

## DETAINING QUESTIONS OR COMPROMISING CONSTITUTIONALITY?: THE *ASIO LEGISLATION AMENDMENT (TERRORISM) ACT 2003 (CTH)*

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### I INTRODUCTION

The extensively amended *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth)* (*ASIO (Terrorism) Act 2003*), having first been introduced into Parliament in March 2002, was eventually passed after a Government ‘compromise’ aimed at achieving Opposition support. The final version of the legislation is remarkable not only because the Commonwealth Parliament has enacted a secret, renewable, incommunicado regime of detention and questioning of persons not suspected of any terrorism offence (for the purposes of the gathering of intelligence), but also because significant questions of constitutionality persist following the June 2003 amendments made to the Bill.

This article commences with a discussion of several contextual matters providing important background for an examination of the Act’s constitutionality. These include a reticence in articulating and defending constitutional issues in the protracted debate around the legislation – significant because the Act overturns familiar civil rights standards and invites constitutional challenge. Fresh constitutional issues arise in relation to the extended nature of the powers given to the Australian Security Intelligence Organisation (‘ASIO’) following the Government’s ‘compromise’ regarding the original Bill, and the influential role of the High Court in assessing the purposive aspect common to the constitutional powers said to support the legislation.

An analysis is then made of the jurisprudence relating to the constitutional heads of power seen as providing the legal foundation for the detention powers enshrined in the *ASIO (Terrorism) Act 2003*. Whilst it is most likely that the *Commonwealth Constitution* does furnish power to support measures for

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interrogative counter-terrorism intelligence-gathering,<sup>1</sup> the detention provisions in the present scheme, and their public justifications, are demonstrated as being open to question in their relationship with the defence, external affairs, implied protective and incidental powers.

The further issue of the legislation's interaction with Chapter III principles, which ordinarily reserve to the judicial process the power to order detention, is then explored. The increased relevance of Chapter III, following key changes in the final version of the legislation, is highlighted, and Commonwealth assertions – that the tests of purpose both in characterising laws and in characterising judicial power and punitive detention should be significantly contracted – are examined. A detailed identification and critique of relevant detention provisions in light of the Chapter III prohibitions concludes the article.

The application of the *ASIO (Terrorism) Act 2003* to non-suspects is as much of practical significance as symbolic and normative. The removal of the need to demonstrate culpability or involvement in terrorism offences as a precondition for the authorisation of a warrant marks a significant transformation in relations between the citizen and the state.<sup>2</sup> It moves substantially towards more authoritarian state characteristics, particularly in the removal or diminution of procedural rights and protections. The breaching of the non-suspect threshold is likely to be exponential and may facilitate further claims to erosions of democratic rights, particularly as the nature of the terrorist threat is unpredictable, unknown, inevitable and indefinite.<sup>3</sup>

## II ESTABLISHING THE CONTEXT: PROBLEMS IN ARTICULATING THE LEGISLATION'S CONSTITUTIONALITY

The Government clearly considers that it has a sufficient head of power for the legislation. While some submissions argue against this proposition, the case can also be made in favour of it.<sup>4</sup>

Protracted debate about the Bill's controversial provisions ironically meant that its constitutionality issues receded into the background. However, poor legislative drafting and inadequately supported assertions by the Attorney-General's Department as to the legislation's constitutionality demand that a more thorough constitutional analysis be undertaken.

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1 With these considerations in mind, the Senate Legal and Constitutional References Committee recommended a model of counter-terrorism interrogative intelligence-gathering closely linked to questioning, rather than questioning in the context of possible extended detention. See Senate Legal and Constitutional References Committee, Parliament of Australia, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (2002) x–xi, 139–41 (Recommendations 4, 5, 6, 7 and 8). See also George Williams, 'Australian Values and the War against Terrorism' (2003) 26 *University of New South Wales Law Journal* 191, 197–8.

2 See Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (2004) 233.

3 See *ibid* 233 for discussion of the fact that the unidentifiable nature of threats encourages an expansive, anticipatory counter-terrorism agenda.

4 Senate Legal and Constitutional References Committee, above n 1, 32.

As became apparent during the Senate Legal and Constitutional References Committee's consideration of the Bill, the Attorney-General's Department's defence of the legislation appeared to be aimed at minimising ventilation and critical exposition of constitutional issues, consisting of broad assertions as to constitutionality.<sup>5</sup> The inadequacy of constitutional advice prompted the pointed censure of the Chair of the Senate Legal and Constitutional References Committee on three separate occasions.<sup>6</sup> A sceptical view of these assertions, of the type made by the former Commonwealth Solicitor-General, Dr Gavan Griffith QC in his Committee evidence, is appropriate:

I do feel the committee has not had the advantage of informed advice as to constitutional issues to which it is entitled. Indeed, it does seem to me that answers to questions have been somewhat evasive in referring to, for example, that the Attorney-General has stated that he believes the legislation is valid or that there is general advice given with respect to validity or that parliamentary counsel has reviewed these matters. It does seem to me ... that there are constitutional difficulties or uncertainties with respect to this legislation and that were it to be passed and invoked, one could expect constitutional challenges in the High Court ... I think that the committee is entitled, from those propounding the legislation, to a more informed opinion on power than is referred to in the evidence ... The evidence is just a general statement, where you can take it from the Attorney that it is valid.<sup>7</sup>

The unsatisfactory articulation of constitutionality might be explained by a risk appraisal approach, as litigation would need to test the constitutionality of the legislation,<sup>8</sup> or by the fact that the Committee had an extremely tight schedule, with only one week to report to the Parliament from its final sitting day.<sup>9</sup> This second consideration was particularly significant because some information sought by the Committee about constitutionality was taken on notice.<sup>10</sup> More generally, the unwillingness to seek and disclose further legal opinions raises disconcerting rule of law issues.

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5 For example, it was remarked that:

the Attorney has actually publicly said that he believes that the constitutional basis of the legislation is sound and that certainly these powers would be supported by the creation of the offences in the ASIO Bill itself and upon the incidental powers of the Commonwealth ... The fact is that the Attorney is satisfied that the Bill is constitutional.

See Evidence to Senate Legal and Constitutional References Committee, Parliament of Australia, Canberra, 12 November 2002, 10–11 (Keith Holland). Presumably this public statement refers to an address by the then Attorney-General Daryl Williams on 2 October 2002 to the Constitutional Law Section of the NSW Bar Association: see Daryl Williams, 'The War against Terrorism, National Security and the Constitution' (2002–03) *Bar News: Journal of the NSW Bar Association* 42.

6 See Evidence to Senate Legal and Constitutional References Committee, above n 5, 19–20 (Nick Bolkus); Evidence to Senate Legal and Constitutional References Committee, Parliament of Australia, Canberra, 13 November 2002, 48 (Nick Bolkus); Evidence to Senate Legal and Constitutional References Committee, Parliament of Australia, Canberra, 26 November 2002, 281 (Nick Bolkus).

7 Evidence to Senate Legal and Constitutional References Committee, Parliament of Australia, Canberra, 22 November 2002, 147, 154 (Gavan Griffith).

8 The lack of automaticity regarding the unconstitutionality of the legislation, and the need for the matter to be decided by a court was explicitly mentioned as a justification in the evidence of an Attorney-General's Department witness: see Evidence to Senate Legal and Constitutional References Committee, Parliament of Australia, Canberra, 26 November 2002, 281 (Richard Glenn).

9 Ibid 282 (Senator Kirk).

10 See Evidence to Senate Legal and Constitutional References Committee, above n 5, 11, 20.

The Senate Legal and Constitutional References Committee was sufficiently concerned about this inadequate response to the constitutionality issue to comment that it received ‘only limited information’,<sup>11</sup> and was ultimately provided with ‘not much greater detail’.<sup>12</sup> Instead, ‘the most useful statement of the possible sources of the Commonwealth’s power’<sup>13</sup> was found in a letter dated 12 June 2002 sent by the Attorney-General’s Department to the Senate Legal and Constitutional Legislation Committee’s separate inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth).<sup>14</sup> The letter cited the creation of terrorist offences in the *Security Legislation Amendment (Terrorism) Act 2002* (Cth),<sup>15</sup> asserting that ‘the creation of these terrorist offences is supported by a number of powers within the Constitution’.<sup>16</sup> However, even this strongest statement of nominated constitutional powers from Commonwealth terrorist offences to underpin the *ASIO (Terrorism) Act 2003* produces some real difficulties.

In justifying the constitutional basis of the detention and questioning regime of the legislation, there is an elision from the incidental aspect of power as it attaches to the nominated constitutional powers supporting the Commonwealth’s anti-terrorism offences to the statutory charter of ASIO itself:

The Attorney has actually publicly said that he believes that the constitutional basis of this legislation is sound and that certainly these powers would be supported by the creation of the offences in the ASIO Bill itself and upon the incidental powers of the Commonwealth.<sup>17</sup>

Significantly, the creation of criminal offences in relation to subject matter supported by a constitutional power is ordinarily *itself* characterised as an act incidental to the enabling constitutional power.<sup>18</sup> The above rationalisation therefore describes an incidental matter extended from a constitutional power to a quite separate matter, which is then also asserted to be incidental, or more confusingly, represents an incidental matter constructed upon an incidental matter. A different way of looking at the same issue is to assert that the purposive nature of the nominated constitutional supporting powers, such as the executive and defence powers, must have been previously understated in scope. Just how

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11 Senate Legal and Constitutional References Committee, above n 1, 23.

12 Evidence to Senate Legal and Constitutional References Committee, above n 8, 281 (Nick Bolkus).

13 Senate Legal and Constitutional References Committee, above n 1, 24.

14 Ibid.

15 Ibid 24.

16 Ibid. The powers nominated were the s 51(vi) defence power, the s 51(xxix) external affairs power and the implied protective power.

17 Evidence to Senate Legal and Constitutional References Committee, above n 5, 10.

18 See the analysis in *Nationwide News v Wills* (1992) 177 CLR 1, 30–1, 34 (Mason CJ), 101, 103–4 (McHugh J). Cf the issues of multiple characterisation in the context of the broadly interpreted non-purposive s 51(xx) corporations power in *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 187–9 (Gibbs CJ), 215 (Wilson J). See also Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2001) 55, 75; Peter Hanks and Deborah Cass, *Australian Constitutional Law: Materials and Commentary* (6<sup>th</sup> ed, 1999) 785.

elastic these applications are in relation to purposes satisfying an applicable proportionality test is not properly substantiated.<sup>19</sup>

The constitutionality of the detention and questioning regime relies and builds upon this analogy with Commonwealth criminal offences.<sup>20</sup> The fallacy of this argument lies in the fact that the detention sanctioned in the *ASIO (Terrorism) Act 2003* is not for criminal investigation of the nominated offences (and thus incidental), but is used for the purpose of intelligence-gathering. Indeed, in other Attorney-General's Department evidence to the Committee, it was strongly asserted that the reason for devising the unique Australian custodial detention and questioning regime for non-suspects was to enhance preventative intelligence-gathering capabilities.<sup>21</sup> A sharp contradistinction was made with the supposed, and sometimes erroneously identified, criminal law offence-based models of the United Kingdom and Canada.<sup>22</sup> The relationship of the intelligence-gathering model of the *ASIO (Terrorism) Act 2003* to the criminal law is therefore invoked selectively and inconsistently. On the one hand, it is used to rationalise the incommunicado detention of non-suspects exceeding anti-terrorism intelligence-gathering methods in comparable common law jurisdictions, but on the other hand, to assert constitutionality on the basis of an incidental link to a claimed head of constitutional power.

The reference of legislative power from the States<sup>23</sup> does not remove the need for a fuller appraisal of the legislation's constitutionality. Any supposed claim for

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19 A discussion of the incidental power as a claimed basis for constitutionality of the legislation is given below.

20 'In evidence, the Attorney-General's Department indicated that, in accordance with the Attorney-General's view, the questioning and detention powers would be supported by the creation of terrorism offences in the *Criminal Code* [and] the creation of offences in the ASIO Bill': Senate Legal and Constitutional References Committee, above n 1, 24.

21 Evidence to Senate Legal and Constitutional References Committee, above n 5, 3 (Keith Holland).

22 Ibid:

The major cornerstones of consideration were the obvious culprits – the United Kingdom, the United States, Canada and New Zealand. The legislation from those jurisdictions was in fact considered in the drafting of this legislation, but there were two very distinct differences in some of that legislation. One was that most of that legislation is law enforcement based. It is drafted in the context of agencies engaging in investigations, finding somebody who had committed an offence, prosecuting them for that offence and ultimately punishing them. So, as I have said, given that we took the view that this was about intelligence collection and not law enforcement ... we then went outside the parameters or looked outside the square to see how ASIO as an agency might deal with those matters.

In fact, Part II.1 of the Canadian *Criminal Code* provides an investigative hearing model of terrorism matters which does not proceed from a criminal law model: see Evidence to Senate Legal and Constitutional References Committee, Parliament of Australia, Canberra, 14 November 2002, 90–104 (Greg Carne), and submissions 24 and 24A to the Committee.

23 See *Terrorism (Commonwealth Powers) Act 2002* (NSW) s 4; *Terrorism (Commonwealth Powers) Act 2003* (Vic) s 4; *Terrorism (Commonwealth Powers) Act 2003* (Qld) s 4; *Terrorism (Commonwealth Powers) Act 2002* (SA) s 4; *Terrorism (Commonwealth Powers) Act 2002* (WA) s 4; *Terrorism (Commonwealth Powers) Act 2002* (Tas). These State Acts constitute a s 51(xxxvii) reference of State legislative power to support, by re-enactment, the provisions of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) by the *Criminal Code Amendment (Terrorism) Bill 2002* (Cth). For a general analysis of the s 51(xxxvii) reference power, see Justice Robert French, 'The Referral of State Powers' (2003) 31 *University of Western Australia Law Review* 19.

the constitutionality of legislation supported by this reference of powers would of course be subject to the implied prohibitions of Chapter III of the *Constitution*.

Appraisals of the constitutionality of the *ASIO (Terrorism) Act 2003* are vital because the legislation overturns the significant democratic principle of the right to freely go about one's business in society, save in circumstances of suspected wrongdoing on reasonable grounds. This aspect of the legislation highlights emerging issues of a broader institutional nature in Australia: the qualitative shift towards a more executive-determined and executive-contingent conception of democracy.<sup>24</sup> This shift is confirmed by the legislation's application to non-suspects in a manner at odds with the scope of comparable legislation in the United Kingdom, Canada and New Zealand.<sup>25</sup> In each of these jurisdictions bills of rights have moderated the contours of legislative responses to terrorism. The significant divergence in the Australian legislation from these models highlights the shortcomings in parliamentary protection of human rights.<sup>26</sup>

The likelihood of a constitutional challenge by a person detained and questioned under the *ASIO (Terrorism) Act 2003* cannot be discounted. The most likely situation for this to arise is under s 34E(3) of the Act, which requires the prescribed authority to advise the detainee at least once in every 24 hour period that they may seek from a federal court a remedy relating to the warrant or to their treatment in connection with the warrant. This invokes the jurisdiction of the Federal Court under ss 19(2) and 23 of the *Federal Court of Australia Act 1976* (Cth) and s 39B(1) of the *Judiciary Act 1903* (Cth), or the original jurisdiction of the High Court under s 75(v) of the *Constitution* and s 38(e) of the *Judiciary Act 1903* (Cth). A detainee could seek a writ against the Director-General of ASIO and/or the Prescribed Authority.<sup>27</sup> Exposition of s 75(v) of the *Constitution* has confirmed that the jurisdiction of the High Court to grant relief under s 75(v) cannot be removed by or under a law of the Parliament when a jurisdictional error, namely a failure to exercise jurisdiction or an excess of jurisdiction, is made by an officer of the Commonwealth.<sup>28</sup>

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24 The shift is consistent with other developments eroding traditional and conservative assumptions underpinning the democratic character of the Australian polity and its institutions: see generally Robert Manne (ed), *The Howard Years* (2004) especially 94–115; Margo Kingston, *Not Happy John! Defending Our Democracy* (2004); Andrew Wilkie, *Axis of Deceit* (2004); Tony Kevin, *Certain Maritime Incident – The Sinking of the SIEV X* (2004), especially 29–30.

25 See *Terrorism Act 2000* (UK) as amended by the *Anti-Terrorism, Crime and Security Act 2001* (UK); *Anti-Terrorism Act 2001* (Canada) Act No 41 of 2001; *Terrorism Suppression Act 2002* (NZ). See also Williams, above n 1, 197 and George Williams, 'National Security, Terrorism and Bills of Rights' (2003) 9 *Australian Journal of Human Rights* 263, 269.

26 Or as George Williams puts it, 'any check upon the power of Parliament or Government to abrogate human rights derives from political debate and the goodwill of our political leadership': George Williams, 'National Security, Terrorism and Bills of Rights' above n 25, 266.

27 The constitutional issue of a right of access to the Courts in the context of an obligation to answer questions under the *Legislation Amendment (Terrorism) Act 2003* (Cth) was briefly canvassed in the Committee hearings: Evidence to Senate Legal and Constitutional References Committee, Parliament of Australia, Canberra, 13 November 2002, 47–8.

28 *Plaintiff S157/2002 v Commonwealth* (2003) 195 ALR 24, 47, 50 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). The joint judgment observed that constitutional writs are available only for jurisdictional error.

### III ESTABLISHING THE CONTEXT: IDENTIFYING KEY CONSTITUTIONAL ISSUES

The major constitutional issues warranting exposition are, first, the scope of the constitutional heads of power which have a purposive nature or a purposive element, upon which primary reliance is placed to support the legislation. Secondly, it is important to consider Chapter III restrictions upon an administrative capacity to detain Australian citizens not suspected of any criminal offence (other than in a relatively limited set of identified and exceptional circumstances). The validity of assigning to judges the role of *persona designata* as the issuing authority for warrants, and of State judges acting as the prescribed authority during detention and questioning,<sup>29</sup> is a question beyond the limits of this paper. Prohibitions on primary and secondary disclosures of information, enhanced by the passage of the *ASIO Legislation Amendment Act 2003* (Cth),<sup>30</sup> which may impinge upon the implied freedom of political communication,<sup>31</sup> is a matter likewise beyond the scope of this article.

Constitutional issues surrounding the legality of detention have additional importance due to the enhancements of power arising from the Government's 'Compromise for the Sake of National Security',<sup>32</sup> which secured Opposition support for the Bill's passage. Of particular interest is the system of renewable warrants of up to two days duration for detention and questioning which was replaced by a single warrant for detention of up to a week, with a total of up to 24 hours of questioning in three eight-hour blocks.<sup>33</sup> The constitutional issues are now located in a significantly extended regime which obviates the need to seek renewal of a detention and questioning warrant every 48 hours from the issuing

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29 These roles are possibly incompatible with the personal capacity exception to judicial power articulated by members of the High Court in *Grollo v Palmer* (1995) 184 CLR 348 and subsequently in *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1. The unprecedented detention of non-suspects for intelligence-gathering purposes traverses completely new ground, and potentially engages larger Chapter III issues than the impact of the *Telecommunications (Interception) Act 1979* (Cth) in *Grollo v Palmer*, especially as serving State or Territory Supreme or District Court judges can, under *Australian Security Intelligence Organisation Act 1979* (Cth) s 34B(2) be appointed as prescribed authorities, drawn from courts upon which Federal judicial power can be conferred under the *Constitution* s 77(iii).

30 This Act includes extensive provisions prohibiting the disclosure of information relating to warrants and questioning both before the expiry of a warrant (see *Australian Security Intelligence Organisation Act 1979* (Cth) s 34VAA(1)(a)–(f)) and in the two years after the expiry of the warrant (see *Australian Security Intelligence Organisation Act 1979* (Cth) s 34VAA(2)(a)–(f)). These disclosure offences prohibit primary and secondary disclosures of a range of information.

31 *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) s 34VAA(12) acknowledges this by stating: 'This section does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication'.

32 Commonwealth Attorney-General, 'Compromise for the Sake of National Security' (Press release, 11 June 2003) with attachment 'Office of the Attorney-General, Australian Security Intelligence Organisation Legislation (Amendment) Terrorism Bill 2002 Government Proposals'.

33 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34HB.

authority.<sup>34</sup> The approval of further questioning is now devolved to the prescribed authority, who must be satisfied that there are reasonable grounds to believe that continuing questioning would substantially assist in the collection of intelligence and that persons conducting the questioning are doing so properly and without delay.<sup>35</sup>

The deletion of the 48 hour judicial warrant process will thus encourage maximum questioning flexibility over a seven day detention, whilst reducing any direct, necessary linkage between detention and questioning. Such disconnection increases the possibility of preventative and punitive detention in a constitutional sense,<sup>36</sup> more squarely raising questions about constitutional purpose.

#### IV ESTABLISHING THE CONTEXT: THE RELEVANCE OF PURPOSE AND PROPORTIONALITY IN CONSTITUTIONAL POWERS

The Attorney-General's Department submissions to the Senate Legal and Constitutional References Committee asserted that several powers constitutionally supported the legislation and its questioning and detention provisions.<sup>37</sup> The most likely sources of constitutional power to underpin the detention and questioning provisions in the *ASIO (Terrorism) Act 2003* are the s 51(vi) defence power, the s 51(xxiv) external affairs power, the s 61 executive power together with the s 51(xxxiv) express incidental power, and the implied power to protect the polity.<sup>38</sup> The implied power to protect the polity is properly

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34 A judge or federal magistrate – who has the independence of security of tenure under the *Constitution* and is at arm's length from the physical supervision of questioning during detention.

35 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34HB(4)(a).

36 A similar disconnection, in that the detention was not ancillary to or incidental to a constitutional head of power and therefore potentially offensive to Chapter III of the *Constitution* as being punitive in substance, was highlighted by Black CJ, Sundberg and Weinberg JJ in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 197 ALR 241, 256–8.

37 Senate Legal and Constitutional References Committee, above n 1, 26–7 (that the second limb of the defence power 'the control of the forces to execute and maintain the laws of the Commonwealth' extended to deal with a range of internal security threats, including terrorism); 27 (that the external affairs power supported the legislation and that Australia's international law obligation to implement UN Security Council Resolution 1373 provided a basis of power); 29 (that the legislation was supported by the incidental powers implied within each of the s 51 powers, for example, to support federal criminal law); 29 (that the legislation was supported by the implied power of self protection. This last ground did not given specific endorsement by the Attorney-General's Department, but was raised in Evidence to Senate Legal and Constitutional References Committee, above n 5, 11 (Keith Holland)).

38 See *Burns v Ransley* (1949) 79 CLR 101, 116 (Dixon J); *R v Sharkey* (1949) 79 CLR 121, 148 (Dixon J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187, 189 (Dixon J), 259–60 (Fullagar J). An earlier examination of constitutional powers able to support Commonwealth counter-terrorism measures also discussed the 'major sources of the Commonwealth government's legislative power to deal with terrorism': Commonwealth, Royal Commission into Protective Security, *Protective Security Review Report* (1979) 27, which described these powers as



considered alongside the s 61 executive power,<sup>39</sup> following relevant High Court cases.<sup>40</sup>

A critical feature of the powers claimed to constitutionally support the Act's detention provisions is that they are purposive in nature or have a purposive aspect.<sup>41</sup> The High Court applies a proportionality test to the exercise of such powers in order to assess the constitutionality of the relevant law. The test asks whether the legislation in question is reasonably capable of being considered appropriate and adapted to an identified constitutional purpose under the relevant head of power.<sup>42</sup>

This process of characterisation of such laws allows the High Court a more influential role in assessing constitutionality, in contrast to the test of sufficient connection applied to non-purposive constitutional powers. The High Court and individual judges have on occasion found that laws based on purposive powers may fail the proportionality test<sup>43</sup> and are thus unconstitutional. In doing so, the Court states that the legislative choice selected by Parliament does not fall within the range of available choices reasonably capable of being considered appropriate and adapted to the constitutional purpose. The reliance on these purposive powers to support the *ASIO (Terrorism) Act 2003* raises the question of whether various aspects of the detention and questioning powers might fail to satisfy the proportionality test and therefore be unconstitutional. With this in mind, the specific heads of power will now be considered.

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(a) its power to protect its own existence and the unhindered play of its legitimate activities; (b) the power inherent in the Commonwealth government's status as an international state (the 'inherent powers of nationhood'); (c) the external affairs power; (d) the territories power; (e) the power to control the forces to execute and maintain the laws of the Commonwealth; and (f) the duty of the Commonwealth to protect the States against domestic violence.

39 This issue has been identified elsewhere. See, eg, *Protective Security Review Report*, above n 38:

Indeed, the Commonwealth's power to deal with terrorism directed against it, hindering its legitimate activities, or attacking its territories or assets has the same basis as in the case of subversion. That basis may be variously ascribed to the inherent power of self protection ... to the Commonwealth's executive power, to the incidental power or to a combination of these powers.

40 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1; *Victoria v Commonwealth* (1975) 134 CLR 338; *Davis v Commonwealth* (1988) 166 CLR 79.

41 The purpose of the relevant law 'must be collected from the instrument in question, the facts to which it applies and the circumstances which called it forth': *Stenhouse v Coleman* (1944) 69 CLR 457, 471 (Dixon J) in the context of discussing the s 51(vi) defence power.

42 *Victoria v Commonwealth* (1996) 187 CLR 416, 488 ('*Industrial Relations Act Case*') (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

43 See *Davis v Commonwealth* (1988) 166 CLR 79; *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Nationwide News v Wills* (1992) 177 CLR 1, 26–7, 33 (Mason CJ), 100–4 (McHugh J); *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'), 266–7 (Deane J), 236–8 (Brennan J); *Richardson v Forestry Commission* (1988) 164 CLR 261, 315–16 (Deane J), 347 (Gaudron J).

## V SECTION 51(VI) DEFENCE POWER: CONSTITUTIONAL ISSUES

The s 51(vi) defence power, considered as a major source of power in support of the legislation,<sup>44</sup> presents some distinct constitutional issues. The purposive character of the defence power is such that a law may be found to be valid under the power even though it does not deal specifically with a defence topic, if it may be reasonably considered to be conducive to a defence purpose or object.<sup>45</sup> Accordingly, laws may be within power if they relate to a secondary aspect of defence supportive of the main conception of defence. In wartime, the High Court has upheld the validity of detention measures as essential to the defence of the Commonwealth.<sup>46</sup> However, in contrast to the present legislation, the detention powers in the relevant wartime cases are all based upon an assessment of the direct risk of allowing a named person to remain at large in the community. In other words, while those laws had an explicit preventative purpose, the *ASIO (Terrorism) Act 2003* has the secondary purpose of coercive and speculative intelligence-gathering from persons not posing any risk to the security and defence of the Commonwealth, arising in circumstances well short of full-scale war hostilities.

It is probable that the Attorney-General's assertions that the subject matter of the legislation – international terrorism – involves a war,<sup>47</sup> is intended to place the legislative measures within an expanded notion of the defence power. Whilst the validity of a law or an act of the Executive branch done under a law cannot depend upon the view of the legislature or executive officer that the conditions for validity have been satisfied,<sup>48</sup> consistent repetition of the vocabulary of war might well contribute to the construction of notorious facts of which judicial notice may be taken,<sup>49</sup> or render facts more readily susceptible to judicial

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44 See Senate Legal and Constitutional References Committee, above n 1, 25–6.

45 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (3<sup>rd</sup> ed, 2002) 736.

46 See *Lloyd v Wallach* (1915) 20 CLR 299: an order for detention of the appellant in military custody under reg 55(1) of the *War Precautions Regulations 1915* (Cth), which provided that '[w]here the Minister has reason to believe that any naturalised person is disaffected or disloyal, he may, by warrant under his hand, order him to be detained in military custody'; *Little v Commonwealth* (1947) 75 CLR 94 and *Ex parte Walsh* [1942] ALR 359: orders for detention under reg 26(1)(c) of the *National Security (General) Regulations 1939* (Cth), which provided that the Minister might, if satisfied that it is necessary to prevent a particular person acting in any manner prejudicial to the public safety or defence of the Commonwealth, make an order directing that he be detained.

47 See, eg, Attorney-General Philip Ruddock, 'The Commonwealth Response to September 11: The Rule of Law and National Security' (Paper presented at the Gilbert + Tobin Centre of Public Law – National Forum: The War on Terrorism and the Rule Of Law, Sydney, 10 November 2003).

48 A central characteristic of the High Court's decision in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 was that the executive and the legislature cannot recite themselves into power, that is, the scope of the constitutional power is a question for resolution by the Court.

49 Blackshield and Williams, above n 45, 736:

The most obvious facts are external to Australia, but internal conditions are also important. Most of these are political, international, economic and social in nature and are likely to be notorious as matters of common knowledge. They are thus the kind of facts of which courts take 'judicial notice', that is, facts that judges can draw from their personal knowledge without requiring evidentiary proof.

acceptance as being reasonably capable of achieving a defence objective. The invocation of warlike language encourages the sweeping aside of legal norms and niceties<sup>50</sup> and provides justification for exceptional measures as practical legislative expressions of a quest for survival of the state.<sup>51</sup>

The purposive nature of the defence power means that the secondary aspect of the power<sup>52</sup> is elastic in nature – its scope expanding and contracting according to factual circumstances. The legislation’s sunset clause<sup>53</sup> raises the possibility that external circumstances, *prima facie* supporting the provisions at their enactment, may not be of the same order at the expiration of the legislation after three years and therefore cannot provide a constitutional basis of support under the defence power.

The present context of these external factual circumstances is one of peace in a conventional sense, but with an identified international terrorist threat. A number of reference points emerge from cases dealing with the scope of the defence power in peacetime. In *Australian Communist Party v Commonwealth*<sup>54</sup> (*‘Communist Party Case’*), the external factual circumstances were insufficient to provide the necessary connection between the s 51(vi) defence power and the legislation’s provisions.<sup>55</sup> The relevant scope of the power in those circumstances was approached ‘substantially upon the same basis as if a state of peace

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50 ‘When it comes to the war against terrorism, many of the subtleties usually associated with the fair and even application of the rule of law are not neatly applied’: Ruddock, above n 47.

51 ‘Through this process, the discourse of terrorism feeds into an argument that anything is acceptable in countering terrorism’: Jenny Hocking, ‘Counter-Terrorism and the Criminalisation of Politics: Australia’s New Security Powers of Detention, Proscription and Control’ (2003) 49 *Australian Journal of Politics and History* 355, 359. See also Latham CJ’s dissenting judgment quoting Oliver Cromwell’s dictum that ‘[b]eing comes before well being’, in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 141 and in survivalist language eerily familiar today, ‘[t]he Parliament of the Commonwealth and the other constitutional organs of the Commonwealth cannot perform their functions unless the people of the Commonwealth are preserved in safety and security’: at 141–2.

52 A phrase used by Fullagar J in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 254 to identify power extending ‘to an infinite variety of matters which could not be regarded in the normal conditions of national life as having any connection with defence’.

53 See *Australian Security Intelligence Organisation Act 1979* (Cth) s 34Y: ‘This Division ceases to have effect 3 years after it commences’ applying to Part III, Division 3 of the *Australian Security Intelligence Organisation Act 1979* (Cth).

54 (1951) 83 CLR 1. The circumstances surrounding this case are partly analogous to those of the present international terrorist threat, including the commitment of Australian military forces overseas in Afghanistan and Iraq. As Dixon J observed in the *Communist Party Case* (1951) 83 CLR 1, 196:

[a]t the date of the royal assent Australian forces were involved in the hostilities in Korea, but the country was not of course upon a war footing, and though the hostilities were treated as involving the country in a contribution of force, the situation bore little relation to one in which the application of the defence power expands because the Executive Government has become responsible for the conduct of a war.

55 See George Williams, ‘Reading the Judicial Mind: Appellate Argument in the Communist Party Case’ (1993) 15 *Sydney Law Review* 3, 23; Justice Michael Kirby, ‘H V Evatt, the Anti-Communist Referendum and Liberty in Australia’ (1991) 7 *Australian Bar Review* 93, 104; George Winterton, ‘The Significance of the Communist Party Case’ (1992) 18 *Melbourne University Law Review* 630, 647; Roger Douglas, ‘A Smallish Blow for Liberty? The Significance of the Communist Party Case’ (2001) 27 *Monash University Law Review* 253, 279–80.

ostensibly existed'.<sup>56</sup> Significantly, Fullagar J observed that in relation to the secondary aspect of the defence power that it:

has so far only been invoked and expounded in connection with an actual state of war in which Australia has been involved. It has hitherto, I think, been treated in the cases as coming into existence upon the commencement or immediate apprehension of war and continuing during war and the period necessary for post-war readjustment. In a world of uncertainty and rapidly changing international situations it may well be held to arise in some degree upon circumstances which fall short of an immediate apprehension of war. In its secondary aspect the power extends to an infinite variety of matters which could not be regarded in the normal conditions of national life as having any connection with defence ... I am not prepared to hold that nothing short of war or an immediate threat of war can bring into play a fully extended defence power.<sup>57</sup>

Whilst this description of the secondary aspect of the defence power is potentially adaptable in present circumstances to support domestic legislative responses to terrorism, 'to a large extent this depends on whether the current international situation amounts to an external threat to Australia's defence'.<sup>58</sup> The question of whether such a threat arises so as to supply a connection of the legislative measures to the defence power (as a step proportionate to dealing with the threat or emergency) is a matter for judicial determination based upon judicial notice<sup>59</sup> (it being clear that legislative and executive assertions as to a state of events as a basis for invoking the power are constitutionally impermissible).<sup>60</sup>

The involuntary detention for intelligence-gathering of persons who pose no direct risk to the security and defence of the Commonwealth, and in circumstances falling short of war hostilities, points to inadequate constitutional justification for invoking an ancillary aspect of the expanded s 51(vi) defence power. The war-time detention cases<sup>61</sup> involving executive ability to detain pursuant to the defence power fail in this sense to readily support the present legislation.

More substantial difficulties arise from the claim that the second limb of the defence power<sup>62</sup> supplies an alternative basis of constitutional support for the legislation. The Senate Legal and Constitutional References Committee report states that the Attorney-General's Department 'may be taken to have argued

56 *Communist Party Case* (1951) 83 CLR 1, 196 (Dixon J).

57 *Ibid* 254, 268.

58 Senate Legal and Constitutional References Committee, above n 1, 26.

59 See also Senate Legal and Constitutional References Committee, *ibid.* In the *Communist Party Case* (1951) 83 CLR 1, 267, Fullagar J pointedly observed:

The question whether the Act can be supported as an exercise of the defence aspect must, in my opinion, depend entirely on judicial notice. The coming into existence of this secondary aspect has never been treated as depending on anything else. Nor could it, in my opinion, be treated as depending on anything else. It is only when the existence of the secondary aspect has been established by judicial notice of an emergency that evidence has ever been admitted to connect the enactment in question with power.

60 *Communist Party Case* (1951) 83 CLR 1, 199, 201–2 (Dixon J), 258 (Fullagar J).

61 *Lloyd v Wallach* (1915) 20 CLR 299; *Ex Parte Walsh* [1942] ALR 359; *Little v Commonwealth* (1947) 75 CLR 94, as discussed above n 46.

62 The second limb of s 51(vi) is 'the control of the forces to execute and maintain the laws of the Commonwealth'.

primarily in favour of this second part of s 51(vi) ... [the Attorney-General's Department] said there were "cogent arguments" to support the use of the second limb "to deal with a range of internal security threats, including terrorism".<sup>63</sup> Such arguments, however, are based upon supporting reference material<sup>64</sup> that has been taken out of context. The language of the second limb contemplates use of naval and military forces of the Commonwealth to execute the laws of the Commonwealth, and the *Protective Security Review Report's* discussion of responses to terrorism under the defence power is discussed with reference to those forces.<sup>65</sup> ASIO, the subject of the empowering legislation, is not constituted as part of those military forces, and the likelihood that an incidental aspect of the defence power will supply the necessary connection is remote.

## VI SECTION 51(XXIX) EXTERNAL AFFAIRS POWER: CONSTITUTIONAL ISSUES

The Attorney-General's Department also considered that the *ASIO (Terrorism) Act 2003* was supported by the external affairs power.<sup>66</sup> The aspects of this power that might support the detention and questioning provisions of the legislation are those relating to the implementation of treaties and to the response to matters of international concern. The focus in both of these applications is the implementation of international obligations.

### A Treaty Implementation

It is important to identify the nature of 'purpose' in the external affairs power. Justice Brennan in *Cunliffe v Commonwealth*<sup>67</sup> considered that the external

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63 Senate Legal and Constitutional References Committee, above n 1, 26–7. The Report however comments that in relation to questions on notice, the Attorney-General's department acknowledged that '[t]he limits of the defence power in relation to internal or domestic threats to security are not entirely clear'. It is to be noted that Dixon and Fullagar JJ in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 194, 259 considered that the s 51(vi) defence power was applicable only to defence against external forces; see also Winterton, above n 55, 649.

64 Reference was made to the *Protective Security Review Report*, above n 38, 32, conducted in response to concerns arising from the bomb incident at the Sydney Hilton Hotel on 13 February 1978, including the security implications arising from that event, and especially the call out of the Defence Force to protect the travel of the heads of government to Bowral. The Report stated that the second limb of the defence power provided a constitutional basis for dealing 'with a range of internal security threats, including terrorism' and that it 'may be an important source of legislative power for the Commonwealth in law and order matters generally, and countering terrorism in particular': see *Protective Security Review Report*, above n 38, ch 1 'Introduction: Terms of Reference', 1.

65 The report clearly states: 'Which forces are referred to is not clear, but at least the power extends to the defence forces': *Protective Security Review Report*, above n 38, 32. Given that the *Constitution* ss 68 and 114 refer to naval and military forces, whilst ss 51(vi) and 69 refer to naval and military defence, it is reasonable to assume that the second limb of s 51(vi) should be read in conformity with those sections, confining 'forces' to military and naval forces. See also *Protective Security Review*, *ibid*, ch10 'The Defence Force and Civilian Security', which deals with military aid to the civilian authority.

66 See Evidence to Senate Legal and Constitutional References Committee, above n 5, 11 (Keith Holland), and Senate Legal and Constitutional References Committee, above n 1, 24, 27.

67 (1994) 182 CLR 272, 322.

affairs power has a purposive aspect. More specifically, Dawson J in *Richardson v Forestry Commission*<sup>68</sup> observed that:

The power to make laws with respect to external affairs contains no expression of purpose and in that respect it is like most of the other powers contained in s 51 of the Constitution. It is not a power to make laws for the purpose of cementing international relations or achieving international goodwill or even for implementing international treaties. The implementation of treaties falls within the power because it is a subject matter covered by the expression 'external affairs'. And the purpose of legislation which purports to implement a treaty is considered not to see whether it answers a requirement of purpose to be found in the head of power itself, but to see whether the legislation operates in fulfilment of the treaty and upon a subject which is an aspect of external affairs.

In *Victoria v Commonwealth*,<sup>69</sup> ('*Industrial Relations Act Case*') the above statement led Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ to conclude that the basic question is 'whether the law selects means which are reasonably capable of being considered appropriate and adapted to achieving the purpose or object of giving effect to the treaty, so that the law is one upon a subject which is an aspect of external affairs'.

A consideration of treaty implementation arises in relation to the *ASIO (Terrorism) Act 2003* in the context of Australia's obligations as a member of the United Nations ('UN') and as a party to the *Charter of the United Nations*.<sup>70</sup> Article 25 of the *Charter of the United Nations* creates a binding obligation upon members to accept and carry out the decisions of the Security Council in accordance with the Charter.

Security Council Resolution 1373 of 2001, adopted in the aftermath of the September 11 2001 attacks, creates binding international law obligations upon Australia to undertake certain measures to combat and prevent terrorist activity. Security Council Resolution 1373 also establishes the Counter-Terrorism Committee<sup>71</sup> as a committee of the Security Council to monitor implementation of the resolution. The Counter-Terrorism Committee agreed that states should first focus on certain aspects of the resolution, particularly implementation of counter-terrorism legislative measures.<sup>72</sup>

Security Council Resolution 1373 was identified by the Attorney-General's Department as the basis for recognising the external affairs power as supporting the *ASIO (Terrorism) Act 2003*.<sup>73</sup> However, in four reports by Australia submitted to the Counter-Terrorism Committee pursuant to para 6 of Resolution 1373, mention is only made of the detention and questioning legislation (in a

68 (1988) 164 CLR 261, 326.

69 (1996) 187 CLR 416, 487.

70 Cf Nicole Rogers and Aidan Ricketts, 'Fear of Freedom: Anti-Terrorism Laws and the Challenge to Australian Democracy' [2002] *Singapore Journal of Legal Studies* 149, 165.

71 *Resolution on International Cooperation to Combat Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1373, UN SCOR, 4385<sup>th</sup> mtg, [6], UN Doc S/Res/1372 (2001).

72 States should focus upon '[h]aving legislation in place covering all aspects of 1373, and a process in hand for becoming party as soon as possible to the 12 international conventions and protocols relating to terrorism; Having in place effective executive machinery for preventing and suppressing terrorist financing': Counter Terrorism Committee, *States' Reports* <<http://www.un.org/Docs/sc/committees/1373/reports.html>> at 15 November 2004.

73 See Senate Legal and Constitutional References Committee, above n 1, 27.

much narrower version, which was contemplated before the enactment of the legislation)<sup>74</sup> in the first of the reports. Moreover, Australia's fourth report,<sup>75</sup> submitted on 18 December 2003, over 5 months after the enactment of the *ASIO (Terrorism) Act 2003*, makes no reference to its passage and implementation as a measure pursued in compliance with Security Council Resolution 1373.

Security Council Resolution 1373 comprises a range of specific obligations<sup>76</sup> and exhortations to action in countering terrorism.<sup>77</sup> The difference between specific obligations and exhortations is significant because it affects the nature of the international law obligation under art 25 of the *Charter of the United Nations*. This distinction, has been formally made elsewhere:

While it does not follow from the mere use of the term 'decision' as distinct from the term 'recommendation' that it is supposed to be a binding decision according to the intentions of the SC [Security Council], it has to be recognised on the other hand that the very fact that the Charter does indeed make a distinction between 'decisions' and 'recommendations' for more than semantic reasons indicates that the SC may take either binding decisions or non-binding recommendations ... it may therefore be stated that decisions of the SC which, according to their wording, are clearly recognizable as recommendations and which, according to the Charter

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74 The power of detention referred to is 'for up to 48 hours without legal representation in very serious cases where such a step is necessary to prevent a terrorist attack': *Enclosure: Report of Australia to the Counter-Terrorism Committee of the United Nations Security Council Pursuant to Paragraph 6 of the Security Council Resolution 1373 (2001) of 28 September 2001*, 10, UN Doc S/2001/1247 (2001).

75 *Letter dated 18 December 2003 from the Permanent Representative of Australia to the United Nations addressed to the Chairman of the Counter-Terrorism Committee and Enclosure: Fourth Report to the UN Counter-Terrorism Committee*, Annex, UN Doc S/2003/1204 (2003).

76 The obligations are signified by the phrase 'Decides that all States shall', pursuant to acting under Chapter VII of the *Charter of the United Nations*: see paras 1 and 2 of Security Council Resolution 1373. Such obligations include, inter alia, the prevention and suppression of the financing of terrorist acts; criminalising the collection of funds directed towards terrorist acts; freezing without delay funds and other financial assets or economic resources of persons who commit or facilitate terrorist acts; refraining from providing active or passive support to entities or persons involved in terrorist acts; taking necessary steps to prevent the commission of terrorist acts; denying safe haven to those who finance, plan, support or commit terrorist acts; ensuring that any person who participates in the financing, planning, preparation or perpetration of terrorist acts is brought to justice and ensuring that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws; and affording other states the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts.

77 These exhortations are signified by the phrase 'Calls upon all States to', at the commencement of para 3 of Security Council Resolution 1373. These matters include, inter alia, calls upon states to intensify and accelerate the exchange of operational information; exchange information in accordance with international and domestic law and cooperate by administrative, judicial and bilateral and multilateral arrangements to prevent and suppress terrorist attacks; become parties to the relevant international conventions and protocols relating to terrorism; the taking of appropriate measures before granting refugee status to ensure that asylum-seekers have not planned, facilitated or participated in the commission of terrorist acts; ensure in conformity with international law that refugee status is not abused by perpetrators, organisers or facilitators of terrorist acts.

provisions on which they are based, cannot be expected to be regarded as binding, are exempt from the binding force of decisions of the SC under Art 25. At the same time, this conclusion makes it positively clear that decisions taken under Chapter VII which are not couched in terms of a recommendation ... are ... binding under Art 25.<sup>78</sup>

Of the specific obligations set out in Resolution 1373, only one is directly identifiable with the detention and questioning functions of the legislation. This is the obligation to take ‘necessary steps to prevent the commission of terrorist acts, including by provision of early warning of other states by exchange of information’.<sup>79</sup> In relation to the exhortations, only the following paragraphs: ‘Find ways of intensifying and accelerating the exchange of operational information ...’;<sup>80</sup> and ‘Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts’,<sup>81</sup> are directly identifiable with the legislation’s detention and questioning powers. The High Court considers it important that the treaty obligation be clearly identifiable.<sup>82</sup> Accordingly, some significant questions arise from the claim that the external affairs power supports the legislation.

Furthermore, it is not at all clear from the above obligations and exhortations under Security Council Resolution 1373 that an application of the relevant purposive test would be satisfied, that is, that the law selects means which are reasonably capable of being considered appropriate and adapted to achieving the purpose of giving effect to the international obligation, so that the legislation is upon a subject which is an aspect of external affairs.

The fact that the legislative measures must be ‘*necessary* steps to prevent the commission of terrorist acts’<sup>83</sup> increases the threshold in any assessment of proportionality, and highlights the unprecedented nature of the detention measures in the *ASIO (Terrorism) Act 2003* as they relate to non-suspects. This reinforces the principle that there must be a degree of specificity in the legislative measures.<sup>84</sup>

Whilst the High Court has moved away from the approach of Evatt and McTiernan JJ in *R v Burgess; Ex parte Henry*,<sup>85</sup> several High Court external

78 Jost Delbruck, ‘Article 25’ in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2<sup>nd</sup> ed, 2002) vol 1, 452, 457–8. See also Antonio Cassese, *International Law* (2001) 278.

79 Security Council Resolution 1373, above n 71, [2(b)].

80 Ibid [3(a)].

81 Ibid [3(b)].

82 In the *Industrial Relations Act Case* (1996) 187 CLR 416, 486 Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ cited Deane J’s observation in *Tasmanian Dam Case* (1983) 158 CLR 1, 261–2 that:

Absence of precision does not, however, mean any absence of international obligation. In that regard, it would be contrary to both theory and practice of international law to adopt the approach which was advocated by Tasmania and deny the existence of international obligations unless they be defined with the degree of precision necessary to establish a legally enforceable agreement under the common law.

83 Security Council Resolution 1373, above n 71, [2(b)] (emphasis added).

84 *Industrial Relations Act Case* (1996) 187 CLR 416, 486.

85 (1936) 55 CLR 608, 687:



affairs power judgments indicate a willingness to strike down provisions exceeding the purposive test.<sup>86</sup> As only one of the binding obligations of Security Council Resolution 1373 is directly identifiable with the legislation, and the question of what is ‘necessary’ under that obligation is open textured, some aspects of the detention and questioning provisions are open to constitutional challenge for exceeding the external affairs power obligation to implement treaty measures.<sup>87</sup>

The exhortatory statements of Security Council Resolution 1373, as a basis for supporting the legislation, may be logically treated on the same footing as treaty recommendations.<sup>88</sup> Similar recommendations have previously been appraised by the High Court,<sup>89</sup> including in the *Industrial Relations Act Case*. In that case, recommendations were seen as secondary and supportive of the implementation of the main treaty provisions. The constitutionality of such support relied upon the s 51(xxxix) incidental power, itself requiring proportionality in support of the exercise of the external affairs power, namely that ‘the terms of these Recommendations themselves can reasonably be regarded as appropriate and adapted to giving effect to the terms of the Conventions to which they relate’.<sup>90</sup>

The relationship of the *ASIO (Terrorism) Act 2003* with the exhortatory statements in Resolution 1373 provides a sharp contrast to that of the *Industrial Relations Reform Act 1993* (Cth) with the International Labour Organisation recommendations considered in the *Industrial Relations Act Case*.<sup>91</sup> The tight

It is a necessary corollary of our analysis of the constitutional power of Parliament to secure the performance of an international convention that the particular laws or regulations which are passed by the Commonwealth should be in conformity with the convention which they profess to be executing. In other words, it must be possible to assert of any law which is, ex hypothesi, passed solely in pursuance of this head of the ‘external affairs’ power, that it represents the fulfilment, so far as is possible in the case of laws operating locally, of all the obligations assumed under the convention.

- This means that legislation purporting to implement a treaty does not operate upon a subject which is an aspect of external affairs unless the legislation complies with all the obligations assumed under the treaty.
- 86 See, eg, in *Tasmanian Dam Case* (1983) 158 CLR 1, 266–7 (Deane J), 236–8 (Brennan J); *Richardson v Forestry Commission* (1988) 164 CLR 261, 315–16 (Deane J), 347–8 (Gaudron J); *Industrial Relations Act Case* (1996) 187 CLR 416, 517–18 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
- 87 The clear constitutional point is that such means chosen by the legislature may not be reasonably capable of being considered appropriate and adapted to the limited and specific international obligation under Security Council Resolution 1373 of providing *necessary* steps to prevent the commission of terrorist acts.
- 88 As distinguished from binding provisions in treaties. For example, the International Labour Organisation recommendations arising for consideration in the *Industrial Relations Act Case* (1996) 187 CLR 416 have been described as the means ‘by which the broad provisions of the Conventions had been fleshed out’: Blackshield and Williams, above n 45, 797.
- 89 In *R v Burgess Ex parte Henry* (1936) 55 CLR 608, 687 Evatt and McTiernan JJ observed that:  
the Parliament may well be deemed competent to legislate for the carrying out of ‘recommendations’ as well as ‘draft international conventions’ resolved upon by the International Labour Organisation or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations.
- 90 *Industrial Relations Act Case* (1996) 187 CLR 416, 509. See also Blackshield and Williams, above n 45, 797; Joseph and Castan, above n 18, which considers, somewhat contentiously, that this approach ‘apparently endorsed a very broad extension of legislative power under s 51(xxix)’: at 96.
- 91 (1996) 187 CLR 416, 509.

symmetry between the two instruments considered in the *Industrial Relations Act Case* is not present as between the identified exhortatory statements of Security Council Resolution 1373 and the detention and questioning powers under the *ASIO (Terrorism) Act 2003*. This in turn calls into question the Act's ability to be understood as supportive of the obligations under the Resolution, and strongly suggests that the legislative provisions fall short of the requirement of being reasonably regarded as appropriate and adapted to giving effect to the terms of the international obligation.

Furthermore, the High Court observed in the *Industrial Relations Act Case* that '[t]here may be some treaties which do not enliven the legislative power conferred by s 51(xxix) even though their subject matter is of international concern'.<sup>92</sup> One commentator, following the observations of Emeritus Professor Zines,<sup>93</sup> has interpreted this statement as the High Court suggesting that treaties in aspirational terms may not trigger Commonwealth power.<sup>94</sup>

## B Matters of International Concern

Aside from treaty obligations, matters of international concern have been recognised by the High Court as a foundation for invoking the external affairs power.<sup>95</sup> This may provide a useful external affairs alternative for justifying the *ASIO (Terrorism) Act 2003*. The concept of 'international concern' has been given some exposition by Stephen J in *Koowarta v Bjelke-Petersen*<sup>96</sup> and by Brennan<sup>97</sup> and Toohey JJ<sup>98</sup> in *Polyukhovich v Commonwealth*. However, whilst

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92 *Industrial Relations Act Case* (1996) 187 CLR 416, 486.

93 Leslie Zines, *The High Court and the Constitution* (4<sup>th</sup> ed, 1997) 291:

Accepting, as Mason J and others have said, that the agreement by nations to take common action in pursuit of a common objective amounts to a matter of external affairs, the objective must, nonetheless, be one in relation to which *common* action can be taken. Admittedly, this raises questions of degree; but a broad objective with little precise content and permitting widely divergent policies by parties does not meet the description.

This statement is incorporated in the judgment of Brennan CJ, Toohey, Gaudron McHugh and Gummow JJ in the *Industrial Relations Act Case* (1996) 187 CLR 416, 486.

94 Deborah Cass, 'Traversing The Divide: International Law and Australian Constitutional Law' (1998) 20 *Adelaide Law Review* 73, 79–80.

95 See generally, Peter Hanks, *Constitutional Law in Australia* (2<sup>nd</sup> ed, 1996) 430–2; Joseph and Castan, above n 18, 96–7; Zines, above n 93, 293–4. In *Tasmanian Dam Case* (1983) 158 CLR 1, several justices referred to the international concern aspect as a separate basis for invoking the external affairs power: see (1983) 158 CLR 1, 131–2 (Mason J), 171 (Murphy J), 220 (Brennan J), 258 (Deane J).

96 (1982) 153 CLR 168, 217–20.

97 Justice Brennan observed, in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 561, that:

unless [standards expected of and by the community of nations] are broadly adhered to or are likely to be broadly adhered to in international practice and unless those standards are expressed in terms which clearly state the expectation of the community of nations, the subject of those standards cannot be described as a true matter of international concern ... whether the enlivening factor be an obligation or concern it is necessary to define it with some precision in order to ascertain the scope of the power.

98 Whilst accepting Stephen J's statement in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 that matters international concern are those with capacity to affect a country's relations with other nations, Toohey J also included 'a matter touching the public business of Australia in relation to an event outside Australia': *ibid* 657.

responding to and preventing international terrorism is prima facie a matter of international concern, the purposive test is still arguably applicable,<sup>99</sup> so that the reasonableness of the legislation's measures is open to an analysis similar to that applicable in the case of treaties.

This criterion of matters of international concern as an alternative basis for the s 51(xxix) external affairs power brings into focus countervailing UN human rights instruments and documents.<sup>100</sup> Whilst purporting to rely upon Security Council Resolution 1373, the detention and questioning provisions prima facie appear to have been developed in abstraction from these human rights instruments and documents. The comments of Stephen, Brennan and Toohey JJ show that the mere invocation of the term 'international concern' will be insufficient to enliven the external affairs power. These judicial thresholds suggest that an invocation of matters of international concern to support the detention and questioning powers must compatibly address relevant human rights instruments and documents, which themselves contain matters of 'international concern'.<sup>101</sup>

It is interesting that s 34J(2) of the *ASIO (Terrorism) Act 2003* specifies that '[t]he person must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment, by anyone exercising authority under the warrant or implementing or enforcing the direction'. This language derives from arts 7<sup>102</sup> and 10<sup>103</sup> of the *International Covenant on Civil and Political Rights*<sup>104</sup> ('ICCPR') and more generally from the *Geneva Conventions*.<sup>105</sup> Section 34C(3A) makes the detention and questioning regime contingent upon the adoption of a written statement of procedures<sup>106</sup> to be followed in exercise of authority under s 34D warrants. However, the legislation does not specify that the statement of procedures should be consistent with arts 7 and 10 of the ICCPR, and the interpretive General Comments of the UN Human Rights Committee on art 7 (currently General Comment 20) and art 10 (currently

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99 In order to assess whether the legislation is reasonably capable of being considered appropriate and adapted to addressing the identified matter of international concern. The proportionality test may be a stronger constraint on domestic enactments relating to matters of international concern, as there do not exist the identifiable range of obligations and recommendations typically extant in a treaty.

100 See the references to several human rights documents of UN bodies in Senate Legal and Constitutional References Committee, above n 1, 28–9. Documents cited include those of the UN Commission on Human Rights, the UN Committee against Torture and the UN High Commissioner for Human Rights.

101 See also Senate Legal and Constitutional References Committee, above n 1, 28, which states that '[i]n addition, any underlying "international concern" may be qualified'.

102 Article 7 states that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

103 Article 10 states, inter alia, that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.

104 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

105 See, eg, common art 3(1)(a) of the four *Geneva Conventions*, opened for signature 12 August 1949, 75 UNTS 31, 85, 135, 285 (entered into force 21 October 1950).

106 Commonwealth, *Australian Security Intelligence Organisation Protocol*, Tabled Paper 319 (2003). The statement of procedures, or protocols, was tabled in Parliament by the Attorney-General on 12 August 2003. See also Attorney-General Philip Ruddock, 'ASIO Protocol to Guide Warrant Process' (Press Release, 12 August 2003).

General Comment 21). Instead, it is merely asserted that '[r]elevant standards, including United Nations rules in relation to detained persons, have been taken into account in preparing the document'.<sup>107</sup>

Some of the UN human rights instruments and documents mentioned above will create binding obligations or potentially indicate matters of international concern. Various UN human rights bodies, such as the High Commissioner for Human Rights,<sup>108</sup> the Commission on Human Rights<sup>109</sup> and the Sub-Commission on the Promotion and Protection of Human Rights<sup>110</sup> of the UN Economic and Social Council, the Secretary-General,<sup>111</sup> the Secretary-General's Policy Working Group on the United Nations and Terrorism,<sup>112</sup> the Committee on the Elimination of Racial Discrimination,<sup>113</sup> the Committee against Torture<sup>114</sup> and the UN General Assembly<sup>115</sup> have responded to the concern that governmental responses to terrorism will erode the substance and practice of human rights as much as would terrorism itself. A constant theme of these UN human rights bodies has been a more holistic appraisal of the concept of security, so that human rights values are fully integrated with responses to terrorism.

These types of human rights issues current to the date of enactment of the legislation can properly be considered as matters of international concern. Some examples, such as *ICCPR*, the *Convention against Torture* and the *Convention for the Elimination of Racial Discrimination*, to which Australia is a party and has ratified the individual communications process,<sup>116</sup> create countervailing international human rights obligations for Australia. Any claimed reliance upon

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107 Ruddock, above n 106.

108 See, eg, the work of the United Nations High Commissioner for Human Rights, *Human Rights: A Uniting Framework*, Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights (27 February 2002) UN Doc E/CN.4/2002/18, especially 3–7, 9–12, 15; United Nations, 'Action against Terrorism Must Not Undermine Human Rights, Say High Commissioner for Human Rights, Council of Europe and OSCE' (Press Release, 29 November 2001), including Joint Statement by UN High Commissioner for Human Rights, Secretary-General of the Council of Europe and Director of the OSCE Office for Democratic Institutions and Human Rights; United Nations, 'Post 11 September Efforts Should Lead to More Human Security, Not Rollback in Civil Liberties, UN Rights Chief Says' (Fifth Commonwealth Lecture) (Press Release, 6 June 2002).

109 *Human Rights and Terrorism*, ECN Res 2001/37, 57<sup>th</sup> sess, 72<sup>nd</sup> mtg, UN Doc E/CN.4/RES/2001/37 (2001); *Human Rights and Terrorism*, ECN Res 2002/35, 58<sup>th</sup> sess, 50<sup>th</sup> mtg, UN Doc E/CN.4/RES/2002/35 (2001).

110 Kalliopi K Koufa, *Terrorism and Human Rights: Second Progress Report*, UN Doc E/CN.4/Sub.2/2002/35 (2002).

111 *Report of the Secretary-General on Implementation of General Assembly Resolution 57/219*, UN Doc E/CN.4/2003/120 (2003).

112 *Report of the Policy Working Group on the United Nations and Terrorism*, UN Doc A/57/273, S/2002/875 (2002).

113 Commission on the Elimination of Racial Discrimination, *Statement on Racial Discrimination and Measures to Combat Terrorism*, UN Doc A/57/18 (Chapter XI)(C)(Statement) (2002).

114 Statement of the Committee Against Torture, UN Doc CAT/C/XXVII/Misc.7 (2001).

115 *Resolution on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, GA Res 219, UN GAOR, 57<sup>th</sup> sess, 77<sup>th</sup> plen mtg, UN Doc A/Res/219 (2003); *Resolution on Human Rights and Terrorism*, GA Res 160, UN GAOR, 56<sup>th</sup> sess, 88<sup>th</sup> plen mtg, UN Doc A/Res/56/160 (2002).

116 See *First Optional Protocol to the International Covenant on Civil and Political Rights*; Article 22 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; Article 14 of the *Convention on the Elimination of All Forms of Racial Discrimination*.

international concern to support the legislation under the external affairs power is properly examinable in that broader context. For example, General Comment 20 on art 7 of the *ICCPR*<sup>117</sup> observes that no limitation or derogation from art 7 is allowed, even in situations of public emergency such as those referred to in art 4 of the *ICCPR*. In particular, General Comment 20 specifically prohibits incommunicado detention.<sup>118</sup>

The legislation also potentially infringes other *ICCPR* articles. These include arts 9(1),<sup>119</sup> 9(2),<sup>120</sup> 9(4)<sup>121</sup> and 9(5),<sup>122</sup> 10<sup>123</sup> and 14.<sup>124</sup> Accordingly, the *ASIO*

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117 Article 7 of the *ICCPR* states that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

118 See General Comment 20 on art 7 of the *ICCPR*.

119 Article 9(1) requires that arrest or detention must not be arbitrary. General Comment 8 governs art 9. The meaning of 'arbitrary' has been found to include elements such as inappropriateness, injustice and unpredictability: *Van Alphen v Netherlands* (Communication 305/1988) and disproportionality in the circumstances: *A v Australia* (Communication 560/1993). The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) may breach the art 9(1) prohibition against arbitrariness as the grounds for obtaining a warrant for detention under s 34C(3)(a) 'that 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' are very broad, and may be considered unreasonable and inappropriate in some circumstances.

120 Article 9(2) requires that persons arrested shall be informed, at the time of the arrest, of the reasons for the arrest. The legislation arguably breaches art 9(2) as it makes no explicit provision for this requirement on arrest: *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34D(2)(b)(i), 34DA. The prescribed authority's explanation of the warrant similarly does not satisfy this requirement: s 34E.

121 Article 9(4) states that '[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'. *Australian Security Intelligence Organisation Act 1979* (Cth) s 34E(1)(f) requires that when the person first appears before a prescribed authority for questioning under the warrant, the prescribed authority must inform the detainee that they may seek from a federal court a remedy relating to the warrant or their treatment in connection with the warrant. Likewise, s 34E(3) requires that at least once in every 24 hour period during which questioning of the person under the warrant occurs, the prescribed authority before whom the person appears for questioning must inform the person of the fact that the person may seek from a federal court a remedy relating to the warrant or the treatment of the person in connection with the warrant. Similarly, s 34U(11) states that regulations made under the legislation must not prevent a legal adviser from communicating to a member or Registrar (however described) of a federal court, for the purposes of seeking a remedy relating to the warrant or the treatment of a person in connection with the warrant, information relating to the questioning or detention of the person in connection with the warrant. However, the *effective* exercise of the ss 34E(1)(f) and 34E(3) right by the detainee could well be negated or frustrated by the combined operation of s 34TA which authorises the prescribed authority to prevent contact with particular lawyers, s 34TB which permits questioning in the absence of a lawyer of the detainee's choice and s 34U which imposes various restraints upon the contact with legal advisers, such as allowing contact between the legal adviser and the detainee to be monitored (s 34U(2)) and prohibiting the legal adviser from intervening in the questioning or addressing the prescribed authority except to request clarification of an ambiguous question (s 34U(3)). In addition, requests to the prescribed authority to permit the questioning to continue beyond eight or 16 hours (and thus ensure the continuation of the detention) are able to be made in the absence of the detainee's legal adviser: s 34HB(3)(b).

122 Article 9(5) of the *ICCPR* states that '[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'. The legislation arguably breaches art 9(5) as it includes no provision as to an enforceable mechanism for compensation.

*(Terrorism) Act 2003* has some difficulties in claiming support under the doctrine of international concern as doubts must arise as to whether it is reasonably capable of being considered appropriate and adapted to the international concern identified.

## VII THE IMPLIED SELF PROTECTIVE POWER: CONSTITUTIONAL ISSUES

Evidence to the Senate Committee also suggested that the *ASIO (Terrorism) Act 2003* was supported by the Commonwealth's implied power of self-protection,<sup>125</sup> sometimes described as an implied power to protect the polity. This power could provide a strong claim for the constitutionality of the legislation. However, significant questions exist about the scope of the power as articulated to date.

The implied self protective power can be considered as an integral part of the s 61 Executive power,<sup>126</sup> legislatively expressed through the s 51(xxxix) incidental power.<sup>127</sup> Alternatively, it can be considered part of the implied nationhood power, an independent source of power not reliant upon application of the incidental power for its legislative expression.

123 Article 10(1) of the *ICCPR* requires that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. The positive obligations upon the detaining authorities in relation to the detainee are reflected in the requirements of General Comment 21 on art 10 and include the guarantee of the same respect for dignity as that for free persons, and that detainees should enjoy all the rights set forth in the *ICCPR*, subject to restrictions that are unavoidable in a closed environment. The legislation arguably breaches art 10 by not specifying any provisions for fulfilling the positive obligations of art 10. An offence of engaging in conduct knowingly contravening *Australian Security Intelligence Organisation Act 1979* (Cth) s 34J(2) is included in s 34NB(4). However, it is left to the written statement of procedures, or protocol, provided for in ss 34C(3)(ba) and 34C(3A), to potentially address these positive obligations. Attorney-General Daryl Williams referred to some of the matters covered and stated that '[r]elevant standards, including United Nations Rules in relation to detained persons, have been taken into account in preparing the document': 'ASIO Protocol to Guide Warrant Process' (Press Release, 12 August 2003).

124 Article 14 of the *ICCPR* specifies a range of due process rights, potentially relevant in relation to the offences in *Australian Security Intelligence Organisation Act 1979* (Cth) s 34G, comprising the obligation to appear before the prescribed authority, to give information and to produce things. For example, art 14(2) states that '[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'. Accordingly, the strict liability aspect of the s 34G(1) offence and the evidential burdens on the defendant in the ss 34G(3) and 34G(6) offences may breach art 14(2). Article 14(3)(b) provides an entitlement to a minimum guarantee to have adequate time and facilities for the preparation of a defence and to communicate with counsel of the person's own choosing. Incommunicado detention, with limits on contact with a lawyer of choice and the prohibition against consulting that legal adviser in private, may breach art 14(3)(b).

125 Senate Legal and Constitutional References Committee, above n 1, 29; Evidence to Senate Legal and Constitutional References Committee, above n 5, 11 (Keith Holland).

126 Deriving from the fact that under *Constitution* s 61, the executive power 'extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth'.

127 Enabling the making of laws with respect to 'matters incidental to the execution of any power vested by this Constitution in the Parliament or in either house thereof, or in the Government of the Commonwealth'.

Several cases have explored the implied protective power,<sup>128</sup> but prior to Dixon J's exposition of the power in *Burns v Ransley*<sup>129</sup> and *R v Sharkey*,<sup>130</sup> it received only piecemeal judicial exposition.<sup>131</sup> In *Burns v Ransley*, Dixon J considered that the power supportive of sedition laws emerged from institutional sources.<sup>132</sup> The scope of the power was foremost considered for its effect in preventing the use of violence as an instrument for challenging the authority of the Commonwealth or effecting change in the form of government.<sup>133</sup> Justice Dixon also suggested an expansive reach for the implied power to affect activities much removed from the actual use or apprehension of violence.<sup>134</sup> In *R v Sharkey*, Dixon J described in more detail the inherent source of the power to protect the polity. The broad conception of the scope of the implied protective power was confirmed,<sup>135</sup> and its instrumental function in government highlighted.

Later, in the *Communist Party Case*<sup>136</sup> Dixon J made a more expansive exposition of the basis of the implied protective power:

I do not think that the full power of the Commonwealth Parliament to legislate against subversive or seditious courses of conduct or utterances should be placed upon s 51(xxxix) in its application to the executive power dealt with by s 61 of the Constitution or in its application to other powers ... As appears from *Burns v Ransley* and *R v Sharkey*, I take the view that the power to legislate against subversive conduct has a source in principle that is deeper or wider than a series of combinations of the words of s 51(xxxix) with those of other constitutional powers ... I prefer the view adopted in the United States ... the power is deduced not only

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128 For a survey of the protective scope of implied powers conferred on the Commonwealth of Australia, see DSK Ong, 'The Federal Balance: The Australian Constitution and its Implied Power, Implied Prohibition and Incidental Powers' (1984) 14 *Melbourne University Law Review* 660, 660–5.

129 (1949) 79 CLR 101.

130 (1949) 79 CLR 121.

131 *R v Kidman* (1915) 20 CLR 425, 440–1; *Ex parte Walsh and Johnson*; *Re Yates* (1925) 37 CLR 36, 134–5; *R v Hush*; *Ex parte Devanny* (1933) 48 CLR 487, 505.

132 (1949) 79 CLR 101, 116:

I see no reason to doubt ... the provisions are constitutionally capable of a valid operation ... Our institutions may be changed by laws adopted peaceably by the appropriate legislative authority. It follows necessarily from their existence that to preserve them from violent subversion is a matter within legislative power.

133 *Burns v Ransley* (1949) 79 CLR 101, 116.

134 *Ibid*:

The power must extend much beyond inchoate or preparatory acts directed to the resistance of the authority of government or forcible political change. I am unable to see why it should not include the suppression of actual incitements to an antagonism to constitutional government, although the antagonism is not, and may never be, manifested by any overt acts of resistance or by any resort to violence.

135 The familiar aspects of incitement to insurrection and resistance against the Commonwealth government were repeated, it being sufficient to invoke the power if publications and utterances were reasonably likely to cause discontent and opposition to the laws of the Commonwealth or the operations of the federal government. It was also confirmed that publications with the purpose, but not the effect, of arousing actual or passive opposition to the exercise of the functions of government fell within the scope of the power: (1949) 79 CLR 121, 148.

136 (1951) 83 CLR 1.

from what is inherent in the establishment of a polity but from the character of the polity set up and more particularly from the power of Congress to make laws which shall be vested in Congress by the Constitution and in the Government or in any Department or officer thereof.<sup>137</sup>

A distinct emphasis is here placed on the operations of government,<sup>138</sup> consistent with Dixon J's construction of the power to legislate against subversive conduct as a 'principle that is deeper or wider than a series of combinations of the words of s 51(xxxix) with those of other constitutional powers'.<sup>139</sup> Justice Fullagar offered an alternative appraisal of inherent power as the source underpinning the legislation.<sup>140</sup> His Honour viewed the power as providing a capacity to make laws for the protection of the Parliament and the *Constitution* against domestic attack,<sup>141</sup> relying upon Dixon J's formulation of the scope of the power in that case.<sup>142</sup>

In two cases subsequent to the *Communist Party Case*, the High Court guardedly endorsed the continuation of the implied power, at least in its protective function over Commonwealth institutions. Significantly, judicial support was focused on the Commonwealth's capacity to deal with subversive or seditious conduct, but that support was neither uncritical nor overwhelming.

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137 Ibid 189. Other justices considered that the Commonwealth's power to protect itself against subversion derived from the s 61 executive power, which, in combination with the s 51(xxxix) incidental power, extended to 'the execution and maintenance of this Constitution': *ibid* 156 (Latham CJ), 211–12 (McTiernan J), 230–2 (Williams J), 233–4 (Webb J). See also Jeremy Kirk, 'Constitutional Implications (I): Nature, Legitimacy, Classification, Examples' (2000) 24 *Melbourne University Law Review* 645, 670.

138 *Communist Party Case* (1951) 83 CLR 1, 188:

it is within the necessary power of the federal government to protect its own existence and the unhindered play of its legitimate activities. And to this end, it may provide for the punishment of treason, the suppression of insurrection or rebellion and the putting down of all individual or concerted attempts to obstruct or interfere with the discharge of the proper business of government.

139 *Ibid*.

140 *Ibid* 260:

I think that, if it ever becomes necessary to examine it closely, it may well be found to depend really on an essential and inescapable implication which must be involved in the legal constitution of any polity. The validity of the Act, however, if it could be supported by the power, would not be affected by the fact that its framers had taken too narrow a view of the source of the power.

Like Fullagar J, Kitto J also acknowledged a carefully circumscribed 'implied power to legislate for the protection of the Commonwealth against subversive activities', commenting that 'to treat that power as extending to any activities to which the Parliament sees fit to ascribe a subversive character, would be to transform the power into one far wider than can be justified by the reasoning upon which the implication of the power depends': at 275.

141 *Ibid* 259.

142 Justice Fullagar's conception of the power included the capacity to act against incitements to violent resistance of Commonwealth authority, or incitement to effect revolutionary change in the form of government or Australia's constitutional position under the Crown (in relation to the United Kingdom or form of government in the United Kingdom): *ibid* 260. Justice Fullagar also commented that '[n]o less important are the statements to be found in *R v Sharkey*'. This would seem to indicate his Honour's approval of Dixon J's assertion in *R v Sharkey* that the power extended to deal with arousing disaffection against the Crown, the government, or the established institutions of the country, even though these actions fall short of counselling or inciting active or passive action against the functions of government: *ibid* 260.



In *Victoria v Commonwealth*,<sup>143</sup> Mason J confirmed the inherent power protective of the polity and a similar power arising from ss 51(xxxix) and 61 as having supported the relevant provisions of the *Crimes Act 1914* (Cth) in *Burns v Ransley* and *R v Sharkey*.<sup>144</sup> In *Davis v Commonwealth*,<sup>145</sup> the joint judgment of Mason CJ, Deane and Gaudron JJ likewise signalled a continuing acceptance of the implied protective power.

In *Davis v Commonwealth*, there are also attempts to limit the implication to a protective aspect and to confine the implication to the facts of cases in which it arose.<sup>146</sup> In expressing reservations about the uses of the doctrine of an implied power to protect the polity, Wilson and Dawson JJ described Dixon J's preference in the *Communist Party Case* for a protective power with its source in 'the very nature of the polity established by the Constitution and the capacity which it must of necessity have to protect its own existence' as a 'minority view'.<sup>147</sup> Their Honours noted that the majority of the judges considered the validity of the *Communist Party Dissolution Act 1950* (Cth) by an examination of s 51(vi), s 61 and s 51(xxxix) powers.<sup>148</sup> Justices Wilson and Dawson then proceeded to limit the cases where the implied protective power arose to their own particular facts,<sup>149</sup> calling them *exceptional* situations going to the very basis of the Constitution.<sup>150</sup>

Similarly, in discussing the development by Dixon J of the implied protective power, and the brief discussion of it by Fullagar J in the *Communist Party Case*, Toohey J placed particular emphasis upon the context in which that development arose.<sup>151</sup> Whilst Toohey J did not narrow the basis of the Commonwealth's power to the same degree as Wilson and Dawson JJ, his Honour still sought to curtail its scope.<sup>152</sup> Justice Brennan, in contrast, saw little point in discussing the inherent

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143 (1975) 134 CLR 338, 397.

144 Ibid.

145 (1988) 166 CLR 79.

146 See Cheryl Saunders, 'The National Implied Power and Implied Restrictions on Commonwealth Power' (1984) 14 *Federal Law Review* 267, 269–70.

147 Ibid.

148 Ibid.

149 The cases cited by their Honours are the *Communist Party Case* (1951) 83 CLR 1; *Burns v Ransley* (1949) 79 CLR 101; *R v Sharkey* (1949) 79 CLR 121; *Ex parte Walsh and Johnson*; *Re Yates* (1925) 37 CLR 36.

150 Justices Wilson and Dawson indicated this approach by their opinion that:

subversion, sedition and the like are matters of a very special kind, striking as they do, at the very foundation of the Constitution ... It would be dangerous to attempt to derive too much from the cases dealing with those matters. This is particularly so when the decision in each of these cases was referable to the incidental power conferred by s 51(xxxix): *Davis v Commonwealth* (1988) 166 CLR 79, 103.

151 Justice Toohey noted, '[t]he reference by Dixon J to implied powers in *Burns v Ransley* ... *R v Sharkey* ... and *Australian Communist Party v Commonwealth* ... was clearly in the context of legislation against subversive conduct' and that Fullagar J, while not completely excluding the existence of an implied power, raised the issue when 'speaking of the protection of the Commonwealth': ibid 117–18.

152 'For the purpose of disposing of the demurrer it is not necessary to take a firm position on the matter. But I am presently not persuaded that any implied power arising only from the creation of the Commonwealth as a body politic extends beyond steps necessary to protect the existence of government': ibid 119.

power to protect the polity in any detail.<sup>153</sup> His Honour was of the opinion that the national aspect, and, presumably, the protective powers, were properly conceptualised as forming parts of the executive power.<sup>154</sup>

Whilst the implied self-protective power might provide a relatively strong claim for constitutionality of the detention and questioning powers, such a claim is not without problems. The cases articulating the self-protective aspect, whilst alluding to protection of the existence of the Commonwealth and its institutions, have been concentrated upon the different topics of sedition, subversion and unlawful associations. Questions of purpose, particularly as to the scope, extent and degree of the present laws in fulfilling a comparable or analogous purpose are open to interpretation. This is particularly so with respect to the *ASIO (Terrorism) Act 2003*, where no connection need exist to the prevention of a violent or imminent terrorist act. There was a further tendency within the judgments of four of the judges in *Davis v Commonwealth* to read down the scope of the implied power and to consider the case law as reflecting a particular factual context.

## VIII THE IMPLIED INCIDENTAL POWER AND THE SECTION 51(XXXIX) INCIDENTAL POWER: CONSTITUTIONAL ISSUES

The *ASIO (Terrorism) Act 2003* was also said to derive support from the implied incidental power inherent within the relevant s 51 constitutional powers.<sup>155</sup> As was observed by the Senate Legal and Constitutional References Committee,

these implied incidental powers essentially support every federal criminal law. The Commonwealth does not have legislative power over ‘criminal activity’. But, within limits, the Parliament can make laws which create criminal offences, and provide for their investigation, prosecution and punishment.<sup>156</sup>

Any consideration of incidental aspects of power must necessarily include the express incidental power under s 51(xxxix) of the *Constitution*.<sup>157</sup>

However, the *ASIO (Terrorism) Act 2003* does not focus upon the creation of criminal offences as an incident of constitutional power. A distinct emphasis has been given to the intelligence-gathering function of the legislation, with a

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<sup>153</sup> Ibid 110.

<sup>154</sup> Ibid.

<sup>155</sup> Senate Legal and Constitutional References Committee, above n 1, 29: ‘As the Attorney-General’s Department has noted, support may also be found from the incidental powers that are implied within each of the powers in section 51’; Evidence to Senate Legal and Constitutional References Committee, above n 5, 10 (Keith Holland). See also Dixon CJ in *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77: ‘every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is necessary to effectuate its main purpose, and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter’.

<sup>156</sup> Senate Legal and Constitutional References Committee, above n 1, 29

<sup>157</sup> However, the express incidental power has been seen as ‘of greatest importance in relation to laws incidental to the grants of executive and judicial power rather than legislative power’: Zines, above n 93, 38. See also Joseph and Castan, above n 18, 48.

deliberate differentiation made from criminal law investigatory mechanisms.<sup>158</sup> To argue for validity by extrapolating from the example of a criminal law jurisdiction ancillary or incidental to s 51 powers is therefore inconsistent with arguments used elsewhere. Instead, it is asserted that relevant s 51 powers (as explored above) or the implied protective power yield newly identified incidental dimensions of power – namely incommunicado detention and questioning powers – to effectuate the main aim of the legislation, namely, intelligence-gathering. Somehow, all of this is seen as linked to the creation of criminal terrorist offences through the incidental powers.<sup>159</sup>

A variation on that argument would be to state that the referral of legislative power by the States to the Commonwealth, to enable re-enactment of s 101 terrorism offences in the *Criminal Code Act 1995* (Cth),<sup>160</sup> should now be seen, in relation to the specific s 51(xxxvii) referral, as supporting the ASIO questioning and detention powers as an incident<sup>161</sup> of that referred power. This argument is simply not sustainable. Aside from the fact that the detention and questioning powers are themselves located in separate legislation, the actual referral of state legislative power is textually quite precise and its distinctive criminal offence orientation, sharply distinguishing it from intelligence-gathering, is also confirmed by other evidence.<sup>162</sup> The respective chronology of

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158 See, eg, the assertion in Evidence to Senate Legal and Constitutional References Committee, above n 22 (used to differentiate the Australian legislation) that most of the legislation in comparable jurisdictions such as the United Kingdom, the United States, Canada and New Zealand

is law enforcement based. It is drafted in a context of agencies engaging in investigations, finding somebody who had committed an offence, prosecuting them for that offence and ultimately punishing them ... given that we took the view that this was about intelligence collection and not law enforcement, before the event rather than after the event, we the went outside the parameters or looked outside the square to see how ASIO as an agency might deal with those matters.

See also Daryl Williams, 'House Message – Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill' (Press Release, 13 December 2002): 'The Opposition is fixated on a flawed notion of a law enforcement regime. They do not appear to be able to grasp that this is an intelligence-gathering exercise'. See also Submission 28 to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Provisions of the Anti-Terrorism Bill 2004* (2004) 6 (Attorney-General); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Provisions of the Anti-terrorism Bill 2004* (2004) 14–15.

159 Senate Legal and Constitutional References Committee, above n 1, 24:

In evidence, the Attorney-General's Department indicated that, in accordance with the Attorney-General's view, the questioning and detention powers would be supported by the creation of terrorism offences in the *Criminal Code*, 'the creation of offences in the ASIO Bill' and 'upon the incidental powers of the Commonwealth'.

Such inconsistencies in the usages of intelligence-gathering and criminal investigative practices and functions are a consequence of the conflation of intelligence gathering and criminal investigation and enforcement roles. For commentary on this conflation, see Hocking, above n 2, 233; Hocking, above n 51, 364–5; Simon Bronitt, 'Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism?' (2003) 14 *Public Law Review* 76, 79.

160 The referral was made under s 51(xxxvii) of the *Constitution*, giving the Commonwealth Parliament the power to make laws on the matters of terrorist acts or actions relating to terrorist acts, expressly amending pt 5.3 (terrorism legislation) or ch 2 (criminal responsibility legislation) of the *Criminal Code* (Cth).

161 Either the incidental power internal to the parent power, in this case s 51(xxxvii), or the express incidental power, s 51(xxxix).

162 See above n 158 and the discussion immediately above and that earlier in this paper in Part II.

the passage of the *Criminal Code Amendment (Terrorism) Act 2002* (Cth)<sup>163</sup> and the *ASIO (Terrorism) Act 2003*<sup>164</sup> also confirm that the detention and questioning powers cannot purport to be incidental to the creation of criminal offences supported by the reference of state power. This point is similarly confirmed in answers to questions on notice supplied by the Attorney-General's Department to the Senate Legal and Constitutional References Committee.<sup>165</sup>

Also relevant to the claim that the incidental power supports the validity of the *ASIO (Terrorism) Act 2003* is the High Court's shift in approach to characterisation issues involving incidental powers. Where an incidental aspect of a *non-purposive* power arises for consideration, the use of proportionality as a general test for validity has been rejected by the Court, as exemplified by the judgments in *Cunliffe v Commonwealth*<sup>166</sup> and *Leask v Commonwealth*.<sup>167</sup>

Statements made in the Senate Legal and Constitutional References Committee Report that a 'law relying on an incidental power must be *reasonably necessary* for the effective operation of a wider regime ... Key concepts are reasonableness and proportionality'<sup>168</sup> must therefore be taken to apply only to purposive powers and not other s 51 powers.<sup>169</sup> The finding in *Leask v Commonwealth* that proportionality was relevant to testing the constitutionality of purposive powers was subsequently approved in passing by Gaudron J in *Minister for Immigration and Multicultural Affairs v Singh*.<sup>170</sup>

The continuing relevance of proportionality in the interplay of the incidental power (in both its express s 51(xxxix) and inherent incidental manifestations) with heads of constitutional power of a purposive nature or with a purposive

163 Passed by the Senate on 15 May 2003 and assented to on 27 May 2003.

164 Passed by the Senate on 25 June 2003 and assented to on 22 July 2003.

165 See points 3, 4 and 5 of major correspondence received on 21 November 2002 by the Senate Legal and Constitutional References Committee from the Information and Security Law Division of the Attorney-General's Department:

The Government's view is that the proposed reference of power is not necessary to support the Bill. The proposed package of Commonwealth and State reference legislation is therefore not designed to support the Bill ... and is not aimed at overcoming limitations of any one particular head of power. The proposed package of Commonwealth and State reference legislation is designed to support the new terrorism offences identified in the answer to question 4.

166 (1994) 182 CLR 272, 351, 355 (Dawson J), 375 (Toohey J), 318–19 (Brennan J). Justice Brennan emphasised that the core and incidental aspects of constitutional power form a single entity. It followed that a test of 'reasonable connexion' therefore applied, not between the law and the incidental power (as they are considered to form a single entity), but instead between the law and subject of the power.

167 (1996) 187 CLR 579, 591 (Brennan J) 613–14 (Toohey J) 624 (Gummow J).

168 Senate Legal and Constitutional References Committee, above n 1, 29.

169 This assessment, based on the connection test in relation to non-purposive powers, is also consistent with the earlier case of *Burton v Honan* (1952) 86 CLR 169, where in a challenge to an application to customs legislation of the incidental power, a question arose as to what is 'necessary for the reasonable fulfilment of legislative purpose' or what is 'reasonably incidental': at 177–8. Justice Dixon observed (at 178):

In the administration of 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. The reason why this appears to be so is simply because a reasonable connection between the law which is challenged and the subject of the power under which the legislature purported to enact it must be shown before the law can be sustained under the incidental power.

170 (2002) 209 CLR 533, 552.

aspect, is further confirmed by the observations of commentators. Speaking of areas where the reasonable proportionality test would apply, Selway observed:

The first area where the test may have application is in respect of incidental powers. All grants of power carry with them such incidental powers as are necessary to make the primary grant effective. This implied incidental power is enhanced in the Commonwealth Constitution by the express grant of incidental power in s 51(xxxix). The incidental power need not be purposive, although purpose is often the key to whether a law falls within the incidental power or not ... at least some justices accept that purpose may be a relevant issue in respect of at least the incidental power, even where the primary power is not purposive. Where purpose is relevant the test would appear to be whether the law is reasonably capable of being seen as appropriate and adapted to achieving, or reasonably proportionate to, some object within power.<sup>171</sup>

Once again, the constitutional question as to validity of the legislation is more complicated than the impressions gleaned from the public information asserting that validity. The predominance of purposive powers or powers with a purposive aspect considered to support the *ASIO (Terrorism) Act 2003* – namely the defence power, external affairs power, executive power and implied protective power – means that the High Court has a wider scope to assess the constitutionality of measures in the legislation than would be the case if the legislation claimed support from non-purposive powers. This assessment centres upon whether the features of the detention and questioning regime, particularly the length and conditions of detention and the review mechanisms for continuation of detention, can be seen as reasonably necessary to effectuate the purpose of the claimed head of constitutional power. However, the willingness to apply that wider scope may be tempered by the realities of judicial deference to the executive in national security matters.

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171 Bradley Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law' (1996) 7 *Public Law Review* 212, 214–15. Zines observed:

Where the principle of incidental powers is involved there can be no question of 'plenary power'. Implied incidental power operates only when the Commonwealth does not have plenary power over the subject of the law ... where implied incidental powers are concerned, the purpose of the law in relation to the subject of the power becomes important.

See Leslie Zines, 'Characterisation of Commonwealth Laws' in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992) 47–8. Cass similarly observed:

The third situation in which proportionality may still be relied upon when determining whether a law on a subject matter is sufficiently connected to that subject matter occurs when the law falls within the incidental range of a power. Here the purpose of a law will assist in determining whether it is sufficiently connected to the power, and in this context proportionality may be useful in ascertaining that connection.

See Deborah Cass, D 'Traversing The Divide: International Law and Australian Constitutional Law' (1998) 20 *Adelaide Law Review* 73, 77. See also Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 21–3; Paul Loftus, 'Proportionality, Australian Constitutionalism and Governmental Theory: Changing the Grundnorm' (1999) 3 *Southern Cross University Law Review* 30, 68–72; Zines, above n 93, 45.

## IX CHAPTER III IMMUNITIES AND DETENTION

It is clear from the above discussion that there are significant issues in claims that the cited constitutional powers can support the *ASIO (Terrorism) Act 2003*'s detention and questioning provisions. In addition, there are significant Chapter III constitutional questions surrounding the administrative capacity for detention, of the type conferred in the legislation, of citizens not involved in or suspected of a criminal offence, save in a limited set of identified and exceptional circumstances.

Several judicial statements are important in this regard. In the joint judgment of Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*<sup>172</sup> ('*Lim*'), their Honours said:

It would be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why is that *putting to one side the exceptional cases to which reference is made below*, 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 ...<sup>173</sup>

The exceptional cases of permissible non-judicial involuntary detention include committal to custody awaiting trial, mental illness, infectious disease, powers of the Parliament to punish for contempt, and for military tribunals to punish for breach of discipline.<sup>174</sup> In *Lim*, the Court was concerned with the validity of provisions of the *Migration Act 1958* (Cth) which authorised the detention of non-citizens for a specified period for the purposes of expulsion or deportation and found those provisions a valid exercise of the aliens power.<sup>175</sup>

Having identified these exceptions to the principle that the power to detain falls within judicial power, the joint judgment observed that

the citizens of this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth.<sup>176</sup>

The judgments of Mason CJ<sup>177</sup> and McHugh J<sup>178</sup> are consistent with the joint judgment, whilst Gaudron J found the Commonwealth's powers of detention

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172 (1992) 176 CLR 1.

173 *Lim* (1992) 176 CLR 1, 27–8 (emphasis added). See Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166, 174; George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 185, 192.

174 *Lim* (1992) 176 CLR 1, 28.

175 Section 51(xix) of the *Constitution*; *Lim* (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ). See also 10 (Mason CJ), 47 (Toohey J), 57 (Gaudron J), 71 (McHugh J).

176 *Lim* (1992) 176 CLR 1, 28–9 (Brennan, Deane and Dawson JJ).

177 *Ibid* 10.

178 *Ibid* 71.

limited, not by an application of Chapter III, but by reading down the relevant s 51 powers.<sup>179</sup>

The question of whether a legislative scheme of detention, divorced from criminal punishment and guilt, offends the separation of Chapter III judicial power, is assessable by the application of a proportionality test. If the law purporting to establish a detention regime fails that test, the law will be punitive in nature and thus offend Chapter III. Differences in the formulation of a proportionality test emerged amongst the various justices in *Lim*. According to Brennan, Deane and Dawson JJ:

The two sections will be valid laws if the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary ... On the other hand, if the detention which those sections require and authorise is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers ... In that event, they *will be of a punitive nature* and contravene Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates.<sup>180</sup>

Justice McHugh likewise observed that:

Although detention under a law of the Parliament is *ordinarily characterised* as punitive in character, it cannot be so characterised if the purpose of the imprisonment is to achieve some legitimate non-punitive objective ... But if imprisonment goes beyond what is reasonably necessary to achieve the non-punitive objective, *it will be regarded as punitive in character* ...<sup>181</sup>

In the later case of *Kruger v Commonwealth* ('*Kruger*'), Gummow J was of the opinion that:

A power of detention which is punitive in character and not consequent upon adjudgment of criminal guilt by a court cannot be conferred upon the Executive by a law of the Commonwealth.

The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature, so as to attract the operation of Ch III, depends on whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective. The categories of non-punitive, involuntary detention are not closed.<sup>182</sup>

Different emphases exist between the four first judges cited above and Gummow J. The affirmative emphasis by Brennan, Deane and Dawson, and McHugh JJ on the reasonable necessity for achieving the non-punitive objective, establishes a higher level of protection for civil and political rights by clearly asserting a general proposition that involuntary detention is ordinarily an incident of the judicial function. In contrast, Gummow J's statement lends itself to identifying further categories of non-judicial detention, providing an internal

179 Ibid 55. See Zines, above n 173, 174; Linda Kirk, 'Chapter III and Legislative Interference with the Judicial Process: *Abebe v Commonwealth* and *Nicholas v The Queen*' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 119, 136 fn 124; Winterton, above n 173, 193, fns 56, 57. This technique was more fully developed by Gaudron J in *Kruger v Commonwealth* (1997) 190 CLR 1, 110–12.

180 *Lim* (1992) 176 CLR 1, 33 (emphasis added). See also 58 (Gaudron J): 'does not exceed what is reasonably necessary'.

181 Ibid 71 (emphasis added).

182 *Kruger* (1997) 190 CLR 1, 161–2.

tendency within that test for legislation to satisfy proportionality requirements. These different emphases highlight potential uncertainties in the constitutional validity of the detention and questioning powers and the available scope for the judiciary in reviewing the conformity of the powers to the requirements of Chapter III.

### **A The Increased Relevance of Chapter III Issues in the *ASIO (Terrorism) Act 2003***

Chapter III questions as to the constitutionality of the detention and questioning powers are of greater significance following changes in the final ‘compromise’ version of the legislation.<sup>183</sup> The enacted version enlarges powers, through expanded detention time, increased flexibility of questioning within that detention time and the removal of the requirement to seek renewal of a detention and questioning warrant every 48 hours from a judge or federal magistrate. Further increases in the duration of warrants and the relaxation of warrant criteria, foreshadowed by the Attorney-General,<sup>184</sup> will intensify Chapter III issues.

There is a significant incongruity between the submissions of the Attorney-General’s Department<sup>185</sup> on the reasons why the May 2002 version of the Bill did not offend Chapter III, compared with justifications for the June 2003 provisions. The 2002 submission cites unspecified legal advice supporting the then envisaged detention regime as constitutional<sup>186</sup> on the bases, amongst others, of ‘the intelligence-gathering purpose of the conferral of powers’, ‘the short period of detention under a warrant’, ‘the need to obtain further warrants for further periods of detention and the safeguards relevant to this process’ and ‘the obligation to desist action under a warrant when the grounds on which it was issued have ceased to exist’.<sup>187</sup> The substance of that submission was confirmed in Attorney-General’s Department evidence to the Senate Legal and Constitutional References Committee.<sup>188</sup> That evidence emphasised the system of

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183 See the discussion above in Parts I and II.

184 See Ruddock, above n 47; *Press Conference Announcing a Review of Migration Litigation and Answering Questions on Deportation of French National* (27 October 2003) Attorney-General’s Department <[http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Interview\\_Transcripts\\_2003\\_Transcripts\\_27\\_October\\_2003\\_-\\_Transcript\\_-\\_Press\\_Conference](http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Interview_Transcripts_2003_Transcripts_27_October_2003_-_Transcript_-_Press_Conference)> at 15 November 2004; ABC Television, ‘Intelligence Delay Has Ruddock Asking Questions’, *Lateline*, 27 October 2003 <<http://www.abc.net.au/lateline/content/2003/s976417.htm>> at 15 November 2004; Channel 9 Television, ‘Interview: Philip Ruddock’, *Sunday*, 2 November 2003; Tom Allard, ‘ASIO Needs New Powers: Ruddock’, *Sydney Morning Herald* (Sydney), 3 November 2003, 4. See also Greg Carne, ‘Brigitte and the French Connection: Security *Carte Blanche* or *A La Carte*?’, (2004) 9 *Deakin Law Review* (forthcoming).

185 See Submission 167 to Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) (Attorney-General’s Department).

186 In the sense that it cannot reasonably be regarded as punitive in character.

187 See Attorney-General’s Department, above n 185. The reasons advanced later in October 2002 by the Attorney-General are of a similar or identical nature to that submission: see Williams, above n 5, 44. Similarly, the source of that legal advice remains anonymous.

188 Evidence to Senate Legal and Constitutional References Committee, above n 5, 16–18.



checks and balances then in place,<sup>189</sup> in that the warrant period was confined to 48 hours with the particular requirement that

after each 48 hour period, the process for obtaining a warrant would have to start again with an application by the Director-General of Security to the Attorney-General, and approval by the Attorney-General and again by an issuing authority – a judge or a magistrate.<sup>190</sup>

The expanded *ASIO (Terrorism) Act 2003* is clearly at odds with the reasons previously given in support of the constitutionality of the detention and questioning provisions. Whilst there is an explicit intelligence-gathering purpose in the legislation,<sup>191</sup> the extended period of detention creates the possibility of other constitutionally impermissible applications. There is no longer a ‘short period of detention under the warrant’, with the original 48 hours being dramatically expanded to 168 hours. Hence there is no need ‘to obtain further warrants for further periods of detention’, as any further warrants sought under the legislation merely refer to a second or subsequent warrant for 168 hours detention.<sup>192</sup> The threshold for a second or subsequent warrant<sup>193</sup> is quite modest as in most situations it would be expected that some additional indicative information would be obtained from the preceding 24 hours of questioning over a seven day period. In that instance, the requirement of not currently being in detention<sup>194</sup> imposes no minimum time interval before which a person may be taken back into custody under a second or subsequent warrant. It is therefore conceivable that there might only be a brief period of time between the first and second or subsequent detentions,<sup>195</sup> meaning – in practical application – extended detentions.

## **B Subsequent Constitutionality Developments Relevant to Detention**

Some other issues as to constitutionality arise from the enlarged legislative detention and questioning arrangements and from the application of the

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189 Ibid 16.

190 Ibid 17.

191 For example, the Minister is only able to consent to the Director-General of Security’s request for a warrant if he or she ‘is satisfied ... that 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’: *Australian Security Intelligence Organisation Act 1979* (Cth) s 34C(3).

192 The issuing authority must be satisfied in order to issue such a warrant that (i) the issue of that warrant is justified by information additional to or materially different from that known to the Director-General at the time the Director-General sought the Minister’s consent to request the issue of the last of the earlier warrants issued before the seeking of the Minister’s consent to the request for the issue of the warrant requested; and (ii) the person is not being detained under this Division in connection with one of the earlier warrants: *Australian Security Intelligence Organisation Act 1979* (Cth) s 34C(3D).

193 See *Australian Security Intelligence Organisation Act 1979* (Cth) s 34D(1A).

194 See *Australian Security Intelligence Organisation Act 1979* (Cth) s 34D(1A)(ii).

195 Indeed, the imposition of a range of further restraints advocated by the Law Council of Australia upon the issue of second or subsequent warrants was not taken up in the amendments made to the Bill: see Duncan Kerr, ‘Australia’s Legislative Response to Terrorism’ (Paper presented to the Criminal Bar Association of Victoria, Melbourne, 26 August 2003) 5.

proportionality tests as variously configured in *Lim* and *Kruger*.<sup>196</sup> These issues were given further emphasis by the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*<sup>197</sup> ('*Al Masri*'), which emphasised the limitations on the executive power of detention under the s 51(xix) aliens power, consistent with Chapter III of the *Constitution*.<sup>198</sup> The Court stressed that the power to detain was but an *incident* of effecting deportation or to enable the making and consideration of an application for an entry permit.<sup>199</sup>

The Full Federal Court's focus in *Al Masri* on the joint judgment principles in *Lim* is instructive because 'the analysis then undertaken in the joint judgment shows what their Honours considered would *not* have been "reasonably capable of being seen as necessary for the purposes of deportation"'.<sup>200</sup> A key feature in favour of validity of the *Lim* legislative scheme were various time-referenced provisions enabling removal of aliens from Australia pursuant to their detention.<sup>201</sup> Another feature supporting validity was the practical ability of the legislation to bring to an end the detention.<sup>202</sup> In *Al Masri*, the Full Federal Court

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196 See the discussion above regarding the different formulations of the proportionality test relevant to Chapter III detention by different justices in *Lim* (1992) 176 CLR 1 and *Kruger* (1997) 190 CLR 1.

197 (2003) 197 ALR 241.

198 *Ibid* 253 (Black CJ, Sundberg and Weinberg JJ):

A limited authority to detain an alien in custody can be conferred on the executive without the infringement of Ch III's exclusive vesting of the judicial power of the Commonwealth in the courts which it designates for the reason that, to this limited extent, authority to detain in custody is neither punitive in nature nor part of the judicial power of the Commonwealth.

199 *Ibid* 253–4 (Black CJ, Sundberg and Weinberg JJ). Similarly, in hearing submissions in the Transcript of Proceedings, *Minister for Immigration and Multicultural and Indigenous Affairs v B* (High Court of Australia, 30 September 2003 and 1 October 2003), the centrality of the lawfulness of executive detention as an *incident* of the aliens power following *Al Masri* was given particular emphasis by McHugh and Kirby JJ: at 39, 40 (McHugh J, 30 September 2003), 15 (McHugh J, 1 October 2003), 16 (Kirby J, 1 October 2003).

200 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 197 ALR 241, 254 (Black CJ, Sundberg and Weinberg JJ).

201 Under the legislative scheme in *Lim*, these provisions included limitations on the total period a person could be detained in custody; the requirement of removal from Australia 'as soon as practicable' where entry is refused, and time limits on the finalisation of appeals and reviews. See also, for persons already unlawfully held in custody for years before the commencement of the mandatory detention provision (the other limitations in this instance not going far enough to satisfy the proportionality test), the provision that a designated person be removed from Australia as soon as practicable, if the designated person requests removal: *ibid* 254–5.

202 *Ibid* 255:

A serious question about the validity of the present scheme, interpreted without at least the second of the suggested limitations, arises because the way in which s 54P(1) of the *Migration Act 1958* (Cth) was seen by Brennan, Deane and Dawson JJ in *Lim* as having a practical operation to bring detention to an end. Its importance to validity lay not in the foundation it gave for an alien in custody to apply for mandamus to enforce performance of the duty the provision imposed; its importance lay in its presumed practical effect ... To speak of the 'power' of a person to bring detention to an end is to speak of something that has real effect. If further support were needed for this understanding of the sense in which the language was used, it is surely to be found in the context. That context included statutory time limits upon the period of detention which, with other elements, were considered not to have gone far enough to save the impugned sections from invalidity in the absence of s 54P(1) of the *Migration Act 1958* (Cth).

indicated that the absence of a limitation in capacity to bring about release from detention, in combination with other changes to the legislation, would go beyond what was constitutionally permissible.<sup>203</sup> These considerations might be important in assessing the proportionality of the present detention and questioning regime.

The enlargement of the ASIO detention and questioning powers is certainly of sufficient significance to warrant the concerns of the Senate Legal and Constitutional References Committee about the potentially impermissible punitive *impact* of the legislation, even where the safeguards – which have now been changed or relaxed in the final version of the legislation – apply.<sup>204</sup>

Because the reasons considered to support the constitutionality of the detention provisions of the earlier versions of the ASIO legislation are arguably weaker in relation to the final version of the legislation, further analysis is warranted. It is instructive to look at Commonwealth submissions to the High Court in 2003 and 2004 in immigration matters, which seek to limit questions of purpose relating to the operation of a proportionality test. These submissions also attempt to reshape the test in *Lim* relating to Chapter III protection, in order to curtail its capacity to protect civil and political rights.

Judicial acknowledgements have already been made of the possible constitutionality issues raised by the questioning and detention powers in the *ASIO (Terrorism) Act 2003*.<sup>205</sup> A closer evaluation of the legislative provisions, accounting for the factors emphasised in the *Lim* and *Al Masri* jurisprudence, should highlight potential constitutional weaknesses in the legislation, contrary to views of its constitutionality put forward by the Attorney-General's Department.

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203 *Al Masri* (2003) 197 ALR 241, 257–8. Ultimately, the Full Court of the Federal Court decided that whilst the constitutional considerations pointed strongly to the need and foundation for a temporal limitation on detention producing a real likelihood or prospect of removal from Australia, the matter could be determined on a principle of statutory construction concerning fundamental rights and freedoms: at 260.

204 See, eg, the comments of Senator Bolkus in evidence to the Senate Legal and Constitutional References Committee, above n 5, 17, 19:

It is not necessarily constitutionally valid if the regime provides for punitive detention, even if you have those safeguards. It may very well be that the capacity of the Commonwealth to legislate for detention does not extend to legislating for a regime which may in itself, have the capacity for what could be determined to be punitive detention ... My concern is that the system itself may be inherently flawed in that it does allow for the rollover, for instance, or a maximum of 168 hours.

See also the comments of Senator Kirk: 'I am still trying to determine whether it could be said that these powers may be exercised for the purpose of punitive or preventative detention': Evidence to Senate Legal and Constitutional References Committee, above n 5, 18.

205 See the exchanges between Gleeson CJ and David Bennett QC, Solicitor-General for the Commonwealth, in Transcript of Proceedings, *Re Woolley; Ex parte Applicants M276/2003* (High Court of Australia, 3 February 2004) 39, 42 regarding anti-terrorism legislation and legitimate non-punitive purposes. In the same case McHugh J observed:

It seems to me there are very important questions of principle involved in this case or, at all events, the decision may have consequences for many cases far removed from this. If your argument is right, can the Commonwealth detain people or can the Parliament authorise the detention of people for weeks, months, to question them about security matters.

Mr Bennett QC replied: 'Your Honour, so long as one can find a legitimate non-punitive purpose, yes': at 39.

### C Attempting to Re-shape the *Lim* Test for Security Reasons: Statutory Purpose and the Disregard of Practical Operation

Submissions by the Commonwealth Solicitor-General to the High Court in several migration matters subsequent to *Al Masri* advocated a narrower approach to ascertaining purpose. Such advocacy appeared to be directed at reducing the scope of Chapter III protections and curtailing potential litigation on the point that detention is punitive or penal in *substance*.

In these subsequent matters, the Solicitor-General took issue with the test formulated by Brennan, Deane and Dawson JJ in *Lim*, namely that ‘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’.<sup>206</sup> This statement, it was argued, goes too far<sup>207</sup> in ascribing non-judicial detention as penal or punitive in character save in limited identified circumstances.<sup>208</sup> The Solicitor-General claimed that this approach did not represent the majority view of the Court in *Lim*.<sup>209</sup> In fact, the judgments of Mason CJ<sup>210</sup> and McHugh J<sup>211</sup> are consistent with the joint judgment, and the express disavowal of a Chapter III approach taken by Gaudron J<sup>212</sup> sourced a similar limitation to that of Chapter III in the s 51 powers.<sup>213</sup> Significantly, the Solicitor-General exceeded the moderate response in Emeritus Professor Zines’ critique of the *Lim* proposition, that ‘one

206 *Lim* (1992) 176 CLR 1, 27 (emphasis added).

207 See Transcript of Proceedings, *Re Woolley; Ex parte Applicants M276/2003* (High Court of Australia, 3 February 2004) 40–2; Transcript of Proceedings, *Behrooz v Secretary DIMIA; SHDB v Godwin; MIMIA v Al Khafaji* (High Court of Australia, 12 November 2003) 11–12.

208 On this point Leslie Zines observes: ‘Winterton does not approve of this, saying it is not obvious that all involuntary detention, other than the traditional exceptions, is punitive. Lindell also disapproves’: Zines, above n 173, 174. See Winterton, above n 173, 192–3; Geoffrey Lindell, ‘Recent Developments in the Judicial Interpretation of the Australian Constitution’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 1, 35, fn 136.

209 Transcript of Proceedings, *Behrooz v Secretary DIMIA; SHDB v Godwin; MIMIA v Al Khafaji* (High Court of Australia, 12 November 2003) 11: ‘It is a dictum which we assert was not expressly adopted by any of the other Justices, so it is a dictum of three Justices. It was expressly disavowed by Justice Gaudron in *Kruger*... It is also inconsistent with what some of the other Justices, including your Honour Justice Gummow, said in *Kruger*’.

210 Chief Justice Mason expressly talks about a *limited authority* to detain as an *incident* of the executive powers to receive, investigate and determine applications for entry by aliens and to admit or deport as part of the s 51(xix) aliens power, ‘without contravening the investment of the judicial power of the Commonwealth in Chapter III courts’: *Lim* (1992) 176 CLR 1, 10.

211 Justice McHugh stated, *ibid* 71:

Although detention under a law of the Parliament is ordinarily characterised as punitive in character, it cannot be so characterised if the purpose of the imprisonment is to achieve some legitimate non-punitive object ... But is imprisonment goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character.

212 Transcript of Proceedings, *Behrooz v Secretary DIMIA; SHDB v Godwin; MIMIA v Al Khafaji* (High Court of Australia, 12 November 2003) 12. The Solicitor-General was subsequently obliged to qualify these remarks: ‘We simply note that it is correct to say that although her Honour, as I showed in-chief, rejected the approach based on Chapter III, her Honour reached a similar conclusion by a totally different route, namely a reading down of the powers in section 51. That was a course which no other Justice took.’: at 62.

213 *Kruger v Commonwealth* (1996) 190 CLR 1, 110–11.

should, at least, begin with a suspicion that incarceration by legislative decree is, in effect, legislative punishment, placing the onus on the Commonwealth to show that (outside the accepted categories) it is not'.<sup>214</sup>

So as to substantially narrow the constitutionality test for executive detention, the Solicitor-General proposed that the test be formulated to ask the question whether there is an exercise of judicial power,<sup>215</sup> rather than whether the particular form of detention is penal or punitive in character. This approach, it was said, doctrinally asserted an implication consistent with Chapter III, in contrast to one supposedly synonymous with a bill of rights.<sup>216</sup> The Solicitor-General's narrower approach asserted that the constitutionality of executive detention should be determined only by the direct or statutory purpose:<sup>217</sup>

We submit what follows from *Chu Kheng Lim* is that the relevant purpose is the statutory purpose. Of course, when one has a statutory purpose there will often be situations caught up in a general provision where that statutory purpose might be seen to be inappropriate. One can think of many, many examples of that where legislation has a general purpose but has a particular effect, perhaps outside that purpose, in a particular case. That does not mean one reads down the legislation as not applying to that case. That is the whole point of the – capable of being seen as 'reasonably appropriate and adapted' test. One applies that test, and when one applies it one may well find that there is a particular person in relation to whom someone does not have a particular purpose. That does not matter. What does matter is that the purpose of the provision is to achieve certain results.<sup>218</sup>

It was argued that the determination of purpose should be divorced from considerations of indirect or practical effects of the legislation as being punitive or penal in substance.<sup>219</sup> To make these submissions plausible, the Solicitor-General continued to apply a *Lim* proportionality test.<sup>220</sup> However, distinguishing characteristics of that test's application were seen as properly described in the judgment of Gummow J in *Kruger*.<sup>221</sup> This method produces a narrower result, in

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214 Zines, above n 173, 174. George Winterton endorses Zines' comment on this point: see Winterton, above n 173, 193 fn 55. It is difficult to see, other than in shades of emphasis, how such a presumption would differ in practical terms from the *Lim* formulation by Brennan, Deane and Dawson JJ (of a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth) when their proportionality test, cited shortly after that formulation, is actually applied to test the constitutionality of a claimed exception: see *Lim* (1992) 176 CLR 1, 28–9 and 33 respectively.

215 Transcript of Proceedings, *Behrooz v Secretary DIMIA; SHDB v Godwin; MIMIA v Al Khafaji* (High Court of Australia, 12 November 2003) 13.

216 Transcript of Proceedings, *Re Woolley; Ex parte Applicants M276/2003* (High Court of Australia, 3 February 2004) 32, referring to the extent to which it is permissible to find implications in Chapter III.

217 Transcript of Proceedings, *Behrooz v Secretary DIMIA; SHDB v Godwin; MIMIA v Al Khafaji* (High Court of Australia, 12 November 2003) 18.

218 Transcript of Proceedings, *Behrooz v Secretary DIMIA; SHDB v Godwin; MIMIA v Al Khafaji* (High Court of Australia, 13 November 2003) 62.

219 See the exchange between Solicitor-General Bennett and Kirby J, *ibid* 19.

220 'But all we submit is that in the tests laid down in *Chu Kheng Lim* and the cases following it, the word "necessary" should not be construed in an absolute way': Transcript of Proceedings, *Re Woolley; Ex parte Applicants M276/2003* (High Court of Australia, 3 February 2004) 37.

221 *Ibid* 37.

the sense that detention is not seen as presumptively punitive, subject to some exceptions, but only punitive if it fails to satisfy a proportionality test relating to a legitimate non-punitive purpose,<sup>222</sup> with purpose determined solely by the statutory language.

This submission runs contrary to the joint judgment of Black CJ, Sundberg and Weinberg JJ in *Al Masri* which stated that

the reasoning of a majority of the court in *Lim* as to what was considered in that case to be reasonably capable of being seen as necessary for a legitimate non-punitive objective remains quite unaffected by what was later said in *Kruger* or by the court's conclusions in *Kruger* about the nature of the impugned provisions.<sup>223</sup>

Moreover, Gummow J's remarks prefacing the proportionality test in *Kruger*<sup>224</sup> can be alternatively interpreted as emphasising the *actual* character of the law in question. This is a view supported by the accompanying citation of *Kable v Director of Public Prosecutions (NSW)*<sup>225</sup> ('*Kable*') where practical operation matters were taken into account.<sup>226</sup> Although in *Kruger*, other justices considering the judicial power issue<sup>227</sup> found that the *Aboriginals Ordinance 1918* (NT) power to detain was not offensive to Chapter III, this does not discount the relevance of circumstances external to the statutory text in assessing purpose.<sup>228</sup>

The test which we are content to adopt is that referred to by your Honour Justice Gummow in *Kruger* (1997) 190 CLR at 162 where your Honour said: 'The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature, so as to attract the operation of Ch III, depends upon whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective. The categories of non-punitive, involuntary detention are not closed.'

222 See also Henry Burmester, 'Detention by the Executive – History and Constitutional Issues' (Paper presented at the Gilbert + Tobin Centre of Public Law – 2004 Constitutional Law Conference, Sydney, 20 February 2004) 11.

223 *Al Masri* (2003) 197 ALR 241, 258.

224 'A power of detention which is punitive *in character* and not consequent upon adjudgment of criminal guilt by a court cannot be conferred upon the Executive by a law of the Commonwealth': *Kruger* (1996) 190 CLR 1, 161–2 (Gummow J) (emphasis added).

225 Cited at fn 633 in Gummow J's judgment: *ibid* 162.

226 It is also supported by Gummow J's reference in *Kruger* to some matters external to the instant legislative instrument, namely 'the existence before 1918 of long-established statutory regimes in the colonies and States which were directed to the welfare and protection of other indigenous persons': *ibid*.

227 See *Kruger* (1997) 190 CLR 1, 84–5 (Toohey J): 'The point is that there are qualifications to the general proposition so that it cannot be said in absolute terms that the power to detain in custody is necessarily an incident of judicial power ... the argument based on judicial power cannot succeed'; *Kruger* (1997) 190 CLR 1, 62 (Dawson J, with whom McHugh J agreed at 142). Justice Gaudron resolved the matter through a different approach (at 110–11):

I do not doubt that there is a broad immunity similar to, but not precisely identical with that enunciated by Brennan, Deane and Dawson JJ in *Lim*. In my view, however, it does not derive from Ch III. Rather, I am of the view that the true constitutional position is that, subject to certain exceptions, a law authorising detention in custody, divorced from any breach of the law, is not a law on a topic with respect to which s 51 confers legislative power.

228 The application of the *Lim* principle as including both direct and indirect assessments of purpose is borne out by the fact that 'the Commonwealth submitted that the welfare and protection object of the legislation must be judged by the values and standards prevailing at the time': *ibid* 84 (Toohey J). Likewise Dawson J (one of the judges in the joint judgment with Brennan and Deane JJ in *Lim*) observed, at *ibid* 62, that:

The Solicitor-General's submissions about how *Lim* should be read is consistent with his *objections* to the proposition that, subject to exceptions, the involuntary detention of a citizen by the state is penal or punitive in character and, under our system of government, exists only as an incident of the exclusive judicial function of adjudging and punishing criminal guilt.<sup>229</sup>

### **D Statutory Purpose and the Disregard of Practical Operation: A Departure from and Inconsistency with the Application of Purpose Elsewhere**

The Solicitor-General's submissions are a demonstrable departure from the use of purpose elsewhere. The attempt to limit the use of purpose to statutory purpose applies a narrower concept more appropriate to a characterisation of a purposive s 51 power, rather than situations intersecting with a Chapter III constitutional immunity.

Indeed, the formulation advanced elsewhere in relation to characterisation of the purposive s 51(vi) defence power demonstrates just how narrow an approach is advocated in the Solicitor-General's submissions:

Some of the difficulties which have been felt in the application of that power seem to me to be due to the circumstance that, unlike most other powers conferred by s 51 of the Constitution, it involves the notion of purpose or object ... For apparently the purpose must be collected from the instrument in question, the facts to which it applies and the circumstances which called it forth. It is evident that among these circumstances the character of the war, its notorious incidents, and its far reaching consequences must take first place. In some cases they must form controlling considerations, because from them will appear the cause and justification for the challenged measure. They are considerations arising from matters about which, in case of doubt, courts can inform themselves by looking at materials that are the subject of judicial notice.<sup>230</sup>

Whilst this formulation deals with the arguably narrower task of characterisation of regulations made under a legislative expression of a purposive

However much one may *with hindsight* debate the appropriateness of the actions authorised by the 1918 Ordinance, those actions may be legitimately seen as non-punitive ... No doubt it may be said with justification that the events in question did not promote the welfare of Aboriginals, but that does not mean that the decisions made and actions taken were of a judicial rather than an executive character.

(emphasis added).

229 See *Lim* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ). An analysis of the phrases of the test and the objection is made by the Solicitor-General in Transcript of Proceedings, *Behrooz v Secretary DIMIA; SHDB v Godwin; MIMIA v Al Khafaji* (High Court of Australia, 12 November 2003) 11. See also the discussion in the text above.

230 *Stenhouse v Coleman* (1944) 69 CLR 457, 471. Again, speaking in the context of the s 51(vi) defence power, Dixon J was of the opinion, at 469, that:

If the form of the power makes the existence of some special or particular state of fact a condition of its exercise, then, no doubt, the existence of that state of fact may be proved or disproved by evidence like any other matter of fact. But ordinarily the court does not go beyond matters of which it may take judicial notice. This means that for its facts the court must depend upon matters of general public knowledge.

power,<sup>231</sup> it still envisages consideration of ‘the facts to which it applies and the circumstances which called it forth’. In contrast, the Solicitor-General’s submission restricted itself to a still narrower version of direct purpose,<sup>232</sup> absent even considerations of such facts and circumstances. It does so, remarkably, where Chapter III immunities are relevant.

The Solicitor-General’s submission was also distinctive in its narrow approach compared to another immunity on legislative power, namely the implied freedom of political communication, including the application of a proportionality test.<sup>233</sup> Such an immunity or limitation on power encompassing a test of practical application makes it appropriate and consistent that considerations concerning practical application also be taken onto account when questions of purpose arise in relation to legislation intersecting with the Chapter III immunity.

This argument is supported by the High Court’s focus on practical considerations in its examination of the more precise preventative detention provisions of the *Community Protection Act 1994* (NSW). The application of Chapter III principles in *Kable*<sup>234</sup> also evidences strong consideration of the effects of the legislation as compromising judicial independence, contrary to the incompatibility doctrine.<sup>235</sup> The suggestion by the Solicitor-General that the Court look to the statutory purpose of legislation as exclusively relevant to

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231 In this instance, reg 59 of the *National Security (General) Regulations* (Cth) authorised by s 5 of the *National Security Act 1939–1943* (Cth): see *ibid* 457–8.

232 See the material referred to above nn 219 and 220.

233 As consolidated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). The High Court favoured a test encompassing a practical application (at 567):

Where a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined. 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 the fulfilment of which is compatible with the constitutionally prescribed system of representative and responsible government?

The test was subsequently applied by the High Court in *Levy v Victoria* (1997) 189 CLR 579; *Kruger* (1997) 190 CLR 1; *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199.

234 (1996) 189 CLR 51. See generally Elizabeth Handsley, ‘Do Hard Laws Make Bad Cases? – The High Court’s Decision in *Kable v Director of Public Prosecutions (NSW)*’ (1997) 25 *Federal Law Review* 171; Gerard Carney, ‘*Wilson and Kable: The Doctrine of Incompatibility – An Alternative to Separation of Powers?*’ (1997) 13 *Queensland University of Technology Law Journal* 175.

235 Moreover, when regard is had to the precise nature of the function purportedly conferred by s 5(1), the matters to be taken into account in its exercise and its contrariety to what is ordinarily involved in the judicial process, the effect of s 5(1) is, in my view, to compromise the integrity of the Supreme Court of New South Wales and, because that court is not simply a State court but a court which also exists to exercise the judicial power of the Commonwealth, it also has the effect of compromising the integrity of the judicial system brought into existence by Ch III of the Constitution.

See *Kable* (1996) 189 CLR 51, 107 (Gaudron J) (emphasis added). Similarly, McHugh J stated:



constitutionality (within the context of a s 51 power intersecting with Chapter III judicial power protections) is also at odds with the approach advanced by Chief General Counsel of the Australian Government Solicitor's Office (within the context of the Chapter III judicial power protections extending to State courts invested with federal judicial power) in a situation raising the *Kable* principles.<sup>236</sup>

In *Fardon v Attorney-General for Queensland*,<sup>237</sup> a challenge to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), Mr Henry Burmester submitted a practical operation approach to the Court.<sup>238</sup> Even with the apparent contrast of approaches between the two representatives of the Commonwealth – the Solicitor-General and the Chief General Counsel – the Chief General Counsel's formulation<sup>239</sup> cannot be completely distinguished by the different contexts.<sup>240</sup> There is a strong argument for consideration of the practical operation of legislation at the intersection of Chapter III issues with legislative

it also follows that no State or federal parliament can legislate in a way that might undermine the role of those courts as repositories of federal judicial power ... [T]he Act does not seek to interfere with the invested federal jurisdiction of the Supreme Court. *On its face* it is directed to the exercise of State, not federal, jurisdiction. But for present purposes that is irrelevant. The compatibility of State legislation with federal judicial power *does not depend on intention*. It *depends on effect*.

See *Kable* (1996) 189 CLR 51, 116 (emphasis added). See also Toohy J (at 98).

236 The relevance of purpose in Australian constitutional law is well established in relation to the defence power, and also the incidental power. But it is not without its difficulties. Here the issue is to apply concepts associated with purpose not for purpose of characterisation as such but for purposes of determining whether Chapter III limits a power. It is closer to the situation of balancing an implied freedom of communication with a law enacted under head of power.

See Burmester, above n 222, 13–14.

237 Transcript of Proceedings, *Fardon v Attorney-General for Queensland* (High Court of Australia, 2 March 2004).

238 The Commonwealth, as does Queensland, contends that the proper characterisation of the legislation is preventive and that it is not punitive ... Your Honour, whether the law in a particular case has the character as a preventive law depends on examining the law in terms of how it operates, its substance and context ... As a law of the Commonwealth Parliament, then it would be incumbent on the Commonwealth to show the way it operated, having regard to its context and substance, was reasonably capable of being seen as appropriate and adapted to a legitimate non-punitive end ... Your Honour, based on the cases like *Lim* and *Kruger*, there is an acceptance in those cases that where one finds detention one then has to look closely to work out what is the purpose behind that detention ... Your Honour, it ultimately comes down to an assessment of all the circumstances about how a particular law operates. It is not a novel concept when it comes to characterisation of laws where purpose becomes a key and critical factor.

See Transcript of Proceedings, *Fardon v Attorney-General for Queensland* (High Court of Australia, Henry Burmester, 2 March 2004) 38–9. Similarly, Attorney-General Daryl Williams ascribed to the view that '[w]hether detention is punitive is a matter of substance and not form'. See Williams, above n 5, 44.

239 This is especially so given the Chief General Counsel's approach is also supported by earlier advice provided by the Attorney-General's Department. The Senate Legal and Constitutional Legislation Committee observed:

In correspondence to the Committee dated 12 June 2002, the Department advised: 'The test for determining whether or not a warrant is punitive in nature is whether the power to detain is "reasonably capable of being seen as necessary for a legitimate non-punitive objective"'. Whether detention is punitive is a matter of substance and not form.

See Senate Legal and Constitutional References Committee, above n 1, 3.

240 Indeed, from the Chief General Counsel's concessions as to the operation of the law in the above extract citing *Lim* and *Kruger* where Chapter III issues intersected with the scope of s 51 powers.

purpose issues under s 51 powers, thereby identifying activities that are not reasonably capable of being seen as necessary for a legitimate non-punitive purpose.

### E Chapter III Issues about the Detention and Questioning Powers

The final version of the detention and questioning powers in the *ASIO (Terrorism) Act 2003* reflects in some respects the time-related issues<sup>241</sup> which were seen as significant in *Al Masri* when applying a proportionality test to executive detention under a constitutional head of power. The time-related focus in the detention provisions, and the Commonwealth's subsequent advocacy of a narrow proportionality test for issues of statutory purpose in immigration matters (which is of direct relevance in security detention and questioning powers), heightens questions about the constitutionality of the legislation. A purposive test incorporating a practical operation element would render provisions more susceptible to a judicial determination that they are disproportionate in nature and hence punitive or penal following the *Lim* and *Kruger* formulation, under which activities must be reasonably capable of being seen as necessary for a legitimate non-punitive objective.

Accordingly, s 34HB of the *ASIO (Terrorism) Act 2003* is headed 'End of Questioning under Warrant'. Its text creates an *initial* impression of a series of time-related constraints linking the continuation and cessation of detention to the grounds for the request and issue of a warrant, namely, that it 'will substantially assist the collection of intelligence that is important in relation to a terrorism offence'.<sup>242</sup> The legislative drafting is directed towards avoiding a *direct* or *facial* excess of purpose when a proportionality test is applied.

Section 34HB(7) creates an obligation upon a prescribed authority 'that the person be released immediately from detention' in the following circumstances: where they have been detained under a s 34D(2) warrant, and have been questioned under the warrant for periods of eight hours and 16 hours and the prescribed authority does not permit, for the purposes of s 34HB(1) or (2), the continuation of questioning;<sup>243</sup> where the prescribed authority has previously given such permission to continue questioning beyond eight or 16 hours but later revokes that permission;<sup>244</sup> and where a person exercising authority under a s 34D warrant has questioned the detainee for a total of 24 hours.<sup>245</sup>

Permission by the prescribed authority for the continuation of questioning, in place of an immediate release from detention, beyond successive periods of eight

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241 Especially in relation to s 34HB(1)–(7) of the *Australian Security Intelligence Organisation Act 1979* (Cth): 'End of questioning under warrant'.

242 See s 34C(3)(a) (requesting warrants) and s 34D(1)(b) (issuing of warrants) of the *Australian Security Intelligence Organisation Act 1979* (Cth). This phrase can be identified as the statutory purpose, respectively requiring that the Attorney-General (s 34C) be satisfied that the test will be met before consenting to the making of a request for the issue of a warrant and that the issuing authority (s 34D) be satisfied that the test is met before issuing a warrant.

243 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34HB(7)(a).

244 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34HB(7)(b).

245 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34HB(7)(c).

hours and 16 hours, is similarly structured as an attempt to invoke proportionality characteristics of timeliness and reasonableness in the intelligence collection exercise. Consequently, the prescribed authority may permit this questioning to continue only if they are satisfied that:

- (a) there are reasonable grounds for believing that permitting the continuation will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and
- (b) persons exercising authority under the warrant conducted the questioning of the person properly and without delay in the period [mentioned in s 34HB(1) or s 34HB(2)].<sup>246</sup>

The prescribed authority's other powers to initiate or continue detention<sup>247</sup> are similarly drafted to avoid a direct or facial excess of purpose. When a person is before a prescribed authority for questioning under a warrant, the prescribed authority may give a direction for detention or further detention<sup>248</sup> only if satisfied that there are reasonable grounds for believing that, if the person is not detained, the person:

- (a) may alert a person involved in a terrorism offence that the offence is being investigated; or
- (b) may not continue to appear, or may not appear again, before a prescribed authority; or
- (c) may destroy, damage or alter a record or thing the person has been requested, or may be requested, in accordance with the warrant, to produce.<sup>249</sup>

However, this drafting technique would not avert the real possibility that the actual *operation* of the detention provisions of the legislation may offend Chapter III for being punitive in character by failing to be reasonably capable of being seen as necessary for a legitimate non-punitive objective. This is particularly the case since there is no longer *automatically* a relatively short period of detention (48 hours). Similarly, devolving the decision-making to the prescribed authority as to whether a person will continue in detention for up to 168 hours is problematic in terms of proportionality. In place of a fresh warrant application before a separate judicial officer acting as a *persona designata* at each 48 hour interval, the loosening of the operative restraints on the legislation opens up and indeed increases the possibility that the character of the detention could be transformed so that it could no longer be described as an *incident* of a legitimate, non-punitive purpose answerable to a constitutional head of power, such as intelligence-gathering.

This devolution of decision-making to the prescribed authority and the expansion to a maximum of 168 hours of detention is compounded by the

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246 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34HB(4)(a)–(b).

247 These powers arise most clearly in the situation of a non-custodial appearance before a prescribed authority, where a warrant requires a person to appear before a prescribed authority for questioning under the warrant immediately after the person is notified of the issue of the warrant, or at a time specified in the warrant: see *Australian Security Intelligence Organisation Act 1979* (Cth) s 34D(2).

248 See *Australian Security Intelligence Organisation Act 1979* (Cth) s 34F(1)(a)–(b).

249 See *Australian Security Intelligence Organisation Act 1979* (Cth) s 34F(3)(a)–(c).

circumstances under which a person exercising authority under the warrant may request the prescribed authority to permit the questioning to continue beyond the respective intervals of eight and 16 hours.<sup>250</sup> These circumstances allow the request to be made in the absence of the person being questioned<sup>251</sup> and their legal adviser,<sup>252</sup> amongst others.<sup>253</sup> A blanket prohibition on knowing anything about the case<sup>254</sup> for continuing an initial or subsequent questioning, and for the exclusion of legal representation in making submissions and responses to the prescribed authority,<sup>255</sup> impairs any ability to test the reasonableness of the continuing intelligence-gathering purpose of the detention.<sup>256</sup> This increases the possibility that the questioning and detention will be susceptible to constitutional attack.

This restricted and untested information profile from which continuations of detention are determined also impacts upon the ability of a detainee to effectively seek from a federal court a remedy relating to the warrant or treatment in connection with the warrant,<sup>257</sup> a practical method by which the detention could be concluded. The question of whether detention measures are reasonably capable of being seen as necessary for the purpose of the collection of intelligence, including the protection of intelligence collection processes, is more accurately assessed in the context of other legislative provisions affecting access to judicial review. Strict liability provisions,<sup>258</sup> creating a reverse onus of proof on the balance of probabilities, apply to the warrant characteristics and nature of warrant information<sup>259</sup> forming the basis of the information disclosure

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250 See *Australian Security Intelligence Organisation Act 1979* (Cth) s 34HB(3).

251 See *Australian Security Intelligence Organisation Act 1979* (Cth) s 34HB(3)(a).

252 See *Australian Security Intelligence Organisation Act 1979* (Cth) s 34HB(3)(b).

253 See *Australian Security Intelligence Organisation Act 1979* (Cth) s 34HB(3)(c) (a parent of that person); s 34HB(3)(d) (a guardian of that person); s 34HB(3)(e) (another person who is able to represent the person's interests); s 34HB(3)(f) (anyone the person being questioned is permitted by a direction under s 34F to contact).

254 Other than the information contained in the warrant, a copy of which must be given to the legal adviser by a person exercising authority under the warrant: *Australian Security Intelligence Organisation Act 1979* (Cth) s 34U(2A). Developments from questioning subsequent to the issuance of the warrant therefore cannot be meaningfully addressed or responded to from the perspective of the detainee.

255 When deciding whether questioning will continue just before the end of 8 and 16 hour intervals under *Australian Security Intelligence Organisation Act 1979* (Cth) s 34HB(1) or s 34HB(2) respectively, or in making directions to detain, or a direction for further detention of, a person before the prescribed authority under s 34F(1)(a) or s 34F(1)(b) respectively.

256 That is the basis of the prescribed authority's satisfaction to permit the continuation of questioning under the *Australian Security Intelligence Organisation Act 1979* (Cth) s 34HB(4) criteria that (a) there are reasonable grounds for believing that permitting the continuation will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and (b) persons exercising authority under the warrant conducted the questioning of the person properly and without delay in the period mentioned, can only be obtained on the basis of evidentiary material from persons exercising authority under the warrant.

257 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34E(1)(f)–(3).

258 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34VAA(3), applying to paras (1)(c) and (2)(c) of s 34VAA.

259 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34VAA(1)(c) and s 34VAA(2)(c).

prohibitions applying to lawyers.<sup>260</sup> The tightening of obligations on a detainee's lawyer not to disclose information obtained during ASIO interrogations will, in the context of the severe constraints on legal representation during interrogation<sup>261</sup> – including regulations about communication by legal advisers of information relating to a person specified in a warrant<sup>262</sup> and lawyers' access to information for proceedings relating to a warrant<sup>263</sup> – further constrain effective legal representation in accessing remedies in the courts in the case of individual detainees. It can therefore be plausibly argued that the extensive restrictions on legal representation to challenge the legality of the detention by accessing Chapter III courts, so adversely affect the detention as to render it of a punitive character.

Whilst s 34HC of the *ASIO Act 1979* (Cth) ensures that a person may not be detained for a continuous period of more than 168 hours, a capacity exists to obtain second and subsequent warrants for questioning and detention upon undemanding additional grounds<sup>264</sup> to the s 34D(1)(b) requirement.<sup>265</sup> Yet the very nature of the compulsory disclosure regime during questioning,<sup>266</sup> operating in tandem with the threshold issuing requirement that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence,<sup>267</sup> logically ensures that the requirement of 'information additional to or materially different from that known to the Director-General at

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260 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34VAA(3)(b)(i)–(iii). A 'lawyer' comprises those who have at any time been (i) present, as the subject's legal adviser, at the questioning of the subject under the warrant; (ii) contacted for the purpose of the subject obtaining legal advice in connection with the warrant; or (iii) contacted for the purpose of the subject obtaining representation in legal proceedings seeking a remedy relating to the warrant or the treatment of the subject in connection with the warrant.

261 See *Australian Security Intelligence Organisation Act 1979* (Cth) s 34TA (limit on contact of lawyer of choice), s 34TB (questioning person in absence of lawyer of person's choice), s 34U (involvement of lawyers, including the fact that communications with a legal adviser are able to be monitored, a prohibition on the legal adviser intervening in the questioning of the detainee, a capacity to remove the legal adviser for unduly disrupting the questioning and various offences for unauthorised communications).

262 *Australian Security Intelligence Organisation Amendment Regulations 2003* (Cth) (No 1) reg 3A.

263 *Australian Security Intelligence Organisation Amendment Regulations 2003* (Cth) (No 1) reg 3B.

264 The issuing authority must take account of the facts of the person already having been detained in connection with one or more of the warrants (*Australian Security Intelligence Organisation Act 1979* (Cth) s 34D(1A)(a)) and may only issue the requested warrant if satisfied that (i) the issue of the warrant is justified by information additional to or materially different from that known to the Director-General at the time the Director-General sought the Minister's consent to request the issue of the last of the earlier warrants issued before the seeking of the Minister's consent to the request for the issue of the warrant requested; and (ii) that the person is not being detained under this Division in connection with one of the earlier warrants: see *Australian Security Intelligence Organisation Act 1979* (Cth) s 34D(1A)(b)(i)–(ii).

265 Namely that 'the issuing authority 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'.

266 In particular, see *Australian Security Intelligence Organisation Act 1979* (Cth) s 34G(3), (6) respectively creating offences with a penalty of five years imprisonment for failing to give any information requested in accordance with the warrant when before a prescribed authority for questioning, and failing to produce any record or thing that the person is requested in accordance with the warrant to produce when before a prescribed authority for questioning.

267 See *Australian Security Intelligence Organisation Act 1979* (Cth) s 34D(1)(b).

the time the Director-General sought the Minister's consent to request the issue of the last of the earlier warrants<sup>268</sup> is self-fulfilling and almost inevitable. The combined *operation* of these provisions is that, subject to a brief, unspecified period of release from custody at the expiration of 168 hours,<sup>269</sup> the provisions may be invoked to produce renewed, prolonged detention that in a real sense is all but continuous.<sup>270</sup> The self-fulfilling, circular and perpetual nature of the low threshold for second and subsequent warrants exposes in the textual interaction of the relevant sections of the detention legislation a vulnerability to failing the description of 'being limited to what is reasonably capable of being seen as necessary for an intelligence-gathering purpose'.

Furthermore, the phrase 'terrorism offence', which is pivotal to the operation of the detention and questioning warrants, is extensive and incorporates a whole range of offences, not necessarily involving violence, under the *Criminal Code Act 1995* (Cth).<sup>271</sup> On the assumption that the intelligence collection function in relation to terrorism offences is a constitutionally permissible activity supporting executive detention, such detention now attaches to a much broader array of offences than was contemplated in the Attorney-General's original proposals.<sup>272</sup> The *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth), passed on 4 March 2004, allows executive proscription of terrorist organisations, thus increasing the opportunities for application of a range of offences relating to proscribed organisations in the *Criminal Code Act 1995* (Cth).<sup>273</sup>

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268 See *Australian Security Intelligence Organisation Act 1979* (Cth) s 34D(1A)(b).

269 As required following *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34D(1A)(b)(ii), 34HC.

270 Of course, a person detained for intelligence-gathering purposes under the *Australian Security Intelligence Organisation Act 1979* (Cth) could, at the cessation of that detention, be immediately arrested for criminal law investigatory purposes for alleged terrorism offences under the *Criminal Code Act 1995* (Cth). They would then be subject to the extended criminal law investigatory regime for terrorism matters envisaged by the *Anti-Terrorism Bill 2004* (Cth), which amends custodial time limits under the relevant provisions of the *Crimes Act 1914* (Cth).

271 See *Criminal Code Act 1995* (Cth) ss 101.1–101.6, 102.2–102.7, 103.1. The *Anti-Terrorism Act (No 2) 2004* (Cth) has now also inserted an additional offence into the *Criminal Code* (Cth), of s 102.8 (associating with terrorist organisations).

272 See Daryl Williams, 'New Counter-Terrorism Measures' (Press Release, 2 October 2001) where it was stated that:

The legislation would also authorise the State or Federal Police, acting in conjunction with ASIO, to arrest a person and bring that person before the prescribed authority. Such action only would be authorised where the magistrate or tribunal member was satisfied it was necessary in order to protect the public from *politically motivated violence*.

'Politically motivated violence' was, prior to the passage of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2002* (Cth), defined by paras (a), (b), (c) and (d) of the phrase in s 4, the definition section of the Act. See also *Report of Australia to the Counter-Terrorism Committee of the United Nations Security Council Pursuant to Paragraph 6 of the Security Council Resolution 1373 (2001) of 28 September 2001*, 10, UN Doc S/2001/1247 (2001), which describes the original proposal to extend detention, which amounted 'to a power to seek to detain people for up to 48 hours without legal representation in very serious cases where such a step is necessary to prevent a terrorist attack'. See also James Renwick, 'The War against Terrorism: National Security and the Constitution', *Bar News: Journal of the New South Wales Bar Association*, Summer 2002–03, 42, 47.

273 *Criminal Code Act 1995* (Cth) s 102.4(1)(a)–(e).

Both the breadth of the offences to which the intelligence-gathering purposes formally attach under the warrant, as well as the non-intelligence-gathering purposes or applications of the legislation, render sections of the legislation potentially invalid as exceeding proportionality requirements. Indeed, the breadth of offences attaching to a nominated intelligence-gathering purpose enlarges the risk that purposes other than the gathering of intelligence become the real, but unarticulated, reason in a warrant application and issue. This point was recognised by the Senate Legal and Constitutional References Committee.<sup>274</sup>

The fact that the Senate Legal and Constitutional References Committee recognised that other purposes might arise points to the importance of a practical operation element in the test of proportionality. It confirms that the formal statutory purpose of intelligence-gathering might also be invoked so as to facilitate substantively parallel, but non-intelligence-gathering purposes,<sup>275</sup> such as preventative detention. Accordingly, even if detention for intelligence-gathering purposes is reasonably capable of being considered as appropriate and adapted to a legitimate end, other purposes that should not satisfy the constitutional test of proportionality can transform the status of the detention.

Indeed, a preventative detention purpose implicitly assumes the detainee will, if not detained, do something illegal and so involves an imputation of criminality to the detainee. Such an imputation and the consequences of detention can potentially be understood as a purpose that is penal or punitive in nature. This observation is confirmed more specifically through examining the character of particular sections authorising detention, as distinct from a non-detention attendance before a prescribed authority for questioning.

Section 34C(3)(c) provides the third of the warrant criteria: The Minister may, in writing, consent to the making of the request (for detention), but only if the Minister is satisfied:

- (c) if the warrant to be requested is to authorise the person to be taken into custody immediately, brought before a prescribed authority immediately for questioning and detained – that 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.

Such conduct in itself would ordinarily constitute an offence under s 101.6 of the *Commonwealth Criminal Code*, namely that '[a] person commits an offence if the person does any act in preparation for, or planning, a terrorist act'. Alternatively, such a person would be liable under the complicity and common purpose provisions<sup>276</sup> as aiding, abetting, counselling or procuring the s 101.1 *Commonwealth Criminal Code* offence: '[a] person commits an offence if the person engages in a terrorist act'.

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274 Senate Legal and Constitutional References Committee, above n 1, 72.

275 This point was noted by the Senate Legal and Constitutional References Committee which considered the Attorney-General's press release of 2 October 2001 as signalling a form of preventive or protective detention: Senate Legal and Constitutional References Committee, above n 1, 77.

276 *Criminal Code Act 1995* (Cth) s 11.2.

This existence of reasonable grounds for believing that without immediately taking the person into custody the person will alert others that a terrorism offence is being investigated arguably imputes criminality<sup>277</sup> as the legal basis for detention, rather than the available warrant obligation to be questioned.<sup>278</sup> Having identified the formal criminal nature of the behaviours that may, according to s 34C(3)(c), occur, the provision can be seen as overtly preventative in nature, both in its application to the detainee but also to investigation of the involvement of a person in the referent terrorism offence.

Similar, but more acute, criminally imputative and preventative characteristics are reflected in the legislative provision applying to minors, which is additional to s 34D:

If the Director-General seeks the Minister's consent to request the issue of a warrant under s 34D in relation to a person and the Minister is satisfied on reasonable grounds that the person is at least 16 but under 18, the Minister may consent only if he or she is satisfied on reasonable grounds that:

- (a) it is likely that the person will commit, is committing or has committed a terrorism offence...<sup>279</sup>

Both forms of imputation of criminality – the alerting of a person involved in a terrorism offence and that a person at least 16 years of age but less than 18 years of age is, has or will be involved in a terrorism offence – forming a consequential basis for an executive authorisation of detention, can be argued as being bills of attainder.<sup>280</sup> Given the *Polyukhovich* understanding of what constitutes a bill of attainder, such an argument is plausible. As Professor Zines observes:

It does not matter if punishment is prescribed by the general law or specified in the special Act. Attempts by parliament to achieve results such as this may, however, be disguised. Difficulties can arise in distinguishing camouflaged attempts by parliament to judge persons, and punish them, from the imposition of harsh prospective liabilities or duties on specified persons or groups.<sup>281</sup>

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277 Importantly, the imputation involves criminal behaviour quite separate from the operation of criminal penalties under the *Australian Security Intelligence Organisation Act 1979* (Cth), such as found in s 34G. The alternative grounds in s 34C(3)(c) are (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.

278 Contrast the preceding paras (a), (b), (ba) of s 34C(3) of the *Australian Security Intelligence Organisation Act 1979* (Cth) as well as s 34D(2)(a) which requires a specified person to appear before a prescribed authority for questioning under the warrant immediately after the person is notified of the issue of the warrant, or at a time specified in the warrant, as providing the necessary basis for a questioning only warrant.

279 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34NA(4)(a)–(b).

280 Bills of attainder are variously described in *Polyukhovich v Commonwealth* (1991) 172 CLR 501:

Bills of attainder ... and bills of pains and penalties ... may be defined as legislative acts imposing punishment without the safeguards of a judicial trial ... Legislative acts of this character contravene Ch III of the Constitution because they amount to an exercise of judicial power by the legislature. In such a case, membership of a group would be legislative assessment as to the certainty, or at least the likelihood to the criminal standard of proof, of an accused doing certain acts or having certain intentions. Those acts or intentions would not themselves be open to scrutiny by the court.

See Toohey J at 686. See also 535 (Mason CJ), 612 (Deane J) and 721 (McHugh J).

281 Zines, above n 93, 206–7.



The potential authorisation of detention for broader purposes, as identified by the Senate Legal and Constitutional References Committee, is further confirmed by the fact that the information obtained during questioning is not subject to a derivative use immunity, even though the giving of information or the production of a record or thing might tend to incriminate the person or make the person liable to a penalty.<sup>282</sup> Instead, information, documents and things obtained are only subject to direct use immunity in criminal proceedings.<sup>283</sup> The scope for derivative use of such information for the investigation of alleged criminal offences and, in this instance, the terrorism offences of the *Criminal Code Act 1995* (Cth), is enhanced by the operation of two other provisions in the *ASIO Act 1979* (Cth) dealing with communication<sup>284</sup> and co-operation<sup>285</sup> with law enforcement authorities.<sup>286</sup> Significantly, such information is obtained from a compulsory disclosure process freed from the investigatory constraints and rights of the suspect that are enshrined in the investigation of offences under the *Crimes Act 1914* (Cth).<sup>287</sup>

It is therefore arguable that these aspects of the legislation – the imputation and adjudgment of criminality as a precondition to obtaining a detention warrant, and the very significant potential applications of a nominally intelligence-gathering process to a criminal law investigatory purpose – result in an infringement of the proportionality requirement. That is, it may be that the effect of the measures described cannot be seen as being reasonably capable of being appropriate and adapted to the purpose of intelligence-gathering. The operation and content of these aspects of the legislation invoke criminal law culpability or process, but do so outside of a criminal law process seen as consistent with Chapter III judicial power, namely

the arrest and detention in custody, pursuant to executive warrant, of a person accused of crime to ensure that he or she is available to be dealt with by the courts. Such committal to custody awaiting trial is not seen by the law as punitive or as appertaining exclusively to judicial power.<sup>288</sup>

These aspects of the legislation fail to answer the description of being ‘part of a system of preventive detention with appropriate safeguards, consequent upon or ancillary to the adjudication of guilt’.<sup>289</sup>

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282 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34G(8) in operation with the obligations under s 34G(3) and s 34G(6).

283 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34G(9).

284 See *Australian Security Intelligence Organisation Act 1979* (Cth) s 18(3).

285 See *Australian Security Intelligence Organisation Act 1979* (Cth) s 19(1).

286 Paragraph 4.1 of the *Australian Security Intelligence Organisation Protocol*, made pursuant to the *Australian Security Intelligence Organisation Act 1979* (Cth) s 34C(3A) requires that ‘[a] police officer must remain present at all times during the questioning of a subject’, whilst para 5.1 of the *Protocol* requires that ‘[a] police officer shall supervise all detention pursuant to a warrant’.

287 See *Crimes Act 1914* (Cth) pt 1C, divs 1–3 and pt 1D, divs 1–5. See also the amendments to *Crimes Act 1914* (Cth) regarding the length of investigative custody following arrest made by the *Anti-terrorism Act 2004* (Cth) and the Senate Committee report on the same: Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Provisions of the Anti-Terrorism Bill 2004* (2004) 11–22, 57–8.

288 *Lim* (1992) 176 CLR 1, 28.

289 *Kable* (1996) 189 CLR 1, 98 (Toohey J).

## X POSTSCRIPT AND CONCLUSION

On 6 August 2004, following submission of this article, the High Court handed down decisions in three important *Migration Act 1958* (Cth) detention cases.<sup>290</sup> The first two of these cases, *Al Kateb v Godwin*<sup>291</sup> ('*Al Kateb*') and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji*<sup>292</sup> ('*Al Khafaji*'), are relevant to the instant issues of the detention and interrogation powers. They deal with the interconnected issues of the scope of the aliens power, the constitutional nature of purpose and Chapter III immunities.<sup>293</sup> The views of the Commonwealth Solicitor-General, as outlined above, can be seen to have resonance in the majority's treatment of these interconnected issues.

A first consideration in gauging the likely relevance of these decisions upon the constitutionality of the *ASIO (Terrorism) Act 2003* is to recognise that discussion of the *Lim* detention principle<sup>294</sup> has occurred within the highly differentiated context of the s 51(xix) aliens power. On the one hand, the majority<sup>295</sup> in *Al Kateb* and *Al Khafaji*, endorsing the constitutionality of

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290 In *Al Kateb v Godwin* [2004] HCA 37 the applicant was a stateless person born of Palestinian parents in Kuwait who had arrived in Australia in December 2000 without a visa. He was taken into immigration detention, refused a protection visa and sought removal from Australia, which proved impossible. He subsequently sought release from immigration detention. A majority of four judges of the High Court refused such release. In *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] HCA 38, Al Khafaji was an Iraqi national who, whilst found to be a genuine refugee, was refused a protection visa in Australia on the grounds that he had not taken all reasonable steps to avail himself of a right to reside in Syria. Attempts by the Australian Government to remove him from Australia had proved unsuccessful and there was no real prospect of successful removal in the foreseeable future. The Minister appealed the judgment and order of Mansfield J of the Federal Court that Al Khafaji be released from immigration detention. The appeal then removed into the High Court under s 40 of the *Judiciary Act 1903* (Cth) by order of the High Court. A majority of four judges of the High Court allowed the Minister's appeal, set aside the orders made by Mansfield J and upheld the validity of the provisions of the *Migration Act 1958* (Cth) requiring the continued detention of the respondent. In *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36, the appeal concerned the relevance of information about the general conditions at the place of detention from which Behrooz escaped to a charge of escaping from immigration detention contrary to s 197A of the *Migration Act 1958* (Cth).

291 *Al Kateb* [2004] HCA 37 has a series of lengthier judgments where these principles are expounded in detail.

292 The judgments in *Al Khafaji* are brief and rely extensively upon the principles set out in *Al Kateb*: see *Al Khafaji* [2004] HCA 38, [2] (Gleeson CJ), [3] (McHugh J), [5] (Gummow J), [25] (Kirby J), [30] (Hayne J), [39] (Callinan J). Justice Heydon agreed with the reasons stated by Hayne J: at [51].

293 The broader potential import of the immigration cases to the detention and questioning powers has been previously mentioned by Gleeson CJ and McHugh J in Transcript of Proceedings, *Re Woolley; Ex parte Applicants M276/2003* (High Court of Australia, 3 February 2004). See the above discussion in Part X(B).

294 That is, the High Court's finding that the s 51(xix) constitutional power extended to the Executive having authority to detain an alien in custody for the purposes of expulsion or deportation: see *Lim* (1992) 176 CLR 1, 32 (Brennan, Deane and Dawson JJ).

295 Justices McHugh, Hayne, Callinan and Heydon constituted the majority in these cases, each writing separate judgments, although the very brief judgments of Heydon J agreed with those of Hayne J. Chief Justice Gleeson, Gummow and Kirby JJ wrote dissenting judgments in each of the two cases.

indefinite detention of *aliens* unable to be removed from Australia, might be seen as confirming the opposing principle that involuntary detention of a *citizen* can generally only occur as an incident of the exclusively judicial power of adjudging and punishing criminal guilt. This might be the case since aliens have less protection because of the existence of s 51(xix)<sup>296</sup> and the different nature of purpose therein.

On the other hand, the readiness with which the majority judges embraced permissible (and indefinite) detention to include a situation not contemplated<sup>297</sup> by the restrictions on detention in *Lim*, rather than implying a statutory or constitutional principle involving reasonable limits upon such detention,<sup>298</sup> might suggest a predisposition to look more expansively at other identified constitutional heads of power supporting other detention legislation. Such an approach would readily but improperly lean towards a finding of a constitutional purpose in the other claimed heads of legislative power. It tends to blur the very real distinction between the aliens power and the other constitutional heads of power argued to support security detention and questioning provisions.

The issue of constitutional purpose was of critical significance in *Al Kateb* and *Al Khafaji*. The majority's finding of the validity of the detention was grounded in an approach where 'purposes must be gleaned from the content of the heads of power which support the law'.<sup>299</sup> This facilitated further judicial exposition of purposes falling within the alien power.<sup>300</sup> It produced contrived views amongst the majority justices of what could constitute a protracted constitutional purpose found in the detention provisions under the *Migration Act 1958* (Cth), establishing that a residual or dormant capacity to remove sufficed as a constitutional purpose under the aliens power.<sup>301</sup>

Similarly, the *Lim* distinction between punitive and non-punitive purposes in detention was equally shown to be susceptible to judicial determination of purpose. This facilitates a narrowing of the Chapter III immunity through a

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296 This interpretation accords with the more moderate principle enunciated by Leslie Zines and approved by George Winterton: see the above discussion in Part X (C).

297 The situation where there is, for whatever reason, no practical capacity to remove an alien from Australia: see *Al Kateb* [2004] HCA 37, [49] (McHugh J), [247], [255], [267] (Hayne J), [294] (Callinan J).

298 As in the minority judgments of Gleeson CJ, Gummow and Kirby JJ.

299 *Al Kateb* [2004] HCA 37, [267] (Hayne J). See also [42], [44] (McHugh J), [289] (Callinan J).

300 The relevant additional purpose in this instance being indefinite detention for the purpose of removal so as to prevent absorption into the Australian community.

301 *Al Kateb* [2004] HCA 37, [227], [229] (Hayne J):

*Removal* is the purpose of the provisions, not repatriation or removal to a place. It follows, therefore, that stateless or not, absent some other restriction on the power to remove, a non-citizen may be removed to *any place* willing to receive that person ... the time for performance of the duty does not pass until it is reasonably practicable to remove the non-citizen in question ... The duty remains unperformed: it has not yet been practicable to effect removal. That is not to say that it will *never* happen.

See also [45]–[46] (McHugh J), [290]–[291] (Callinan J).

simple process of labelling or characterising the activity as non-punitive,<sup>302</sup> thereby expanding the scope of an executive power to detain. In this respect, Gummow J's dissenting critique of the difficulties associated with the punitive/non-punitive distinction in assessing the Commonwealth's ability to impose administrative detention is illuminating and apposite.<sup>303</sup> Responding to the approach that would diminish the Chapter III immunity through the expedient of labelling types of detention as non-punitive, Gummow J observed that '[i]t is primarily with the deprivation of liberty that the law is concerned, not with whether that deprivation is for a punitive purpose'.<sup>304</sup> In assessing the purposes of continuing detention, 'it cannot be for the executive government to determine the placing from time to time of that boundary line which marks off a category of deprivation of liberty from the reach of Ch III'.<sup>305</sup> Importantly, the dissenting view would ensure judicial review of continuing detention beyond an initial establishment of a constitutional purpose in the legislation.

This examination leads to a final consideration concerning the scope of the Chapter III immunity and the judicial role in assessing the existence and duration of an executive power to detain. The majority judgments in *Al Kateb* and *Al Khafaji* effectively and definitively exclude a Chapter III role beyond initial constitutional questions of whether a person is an alien within the meaning of the

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302 See *ibid* [44] (McHugh J): 'However, a law authorising detention will not be characterised as imposing punishment if its object is purely protective. *Ex hypothesi*, a law whose object is purely protective will not have a punitive purpose'. Justice Hayne firstly identified from the *Lim* formulation that where detention was not 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'; this was said to be punitive: at [252]. His Honour then provided a three stage critique of this punitive identification in *Lim*: at [253]–[257], and characterised the instant circumstances as non-punitive (at [261]):

If the line to be drawn attaches importance to the characterisation of the consequences as punitive, it must be recognised that the consequences which befall an unlawful non-citizen whom the Executive cannot quickly remove from Australia are not inflicted on that person as punishment for any actual or assumed wrongdoing. They are consequences which come about as the result of a combination of circumstances.

A range of reasons for characterising the laws as non-punitive was offered: 'punishment is not to be inflicted in exercise of the judicial power except upon proof of commission of an offence'; 'immigration detention is not detention for an offence'; segregation of non-citizens making landfall within Australia without permission is of a substantially different character to punishment; and it is necessary to look to the content of the heads of power in support of a law, rather than the effluxion of time, to determine the purpose of the law: at [265]–[267]. Justice Callinan likewise characterised indefinite detention of aliens as non-punitive, and willingly contemplated 'that a penalty imposed as a deterrent or as a disciplinary measure is not always to be regarded as punishment imposable only by a court': at [291].

303 *Al Kateb* [2004] HCA 37, [135]–[136] (Gummow J):

there is often no clear line between purely punitive and purely non-punitive detention ... Once it is accepted that many forms of detention involve some non-punitive purpose, it follows that a punitive/non-punitive distinction cannot be the basis upon which the Ch III limitations respecting administrative detention are enlivened.

Justice Kirby expressed his agreement with the reasons of Gummow J: at [144], [146], [150], [151].

304 *Ibid* [137]. In support of this observation, Gummow J also cited the observation of Brennan, Deane, Toohey and Gaudron JJ in *Witham v Holloway* (1995) 183 CLR 525, 534 that 'nothing is achieved by describing some proceedings as "punitive" and others as "remedial or coercive". Punishment is punishment, whether it is imposed in vindication or for remedial or coercive purposes'.

305 Indeed, that question was itself seen 'as a question arising under the Constitution or involving its interpretation': *ibid* [140] (Gummow J).

s 51(xix) power.<sup>306</sup> These judgments essentially confine the Chapter III judicial function over the aliens power to the barest conformity with s 75(v) of the *Constitution*.<sup>307</sup> In a comparison of the majority and minority judgments, the starkest conflict arises in the relevance and application to detention of the *Communist Party Case*<sup>308</sup> principle, namely that the legislature or the executive cannot conclusively determine the conditions or limits of a claimed power.<sup>309</sup> The assertion by McHugh J that the *Communist Party Case* is of no assistance<sup>310</sup> confirms the exceptional import of the majority's findings,<sup>311</sup> a point underlined by recent endorsement of the *Communist Party Case* principle in a separate matter by two of the majority judges.<sup>312</sup>

Perhaps of most pressing interest to constitutional questions about the detention and questioning powers is the bullish institutional disengagement from human rights considerations in the constitutional methodology<sup>313</sup> of the majority judgments of McHugh J,<sup>314</sup> Hayne J<sup>315</sup> and Callinan J<sup>316</sup> in the *Migration Act*

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306 Or perhaps any necessary precondition to the initial exercise of the power.

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 ... Nothing in ss 189, 196 or 198 purports to prevent courts, exercising federal jurisdiction, from examining any condition precedent to the detention of unlawful non-citizens.

See *ibid* [44], [48] (McHugh J). See also [254], [267] (Hayne J), [290] (Callinan J).

307 Such an observation is both reinforced and reflected by McHugh J's constitutional method in *Al Kateb* which asserts a narrow operation of Ch III protection by distinguishing and quarantining its development from overseas constitutional and human rights jurisprudence (at [51]–[54]), war time detention powers (at [55]–[61]), international law developments (at [62]–[72]) and by eschewing a judicially created bill of rights (at [73]). Cf Justice Michael McHugh, 'Does Chapter III of the Constitution Protect Substantive as well as Procedural Rights?' (2001) 21 *Australian Bar Review* 236.

308 (1951) 83 CLR 1.

309 The reason is that it cannot be for the executive government to determine the placing from time to time of that boundary line which marks off a category of deprivation of liberty from the reach of Ch III. The location of that boundary line is itself a question arising under the Constitution or involving its interpretation, hence the present significance of the *Communist Party Case*.

See *Al Kateb* [2004] HCA 37, [140] (Gummow J).

[T]he *Communist Party Case* is of substantial assistance ... This is for the reasons that Gummow J has identified. It is inconsistent with a basic proposition of Australian constitutional doctrine, at least since 1951, that the validity of a law or an act of the Executive should depend on the conclusive assertion or opinion of the Parliament ... or the assertion or opinion of an officer of the Executive.

See at [155] (Kirby J). See also Gleeson CJ at [4], setting out the constitutional framework of Chapter III, within which the bounds of the s 51(xix) aliens power must be assessed.

310 *Ibid* [50].

311 The other majority judges make no mention of the *Communist Party Case* principle in their judgments.

312 See *Attorney-General (WA) v Marquet* (2003) 202 ALR 233, 248 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

313 Justice Kirby, one of the three dissenting judges (the others being Gleeson CJ and Gummow J) pointedly commented: 'I dissent from the majority view in this case. Potentially, that view has grave implications for the liberty of the individual in this country which this Court should not endorse. "Tragic" outcomes are best repaired before they become a settled rule of the Constitution': *Al Kateb* [2004] HCA 37, [148]–[149].

314 *Ibid* [31], [74] (McHugh J):

1958 (Cth) cases. These judicial dispositions will be of interest in any litigation challenging the constitutional validity of the *ASIO (Terrorism) Act 2003*. There is a genuine risk of misleading comparisons and elisions of purpose being made between the s 51(xix) aliens power, and the purpose informing the defence, external affairs, executive, implied nationhood and incidental powers, which are said to support the detention and questioning provisions.<sup>317</sup> The obvious point is that in those constitutional powers the concept of purpose is different and is not as broad as the purpose acknowledged in the s 51(xix) aliens power. A further point is that the *Migration Act 1958* (Cth) established a system of mandatory detention, without administrative discretion<sup>318</sup> and did so under the broader s.51(xix) aliens power. In contrast, the detention and questioning provisions, established under narrower purposive powers, include a range of discretions – indicated by frequent use of the word ‘reasonable’<sup>319</sup> in the legislation – which render improper a crude transplantation of the scope of purpose in the aliens power to that legislation. The *ASIO (Terrorism) Act 2003* also provides clearer textual foundations for challenging the constitutionality of extended warrant questioning and detention of persons.<sup>320</sup>

The examination in this article of the *ASIO (Terrorism) Act 2003* has demonstrated that there are a number of unresolved constitutional questions. Following the tragedies of September 11 and Bali, and exposure of the al Qaeda and associates’ manifesto of schematically targeting *en masse* innocent persons, it is obvious that enhanced intelligence-gathering and analysis are essential to the defence of democratic societies and their institutions and practices. However, the choice of methods must both reinforce and reflect critical rule of law principles such as restraint, accountability, proportionality, necessity and due process,

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tragic as the position of the appellant certainly is, his appeal must be dismissed ... It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.

See also [48] (McHugh J).

315 To adopt and adapt what [Learned Hand J said in *United States v Shaughnessy* 195 F 2d 964, 971 (2<sup>nd</sup> Cir, 1952)]: ‘Think what one may of a statute ... when passed by a society which professes to put its faith in [freedom], a court has no warrant for refusing to enforce it. If that society chooses to flinch when its principles are put to the test, courts are not set up to give it derring-do’.

See *ibid* [269] (Hayne J). Justice Heydon agreed with the reasons of Hayne J: at [303].

316 *Ibid* [298]:

It is a matter for the Australian Parliament to determine the basis on which illegal entrants are to be detained. So long as the purpose of detention has not been abandoned, a statutory purpose it may be observed that is within a constitutional head of power, it is the obligation of the courts to ensure that any detention for that purpose is neither obstructed nor frustrated.

317 See the exchange between McHugh J and Solicitor-General Bennett on this point in *Re Woolley; Ex parte Applicants M276/2003* (High Court of Australia, 3 February 2004) 39.

318 See particularly the judgments in *Al Kateb* of Gleeson CJ at [1] and Hayne J at [199] and [210].

319 See, eg, *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34HB(4)(a)–(b), 34F(3)(a)–(c), 34C(3)(c), 34NA(4)(a)–(b), as mentioned in Part X (B) above.

320 Indeed, the extensive use of ‘reasonable’ or its derivatives in the legislation provides a direct textual basis for testing the constitutionality of purpose, the purpose, of course, being derived from the narrower defence, executive, implied nationhood and incidental powers through an application of the proportionality tests.

which are embedded in the institutions and practices of commonly accepted notions of liberal democratic representative and participatory democracy. Such modest but basal concepts arising from a written constitution founded on a system of common law<sup>321</sup> deserve present reflection.

If counter-terrorism legislation falls short of basic standards and principles of constitutionality, and the judicial branch endorses such deficiencies, then permanent damage will be done over time to the fabric of the same societies, institutions, practices and values that are the target of terrorism. Such legislative measures are also unlikely to be as effective as claimed, and will be vulnerable at critical times to constitutional challenge. It was this concatenation of factors, highlighted by real questions of constitutionality, which produced alternative, constitutionally-sound intelligence-gathering models in the time leading up to the passage of the Bill.<sup>322</sup>

The legislation, its subsequent amendments and the *res gestae* of its enactment and aftermath persist as characteristics that ‘would undermine key legal rights and erode the civil liberties that make Australia a leading democracy’.<sup>323</sup> These features include the exceptional and loose provisions of the original drafts tempered only by parliamentary committee, and Senate review, the accretion of insufficiently accountable executive power and inadequate official articulation of constitutional issues and of how the legislation integrated and defended democratic principles. In time, the High Court is likely to be called upon to pronounce upon the constitutionality of some, or many, of the issues raised in this article. In doing so, its judgments will have as profound an impact upon the quality of Australian democracy and the wellbeing of the Australian body politic as the enlightened decisions of the majority justices in the *Communist Party Case*.

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321 Justice Dixon in the *Communist Party Case* (1951) 83 CLR 1 conceived of the *Constitution* as existing within a system of common law, so that a determinative role arises for common law conventions in its interpretation: ‘Moreover, it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions ... Among these I think it may fairly be said that the rule of law forms an assumption’: at 193. Similarly, writing extra-curially, His Honour observed:

It is easy to treat the written instrument as the paramount consideration, unmindful of the part played by the general law, notwithstanding that it is the source of legal conceptions that govern us in determining the effect of the written instrument ... constitutional questions should be considered and resolved in the context of the whole law, of which the common law ... forms not the least essential part.

See Sir Owen Dixon, ‘The Common Law as an Ultimate Constitutional Foundation’ in S Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (1965) 205, 212–13.

322 See Senate Legal and Constitutional References Committee, above n 1, 86–8, 91–9, 101–7 and Submissions 24 and 24A (Carne), 61 (Donaghue) and 299 (Law Council of Australia) to the Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (2002).

323 Adopted from Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) vii (Chairman’s Foreword).