.

Like the Criminal Code, s 34T requires that the person must be treated with humanity and must not be subjected to cruel, inhuman or degrading treatment. Additionally, the Statement of Procedures — warrants issued under Division 3 of Part III, which is issued under s 34C, contains express directions including, inter alia, that all persons must interact with the subject in a manner that is both humane and courteous, the subject must not be questioned in a manner that is unfair or oppressive, the subject must have access to fresh drinking water and clean toilet and sanitary facilities, a police officer may only use the minimum force reasonably necessary in the circumstances, and the subject must be permitted to engage in religious practices. To this end, the ASIO regime also contains an acknowledgment of the human rights to which a subject is entitled. Indeed, the Inspector-General of Intelligence and Security supervises most questioning sessions and has observed that questioning has been conducted in a professional and appropriate manner, that subjects have been accorded dignity and respect, and that due consideration has been given to the subject’s physical comfort and religious needs.  

In relation to the rights of review, s 34J(1) requires that when a person first appears before a prescribed authority for questioning, the prescribed authority must inform the person of, inter alia, information regarding the warrant and their right to make a complaint to the Inspector-General of Intelligence and Security or the Ombudsman. Additionally, s 34J(5) provides that at least once in every 24-hour period during which the person is questioned, the prescribed authority must inform the person that they may seek from a Federal Court a remedy relating to the warrant or their treatment. This may include an application to the High Court under Constitution s 75(v) (although, as discussed on page 146 and in Chapter I of this thesis, the utility of s 75(v) is limited). This is broader than the review options available under Criminal Code pt 5.3 div 105, which may be due to the more extensive period in which individuals may be detained under the ASIO Act. Nevertheless, s 34ZT still provides that the regulations may prohibit or regulate access to information on security grounds by lawyers acting for a

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210 Ian Carnell, Inspector General of Intelligence and Security Annual Report 2003-04 (14 October 2003) 18 [131].
person in connection with proceedings for a remedy in these circumstances. To this end, the procedural due process right to obtain fully informed legal representation in proceedings is limited. Additionally, s 34ZW excludes the jurisdiction of a State or Territory court while the warrant is in force.

(c) Issuing Authority and Prescribed Authority

Section 34AB provides that the Minister may appoint as an issuing authority a Judge, or a person of a specified class declared in the regulations. Section 34B(1) provides that the Minister may appoint as a prescribed authority (that is, the individual who asks the questions) a person who has served as a judge in one or more superior courts for five years and no longer holds a commission as a judge of a superior court. Sections 34B(2) and (3) then allow the Minister to appoint a currently serving State or Territory Supreme Court or District Court judge, or the President or a Deputy President of the Administrative Appeals Tribunal, if there are an insufficient number of former judges to act as a prescribed authority.

There are similar provisions regarding the issuing authority under the ASIO Act as there are in Criminal Code pt 5.3 div 105. Like the Criminal Code, s 34ZM provides that in performing functions under the division, an issuing authority or prescribed authority has the same protection and immunity as a Justice of the High Court and clarifies that the person is acting in a personal capacity and not as a court or a member of a court. The same issues identified in the previous subsection of this thesis regarding judges acting persona designata as an issuing authority also arise in this context.

In relation to the prescribed authority, interestingly the default position in the ASIO Act is for only former serving judges to be appointed. Presumably, this is due to the more active role that a prescribed authority has in undertaking the questioning, rather than simply granting the warrant. Welsh identifies that there is no other role in Australia similar to that of the prescribed authority. The prescribed authority plays an authoritative role throughout the interrogation, but is ultimately fulfilling an executive role as a ‘master of ceremonies’. In accordance with Grollo v Palmer, the questioning function would arguably be a function incompatible with the judge’s

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211 Walsh, above n 178, 146.
212 Ibid 149.
performance of his or her judicial functions. Williams argues that involving judges in an investigative process by which Australian citizens are detained in secret for unprecedented periods would undermine public confidence in the judicial system. This is particularly given the extent of the intrusion on individual rights.

Kirby J stated that the loss of liberty ‘is ordinarily one of the hallmarks reserved to criminal proceedings conducted in the courts, with the protections and assurances that criminal proceedings provide’. It is clear that the detention provisions contained in both the ASIO Act and the Criminal Code regarding terrorism offences displace this principle. While comparisons can be drawn between these post-September 11 executive detention regimes and the regimes that existed during WWI and WWII, it is important to remember that the latter was wartime, when the defence power was at its most expanded scope. As discussed in Chapter IV of this thesis, while Australia can be said to be in a period of increased international tension, it is not at war.

E Special Trial Procedures under the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)

The NSI Act deals with the protection of classified and sensitive information in federal criminal and civil proceedings conducted in a Commonwealth, State or Territory court. It was introduced following a detailed review by the Australian Law Reform Commission into mechanisms for the protection of national security information. According to the NSI Act Practitioners Guide, as at June 2008, the NSI Act had been invoked in federal criminal cases involving 28 defendants, and it had also been invoked in civil proceedings relating to the making of a control order. A key issue has been whether the NSI Act ‘established a reasonable balance between protecting intelligence information and ensuring that defendants can receive a fair trial by seeing the evidence against them’. The Independent National Security Legislation Monitor concluded in late 2013 that that the NSI Act has not detracted from fair trial values in

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214 Williams, Submission to the Senate Legal and Constitutional References Committee, above n 3, 6.
218 Saul, above n 7, 4.
terrorism criminal proceedings, however he did note that ‘the paucity of occasions in actual criminal proceedings when the NSI Act has been argued in a fully contested fashion renders this conclusion provisional, in the nature of a progress report only’.219

The following section commences with a discussion of the purpose of the NSI Act. It then discusses the key provisions that apply to federal criminal and civil proceedings. It also discusses the effect the provisions have on the right to a fair trial and the argument that the scheme has resulted in a fettering of the court’s discretion in its exercise of judicial power. Notwithstanding the requirement for the protection of national security information, there remains the concern that convicting a person, or even issuing a control order against them, on evidence which the defendant or his or her legal representative is prohibited from viewing, raises issue of fairness.220

1 Purpose and Key Definitions

Section 3(1) provides that the object of the NSI Act is to ‘prevent the disclosure of information in federal criminal proceedings and civil proceedings where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice’. Prior to the NSI Act, the Commonwealth was forced to rely on the common law doctrine of public interest immunity to prevent the disclosure of national security information in court proceedings. The limitations of the immunity can be seen in the espionage case R v Lappas and Dowling, where the Supreme Court of the ACT rejected a public interest immunity claim on the basis that it would have resulted in an unfair trial to the defendant, despite concerns that disclosure could compromise national security.221 The NSI Act sought to overcome the difficult choice between discontinuing prosecution or risking prejudice to national security. As Dame Mary Arden argues, special trial procedures have been developed to address the special problems that affect the trial of suspected terrorists, ‘and yet preserve sufficient freedom to ensure that justice is still done’.222

220 von Doussa, 'Reconciling Human Rights and Counter-Terrorism', above n 5, 118.
222 Arden, above n 68, 833.
In relation to the key terms used in the legislation, ‘national security information’ is defined as information that (a) relates to national security, or (b) the disclosure of which may affect national security. ‘National security’ is broadly defined in s 8 as Australia’s defence, security, international relations or law enforcement interests. In the trial of Faheem Lodhi, an argument was put forward that due to the wide ranging definition of national security, among others, the court would be deciding policy matters that fell outside the proper arena of judicial consideration. However, this argument was rejected on the basis that there was little difference between this situation and where the court considers public interest immunity claims, such as in relation to ‘matters of state’ under the Evidence Act 1995 (Cth) which includes matters which may prejudice the security of the Commonwealth. Such an approach is less conservative than some of the wartime cases, where the High Court frequently deferred to the Parliament for matters of defence policy. Although here, the Court was legislatively empowered to consider such issues, which it was not during wartime.

2 Federal Criminal Proceedings

Part 3 of the NSI Act sets out the regime for the protection of national security information in federal criminal proceedings. Section 6 provides that the Act applies if the prosecutor gives notice in writing to the defendant, the defendant’s legal representative and the court that the Act applies. Section 13(2) provides that a criminal proceeding includes all stages of the trial process, as well as any pre-trial proceedings or appellate proceedings. Section 21(1) provides that at any time during a federal criminal proceeding, the Attorney-General or his or her legal representative, the prosecutor, or the defendant or his or her legal representative may apply to the court to hold a hearing to consider issues relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information. Hearings under s 21 have been held as pre-trial conferences to consider any national security issues in proceedings involving terrorism offences such as Thomas v Mowbray, R v Ul-Haque and R v Lodhi.

224 Ibid.
Sections 24 and 25 contain general requirements regarding the notification of possible disclosure of national security information, and failure to comply is an offence punishable by up to two years imprisonment. Section 24 provides that if the prosecutor, the defendant or the defendant’s legal representative knows or believes that national security information will be disclosed during a proceeding, he or she must notify the Attorney-General as soon as practicable and advise the court, the other party and any relevant witnesses in writing that the Attorney-General has been so notified. Subsection 24(5) then provides that the court must adjourn until the Attorney-General provides a non-disclosure certificate to the court under s 26(4) or a witness exclusion certificate under s 28(3), or otherwise advises the court that a certificate will not be issued. Section 27 states that if the Attorney-General issues a non-disclosure certificate, it is conclusive evidence that disclosure in the proceeding is likely to prejudice national security. Speaking extra-judicially, the Hon Michael McHugh argues that conclusive certificates are such an interference with a criminal trial that it is difficult to see how they could be valid. He considers that such is a legislative attempt to reverse the decisions in Sankey v Whitlam and Alister v R that it is for the courts and not the executive to determine whether a claim for public immunity is made out. Such arguably amounts to a legislative attempt to usurp the judicial power of the Commonwealth. It also restricts the ability of the defendant to present a fully informed defence.

Division 3 sets out the processes governing closed hearings, which must be held following the issue of a non-disclosure or witness exclusion certificate by the Attorney-General. Section 29(2) provides a list of who may be present, including the defendant and their legal representative. However, s 29(3) provides that if the court considers that information would be disclosed to the defendant or their non-security cleared legal representative, and the disclosure would be likely to prejudice national security, the court may order that that person is not entitled to be present during any part of the hearing in which the information itself, or arguments relating to the information, is given. According to the NSI Practitioners Guide, the purpose of such provisions are to

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228 NSI Act s 42.
233 Ibid.
attempt to strike an appropriate balance between protecting national security and not unduly interfering with court procedures.\textsuperscript{234} However, this raises a serious issue as to how an accused can defend an action brought against them and respond to arguments if they are not able to view the evidence – as identified by Beck, one of the minimum requirements of the due process right to a fair trial is the right of an individual to be informed of the essence of the case against him or herself.\textsuperscript{235} In \textit{Chahal v United Kingdom}, the European Court of Human Rights held that a procedure for reviewing the lawfulness of detention pending deportation which did not allow the relevant individuals to be provided even with a general summary of the allegations against them was inconsistent with the right to have detention considered speedily by a court.\textsuperscript{236} Additionally, Justice von Doussa argues extra-judicially that the \textit{NSI Act} adopts a ‘one size fits all’ approach by removing the discretion of the court to hold a closed hearing and order greater or lesser restrictions depending on the nature of the information said to require protection.\textsuperscript{237} He concludes that this aspect of the Act is unlikely to satisfy the proportionality test.\textsuperscript{238}

Following the closed hearing, s 31 requires the court to make an order that either the information not be disclosed except in permitted circumstances, that the information be disclosed in a particular form (for example, in summary form or with redactions), or that the information be disclosed (which effectively overturns the Attorney-General’s certificate). In relation to a witness exclusion certificate, the court must make an order that the prosecutor or defendant may or may not call the person as a witness. Section 31(7) provides that in determining what order to make, the court must consider a number of issues including whether there would be a risk of prejudice to national security if the information was disclosed, or whether any such order would have a substantial adverse effect on the defendant’s right to receive a fair hearing. In making its decision, however, s 31(8) provides that the court must give greatest weight to national security issues. Through setting out a regime in which the Attorney-General dictates the court’s consideration of evidence and the weight it must give to competing

\begin{footnotesize}
\textsuperscript{234} Attorney-General’s Department, above n 216, 22.
\textsuperscript{236} (1996) 23 EHRR 413, [124]-[133] (Ryssdal P).
\textsuperscript{238} Ibid.
\end{footnotesize}
interests, the judiciary’s exercise of judicial power is being fettered. This has flow on effects for the procedural and substantive due process rights of individuals. As Justice HcHugh argues extra-judicially:

It is no doubt true in theory that the [Act] does not direct the court to make the order which the Attorney-General wants. But it does as close as it thinks it can. It weighs the exercise of the direction in favour of the Attorney-General and in a practical sense directs the outcome of the closed hearing. How can a court make an order in favour of a fair trial when it exercising its direction, it must give the issue of fair trial less weight than the Attorney-General’s certificate.239

Dame Mary Arden suggests that cases dealing with these issues illustrate the variety of different ways in which Parliament may seek to change the trial process and the judgments which the courts have to make as to whether the essential requirement of fairness to the defendant is met or whether the balance is swung too far in favour of the those who prosecute or investigate terrorism.240

This issue was considered in R v Lodhi.241 Here, a media interests group submitted that pt 3 in general, and s 31 in particular, purported to confer on the Supreme Court of New South Wales a discretion incompatible with the exercise of the judicial power of the Commonwealth. It was argued that the hearing under s 31 entails considerations which relate to policy, not true discretionary considerations, and that the discretion was merely a ‘sham’ because the effect of s 31(8) was that the interests of the accused in securing a fair trial were to be disregarded. These arguments were rejected by Judge Whealy. His Honour held that s 31 does provide a real discretion due to, inter alia, the right of the defendant to be heard, the requirement that the court give consideration to whether an order would have a substantial adverse affect on the defendant’s right to receive a fair hearing, and that an order does not prevent the court from later ordering that the proceedings be stayed if it would have a substantial adverse affect on the defendant’s right to receive a fair hearing.242

Judge Whealy considered that the statutory procedures were not materially different from the situation that arises traditionally where a public interest immunity claim is made.243 His Honour stated of the closed hearing that it

240 Arden, above n 68, 833.
243 Ibid 467.
is not concerned essentially with the admission or exclusion of evidence. It is concerned only with disclosure and the identification of material that may be later adduced in the trial. Questions as to the admissibility of the evidence and the manner of giving the evidence remain for the determination of the trial judge in the ordinary way.  

Respectfully, the limitations to the procedural due process rights of individuals are far greater under the *NSI Act* compared to those under a public interest immunity claim. As discussed above, the *NSI Act* purports to restrict, or even limit, the discretion of the court in determining whether evidence or other information is admissible. The provisions of the *NSI Act* and the outcome in *R v Lodhi* can be contrasted with *Assistant Commissioner Condon v Pompano Pty Ltd*. Here, the *Criminal Organisation Act 2009* (Qld) similarly allowed ‘criminal evidence’ to be withheld from the respondent and his legal representatives during a hearing to consider an application by the Queensland Police to have a motorcycle gang declared a criminal organisation. However before allowing this, the Supreme Court was required to take into account fairness to the respondent and, unlike under the *NSI Act*, no single factor (including prejudice to a current criminal investigation) was to be given priority over another. The High Court held that on this basis the Supreme Court retained its decisional independence and the powers necessary to mitigate the extent of any unfairness to a respondent, including what weight to give to criminal intelligence. Given these features, which are not present in the *NSI Act*, the legislation was held not to impair the essential and defining characteristics of the Supreme Court.

In relation to record-keeping, *NSI Act* s 29(5) states that a court conducting a closed hearing must only make a copy of the record of the hearing available to an appeal court, the prosecutor and the Attorney-General. It also permits any security-cleared legal representative of the defendant to access the record in certain circumstances. However, s 29(7) provides that if the prosecutor or the Attorney-General considers that making the proposed record available to an appeal court or the defendant’s legal representative will disclose information likely to prejudice national security, they may request that the court vary the proposed record so that the information will not be disclosed. This limits the ability of the defendant to prepare an appeal.

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244 Ibid.
245 Ibid.
247 Ibid 250 (French CJ), 289 (Gageler J).
248 Ibid.
Part 3A of the *NSI Act* contains the regime for civil proceedings. It is substantially the same as pt 3 in relation to federal criminal proceedings, although does contain some key differences. Subsection 6A(1) states that if the Attorney-General is not a party to civil proceedings the Act applies if the Attorney-General gives notice in writing to the parties, their legal representatives and the court that the Act applies. Alternatively, s 6A(2) states that if the Attorney-General is a party the Act applies if a Minister appointed by the Attorney-General gives such notice. Section 15A provides that a civil proceeding includes any proceeding in a court of the Commonwealth, a State or Territory other than a criminal proceeding and includes, inter alia, an ex parte application, a discovery, appeal proceedings, and interlocutory proceedings. Therefore, as with pt 3, it encompasses all stages of the civil process.

Section 38A(1) provides that at any time during a civil proceeding, the Attorney-General, the Attorney-General’s legal representative, or a party to the proceeding or their legal representative may apply to the court for it to hold a hearing to consider issues relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information. Section 38D(1) requires a party or their legal representative to notify the Attorney-General as soon as practicable if he or she believes that either they, a person they intend to call as a witness, or another person who is the subject of a subpoena, will disclose national security information in the proceeding. Section 38D(5) then provides that the court must adjourn so much of the proceeding as is necessary to ensure that the information is not disclosed until the Attorney-General provides a non-disclosure certificate under s 38F(5), or advises the court that he or she will not be issuing a certificate. Similarly, s 38E provides that a party must advise the court if they know or believe that a witness’ testimony involves information that relates to or may affect national security. Again, the *NSI Act* sets out a procedure to be followed in such circumstances.

Sections 38F and 38H allow the Attorney-General to issue a civil non-disclosure certificate or a civil witness exclusion certificate if a party or a witness will disclose information in the proceeding and such disclosure is likely to prejudice national security. Again, following the issue of such a certificate, a closed hearing must be held. The provisions governing closed hearings in civil proceedings broadly mirror those
discussed in the previous section in relation to closed hearings for federal criminal proceedings and as such will not be restated. Again, following a closed hearing the court must make an order that either the information not be disclosed (or that the witness not be called), that the information be disclosed in a particular form, or that the information be disclosed. Section 38L provides that in determining which order is most appropriate, the court must take into consideration whether the disclosure or presence of the witness would be a risk of prejudice to national security, whether such an order would have a substantial adverse effect on the substantive proceeding and any other relevant matter. However, the court must give the greatest weight to national security considerations.

As with criminal proceedings, s 19 explicitly states that the court is not prevented from later ordering that the civil proceeding be stayed on the basis that this would have a substantial adverse effect on the substantive hearing in the proceeding. However, while this may prevent unfairness in criminal trials, it provides little assistance in relation to civil proceedings where an applicant may be denied an effective remedy. For example, in proceedings relating to a person’s entitlement to a protection visa, the applicant may be prevented from presenting or accessing evidence supporting their entitlement. Staying the proceedings will not assist the applicant. To this end, the 

**F Concluding Remarks regarding the Anti-Terrorism Legislation**

It is clear that the legislative response to the September 11 terrorist attacks resulted in a restriction of the right to liberty of the person which had not been seen since wartime. Most disconcerting is that the terrorist offences are broad enough to cover activities with innocent motives. The control order regime allows the liberty of non-suspects to be restricted to an extent that amounts to punitive detention in all but name. Individuals can have their substantive and procedural due process rights limited through being detained without charge and with limited access to legal assistance under the detention regimes. Defendants and applicants in criminal and civil proceedings can be prevented from viewing evidence and therefore presenting a fully informed argument.
The control order and detention regimes operate more widely than the criminal law, and do not follow the ordinary criminal justice model which requires that legislation spell out a particular crime, an investigation be undertaken to determine whether a breach of that legislation has occurred, and punishment imposed after that offending individual’s guilt has been determined in a public trial. Instead, restriction of liberty of the person can occur without even contemplation of criminal charge, and the decisions of members of the executive to issue such orders are not subject to substantive review by the judiciary. From Lim, there is a strong argument that the restrictions of liberty enabled through these schemes are punitive in nature, in that they go beyond what is ‘reasonably necessary’ or ‘appropriate and adapted’ to achieve non-punitive objectives. That being said, the absence of a constitutionally entrenched right to due process has meant that these regimes have withstood challenge and been held to be intra vires the defence power.

As noted by Lindell, terrorist acts occurred in Australia prior to September 11; an example being the Hilton Hotel bombing during the Commonwealth Heads of Government meeting in 1978. Such matters were dealt with under the ordinary law, and so there is an argument that the measures contained in the anti-terrorism legislation were not needed. Nevertheless, this thesis does not endeavour to analyse the need for the anti-terrorism legislation, but rather seeks to determine how it and the defence power threaten human rights in the War on Terror. As established in Chapter I of this thesis, there is limited protection of human rights in Australia, and this position is very disconcerting in the current climate. Writing extra-judicially, the Hon Tim Carmody asks: ‘How clear and credible does the proof of danger have to be and how heavy handed a response is society as a whole prepared to tolerate for the sake of national security and public safety?’ As discussed in the following Chapter, the right to liberty of the person requires extra protection to ensure that a balance can be struck.

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249 Saul, above n 7, 9.
252 Lindell, above n 102, 3.
IV THE NEED FOR GREATER PROTECTION OF HUMAN RIGHTS IN AUSTRALIA

A Introduction

It is clear that the decade following September 11 has seen an increased reliance on intelligence and preventative measures to minimise the actual and perceived threat of terrorism. Such measures, which allow for the imposition of restrictions on the liberty of individuals without charge, have historically been used in preparation for war and during wartime. Australia’s political climate post-September 11 is not one of ostensible peace but, given the continuing threat of terrorism and the often strained relationships between nations, can be said to be one of increased international tension.\(^1\) As Lynch argues, it is reasonable to conclude that this threat will not subside in the short term, and therefore the political climate is unlikely to revert back to one of ostensible peace in the coming decade.\(^2\) This is despite the positive remarks of former Prime Minister Julia Gillard regarding the post-9/11 era.\(^3\) Indeed, given the interconnectedness of individuals through the internet and ease at which propaganda can be disseminated, the threat is arguably the greatest from ‘home grown’ terrorists. However, while it is acceptable to impose some level of intrusion on liberty in order to protect the wider community, it is still essential for adequate safeguards to be in place to protect individuals against arbitrary actions by the executive. The threat must not be overstated in order to justify such intrusions.

This Chapter draws together the key themes from the previous Chapters to substantiate why it is not sufficient to rely on Australia’s current mechanisms for the protection of human rights in the era of the War on Terror. It commences with a discussion of the threats to the right to liberty of the person that are posed by the defence power and the anti-terrorism legislation if the Parliament is left unrestrained. It outlines why existing protections, including the implied right to due process, are not adequate. It concludes with a discussion of the need to strike a balance between individual liberty and the protection of the community from terrorist threats. This provides justification for the

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\(^1\) As discussed on page 136, in Thomas v Mowbray (2007) 233 CLR 307, 397 (Kirby J), 506 (Callinan J) there were intimations that Australia is in a period of increased international tension (or at least a period falling short of ostensible peace).


\(^3\) Department of the Prime Minister and Cabinet, Strong and Secure: A Strategy for Australia’s National Security, (January 2013) ii.
two models outlined in Chapters V and VI of this thesis for achieving more effective human rights protection in Australia.

B Future Threats to Human Rights if the Parliament is left Unrestrained

The defence power poses significant risk to human rights. As discussed in Chapter II of this thesis, the range of subject matters regulated by legislation enacted pursuant to the defence power during wartime and periods of increasing international tension pre-September 11 was broad, from groceries to housing. While there has not been the same level of regulation of everyday items for defence purposes post-September 11, Australia has still seen the introduction of legislation which has the potential to affect the most significant aspects of everyday life. Individuals may be restricted in their movements and contact with others, they may be detained without charge, and in the event that they are charged they may be restricted from accessing incriminating evidence against them. Chapter I of this thesis provided an analysis of the effectiveness of the different protection regimes as they currently exist in Australia, including the express and implied constitutional rights, the doctrine of separation of judicial power, Constitution s 75(v) and the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth). As demonstrated above, these measures do not provide adequate protection of human rights.

This section commences with a discussion of the risks associated with the defence power, from during wartime to periods of increased international tension. This is followed by an analysis of the risks posed by the anti-terrorism legislation in light of the deficiencies in the protection of the right to liberty of the person.

1 Risks Posed by the Defence Power

Chapter II of this thesis discussed the scope of the primary and secondary aspects of the defence power during peacetime, periods of increased international tension, wartime and the aftermath of war. It discussed how the High Court interpreted the defence power in light of the threat faced. This elasticity meant that during wartime there was greater capacity for the infringement of civil liberties compared to other periods. However, the nature of the defence power means that there is still scope for significant human rights infringements outside periods of war, including this current period of
increased international tension. As Lynch and Reilly argue, history shows that governments seeking to protect the State during times of emergency will often do so by restricting the liberty of those persons who are perceived to pose a threat.\(^4\) This alteration of the balance of power between the executive and judicial branches which allows executive detention, they submit, amounts to a disproportionate response of little benefit to national security.\(^5\)

As discussed in Chapter II of this thesis, the subject matter test applicable to the defence power as a purposive power can be used to permit the Parliament to regulate with respect to a wide variety of subject matters. During wartime in particular, certain restrictions were accepted as being necessary for the successful prosecution of the war and the continued existence of the Commonwealth. Some subject matters related to the supply of food and produce, and while restrictions may have created inconvenience and prevented suppliers from deriving greater profits, they ultimately served community-wide purposes.\(^6\) Other subject matters related to important rights of individuals, including the right to liberty of the person, which were restricted in order to ensure that persons who were considered to pose security risks could be detained.\(^7\) All measures were justified on the basis that the subject matter of the legislation was for defence purposes, either directly or incidentally (that is, within the primary or secondary aspects of the power), according to the extant ‘needs’ or threat that existed at the time. In *Australian Communist Party v Commonwealth*, McTiernan J summarised the tests during hostilities as follows:

> In all the cases concerning the validity of statutory regulations made for the war of 1914-1918 and for the war of 1939-1945 the principle was acknowledged or assumed that it was for the Executive Government to decide what was necessary or expedient for the purpose of the war and in doing so to act upon its opinion of the circumstances and conditions that existed and of the policy or course of action that should be followed. Variously formulated as the tests have been for deciding whether regulations made under the war powers were within the power to make laws with respect to defence, they have uniformly been based upon the principle that there is to be no inquiry into the actual effect the regulation would have or be calculated to have in conducing to an end likely to advance the prosecution of the war and that it was at least enough if it tended or might reasonably be thought conducive or relevant to such an end.\(^8\)

\(^5\) Ibid 106.
\(^6\) See, eg, *Farey v Burvett* (1916) 21 CLR 433; *Sloan v Pollard* (1947) 75 CLR 445; *Andrews v Howell* (1941) 65 CLR 255.
\(^7\) See, eg, *Lloyd v Wallach* (1915) 20 CLR 299.
\(^8\) (1951) 83 CLR 1, 199.
In their dissenting judgment in *Farey v Burvett*, Gavan Duffy and Rich JJ discussed the immense legislative and executive power that could be drawn from s 51(vi) if its meaning was not limited. Contrary to the opinion of the majority, which is discussed in detail in Chapter II of this thesis, their Honours were of the opinion that the words ‘naval’ and ‘military’ did limit the meaning of the word ‘defence’ because if the meanings were not limited it would allow the Parliament to, for example, enact a law which provided that no person should wear clothes during the period of the war. Respectfully, such a law would only be permitted if it could be established that such a measure was appropriate and adapted for defence purposes in light of the extant threat, however it does demonstrate how legislation touching all aspects of life can potentially be enacted under the defence power. That is, if the Parliament was able to justify that a law restricting persons from wearing clothes for the duration of the war was appropriate and adapted for defence purposes, and did not disproportionately infringe one of the few constitutional rights, such a law might very well be supported. This is notwithstanding that the restriction is not the least restrictive of human rights available to serve the defence interest. Deane J recognised that there are few domestic laws which could not arguably be seen as capable of affecting upon the country’s defence, and therefore fall within the primary or secondary aspects of the power. This is significant for a right as fundamental as the right to liberty of the person, for which there is only minimal constitutional protection through a tenuous implied right to due process.

While this risk may be great during wartime, at the cessation of war or hostilities legislation has been revoked on the basis that it was no longer necessary in light of its original defence purpose. The effect of this is that while some measures may be justifiable during wartime, the continued existence of such measures would be ultra vires the defence power upon the conclusion of the war. However, while in theory the scope of the defence power during periods of increasing international tension is not as great as during wartime, *Marcus Clarke & Co Ltd v Commonwealth* indicates that a wide range of subject matters can still be legislated upon. As long as the measures might ‘conceivably, even incidentally, aid the effectuation of the powers of defence’, a

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9 (1916) 21 CLR 433.
10 Ibid 457.
12 (1952) 87 CLR 177.
sufficient connection will exist. Significantly, as established in Chapter II of this thesis, the greater the extant threat or tension, the greater the power available. Lacey contends that the Constitution does not permit the arbitrary exercise of power, as power of that description would be unable to be characterised as a law with respect to a head of power conferred upon the Parliament. However, this view does not take into account the broad legislative power that can be derived from s 51(vi), coupled with ss 61 and 51(xxxix), and the scope this has for infringement of human rights. Lynch and Reilly argue that while previous departures from legal norms were in response to specific conflicts with a finite end or objective in sight, the use of detention in an ongoing ‘conflict’ such as the War on Terror presents the potential for a permanent readjustment of the relationship between the arms of government and the rights of individuals.

The defence power is the focus of this thesis due to the broad scope of legislative topics that can be drawn from it. The greater the threat, the greater the potential for the right to liberty of the person to be restricted, given the limited protections currently available. While this thesis does not purport to explore the threat that other constitutional heads of power pose, conceivably any power could be used to limit individual liberty (particularly where a patchwork of powers is used as in the case of the anti-terrorism legislation). Increased protection of human rights, such as through the two approaches posited in Chapters V and VI of this thesis, would therefore not only be of benefit in the context of the defence power but would also be of great benefit in constitutional characterisation more broadly.

2 The Anti-Terrorism Legislation and Deficiencies in Human Rights Protection

The current protection of human rights in Australia is deficient, and this poses a great risk in the context of the anti-terrorism legislation. As discussed in Chapter I of this thesis, in the absence of a bill of rights, reliance is placed on few express and implied constitutional rights, as well as the separation of judicial power and entrenched original jurisdiction of the High Court in s 75(v). This section summarises the inability of the

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15 Lynch and Reilly, above n 4, 106.
current mechanisms to protect human rights in Australia in light of the anti-terrorism legislation.

As discussed in Chapter I of this thesis, there are few express and implied constitutional rights which protect a limited number of subject matters. In relation to protection of the right to liberty of the person, significantly there is no explicit constitutional right to due process. The High Court has recognised an implied guarantee of due process in a number of cases during the past two decades, which generally stems from the exclusive power of the judiciary under Constitution Ch III to judge and punish criminal guilt. Chapter I of this thesis discussed how in Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs, the High Court established that if detention is punitive in nature, in that it goes beyond what is ‘reasonably necessary’ to achieve a non-punitive objective, it will be unconstitutional. Recognised exceptions relate to detention for non-punitive purposes where detention is unrelated to a finding of guilt, such as detention on mental health grounds for the protection of the community. The High Court has cautioned against laws disguising executive detention as being for a non-punitive purpose, given that ‘the Constitution’s concern is with substance and not mere form’. However, the anti-terrorism legislation has not been found by the judiciary to have crossed this boundary despite the strong argument that detention is punitive. In any case, the test outlined in Lim, as in the case of other constitutional rights, is flawed in that it does not require that the restriction on human rights be the least restrictive to achieve the legislative objective. As such, the current proportionality test is not sufficient to protect the right to liberty of person.

In its current form the right to due process, both the procedural and substantive elements discussed in Chapter I of this thesis, is a tenuous implied right. In Al-Kateb v Godwin, McHugh J stated that while Constitution Ch III is infringed where detention, other than by a curial order, is authorised by a law of the Commonwealth and imposes punishment,

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16 See, eg, Polyukhovich v Commonwealth (1991) 172 CLR 501; Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1; Al-Kateb v Godwin (2004) 219 CLR 562. These cases were discussed in Chapter I.

17 (1992) 176 CLR 1, 71 (McHugh J).


20 Ibid.
a law authorising detention will not be characterised as imposing punishment if its object is purely protective.\textsuperscript{21} Although, he noted that ‘even a law whose object is purely protective will infringe Ch III if it prevents the Ch III courts from determining some matter that is a condition precedent to authorising detention’.\textsuperscript{22} His Honour went on to refer to National Security (General) Regulations 1939 (Cth) reg 26 which, during WWII, allowed the Minister to detain an individual if satisfied that such was necessary to prevent that individual from acting in any manner prejudicial to public safety or the defence of the Commonwealth.\textsuperscript{23} His Honour stated that here the purpose of the detention was not punitive but protective, and that ‘I see no reason to think that this Court would strike down similar regulations if Australia was again at war in circumstances similar to those of 1914-1918 and 1939-1945’.\textsuperscript{24} The anti-terrorism legislation relies on detention being for protective national security purposes, and therefore a permitted non-punitive purpose. Significantly, however, Australia is not at war and yet liberty can be restricted on the opinion of a member of the executive for protective purposes. That is, to protect the community from the threat of terrorism.

An organisation can be specified as a ‘terrorist organisation’ under Criminal Code div 102 on the Attorney-General’s reasonable satisfaction that the organisation is involved in or advocates a terrorist act, with automatic corresponding offences for members. Division 104 allows an AFP member to apply to an issuing court for a control order where he or she is reasonably satisfied that the order would substantially assist in preventing a terrorist act or where the individual has trained with a terrorist organisation. Such can amount to detention (for punitive purposes) in all but name, without a finding of criminal guilt. The executive detention regimes in Criminal Code div 105 and ASIO Act pt III allow members of the executive to apply for orders where, inter alia, they are satisfied that there are reasonable grounds to suspect that the individual will engage in a terrorist act, or that it will substantially assist the collection of intelligence. While requiring satisfaction on ‘reasonable grounds’ as to the existence of particular facts does impose an objective test, those facts are so broad that it is not difficult to satisfy this requirement. In both types of orders, the issuing authority (or the prescribed authority in the case of questioning and detention warrants) may be a

\begin{footnotesize}
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\item \textsuperscript{21} (2004) 219 CLR 562, 584.
\item \textsuperscript{22} Ibid.
\item \textsuperscript{23} Ibid 588-9.
\item \textsuperscript{24} Ibid 589.
\end{itemize}
\end{footnotesize}
member of the judiciary acting in a *persona designata* capacity or a member of the executive. As well as the limitations this places on an individual’s substantive due process rights, their procedural due process rights can also be severely restricted through limited access to legal representation and, if the matter does proceed to a criminal trial, restrictions on access to incriminating evidence through the *NSI Act*. As discussed in Chapter III of this thesis, these arrangements have withstood judicial challenge and so the implied constitutional right to due process has been of limited effectiveness.

In relation to the other currently available protections of human rights, as discussed in Chapters I and III of this thesis, while the High Court’s jurisdiction to review administrative decisions is entrenched in s 75(v), review in this context is limited to jurisdictional error and provides no basis for substantive review. Similarly, while the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) requires the issue of statements of compatibility with human rights and requires legislation to be interpreted consistently with human rights standards, it does not affect the validity of legislation or administrative decisions or confer additional powers on the judiciary where rights are infringed.

The lesson Williams surmised from *Australian Communist Party v Commonwealth*\(^2\) is do not vest powers of this kind in the executive and do not vest powers of this kind where there is not adequate review. As the High Court itself reflected in that case, the dangers to our civil liberties do not just extend from that point communism or that point terrorism: they extend from the fact that we might unbalance our democracy by giving too much power to any arm of government.\(^3\)

The anti-terrorism legislation confers on the executive wide powers to restrict individuals of their liberty, and the current powers of the judiciary to review and enforce a right to due process are simply inadequate.

\(^2\) (1951) 83 CLR 1.
\(^3\) Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 8 April 2002, 60 (George Williams, Professor).
It is the duty of any government to take reasonable steps to keep persons within their control secure from threats, and the threats posed by the War on Terror are no exception. In Hamilton v University of California it was said that ‘Government, federal and state, each in its own sphere, owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law’. Indeed, the European Court of Human Rights has gone so far as to hold that for a government to not take action to protect citizens may lead to a violation of their right to life. There have been several terrorist attacks since September 11, including the bombings of Bali, Madrid, London and Mumbai. Arguably, it is only a matter of time before such an attack occurs on Australian soil, with current Director-General of ASIO, David Irvine, confirming that ‘[t]errorism remains the most immediate threat to the security of Australians and Australian interests’ and that ‘[t]he threat of home-grown terrorism is of significant concern’. Steps must therefore be taken to identify threats and prevent them from materialising. However, it is essential that a balance be struck and that there are adequate corresponding measures in place to protect individuals. ‘Indeed, sacrificing fundamental liberal values such as the respect for the rule of law, civil liberties and human rights would amount to losing the “war on terrorism without firing a single shot”’. As discussed in Chapter III of this thesis, compared to other criminal offences terrorism represents a special kind of threat which may demand that pre-emptive measures be taken. ‘Quite simply, the state could not afford to wait until terrorist acts have been

28 293 US 245, 262-3 (Butler J) (1934).
30 The Bali bombings involved bombing attacks in the tourist district of Kuta on 12 October 2002 by members of terrorist organisation Jemaah Islamiyah, killing 202 people (including 88 Australians) and injuring 240. The Madrid bombings involved a series of bombings in the commuter train system on 3 March 2004 by an al-Qaeda inspired terrorist cell, killing 191 people and injuring 1800. The London bombings involved a series of suicide attacks on 7 July 2005 by British-born individuals targeting the public transport system, killing 52 people and injuring over 700. The Mumbai bombings involved 12 shooting and bombing attacks between 26 and 29 November 2008 by terrorist organisation Lashkar-e-Taiba, killing 164 people and injuring over 300.
committed. Instead, terrorist acts must be prevented from occurring in the first place’. To the extent that terrorism is distinct from other crimes in terms of the scale of intended destruction and also the motivation to instil terror, it is argued that special legislative powers which provide for the restriction of liberty are justified. Michaelsen discusses the competing arguments for the question of whether it was (and is) necessary to curtail human rights in order to combat and prevent terrorism effectively. On the one hand is the argument that the threat to ‘our way of life’ warrants restrictions of human rights, and that it is imperative that mechanisms protecting human rights do not hamper the Government’s ability to respond effectively to the threat. On the other hand is the argument that, particularly during times of crisis, the liberal democratic state must adhere strictly to its defining principles, as rights would lose all effect if they were easily revocable in situations of necessity. It is achieving a balance between these competing arguments that represents the greatest challenge.

The need for human rights to be restricted in some circumstances is not foreign to human rights law, with many instruments recognising this. For example, *International Covenant on Civil and Political Rights* art 4 permits member states to take measures derogating from their obligations in times of public emergency which threatens the life of the nation, subject to some listed exceptions. Similarly, *Convention for the Protection of Human Rights and Fundamental Freedoms* art 15 permits a member State to derogate from the obligations under the *Convention* ‘in times of war or other public emergency threatening the life of the nation’. Even the human rights instruments of the United States, Canada and South Africa contain limitations, as analysed in Chapters V and VI. Indeed, as Justice von Doussa argues extra-judicially, international human rights law was ‘forged in the wake of devastating periods of global conflict…’.

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36 Ibid.
However, ‘[t]he case for derogating from accepted rights and key elements of our democracy must be fully justified and carefully scrutinised’.

Williams argues that while Australia needs a national legislative response to terrorism, any new laws must strike a balance between defence and important public values and fundamental human rights so as not to damage the same democratic freedoms we are seeking to protect from terrorism. ‘[A]bsent a state of ‘total war’, fidelity to clear constitutional constraints, including federal ones, should not simply be dispensed with whenever governments claim new powers in the name of national security.’ As former United Nations’ Secretary General Kofi Annan argues, compromising human rights facilitates achievement of the terrorist’s objective – by ceding to [them] the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits. Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element.

During the introduction of the anti-terrorism legislation, members of the Parliament described the laws as ‘strik[ing] a balance between those security needs and the rights and liberties of all Australians’, and the proposed measures as ‘balanced and suited to the achievement of a just and secure society’. However, as discussed in Chapter III, in some instances the measures represent an unjustifiable infringement on the right to liberty. The measures contained in the anti-terrorism legislation significantly depart from traditional common law assumptions about liberty in Australia and have the potential to promote fundamental changes to the nature of the democratic relationship between the citizen and the State. While to date the existing provisions may not have been used arbitrarily, there is the potential for this to occur and for new legislation limiting human rights to an even greater extent to be introduced under the defence.
power in the future. After all, ‘even when they act with the best of intentions governments sometimes adopt measures that can result in an unacceptable loss of liberties’. 46

Regardless of the above, Michaelsen argues that a mere ‘balancing’ approach is unsuitable when it comes to reconciling the interests of combating and preventing terrorism and protecting human rights.47 He argues that: it does not give any indication of the relative weight that should be attached to the competing interests; it does not give adequate consideration to the philosophical and conceptual underpinnings of the notions of liberty and security; there are major rights-based objections against a simple balancing exercise such as the jurisprudential problem of whether and to what extent liberties can be actually balanced against community interests; and it does not give appropriate weight to the long-term consequences of curtailing fundamental rights and liberties.48 He asks the fundamental question of ‘whether a diminution of liberty actually enhances security or whether one is trading off civil liberties for symbolic gains and psychological comfort’.49 Instead, Michaelsen argues that it is appropriate to review and reform Australia’s anti-terrorism law and policy on the basis of proportionality.50 This is a strong argument, given that in order to achieve an appropriate balance there must be some additional measure upon which the competing interests can be evaluated. Proposals for a least restrictive proportionality test and constitutionally entrenched rights to habeas corpus and due process are discussed in detail in Chapters V and VI of this thesis.

D Concluding Remarks regarding the Need for Greater Protection

In a pre-September 11 article, Galligan described Australia’s system as ‘premised on a more positive view of representative democracy and buttressed by a faith in the ability of democratic processes both to express the popular will and to protect individual rights’. 51 The omission of a bill of rights from the Australian Constitution is indicative

46 Lynch and Williams, above n 34, 13.
48 Ibid 35.
49 Ibid 35-6.
50 Ibid 31.
of the view at Federation that parliamentary representative democracy and responsible government offered sufficient protection. This approach is acceptable when Australia is in a state of peace, however during times falling short of peace, history has shown that it is not sufficient to simply rely on the Parliament ‘doing the right thing’ in the absence of explicit constitutional rights relating to the right to liberty of the person or a more robust approach to judicial review. In reflecting on this issue in the United States, Katyal and Tribe stated ‘[i]t is ... nice to have White House Counsel’s personal guarantee that this is so, but “trust me” has never been enough for the American people when their rights have been at stake’. Indeed, as Davis argues, ‘[h]istory does little to reassure the civil libertarian about the court’s potential for defending our rights’. In responding to threats, history has shown that the Parliament is more likely to diminish or lessen protective measures rather than safeguard them.

That being said, the threat of terrorism is serious and, as Dame Mary Arden describes, it is a feature of modern society. As such, legislative measures are required to ensure the protection of the population. However, while the need to strike a balance between protecting the community from the risk of terrorism and ensuring that individual rights are not compromised is largely undisputed, the best way of achieving this is unclear. As discussed in the preceding chapters, Australia’s current system offers little by way of protection of human rights, and given the elastic scope of the defence power there is a need to ensure that individuals are protected from human rights abuses. When considering the legislation that sought to address threats to national security pre-September 11, it is predictable that the Parliament will keep in force the legislation enacted for the defence of the Commonwealth post-September 11. This is particularly given that the current political climate is one of increased international tension, and is unlikely to revert back to one of ostensible peace in the near future. It is for this reason that additional protections for human rights are required in Australia. Defending human rights is at the heart of a democracy and ‘becomes infinitely more difficult if we undermine our own human rights credentials’. Speaking extra-judicially, Justice von

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52 Ibid 106.
55 Arden, above n 27, 834.
56 von Doussa, above n 38, 106.
Doussa correctly describes the biggest challenge facing all nations as being ‘how to effectively respond to the threat of terrorism without abandoning the fundamental human rights principles that are essential to the maintenance of the rule of law and the hallmark of free and democratic societies’. The following Chapters posit to strategies for achieving greater human rights protection in Australia, which will still enable an effective response to the threat of terrorism.

57 Ibid 104.
This Chapter explores the first of two strategies for protecting human rights. It posits the idea that the judiciary ought to adopt a modified proportionality test when considering whether legislation enacted under the defence power and associated executive decisions infringe a constitutional right, including the implied right to due process discussed in various cases (noting that, as discussed throughout this thesis, this is a tenuous right).\(^1\) As discussed in Chapter I of this thesis, in summary when determining whether legislation infringes one of the express or implied constitutional rights, the judiciary imposes a proportionality test which requires that there be reasonable proportionality between the interest served by the legislation and the degree of limitation of the freedom.\(^2\) However, this is not sufficient to protect the right to liberty of the person, as it still provides the Parliament with excessive scope to unnecessarily restrict personal liberty. A modified test would require that any limitation on constitutional rights by a defence measure, including administrative decisions made under legislation, be the least restrictive means available to achieve the defence interest in light of the threat to national security that is faced. If such an approach were adopted in Australia, as it has been in overseas jurisdictions, it would strengthen the protective role of the courts where constitutional rights such as the implied right to due process are at issue.

This Chapter commences with a discussion of the approaches to proportionality in overseas jurisdictions including Canada, South Africa and the United Kingdom, in order to identify lessons to be learned for the future development of the proportionality doctrine in Australia. The Chapter outlines a proposal for the adoption in Australia of a modified proportionality test, including how it would apply to the defence power and the anti-terrorism legislation. It concludes with a discussion of the viability of this model and how it could overcome the issues identified in the preceding chapters.

\(^1\) See, eg, Polyukhovich v Commonwealth (1991) 172 CLR 501; Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1; Al-Kateb v Godwin (2004) 219 CLR 562. Also note the contrasting position in Kruger v Commonwealth (1997) 190 CLR 1, as discussed on page 35. These cases were discussed in Chapter I.

\(^2\) Refer to page 18 for detailed discussion of the proportionality test.
regarding the current deficiencies in the protection of the right to liberty of the person in Australia.

B  Proportionality in Other Jurisdictions

The concept of proportionality is not unique to Australian jurisprudence, but derives from the civil law jurisdictions of Europe, including Germany and France. Engle describes proportionality as ‘a universal principle for resolving conflicting (fundamental) norms’. It is a worldwide principle of law which is found in both the common law and civil law, before national and transnational courts alike. While different jurisdictions employ different tests, the underlying theme of balancing competing interests as part of the judicial methodology is the same.

This subsection considers the application of the proportionality test in three different jurisdictions. These include Canada and the R v Oakes test, South Africa which has a constitutionally entrenched proportionality test, and the United Kingdom which has adopted the proportionality test in cases relating to rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (‘European Convention’). While these jurisdictions do have different foundations for the protection of human rights, with some protecting rights constitutionally and others legislatively, all recognise the proportionality test and so there are lessons to be learned for the future development of the proportionality doctrine in Australia.

1  Canada and the R v Oakes Test

The concept of proportionality in Canada first arose in the context of s 1 of the Canadian Charter of Rights and Freedoms. The Canadian Charter, which is discussed in detail in Chapter VI of this thesis, guarantees certain political and civil rights but contains a limitations clause. Section 1 provides:

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5 Ibid 3.
7 [1986] 1 SCR 103, 139 (Dixon CJ.).
8 Canada Act 1982 (UK) c 11, sch B pt I (‘Canadian Charter’).
The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The *Canadian Charter* was only in effect for four years when the Supreme Court of Canada was required to consider the interpretation of s 1. It was in 1986 in *R v Oakes* that the Court established a generally accepted test for determining reasonable limitations on *Charter* rights. The test places a heavy emphasis on the effect that legislative measures have on human rights, and accepts that while it may be necessary in some instances to restrict human rights, measures cannot go further than what is required to achieve its aim. Choudhry states that the decision ‘spoke in a boldness and confidence’ and clarified the Court’s interpretive methodology for *Charter* cases.

In this case, the defendant was charged with possession of a narcotic under s 8 of the *Narcotic Control Act, RSC 1970*, which established a rebuttable presumption that possession inferred an intention to traffic. The defendant argued that s 8 infringed his guarantee of presumption of innocence under *Charter* s 11(d). The Supreme Court identified that the dual purpose of s 1 was to guarantee the rights and freedoms which follow it, and to state the ‘exclusive justificatory criteria … against which limitations on those rights and freedoms may be measured’.Dickson CJ discussed how the rights are not absolute and that it is necessary for them to be subject to limitation in exceptional circumstances to achieve ‘collective goals of fundamental importance’.

His Honour set out the following test for determining whether a reasonable limitation is ‘demonstrably justified’ in accordance with s 1. This test affirmed the decision in *R v Big M Drug Mart*, where Dickson CJ held that the objective of the limitations on rights must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’.

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as

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12 Ibid 136.
13 This test was preceded by a requirement that the objective to be served by the limitation must be ‘of sufficient importance to warrant overriding a constitutionally protected right’: *R v Oakes* [1986] 1 SCR 103, 139 (Dixon CJ), quoting *R v Big M Drug Mart* [1985] 1 SCR 295, 352 (Dixon CJ).
possible’ the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of ‘sufficient importance’.\textsuperscript{15}

It was ultimately held that s 8 did not survive this rational connection test and therefore infringed the Canadian Charter. This was because the ‘possession of a small or negligible quantity of narcotics does not support the inference of trafficking’.\textsuperscript{16}

Fitzgerald concludes that the third element of the test outlined above means that an excessive measure is not justified by the objective it pursues.\textsuperscript{17} That is, an excessive measure defines an illegitimate purpose. He argues that this sees proportionality as a doctrine which weighs the means of obtaining the government objective against the effect such measures have on individual rights, and therefore suggests proportionality is a substantive limit on legislative power.\textsuperscript{18} This is an accurate description, given that the test allows the court to, in effect, consider the overall requirement and aim of the legislation and weigh this against the impact the legislation has on the individual.

In terms of the subsequent application of the Oakes test, in 1990 in \textit{R v Ladoucer},\textsuperscript{19} the defendant was charged with a driving offence after two highway patrol police officers randomly stopped him under the \textit{Highway Traffic Act, RSO 1980}. The defendant argued, inter alia, that the discretion of police officers to stop vehicles under the legislation infringed his s 9 right not to be arbitrarily detained. In a narrow majority, the Supreme Court held that while the random nature of the stop made the detention arbitrary, and therefore his rights had been limited, with reference to s 1 this limit was ‘demonstrably justifiable in a free and democratic society’.\textsuperscript{20} Applying the Oakes test, Cory J recognised that ensuring that vehicles are safe to minimise accidents is a pressing and substantial objective, and authorising police officers to stop vehicles randomly is rationally connected to this objective.\textsuperscript{21} Consistent with the second element of the Oakes test, his Honour was satisfied that random stopping did impair as little as possible the rights of the driver, noting that other activities requiring licenses are also monitored

\textsuperscript{15} \textit{R v Oakes} [1986] 1 SCR 103, 139.
\textsuperscript{16} Ibid 142.
\textsuperscript{17} Brian Fitzgerald, ‘Proportionality and Australian Constitutionalism’ (1993) 12(2) \textit{University of Tasmania Law Review} 263, 272.
\textsuperscript{18} Ibid.
\textsuperscript{19} [1990] 1 SCR 1257.
\textsuperscript{20} Ibid 1258 (Lamer, L’Heureux-Dubé, Gonthier, Cory and McLachlin JJ)
\textsuperscript{21} Ibid 1283.
through random checks. Finally, the limitation was held to be proportionate to the legislative objective.

In 1998 in *Vriend v Alberta*, it was further held that government action can be invalidated if there is no rational objective at all, but rather an excuse or an objective based on unfair or irrational considerations. A law should fail ‘where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances’. Here, the appellant argued that the *Individual Rights Protection Act, RSA 1980* breached his s 15 right to equality because it did not include sexual orientation as a prohibited ground of discrimination. The exclusion of sexual orientation from the Act was held to have the effect of imposing a burden or disadvantage on, and of withholding benefits or advantages from, homosexuals compared to heterosexuals. Budgetary implications were insufficiently important to justify the limitation of *Charter* rights. The exclusion did not satisfy the *Oakes* test and accordingly could not be saved under s 1.

The strength of the *Oakes* test is that it permits the Parliament to infringe protected rights only to the extent that is necessary to achieve the relevant objective. If it does not satisfy this test, it will be invalidated by the judiciary. This is preferable to the current approach in Australia, although it should be noted that the *Canadian Charter* provides a broader range of human rights upon which legislation can be invalidated for inconsistency compared to Australia, which only recognises a limited number of constitutional rights. Nevertheless, to the extent that Australia has an implied constitutional right to due process, there is scope for the proportionality test to be adopted in relation to this fundamental right.

2 The Limitations Clause in the South African Bill of Rights

As discussed in detail in Chapter VI of this thesis, South Africa has a Bill of Rights entrenched in its *Constitution*. Like the *Canadian Charter*, these rights are not

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22 Ibid 1286.
23 Ibid 1287.
26 *Vriend v Alberta* [1998] 1 SCR 493, 546-7 (Cory and Iacobucci JJ).
27 Ibid 572.
28 Ibid 579.
absolute, with the Bill of Rights containing a limitations clause which allows rights to be limited in certain circumstances. However, due to the comprehensive nature of the Bill of Rights, there has been a divergence in approach from the *Canadian Charter*.

The s 36 limitations clause in South Africa’s Bill of Rights is similar to s 1 of the *Canadian Charter*, although is more detailed in terms of what factors must be taken into account. Section 36 provides:

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
   - the nature of the right;
   - the importance of the purpose of the limitation;
   - the nature and extent of the limitation;
   - the relation between the limitation and its purpose; and
   - less restrictive means to achieve the purpose.

2. Except as provided in subsection (1) or in any other provision of the *Constitution*, no law may limit any right entrenched in the Bill of Rights.

The South African Constitutional Court initially addressed the scope of the limitations clause in the context of the transitional *Constitution* of 1993 in a series of cases decided in 1995. This included consideration of the equivalent clause of the *Canadian Charter*. In *S v Zuma and Others*, the *Criminal Procedure Act 1977* (South Africa) s 217(1)(b), which was held to infringe the rights of a person who had been arrested, contained a presumption that a confession was free and voluntary and therefore imposed the burden on the defence to prove that a confession was not so. The Court considered the approach taken by the Supreme Court of Canada, but noted:

> These criteria may well be of assistance to our courts in cases where a delicate balancing of individual rights against social interests is required. But [the limitations clause] itself sets out the criteria which we are to apply, and I see no reason, in this case at least, to attempt to fit our analysis into the Canadian pattern.

In light of this, Goldstone surmises that the two-stage approach set out in the limitations clause requires that two inquiries be made:

> The first inquiry is whether the challenged law or conduct violates, denies, or infringes any right. This requires an analysis of the scope and definition of the right, as well as

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30 Prior to the introduction of the 1997 *Constitution*, South Africa’s Bill of Rights was contained in Chapter 3 of the transitional *Constitution* of 1993. The current Bill of Rights retained all of the rights in the 1993 transitional *Constitution*, as well as other new economic, social and cultural rights.


the purpose and effect of the legislation or conduct. The second inquiry is whether there has been a justifiable limitation of the right concerned. Ultimately, it is the responsibility of the Court to establish if the requirements of [the limitations clause] have been satisfied.\textsuperscript{33}

In relation to the second inquiry above, in \textit{Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others}, Kriegler J stated that interpretation of the limitations clause is ‘perfectly simple’.\textsuperscript{34} He summarised that in determining whether a limitation is justifiable, ‘[a]t the very least a law or action limiting the right to freedom must have a reasonable goal and the means for achieving that goal must also be reasonable’.\textsuperscript{35} Sachs J concluded that ‘faithfulness to the \textit{Constitution} is best achieved by locating the two-stage balancing process within a holistic, value-based and case-oriented framework’.\textsuperscript{36} This decision was criticised on the basis that the Court largely refused to analyse the limitation clause itself and state what its general words mean.\textsuperscript{37} Additionally, through referring to a balancing of fundamental rights in the first stage, Sachs J arguably implied that the Court’s role involves considering the values underlying the rights, rather than simply determining whether rights have been infringed and leaving the balancing analysis to the second stage where the limitation is considered.\textsuperscript{38} The Bill of Rights sets out what rights are protected, and any analysis of competing interests should be left to determining whether a limitation on that right is justified.

Similarly, in \textit{S v Makwayane and Another}, which concerned whether the death penalty for a murder conviction was consistent with the Bill of Rights, President Chaskalson referred to the need to undertake a balancing process. Although, President Chaskalson did little more than repeat the content of the detailed s 36 limitations clause, which shows the reliance placed by the Constitutional Court on considerations being listed in that section rather than a need (or perhaps willingness) to develop separate jurisprudence as the Supreme Court of Canada has done.

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an

\textsuperscript{34} [1995] ZACC 7 (Constitutional Court), 9 [11].
\textsuperscript{35} Ibid.
\textsuperscript{36} Ibid 37 [46].
\textsuperscript{38} Ibid 102.
assessment based upon proportionality ... [P]roportionality ... calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.39

More recently, in 2010 in Road Accident Fund and Another v Vusumzi Mdeyide,40 the appellant, who was blind, illiterate and innumerate, was involved in a motor vehicle collision and lodged his claim for compensation three years and three days after the accident; which was three days after the maximum prescribed period in Road Accident Fund Act 1996 (South Africa) s 23(1) for lodging a claim. In considering whether the statutory prescription period was inconsistent with the s 34 right to access courts, Van der Westhuizen J noted that s 23(1) was clearly connected to a legitimate purpose of high public importance, being the continued existence and maximum efficiency of a compensation fund.41 His Honour applied the proportionality test in balancing the difficult position that some poverty-stricken applicants may be in, with other factors such as the generosity of the period, the need for the proper administration of public funds and the potential harmful effects of a more flexible or open dispensation.42 He held that given that a three year period was provided, the limitation of the right was reasonable and justifiable. However, again, there was no specific analysis of the limitations clause.

The above interpretation, which diverges from the Canadian approach, stems from the fact that the limitations clause contains a list of factors to be taken into account, which includes the nature of the right itself. As a result, the Court has refused an interpretation like the Canadian approach, and has instead applied a balancing requirement to all of the factors. As identified above, there are risks with the South African approach, where the policy behind the right can be considered and balanced in the first stage, thereby allowing two opportunities to justify a limitation.43 Additionally, while the limitations clause in the South African Bill of Rights refers to the ‘less restrictive means to achieve the purpose’, based on President Chaskalson’s interpretation above this does not require

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39 [1995] ZACC 3 (Constitutional Court), 69 [104].
40 [2010] ZACC 18 (Constitutional Court).
41 Ibid 34 [79].
42 Ibid 28 [66].
43 Woolman, above n 37, 103.
the means to be the least restrictive available. It is therefore not as strict as the Oakes test and indeed is not dissimilar to the current formulation of the proportionality test in Australia which merely requires that the measure be reasonably appropriate and adapted (or proportionate) to the objective. This is a significant weakness of the South African approach and from this perspective, as discussed further in the following section, the Canadian approach is preferable.

3 Proportionality in Human Rights Cases in the United Kingdom

The United Kingdom judiciary has considered proportionality in the context of judicial review of executive decision making. While the application of the proportionality test has been accepted in relation to cases involving rights under the European Convention, the courts have continued to rely on the Wednesbury test of unreasonableness (as discussed in detail on page 48) in domestic cases. It is the former application that is most useful for the purposes of this thesis.

In 1985 in Council of Civil Service Unions v Minister for the Civil Service,44 Lord Diplock first alluded to the possible adoption of proportionality as a basis of review in the United Kingdom. After citing illegality, irrationality and procedural impropriety as the three grounds upon which administrative action is subject to control by the judiciary, his Honour added ‘[t]hat is not to say that further developments on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of proportionality’.45 Such a statement may have inferred a willingness on the part of the House of Lords to consider proportionality as an additional ground of review. However, in later cases, the House of Lords refused to adopt the principle more broadly, which Johnston describes as being ‘based on respect for the demarcation line between judicial and merits review’.46 Instead there has been a continued reliance on Wednesbury unreasonableness. For example, in 1991 in R v Secretary of State for the Home Department; Ex parte Brind,47 the Court expressed its concerns regarding the adoption of any principle which would, in its view, require the

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45 Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 410.
judiciary to consider the appropriateness of decisions made by the executive. Lord Lowry was the most critical of the test, stating:

[T]here can be very little room for judges to operate an independent judicial review proportionality doctrine in the space which is left between the conventional judicial review doctrine and the admittedly forbidden appellate approach. To introduce an intermediate area of deliberation for the court seems scarcely a practical idea, quite apart from the other disadvantages by which, in my opinion, such a course would be attended.\textsuperscript{48}

Despite the hesitancy of the English courts in applying the proportionality test in the domestic context, the introduction of the \textit{Human Rights Act 1998} (UK), which contains a requirement that the courts uphold the provisions of the \textit{European Convention}, has resulted in the English courts accepting the proportionality test as a stand-alone head of review only for cases involving \textit{European Convention} rights\textsuperscript{49} (noting that the \textit{Convention} does not empower the judiciary to quash legislation). There are many references in the \textit{European Convention} to the ability of signatories to restrict rights and freedoms where such is ‘necessary in a democratic society’. For example, art 8 provides that there shall be no interference with the right to respect for private and family life by a public authority except such as is in accordance with the law and is necessary in a democratic society in the interests of, inter alia, national security or public safety. As discussed in the following paragraphs, this qualification has been interpreted as requiring a proportionality test to be applied. According to Varuhas, the European Court of Human Rights held that the traditional heads of review contained in the \textit{Wednesbury} test were inadequate to protect rights as they were too limited in scope or too deferential to allow the reviewing court to consider the proportionality of limits placed on rights by the executive.\textsuperscript{50} De Búrca surmises that the principle of proportionality, as it has been developed in European Court cases, holds that ‘the decision of a public body should be quashed if its adverse effects on a legally protected interest or right go further than can be justified in order to achieve the legitimate aim of the decision’.\textsuperscript{51} This can be contrasted with \textit{Wednesbury} unreasonableness, which requires that a decision be quashed only if it is so unreasonable that no reasonable authority could ever come to it.

\textsuperscript{48}\textit{Ibid} 767.
\textsuperscript{49} Varuhas, above n 3, 341.
\textsuperscript{50} \textit{Ibid}.
The application of proportionality in interpreting the ‘necessary in a democratic society’ exemption occurred in English cases such as the 2001 decision of *R (Daly) v Secretary of State for the Home Department*. Here, in considering the validity of a policy governing the searching of prisoners’ cells, Lord Steyn explained the requirement to apply a proportionality test where *European Convention* rights were at stake. He referred to the three stage test applied by the European Court in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, which provides that when determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself whether:

(i) the legislative objective is sufficiently important to justify limiting a fundamental right;

(ii) the measures designed to meet the legislative objective are rationally connected to it; and

(iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

It therefore requires the court to consider the balance the decision-maker has struck, rather than simply whether the decision was demonstrably reasonable. Lord Steyn was careful to clarify that the use of proportionality in this context did not mean that there has been a shift to merits review, and concluded that the respective roles of judges and administrators are fundamentally distinct and will remain so.

The concept of proportionality in this context has further developed in subsequent cases. In 2002 in *International Transport Roth GmbH & Ors v Secretary of State for the Home Department*, which concerned legislation relating to clandestine arrivals in the United Kingdom, Lord Brown stated:

> It is further implicit in the concept of proportionality, however, that not merely must the impairment of the individual’s rights be no more than necessary for the attainment of the public policy objective sought, but also that it must not impose an excessive burden on the individual concerned.

Kavanagh concludes that the doctrine of proportionality therefore sets limits to the acceptable legislative response to any social problem. She refers to the

52 [2001] 2 AC 532.
53 Ibid 547, citing *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 (Lord Clyde).
54 Ibid.
55 [2002] EWCA Civ 158, [52].
proportionality enquiry as being explicitly rights based, because it provides a way of
testing or judging legislative measures in light of the importance of European
Convention rights.57 ‘However compelling the social goal, there are limits to how far
the individual’s interest can legitimately be sacrificed to achieve it.’58 This was
considered in 2006 in R (Begum) v Headteacher and Governors of Denbigh High
School,59 which concerned whether a school’s uniform policy infringed the art 9
freedom of religion. The prohibition on the appellant wearing a Jilbab to school was
held to be justified in light of the objective of the uniform policy, the lengths to which
the school went in order to ensure an inclusive uniform policy, and the acceptance of
the policy by mainstream Muslim opinion.60 On the issue of judicial review, Lord
Bingham said of the proportionality test that ‘[t]here is no shift to a merits review, but
the intensity of review is greater than was previously appropriate …’.61

In terms of the future use of the proportionality test, de Búrca argues that while some
judges show a greater receptiveness than others to the development of the principle,
almost all express some caution by emphasising the difference between the roles of the
judiciary and the executive and the difference between ‘review’ and ‘appeal’.62
Nevertheless, as Knight argued ‘not only is proportionality a concept perfectly able to
deal with the internal complexities of the law on legitimate expectations, but also that
once proportionality has been recognised in one domestic administrative context, it
should be done so in all’.63 Proportionality is becoming a more common feature of
judgments in the United Kingdom, and as Olley states there is now less justification for
continuing to confine the application of the principle to European Convention cases.64
It is impractical and unnecessarily complex for two separate sets of rules to apply to
matters arising in the domestic context on the one hand, and matters arising in the
European context on the other. There is great benefit in ensuring that a consistent
approach to human rights protection applies more broadly, as it would provide greater

57 Ibid 237.
58 International Transport Roth GmbH & Ors v Secretary of State for the Home Department [2002]
EWCA Civ 158, [29].
59 [2006] UKHL 15.
60 Ibid [34] (Lord Bingham).
61 Ibid [30].
62 de Búrca, above n 51, 564.
63 Christopher Knight, ‘The Test that Dare Not Speak its Name: Proportionality Comes out of the

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certainty for individuals, government administrators and the judiciary alike. The European approach is preferable given that it is has the ability to protect human rights to a far greater extent than the Wednesbury unreasonableness test. Although, without references such as ‘necessary in a democratic society’ in domestic law, incorporation of the proportionality test domestically may be difficult to achieve. It is for this reason that there is benefit in explicit rights statements.

C Argument for a Modified Proportionality Test in Cases Involving the Defence Power

As discussed in previous chapters, the current use of the proportionality test in Australia is limited in its effectiveness. A weakness of its current use in invalidating legislation on the grounds of inconsistency with constitutional rights is that there is no requirement that the measure go no further than is necessary to achieve the objective. This can result in an unduly burdensome infringement on an individual’s human rights for the sake of a measure which may only have a minor benefit for defence. Given this, a preferable approach would be for the judiciary to adopt a modified proportionality test which would hold valid a measure, including legislation or an executive decision, which infringes constitutional rights only where it is the least restrictive means available to achieve the objective. This would require ‘public officials [to] justify their actions by reference to the principles of necessity and proportionality when they interfere with individuals’ rights’. Significantly in the context of the anti-terrorism legislation, this would include interference with the implied constitutional right to due process as set out in various cases, noting that the tenuous nature of this right is a weakness of this strategy for greater human rights protection.

The following subsection commences with an outline of the proposed approach, including identifying case law which supports the future development of the principle. It then discusses how a modified proportionality test could apply in the context of the

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65 The weaknesses of the Wednesbury test are discussed on pages 48 to 53.
66 As discussed on page 23, in Coleman v Power (2004) 220 CLR 1, 86 (Kirby J) it was held that any limitation on a constitutional right must be reasonably proportionate (or reasonably appropriate and adapted) to serve a legitimate end.
68 See, eg, Polyukhovich v Commonwealth (1991) 172 CLR 501; Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1; Al-Kateb v Godwin (2004) 219 CLR 562. These cases were discussed in Chapter I.
anti-terrorism legislation. Finally, it expands on the issues identified in previous chapters by discussing the issues surrounding the potential involvement of the judiciary in defence policy.

1 Outline of Proposed Approach

The approach to the proportionality test taken to date by Australian courts is not sufficient in protecting human rights as it is limited in the extent to which the courts may review the merits of a defence measure in light of the effect the measure has on human rights. That is, legislation and executive decisions can still be valid even where they unnecessarily infringe fundamental freedoms, such as the right to liberty of the person, because there is no requirement that any limitation of rights be the least restrictive to achieve the objective. To this end, it is necessary for a modified proportionality test to be adopted, with a view to placing greater emphasis on human rights considerations. An approach which requires that the measure be the least restrictive means available to achieve the defence objective would involve the judiciary placing a greater emphasis on the burden that the legislation, and any executive decisions made under it, would put on constitutional rights. In the context of the right to liberty of the person, this is consistent with the sentiments of the European Court of Human Rights, which has stated that ‘[t]he detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient’. A test for Australia would best be modelled on Canada’s approach and tailored to apply to legislation and executive decisions made pursuant to the elastic defence power.

The need for parliaments to place more emphasis on human rights through proportionality has been identified by many Australian commentators, particularly in the context of the anti-terrorism legislation. Michaelsen recommends a test whereby the Parliament is required to demonstrate that its domestic anti-terrorism measures are necessary to counter the threat posed by terrorism, and that the response is proportionate to the threat faced. Williams argues in the context of terrorism laws that a balance must be struck whereby any diminution of human rights is proportionate to the threat faced.

69 Saadi v United Kingdom (European Court of Human Rights, Grand Chamber, Application No 13229/03, 29 January 2008) [70] (Costa P).
faced. Lynch and Williams outline a test whereby freedoms are only limited where it can be demonstrated that the restriction will actually help to lessen a harm like terrorism, the restriction is proportionate to the harm that is to be prevented, and the actual limitation is the least restrictive means of achieving the goal. Fitzgerald argues that there is a need to find proportion between the interference and the factors legitimating the objective. He argues ‘[u]ntil Parliament removes itself from the Diceyan paradigm of parliamentary supremacy and infuses its work with the ethic of proportionality, people are at an unnecessary disadvantage’. The need for a greater focus on human rights is especially necessary in the context of the defence power. As demonstrated in Chapter II of this thesis, the defence power can be used to restrict nearly all aspects of life, and given that we are in a period of increased international tension (when the defence power operates in an expanded scope), it is essential that a human rights focus be maintained.

As discussed above, unlike in Australia the proportionality tests developed by the courts of Canada and United Kingdom both contain a type of ‘least restrictive means’ requirement, although the applicable tests are phrased slightly differently. These tests are preferable to the South African approach, given the flaws identified above. Canada’s *Oakes* test requires that:

(i) a measure be rationally connected to the objective;
(ii) the measure impair as little as possible the right or freedom; and
(iii) there be a proportionality between the effects of the measure and the objective.

Similarly, the United Kingdom’s approach, which is based on the approach of the European Court of Human Rights, asks whether

(i) the legislative objective is sufficiently important to justify limiting a fundamental right;
(ii) the measures designed to meet the legislative objective are rationally connected to it; and
(iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

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73 Fitzgerald, above n 17, 273.
74 Ibid 300.
Both tests thus generally address the same issues, albeit in a different order and using slightly different phraseology. The benefit of both tests is the ability of the judiciary to enquire into the purpose or objective of the legislation and consider whether that purpose or objective is sufficient to justify the infringement or restriction on human rights, or whether another measure could have been used which did not result in such an infringement. The tests place far more emphasis on the effect that legislative measures have on human rights, and accept that while it may be necessary in some instances to restrict human rights, the legislation must not go further than what is required to achieve its aim. As Michaelsen identifies, in the context of the anti-terrorism legislation little effort has been made previously to determine whether measures which impair human rights diminish the terrorist threat, or whether less repressive measures are available to achieve the objective at hand.\textsuperscript{75} The test recommended in this thesis is based on the premise that any law or executive action that is more excessive than it needs to be to achieve its goal is unjustifiable.

It is important to note that, given the elastic scope of the defence power, any test adopted in Australia must take into account the current political climate including the nature of the threat faced. This requirement is not dissimilar to Canada’s \textit{Oakes} test, which was premised on the qualification that ‘the nature of the proportionality test will vary depending on the circumstances’.\textsuperscript{76} This qualification was criticised by Choudhry on the basis that it resulted in the test being framed in abstract terms which did not invite the courts to differentiate its application in future appeals that might differ from the rights or policy context that applied in \textit{Oakes}.\textsuperscript{77} However, it is appropriate for an Australian defence power test to vary depending on the circumstances given the elastic nature of this power.\textsuperscript{78} Thus a defence measure which results in the incarceration of an individual may be the least restrictive means available to serve the defence interest during war time, but not so during peace time, given that the objective and the range of ways in which that objective can be achieved differs according to the threat faced. This is consistent with the current interpretation of the defence power, as discussed in Chapter II of this thesis. In relation to the validity of any given measure and the availability of alternative means, Varuhas suggests that the degree of deference afforded

\textsuperscript{75} Michaelsen, 'Reforming Australia's National Security Laws', above n 70, 36.
\textsuperscript{76} \textit{R v Oakes} [1986] 1 SCR 103, 139 (Dixon CJ).
\textsuperscript{77} Choudhry, above n 10, 506.
\textsuperscript{78} Chapter II discusses the four stages of expansion and contraction of the defence power.
by the courts will vary according to the confidence the court can place in the competence of the executive body or decision-maker.\(^79\) Defence policy issues are discussed further on page 207.

In light of the above, a modified proportionality test applicable to the defence power is appropriate in Australia. While a variation of this test could be used in relation to alleged infringements of constitutional rights by measures undertaken in respect of all constitutional heads of power, it is most pressing in relation to the defence power given that its expansion and contraction according to the extant threat makes it particularly prone to being used in ways that infringe individual liberty. A suitable approach specifically applying to the defence power may be the following five limb test, noting that it refers generally to a ‘measure’ which could include legislation or an administrative decision made under legislation:

1. is the measure rationally connected to the defence interest;
2. has a constitutional right been limited;
3. in light of the level of threat, is the defence interest sufficiently important to justify limiting that constitutional right;
4. is the defence interest served by the measure (including its purpose or objective) proportionate to the level of threat faced; and
5. is the measure the least restrictive means available to serve the defence interest.

If the answer to any of the above (other than the second limb) was no, then the measure would be ultra vires the defence power.

The first limb would require an assessment as to whether a rational connection exists between the measure and the defence interest, in a similar way that the judiciary currently undertakes the subject matter test discussed on page 69. Significantly, the second and third limbs refer to constitutional rights, rather than human rights more broadly. Lacey proposes that the rights and freedoms to be considered when applying a proportionality-type test should include those which the courts have themselves identified and treated as fundamental, including personal liberty, physical integrity of the person, personal property, privacy, freedom of expression, equality before the law and natural justice.\(^80\) Similarly, Johnston argues that objective analysis in the context

\(^79\) Varuhas, above n 3, 346.

of a proportionality test allows for some margin of discretion, with what is considered ‘admissible’ or ‘acceptable’ reflecting community values.\textsuperscript{81} However, such rights are not constitutionally entrenched in Australia, and as discussed in Chapter I of this thesis, the High Court has appropriately refrained from invalidating legislation on the basis of inconsistency with human rights more broadly due to the doctrine of parliamentary supremacy. As such, a modified proportionality test would still be limited to those implied and express rights entrenched in the \textit{Constitution}.\textsuperscript{82} Nevertheless, most significantly the High Court would be able to use this to protect liberty of the person to the extent that an implied constitutional right to due process has been recognised.

The five-limb test proposed above is not inconsistent with existing principles of interpretation of the defence power, and while the current formulation of the proportionality test remains that set out in \textit{Coleman v Power},\textsuperscript{83} there is case law in which the High Court has hinted at the potential for the proportionality test to evolve in such a way in the future. As early as 1951 in \textit{Australian Communist Party v Commonwealth}, Williams J stated that ‘[l]egislation of this nature can only be valid in times of grave crisis during hostilities waged on a large scale, and it must, even then, be limited to such preventive steps as are reasonably necessary to protect the nation during the crisis’.\textsuperscript{84} In 1996 in \textit{Leask v Commonwealth}, in discussing how the purpose of legislation is a crucial determinant of validity, Dawson J stated of the defence power:

> There is no subject-matter as there is with other powers - lighthouses or external affairs, for example - and it is therefore not possible to delineate the boundaries of the power by reference to subject-matter: the acts, facts, matters or things upon which a law with respect to defence may operate are, at least in war-time, virtually without limits. To determine the validity of a law said to be supported by a purposive power, a court must ask whether it is a law for the specified purpose, and the court may have to inquire into whether the law goes further than is necessary to achieve that purpose. That is an exercise in proportionality.\textsuperscript{85} (footnotes omitted)

By stating that a court may have to inquire into whether the law goes further than is necessary to achieve that purpose, there is an argument that Dawson J was hinting at a ‘least restrictive’ test such as that adopted in Canada. Similarly, as discussed in Chapter I of this thesis, in cases involving the express and implied constitutional rights including

\textsuperscript{81} Johnston, above n 46, 152.
\textsuperscript{82} Constitutional rights were discussed on page 18.
\textsuperscript{83} (2004) 220 CLR 1, 86 (Kirby J).
\textsuperscript{84} (1951) 83 CLR 1, 227.
\textsuperscript{85} (1996) 187 CLR 579, 606.
Nationwide News v Wills,\textsuperscript{86} Betfair Pty Limited v Western Australia,\textsuperscript{87} and Attorney-General (SA) v Corporation of the City of Adelaide,\textsuperscript{88} in obiter dicta statements members of the High Court made references to less severe curtailments and the requirement to not go beyond what is reasonably necessary to achieve the legislative objective. Nevertheless, significantly the current formulation of the proportionality test remains that set out in Coleman v Power,\textsuperscript{89} which does not contain such a requirement. Indeed, Harris argues that the net effect of these dicta is that the state of the law regarding whether the proportionality test includes a requirement that laws limiting rights should do so to the least restrictive extent is at best confused and at worst hostile to that proposition.\textsuperscript{90}

Despite this, the High Court has shown its willingness to scrutinise the utility of a defence measure when considering the validity of the legislation in question, which is significant for the purposes of the proposed modified test in terms of the willingness of the Court to consider the importance of the measure and whether other less restrictive means are available. For example, during wartime the High Court has considered the capacity of the measures contained in the legislation to assist with the war effort. Sawer concluded of the WWII decisions in which the measures were held invalid that ‘each such restrictive decision could be explained only on the basis of an opinion of the majority justices that the measure in question in actual fact would not assist the war effort’.\textsuperscript{91} In Shrimpton v Commonwealth, Rich J looked to the effect of the Regulations and stated that, in his opinion, the conditions relating to the purchase of land could not have any bearing on the subject of defence, and indeed ‘could hardly aid in defence’.\textsuperscript{92}

To this end, the Court has demonstrated its willingness to evaluate the utility of defence measures, which is not substantially different in substance from the Court considering the utility of other defence measures which may have been available in the circumstances.

\textsuperscript{86} (1992) 177 CLR 1, 51 (Brennan J).
\textsuperscript{88} (2013) 249 CLR 1, 84 (Crennan and Keifel JJ).
\textsuperscript{89} (2004) 220 CLR 1, 86 (Kirby J).
\textsuperscript{92} (1945) 69 CLR 613, 625.
The key strength of the modified proportionality test outlined above is that the High Court would be able to consider, based on evidence put before it, whether any infringement of a constitutional right is justified and acceptable in the sense of going no further than is necessary to achieve a legitimate objective. Galligan and Morton argue that the primary effect of adopting a bill of rights is institutional, shifting primary responsibility for making decisions about rights claims from the legislature to the courts.93 Such could also be said of a modified proportionality test. Through placing a greater emphasis on human rights, and greater hurdles for the Parliament to overcome before being permitted to interfere with human rights in the name of the defence power, it would strengthen the judiciary’s role as protector of human rights. It would not compromise the defence of the Commonwealth, as there would still be a place for the expansion and contraction of the scope of the defence power, but the judiciary would be more proactive in its analysis of any adverse effect that the legislation has on human rights. In the context of executive decisions, the benefit of the proportionality approach compared to, for example, the Wednesbury test of unreasonableness, is that it will give executive decision-makers greater capacity to ensure their decisions are made within legal limits, as it will allow them to analyse their decisions on the basis of a more certain test rather than trying to predict what a court will consider reasonable.94 Fitzgerald argues that the Parliament and decision-makers must be made accountable and, in time, their actions will be informed by the ethic of proportionality which will hopefully make judicial review unnecessary.95 As Lord Diplock asked in R v Goldschmidt, ‘why use a steam hammer to crack a nut, if a nutcracker would do?’96 The modified proportionality test would ensure that an infringing measure went no further than is necessary to achieve the objective.

2 Application to the Anti-Terrorism Legislation

The modified proportionality test outlined above provides an appropriate mechanism for ensuring the protection of constitutional rights such as the right to due process in the context of the anti-terrorism legislation. Dame Mary Arden suggests that ‘[t]he

94 Varuhas, above n 3, 345.
95 Fitzgerald, above n 17, 297.
The traditional role of the courts is to be guardians of individual rights and liberty, and the terrorist threat has made this role even more important. The proposed modified proportionality test would result in the judiciary placing a greater emphasis on the implications of legislation and executive decisions on the right to liberty of the person. Indeed, the Senate Legal and Constitutional Committee Inquiry into the *Anti-Terrorism Bill (No. 2) 2005* recommended that a least restrictive means test be added to the legislation, although this was not incorporated into the final Bill. The following discusses how the modified proportionality test would apply in the context of the anti-terrorism legislation, including to terrorist offences, control orders, detention orders and the *NSI Act*.

In relation to the application of the first four limbs of the modified proportionality test, it is arguable that making a terrorist act a criminal offence, imposing restrictions on the movements of individuals or detaining individuals where it is considered on reasonable grounds that such would substantially assist in preventing terrorist acts, or restricting access to intelligence information during court proceedings, is rationally connected to the defence interest (being protecting the public from a terrorist act). It may even be that given that Australia is in a period of increased international tension, the defence interest served by the measures contained in the anti-terrorism legislation is sufficiently important to justify limiting a constitutional right such as the implied right to due process. Finally, this defence interest could be considered proportionate to the threat currently faced, given that it is reasonable to conclude that there is a risk of a future terrorist attack similar to September 11, potentially on Australian soil. However, it is the fifth limb of the test, namely the requirement for the measure to be the least restrictive to serve the defence interest, which is the novel aspect of this test and therefore the focus of this discussion. According to Lynch and Williams, ‘[s]trong counterterrorism laws are justified where it can be shown that they will help to meet the

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99 The focus of this thesis is on the implied constitutional right to due process, however other constitutional rights are potentially limited through the anti-terrorism legislation such as the implied freedom of communication. The modified proportionality test would apply equally to these other rights.
threat and that they have been drafted in such a way as to have as little impact as possible on fundamental freedoms'.

As discussed in Chapter III of this thesis, the terrorist offence provisions in Criminal Code pt 5.3 are drafted very broadly, and there is the potential for innocent conduct to fall within the definition of a ‘terrorist act’. However, there is a significant discrepancy between the conduct of a critical political protester on the steps of Parliament House and the threat of the bombing of a school or hospital by members of a recognised terrorist organisation – the level of infringement on human rights that is appropriate in each circumstance is drastically different. If the fifth limb of the modified proportionality test were to be applied to these offence provisions, it would need to be determined whether the suppression of particular conduct through making such conduct an offence is the least restrictive means available to protect the public from the threat of terrorism. As detailed in Chapter III of this thesis, there are explicit exclusions from the definition of ‘terrorist act’, such as advocacy and protest, and so this attempts to limit the scope for ‘innocent’ activities to fall within the offence. However, these exclusions are not broad enough and therefore the offence provisions may not be the least restrictive available. Additionally, while some offence provisions contain an exemption where the particular conduct was not intended to cause harm or death, the evidential burden is imposed on the defendant, which has implications for the procedural due process rights of an individual. While the legal burden would still appear to rest with the prosecution, given the broad scope of the offence provisions as discussed in Chapter III of this thesis, it is again arguable that imposing the evidential burden on the defendant is not the least restrictive means available to serve the defence interest.

Control orders are not custodial, and so from this perspective, the issue of a control order against a person suspected of involvement in, or knowledge of, a terrorist act may be the least restrictive means available of protecting the public in the circumstances. That is, it may not be necessary to detain the individual in custody in order to protect the public, and so generally speaking the control order regime in div 104 is capable of being less offensive to an individual’s right to due process. In terms of the criteria for issuing a control order, the legislation currently requires that each of the obligations,

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100 Lynch and Williams, above n 72, 12.
prohibitions and restrictions be reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act. If the least restrictive proportionality test were applied, the issuing court would need to satisfy itself that each of the conditions are the least restrictive means available to serve the defence interest. Importantly, what the least restrictive means available are would depend on the circumstances. For example, if a terrorist suspect is the subject of a control order, the types of conditions imposed in the order to protect the public may be justifiably extensive, with restrictions on them leaving their house and using communication devices. By contrast, if an associate of a terrorist suspect is the subject of a control order, the least restrictive means of achieving the objective may simply be restricting that individual from contacting the terrorist suspect. Such an approach would limit the extent to which a control order could unnecessarily burden an individual’s right to liberty, particularly given that the type of restrictions that can be imposed can effectively result in detention in all but name.

In relation to *Criminal Code* div 105 and *ASIO Act* pt III div 3, as well as the overarching issue discussed throughout this thesis of detention being punitive, these detention regimes are problematic to the extent that judicial review is limited and other procedural due process rights are restricted. Applying the existing proportionality test to the *ASIO Act* in particular, Michaelsen concedes that the detention regime meets the legislative objective, in that it is generally suitable to prevent terrorism and gather intelligence in relation to a terrorism offence. However, he queries how the objective of intelligence gathering can justify drastic restrictions of the right to liberty and security of the person, the right to legal representation and the right to judicial review. Such may not satisfy the fifth limb of the modified proportionality test, given that if there is not enough evidence to formally charge an individual with a criminal offence and detain them on this basis, they should not be detained at all.

In any case, given the significant effect that detention can have on an individual, the application of the fifth limb of the modified proportionality test to the issue of a detention order in any given circumstances would require an appropriately high

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102 Ibid 39.
threshold to be met. Rather than the issue of the order being ‘reasonably necessary’ as in the case of div 105, or based on ‘reasonable grounds’ in div 3, the order would be required to be the least restrictive means of serving the defence interest. As discussed in the previous paragraph, a control order may represent the least restrictive means available in such circumstances. Indeed, in other circumstances formally charging the individual with a terrorist offence may be the least restrictive means available, given that their substantive due process rights would be met through access to the judicial system as with any other offence. In other circumstances, detention may very well be the least restrictive means available. In the event that detention is imposed, rather than default rules about limitations on contact with family members and legal representatives, each restriction imposed on a detainee during their detention would be required to be the least restrictive means of serving the particular objective. This would ensure that any specific infringement of a detainee’s rights to liberty and procedural due process are the least restrictive means in the circumstances.

The NSI Act allows the Attorney-General to issue a non-disclosure or witness exclusion certificate in federal criminal or civil proceedings. While the court may then decide whether the national security information should be disclosed or the witness called, ss 31 and 38L require that it give the greatest weight to national security issues. As discussed in Chapter III of this thesis, this has implications for the ability of a defendant or civil party to present a fully informed case. The fifth limb of the modified proportionality test would require that prior to making an order, the court be satisfied that restriction of access to information is the least restrictive means of protecting the public. It may be that the least restrictive means would be redacting parts of the information or making other alternative arrangements to minimise the infringement of the individual’s procedural due process rights.

That being said, it is doubtful that overall the legislation would meet the fifth limb of the modified proportionality test in its current form, given that there are other less offensive means of protecting sensitive information than simply preventing access altogether. For example, the United Kingdom has adopted the use of special advocates to allow a defendant to be represented and for representations to be made on their behalf in closed court in instances when the defendant cannot be given access to national
security information.103 Such a mechanism allows information to be kept confidential, while still preserving the defendant’s procedural due process rights to some extent. The use of special advocates was recommended in 2012 by the Council of Australian Governments Review of Counter-Terrorism Legislation,104 although in 2013 the Independent National Security Legislation Monitor recommended against its introduction on the basis that it would not remedy the fair trial issues that would arise where a defendant’s lawyer was excluded from the court.105

Dame Mary Arden argues that the ‘courts cannot respond to the situation posed by terrorism in a totally inflexible way. They are guardians of individual rights but at the same time they have to take account of the seriousness of the terrorist threat.’106 If the modified proportionality test were applied when determining the validity of anti-terrorism legislation (to the extent that it was / is introduced pursuant to the defence power) and decisions made under it, it would ensure that an individual’s implied constitutional right to due process is only infringed where such is the least restrictive means available to protect the public. This would offer far greater comfort in terms of the protection of rights when compared to the current proportionality test. Lynch posed the following question in relation to the decision in *Thomas v Mowbray*107:

> At the same time, the case directly addresses the policy arguments over the best way for the judiciary to moderate excess in the responses made by the political arms of the government to the threat of terrorism. Should courts be defending liberty through a traditional review function, or should they play a more active role in the development of viable processes of preventative justice? If the latter, can this be accommodated with the prevailing orthodoxy of federal judicial power under the Constitution?108

The judiciary should play a more active role in the context of the anti-terrorism legislation, and such is consistent with the exercise of judicial power. The proportionality test is an accepted test for the infringement of constitutional rights, and

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103 The use of special advocates is discussed at length in Select Committee on Constitutional Affairs, *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates*, House of Commons Paper No 7, Session 2004-05 (2005).
106 Arden, above n 97, 819.
it is not such a great step for it to be stretched to require that restrictions be the least restrictive to achieve the objective.

3 Issues Surrounding Judicial Involvement in Defence Policy

One potential barrier to the application of a least restrictive proportionality test is the issue of the judiciary considering, and making judgments on the most appropriate ways to address, defence policy and national security matters. As discussed in Chapter II of this thesis, in approaching the defence power as a purposive power, the judiciary has considered extrinsic material and taken judicial notice of notorious facts in determining whether legislation is for defence purposes. However on occasions, particularly during times of war, the judiciary has been adamant that it is not appropriate for it to consider whether the measures are effective in supporting the defence of the Commonwealth.109 Concerns have also been raised regarding any further development of the proportionality test and the ability of the judiciary to balance competing interests. These are not convincing objections or barriers to the adoption of the modified proportionality test in the context of the defence power. This is particularly given that the test refers to constitutional rights, the infringement of which is appropriate for judicial consideration. According to Lee ‘[s]urely it would be an enhancement of the rule of law if Parliament were, through the operation of the proportionality concept, forced to devise legislative strategies which impact as minimally as possible on fundamental rights’.110

McGarrity, Lynch and Williams argue that ‘[t]ypically, the courts have been reluctant to challenge the executive’s assessment of a particular threat, and have sanctioned indiscriminate and disproportionate abuses of human rights... on that basis’.111 ‘Deference on national security issues remains overwhelmingly the tenor of the judicial approach.’112 An example of this can be seen in Australian Communist Party v

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109 See, eg, Lloyd v Wallach (1915) 20 CLR 299 or Ferrando v Pearce and Another (1918) 25 CLR 241.
112 Ibid.
Commonwealth,\textsuperscript{113} where Latham CJ outlined what he considered to be defence policy issues and discussed the limited role of the court in analysing such issues. He saw determining defence policy as including identifying what dangers exist that the community should be protected from according to the national policy objectives, and argued that the court cannot engage in a fact finding exercise to identify those dangers.\textsuperscript{114} Responsible authorities will base their decisions on reports, rumour and suspicion, many of which are secret and cannot be produced in a court, or would be considered inadmissible in any case.\textsuperscript{115}

The Government of the day decides matters of defence policy subject to parliamentary control and, in so doing, it determines what the people are to be defended against. Such a decision is not a finding of fact or an opinion upon law. It is a decision of policy as to what ought to be done in the interests of the country.\textsuperscript{116}

Indeed, in the Tasmanian Dam case,\textsuperscript{117} the High Court went so far as to publish a statement before delivering its written judgments, to the effect that the questions raised in the case concern the validity of certain legislation which were strictly legal questions, and that the Court was in no way concerned with whether the construction of the dam was desirable: ‘The wisdom and expediency of the two competing courses are matters of policy for the Governments to consider, and not for the Court.’\textsuperscript{118} According to Dixon J in Burton v Honan, ‘[i]n the administration of the judicial power in relation to the Constitution there are points at which matters of degree seem sometimes to bring forth arguments in relation to justice, fairness, morality and propriety, but those are not matters for the judiciary to decide upon’.\textsuperscript{119}

These issues have been heavily debated in academia. Tushnet argued that ‘judges rarely have the background or the information that would allow them to make sensible judgments about whether some particular response to a threat to national security imposes unjustifiable restrictions on individual liberty or is an unwise allocation of decision making power’.\textsuperscript{120} Doyle points out that there is a risk that in such instances the Court will be making decisions ‘about the reasonableness of the response of

\begin{itemize}
\item \textsuperscript{113} (1951) 83 CLR 1.
\item \textsuperscript{114} Ibid 143-4.
\item \textsuperscript{115} Ibid 145.
\item \textsuperscript{116} Ibid 165.
\item \textsuperscript{117} Commonwealth v Tasmania (Tasmanian Dam case) (1983) 158 CLR 1.
\item \textsuperscript{118} Ibid 60 (Gibbs CJ).
\item \textsuperscript{119} (1952) 86 CLR 169, 179.
\item \textsuperscript{120} M Tushnet, ‘Replies: Controlling Executive Power in the War on Terrorism’ (2005) 118 Harvard Law Review 2673, 2679.
\end{itemize}
Parliament to a problem – judgments which look like value judgments’.  

121 However, despite these arguments, the judiciary is well-placed to undertake an analysis of whether a legislative measure or associated decision is the least restrictive of constitutional rights. While the Parliament should determine what is best for the nation, where the measures chosen infringe the rights of individuals, the Court must be able to assess its acceptability in the circumstances. As Lee argues, ‘the allegation of a usurpation of the role of Parliament ignores the unstated assumption of the Australian constitutional order, namely, the Parliament, just like any other institutions of government, is subject to the rule of law’. 122 Davis goes so far as to say that the type of judicial subservience that was present during wartime is problematic because it has the potential to sanction present objectionable abuses of civil liberties and also provides a ‘loaded weapon’ of precedent for the future. 123 While it is accepted that, as discussed in Chapter I of this thesis, there are currently limits to the extent to which the judiciary can substantively review the merits of legislation and executive decisions, judicial review of statutory regimes such as the anti-terrorism legislation, which purport to limit the implied constitutional right to due process, is appropriate. The exercise of legislative and executive power which results in such an effect should be subject to ‘checks and balances’ by the judiciary.

There has been debate regarding the appropriateness of the judiciary further developing the current proportionality test. On the one hand, Fitzgerald warns that such may meet with claims that the Court is usurping the political arm of government to too great a degree. 124 On the other hand, Michaelsen argues that an analysis based on the principle of proportionality is an analytical procedure which does not, in itself, produce substantive outcomes or answers to legal and policy problems. 125 Instead, he argues that ‘[i]t is a decision-making procedure and analytical structure that leads to the formulation of an opinion concerning policy implementation and which usually deals with tensions between two pleaded legal or political values and/or public policy

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122 Lee, above n 110, 148.
124 Fitzgerald, above n 17, 273.
125 Michaelsen, 'Reforming Australia's National Security Laws', above n 70, 37.
goals’. This is the stronger argument, noting that the High Court is the logical arbiter and the most immediate and obvious reformer in the absence of a bill of rights. Appleby correctly observes that the argument that the judiciary should not tread into the area of balancing competing policy issues cannot consistently sit with the High Court’s current endorsement of the proportionality principle in determining proportionality in rights infringement cases and for legislation enacted under purposive powers. She asks if the Court undertakes such a role in these circumstances, why not more generally?

To this end, the modified proportionality test is not inconsistent with the current role of the courts in undertaking judicial review. As generally identified by Varuhas, proportionality review entails a similar legal analysis required by the traditional heads of review. He quotes Taggart, who states:

> [M]any of the dichotomies upon which administrative law has rested – appeal/review, merits/legality, process/substance, discretion/law, fact/law – are no longer seen as giving as much guidance as they once did, and they are being replaced or blurred by more context-sensitive doctrines.

Varuhas argues that ‘[j]udges are not being asked to supplant the executive decision with their own, they are simply being called upon to assess whether the executive has gone further than needed to achieve its goal; the goal itself is not questioned’. Merely requiring that the Parliament ensure that the means it has chosen to serve a defence interest is the least restrictive of rights available does not mean that, if challenged, the court will be substituting its own opinion. As Rivers argues:

> This does not mean that the court increasingly displaces the executive and the legislature in matters of factual expertise and policy-choice. Rather, it means that the more serious a limitation of rights is, the more evidence the court will require that the factual basis of the limitation has been correctly established, and the more argument it will require that alternative, less intrusive, policy-choices are, all things considered, less desirable.

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126 Ibid.
127 Fitzgerald, above n 17, 300.
128 Appleby, above n 6, 28-9.
129 Ibid 29.
130 Varuhas, above n 3, 346.
132 Varuhas, above n 3, 346.
Importantly, the proportionality test is concerned not with the desirability of the legislation or the defence interest, but with the proportionality of the defence measure in achieving the defence interest in light of the human right implications. While there have been warnings that ‘[t]he use of the proportionality concept without a sensitive appreciation of the demarcation between the judicial and the parliamentary functions may, arguably, lead to an obliteration of this distinction …’, the application of the proportionality test as outlined above would not lead to such a consequence. This test still accepts that the roles of the judiciary and the Parliament are separate – the Parliament would determine the defence interest, including the purpose and objective of particular legislative measures, and the judiciary would consider the effect that the measures have on constitutional rights or whether there was another way of achieving this objective which was less intrusive. The Court would be assessing the legislative measures used to achieve the defence interest, not the desirability or appropriateness of the defence interest itself. With reference to the right to due process if, for example, the detention of an individual for a certain period of time is found to be the only way of achieving a defence interest, then this would be valid. If there were less restrictive means of achieving the defence interest, such as monitoring the individual or imposing a control order, then the measure would be invalid. Indeed, Fitzgerald argues that where legislation is found to be invalid on the basis of proportionality, invalidity is more procedural in that what is being invalidated is not the objective but the means by which the objective can be obtained.\(^\text{135}\)

Similarly, in the context of implied constitutional guarantees on which the modified proportionality test relies, Lindell expressed the view that the Court lacks a democratic mandate to give effect to what may well become an implied bill of rights.\(^\text{136}\) He drew attention to the fact that the framers of the Constitution deliberately decided not to adopt a bill of rights and queried whether it is a case of judges ‘amending’ the Constitution and giving effect to what they perceive as a universal trend in favour of protecting the position of the individual.\(^\text{137}\) Zines warns that the concept of fundamental common law liberties being articulated into an implied judicially created bill of rights over time

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134 Lee, above n 110, 128-9.
135 Fitzgerald, above n 17, 273.
137 Ibid 38.
should be approached with scepticism, as this invites judges to ‘discover in the
Constitution his or her own broad political philosophy’.

While this may be true of other human rights, such is not the case in relation to the right to due process and the
protection of liberty of the person. As discussed on page 34, the right to due process
traces its origins back to the Magna Carta and its constitutional basis has been
recognised in several cases during the past three decades. A constitutional right to due
process is one of the most essential human rights and while in Australia its recognition
to date has been tenuous, it is open to the High Court to recognise it as having a solid
basis in the Constitution as it has done in the case of the implied freedom of political
communication.

Another criticism of the modified proportionality test may be that in applying this test,
the judiciary would be required to balance competing interests, namely the defence
interest on the one hand and the rights of the individual on the other. However, as Stone
argues, proportionality does not equal unreined judicial discretion or balancing.

There are many current legal principles which routinely require courts to balance
competing interests, for example in cases relating to an alleged breach of duty of care.
The role of the courts in balancing such interests is not inconsistent with the
Constitution as the heads of power, including s 51(vi), are stated as being ‘subject to
this Constitution’. Indeed, the effect of such a test in Canada has not resulted in the
courts exercising unrestrained power, but has resulted in a more balanced approach to
the consideration of competing interests. Given the significant effect that legislation
enacted pursuant to the defence power can have on the right to liberty of the person,
effective protection of human rights requires that the Constitution impose restraints on
that power.

An example of the judiciary successfully balancing competing interests and considering
the appropriateness of defence measures in light of the human rights implications
occurred in the House of Lords decision of A v Secretary of State for the Home
Department. This decision, in which it was found that the United Kingdom’s
preventative detention regime was incompatible with the Human Rights Act 1988

139 Adrienne Stone, ‘The Limits of Constitutional Text and Structure: Standards of Review and the
140 [2005] 2 AC 68.
(UK),\textsuperscript{141} was considered ‘one of the first times that the courts of the United Kingdom have dealt such a body blow to legislation enacted by Parliament to confer powers on the Executive to meet a threat to national security’.\textsuperscript{142} Specifically, it was Lord Hoffmann’s judgment that caused the greatest controversy. His Honour argued that the freedom from arbitrary arrest and detention is ‘a quintessentially British liberty’,\textsuperscript{143} and while he recognised that the United Kingdom had suffered loss of life and was threatened by fanatical groups of terrorists, he did not consider that they threatened the life of the nation which justified the measures.\textsuperscript{144} He concluded:

The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.\textsuperscript{145}

This dialogue ultimately led to the repeal of the regime and so this case demonstrates the positive effect that judicial scrutiny can have in ensuring the protection of human rights. The Parliament cannot simply be left to its own devices to enforce laws which it considers necessary in light of the threat faced. Where human rights are infringed, it must be required to defend its position and justify why that measure is necessary to achieve the defence interest, rather than some other measure which is less restrictive on human rights. It is entirely appropriate for Australia’s High Court to review legislative measures in light of the defence interest.

D \hspace{1em} \textit{Concluding Remarks regarding the Viability of this Model}

As it currently stands, ‘[i]f we rely upon the judiciary to uphold liberty and restrain the executive in times of emergency, they will let us down because, faced with a security threat, the judicial will bend to the will of the executive and ... will determine the executive action to be acceptable’.\textsuperscript{146} As identified in Chapter I of this thesis, the proportionality test is available when interpreting the express and implied constitutional

\textsuperscript{141} The regime was introduced after the September 11 attacks. This included what became \textit{Anti-terrorism Crime and Security Act 2001} pt IV and the \textit{Human Rights Act 1998 (Designated Derogation) Order 2001} (SI 2001/3644). In essence, s 23 of the Act made provision for the indefinite detention of any foreign national whom the Home Secretary suspected to be a terrorist, while the Derogation Order detailed the way in which the United Kingdom legislature proposed to derogate from \textit{European Convention} art 5(1).

\textsuperscript{142} Arden, above n 97, 822.

\textsuperscript{143} \textit{A and Others v Secretary of State for the Home Department} [2005] 2 AC 68 [88]-[89].

\textsuperscript{144} Ibid [96].

\textsuperscript{145} Ibid [96].

\textsuperscript{146} Davis, above n 123, 220.
rights. However, the current proportionality test is insufficiently protective of human rights, and it is for this reason that a more proactive approach by the judiciary, such as the modified proportionality test outlined in this Chapter, is required. It would have the effect of preventing the executive from interfering with the constitutional rights of individuals, including the implied right to due process, for defence purposes if the legislative aim could be accomplished without interference with those rights at all or by resorting to less drastic measures.\textsuperscript{147} It focuses on the ‘justification for governmental action and highlight[s] the factors which the judges see as most compelling’.\textsuperscript{148}

That being said, as Stone argues, a system of rights protection that depends so heavily on the implication of rights and other judicially created rules of constitutional law is inevitably weak due to the contested nature of constitutional interpretation itself.\textsuperscript{149} That is, due to the contested nature of methods of constitutional interpretation on which Australia’s constitutional rights rely, many of these rights are subject to ongoing disagreement as to their very existence.\textsuperscript{150} The right to due process is one of them, as it is currently ambiguous and is vulnerable to judicial revision over time. Specifically, the delineation between punitive versus non-punitive detention is not settled, including the extent to which detention can be considered to be for protective purposes. Thus on the application of the modified proportionality test, there is still an indeterminate basis on which the High Court can invalidate legislation and administrative decisions which infringe the due process rights of individuals. This is where the strength of express constitutional rights, addressed in the following Chapter, is apparent.

\textsuperscript{147} Michaelsen, ‘Reforming Australia’s National Security Laws’, above n 70, 42.
\textsuperscript{148} Johnston, above n 46, 156.
\textsuperscript{150} Ibid 138.
VI MODELS FOR ACHIEVING EFFECTIVE HUMAN RIGHTS PROTECTION: CONSTITUTIONAL AMENDMENT

A Introduction

This Chapter will explore the second of two strategies for ensuring the protection of the right to liberty of the person. It posits the idea that the only way in which the right can truly be guaranteed is to include an explicit due process clause in the Australian Constitution, supported by an explicit reference to habeas corpus. As established in the preceding chapters, the judiciary does not have a general power of review and so cannot invalidate legislation on substantive grounds, but it does have the power to invalidate legislation on the basis that it infringes one of the express or implied rights enshrined in the Constitution, including an implied right to due process. Similarly, while Constitution s 75(v) does not refer to habeas corpus, there is a view that it may extend to this as a judicial remedy. This can be distinguished from explicit rights to due process and habeas corpus contained in United States Constitution amends V, XIV and the Suspension Clause, Canadian Charter ss 9, 10 and South African Constitution ss 12, 35. In Australia, explicit constitutional rights which would empower the judiciary to quash legislation and administrative decisions that infringe an individual’s rights to habeas corpus and due process would put the judiciary in a stronger position to protect individuals from infringement of their right to liberty of the person.

This Chapter commences with a general discussion of habeas corpus and its origins, and builds on the discussion of habeas corpus and due process in Australia in Chapter I of this thesis. It analyses the utility of these rights being expressly conferred in the constitutions of the United States, Canada and South Africa. It then discusses how these rights could be included in the Australian Constitution, with necessary limitations. It concludes with a discussion of the viability of this model.

The writ of habeas corpus was described by Blackstone as ‘the great and efficacious writ in all manner of illegal confinement’.\(^2\) Literally meaning ‘may you have the body’, it is a writ requiring a person who is being detained to be brought before a court to have the basis upon which they were detained reviewed. It was famously described by Marshall CJ of the United States Supreme Court as ‘the Great writ’,\(^3\) and the United Nations has stressed the need for legal systems to have mechanisms such as habeas corpus.\(^4\) However, the utility of the writ on its own is limited given that it only allows an individual to be released in the event that they are being held unlawfully – if a law permits them to be detained, then the writ is of no further assistance. To this end, it is essential that it be coupled with a right to due process.

The following provides a brief background of the origins of the writ of habeas corpus. It then discusses the limitations of habeas corpus in protecting individuals from arbitrary detention, and the relationship between habeas corpus and due process.

1 **Origins of Habeas Corpus and Incorporation**

Habeas corpus has its origins in the United Kingdom and features in many legal systems throughout the world.\(^5\) Like the right to due process, habeas corpus is reputed to have its origins in the Magna Carta.\(^6\) This is because, despite the importance of the principle contained in art 39, no specific legal process was initially prescribed to enforce it, and so gradually the writ of habeas corpus became the means by which the promise of art 39 (discussed further on page 34) was fulfilled.\(^7\) McFeeley argues that the habeas corpus principle can be traced back to Roman or Norman law.\(^8\) In any case, the writ itself was originally merely a vague procedural order to ‘have the body’ brought before

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\(^3\) *Ex Parte Bollman*, 8 US (4 Cranch) 75, 95 (1807).
\(^5\) Ibid 1.
\(^7\) *Boumediene v Bush*, 553 US 723, 740 (2008). Article 39 of the Magna Carta has been interpreted as saying: ‘No freeman shall be taken or imprisoned or disseised, or outlawed, or exiled, or in any wise destroyed, nor shall we go upon him, nor send upon him, but by the lawful judgement of his peers or by the law of the land’.
the court for various reasons, but over time it evolved into distinct forms with different functions, largely due to conflicts over jurisdiction by rival courts.\(^9\)

In the 17\(^{th}\) Century, the writ was originally used to protect the rights of the King and his courts, rather than the rights of citizens, and so ‘conceptually the writ arose from a theory of power rather than a theory of liberty’.\(^10\) Halliday and White discuss in their historical account of the writ that it was originally viewed as an instrument used by the King’s Bench to inspect the actions of all other inferior courts and administrative officers when they detained one of the King’s subjects.\(^11\) The writ was issued to the jailer, directing him to produce the body of the prisoner to the court, along with an explanation of the cause of the prisoner’s detention. It was therefore a means ‘by which the king demands account for his subject who is restrained of his liberty’.\(^12\) The courts were effectively agents of the Crown who served the King in the exercise of his power or prerogative. To this end, the primary function of the writ was not to protect individuals from arbitrary detention, as it is today.

Despite this, Halliday and White assert that the single most important feature of habeas corpus jurisprudence did not concern how the King’s Bench justices decided the fate of prisoners, but concerned the fact that they decided their fate, regardless of who detained them.\(^13\) Over time, it was understood that the King was subject to the law in the same way as his subjects, and the writ of habeas corpus was therefore deemed less an instrument of the King’s power and more a restraint upon it.\(^14\) Clarke discusses the importance of the Habeas Corpus Act of 1641 (UK) in granting the common law courts the power to inquire into the causes of imprisonment and order release if sufficient cause were lacking.\(^15\) He cites the following passage from the legislation:

[I]f any person shall hereafter be committed ... by the command or warrant of the King ... or by the command or warrant of the council board, or of and of the lords or others of his majesty’s privy council ... have forthwith granted unto him a writ of habeas corpus ... and the ... [officer] in whose custody the party so committed or restrained

\(^9\) Ibid 586.
\(^12\) Gefrey Palmer, ‘Habeas Corpus al Cinque-Ports pur un Borne Imprison La’ (1619) 54, 81 Eng. Rep. 975, 975 (KB) quoted in ibid 600.
\(^13\) Halliday and White, above n 11.
shall ... bring or cause to be brought the body of the said party so committed ... in open court ... and shall ... certify the true cause of such his detainer.\textsuperscript{16}

The \textit{Habeas Corpus Act of 1679} (UK) is reputedly the final stage of the writ’s development in terms of its protection of individual liberty, with the preamble describing it as ‘[a]n Act for better securing the liberty of the subject and for prevention of imprisonments beyond the Seas’. It is argued that as a result of this Act, habeas corpus became ‘the most effective weapon yet devised for the protection of the liberty of the subject’.\textsuperscript{17}

As discussed in this Chapter, overseas jurisdictions including the United States, Canada and South Africa have all incorporated habeas corpus in their respective constitutions. Indeed, the \textit{United States Constitution} contains one of the earliest constitutional provisions to protect the writ of habeas corpus.\textsuperscript{18} In \textit{Boumediene v Bush}, the United States Supreme Court discussed how the habeas privilege was one of the few safeguards of liberty specified in the \textit{United States Constitution} which, at the time of its creation, did not contain a bill of rights.\textsuperscript{19} In Australia, the incorporation of the writ of habeas corpus was originally through the creation by legislation of Supreme Courts with the same jurisdiction as the Superior Courts at Westminster, which allowed the Supreme Courts to issue the common law version of the writ.\textsuperscript{20} Today, many jurisdictions have incorporated a statutory right to habeas corpus. In Australia, all State and Territory jurisdictions have local rules or orders in their Supreme Court rules to govern the procedure.

In terms of modern application in Australia, there has been discussion of the availability of the writ in instances of non-custodial restraint. In \textit{Jago v District Court of New South Wales}, Toohey J identified that habeas corpus, as a rule with the objective of preventing unlawful detention, arguably does not extend to persons on bail.\textsuperscript{21} Principles such as this are relevant in instances where the executive imposes restraints on individuals in situations falling short of detention, for example, the imposition of control orders on individuals under the anti-terrorism legislation.

\begin{footnotes}
\item[16] Ibid 383.
\item[17] McFeeley, above n 8, 589.
\item[18] Clark and McCoy, above n 4, 29.
\item[20] Clark and McCoy, above n 4, 19.
\item[21] (1989) 168 CLR 23, 68.
\end{footnotes}
Despite the importance of the writ of habeas corpus in protecting individual liberty, the efficacy of the writ is limited in terms of its capacity to protect against executive detention. The writ ensures that the judiciary is able to require that a member of the executive present a detainee to the court so that the lawfulness of their detention can be considered. However, the role of the court in this instance will be simply to determine the lawfulness of the detention, rather than whether, if the detention is lawful, it is reasonable or excessive. Where a law permits the continued detention of an individual (including through explicitly suspending the writ), the writ does not empower the judiciary to order their release. As summarised by Clarke and McCoy:

since the remedy exist to establish whether or not a detention is lawful, once it is shown that the detention is lawful there is nothing further for the writ to do. This means that if laws are passed that allow for detentions, and these laws are properly used, then the writ can achieve little for the incarcerated ...

Given this, it is the scope of the law authorising detention which dictates the efficacy of the writ. Thus a corresponding constitutional right to due process, which can be used to review and invalidate a law authorising detention, is essential.

Additionally, historically there are many examples of the writ being suspended or restricted, particularly during times of war or emergency; indeed, ‘[w]ar is the greatest enemy of the writ’. ‘Denial or suspension occurred in times of political unrest, to the anguish of the imprisoned and the outrage of those in sympathy with them’. During the late 17th Century, the English House of Commons debated whether to suspend habeas corpus in light of fears of invasion. There was a view that the liberties of English subjects might only survive the extant dangers under the protection of a suspension. Halliday and White quote Whig Richard Hampden who famously stated: ‘We are in War, and if we make only use of that remedy as if we were in full Peace, you may be destroyed …’. Such arguments ultimately prevailed, with the first explicit

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22 Clark and McCoy, above n 4, 35.  
23 Ibid 46.  
25 Halliday and White, above n 11, 616.  
26 Ibid.  
suspension law, which had effect for a period of one month (and was twice extended), receiving royal assent on 16 March 1689, being ‘an act impowering [sic] his Majesty to apprehend and detain such persons as he shall find just cause to suspect are conspiring against the government’. 28

Perhaps as a result of the English history of the writ, many jurisdictions subsequently included suspension clauses in their respective constitutions, including those jurisdictions discussed in the following section.

C Habeas Corpus and Due Process in Other Jurisdictions

The influence of English jurisprudence regarding habeas corpus can be seen in many overseas jurisdictions, including the United States, Canada and South Africa. The constitutions of each of these jurisdictions contain references to habeas corpus, including circumstances in which it can be suspended. Importantly, the constitutions also contain explicit rights to due process, including the right not to be arbitrarily detained without trial. While each of these jurisdictions is historically diverse in terms of the development of their legal systems and recognition of human rights, it is useful to consider how these countries have approached protection when determining the utility of such express constitutional rights in Australia.

The following section discusses how habeas corpus and due process are protected in the United States, Canada and South Africa. These jurisdictions have been selected due to the lessons that can be learned from their Western legal systems comprising open and free democratic elections, and constitutional entrenchment of human rights.

1 The United States Bill of Rights

The Bill of Rights was first adopted in the United States on 15 December 1791. It is entrenched in the United States Constitution and comprises ten amendments which limit the power of the federal government. These limitations protect rights including, inter alia, the freedom of speech, protection from unreasonable search and seizure, and the right to due process. Through conferring a series of constitutionally entrenched rights on citizens, the Bill of Rights is a powerful feature of the United States system in the

28 Halliday and White, above n 11, 617.
protection of civil liberties. It ‘commands a continuous, dynamic tension between majority rule and the protection of individual and minority rights and freedoms’. However there are limitations to the rights it protects. As Nesbitt identifies, this is demonstrated through the measures that Congress has taken to authorise, potentially indefinitely, the detention of terrorist suspects as ‘enemy combatants’ in the War on Terror.

(a) The Utility of the United States Bill of Rights, the Right to Due Process and the Suspension Clause

It has been said that ‘the very purpose of a Bill of Rights [is] to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts’. Galligan describes the United States’ system as comprising a tradition ‘strongly informed by liberal assumptions which give primacy to the individual and distrust of popular democratic government because of its assumed propensity towards tyranny of the majority’. The United States Bill of Rights sets certain limitations on the power of the government and in turn relies on an independent judiciary to confirm or deny the proper exercise of that power. Sietz summarises the role of the judiciary in the Bill of Rights as follows:

Our judiciary has been entrusted with the definition and protection of the freedoms of speech, press, association, and religion. In addition, the courts are responsible for ensuring that persons receive due process and the equal protection of the laws. Finally, courts enforce the Constitution’s guarantees against unreasonable searches and seizures, self-incrimination, and cruel and unusual punishment.

Unlike in the United Kingdom and Australia where the judiciary has limited capacity to invalidate legislation that is inconsistent with human rights, in the United States the judiciary is granted wide powers to quash legislation by virtue of the Bill of Rights. Marbury v Madison was a landmark case in United States constitutionalism, being the first time a court in a Western system invalidated a law on the basis that it was

31 West Virginia Board of Education v Barnette, 319 US 624, 638 (Jackson J) (1948).
33 Sietz, above n 29, 3.
34 5 US (1 Cranch) 137 (1803).
unconstitutional. Marbury was appointed to federal judicial office at the end of the presidency of John Adams, and when President Jefferson took office the Secretary of State refused to honour the appointment on the basis that the previous government was attempting to ‘stack’ the judiciary with sympathisers of the previous administration.\(^{35}\) Marbury succeeded in a writ of mandamus to compel the new government to honour his commission on the basis that the *Constitution* is superior to any ordinary Act of the legislature and it is the judicial duty of the courts to decide whether a law is consistent or in opposition with it.\(^{36}\) In this historic decision, Marshall CJ asserted the power of the judiciary to decide that legislation is void if it exceeds the law-making power conferred upon the legislature by the *Constitution*, and it is therefore significant in terms of its ability to protect human rights.\(^{37}\)

In relation to the specific rights contained in the Bill of Rights upon which the courts may invalidate legislation for inconsistency, amends V and XIV are relevant for protection against arbitrary detention. Spies asserted in 1964 that it has only been since WWII that the due process clause and the protection of personal constitutional rights has become significant,\(^{38}\) although the War on Terror has made these clauses even more significant. Amendment V provides that ‘no person shall be ... deprived of life, liberty, or property without due process of the law’. Similarly, amend XIV states ‘nor shall any State deprive any person of life, liberty, or property, without due process of law’. In *United States v Lovett*, the Supreme Court stated that the drafters of the *Constitution* ‘intended to safeguard the people of this country from punishment without trial by duly constituted courts’.\(^{39}\) According to Nesbitt, these provisions provide strong substantive and procedural protections from government deprivations of individual rights, including the right to liberty of the person.\(^{40}\) Therefore, theoretically detention of any person will be invalid if it involves punishment prior to an adjudication of guilt.\(^{41}\)

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35 Keyzer, Clarke and Stellios, above n 1, 23.
36 *Marbury v Madison*, 5 US (1 Cranch) 137, 178 (Marshall CJ) (1803).
37 French, above n 1, 1.
40 Nesbitt, above n 30, 44.
However, as discussed further below, the treatment of prisoners at Guantánamo Bay has called this general principle into question.

Like the Australian courts, the United States courts have recognised that there are exceptions and that in order to be valid, a particular imprisonment must serve a regulatory purpose rather than a punitive one. Pre-trial, preventative and immigration detention have been considered regulatory and the United States courts have sought to distinguish between such categories. That being said, as well as requiring that any detention be non-punitive in order to avoid infringing these rights, the Supreme Court has imposed a balancing test whereby there must be a special justification which outweighs the individual’s constitutionally protected interest in avoiding physical restraint. The Bill of Rights therefore does not guarantee the protection of rights absolutely, with departure being justified in some instances. The most notable of examples concerns Executive Order 9906 which provided for the detention of persons of Japanese ancestry into internment camps following the Pearl Harbour attack in December 1941 for community protection purposes. The Supreme Court contemporaneously confirmed the constitutional validity of the Order in cases including Korematsu v United States and Hirabayashi v United States, although these decisions have since been overturned and referred to as a ‘substantive disaster of constitutional doctrine – a fundamentally mistaken endorsement of a repressive military programme’. Since then, in 2001 in Zadvydas v Davis, which concerned migration detention, the Supreme Court held that indefinite detention was not justified by preventing danger to the community. This contrasts with the Australian position discussed above where a non-punitive purpose can include protective purposes.

In addition to the above, the United States Constitution contains a restriction on the legislature in relation to habeas corpus. It is contained in art 1§ 9, which provides that ‘[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it’. This clause, known

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43 Dias, above n 41, 40.
45 323 US 214 (1944).
46 320 US 81 (1943).
as the Suspension Clause, does not confer an express right on detainees but rather prevents Congress from legislating to restrict it. It ensures that, except during periods of formal suspension, ‘the Judiciary will have a time-tested device, the writ, to maintain the “delicate balance of governance” that is itself the surest safeguard of liberty’.\textsuperscript{49} The inclusion of the clause in the \textit{Constitution} is largely a result of awareness of the English jurisprudence in the 17th Century,\textsuperscript{50} and the legacy of executive imprisonment in the colonies.\textsuperscript{51} Historically, there have been examples of the suspension of habeas corpus in the United States during times of emergency, particularly during rebellion or war.\textsuperscript{52} Commentators have frequently referred to President Lincoln’s suspension during the Civil War and argue that democracies have survived because they have occasionally suspended traditional rights.\textsuperscript{53} Most relevantly for the purposes of this thesis is the November 13, 2001 Presidential Military Order \textit{Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism}, which was issued following September 11 and gave the President the power to detain individuals suspected of connection to terrorists or terrorism as ‘enemy combatants’. While this did not constitute a formal suspension of habeas corpus, it purported to allow persons to be held indefinitely without being charged, without a court hearing, and without legal counsel. It also specified that those persons were to be tried by military tribunal.

In Australia, while \textit{Constitution} s 75(v) entrenches the original jurisdiction of the High Court and an implied right to due process has been recognised in various cases,\textsuperscript{54} as discussed in Chapter I of this thesis the \textit{Constitution} does not contain an express right to due process or even personal liberty. The effect of this is that, on application of the proportionality test, there is an indeterminate and vulnerable basis on which the High Court can invalidate legislation and administrative decisions which infringe the due process rights of individuals. The response of the United States Supreme Court to executive detention regimes has been far more assertive in light of amends V and XIV.\textsuperscript{55}

\textsuperscript{49} Boumediene v Bush, 553 US 723, 745 (Kennedy J) (2008).
\textsuperscript{50} Halliday and White, above n 11, 629.
\textsuperscript{51} McFeeley, above n 8, 594.
\textsuperscript{52} The first occasion that habeas corpus was suspended was the Shays Rebellion in 1787.
\textsuperscript{54} See, eg, Polyukhovich v Commonwealth, (1991) 172 CLR 501, Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1; Al-Kateb v Godwin (2004) 219 CLR 562. These cases were discussed in Chapter I.
\textsuperscript{55} Nesbitt, above n 30, 39.
As well as requiring that detention be for a non-punitive purpose, the Supreme Court has imposed the additional requirements that the detention serve a compelling government interest and afford sufficient procedural protections.\textsuperscript{56} However, from a practical perspective there are still limitations on the extent to which amends V and XIV have assisted individuals, and this is particularly apparent in relation to the detainees on military bases and at Guantánamo Bay. Nesbitt argues that in this context the Supreme Court has ‘ducked’ constitutional challenges to indefinite detention.\textsuperscript{57}

(b) Detention at United States Military Bases and Guantánamo Bay

One of the most infamous examples of executive detention is the holding of terrorist suspects in military bases in the United States and the Guantánamo Bay Naval Base. Following September 11, the Bush administration claimed the power to designate individuals as ‘enemy combatants’ and hold them indefinitely without judicial review or access to counsel.\textsuperscript{58} As well as the 2001 Presidential Military Order discussed above, Congress created a power to detain enemy combatants through its Authorisation for Use of Military Force (AUMF),\textsuperscript{59} among others. It was the policy of the Bush Administration that the detainees were not entitled to any rights and protections, including habeas corpus, because Guantánamo Bay is not territory of the United States. The Supreme Court has reviewed the detention of persons at United States military bases and at Guantánamo Bay on several occasions, and in analysing such decisions, Weisselberg argues that the Court is ‘keenly aware of how its decisions may help or hinder the fight against terrorism’.\textsuperscript{60} However, while in a number of key cases the Supreme Court has recognised the ability of detainees to apply for the writ of habeas corpus and enforce their rights to due process, on each occasion the legislature has responded by making legislative amendments to further restrict such rights. Consequently, Guantánamo Bay remains open. Lynch and Reilly are confident that attempts to redefine executive and judicial power to enforce new laws restricting

\textsuperscript{56} Ibid 46, referring to \textit{Zadvydas v Davis}, 533 US 678, 690 (Breyer J) (2001).
\textsuperscript{57} Ibid 56.
\textsuperscript{60} Charles Weisselberg, 'Constitutional Criminal Procedure and Civil Rights in the Shadow of the 'War on Terror': A Look at Recent United States Decisions and Rhetoric of Terrorism' in Nicola McGarrity, Andrew Lynch and George Williams (eds), \textit{Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11} (Abingdon, Oxon Routledge, 2010) 71, 72.
individual liberty will not go wholly unchecked by the courts.\textsuperscript{61} Agamben is less optimistic in his writing on the state of exception, describing the implication of the legislation as ‘radically erasing any legal status of the individuals, thus producing a legally unnameable and unclassifiable being’.\textsuperscript{62}

There have been several challenges to the detention of persons captured as part of the War on Terror. In 2004 in \textit{Hamdi v Rumsfeld},\textsuperscript{63} a United States citizen who was captured in Afghanistan and held at a Navy brig in the United States filed a habeas corpus petition. The Supreme Court held that he was entitled, in the absence of any official suspension of habeas corpus by Congress, to ‘a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker’ and to the assistance of counsel.\textsuperscript{64} Additionally, the due process protection was held to have the effect that the executive does not have the power to detain a citizen indefinitely without judicial review. The appellant was held to be entitled to a \textit{Matthews v Eldridge} due process analysis, which was described as follows:

\textit{Matthews} ... dictates that the process due in any given instance is determined by weighing “the private interest that will be affected by the official action” against the Government’s asserted interest, “including the function involved” and the burdens the Government would face in providing greater process.\textsuperscript{65}

That being said, O’Connor J did acknowledge the authority granted by the AUMF to detain the individuals captured for a \textit{limited} period of time: ‘[D]etention of individuals ... for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the “necessary and appropriate force” Congress has authorized the President to use.’\textsuperscript{66} Despite this, Hamdi was subsequently released and deported to Saudi Arabia.

While the above decision related to citizens, its ratio was expanded to include non-citizens in \textit{Rasul v Bush},\textsuperscript{67} which was decided on the same day. Here, the appellant was a non-citizen who had been captured in Pakistan and transported to Guantánamo Bay.


\textsuperscript{63} 542 US 507 (2004)

\textsuperscript{64} Ibid 509, 511 (O’Connor J).


\textsuperscript{66} Ibid 518.

\textsuperscript{67} 542 US 466 (2004).
The District Court, and later the Court of Appeal, dismissed the appellant’s petition for habeas corpus on the basis that it did not have jurisdiction due to the decision in *Johnson v Eisentrager* where it was held that ‘aliens detained outside the sovereign territory of the United States [may not] invoke[a] a petition for a writ of habeas corpus’.  

The Supreme Court focused on the statutory right to habeas corpus under the United States Code rather than the *Constitution*. In *Ahrens v Clark*, upon which the decision in *Johnson v Eisentrager* was based, the statutory phrase ‘within their respective jurisdictions’ was interpreted as requiring the petitioners’ presence within the District Court’s territorial jurisdiction. However, as there was no such requirement in the present statutory right, the detainees at Guantánamo Bay could challenge their detention without being present in the United States. While Cuba maintains ‘ultimate sovereignty’ over Guantánamo Bay, the United States maintained ‘plenary and exclusive jurisdiction’ under the terms of its lease with Cuba. It was therefore enough that they were being held in a facility which was controlled by the United States.

Despite the focus on the statutory right to habeas corpus, it has been concluded that the majority opinion strongly suggested that foreign nationals in the custody of the United States at Guantánamo Bay possess constitutional rights. However, the opinion was ambiguous as to why this is the case, namely whether it is because they are in long-term custody of the United States or because of the special character of United States authority at Guantánamo Bay. In any case, the decision was criticised on the basis that the same logic of the case could presumably be used in interpreting the Suspension Clause, and therefore conferring *United States Constitution* rights on wartime enemies captured in foreign jurisdictions. According to McKaig, ‘[i]t is not much of a stretch to imagine future courts seizing on this beachhead and declaring other legal protections

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69 In particular, 28 USCA § 2241 which grants habeas corpus for a person in custody ‘under or by color of the authority of the United States’ or where the person is ‘in custody in violation of the *Constitution* or laws or treaties of the United States’.


73 Ibid 475.


75 Ibid.

for detainees, including possibly substantive and even constitutional rights.\textsuperscript{77} This issue was considered in \textit{Boumediene v Bush},\textsuperscript{78} which is discussed further on page 229.

Following the decision in \textit{Rasul v Bush},\textsuperscript{79} Congress introduced the \textit{Detainee Treatment Act of 2005} in an attempt to limit non-citizens from accessing habeas corpus. It provided that no court, justice or judge shall have the jurisdiction to hear or consider a writ of habeas corpus filed by or on behalf of an alien being detained as an enemy combatant at Guantánamo Bay. It then vested the Combatant Status Review Tribunal with the exclusive jurisdiction to determine whether an alien detainee was an enemy combatant and, if so, permitted the military to detain them at Guantánamo Bay indefinitely. However, in \textit{Hamdan v Rumsfeld}, the Supreme Court held that it did have the jurisdiction to hear the appellant’s habeas corpus petition and that the President had no power to restrict the right of a detainee from access to habeas corpus and cause them only to be tried by a military tribunal unless they were a prisoner of war.\textsuperscript{80} It further determined that all detainees at Guantánamo Bay are entitled to the protection of the Geneva Convention.\textsuperscript{81} This was a significant step in the recognition of rights, although Dame Mary Arden has commented that it is remarkable how long the issues relating to detainees have taken to reach the Supreme Court, and that the detainees were not originally recognised as prisoners of war for the purposes of the Geneva Convention.\textsuperscript{82} She considers:

> If the detainees are indeed terrorists who have committed crimes, it should be possible for the American authorities to adduce sufficient evidence to determine their status and to bring criminal charges against them. If they are not persons whom the American authorities are entitled to detain, they should be released as soon as possible.\textsuperscript{83}

In response to this decision, Congress passed the \textit{Military Commissions Act of 2006}, which amended the habeas corpus statute. It suspended habeas corpus for any alien determined to be an unlawful enemy combatant engaged in hostilities or having supported hostilities against the United States, other than pursuant to the limited review permitted under the \textit{Detainee Treatment Act of 2006}. The validity of this legislation

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{77} Ibid 138.
\item \textsuperscript{78} 553 US 723 (2008).
\item \textsuperscript{79} 542 US 466 (2004).
\item \textsuperscript{80} 548 US 557, 567 (Stevens J) (2006).
\item \textsuperscript{81} Ibid 562.
\item \textsuperscript{82} Dame Mary Arden, 'Meeting the Challenge of Terrorism: The Experience of English and Other Courts' (2006) 80 \textit{Australian Law Journal} 818, 828.
\item \textsuperscript{83} Ibid 828-9.
\end{itemize}
\end{footnotesize}
was considered in *Boumediene v Bush*. Here, the appellant was an alien held at Guantánamo Bay and sought a writ of habeas corpus in respect of his continued detention and designation as an enemy combatant. Consistent with the previous decisions, the Supreme Court held that the United States maintained ‘de facto’ sovereignty over Guantánamo Bay and therefore enemy combatants were entitled to the writ of habeas corpus under the *United States Constitution*. It further held that the *Military Commissions Act of 2006* did not provide an adequate substitute for habeas corpus, and therefore the Act was an unconstitutional suspension of that right. Significantly, the Supreme Court held that the fundamental rights afforded by the *Constitution* extend to the detainees.

The *Constitution* grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms may apply. Even when the United States acts outside its borders, its powers are not “absolute and unlimited” but are subject “to such restrictions as are expressed in the *Constitution*”...

To hold that the political branches may switch the *Constitution* on and off at will … would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say “what the law is” … These concerns have particular bearing upon the Suspension Clause question in the case before us now, for the writ is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.

The immediate effect of this decision, and consequent invalidity of the legislation, was that detainees at Guantánamo Bay could petition a federal district court for habeas corpus review of the circumstances of their detention. The appellant and others subsequently applied to the Columbian District Court challenging their designation as ‘enemy combatants’ and seeking their release from Guantánamo Bay. Leon J held that while the information upon which the government acted may have been sufficient for intelligence purposes, it was not sufficient for the purposes for which a habeas corpus must evaluate: ‘To allow enemy combatancy to rest on so thin a reed would be inconsistent with this court’s obligation under the Supreme Court’s decision in *Hamdi*

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85 Ibid 755 (Kennedy J).
86 Ibid 792.
87 Ibid 765-6.
to protect petitioners from the risk of erroneous detention. The applicant was subsequently released at Leon J’s order.

This right of detainees to seek habeas corpus was confirmed by an Executive Order issued by Presented Barack Obama on 22 January 2009, which states in s 2(c) that ‘[t]he individuals currently detained at Guantánamo have the constitutional privilege of the writ of habeas corpus’. However, despite this, in December 2011 the National Defense Authorization Act for Fiscal Year 2012 was signed by President Obama, s 1021 of which sought to affirm the authority of the President under the AUMF to inter alia detain any person ‘who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners’. In September 2012 in Hedges v Obama, a permanent injunction was issued by the District Court of New York preventing the government from enforcing s 1021, pending further order of the Court or an amendment to the statute by Congress on the basis that it likely violates amend V. Following a series of appeal processes, in July 2013 the Second Circuit Court of Appeals overturned the District Court’s ruling due to the plaintiff’s lack of standing to challenge s 1021 given that it does not refer to the President’s authority to detain US citizens, thereby avoiding the constitutional challenge. Nevertheless, even if the government was not successful and the legislation was similarly held constitutionally invalid, it could once again amend the relevant legislation to avoid breaching amend V and the remaining Guantánamo Bay inmates will be no closer to release. These cases demonstrate the need for the judiciary to actively address the substantive constitutional issues.

2 The Canadian Charter of Human Rights

The Canadian Charter of Rights and Freedoms, entrenched in 1982 in the Canadian Constitution, guarantees certain political rights to citizens and civil rights to all individuals from the policies and actions of all levels of government. It contains explicit rights including, inter alia, the right to life liberty and freedom, freedom and

90 Ibid 11.
91 Executive Order 13492 - Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities.
92 Pub L No 112-81, 125 Stat 1298 (2011).
93 D NY, 12 Civ 331, 12 September 2012.
94 Hedges v Obama (2nd Cir, No 12-3176 (Lead) 12-3644 (Con), July 17, 2013).
95 Canadian Charter s 32 states that the instrument is binding on all levels of government.
security of the person, freedom from unreasonable search and seizure, the right not to be arbitrarily detained or imprisoned, and guarantees habeas corpus. Ahmed argues that the drafters of the Canadian Charter were inspired by pre-existing human rights documents, such as the United States Bill of Rights and international humanitarian conventions.\textsuperscript{96} Significantly, the Canadian Charter represents Canada’s first experience with explicit guarantees of individual liberties at the constitutional level.\textsuperscript{97} However, despite conferring explicit rights on individuals, like many other international human rights instruments, its operation is restricted by limitation and notwithstanding clauses.

(a) \textit{The Introduction of the Canadian Charter and the Rights to Habeas Corpus and Due Process}

Prior to the entrenchment of the Canadian Charter, the Canadian Bill of Rights provided a statutory source of human rights protection. However, this was merely a federal Act of Parliament which only applied to federal government, and therefore its effectiveness was limited.\textsuperscript{98} The Canadian Charter sought to overcome these issues through more explicitly guaranteeing individual rights, and ensuring that the judiciary had the power to invalidate legislation introduced by any level of government found to be inconsistent with those rights. Section 52 of the Charter declares that the Constitution (including the Charter) is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect. Isaac argues that the Charter ‘changed the role of the courts, generating an abundance of judicial decisions affecting almost every aspect of Canadian society’.\textsuperscript{99}

Sections 9 and 10(c) of the Canadian Charter relate to detention and arrest. These rights are phrased as affirmative declarations of individual rights, although the clear intent is to restrict the ability of government to interfere with those rights.\textsuperscript{100} Section 9

\textsuperscript{96} Nadia Ahmad, 'The Canadian Charter of Rights and Freedoms: An Example of Canadian Dependence on the United States or Commitment to International Law' (1998) 7 Detroit College of Law Journal of International Law and Practice 89, 89.
\textsuperscript{98} Ahmad, above n 96, 92.
\textsuperscript{100} Liss, above n 97, 1284.
provides that ‘everyone has the right not to be arbitrarily detained or imprisoned’, while s 10(c) provides that everyone has the right on arrest or detention ‘to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful’. In this context, in *R v Grant* the Supreme Court of Canada held that detention occurs where an individual’s liberty is restricted by a significant physical or psychological restraint; the latter arising where in the circumstances a reasonable person would have concluded that he or she had no choice but to comply.\footnote{[2009] 2 SCR 353, 355 (McLachlin CJ, LeBel, Fish, Abella and Charron JJ).}

In relation to s 9, it has been made clear by the Supreme Court that lawful detention is not ‘arbitrary’ for the purposes of s 9. In 1990 in *R v Ladouceur*,\footnote{[1990] 1 SCR 1257.} which was discussed on page 185, legislation permitting highway stops at the discretion of the police officer were held to be arbitrary. This is because ‘[i]f sanctioned, a police officer could stop any vehicle at any time, in any place, without having any reason to do so. For the motorist, this would mean a total negation of the freedom from arbitrary detention guaranteed by s 9 of the Charter’.\footnote{Ibid 1260 (Dickson CJ, Wilson, La Forest and Sopinka JJ).} Conversely, in 2004 in *R v Mann*,\footnote{[2004] 3 SCR 59.} police officers responding to a break and enter stopped the respondent and patted him down, finding marijuana in his pocket. The Supreme Court determined that if an investigative detention was carried out in accordance with common law powers, then it would not be arbitrary and therefore would not infringe the respondent’s rights under s 9.\footnote{Ibid 76 (Iacobucci J).} Here, while there were reasonable grounds to stop the appellant and search him for break and enter tools and weapons, given that he matched the description of the suspects, there was no reasonable basis for reaching into his pockets.\footnote{Ibid 82-3.}

In 2007 in *Charkaoui v Canada (Minister of Citizenship and Immigration)*,\footnote{[2007] 1 SCR 350.} the appellants were suspected of involvement in terrorism and were arrested and detained following the issue of a security certificate by the Minister which allowed named persons to be refused entry to Canada and detained. The reasonableness of the certificate and the detention were subject to review by the Federal Court in a process which could deprive the person of some or all of the information relied on in issuing
the certificate or ordering the detention. The Supreme Court held that the detention of foreign nationals without a warrant did not infringe the s 9 guarantee against arbitrary detention, as the security ground was based on the danger posed by the named person and therefore provided a rational foundation for the detention.\textsuperscript{108} However, the lack of review of the detention until 120 days after the reasonableness of the certificate had been judicially confirmed did infringe s 9 and the right to prompt review of detention under s 10(c).\textsuperscript{109} Thus while the substantive due process rights of the appellants were held not to have been infringed, their procedural due process rights were.

Further to s 10(c), it has been held that the \textit{Charter} does not confer any additional rights beyond those already existent under the common law; it merely entrenches the right in the \textit{Constitution}.\textsuperscript{110} Nevertheless, enshrining the right does ensure that it is safeguarded. For example, it has been held that if a privative clause purports to immunise a provincial government body from judicial review, it cannot operate so as to preclude the exercise of s 10(c).\textsuperscript{111}

\textit{(b) The Effect of the Limitations and Notwithstanding Clauses}

The right not to be arbitrarily detained and the guarantee of habeas corpus contained in the \textit{Canadian Charter} are not absolute, with the document containing a limitations clause and a notwithstanding clause which allow the government to limit the rights contained in the \textit{Charter}. Ahmed argues that the limitations clause sets the tone for the document, through entrenching the notion that no right is absolute.\textsuperscript{112}

As outlined in Chapter V of this thesis, \textit{Canadian Charter} s 1 provides that it guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. In the event that an individual considers that their rights have been infringed, they must therefore first establish that their right was protected under the \textit{Constitution}, and secondly that some governmental action has infringed their right. Once infringement has been demonstrated, the governmental action may nevertheless be deemed constitutional if it

\begin{itemize}
\item \textsuperscript{108} Ibid 401 (Dixon CJ).
\item \textsuperscript{109} Ibid 402.
\item \textsuperscript{110} \textit{Re Day} (1983) 62 NSR (2d) 67 (NSSC).
\item \textsuperscript{111} \textit{Cadeddu v The Queen} (1982) 4 CCC (3d) 97 (Ont. SC).
\item \textsuperscript{112} Ahmad, above n 96, 91.
\end{itemize}
satisfies the requirements of s 1.\textsuperscript{113} Thus, for example, detention may be held to be ‘arbitrary’ for the purposes of s 9, but it may nevertheless be justified under s 1. In determining whether s 1 is satisfied, the test outlined in \textit{R v Oakes}\textsuperscript{114} is applied. In relation to the application of s 1 to ss 9, 10, in \textit{R v Wilson}, the majority held that a law authorising random stops of cars by police officers did infringe s 9, but this was justified as a reasonable limitation under s 1.\textsuperscript{115}

In addition to this limitations clause, the s 33 notwithstanding clause also provides for derogation from the rights and freedoms contained in the \textit{Canadian Charter}. This is a feature of the \textit{Canadian Charter} which gives Canada’s governments the authority to exempt legislation from certain guarantees contained in the \textit{Charter}, and has no equivalent provision in the \textit{United States Constitution}.\textsuperscript{116} Section 33(1) is the core provision and provides as follows:

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Sections 33(3) and (4) allow all levels of government to issue a declaration overriding the rights and freedoms contained in the listed sections for five years, which may be renewed. It essentially allows the government to ‘opt out’ of rights contained in the \textit{Charter}, thereby preserving Parliamentary supremacy.\textsuperscript{117}

The federal government has never invoked the notwithstanding clause, however the provinces of Quebec, Saskatchewan and Alberta have, for reasons including to end a strike and impose a heterosexual definition of marriage. In \textit{Ford v Quebec (Attorney General)},\textsuperscript{118} Quebec introduced the \textit{Charter of the French Language} which restricted the use of commercial signs written in a language other than French. The Supreme Court held that the legislation infringed the s 2(b) freedom of expression, but noted that a s 33 declaration would only require an express reference for the \textit{Charter} provision to be overridden: ‘Section 33 lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy in

\textsuperscript{113} Liss, above n 97, 1284.
\textsuperscript{114} [1986] 1 SCR 103, 139 (Dixon CJ).
\textsuperscript{115} [1990] 1 SCR 1291, 1292 (Lamer, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ).
\textsuperscript{116} Liss, above n 97, 1285-6.
\textsuperscript{117} Ahmad, above n 96, 92.
\textsuperscript{118} [1988] 2 SCR 712.
exercising the override authority in a particular case". Dickson J later described the notwithstanding clause as ‘an anomaly because the whole purpose of the Charter is to take away the limitation of the rights out of government, the party in power, and place it with the court’. Despite this, the high political cost associated with expressly overriding Charter-protected rights has meant that invoking this section is rare.

3 The South African Bill of Rights

The current South African Constitution came into effect in 1997 and is one of the most detailed and progressive constitutions in the world. South Africa’s history has been said to be one which ‘generated gross violations of human rights [and] the transgression of humanitarian principles in violent conflicts’. Goldstone identifies that ‘[a] Bill of Rights was one of the essential tools without which the relatively peaceful transition from this history of racial oppression and apartheid to a nonracial democracy would not have been possible’. Section 7 of the Constitution describes the Bill of Rights as a cornerstone of democracy in South Africa which ‘enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom’. However, like in the United States and Canada, the South African Bill of Rights contains provisions permitting the limitation of rights.

(a) Habeas Corpus and Due Process in the Bill of Rights

During constitutional negotiations, it was generally accepted that the best way of ensuring the interests of all South Africans was through the protection of individual rights in an entrenched Bill of Rights, and that the rights should be fully justiciable in that the courts should have the power to strike down legislation that violates any of its provisions. The South African Bill of Rights comprises 32 sections setting out explicit rights in favour of citizens, which bind all branches of the South African

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119 Ibid 740 (Dixon CJ, Beetz, McIntyre, Lamer and Wilson JJ).
120 Quoted in Robert J Sharpe, Brian Dickson: A Judge's Journey (University of Toronto Press, 2003) 436.
121 Liss, above n 97, 1286.
124 Ibid 455.
government. These include, inter alia, the right to life, the right to freedom and security of the person, and rights relating to arrested, detained and accused persons.

Relevantly for the purposes of this thesis, *South African Constitution* s 12 provides for the freedom and security of the person:

(1) Everyone has the right to freedom and security of the person, which includes the right-

   (a) not to be deprived of freedom arbitrarily or without just cause;
   (b) not to be detained without trial;

Additionally, s 35 relates to the rights of arrested, detained and accused persons. In summary, it provides:

(1) Everyone who is arrested for allegedly committing an offence has the right-

   (d) to be brought before a court as soon as reasonably possible, but not later than-

      (i) 48 hours after the arrest; or
      (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours, expire outside ordinary court hours or on a day which is not an ordinary court day;

(2) Everyone who is detained, including every sentenced prisoner, has the right-

   (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

In 2008 in *Zealand v Minister of Justice and Constitutional Development and Another*, the applicant was awaiting trial for an offence, and was convicted of a second offence and sentenced to 18 years imprisonment. He was transferred to a maximum security prison, where he remained for five years even though his conviction for the second offence was overturned. The applicant argued inter alia that the detention unreasonably and unjustifiably infringed his s 12(1) right not to be deprived of freedom arbitrarily or without just cause. Langa CJ of the Constitutional Court of South Africa determined that once the applicant established that he was unlawfully detained, as could be established in this instance, the burden fell on the State to justify the deprivation of liberty. His Honour discussed the fundamental difference in status between persons merely awaiting the completion of their trials and persons who have been convicted of a crime and sentenced to punishment. His Honour concluded that the only justification for deprivation of the applicant’s freedom was the fact that he was still

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125 [2008] ZACC 3 (Constitutional Court).
126 Ibid 13 [24].
127 Ibid 16-7 [30].
awaiting trial for the first offence, however this was insufficient to justify treating him as if he were convicted and sentenced. \(^\text{128}\) It was held that the applicant’s s 12(1) right had been infringed.

In 2010 in *Malachi v Cape Dance Academy and Others*, \(^\text{129}\) the Constitutional Court was required to determine whether the remedy *arrest tanquam suspectus de fuga*, which empowered a Magistrate to issue an order for the arrest and detention of a debtor where a creditor reasonably believes the debtor is about to flee the country to avoid paying the creditor, was consistent with the *Constitution*. Mogoeng J noted that detention was instituted before the debtor’s liability had been proven in a court, \(^\text{130}\) and in any case does not necessarily secure the payment of the debt. \(^\text{131}\) His Honour noted the irreparable harm that can be caused by detention, \(^\text{132}\) and recognised the important purpose of s 12: ‘There can be no doubt that s 12 is designed to bury our painful history of random, unjust and arbitrary deprivation of physical liberty and to ensure that abuse of state power never again rears its ugly head’. \(^\text{133}\) With brief reference to the s 36 limitation clause, it was held that there was no justification in this instance, with Mogoeng J even noting that ‘[i]t is difficult to imagine the circumstances in which a law that allows detention without just cause could ever be justifiable’. \(^\text{134}\)

\((b)\) **The Effect of the Limitations and State of Emergency Clauses**

Chapter V of this thesis discussed in detail the s 36 limitations clause and the South African Constitutional Court’s approach to its interpretation. As discussed, given the prescriptive nature of the clause, the Constitutional Court has largely refused to undertake an analysis of the clause itself, and indeed has implied an extensive balancing analysis which arguably limits the effectiveness of the Bill of Rights.

In addition to the limitations clause, s 37 provides scope for restriction of the rights and freedoms contained in the Bill of Rights. Section 37 provides for the declaration of a state of emergency:

\(^{128}\) Ibid 19 [34].  
\(^{129}\) [2010] ZACC 13 (Constitutional Court).  
\(^{130}\) Ibid 11 [21].  
\(^{131}\) Ibid 17-8 [32].  
\(^{132}\) Ibid 18 [33].  
\(^{133}\) Ibid 13 [24].  
\(^{134}\) Ibid 21 [40].
(1) A state of emergency may be declared only in terms of an Act of Parliament and
only when-
  (a) the life of the nation is threatened by war, invasion, general insurrection,
disorder; and
  (b) the declaration is necessary to restore peace and order.

Section 37(2) provides, inter alia, that a declaration of a state of emergency, and
legislation enacted or action taken pursuant to it, may only be effective prospectively
and for no more than 21 days unless the National Assembly resolves to extend the
declaration (which may be for no more than three months at a time). Additionally,
s 37(3) provides for judicial involvement. It states that any competent court may decide
on the validity of a declaration of a state of emergency and any extension, or any
legislation enacted or action taken in consequence of a declaration. Section 37(4) then
provides that any legislation enacted in consequence of a declaration may derogate from
the Bill of Rights only to the extent that the derogation is strictly required by the
emergency and the legislation is consistent with international law.

Section 37(5) provides a list of non-derogable rights which cannot be derogated from
in a state of emergency. Relevantly, this includes the s 35(2)(d) right to be brought
before a court as soon as reasonably possible after arrest. In relation to those other
rights which can be derogated from, including ss 12(1)(a) and (b) and 35(1)(d), s 37(6)
sets out a list of conditions which must be observed whenever anyone is detained
without trial in these circumstances. These conditions relate to contact with family
members and access to medical care and legal representation. Additionally,
s 37(5)(d)(e) provides that a court must review the detention as soon as reasonably
possible, but no later than 10 days after the date the person was detained, and the court
must release the detainee unless it is necessary to continue the detention to restore peace
and order. This level of judicial supervision provides a striking contrast to the
legislative regime enacted in Australia in the wake of the September 11 terrorist attacks.

The s 37 power is exercised in terms of the State of Emergency Act 1995 (South Africa),
which permits the President by proclamation to declare a state of emergency. The
Constitutional Court has not been called upon to consider any declaration made under
this legislation or s 37.
D Composition of the Rights to Habeas Corpus Due Process in the Australian Constitution

The brief comparative analysis above identifies how three overseas jurisdictions have entrenched the rights to habeas corpus and due process in their respective constitutions. The greatest strength of this approach compared to reliance on the common law or legislation is that these rights cannot be overridden and constitutional entrenchment empowers the judiciary to quash legislation and associated executive actions where there is a breach of these rights. If these rights were explicitly entrenched in Australia’s Constitution, there would be no ambiguity as to the judiciary’s power to invalidate legislation and overturn decisions, including those related to the defence power and the anti-terrorist legislation, in the event of infringement. However, the right to due process should not be absolute. Given the threat of terrorism posed by the War on Terror, it is necessary for it to be limited in some instances, as the above jurisdictions have also accepted.

The following section proposes the inclusion of habeas corpus and due process clauses in the Australian Constitution. It provides suggestions for the wording of such clauses, including how an appropriate limitations clause could be drafted. It then discusses how such constitutional rights would apply to the defence power and the anti-terrorism legislation.

1 A Right to Habeas Corpus in the Australian Constitution

As discussed in Chapter I of this thesis, while habeas corpus is not explicitly listed in Constitution s 75(v), there is a view that it is a judicial remedy available under this section.135 However, s 75(v) is only effective to the extent that it confers original jurisdiction on the High Court where a constitutional writ is sought against an officer of the Commonwealth. The purpose of s 75(v) is ‘to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power’.136 It does not refer to the exercise of State power by an officer of a State. Given this, s 75(v) in its current form (or indeed if it were amended to explicitly list habeas corpus) would not assist in instances where a State or Territory

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135 French, above n 1, 12.
136 Bank of New South Wales v Commonwealth (1948) 76 CLR 1, 363 (Dixon J).
government restricted the liberty of an individual under their corresponding anti-terrorism provisions. Additionally, s 75(v) merely confers jurisdiction on the High Court in relation to the constitutional writs, rather than conferring a positive right on individuals.

Given this, it is preferable for a separate explicit and positive right to be included in the Constitution. Such should be modelled on Canadian Charter s 10(c), which specifically refers to habeas corpus:

> Everyone has the right on arrest or detention to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

The above clause refers generally to ‘detention’, and so this would be subject to judicial interpretation in the same way that courts in overseas jurisdictions have considered the meaning of this term. For example, whether this extends to individuals detained by the Australian government outside Australia’s territorial boundaries, and whether it applies to deprivation of liberty other than through physical confinement (such as in the case of control orders). It is appropriate for such issues to be determined by the judiciary on a case by case basis with reference to the common law principles of habeas corpus set out in Jago v District Court of New South Wales. The proposed clause also refers to ‘everyone’ having the right, and so would apply to both citizens and non-citizens.

Unlike the Canadian Charter and the United States Constitution, it is proposed that the constitutional right to habeas corpus not be subject to limitation or suspension. In accordance with the doctrine of separation of judicial power, the judiciary should always be the final arbiter of a deprivation of liberty. Even in times of emergency, or periods of increased international tension such as this post-September 11 War on Terror era, individuals should always have the right to access courts to have the legality of their detention determined by an independent judiciary. As discussed on page 216, habeas corpus gives an individual the right to access the courts to challenge their detention under the law, and it is not necessary for this right to be limited.

Given that habeas corpus merely guarantees access to the courts, on its own it is not enough to provide protection from detention by the executive where legislation permits

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137 See, eg, Terrorism (Police Powers) Act 2002 (NSW) s 11(3)(a) or Terrorism (Preventative Detention) Act 2005 (Qld) s 12(2), which allow for detention for up to 14 days.
such. Like the constitutions of the above overseas jurisdictions, an additional constitutional right to due process is required so that the judiciary is also empowered to quash legislation and executive actions which arbitrarily infringe an individual’s right to liberty of the person.

2 A Right to Due Process in the Australian Constitution

Chapter I of this thesis discussed the extent to which a substantive right to due process in Australia protects individuals from detention by the legislative or executive branches of the Commonwealth for punitive purposes other than by a court order. It also discussed the extent to which this includes aspects of procedural due process. Wheeler argues that the due process principle continues to be endorsed by the High Court, and quotes the Hon Michael McHugh who claimed in 2001 that ‘[f]ew would now doubt that Ch III protects some procedural rights’. Indeed, as a fundamental principle ‘[t]he vesting of judicial power in the courts by Ch III of the Constitution is a rich source of individual rights’. However, in light of the elasticity of the defence power and the anti-terrorism legislation, reliance on such a fundamental and significant right being implied in the Constitution poses great risk, especially given the ambiguity as to its current formulation as discussed throughout this thesis. Bateman states that ‘the allocation of powers among the various arms of government … is an ill-suited framework for the protection of due process standards’. This is particularly given, as discussed on page 39, the cautionary comments of Gaudron J that legislation authorising detention in circumstances involving no breach of the criminal law will not always be offensive to Ch III; and McHugh J that detention under a law of the Parliament will not be characterised as punitive in character and usurp judicial power if it is reasonably and appropriately adapted to serving some other legitimate object

143 Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1, 55.
within the Parliament’s power.\textsuperscript{144} This can include detention for community protection purposes, as discussed in Chapter V of this thesis. On this basis, an explicit constitutional right to due process is required.\textsuperscript{145} This would allow the judiciary to quash legislation and executive actions which are inconsistent with the substantive and procedural aspects of this right, as is possible in United States, Canada and South Africa.

In terms of the content of a right to due process, as with habeas corpus any clause (and therefore any obligation to afford due process) must be binding on all levels of government given the power of States and Territories under corresponding anti-terrorism legislation to detain individuals for periods of up to 14 days. This is consistent with the constitutions of other overseas jurisdictions. Additionally, any explicit constitutional right to due process would need to go further than simply referring to the right of individuals to life, liberty and freedom, as in the case of United States Constitution amends V, XIV. The approaches in the Canadian Charter and the South African Constitution, which refer to arbitrary detention, are more modern approaches and therefore the preferable way forward. According to Ahmed, the Canadian Charter ‘shed much of the antiquated language and sentiment of preceeding [sic] human rights codes, in exchange for a contemporary approach’.\textsuperscript{146} That being said, in order to ensure that both substantive and procedural due process concepts are incorporated, it is still necessary to refer to ‘due process’, as in the case of amends V and XIV. Like the right to habeas corpus discussed in the previous section, it should apply to everyone, regardless of whether they are citizens of Australia. This is significant, given the extra-territorial application of the anti-terrorism legislation. It should also encompass a positive right in favour of individuals, as well as a restriction on the exercise of legislative power.

In light of the above, appropriate wording for a due process clause in the Australian Constitution is as follows:

\begin{quote}
Everyone has the right not to be arbitrarily detained or imprisoned and the right to be afforded due process of the law. The Commonwealth, the States and the Territories
\end{quote}

\textsuperscript{144} Ibid 71.
\textsuperscript{145} As with any constitutional amendment, such would need to be inserted following a referendum of voters in accordance with Constitution s 128.
\textsuperscript{146} Ahmad, above n 96, 89.
may not legislate to arbitrarily detain or imprison an individual or to remove the right to be afforded due process of the law.

The effect of the above is that legislative power, and therefore executive actions undertaken pursuant to legislation, would not extend to laws or actions which allow for the arbitrary detention or imprisonment of individuals or the interference of the right to be afforded due process or the law (noting the limitations clause discussed on the following page). According to the Human Rights Committee, in this context “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.147

The above text deliberately does not list the types of detention which do or do not amount to arbitrary detention. Similarly, it broadly refers to the right to be afforded due process, but is silent on its specific content. This is intended to leave the judiciary with the role of interpreting the content of these rights on a case by case basis in accordance with common law principles. In relation to the substantive right not to be arbitrarily detained, it is likely that in accordance with *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* punitive detention would be unconstitutional,148 however the judiciary would need to consider whether detention for protective purposes would be considered punitive in the prevailing circumstances including the threat faced. Further, in accordance with the case law of overseas jurisdictions, it may be that detention of individuals without trial, random stops by police officers, or detaining an individual in a prison as if they had been convicted and sentenced would also be considered arbitrary for the purposes of such a clause. Similarly, in relation to the procedural aspects of the right to due process, the judiciary would be left to determine whether it includes the right to a fair trial, the right to a speedy trial, and the right to legal representation. Such an approach would allow these rights to develop over time in accordance with modern human rights jurisprudence, and importantly will not restrict its application in any given fact scenario. According to Welsh, the court’s traditional processes, incorporating central tenants of due process

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148 (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).
such as equality before the law, impartiality, the right of a party to meet and know the
case against them and a fair trial, are central to judicial power.¹⁴⁹

That being said, it is accepted that, consistent with the sentiments of the High Court,
rights are not absolute and must be limited in certain circumstances. Winterton
identifies that one area of dispute is the extent of the boundary between the Parliament’s
undoubted power to regulate rights and obligations on subjects within its legislative
power on the one hand, and the need to protect the federal judicial process from
legislative interference on the other.¹⁵⁰ The United States Supreme Court has said,
‘[d]ue process of law requires that the proceedings shall be fair, but fairness is a relative,
ot an absolute concept. It is fairness with reference to particular conditions or
particular results’.¹⁵¹ The Supreme Court subsequently developed a balancing test, as
discussed on page 223. Similarly, the Human Rights Committee has stated that ‘remand
in custody pursuant to lawful arrest must not only be lawful but reasonable in all the
circumstances ... [and] must further be necessary in all the circumstances, for example
to prevent flight, interference with evidence or the recurrence of crime’.¹⁵² To assist in
ensuring that an appropriate balance is maintained, it is appropriate for a limitation to
be included in the text of the above proposed due process clause.

In relation to the wording of this limitation, both the South African and Canadian
constitutions incorporate explicit limitations clauses which allow rights to be limited
where such is reasonable and justifiable in a democratic society. As discussed above,
the limitations clause in the South African Constitution contains an explicit list of
matters which the court must take into account. Noting the historical context in which
South Africa’s detailed limitations clause was drafted, it is not necessary for such
explicit requirements to be listed in Australia. Australia has a developed system of
judicial interpretation, particularly in relation to the application of the proportionality
test to explicit and implied constitutional rights. As such, rather than directing the court
to consider certain matters when determining the validity of a limitation, it is

¹⁴⁹ Rebecca Welsh, ‘A Question of Integrity: The Role of Judges in Counter-Terrorism Questioning and
¹⁵⁰ George Winterton, ‘The Separation of Judicial Power as an Implied Bill of Rights’ in Geoffrey J
Lindell (ed), Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie
Zines (The Federation Press Pty Ltd, 1994) 185, 194.
¹⁵¹ Snyder v Massachusetts, 291 US 97, 116 (Cardozo J) (1934).
¹⁵² Human Rights Committee, above n 147, [9.8].
appropriate to simply rely on the common law tests, as has been the approach of the Supreme Court of Canada through the test outlined in *R v Oakes*.[153]

That being said, it is preferable for any limitation to be the least restrictive of human rights to achieve the objective. Noting the current approach of the High Court in relation to the proportionality test, to ensure that any infringement is the least restrictive of human rights (as proposed in the modified proportionality test outlined in Chapter V of this thesis), it is necessary for the limitations clause to explicitly refer to this test. Thus the wording of the *Canadian Charter*, with an explicit reference to the ‘least restrictive’ requirement from the *Oakes* test, is appropriate. On this basis, the following text is proposed to follow the above right to due process:

> The right not to be arbitrarily detained or imprisoned and the right to be afforded due process of the law are subject only to such reasonable limits prescribed by law as can be demonstrably justified as being the least restrictive of those rights as is necessary in a free and democratic society.

Again, such an approach would leave the judiciary to determine what laws or actions would fall within the scope of this clause, in accordance with modern human rights jurisprudence. It also provides scope for the judiciary to take into account broader issues, such as the threat of terrorism in the case of the anti-terrorism legislation. As Nesbitt identifies, during WWII the United States Supreme Court acknowledged that the executive should be given a ‘wide’ scope for the exercise of judgment so as to win the war, but cautioned that it must be mindful of the constitutional protections in favour of liberty of the person.[154] The above approach ensures that the Australian courts will have the constitutional backing to achieve this.

### 3 Application to the Anti-Terrorism Legislation

As stated above, the key benefits of constitutionally entrenched rights is that, unlike the common law and legislation, constitutional rights cannot be overridden by legislation and the judiciary may invalidate legislation and executive decisions which infringe those rights. Stone has pointed out that the process of implying constitutional limitations on legislative or executive power necessarily brings into play ‘extra-

[153] [1986] 1 SCR 103, 139 (Dixon CJ).
constitutional values or principles',\textsuperscript{155} and such could largely be avoided in the case of the anti-terrorism legislation if explicit constitutional rights were entrenched. As discussed, a constitutionally entrenched right to habeas corpus would ensure that an individual who is detained under the anti-terrorism legislation could seek judicial review of the legality of their detention. The constitutionally entrenched right not to be arbitrarily detained and to be afforded due process would then guarantee that an individual’s procedural and substantive due process rights could not be infringed by legislation or executive decisions, subject to the limitations clause. While the anti-terrorism legislation in its current form is burdensome from a human rights perspective, the reactive nature of the Parliament means that if there is another significant event, it may introduce measures under the defence power which have an even greater effect on the right to liberty of the person. Lord Diplock once said that ‘[t]he fundamental human right is not to a legal system that is infallible but to one that is fair’.\textsuperscript{156} Only constitutional amendment would entrench protection which cannot be removed through statutory measures.

In the context of the terrorism offences contained in \textit{Criminal Code} divs 101, 102 and 103, a constitutionally entrenched right to due process would enable the judiciary to protect the procedural due process rights of an individual. This could relevantly include the right to be presumed innocent and other rights associated with a fair trial, which may address some of the issues raised in Chapter III of this thesis such as those arising from the evidential burden being placed on the defendant. As the Hon Tim Carmody notes extra-judicially, ‘[p]re-emptive action is not totally alien to or irreconcilable with democratic principles but protective thinking raises fundamental civil liberties issues’.\textsuperscript{157} A right to due process would ensure that those fundamental civil liberties are not arbitrarily oppressed. The right to due process may also offer assistance in relation to the capacity of the judiciary to review the merits of a decision of the Attorney-General to specify an organisation as a terrorist organisation which, as discussed on page 123, is currently limited.

\textsuperscript{156} Maharaj \textit{v} Attorney-General of Trinidad and Tobago [1979] AC 385 PC, 399.
In relation to control orders, as discussed on page 129, the issuing authority for a confirmed control order is a Federal Court and so judicial involvement is already incorporated into the scheme. That said, entrenching these rights would guarantee these rights without relying on a statutory entitlement, and would also ensure compliance by the courts themselves. This is significant from the perspective that the necessity to issue a control order and the appropriateness of certain conditions is highly discretionary. Thus in relation to the conditions of control orders, while the issuing court is required to determine whether each of the obligations, prohibitions and restrictions are reasonably necessary and reasonably appropriate and adapted, in the event that the individual is still concerned that the conditions go beyond this, the right to due process will ensure that they may seek judicial review from a higher court. If the effects of the conditions are so extensive that the individual is practically being detained or imprisoned, this might constitute arbitrary detention for the purposes of the proposed clause, and therefore be ultra vires. As discussed on page 243, the non-prescriptive nature of the proposed due process clause intends to ensure that the judiciary is left to interpret the meaning of arbitrary based on common law principles, and it might be that by reference to *R v Grant*,\(^{158}\) the court would consider that extensive conditions constitute unlawful arbitrary detention. The procedural aspects of the right to due process may also offer the subject assistance in gaining access to the information relied on in issuing the control order, which can currently be restricted for national security reasons. Such would allow the subject to obtain fully informed legal representation in order to present a complete defence.

The benefits of constitutionally entrenched rights are most apparent in relation to the detention regimes contained in *Criminal Code* div 105 and *ASIO Act* pt III div 3. As discussed in Chapter III of this thesis, the extent to which an individual may seek judicial review of their detention upon being detained is currently limited. In the event that the right to habeas corpus was constitutionally entrenched, following the detention of an individual under one of these schemes, the constitutional right would ensure that they could be brought before a court to have the legality of their detention determined. This would not be a process that could only be undertaken after the fact, but would

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\(^{158}\) [2009] 2 SCR 353, 355 (McLachlin CJ, LeBel, Fish, Abella and Charron JJ).
allow the individual to seek the remedy at any point during their detention. Being part of the _Constitution_, this right would also not be capable of statutory over-ride.

Furthermore, constitutionally entrenched substantive and procedural due process rights would then allow the judiciary to consider the appropriateness of the individual’s detention. As in the case of the prescription of terrorist organisations, the judiciary could review the basis on which the detention order was issued. That is, with reference to _Criminal Code_ s 105.4(4), an individual could enforce their procedural right to a fair hearing and seek substantive judicial review of whether there were indeed reasonable grounds to suspect that they would engage in a terrorist act. This could take into account issues such as whether the detention was for punitive purposes, including where the grounds for the issue of the order are cited as being for protective purposes. If the detention amounted to punitive detention, or there were not reasonable grounds for issuing the order, this could constitute arbitrary detention for the purposes of the due process clause. The judiciary would be empowered to order the release of the individual (and potentially quash the enabling legislation) if their rights had been infringed.

A constitutionally entrenched right to due process would also be significant in relation to the _NSI Act_. As discussed on page 243, it may be that a key component of the right to due process would be the right to a fair trial, which encompasses the right of an individual to know the case against them and to be able to respond to adverse evidence. By requiring the court to hold a closed hearing to consider evidence, and requiring the court to give greatest weight to national security issues, there is an argument that the _NSI Act_ currently restricts an individual’s right to due process. A constitutional right to due process would ensure that an individual who is a party to criminal proceedings would not be permitted to suffer a detriment without the benefit of being notified of the arguments being made against them. This does not necessarily require the disclosure of national security information. The European Court has stated that where restrictions on disclosure of evidence were necessary for national security reasons, it is essential that the individual’s fair hearing rights are counterbalanced in such a way that they still have the possibility to challenge effectively the allegations against them.159 Thus alternatives to disclosure could be incorporated, such as the use of special advocates as

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159 _A and Others v United Kingdom_ (European Court of Human Rights, Grand Chamber, Application No 3455/05, 19 February 2009) [218] (Costa P).
discussed briefly on page 206. Additionally, as discussed in Chapter I of this thesis, current notions of due process protection under Australia’s legal system vary, and in the case of the *NSI Act* can largely depend on which judge is presiding. Constitutional entrenchment would alleviate such ambiguity.

The limitations clause proposed would result in constitutional entrenchment of the modified proportionality test outlined in Chapter V of this thesis. Chapter V discussed how this test would apply to the anti-terrorism legislation and will not be repeated here, suffice to say that constitutionally entrenched rights would not necessarily prohibit the Parliament from legislating to allow persons to be detained without trial or to make provision for the disclosure of national security information in court proceedings. However, it would ensure that where any measure is taken which infringes the right to liberty of individuals, it must be reasonable and demonstrably justified as being the least restrictive of those rights as is necessary in a free and democratic society. This will ensure that there is an appropriate balance between individual rights and the need to protect the community. From the viewpoint of the European Court:

> The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is executed in conformity with national law but it must also be necessary in the circumstances.\(^{160}\)

In a pre-September 11 text, Clark and McCoy recognise that ‘[d]ue process protections linked to the presumption of innocence, such as the right to silence, the right to a fair trial and the presumption in favour of bail, have been significantly undermined and even eclipsed by counter-terrorism frameworks’.\(^{161}\) This has become even greater in the post-September 11 era of the War on Terror. It is necessary for additional protective measures to be put in place, and constitutionally entrenched rights to habeas corpus and due process offer the best method for achieving this objective.

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\(^{160}\) *Witold Litwa v Poland* (European Court of Human Rights, Strasbourg, Application No 26629/95, 4 April 2000) [78].

\(^{161}\) Clark and McCoy, above n 4, 19.
The right to habeas corpus is one of the oldest forms of human rights protection in the world. However, while it offers assistance in ensuring that an individual has the opportunity to challenge their detention in court, its effectiveness is limited in that if the detention is found to be lawful, it is of no further assistance. This is where the right to due process is relevant, as it allows an individual to challenge legislation or executive actions which infringe the fundamental right to liberty of the person.

Unlike the United States, Canada and South Africa, Australia does not have explicit constitutionally entrenched rights to habeas corpus or due process, and this poses a significant risk to the right to liberty in the context of the defence power and the anti-terrorism legislation in this period of increased international tension. Habeas corpus is arguably available as a constitutional writ in s 75(v), and a right to due process has been implied in cases including *Polyukhovich v Commonwealth*,¹⁶² *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,¹⁶³ and *Al-Kateb v Godwin*.¹⁶⁴ However, this thesis has established that these mechanisms for protection are tenuous and additional protections are required. This is particularly given the elasticity of the defence power and the need for greater protection in the post-September 11 era. The offence provisions, control order regime, preventative detention regime and special trial procedures contained in the anti-terrorism legislation all expose individuals to significant risks to their right to liberty of the person.

Constitutional entrenchment of the rights to habeas corpus and due process would ensure that these rights cannot be extinguished by legislation, and would empower the judiciary to invalidate legislation and executive actions that arbitrarily infringe those rights. While the right to habeas corpus should not be subject to any exceptions, a limitations clause in relation to the right to due process is appropriate. This would ensure that an appropriate balance could be reached between individual rights and the need to protect the community through allowing the right to be restricted only where it is reasonable and demonstrably justified as being the least restrictive of that right as is necessary in a free and democratic society.

CONCLUSION

This thesis has established that the current protection of the right to liberty of the person in Australia is deficient. This is particularly so in light of the elasticity of the defence power and the anti-terrorism legislation, which was held to be supported by the primary conception of this power.\(^1\) In this current post-September 11 period of increased international tension, greater protection is required to ensure that individuals have access to judicial review and can enforce the procedural and substantive aspects of the right to due process. Two strategies have been posited to achieve this. The first is a modified proportionality test which would require that any infringement of constitutional rights, including the implied right to due process, be the least restrictive means available to serve the defence interest. The second would see the rights to habeas corpus and due process explicitly entrenched in the Constitution.

In terms of the strengths of the first strategy, the modified proportionality test outlined in Chapter V of this thesis was drafted so as to only apply to defence measures (given the focus of this thesis on the capacity of the defence power to infringe fundamental rights). However, it could nevertheless apply more broadly to all constitutional heads of power. This is important in light of the approach taken by the Parliament in enacting the anti-terrorism legislation, where a ‘patchwork’ of constitutional powers has been used. Additionally, if the modified proportionality test were to apply to all constitutional rights, it would result in protection of rights more broadly, as opposed to relying on only on the explicit constitutional rights to habeas corpus and due process outlined in Chapter VI of this thesis.

However, while the modified proportionality test would offer more substantial protection compared to the current proportionality test, it still relies on judicial interpretation alone and is subject to legislative interference. Speaking extra-judicially, Justice Ronald Sackville describes the last two decades of constitutional jurisprudence as having produced an ‘age of judicial hegemony’ where the High Court has expanded its authority and power, particularly in the realm of judicial review of administrative decisions and implied constitutional rights.\(^2\) Similarly, Davis asserts that in Australia

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\(^1\) *Thomas v Mowbray* (2007) 233 CLR 307, 324 (Gleeson CJ) 363 (Gummow and Crennan JJ), 503-4 (Callinan J), 525 (Heydon J).

there is some evidence that since September 11 a new judicial activism has intervened on the side of liberty. However, he argues that reliance on this ‘more assertive’ judiciary is misplaced because it ignores the possible emergence of a more subservient judicial position. This risk is particularly apparent in relation to the current implied constitutional right to due process, which is tenuous at best. If a restrictive interpretation of the right to due process were adopted by the judiciary in the future, the modified proportionality test would be of no assistance to individuals in enforcing their rights.

Coper is of the opinion that change ‘must come, in a democratic system, from the people, or from their elected representatives, not from an appointed and unaccountable elite’. A more reliable form of protection would therefore be the entrenchment of explicit rights to habeas corpus and due process in the Constitution. Such would first guarantee the right of an individual to challenge their detention in court, and secondly empower the judiciary to invalidate legislation and corresponding executive actions where these rights have been infringed. That being said, it is accepted that a balance needs to be struck between protecting individuals on the one hand, and protecting the community on the other. Accordingly, it is appropriate for the due process clause to be subject to an explicit limitations clause, which would incorporate the modified proportionality test’s requirement that any infringement of the right be the least restrictive means available to serve the defence interest.

To this end, on the issue of who is best placed to protect the right to liberty of the person, the answer must be both the judiciary and the Parliament, rather than either acting independently: the Parliament and the voters in a constitutional referendum to entrench the right and the judiciary to enforce the right. While historically Australians have shown hesitation in referendums seeking amendments to the Constitution, the right to liberty of the person is so fundamental and well-known that, among all potential

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4 Ibid.
constitutional changes, it is arguably the one most likely to succeed at referendum.\textsuperscript{6} Additionally, inserting a relatively uncontroversial change in the \textit{Constitution} relating to that specific right, but one which entrenches a new proportionality test, might lead the High Court to adopt the modified proportionality test in relation to all rights and so be of broader benefit.

When introducing the \textit{National Security Bill 1939} (Cth) in the early years of WWII, Menzies stated that ‘the greatest tragedy that could overcome a country would be for it to fight a successful war in defence of liberty and to lose its own liberty in the process’.\textsuperscript{7} This statement is still highly relevant today, in this period of increased international tension, and justifies the requirement for additional protections.

\textsuperscript{6} Noting that, prior to a referendum taking place, it would be desirable to have bipartisan support to increase the chances of success.
\textsuperscript{7} Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 7 September 1939, 164 (Robert Menzies).
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