

POSSIBLE CONSTITUTIONAL OBJECTIONS TO THE POWERS TO BAN 'TERRORIST' ORGANISATIONS

JOO-CHEONG THAM*

I INTRODUCTION

A primary target of the 'War on Terror' are groups engaged in extreme acts of political/religious violence. Since the September 11 attacks, various types of laws have been passed which are ostensibly aimed at suppressing such groups.¹ These laws include legislation enacting broad-ranging 'terrorism' offences,² as well as legislation granting unprecedented powers of compulsory questioning and detention to the Australian Security Intelligence Organisation.³

A crucial plank of these laws has been the enactment of executive proscription regimes. There are presently two proscription regimes aimed at 'terrorist' groups. There is the regime under the *Criminal Code* (Cth) ('*Criminal Code* proscription

* LLB (Hons) (Melb), LLM (Melb); Associate Lecturer, School of Law and Legal Studies, La Trobe University. Special thanks to Roger Douglas, Jude McCulloch and George Williams for kindly reading an earlier draft of this article and providing feedback. I also greatly benefited from the anonymous referees' comments, especially in revising the sections dealing with bills of attainder. All errors remain my own.

- 1 For an account of such legislation, see Michael Head, "'Counter-Terrorism' Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 *Melbourne University Law Review* 666; Greg Carne, 'Terror and the Ambit Claim: *Security Legislation Amendment (Terrorism) Act 2002* (Cth)' (2003) 14 *Public Law Review* 13; Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (2003) ch 11; Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2nd ed, 2004) ch 11. For specific discussion of the 'terrorist' proscription regime under the *Criminal Code*, see Nathan Hancock, 'Criminal Code Amendment (Terrorist Organisations) Bill 2003' (Bills Digest No 174/2002-3, 2003).
- 2 *Security Legislation Amendment (Terrorism) Bill 2002* (Cth). See generally Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth); Suppression of Financing of Terrorism Bill 2002 (Cth); Criminal Code Amendment (Suppression of Terrorist Bombing) Bill 2002 (Cth); Border Security Legislation Amendment Bill 2002 (Cth) and Telecommunications Interception Legislation Amendment Bill 2002 (Cth)* (2002); Nathan Hancock, 'Security Legislation Amendment (Terrorism) Bill 2002 [No 2]' (Bills Digest No 126/2001-2, 2002).
- 3 Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth). See generally 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); Senate Legal and Constitutional References Committee, Parliament of Australia, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* (2002).

regime'); a regime that was enacted despite significant community opposition.⁴ The second, less well known, proscription regime is provided under the *Charter of United Nations Act 1945* (Cth) ('*Charter of UN proscription regime*'). This regime deals with the financing of 'terrorist' organisations and the freezing of their assets.⁵

These regimes are distinguished by four key features. First, they arm the Executive or, more accurately, a member of the Executive, with the power to list groups as 'terrorist' organisations albeit with the availability of judicial review. Second, a key criterion of the exercise of such power is the use of a political tactic, namely, the use of violence or other damage to further a political cause. Third, the exercise of such power triggers criminal offences that specifically apply to the 'terrorist' organisation. Lastly, these offences not only apply to such organisations but also cast a net of criminal liability that draws in individuals who participate in and support these organisations.

It is these four elements, separately and collectively, that thrust the proscription regimes up against the limits imposed by the *Commonwealth Constitution*. Indeed, the original version of the *Criminal Code* proscription regime was said to have a 'disturbing similarity'⁶ with the *Communist Party Dissolution Act 1950* (Cth); an Act that was struck down by the High Court.⁷ Despite these concerns, there has yet to be a sustained analysis of the constitutional issues surrounding these proscription regimes.⁸ In light of this lacuna, this article attempts to examine these issues.

The first part of this article considers – from a constitutional perspective – the *Criminal Code* proscription regime, while the second part is devoted to examining the constitutional validity of the *Charter of UN* proscription regime. With both regimes, three constitutional restrictions come to the fore:⁹ the implied freedom of political communication, the implied freedom of association, and the separation of judicial power. The last raises the specific question whether these regimes give rise to bills of attainder.

After examining these issues, the article concludes that while these proscription regimes burden the implied freedoms of political communication and association, it is difficult to give a clear answer as to whether they conform with these freedoms because of the ambiguity and uncertainty surrounding the

4 The Senate Legal and Constitutional Legislation Committee commented that '[t]he provisions of the [Security Legislation Amendment (Terrorism)] Bill dealing with the Attorney-General's proposed proscription powers raised the most concern': Senate Legal and Constitutional Legislation Committee, above n 2, 45.

5 See generally Mark Tan, 'Money Laundering and the Financing of Terrorism' (2003) 14 *Journal of Banking and Finance Law and Practice* 81, 100–1; Jude McCulloch et al 'Suppressing the Financing of Terrorism' (2004) 16 *Current Issues in Criminal Justice* 7.

6 George Williams quoted in Senate Legal and Constitutional Legislation Committee, above n 2, 47.

7 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. A crucial difference, however, between the proscription regimes and the *Communist Party Dissolution Act 1950* (Cth) is that the former is subject to judicial review.

8 There is a brief discussion in Head, above n 1, 687–8.

9 Both regimes also raise the question of whether a head of power can support them. In both cases, this question can be easily answered in the affirmative, see below nn 22–24 and accompanying text, and Part III(A).

question of reasonable proportionality. In some situations, however, reliance on these regimes is constitutionally fraught as they may give rise to bills of attainder.

II THE *CRIMINAL CODE* PROSCRIPTION REGIME

As it stands, the *Criminal Code* proscription regime grants a general power of proscription ('general power of proscription') as well as specific power in relation to certain organisations. The provisions governing these respective powers will be examined in turn.

A General Power of Proscription under the *Criminal Code*

As a result of the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth),¹⁰ the general power now enables the Governor-General to make a regulation identifying an organisation as a 'terrorist organisation' if the Attorney-General is satisfied, on reasonable grounds, that the organisation is: 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)'.¹¹

Any proposed proscription must be preceded by a briefing of the Leader of the Opposition.¹² Once made, a proscribing regulation can be disallowed like any other piece of subordinate legislation.¹³ It can also be subject to review by the Parliamentary Joint Committee on ASIO, ASIS and DSD. If the committee does exercise its power of review and hands down a report, the tabling of the report triggers another disallowance period.¹⁴

Once an organisation has been specified as a 'terrorist organisation', a range of 'terrorist organisation' offences will apply to the organisation, its members and supporters. Direct participation in the organisation with either knowledge or recklessness as to whether the organisation is a 'terrorist organisation' is punishable by heavy penalties. These penalties – which, in some cases, can reach a maximum of 25 years imprisonment – apply to individuals who are members of the proscribed organisation and also to those who recruit for the organisation or direct its activities.¹⁵

Less direct association with the organisation is also criminalised. It is an offence for a person to provide training to an organisation with either knowledge

10 For a discussion of this Act, see Joo-Cheong Tham, 'Casualties of the Domestic "War on Terror": A Review of Recent Counter-Terrorism Laws' (2004) 28 *Melbourne University Law Review* 512; Joo-Cheong Tham, 'How Not to Fight the "War on Terrorism": the Criminal Code Amendment (Terrorist Organisations) Bill 2003', *Sydney Morning Herald: Web Diary* (Sydney), 15 September 2003, <<http://www.smh.com.au/articles/2003/09/15/1063478118687.html>> at 15 November 2004.

11 *Criminal Code* s 102.1(2).

12 *Criminal Code* s 102.1(2A).

13 *Acts Interpretation Act 1901* (Cth) s 48.

14 *Criminal Code* s 102.1A.

15 *Criminal Code* s 102.2 (directing the activities of a terrorist organisation), s 102.3 (membership of a terrorist organisation), s 102.4 (recruiting for a terrorist organisation).

that it is a 'terrorist organisation' or even recklessness to that fact. The same applies to receipt of training from such an organisation.¹⁶ The Act also makes illegal the provision or receipt of funds from such an organisation,¹⁷ as well as providing support to such an organisation to assist it in engaging in a 'terrorist act'.¹⁸ The combined effect of these 'terrorist organisation' offences will clearly mean that such a proscribed organisation cannot legally operate in Australia.

The following discussion will examine the constitutional issues identified in the introduction, namely, the compatibility of this proscription regime with the implied freedoms of political communication and association as well as the question whether this regime gives rise to bills of attainder.

It should be noted that the issue whether this power can be supported by a head of power will not be separately considered, as this question has been settled since the middle of last year.¹⁹ Before then, the relevant provisions were based on various heads of power including the defence and corporations power.²⁰ With such constitutional underpinnings, it was arguable that the breadth of the general proscription regime meant there was an insufficient connection with these heads of power.²¹

These arguments have now been overtaken by the States referring certain matters to the Commonwealth Parliament pursuant to s 51(xxxvii) of the *Constitution*.²² The effect of these referrals is that there is little doubt that the

16 *Criminal Code* s 102.5. As a result of the *Anti-Terrorism Act 2004* (Cth), there are actually two separate training offences. Both are only committed when the accused is reckless as to whether an organisation is a 'terrorist organisation'. The difference is that the offence in s 102.5(1) of the *Criminal Code* places the evidential burden of this element on the prosecution while the offence in s 102.5(2) provides an accused with a defence of disproving recklessness. This difference is of little significance to the constitutional issues and will not be discussed any further. For a discussion of these offences, see Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill 2004* (2004) 7–8.

17 *Criminal Code* s 102.6.

18 *Criminal Code* s 102.7.

19 The *Criminal Code Amendment (Terrorism) Act 2003* (Cth) took effect on 29 May 2003.

20 *Constitution* ss 51(vi) (defence power), 51(xx) (corporations power).

21 Senate Legal and Constitutional Legislation Committee, above n 2, 25, 47. See also Evidence to the Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 8 April 2002, 58–61 (George Williams). For more detail see George Williams and Iain Gentle, *Submission to the Senate Legal and Constitutional Legislation Committee's Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 etc* (2002) Gilbert + Tobin Centre of Public Law <<http://www.gtcentre.unsw.edu.au/Terrorism%20Senate%20Submission.doc>> at 15 November 2004.

22 The States have referred matters to which the provisions of the *Criminal Code* dealing with 'terrorism' relate (ie pt 5.3 of the *Criminal Code*). They have also referred the matter of 'terrorist acts, and actions to terrorist acts' insofar as it enables the making of laws with respect to pt 5.3 and ch 2 of the *Criminal Code: Terrorism (Commonwealth Powers) Act 2002* (NSW) s 4; *Terrorism (Commonwealth Powers) Act 2002* (Qld) s 4; *Terrorism (Commonwealth Powers) Act 2002* (SA) s 4; *Terrorism (Commonwealth Powers) Act 2002* (Tas) s 4; *Terrorism (Commonwealth Powers) Act 2003* (Vic) s 4; *Terrorism (Commonwealth Powers) Act 2002* (WA) s 4. The 'mirror' federal Act is the *Criminal Code Amendment (Terrorism) Act 2003* (Cth) (for a discussion of an earlier version of this Act, see Nathan Hancock, 'Criminal Code Amendment (Terrorism) Bill 2002' (Bills Digest No 89/2002–03, 2002) <<http://www.aph.gov.au/library/pubs/>> at 15 November 2004. These referrals were pursuant to the *Commonwealth and States and Territories Agreement on Terrorism and Multi-Jurisdictional Crime* (5 April 2002) para 3. For a discussion of these referrals, see O'Neill, Rice and Douglas, above n 1, 252–4.

Criminal Code proscription regime is fully supported by a head of power. It now has ‘comprehensive national application’,²³ with such application deriving from s 122 of the *Constitution* in the Territories, and from the s 51(xxxvii) referrals in the States. The referrals by the States pursuant to s 51(xxxvii) of the *Constitution* do not, however, obviate the need to consider the issues raised by the implied freedoms of political communication and association as well as those thrown up by the separation of judicial power. This is because these referrals are ‘subject to (the) Constitution’²⁴ and, by implication, bound by these constitutional restrictions.

1 *Implied Freedom of Political Communication*

In a series of cases, the High Court has ruled that Commonwealth legislative and executive power is restricted by an implied freedom of political communication.²⁵ The scope of this restriction is governed by the test laid down in *Lange v Australian Broadcasting Corporation*²⁶ (*‘Lange’*). In a unanimous decision, the High Court held that:

When 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 maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the *Constitution* to the informed decision of the people?²⁷

It is not entirely clear how the *Lange* test should apply to a regulation-making power like the general proscription power. One approach would be to apply the test only once; that is, to the legislative provisions granting the regulation-

It should be noted that these references do not give rise to ‘[e]xecutive assertions of self-defining and self-fulfilling powers’: *Al-Kateb v Godwin* (2004) 208 ALR 124 (*‘Al-Kateb’*) [149] (Kirby J). Put differently, they do not breach ‘an elementary rule of constitutional law ... that a stream cannot rise higher than its source’: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J). This is because the scope of the references is clearly delineated by the above statutory provisions and does not depend on the opinion of the executive.

23 Second Reading Speech, Criminal Code Amendment (Terrorism) Bill 2002 Commonwealth, House of Representatives, 12 December 2002 (Daryl Williams, Attorney-General); Second Reading Speech to the Criminal Code Amendment (Terrorism) Bill 2002 Commonwealth, House of Representatives, 13 May 2003 (Senator Ian Campbell, Parliamentary Secretary to the Treasurer).

24 Opening sentence of s 51 of the *Constitution*.

25 This freedom has been characterised as negative in the sense that it operates as restriction on legislative and executive power and is not a source of private rights, see *McClure v Australian Electoral Commission* (1999) 163 ALR 734, 740–1 for a recent affirmation of this characterisation. For a critical discussion of such a characterisation, see Adrienne Stone, ‘Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication’ (2001) 25(2) *Melbourne University Law Review* 374, 400–4.

26 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

27 *Ibid* 567–8. This test has been applied in various decisions post-*Lange*, see, eg, *Jones v Scully* (2002) 120 FCR 243, [236] (Hely J).

making power with the effect that if the legislative provisions do not breach the test, regulations made within power would, from the perspective of the *Lange* test, be constitutionally unimpeachable. The other approach would be to apply the test twice: first to the legislative provisions in the principal statute, and again to the specific regulations that have been made under those provisions. The latter would seem to be the better approach.²⁸

At a formal level, there is merit in this second approach. The exercise of the regulation-making power is an exercise of delegated legislative power,²⁹ and hence should be examined separately like any other exercise of legislative power. In short, the principal statute and the regulations are different pieces of legislation.

Moreover, there is precedent for applying the *Lange* test specifically to delegated legislation. The High Court in *Levy v Victoria*³⁰ ('*Levy*') applied this test to the *Wildlife (Game) (Hunting Season) Regulations*.³¹ Similarly, Finn J of the Federal Court in *Bennett v Human Rights and Equal Opportunity Commission*³² found reg 7(13) of the *Public Service Regulations*³³ in breach of the *Lange* test even though this regulation was clearly made within power. Lastly, the Queensland Court of Appeal in *Sellars v Coleman*,³⁴ in dismissing a challenge to certain provisions of the Townsville Council by-laws, examined whether these provisions breached the *Lange* test; provisions that were, in fact, a form of subordinate legislation having been made by the Townsville Council pursuant to powers conferred by ss 25 and 26 of the *Local Government Act 1993* (Qld).

Another, perhaps stronger, reason stems from the fact that the application of the *Lange* test to legislative provisions granting regulation-making power involves a more abstract inquiry than its application to specific regulations. One effect of this difference is that if the *Lange* test is not applied separately to subordinate legislation, the protection afforded by the implied freedom of political communication risks being hollowed out by legislative provisions granting broad regulation-making power.

Take, for example, the legislative provisions considered in *Sellars v Coleman*, ss 25 and 26 of the *Local Government Act 1993* (Queensland). These provisions, in effect, confer plenary power upon local councils within their territorial limits. Determination of the validity of these sections must clearly take into account the legitimate aim of enabling local councils to govern. With such an aim, it is exceedingly difficult to see how these sections can be successfully impugned on the basis of the implied freedom of political communication. Different considerations are, however, involved in applying the *Lange* test to the by-laws

28 See also below nn 165–173 and accompanying text, on the separate application of the *Lange* test to executive acts made within the scope of the relevant legislative provisions.

29 See, eg, *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan* (1931) 46 CLR 73. (1997) 189 CLR 579.

31 *Wildlife (Game) (Hunting Season) Regulations 1994* (Vic).

32 (2003) 204 ALR 119.

33 *Public Service Regulations 1998* (Cth).

34 [2001] 2 Qd R 565. For a discussion of this case, see John Chesterman, 'Sellars v Coleman: The Limits of Free Speech' (2001) 36 *Australian Journal of Political Science* 373.

made in reliance of this broad power. For instance, the Queensland Court of Appeal in *Sellars v Coleman* examined the specific purposes of the by-laws and the burden they placed on the implied freedom.³⁵

These different considerations mean that legislative provisions that are valid under the *Lange* test can give rise to the subordinate legislation that is invalid under this test. One consequence is that, if the *Lange* test is not applied separately to regulations, then the regulation-making power could be exercised selectively to suppress freedom of political communication and there would not be any effective recourse to the constitutional implied freedom of political communication. In such circumstances, an easy way to avoid the rigours of the *Lange* test at the legislative level would be to grant broad discretions like that conferred by ss 25 and 26 of the *Local Government Act 1993* (Qld). In short, if the protection afforded by the implied freedom of political communication at the legislative level is to be one of substance, the *Lange* test should be applied separately to subordinate legislation.

For these reasons, the following discussion will apply this test twice: once to the provisions granting the general power of proscription and again to the regulations specifying the ‘terrorist organisations’. It concludes that the legislative provisions granting the power clearly place a burden on the implied freedom of political communication. The question whether they are reasonably appropriate and adapted to a legitimate aim (‘the question of reasonable proportionality’) cannot, however, be answered in any definite way because the aim of preventing ‘terrorism’ is pregnant with ambiguity. Moreover, the question of reasonable proportionality will ultimately turn upon value judgments. The discussion also concludes that the current proscribing regulations are very unlikely to fall foul of the implied freedom of political communication because of the activities of the proscribed organisations.

(a) *Legislative Provisions Governing the General Proscription Power*

(i) *An Effective Burden on the Freedom of Political Communication*

It is clear that the general proscription power does not directly burden the implied freedom of political communication by instituting a prohibition on such communication.³⁶ Nevertheless, the power does still burden the freedom because the founding criterion of its exercise, a ‘terrorist act’, is, in some cases, an act of political communication.

There is an elaborate definition of a ‘terrorist act’ under the *Criminal Code*. In essence, the elements of this definition can be broken down to those of *intention*

³⁵ Ibid.

³⁶ Burdens of this kind have been challenged in a number of past cases, see, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Langer v Commonwealth* (1996) 186 CLR 302; *Sellars v Coleman* [2001] 2 Qd R 565; *Coleman v Power* [2002] 2 Qd R 620. For a discussion of the last decision, see Elisa Arcioni, ‘Before the High Court: Politics, Police and Proportionality – An Opportunity to Explore the *Lange* Test: *Coleman v Power*’ (2003) 25 *Sydney Law Review* 379. See also Adrienne Stone, ‘The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication’ (1999) 23 *Melbourne University Law Review* 668, 702–4.

and *harm/damage*. There is a two-fold requirement as to intention: the alleged 'terrorist act' must be made with the intention of:

- 'advancing a political, religious or ideological cause' ('political limb of intention requirement'); and
- 'coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country' or 'intimidating the public or a section of the public' ('intimidation limb of intention requirement').

The harm/damage requirement of a 'terrorist act' can be satisfied in several ways. It is present when the act causes serious physical harm, serious property damage or creates a serious risk to the health and safety of a section of the public.³⁷

The definition of a 'terrorist act' also provides for some exceptions. An act is not a 'terrorist act' if it is 'advocacy, protest, dissent or industrial action' that is not intended to cause a person's death, serious physical harm, a serious risk to health or safety or endanger another person's life.³⁸

The intimidation limb of the intention requirement means that a 'terrorist act' may occasionally involve communication about government or political matters. Such an act invariably involves communication because intimidation and coercion are communicative acts: they are acts aimed at influencing someone. That these acts will, in some situations, be non-verbal is not to the point, as non-verbal acts like silent protests and industrial action³⁹ can be communication that is protected by the implied freedom ('protected communication').⁴⁰

Moreover, such communication will, in some cases, relate to political and governmental matters. If the act is directed at the federal government, the issue being agitated will most likely be a matter that comes within the scope of the implied freedom of political communication. The position is less obvious if the act is directed against a State government, as there is a degree of uncertainty as to whether the issue being agitated must have an explicit connection with a federal political matter.⁴¹ In light of the recent High Court decision in *Roberts v Bass*, the

37 *Criminal Code* s 100.1.

38 *Criminal Code* s 100.1.

39 *CEPU v Laing* (1998) 89 FCR 17 [34]. For an interesting discussion of the industrial/political dichotomy in relation to the implied freedom of political communication pre-*Levy*, see Rachel Doyle, 'The Industrial/Political Dichotomy: The Impact of the Freedom of Communication Cases on Industrial Law' (1995) 8 *Australian Journal of Labour Law* 91.

40 *Levy* (1997) 189 CLR 579, 594–5, 622–3, 637; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [281] (Kirby J). For a discussion of this decision, see Francis Trindade, 'Possums, Privacy and the Implied Freedom of Communication' (2002) 10 *Torts Law Journal* 119.

41 This was due to *Lange* failing to confirm that the implied freedom of political communication applied to solely State political matters and statements made by Brennan CJ and McHugh J in *Levy*. For a discussion of the latter, see Adrienne Stone, 'Case Note: *Lange, Levy* and the Direction of the Freedom of Communication under the Australian Constitution' (1998) 21 *University of New South Wales Law Journal* 117, 129.

better view would seem to be that there is no need for such a connection.⁴² If so, ‘terrorist acts’ directed at State governments would involve protected communication.

In other situations, whether the ‘terrorist act’ involves protected communication will turn heavily upon the specific facts. It will depend, first, on the issue being agitated. For example, ‘terrorist acts’ directed against the American army in Iraq protesting against the Coalition occupation would fall within scope of protected communication. This is because the Australian government is involved in the Coalition occupation and hence, the issue being agitated concerns the actions of the Federal Government. On the other hand, a ‘terrorist act’ being committed by an overseas movement struggling for self-determination in a country where the Australian government has no interest is very unlikely to involve protected communication.

Whether a ‘terrorist act’ involves protected communication in such situations will also depend on judicial conceptions of the scope of protected communication. Of note is the string of decisions that have tended to confine protected communication to communication relating to electoral and policy issues⁴³ or ‘explicitly political communication’.⁴⁴ So it is that courts have held that discussion of religious issues on matters that do not directly relate to the conduct of executive or legislative branches of government does not fall within the scope of the implied freedom.⁴⁵ The same has been said of the conduct of courts.⁴⁶ There is even a largely unelaborated suggestion that ‘[t]he advocacy of law breaking falls outside this protection and is antithetical to it’.⁴⁷

Applied to the general proscription power, these authorities will mean that a ‘terrorist act’ is less likely to involve protected communication. For example, acts of this kind advocating civil disobedience would fall outside the scope of the

42 *Roberts v Bass* (2002) 212 CLR 1, [69] (Gaudron, McHugh and Gummow JJ), [170]–[172] (Kirby J). For discussion of this point, see Geoffrey Lindell, ‘The Constitutional and Other Significance of *Roberts v Bass: Stephens v West Australian Newspapers Ltd* Reinstated?’ (2003) 14 *Public Law Review* 201.

43 *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification* (1998) 82 FCR 225, 246 (Heerey J), 258 (Sundberg J) (cf 237–8 per French J). See generally Adrienne Stone, ‘The Freedom of Political Communication since *Lange*’ in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 5–10; Stone, above n 25, 378–80.

44 Stone, above n 25, 383. Stone has also advanced three other categories that could be embraced by the implied freedom of political communication, namely, potential subjects of government action; communication that influences attitudes towards public issues and communication that develops qualities desirable in a voter: *ibid* 383–7.

45 ‘[T]he principles enunciated in *Lange*’s case have no application to the discussion of religious matters or religious organisations or ... “church politics”’: *Harkianakis v Skalkos* (1999) 47 NSWLR 302, 306.

46 ‘The conduct of courts is not, of itself, a manifestation of any of the provisions relating to representative government upon which the freedom is based’: *John Fairfax Publications Pty Ltd v A-G (NSW)* (2000) 181 ALR 694, 709 (Spigelman CJ with whom Priestly JA agreed at 721).

47 *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification* (1998) 82 FCR 225, 246 (Heerey J). In a similar vein is the very brief conclusion of the Supreme Court of Queensland Court of Appeal that ‘grossly offensive imputations relating to the sexual orientation and preference of a Member of Parliament and her performance’ meant that there was no burden on the implied freedom of political communication: *Australian Broadcasting Corporation v Hanson* (Unreported, Supreme Court of Queensland, De Jersey CJ, McMurdo P and McPherson JA, 28 September 1998) 8.

implied freedom. The same would apply to a 'terrorist act' advocating the religious conversion of non-Muslims without agitating for any legislative change.

This narrowing tendency will, however, only affect the *severity* of the burden imposed by this power on the implied freedom⁴⁸ not the existence of the burden itself. A burden still exists by virtue of the fact that a 'terrorist act' will very likely involve protected communication if directed at the federal government or a State government.

In particular, this power, even if unexercised, clearly places a burden on such communication by threatening a 'chilling effect'.⁴⁹ This effect is all the more potent given the effects of proscription under the *Criminal Code* which will mean that a proscribed organisation cannot legally operate in Australia. Frequency of use will, of course, exacerbate this effect, although it should be noted that this power has only been used to proscribe 14 organisations.⁵⁰

In sum, it is highly probable that the general proscription power under the *Criminal Code* will be found to burden the implied freedom of political communication.

(ii) *Reasonably Appropriate and Adapted to Serve a Legitimate Aim?*

Given that the legislative provisions granting the general power of proscription are very likely to be held to place a burden on the implied freedom of political communication, the issue then is whether they are reasonably appropriate and adapted to serve a legitimate aim.

According to the Howard Government, these provisions formed 'part of package of important counter-terrorism legislation designed to strengthen Australia's counter-terrorism capabilities'.⁵¹ The *Criminal Code* proscription regime, in particular, was said to 'provide an effective and accountable mechanism for the government to outlaw terrorist organisations and organisations that threaten the integrity and security of Australia and another country'.⁵² These statements clearly identify a legitimate aim for the provisions, that of preventing 'terrorism'. The crucial question is whether they are reasonably appropriate and adapted to serve this aim.

It is exceedingly difficult to give a clear answer to this question for several reasons. First, the aim against which the provisions are to be measured is vague,

48 The extent of the burden will, however, be relevant to question whether the *Criminal Code* proscription power is reasonably appropriate and adapted to serve a legitimate end: see discussion below n 56.

49 The 'chilling effect' refers to the phenomenon of laws and, more specifically, the penalties they impose discouraging or deterring certain behaviour merely by their existence. This phrase was used by Gaudron, McHugh and Gummow JJ in referring to the availability of damages for defamatory publications: *Roberts v Bass* (2002) 212 CLR 1, [102].

50 *Criminal Code Regulations 2002* (Cth) ('*Criminal Code Regulations*') sch 1. It should be noted that there is a typographical error in sch 1 in that item 14 of the schedule has been inadvertently left out.

51 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 March 2002, 1040 (Daryl Williams, Attorney-General).

52 *Ibid*, 1041. For decisions which that have also relied on parliamentary material in discerning the purpose/s of the laws, see *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *John Fairfax Publications Pty Ltd v A-G (NSW)* (2000) 181 ALR 694, [123], [157]; *Power v Coleman* [2002] 2 Qd R 620, 631, 641–2. For a more sceptical view of such material, see *Mulholland v Australian Electoral Commission* (2003) 128 FCR 523, [28]–[29].

with unresolved controversy concerning the nature of the target or, put differently, the meaning of ‘terrorism’. In this, there are at least two levels of ambiguity. First, there is the question whether justified acts of political violence come within the rubric of ‘terrorism’. As the frequently quoted adage goes, one person’s terrorist is another’s freedom fighter.⁵³ Second, even assuming all types of political violence are ‘terrorist’ acts, what counts as political violence? The consensus regarding seriously violent acts – like bombings – disappears when less violent acts like militant occupations are considered. Disagreements become even more acute with politically motivated acts of property damage that are not accompanied by physical harm. The upshot of such ambiguity is that there is much more room for judicial interpretations of the benchmark against which the general power of proscription should be tested.

Even if the aim of preventing ‘terrorism’ were sufficiently precise, it would still be difficult to provide a clear answer to the question whether the general power of proscription was reasonably appropriate and adapted to this aim. This is because the question of reasonable proportionality, more so than other elements of the implied freedom of political communication, is a source of ‘recurrent uncertainties’.⁵⁴ This is simply because answers to this question inevitably rest on ‘a value judgment on which minds may differ’.⁵⁵ For instance, challenges to the constitutional validity of the general power of proscription based on this freedom will be determined, in part, on judicial views of the importance of preventing ‘terrorism’ vis-à-vis that of protecting freedom of political communication.

These uncertainties aside, certain considerations are likely to be relevant in considering the question of reasonable proportionality.⁵⁶ On one side of the ledger, there are considerations pointing to constitutional validity. The aim of preventing ‘terrorism’ insofar as it means preventing physical harm is a weighty end. Moreover, the burden placed on the freedom is reasonably confined.⁵⁷ While judicial conceptions of the scope of protected communication will determine the severity of this burden, it is clear that the power only restricts a mode of communicating about political and governmental matters. That is, it restricts communication about such matters that is accompanied by an intention to intimidate or coerce, and the causing of physical harm or property damage. It does *not* ‘target ideas or information’.⁵⁸ If it did, it would be subject to stricter scrutiny and would need to be based on a ‘compelling justification’⁵⁹ or

53 See, eg, statements quoted in Senate Legal and Constitutional Legislation Committee, above n 2, 46.

54 *Roberts v Bass* (2002) 212 CLR 1, [285] (Callinan J).

55 *Sellars v Coleman* [2001] 2 Qd R 565, 579 (Jones J).

56 For an excellent enumeration of relevant considerations in applying the proportionality test, see Arcioni, above n 36, 386–8.

57 The scope and extent of such a burden was considered in *Sellars v Coleman* [2001] 2 Qd R 565, 569 (Pincus JA), 579 (Jones J).

58 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ). See also 169 (Deane and Toohey JJ), 234–5 (McHugh J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 76–7 (Deane and Toohey JJ); *Levy* (1997) 189 CLR 579, 614 (Toohey and Gummow JJ), 619 (Gaudron J), 645 (Kirby J); *CEPU v Laing* (1998) 89 FCR 17, [35].

59 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ). See also 235 (McHugh J); *Levy* (1997) 189 CLR 579, 647 (Kirby J).

'overriding public purpose'⁶⁰ and also 'must be no more than is reasonably necessary to achieve the protection of the competing public interest'.⁶¹

On the other hand, there are two significant considerations that point towards invalidity: the breadth of the power and the danger of it being exercised in a discriminatory fashion. With the first, if 'terrorism' were confined to extreme acts of political violence, it is plain that the exercise of the general proscription power and its triggering of 'terrorist organisations' offences would criminalise conduct loosely connected with such acts.⁶²

The scope of this regime is further broadened because it is based on an *executive* proscription power. As noted above, this power can be exercised upon the Attorney-General reaching satisfaction on reasonable grounds that the organisation is 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)'.⁶³ The Attorney-General's decision can only be directly challenged through an application for judicial review.⁶⁴ Given that such review only tests the legality and not the merits of the Attorney-General's decision, this power can be legally exercised upon factually wrong but legally unimpeachable grounds. In other words, an executive proscription power, in conjunction with the restricted character of judicial review, has the effect of broadening the scope of the proscription regime.

The discretionary nature of the general power of proscription is also relevant in a different way. Such discretion inherently throws up the risk of discriminatory application. In the context of the general proscription power, the danger is that this discretionary power will be exercised selectively in the sense of not being exercised against all organisations that are 'terrorist organisations'.⁶⁵ Discriminatory placement of a burden on the implied freedom of political communication may result in a finding that the implied freedom is breached, as shown in *Australian Capital Television Pty Ltd v Commonwealth*, where the discriminatory effect of the challenged provisions influenced Mason CJ's conclusion that there was such a breach.⁶⁶

Indeed, it appears that the danger has already been realised with strong evidence of selective use. For example, the *Criminal Code* proscription regime and the *Charter of UN* regime share the aim of suppressing 'terrorist'

60 *Levy* (1997) 189 CLR 579, 619 (Gaudron J).

61 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ). See also *Levy* (1997) 189 CLR 579, 619 (Gaudron J). This distinction is best incorporated into the proportionality test laid down in *Lange* as distinct from forming the basis of the two-tier approach to the implied freedom. For similar sentiments, see Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 17; George Williams, *Human Rights under the Australian Constitution* (1999) 192. See also Stone, above n 43, 12–16.

62 See above nn 15–18 and accompanying text.

63 *Criminal Code* s 102.1(2).

64 Such an application can be made, for example, pursuant to s 75(v) of the *Constitution*, or under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

65 See generally Aidan Ricketts, 'Freedom of Association or Guilt by Association: Australia's New Anti-Terrorism Laws and the Retreat of Political Liberty' (2002) 6 *Southern Cross University Law Review* 133, 140–4.

66 (1992) 177 CLR 106, 146.

organisations. There is, however, a sharp inconsistency between the organisations that are proscribed under these regimes. Only 14 organisations have been proscribed through use of the *Criminal Code* general proscription power whereas 131 entities have been listed by the Foreign Minister under the *Charter of UN Act*.⁶⁷ Further suggestion of selective use is the fact the general proscription power has only been used against Muslim organisations. Of the 14 proscribed organisations, all of them have word 'Islam' or some variant in their name.⁶⁸

Apart from the questions of breadth and discrimination, there are two other factors that point towards the lack of reasonable proportionality. The first is that once an organisation is proscribed it cannot legally operate in Australia, and there are no other means of communication available to a proscribed organisation. The second is that if the aim was to shut down 'terrorist organisations', there are other means which have a lesser impact on the implied freedom.⁶⁹ For example, instead of an executive proscription power, organisations could be proscribed through a court process like in Part IIA of the *Crimes Act 1914* (Cth).⁷⁰

(b) Regulations Proscribing Organisations

The key factor determining the application of the *Lange* test to the proscribing regulations is the activities of the organisation being proscribed. Most importantly, the burden placed by such a regulation on the implied freedom will depend on the extent to which the proscribed organisation has engaged in protected communication.

As to the question of reasonable proportionality, the aim of preventing 'terrorism' would probably be considered a weighty aim by the courts. Whether the regulation is reasonably appropriate and adapted to this end will depend on the extent to which the proscribed organisation has engaged in extreme acts of political violence. If only a fringe part of the proscribed organisation has engaged in such acts then the fact that there are other means less restrictive of political communication available (for example, criminal prosecution of the persons who had engaged in such acts), would be a factor pointing to invalidity.

It is unlikely that the current proscribing regulations will be in breach of the implied freedom of political communication. The burden placed by these regulations on this freedom will be quite marginal because all proscribed organisations are based in foreign countries⁷¹ and, hence, it is highly improbable that they would have engaged to a significant extent in protected communication. Moreover, the acts of political violence committed by these organisations would

67 These figures have been calculated from the consolidated list found at <http://www.dfat.gov.au/icat/persons_entities> at 15 November 2004.

68 *Criminal Code Regulations 2002* (Cth) sch 1.

69 See reasoning in *Levy* (1997) 189 CLR 579, 614–5 (Toohey and Gummow JJ), 627 (McHugh J), 647–8 (Kirby J).

70 For an excellent examination of these provisions and their use (or lack of), see Roger Douglas, 'Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth *Crimes Act*' (2001) 22 *Adelaide Law Review* 259.

71 *Criminal Code Regulations* sch 1.

likely tip the question of reasonable proportionality in favour of constitutional validity.

2 *Implied Freedom of Political Association*

The following discussion will, first, consider the question whether a freedom of political association should be implied from the *Constitution* and, if so, the scope of any such freedom.

Assuming that such a freedom is implied from the *Constitution*, the test for validity would be a modified version of the *Lange* test that, in essence, substitutes freedom of political association for freedom of political communication.⁷² As with the implied freedom of political communication, this test will be applied to the legislative provisions granting the general proscription power as well as regulations proscribing specific organisations.

Such an application produces the conclusion that the legislative provisions clearly place a burden on the implied freedom of political association. As with the implied freedom of political communication, however, it is difficult to properly assess whether the legislative provisions are reasonably appropriate and adapted to serving a legitimate end due to the ambiguity and uncertainty surrounding this question. The current proscribing regulations, on the other hand, do not appear to breach this freedom.

(a) *An Implied Freedom of Political Association?*

The question whether a freedom of political association should be implied from the *Constitution* has yet to be settled by the High Court.⁷³ Such an implication can be plausibly argued on the basis that it arises independently from the constitutionally-prescribed system of representative democracy, in particular, ss 7 and 24 of the *Constitution*,⁷⁴ or as an incident of the implied freedom of political communication.⁷⁵

Exemplifying the former approach, McHugh J in *Kruger v Commonwealth* ('*Kruger*') stated:

72 See *Kruger v Commonwealth* (1997) 190 CLR 1, 128 (Gaudron J). It should be noted that the Full Bench of the Federal Court has held that the fact that challenged provisions are found to be reasonably appropriate and adapted to a legitimate end for the purpose of the implied freedom of political communication will necessarily mean that the same conclusion issues for any implied freedom of political association: *Mulholland v Australian Electoral Commission* (2003) 128 FCR 523, [41]. Such reasoning is erroneous as these freedoms clearly involve different considerations.

73 But see the brief discussion of *Mulholland v Australian Electoral Commission* [2004] HCA 39 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 1 September 2004) below Part V.

74 These sections respectively require that Senators and members of the House of Representatives be 'directly chosen by the people'.

75 These two bases of implication were also recognised in Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 *Federal Law Review* 37, 47.

the Constitution necessarily implies that ‘the people’ must be free from laws that prevent them from associating with other persons ... for the purposes of the constitutionally prescribed system of government and referendum procedure.⁷⁶

In a similar vein, Williams has cogently argued that freedom of political association lies within the ‘core of representative democracy’. According to this commentator:

The ability to associate for political purposes is obviously a cornerstone of representative government in Australia. How could the people ‘directly choose’ their representatives if denied the ability to form political associations and collectively seek political power? The ability to ‘choose’ must entail the ability to be chosen.⁷⁷

Freedom of political association can also be seen as ancillary to implied freedom of political communication. Justice Gaudron in *Kruger*, for one, recognised that freedom of political association is ‘subsidiary to the freedom of political communication required for the maintenance of the system of representative government for which the Constitution provides’.⁷⁸ This was because ‘[f]reedom of political communication depends on human contact and entails a significant measure of freedom to associate with others’.⁷⁹

Assuming that a freedom of association is implied from the *Constitution*, what should be the scope of the freedom? A threshold issue is whether such a freedom protects all forms of association or only association for political purposes. Justice Gaudron in *Kruger* tended towards the former. According to her Honour:

not every restriction on communication is a restriction on the communication of political ideas and information. On the other hand, any abridgment of the right to move in society and to associate with one’s fellow citizens necessarily restricts the opportunity to obtain and impart information and ideas with respect to political matters.⁸⁰

Such logic is compelling, but it begs the question of what type of association lies at the heart of a constitutionally implied freedom of association.

It is obvious that such a freedom, whether implied independently or as an incident of the implied freedom of political communication, aims to protect association for political purposes. If implied independently, the scope of the implied freedom of association will be fleshed out by reference to ss 7 and 24 of the *Constitution*; sections that mandate that Senators and members of the House of Representatives be ‘directly chosen by the people’. Given this, the association that lies at centre of any implied freedom of association will be association for the purposes related to such choice. If implied as an incident of the implied freedom of political communication, such a freedom will be mainly directed at

76 *Kruger* (1997) 190 CLR 1, 142 (McHugh J). See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 229 (McHugh J).

77 George Williams, ‘Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform’ (1996) 20 *Melbourne University Law Review* 848, 861. See also Williams, above n 61, 194.

78 *Kruger* (1997) 190 CLR 1, 120 (Gaudron J).

79 *Ibid* 115 (Gaudron J). See also *ibid* 91–2 (Toohey J). See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 212 (Gaudron J).

80 *Kruger* (1997) 190 CLR 1, 126–7 (Gaudron J).

association related to political communication. For these reasons, this freedom, if implied, is better characterised as an implied freedom of political association.

Such a freedom would 'extend, at the very least, to such matters as voting for, supporting or opposing the election of candidates for membership of the Senate and the House of Representatives, monitoring the performance of and petitioning federal Ministers and parliamentarians and voting in referenda'.⁸¹ More than this, it should embrace acts of political association like political meetings and rallies.

Beyond protecting individual acts of political association, the implied freedom of political association would also protect certain types of organisations. Such protection would mean that these organisations enjoy constitutionally enshrined *collective rights*. These rights will imply protection of their existence as collective organisations as well as their ability to engage in collective activities.

Certain organisations would clearly come within the scope of the freedom of political association – Australian political parties for example. Such organisations supply candidates and, therefore, provide 'choice' under ss 7 and 24 of the *Constitution*. Through their campaigning and electoral activities, they are also central to the 'free and informed choice as electors'.⁸²

Apart from Australian political parties, other organisations based in Australia may also be protected by this implied freedom. Kirk, for one, has argued that:

if the constitutional freedom were limited to protecting groups formed primarily for political purposes it would protect political parties and little else. The justifications for free association (based on effective political participation) would extend the freedom to groups beyond political parties. Therefore the better view is that a right to form or join any association with even potentially political aims should be recognised.⁸³

If this view is accepted, campaign and pressure groups will be protected whereas 'utilitarian' organisations like commercial corporations will fall outside the envelope of protection.⁸⁴

81 Ibid 142 (McHugh J). See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 229 (McHugh J).

82 *Lange* (1997) 189 CLR 520, 559. See also Williams, above n 61, 194.

83 Kirk, above n 75, 47.

84 Anderson has argued that utilitarian organisations should be distinguished for the purpose of the implied freedom of political communication: Gavin W Anderson, 'Corporations, Democracy and the Implied Freedom of Political Communication: Towards a Pluralistic Analysis of Constitutional Law' (1998) 22 *Melbourne University Law Review* 1, 22 citing Meir Dan-Cohen, 'Freedoms of Collective Speech: A Theory of Protected Communication by Organizations, Communities and the State' (1991) 79 *California Law Review* 1229. Which organisations come within the scope of the implied freedom of political association will, of course, depend upon 'prudential-ethical' considerations, that is, the 'social or political considerations attending the case': Justice Susan Kenny, 'The High Court on Constitutional Law: The 2002 Term' (2003) 26 *University of New South Wales Law Journal* 210, 219. In particular, it will depend upon judicial conceptions of the 'contemporary world of Australian politics': *Roberts v Bass* (2002) 212 CLR 1, [171] (Kirby J). For a discussion of this decision, see Helen Chisholm, 'The Stuff of Which Political Debate is Made: *Roberts v Bass*' (2003) 31 *Federal Law Review* 225; Lindell, above n 42, 201–5.

It should be noted that even though some organisations are not protected by the implied freedom of political association, their acts of political communication will be still be covered by the implied freedom of political association.

(b) *Legislative Provisions Governing the General Proscription Power*

The burden placed by the provisions on the implied freedom of political association is rather confined. It is very unlikely that the general proscription power can be legally used against organisations that lie at the heart of this freedom, Australian political parties. This is because the activities of such organisations would rarely involve ‘terrorist acts’ – the key criterion for the exercise of this power. For the most part, the activities of Australian political parties will not result in physical harm and/or property damage and hence, will not meet the harm/damage requirement of a ‘terrorist act’. Also, the bulk, if not all, of such activities would come under the exemption for ‘advocacy, protest [or] dissent’.⁸⁵ Much of the same applies to Australian campaign and pressure groups like trade unions⁸⁶ and peak business organisations.

The general proscription power, however, still places a burden on the implied freedom of political association because it can be used against groups that employ more militant tactics like occupations and blockades. Take, for example, a university student union that organises an occupation of the vice-chancellor’s office for the purpose of demanding that the university scrap all up-front course fees. In certain circumstances, the student union’s involvement with such an occupation could quite plausibly be seen as directly or indirectly preparing or assisting in the doing of a ‘terrorist act’. For instance, if this occupation results in substantial damage of the vice-chancellor’s office, there is a good chance that it is a ‘terrorist act’. The harm/damage element is clearly present and so is the political limb of intention element because of the purpose of the occupation. It is less clear-cut with the intimidation limb of intention element. However, the more militant the tactics, the more likely this limb will be met. Moreover, the exemption given by ‘advocacy, protest or dissent’ will not apply if some students intended to use the occupation as an opportunity to vandalise the vice-chancellor’s office.

If the occupation were, in fact, a ‘terrorist act’ then the general proscription power could be used to proscribe the university student union under the *Criminal Code*. Groups that assisted the occupation – for instance, the National Union of Students – would also be liable for proscription. It should be underlined that these groups need not have shared the motivations or aims to those who directly engaged in the ‘terrorist act’: it suffices that their conduct *assisted* such an act. It

85 *Criminal Code* s 100.1(3).

86 It should be noted that some industrial activity can be considered ‘terrorist acts’. Picketing by nurses that block entry and egress to hospitals is a case on point. Such action will probably meet the intention and harm elements (the latter because such action creates a risk to a section of public). Moreover, while the definition of a ‘terrorist act’ excludes ‘industrial action’ (*Criminal Code* s 100.1), this is unlikely to afford any protection to picketing which has been found not to be ‘industrial action’ under the *Workplace Relations Act 1996* (Cth): *Dauids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463, [43]–[76] (Wilcox and Cooper JJ), [119] (Burchett J). For commentary on this case, see John Howe, ‘Picketing and the Statutory Definition of “Industrial Action”’ (2000) 13 *Australian Journal of Labour Law* 84. The ruling in this case has subsequently been applied in *Auspine Ltd v Construction, Forestry, Mining & Energy Union* (2000) 97 IR 444 and *Cadbury Schweppes Pty Ltd v Australian Liquor Hospitality and Miscellaneous Worker’s Union* (2000) 106 FCR 148.

is the vulnerability of such groups to proscription that gives rise to a burden on the implied freedom of political association.

Given that there is a burden on the implied freedom, is the general proscription power reasonably appropriate and adapted to the aim of preventing acts of 'terrorism'? An answer to this question is influenced and clouded by the same considerations that apply to the implied freedom of political communication.⁸⁷ The key difference is that the burden being considered is that placed on the freedom of *political association*. This difference does not, however, clarify the situation as it cuts both ways. On the one hand, this difference points to invalidity because proscribed organisations are completely denied the ability to organise and associate. On the other hand, it suggests validity as the power is extremely unlikely to affect groups that lie at the core of this freedom, namely, Australian political parties, and, moreover, its reach beyond these groups is modest.

(c) *Regulations Proscribing Organisations*

Whether a regulation proscribing an organisation breaches the implied freedom of political association will depend on the organisation being proscribed. If a university student union or the National Union of Students were proscribed, the burden imposed by the proscribing regulation would be very severe as these organisations are protected by the implied freedom. Hence, a compelling case would need to be advanced that such a proscription was reasonably appropriate and adapted to preventing the commission of 'terrorist acts' by these organisations.

It is, however, very difficult to see such a case being made out, as such 'terrorist acts' would only constitute a minor portion of such organisations' activities. Moreover, there would be less drastic means available to prevent such acts – for example, criminal prosecution of the individuals engaged in these 'terrorist acts'.

At the other end of the spectrum, it is improbable that the present regulations will be struck down for breach of the implied freedom of political association. This is because they proscribe *foreign political organisations* that engage in acts of political violence. Given that these organisations are unlikely to be protected by this freedom, the burden on the freedom is slight or even non-existent. Moreover, these organisations' acts of political violence would, on the question of reasonable proportionality, considerably strengthen the case for constitutional validity.

3 *Bills of Attainder*

In recent times, it has not been uncommon to proclaim the constitutional separation of judicial power⁸⁸ as a source of implied rights and freedoms.⁸⁹ Such

87 See above Part II(A)(a)(ii).

88 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; aff'd *A-G (Cth) v The Queen* (1957) 95 CLR 529.

rights and freedoms stem from the principles enunciated in *R v Kirby; Ex parte Boilermakers' Society of Australia*:⁹⁰

- at the federal level, judicial functions cannot be conferred upon any body other than a court constituted according to Chapter III of the *Constitution*; and
- a Chapter III court cannot exercise non-judicial functions except those that are strictly incidental to its exercise of judicial power.

These principles have been extended to prohibit:

the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.⁹¹

These principles, together with the notion that ‘the adjudgment and punishment of criminal guilt under a law of the Commonwealth’ is ‘essentially and exclusively judicial in character’⁹² have given rise to various restrictions on the exercise of legislative and executive power. Among these restrictions is the prohibition against bills of attainder.⁹³ A majority of the High Court supported such a prohibition in *Polyukhovich v Commonwealth*⁹⁴ (*Polyukhovich*); a position that was confirmed by three members of the High Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*⁹⁵ (*Chu Kheng Lim*). Such a prohibition has also been supported by academic commentators including Zines, who has characterised the reasoning in *Polyukhovich* as ‘unimpeachable’.⁹⁶

89 See generally Leslie Zines, ‘A Judicially Created Bill of Rights?’ (1994) 16 *Sydney Law Review* 166, 166–75; George Winterton, ‘The Separation of Judicial Power as an Implied Bill of Rights’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994); Fiona Wheeler, ‘The Rise and Rise of Judicial Power under Chapter III of the Constitution: A Decade in Overview’ (2001) 20 *Australian Bar Review* 283, 285–7; Tony Blackshield and George Williams, *Australian Constitutional Law & Theory: Commentary & Materials* (3rd ed, 2002) ch 29.

90 (1956) 94 CLR 254.

91 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

92 *Ibid.*

93 Another is the prohibition against punitive detention by the legislature or the executive: *ibid* 27–8, and discussed in *Al-Kateb* (2004) 208 ALR 124.

94 (1991) 172 CLR 501, 539 (Mason CJ), 612 (Deane J), 648 (Dawson J), 686 (Toohey J), 706 (Gaudron J), 721 (McHugh J). Justice Brennan did not discuss this question. For a discussion of this case, see James Thomson, ‘Is it a Mess? The High Court and the War Crimes Case: External Affairs, Defence, Judicial Power and the Australian Constitution’ (1992) 22 *Western Australian Law Review* 197; Helen Roberts, ‘Retrospective Criminal Laws and the Separation of Judicial Power’ (1997) 8 *Public Law Review* 170; Greg Taylor, ‘Retrospective Criminal Punishment under the German and Australian Constitutions’ (2000) 23(2) *University of New South Wales Law Journal* 196, 203–8. It should be noted that historically, a bill of attainder referred to an Act which imposed the death penalty on a specified person/s whereas an Act of this kind which imposed a lesser penalty was referred to as a Bill of Pains and Penalties. For ease of discussion, I shall follow the example of the High Court in *Polyukhovich* and use the term, ‘bill of attainder’ to refer to both types of Acts.

95 (1992) 176 CLR 1, 34 (Brennan, Deane and Dawson JJ).

96 Zines, above n 89, 169. See also Winterton, above n 89, 190–1.

Several members of the High Court in *Polyukhovich* have elaborated on what they understood to be a bill of attainder. According to Mason CJ, '[t]he application of the doctrine [of the prohibition against bills of attainder] depends upon the legislature *adjudging the guilt of a specific individual or specific individuals or imposing punishment upon them*'.⁹⁷

This description makes clear why a bill of attainder breaches the separation of judicial power. First, 'it involves a usurpation of judicial power'⁹⁸ because it purports to either adjudge criminal guilt or to impose criminal punishment, both of which are judicial functions. Second, 'the application of that law by a court would involve it in an exercise repugnant to the judicial process'.⁹⁹ Such repugnancy arises because a bill of attainder does not 'leave it to the courts to determine whether the person charged has engaged in the conduct complained of and whether that conduct is an infringement of the rule prescribed'.¹⁰⁰ On the contrary, a bill of attainder penalises:

specific persons by name or by means of specific characteristics which, in the circumstances, identify particular persons. A court in applying such a law is in effect confined in its inquiry to the issue of whether or not an accused is one of the persons identified by the law. If he is, his guilt follows. The proper judicial inquiry as to whether an accused has been guilty of prohibited conduct has thus been usurped by the legislature. Alternatively, a bill of attainder may designate the persons it seeks to penalize by means of some characteristic (such as membership of an organization) that is independent of and not equivalent to the criminal activity which it is the purpose of the law to prohibit or prevent.¹⁰¹

Put differently, with a bill of attainder, once the identity of the accused is ascertained, 'the determination of guilt or innocence is foreclosed by the law'.¹⁰²

These statements indicate that the prohibition against bills of attainder presupposes that the proper exercise of judicial power in criminal proceedings involves something more than 'an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined'.¹⁰³ Indeed, these formal indicia of the exercise of judicial power will be met by bills of attainder. Take, for example, a law that is clearly a bill of attainder, namely, one that states Ali is guilty of a 'terrorism' offence and sentences him to 20 years' jail. A court applying such a law in a criminal trial would still be required to ascertain the relevant law, inquire into the facts (for instance, the identity of the accused), and to apply such law to the facts, notably, through a determination whether the accused is the person specified by the law.

What the prohibition against bills of attainder presupposes is that the proper exercise of judicial power in the adjudgment of criminal guilt requires that the court determine whether the accused has engaged in illegal *conduct*. So it is that 'if the law ... leaves it to the courts to determine whether the person charged has

97 *Polyukhovich* (1991) 172 CLR 501, 536 (Mason CJ) (emphasis added).

98 *Ibid* 539 (Mason CJ).

99 *Ibid* 706 (Gaudron J).

100 *Ibid* 536 (Mason CJ).

101 *Ibid* 647 (Dawson J). See also *ibid* 721 (McHugh J). Note that Dawson J merely assumed and did not decide that the separation of judicial power prohibited a bill of attainder.

102 *Ibid*, 706 (Gaudron J).

103 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J).

engaged in the conduct complained of and whether that conduct is an infringement of the rule prescribed, there is no interference with the exercise of judicial power'.¹⁰⁴

The preceding discussion identifies two elements that need to be satisfied before a law is characterised as a bill of attainder. First, the law must specify certain persons by name or through certain characteristics, for instance, membership of an organisation. Second, the status or identity of such persons becomes the basis of adjudgment and/or punishment of criminal guilt, with no requirement that such persons have engaged in any prohibited conduct. Laws that possess these features will invariably breach the separation of judicial power because they constitute legislative usurpation of the judicial function of adjudgment and/or punishment of criminal guilt. Moreover, if such a law relies upon a Chapter III court as a vehicle for such adjudgment and/or punishment then it would also breach the separation of judicial power by requiring the Chapter III court to exercise judicial power in a manner which is inconsistent with the nature of judicial power.

The following examines whether the *Criminal Code* proscription regime flouts the prohibition against bills of attainder. It concludes that it is likely that the membership offence as it applies to proscribed 'terrorist organisations' gives rise to bills of attainder. There is also some argument that the offences prohibiting the provision and receipt of training and funding to proscribed 'terrorist organisations' give rise to bills of attainder in some situations.

(a) Membership Offence

Section 102.3(1) of the *Criminal Code* presently provides that it is an offence for a person to be a member of an organisation that is a 'terrorist organisation'¹⁰⁵ when a person knows the organisation is a 'terrorist organisation' ('membership offence'). This offence is not committed if a person demonstrates that he or she took all reasonable steps to cease being a member of the organisation upon discovering that it was a 'terrorist organisation'.¹⁰⁶

What is key to note is that this offence is committed by members of 'terrorist organisations' regardless of whether they have engaged in any prohibited conduct or, more specifically, are found to have any involvement with a 'terrorist act'. The elements of the membership offence do not explicitly impose such a requirement. Neither does the 'terrorist organisation' element implicitly dictate such a requirement. As noted above, a 'terrorist organisation' includes 'an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs)'. It also embraces an organisation specified in regulations after the Attorney-General has reached satisfaction, on reasonable grounds, that it is a

¹⁰⁴ *Polyukhovich* (1991) 172 CLR 501, 536 (Mason CJ).

¹⁰⁵ Prior to the enactment of the *Anti-Terrorism Act 2004* (Cth), this offence was restricted to proscribed 'terrorist organisations'. For discussion, see Senate Legal and Constitutional Legislation Committee, above n 16, 7.

¹⁰⁶ *Criminal Code* s 102.3(2).

'terrorist organisation'.¹⁰⁷ An organisation can then be said to be a 'terrorist organisation' in circumstances when it is not openly committed to 'terrorist acts' and even when its principal activities are not related to such acts: it need only be directly or indirectly engaged in a 'terrorist act'. It follows that a member of a 'terrorist organisation' need not be involved in a 'terrorist act'. These points apply with even stronger force given the expansive definition given to 'member'. According to the *Criminal Code*, a 'member' of an organisation includes 'an informal member' as well as persons who have taken steps to become a member of the organisation.¹⁰⁸

What should be stressed is that no nexus is required between membership of a 'terrorist organisation' and any prohibited conduct (in particular, 'terrorist acts'). The absence of this requirement is common in relation to both proscribed and non-proscribed 'terrorist organisations'. This fact is even more striking with regard to proscribed organisations because the legality of their proscription does not depend on proof beyond reasonable doubt that these organisations are directly or indirectly engaged in a 'terrorist act': it is sufficient that the Attorney-General has *reasonable grounds* for such a finding.¹⁰⁹

A person does, of course, need to know that the organisation is a 'terrorist organisation' before he or she commits the membership offence. While there may be difficult questions as to whether requirements as to the accused's state of mind can generally redeem a legislative instrument from being a bill of attainder, they do not arise in this case. The state of mind requirement in this case relates to the status (membership) for which the accused is being punished, that is, the accused must intend to be a member of an organisation that they know is a 'terrorist' organisation.

With regard to proscribed 'terrorist organisations', not only does the membership offence punish persons on the basis of their status and not because of their involvement in any prohibited conduct, but this offence, together with the proscribing regulations, clearly specify the persons to be punished. These two features mean that the membership offence, as it applies to proscribed 'terrorist organisations':

designate[s] the persons it seeks to penalize by means of some characteristic (such as membership of an organization) that is *independent of and not equivalent to the criminal activity which it is the purpose of the law to prohibit or prevent*.¹¹⁰

In sum, it is likely that the membership offence as it applies to proscribed 'terrorist organisations' will be constitutionally invalid. It purports to usurp judicial power by criminally punishing a specified group of persons because of their status as members of an organisation regardless of whether they have

107 *Criminal Code* s 102.1.

108 *Criminal Code* s 102.1.

109 *Criminal Code* s 102.1(2). Judicial review of the Attorney-General's decision will be available pursuant to *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 75(v) of the *Constitution*. The availability of such review distinguishes the *Criminal Code* proscription power from the powers granted by the *Communist Party Dissolution Act 1950* (Cth): *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

110 *Polyukhovich* (1991) 172 CLR 501, 647 (Dawson J) (emphasis added). See also 536–7 (Mason CJ), 721 (McHugh J).

committed any prohibited conduct. For the same reason, a Chapter III court trying a membership offence will be acting in a manner inconsistent with the nature of judicial power.

(b) Training and Funding Offences

The *Criminal Code* currently makes it an offence for a person to intentionally provide training to, or receive training from, a ‘terrorist organisation’ when the person is reckless as to this fact (‘training offence’).¹¹¹ It also makes it an offence for a person to provide funds to or receive funds from a ‘terrorist organisation’ when the person knows the organisation is a ‘terrorist organisation’ or is reckless as to this fact (‘funding offence’).¹¹²

It is arguable that the training and funding offences punish members of proscribed ‘terrorist organisation’ on the basis of their membership and, therefore, constitute legislative usurpation of judicial power.

On its face, this argument is quite curious because these offences, unlike the membership offence, apply to certain conduct in relation to a ‘terrorist organisation’ and not to the members of such an organisation per se. They do, of course, affect members of ‘terrorist organisations’ but this is only in relation to the activities in which they engage in their capacity as members of such organisations (‘organisational activities’). The rest of their affairs are not impaired by the offences.

The impact of the training and funding offences on the members’ lives is a question of fact. When the members’ organisational activities only occupy a small part of their lives, that impact can be quite marginal.¹¹³ On the other hand, the impact can be quite profound when there is no apparent or clear distinction between the members’ organisational and other activities.

While such a distinction applies to formal groupings, for instance, organisations that are legal entities and are structured according to certain rules of association, it does not hold fast with informal groupings that do not have an existence, legal or otherwise, separate from their members. The point to be made is that, while the specifics of any case must be examined, it would not be uncommon for a ‘terrorist organisation’ to be an informal grouping.

With such ‘terrorist organisations’, the provision of training or funds to members of the ‘terrorist organisation’ will equate to provision of training or funds to the ‘terrorist organisation’ itself. Specifically, with respect to proscribed ‘terrorist organisations’ that are informal groupings, the training and funding offences – while nominally directed at these organisations – in substance, single out their members.

Such singling out means that these offences as they apply to proscribed ‘terrorist organisations’ meet a key criterion of a bill of attainder: they impose a

111 *Criminal Code* s 102.5.

112 *Criminal Code* s 102.6. It should be noted that a funding offence is not committed if the funds are received solely for the purpose of proceedings relating to the ‘terrorist organisation’ offences or for the purpose of assisting the organisation to comply with an Australian law.

113 To take a fanciful example, an offence targeting a lawn bowling club does affect its members, but only in a minor way, that is, in relation to lawn bowling activities engaged in as club members.

burden on *specified* groups of persons. Moreover, as demonstrated in the discussion of the membership offence,¹¹⁴ this burden is imposed because of the status of such persons, that is, their membership of the proscribed 'terrorist organisations', and not because they have engaged in any prohibited conduct.

But is the burden imposed by the training and funding offences a form of criminal punishment? This question throws up two separate issues: *Can* the burden imposed by the training and funding offences on members of proscribed 'terrorist organisations' be considered a form of criminal punishment? If yes, *is it* properly characterised as a form of criminal punishment?

The first question directs attention to broader issue of the kinds of negative consequences that are embraced by the notion of criminal punishment.¹¹⁵ The position is clear in some situations. At one end of the spectrum, 'there can be no doubt that imprisonment and the imposition of fines, the usual sanctions for contempt, constitute punishment'¹¹⁶ whether 'by reason of their nature or because of historical considerations'.¹¹⁷ At the other end of the spectrum some negative consequences are, by their nature, not forms of criminal punishment even though they may be inflicted in response to perceived wrongdoing. Social disapproval is a case in point.

The burden imposed by the training and funding offences, however, has a somewhat ambiguous quality. Insofar as the training and funding offences single out members of proscribed 'terrorist organisations', they do not subject them to detention, penalties or convictions. What the offences do is subject *persons who deal with them* to criminal penalties. This has the consequence of severely disrupting the lives of the members. The funding offence, for one, makes it impossible for members of proscribed 'terrorist organisations' to function in any cash economy because it makes it illegal for *others* to provide or receive funds from them. The impact of the training offence, while less severe, is still significant. Insofar as this offence singles out members of proscribed 'terrorist organisations', this offence would, for example, make it illegal for *others* to provide educational courses to such persons.¹¹⁸

A critical question then is whether the notion of criminal punishment embraces such disruption which occurs *as a result* of criminal offences? An affirmative answer to this would plainly involve an extension of this notion beyond the paradigmatic instances of imprisonment, detention and fines. In the wake of *Al-Kateb v Godwin* ('*Al-Kateb*'), it is unlikely that the High Court will accept such

114 See above nn 105–110 and accompanying text.

115 See generally Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 208–10.

116 *Witham v Holloway* (1995) 183 CLR 525, 534 (Brennan, Deane, Toohey and Gaudron JJ); also quoted with apparent approval by Gummow J in *Al-Kateb v Godwin* (2004) 208 ALR 124, [138].

117 *Chu Kheng Lim* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ). Their Honours were referring to the task of identifying judicial functions, but similar considerations would apply to the task of determining what constitutes criminal punishment.

118 The term 'training' is not defined by the *Criminal Code*. Hence, the ordinary meaning of the term applies. One definition is found in the Macquarie Dictionary: 'the development in oneself or another of certain skills, habits, and attitudes': *The Macquarie Dictionary* (3rd ed, 1999) 2243. Such a definition would clearly embrace educational courses. For discussion of the breadth of the meaning of training, see Senate Legal and Constitutional Legislation Committee, above n 16, 37–8.

an extension. The judgments in that case seem to indicate that a majority of the present High Court is eager to limit the scope of any restraints on legislative or executive power arising out of the separation of judicial power.¹¹⁹ With such sentiments, the chances of the High Court characterising the burden imposed by the training and funding offences on members of proscribed 'terrorist organisations' as a form of criminal punishment seem quite dim.

Even if the burden imposed by these offences is not, by their nature, *precluded* from being a form of criminal punishment, there is still the question whether it is properly characterised a form of criminal punishment. This question does not admit any precise answer because the law in this area is still developing, and the High Court is yet to provide a clear test as to what constitutes criminal punishment. The recent High Court decision in *Al-Kateb* reveals two competing positions. The first is exemplified by Gummow J's judgment. His Honour seems to treat paradigmatic instances of criminal punishment (such as detention and fines) as typically punitive and, hence, they can only be imposed by a Chapter III court unless an exception applies.¹²⁰ Justice Gummow's treatment of paradigmatic instances of criminal punishment appears to closely conform with Brennan, Deane and Dawson JJ's statement in *Chu Kheng Lim* that, subject to certain exceptions:

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.¹²¹

Justices McHugh, Hayne, Callinan and Heydon seem to take a different view. Their Honours would not reserve any special treatment to detention of unlawful non-citizens in determining whether there has been any breach of the separation of judicial power. Specifically, such detention is not to be treated as *prima facie* punitive.¹²² Moreover, such detention will not be considered punitive if there is a non-punitive purpose like preventing non-citizens from entering Australia or integrating with Australian citizens.¹²³

In considering the burden imposed by the training and funding offences, it must, of course, be remembered that *Al-Kateb* was focussed on administrative detention of unlawful non-citizens and the statements of the High Court members who considered the constitutional issues were directed towards such detention. Nevertheless, it can be said that all the High Court judges who considered these

119 (2004) 208 ALR 124. The majority consisted of McHugh, Hayne, Callinan and Heydon JJ. In another decision handed down on the same day, the various High Court judges reiterated the reasons they gave in *Al-Kateb: Minister for Immigration and Multicultural and Indigenous Affairs v Al-Khafaji* (2004) 208 ALR 201.

120 *Ibid* [137]–[140].

121 *Chu Kheng Lim* (1992) 176 CLR 1, 27 (emphasis added).

122 This position is clearest in Hayne J's judgment where his Honour stated that '[o]nly if it is said that there is an immunity from detention does it become right to equate detention with punishment that can validly be exacted only in the exercise of judicial power': *Al-Kateb* (2004) 208 ALR 124, [267] (with whom Heydon J agreed at [303]). See also [44]–[45] (McHugh J), [258] (Hayne J) (with whom Heydon J agreed at [303]), [287], [289], [291] (Callinan J).

123 *Ibid* [45] (McHugh J), [267] (Hayne J) (with whom Heydon J agreed at [303]). See also [291] (Callinan J).

issues viewed the purpose or object of imposing a burden as key to the question whether it was a form of criminal punishment. Similarly, putting aside the treatment of paradigmatic instances of criminal punishment, all seem to agree that a burden will be considered a form of criminal punishment if it were imposed for a punitive purpose.¹²⁴

When then is such a purpose present? Oddly enough, only one judge, Hayne J, expressly addressed this issue. Justice Gummow rejected the 'punitive/non-punitive distinction [as] the basis upon which the Ch III limitations respecting administrative detention are enlivened'.¹²⁵ Justices McHugh and Callinan seemed to approach the question in a negative manner, that is, by identifying non-punitive purposes.¹²⁶

For Hayne J, with whom Heydon J agreed: '[p]unishment exacted in the exercise of judicial power is punishment *for* identified and articulated wrongdoing'.¹²⁷ If this is the criterion, is it then satisfied by the burden imposed by the training and funding offences on members of proscribed 'terrorist organisations'? There is much to be said for an affirmative answer. It is true that the burden imposed by these offences does not fall because the members of such organisations have committed a criminal offence. On the contrary, it is precisely the absence of this requirement that taints these offences with a key feature of a bill of attainder.¹²⁸ But such a formal nexus is not necessary as Brennan, Deane and Dawson JJ stated in *Chu Kheng Lim*:

In exclusively entrusting to the courts designated by Ch III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with *substance and not mere form*.¹²⁹

Approaching it in this manner, it is clear that the *Criminal Code* proscription regime and its associated offences treat 'terrorist organisations' and their members as invariably engaged in wrongful behaviour. The latter is writ large with the membership offence. If so, it is a very small step to characterise the burdens imposed by the various 'terrorist organisations' as being imposed for the purpose of punishing wrongful behaviour which, in the case of members of proscribed 'terrorist organisations', is their membership of such organisations.

Summing up, in cases where the proscribed 'terrorist organisations' are informal groupings, it can be said that the training and funding offences single out members of such organisations on the basis of their status as members of

124 See *ibid* [44] (McHugh J), [135]–[140] (Gummow J), [265] (Hayne J) (with whom Heydon J agreed at [303]), [287], [289], [291] (Callinan J). Chief Justice Gleeson and Kirby J did not expressly address this issue.

125 *Ibid* [136].

126 *Ibid* [44]–[45] (McHugh J), [287], [289], [291] (Callinan J).

127 *Ibid* [265] (emphasis original). In that same paragraph, Hayne J quoted H L A Hart's definition of the 'central case of punishment' which consisted of the following elements: it was *pain or other unpleasant consequences* imposed *for an offence* against the law *on* the actual or supposed offender *and* was administered by persons other than the actual or supposed offender who were *acting pursuant to authority* conferred by the law. See also *ibid* [261] where Hayne J observed that the detention of the unlawful non-citizen was 'not inflicted on that person as punishment for any actual or assumed wrongdoing'.

128 See above nn 107–109 and accompanying text.

129 *Chu Kheng Lim* (1992) 176 CLR 1, 27 (emphasis added).

these organisations and not because they have engaged in any prohibited conduct. The question whether these offences as they apply to such persons constitute bills of attainder depends on whether the burden they impose on such persons constitutes criminal punishment. Given the current sentiments of the High Court, it is likely that such burdens, by their nature, will be *precluded* from being considered a form of criminal punishment. However, if they are not so precluded, it is seriously arguable that they have been imposed for a punitive purpose.

A final remark is in order. The fact that the organisations proscribed so far are foreign organisations makes no difference to the question of the validity of the laws. Justices Brennan, Deane and Dawson did recognise in *Chu Kheng Lim* that the power to detain non-citizens for the purpose of their expulsion or deportation¹³⁰ was an exception to the ‘constitutional immunity from being imprisoned ... except pursuant to an order by a court’.¹³¹ Their statements, however, do not sanction a general non-citizen exception to the separation of judicial power. Moreover, the two-fold rationale for the prohibition against bills of attainder¹³² makes no distinction between citizens and non-citizens.

B Specific Power of Proscription under the *Criminal Code*

Last year, the Federal Parliament passed the *Criminal Code Amendment (Hizballah) Act 2003* (Cth) and the *Criminal Code Amendment (Hamas and Lashkar-E-Tayyiba) Act 2003* (Cth). These laws enable the proscription by regulation of a ‘Hamas organisation’, ‘Hizballah organisation’ or ‘Lashkar-e-Tayyiba organisations’ under the *Criminal Code* if the Attorney-General has been satisfied, on reasonable grounds, that such an organisation is ‘directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)’.¹³³ Relying upon this specific proscription power, the government has proscribed all three organisations.¹³⁴

The recent broadening of the general proscription power has, however, rendered this power largely otiose. As discussed above, the *Criminal Code* presently allows the proscription by regulation of *any* organisation so long as the Attorney-General is satisfied that it is a ‘terrorist organisation’.¹³⁵ So it is that the general proscription power can be used against ‘Hamas organisations’, ‘Hizballah organisations’ or ‘Lashkar-e-Tayyiba organisations’.

That being said, there is some advantage in proscribing organisations through the specific proscription power as distinct from the general proscription power. The former is not subject to the requirement that any proposed proscription be preceded by a briefing of the leader of the opposition.¹³⁶ Neither is it subject to

130 Ibid 29–32.

131 Ibid 28–9.

132 See above nn 98–99 and accompanying text.

133 *Criminal Code* s 102.1(1), (7)–(8).

134 *Criminal Code Regulations* sch 1A.

135 See above nn 10–11 and accompanying text.

136 *Criminal Code* s 102.1(2A).

review by the Parliamentary Joint Committee on ASIO, ASIS and DSD.¹³⁷ Also, regulations made in reliance on the specific proscription power can be retrospective in the sense that they can take effect at the time the proscription is publicly announced and before actual promulgation of the regulations.¹³⁸

Nevertheless, because the specific proscription power is largely redundant, the following discussion of its constitutional validity will be quite brief. It is very unlikely that either the legislative provisions granting the specific proscription power or the regulations made in exercise of this power will be found in breach of the implied freedom of political communication. This is because the organisations that have been proscribed under this power will not have engaged in protected communication to any significant degree. Similarly, it is unlikely these laws will be found in breach of any implied freedom of political association as the banned groups are foreign-based organisations that are not afforded the protection of this freedom.

On the other hand, the membership offence as it applies to these organisations is likely to be a bill of attainder for same reasons that apply to other proscribed 'terrorist organisations'.¹³⁹ Similarly, if any of these organisations are informal groupings, there is some argument that the training and funding offences as they apply to such organisations give rise to bills of attainder.¹⁴⁰

III CHARTER OF UN PROSCRIPTION REGIME

The *Charter of UN* proscription regime was enacted soon after September 11 attacks in the form of regulations.¹⁴¹ In 2002, this regime was placed on a statutory footing by the *Suppression of the Financing of Terrorism Act 2002* (Cth).¹⁴² Presently, this regime allows the proscription of 'terrorist' entities¹⁴³ in two ways: by executive listing, and regulation.

With executive listing, the Foreign Minister is *required* to list an entity if satisfied that it falls within the scope of para 1(c) of the United Nations Security Council ('UNSC') Resolution 1373.¹⁴⁴ This paragraph requires States to:

137 *Criminal Code* s 102.1A.

138 *Criminal Code* s 102.1(11)–(11B).

139 See above nn 105–110 and accompanying text.

140 See above Part II(A)(3)(b). The susceptibility of these provisions to constitutional invalidity has been acknowledged by the government: see Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 2003, 15398 (Daryl Williams, Attorney-General).

141 *Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001* (Cth).

142 Some minor amendments were also made by the *Charter of the United Nations Amendment Act 2002* (Cth). There were two reasons for such formalisation: transparency, and an increase in the penalties: Commonwealth, *Parliamentary Debates*, House of Representatives, 12 March 2002, 1045 (Daryl Williams, Attorney-General).

143 The regime also allows the listing of individuals and assets. Given the focus of this article, I will not be discussing these aspects of the regime.

144 *Charter of the United Nations Act 1945* (Cth) s 15(1); *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth) reg 6(1).

Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting, on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.¹⁴⁵

Such listings occur by notice in the *Gazette*.¹⁴⁶ To date, 131 entities have been listed by the Foreign Minister.¹⁴⁷

The *Charter of UN Act* also empowers the Governor-General to proscribe entities by regulation.¹⁴⁸ An entity can be proscribed by regulation only if it has been directly or indirectly identified pursuant to a UNSC decision made under Chapter VII of the *Charter of the United Nations* that Australia is obliged to carry out. Such a decision must also relate to terrorism and the dealing of assets.¹⁴⁹ Such proscriptions may also occur by way of incorporating lists found in such decisions or made pursuant to such decisions.¹⁵⁰

This power has been utilised to proscribe the Taliban, Osama bin Laden and the al Qaeda organisation. It has also been used to incorporate the list maintained by the committee established pursuant to UNSC Resolution 1267.¹⁵¹ This committee was initially established to monitor sanctions imposed on the Taliban-controlled Afghanistan for its support of the al Qaeda organisation, and presently maintains a list of organisations directly or indirectly associated with the Taliban, Osama bin Laden and the al Qaeda organisation. At the time of writing, one entity associated with the Taliban and 105 entities associated with the al Qaeda organisation were identified in this list.¹⁵²

Once an entity is either proscribed by regulation or listed by the Foreign Minister, it becomes illegal to use or deal with the assets of that entity. It will also be an offence to directly or indirectly provide assets to that entity. Both offences are punishable by a maximum of five years' imprisonment.¹⁵³

There are four constitutional issues that are thrown up by the *Charter of UN* proscription regime. There is, first, the question whether it can be supported by s 51(xxix) of the *Constitution*, the external affairs power. Like the general proscription power under the *Criminal Code* proscription regime, the compliance of this regime with the implied freedoms of political communication and

145 This paragraph is included as a note to reg 6 of *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth).

146 *Charter of United Nations Act 1945* (Cth) s 15(6).

147 These figures have been calculated from the consolidated list found at <http://www.dfat.gov.au/icat/persons_entities> at 15 November 2004.

148 *Charter of United Nations Act 1945* (Cth) s 18(1).

149 *Charter of United Nations Act 1945* (Cth) s 18(1)–(2).

150 *Charter of United Nations Act 1945* (Cth) s 18(3).

151 *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth) reg 6A.

152 *Consolidated List of Individuals and Entities Belonging to or Associated with the Taliban and al Qaeda Organisation as Established and Maintained by the 1267 Committee* (available at <<http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>> at 15 November 2004).

153 Such conduct is not illegal if authorised by the Foreign Minister: *Charter of the United Nations Act 1945* (Cth) ss 20–1.

association also warrants discussion, as does the question whether the regime breaches the separation of judicial power by giving rise to bills of attainder.

Upon examination of these questions, the following sections conclude that the *Charter of UN* proscription regime is probably supported by the external affairs power. Its conformity with the implied freedoms of political communication and association is, on the other hand, a much more open question. Lastly, there is a good case for arguing that, in some situations, the regime gives rise to bills of attainder.

A Supported by the External Affairs Power

The accompanying material to the Suppression of the Financing of Terrorism Bill 2002 (Cth) stated that the amendments to the *Charter of UN Act* implement Australia's obligations pursuant to UNSC Resolution 1373,¹⁵⁴ and, in particular, para 1(c) of that resolution.¹⁵⁵

These statements clearly seek to rely upon the external affairs power.¹⁵⁶ It is highly probable that such reliance will be successful. The treaty in question is the *Charter of the United Nations*. Article 25 of the Charter requires Members of the United Nations to 'carry out the decisions of the Security Council in accordance with the present Charter'. The upshot is that Australia, a member of the United Nations, is under a treaty obligation to implement UNSC Resolution 1373.

This obligation will enliven the external affairs power.¹⁵⁷ The only question left for serious discussion is whether the *Charter of UN Act* proscription regime is 'reasonably capable of being considered appropriate and adapted to implementing'¹⁵⁸ this resolution. This question is approached by reserving a margin of discretion to the legislature, for 'it is for the legislature to choose the means by which it carries into or gives effect to the [resolution] provided that the means chosen are reasonably capable or being considered appropriate and adapted to that end'.¹⁵⁹

154 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 March 2002, 1044–5 (Daryl Williams, Attorney-General); Explanatory Memorandum, Suppression of the Financing of Terrorism Bill 2002 (Cth) 1.

155 Explanatory Memorandum, *ibid*, 15. See also Australian Government, *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* (2001) [8].

156 There is a wealth of material discussing this head of power, see, eg, Donald Rothwell, 'International Law and Legislative Power' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (1997) 104–31; George Winterton et al, *Australian Federal Constitutional Law: Commentary and Materials* (1999) 273–319; Blackshield and Williams, above n 89, ch 18.

157 *Commonwealth v Tasmania* (1983) 158 CLR 1; *Victoria v Commonwealth* (1996) 187 CLR 416. For a discussion of the latter case, see Michael Coper and George Williams (eds), *The Cauldron of Constitutional Change* (1997) chh 1–4; Deborah Cass, 'Traversing the Divide: International Law and Australian Constitutional Law' (1998) 20 *Adelaide Law Review* 73, 79–82; Kate Eastman, 'The Relationship between International Law and Australian Law' (1997) *Australian International Law Journal* 86; George Williams and Amelia Simpson, 'The Expanding Frontiers of Commonwealth Intervention in Industrial Relations' (1997) 10 *Australian Journal of Labour Law* 222.

158 *Victoria v Commonwealth* (1996) 187 CLR 416, 487.

159 *Ibid* 487.

It is very likely that the *Charter of UN Act* proscription regime will be found to be appropriate and adapted to implementing UNSC Resolution 1373. It gives effect to paras 1(a) and 1(c) of the Resolution. Paragraph 1(a) requires Member States to ‘prevent and suppress the financing of terrorist acts’¹⁶⁰ and para 1(c) has already been reproduced above.¹⁶¹

The offences triggered by the *Charter of UN Act* proscription regime fall squarely within these paragraphs. That these offences are triggered through a proscription regime is largely inconsequential. UNSC Resolution 1373 does not prescribe specific means of freezing and preventing financing, and hence, this method is consistent with the resolution. It should be noted that the fact that the *Charter of UN Act* proscription regime only partially implements UNSC Resolution 1373¹⁶² does not really throw up any complications, as other legislation implements the rest of this resolution.¹⁶³

B The Implied Freedom of Political Communication

For the reasons explained above, the *Lange* test will be applied to the legislative provisions granting the power to proscribe by regulation and executive listing as well as to the regulations proscribing organisations.¹⁶⁴

There is still the question whether the *Lange* test should be applied separately to listings by the Foreign Minister made within the scope of the *Charter of UN Act*. The answer to this question is unclear as the issue of how this test should be applied to legislative provisions that confer power on members of the Executive has yet to be properly settled. To the author’s knowledge, the academic literature has not adequately canvassed this issue.¹⁶⁵

Very much the same applies to the case law. Since *Lange* was handed down, there appears to have been only two superior court decisions that have involved challenges to the constitutional validity of *executive acts* on the basis of the implied freedom of political communication. The first, *Brown v Classification Review Board of the Office of Film*¹⁶⁶ is rather confused on this point. In this case, the Full Bench of the Federal Court examined the impact of the *executive act* made within the scope of the legislative provisions, a refusal of classification, when considering whether the implied freedom of political communication was

160 *Resolution on International Cooperation to Combat Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1373, UN SCOR, 4385th mtg, [1](a), UN Doc S/Res/1372 (2001).

161 See above n 145 and accompanying text.

162 In *Victoria v Commonwealth* (1996) 187 CLR 416, 459, the majority of the High Court stated that ‘[d]eficiency in implementation of a supporting Convention is not necessarily fatal to the validity of a law; but a law will be held invalid if the deficiency is so substantial as to deny the law the character of a measure implementing the Convention’.

163 See Australia, *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* (2001).

164 See above nn 28–34 and accompanying text.

165 Separate application to executive acts was assumed but not discussed in Richard Jolly, ‘The Implied Freedom of Political Communication and Disclosure of Government Information’ (2000) 28 *Federal Law Review* 41, 52–3. See also intriguing remarks in Blackshield and Williams, above n 89, 1196.

166 (1998) 82 FCR 225.

burdened. But it then switched its focus to the *legislative provisions* containing the classification scheme when determining the question of reasonable proportionality.¹⁶⁷ Such a 'mix and match' approach has very little to commend itself. Whatever view one takes of the question whether the *Lange* test is applied separately to executive acts made within the scope of the legislative provisions, each application of the test must involve either the legislative provisions or the executive acts, but not both simultaneously.

The other decision is that of French J in *CEPU v Laing*.¹⁶⁸ In this case, a challenge was made – on the basis of the implied freedom of political communication – to s 127 of the *Workplace Relations Act 1996* (Cth); a provision that confers discretion on the Australian Industrial Relations Commission to issue orders preventing or stopping industrial action. A challenge was also mounted against a specific order made under this section by the Australian Industrial Relations Commission; an order that was found to be within the scope of s 127 of the Act. After finding this statutory provision to be constitutionally valid, French J went on to dismiss the challenge to the particular order. According to his Honour:

The Act being valid and itself within the constitutional standard, the exercise of the discretion within the terms of the Act was not to be impugned by reference to the implied constitutional freedom. The question whether the order was reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which was compatible with the maintenance of the constitutional prescribed system of representative and responsible government, is answered in the affirmative on the basis that the statute under which it was made complied with that requirement in the limitation which it placed upon the exercise of the discretion.¹⁶⁹

With this approach, an executive act made within power raises no separate constitutional questions under the *Lange* test.

Contrary to French J's approach, the better and more consistent view would seem to be that the *Lange* test is applied separately to discretionary executive acts that have been made within the scope of the legislative provisions. I have argued above that the *Lange* test should be applied separately to subordinate legislation.¹⁷⁰ Otherwise, the protection afforded by the implied freedom of political communication risks being hollowed out by legislative provisions granting broad regulation-making power. These arguments apply with equal force to legislative provisions granting broad *executive* discretion.

Moreover, this approach is consistent with that adopted by Kirby J in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.¹⁷¹ In his judgment, his Honour concluded that the implied freedom of political communication did not invalidate the statutory provisions conferring upon the Tasmanian Supreme Court a broad power to grant interlocutory injunctions.¹⁷² At

167 (1998) 82 FCR 225, 237–9 (French J), 246 (Heerey J) and 257–8 (Sundberg J). See remarks in Blackshield and Williams, above n 89, 1196.

168 *CEPU v Laing* (1998) 89 FCR 17.

169 *Ibid* 36.

170 See above nn 28–34 and accompanying text.

171 (2001) 208 CLR 199.

172 *Ibid* [200]–[201].

the same time, his Honour held the implied freedom controlled the exercise of such power in that ‘when relevant, the implication spelt out in *Lange* is a consideration to be taken into account when a judge or a court is invited to grant an interlocutory injunction’.¹⁷³

This preferred approach does not, however, dictate that the *Lange* test be applied separately to the specific listings by the Foreign Minister. This is because such listings are made pursuant to a statutory *obligation*. In such circumstances, French J’s approach is quite sound as the obligatory nature of the executive power means that there should not be a problem of selective application.

In sum, the *Lange* test will be applied to the legislative provisions granting the power to proscribe by regulation and executive listing, and the proscribing regulations, but not to the specific executive listings. The following discussion concludes that it is unclear whether the legislative provisions obliging the Foreign Minister to list certain entities comply with this test. The provisions granting the power to proscribe by regulation, are, however, likely to meet the dictates of this test because of the attendant requirements.

1 *Legislative Provisions*

(a) *Obligation to Proscribe by Executive Listing*

As discussed above, the obligation on the Foreign Minister to list an entity is triggered if he or she is satisfied that the entity falls within para 1(c) of UNSC Resolution 1373.¹⁷⁴

The scope of this obligation largely depends on the meaning of ‘terrorist act’. The meaning given under the *Charter of UN Act* is, however, unclear. This phrase is not defined by the *Charter of the UN Act*. Neither does UNSC Resolution 1373 supply a definition.¹⁷⁵ With such a lacuna, the fall back position will be the ordinary meaning of the phrase read in its statutory context.

A useful pointer to such a meaning is the Macquarie Dictionary’s definition of ‘terrorism’ as ‘the use of terrorising methods, especially the use of violence to achieve political ends’.¹⁷⁶ Such a definition has a strong affinity with the meaning of ‘terrorist act’ under the *Criminal Code*. Both require political motivation. Also, the ‘use of terrorising methods’ corresponds to the requirement that a ‘terrorist act’ under the *Criminal Code* be accompanied by an intention to intimidate or coerce. On the other hand, the harm/damage element of a ‘terrorist act’ under the *Criminal Code* is, arguably, broader as it encompasses property

173 Ibid [209].

174 See above nn 144–145 and accompanying text.

175 *Resolution on International Cooperation to Combat Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1373, UN SCOR, 4385th mtg, [1](a), UN Doc S/Res/1372 (2001). The same applies to subsequent resolutions that reaffirm this resolution. See, eg. *Resolution on Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1526, UN SCOR, 4908th mtg, UN Doc S/Res/1526 (2004); *Resolution on Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1535, UN SCOR, 4936th mtg, UN Doc S/Res/1535 (2004).

176 *The Macquarie Dictionary* (3rd ed, 1999) 2187.

damage and damage to electronic systems whereas the Macquarie Dictionary's definition seems to be confined to physical harm.¹⁷⁷

The strong affinity between these two definitions suggests a close similarity between the meanings of a 'terrorist act' under the *Charter of UN Act* and the *Criminal Code*. Given this, much of the above discussion relating to the *Criminal Code* general proscription power also applies to the provisions imposing upon the Foreign Minister the obligation to list an entity that is directly or indirectly involved in a 'terrorist act'. Like the *Criminal Code* general proscription power, the latter provisions effectively burden the implied freedom of political communication because a 'terrorist act' under the *Charter of UN Act* will involve protected communication, especially if directed against the Commonwealth or State governments. The obligation to proscribe by executive listing will, therefore, have a chilling effect on such actions.¹⁷⁸

On one level, this effect will be weaker than that of the *Criminal Code* general proscription power. The offences triggered by a listing are not so broad-ranging as the 'terrorist organisations' offences and neither are they punishable by such severe sentences. The obligatory nature of the listing provisions, in contrast, exacerbates the chilling effect and so does the frequency of their use. To date, 131 entities have been listed under the *Charter of UN Act*.¹⁷⁹ In contrast, the general proscription power under the *Criminal Code* has only been used against 14 organisations.¹⁸⁰

Given that the obligation to proscribe by executive listing places a burden on the implied freedom of political communication, is it then reasonably appropriate and adapted to serve a legitimate end? The provisions imposing this obligation purport to serve two aims. They are 'designed to equip law enforcement agencies with the legislative tools to enable them to target the financing of terrorism'.¹⁸¹ Further, they aim to implement UNSC Resolution 1373.

As with the *Criminal Code* proscription power, the question of reasonable proportionality cannot be answered with any precision. There is serious ambiguity concerning meaning of 'terrorism'; ambiguity that is not cleared up by UNSC Resolution 1373 because it does not define the meaning of 'terrorism'. Moreover, the determination of the question of reasonable proportionality will, in the final analysis, rest upon value judgments.¹⁸²

We can, however, identify certain relevant considerations. Pointing towards validity is the weightiness of the legitimate end. Insofar as the prevention of 'terrorist acts' involves the prevention of physical harm, it is likely to be considered a compelling public interest. The weight of this interest will be enhanced by the fact that the provisions also aim to implement a treaty

177 See above n 37 and accompanying text.

178 See above n 49 and accompanying text.

179 These figures have been calculated from the consolidated list found at <http://www.dfat.gov.au/icat/persons_entities> at 15 November 2004.

180 *Criminal Code* sch 1.

181 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 March 2002, 1043 (Daryl Williams, Attorney-General).

182 See above n 55 and accompanying text.

obligation. Other considerations suggesting validity include the confined nature of the burden imposed by these provisions, that is, they target a specific mode of political communication. Moreover, they do so by imposing middle-range penalties and through an obligatory, as distinct from a discretionary, listing regime.

The relevant considerations do not, however, all go one way as there are features of these provisions that are suggestive of invalidity. First, the offences that a listing triggers capture conduct that goes beyond the financing of ‘terrorist acts’ because they prohibit the funding of *organisations* considered to be involved in a ‘terrorist act’. So, for example, a listed organisation’s activities, while including ‘terrorist acts’, could also include political activities which do not fall within such a category. Once listed, however, giving money to this organisation for *whatever purpose* is illegal including funding it to engage in non-violent political activity. The reach of these provisions is further amplified by the absence of a statutory definition of ‘terrorist act’. Until the meaning of this phrase is settled judicially, the Foreign Minister will have considerable leeway in interpreting this phrase.

The breadth of these provisions highlights another factor which points towards lack of proportionality: the availability of more targeted means of suppressing the financing of ‘terrorist acts’. A good example would be the ‘financing terrorism’ offence under the *Criminal Code*. In contrast with the *Charter of UN Act* offences, commission of this offence requires that the funds provided or collective be used to facilitate or to engage in a ‘terrorist act’.¹⁸³

In conclusion, the obligation on the Foreign Minister to list organisations that are directly or indirectly involved in ‘terrorist acts’ under the *Charter of UN Act* imposes a burden on the implied freedom of political communication. Whether it can be said to breach this freedom will largely turn upon the question of reasonable proportionality; a question that does not yield any clear answer.

(b) *Power to Proscribe by Regulation*

The burden placed on the implied freedom of political communication by provisions granting the power to proscribe by regulation stems from the fact they can only be used to proscribe organisations identified directly or indirectly pursuant to a UNSC decision relating to ‘terrorism’. This requirement presumably means that the identified organisations must be directly or indirectly engaged in ‘terrorist acts’; acts which, if directed against the Commonwealth or State governments, would involve protected communication.¹⁸⁴

The burden placed by these provisions would seem, however, to be much more attenuated compared to that placed by either the Foreign Minister’s obligation to list, or the general proscription power under the *Criminal Code*. In contrast with the obligation to list, the power is confined by the requirements that an entity be identified directly or indirectly pursuant to a UNSC decision and, furthermore, that such a decision be made under Chapter VII of the Charter of the United

183 *Criminal Code* s 103.1.

184 See above nn 39–47 and accompanying text.

Nations.¹⁸⁵ The latter restricts decisions to those aimed at maintaining or restoring 'international peace and security'.¹⁸⁶

Given this burden, the question is whether these provisions are reasonably appropriate and adapted to serve a legitimate aim. The aims pursued by these provisions are identical to those that apply to the obligation to list. A proscribing regulation also triggers the same offences as an executive listing. Given this, the discussion above relating to the obligation to list applies to this power.¹⁸⁷

Several differences should, however, be noted. This power, unlike the obligation to list, is discretionary. Like the general proscription power under the *Criminal Code*, such discretion points towards a lack of proportionality.¹⁸⁸ On the other hand, two features of the power would strongly suggest that it is reasonably appropriate and adapted to serve a legitimate end. The burden it places on the implied freedom of political communication is quite confined. Moreover, the requirements placed upon the power tailor its contours quite closely to the implementation of the relevant UNSC resolutions. On balance, it would seem that these provisions comply with the implied freedom of political communication.

2 *Proscribing Regulation*

Whether a proscribing regulation falls foul of the Lange test will depend on the organisation being proscribed and, in particular, whether such an organisation has engaged to a significant extent in protected communication. If the latter applies then the burden placed on the implied freedom of political communication will be quite severe.

As noted above, the organisations proscribed so far have been organisations associated with the Taliban, Osama bin Laden and the al Qaeda organisation. It is improbable that the regulations proscribing these organisations breach the Lange test. These organisations would not have engaged to any significant degree in protected communication. Given this, their proscriptions then do not place any effective burden on the implied freedom of political communication. Moreover, the fact that these organisations have committed acts of political violence means that the legitimate aim served by their proscriptions is fairly weighty.

C The Implied Freedom of Political Association

The following discussion will examine whether the legislative provisions obliging the Foreign Minister to list entities and granting the power to proscribe by regulation infringe a constitutionally implied freedom of political association. It will also consider the same with respect to proscribing regulations. As with the discussion of the implied freedom of political communication, it concludes that it is unclear whether the legislative provisions comply with the implied freedom of

185 See above nn 148–152 and accompanying text.

186 *Charter of the United Nations* art 39.

187 See above n 181 and accompanying text.

188 See above nn 63–66 and accompanying text.

political association. The current proscribing regulations, however, are unlikely to breach this freedom.

1 *Legislative Provisions*

(a) *Obligation to Proscribe by Executive Listing*

Because of the strong affinity between the definition of a ‘terrorist act’ under the *Criminal Code* and the ordinary meaning of a ‘terrorist act’,¹⁸⁹ much of the discussion of whether the *Criminal Code* general proscription power burdens the implied freedom of political association also applies to the provisions obliging the Foreign Minister to list certain entities.

The obligation will burden the implied freedom of political association. While it is very unlikely that the listing regime can be legally used against organisations that lie at the heart of this freedom (Australian political parties), there is still an adverse impact because the regime can be used against political groups employing more militant tactics like occupations and blockades.¹⁹⁰

As with the implied freedom of political communication, the question of reasonable proportionality under this head cannot be answered with any precision.¹⁹¹ The only difference is that burden to be considered is that placed on freedom of political association.¹⁹²

(b) *Power to Proscribe by Regulation*

For the same reasons that apply to the Foreign Minister’s obligation to list, this power does burden this freedom. The burden placed by the power to proscribe by regulation is, however, more modest because of the attendant requirements.¹⁹³ As with the question of reasonable proportionality, the above discussion of the implied freedom of political communication similarly applies to this freedom.¹⁹⁴

2 *Proscribing Regulation*

As with the implied freedom of political communication, the question whether a proscribing regulation under the *Charter of UN Act* breaches the implied freedom of political association depends on the organisation being proscribed and, in particular, whether the proscribed organisation is protected by this freedom.

It is very unlikely that the present regulations breach this freedom. The organisations proscribed so far have been organisations associated with the Taliban, Osama bin Laden and the al Qaeda organisation. These organisations do not and have not directly engaged with Australia’s electoral process, and are therefore unlikely to enjoy the protection afforded by the implied freedom of political association.

189 See above nn 176–178 and accompanying text.

190 See above nn 86–87 and accompanying text.

191 See above nn 181–183 and accompanying text.

192 See above n 178 and accompanying text.

193 See above nn 149–153 and accompanying text.

194 See above nn 187–188 and accompanying text.

D Bill of Attainder

From the earlier discussion on whether certain 'terrorist organisation' offences under the *Criminal Code* gave rise to bills of attainder, two key elements of such constitutionally offensive criminal laws can be identified. First, the law must specify certain persons by name or through certain characteristics. Second, the status or identity of such persons becomes the basis of adjudgment and/or punishment of criminal guilt with no requirement that such persons have engaged in any prohibited conduct.

The following discussion will examine whether the *Charter of UN Act* offences as they apply to organisations proscribed by executive listing or by regulation meet these elements. It argues that there is reasonable basis for concluding that the offence prohibiting the using or dealing of such organisations' assets gives rise to a bill of attainder in some situations. Whether the offence prohibiting others from providing assets to such organisations can be similarly characterised raises similar issues to the funding offence under the *Criminal Code*.

1 Organisations Proscribed by Executive Listing

As earlier discussion indicated, the Foreign Minister is required to list an entity if satisfied that it falls within the scope of para 1(c) of the UNSC Resolution 1373.¹⁹⁵ For ease of discussion, it is worthwhile repeating the terms of this paragraph. It obliges States to:

Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting, on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.¹⁹⁶

Two points should be made about entities that should be listed by the Foreign Minister under the *Charter of UN Act*. First, while the terms of para 1(c) of Resolution 1373 require such entities to have a close relationship with person/s who are found to have some involvement with a 'terrorist act' ('the principals') through use of the words, 'owned', 'controlled', 'acting on behalf or at the direction', it *does not* require that such entities to have engaged in 'terrorist acts'. Neither is there any requirement that such entities facilitate the principals in their engagement in 'terrorist acts'. So it is that when such entities are organisations possessing members, the terms of para 1(c) do not require that these members have engaged in or facilitated any 'terrorist acts'.

Second, like some 'terrorist organisations' under the *Criminal Code*, it is not inconceivable that some listed entities are informal groupings where there is no

¹⁹⁵ *Charter of the United Nations Act 1945* (Cth) s 15(1); *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth) reg 6(1).

¹⁹⁶ This paragraph is included as a note to reg 6 of *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth).

clear distinction between their members' organisational and other activities.¹⁹⁷ With such informal groupings, offences that target the organisations, in effect, single out their members.

These two points combine to produce the conclusion that the offences under the *Charter of UN Act*, when they apply to listed organisations that are informal groupings, in effect single out members of such organisations. The question then is whether the offences punish such persons on the basis of their membership. The offence prohibiting the provision of assets to listed entities raises identical issues as the funding offence under the *Criminal Code*, so the above discussion applies.¹⁹⁸

The offence making it illegal to use or deal with the listed entity's assets, however, stands in a different position. Unlike the offence making it illegal for *others* to provide the listed entity with funds, this offence impacts directly upon the entity and, with respect to entities that are informal groupings, its members. However, it does require certain conduct before an offence is committed, that is, the using or dealing with the entity's assets. Does such a requirement mean that this offence, as it applies to members of informal listed entities, is not a bill of attainder because it requires engagement in certain wrongful conduct?

The answer would seem to be no. This can be approached by analogy. Take, for instance, a law that makes it illegal for Fatima to eat. It would seem farcical to suggest that such an offence, because it requires certain conduct, is not a bill of attainder. This is because eating is essential to Fatima's physical survival. More generally, it can be strongly argued that if the only required conduct is that which is essential to the accused's survival, such a requirement should not be able to save a law that is otherwise a bill of attainder.

As with the offence prohibiting the using and dealing of listed entity's assets, when it applies to listed entities that are informal groupings, it, in effect, prohibits the use of, and dealing with, members' assets. The latter is essential to the members' survival in any cash economy. In such a situation, this offence meets the description of a bill of attainder despite requiring some prohibited conduct.

It was, of course, noted above that an offence is not committed under the *Charter of UN Act* if the conduct was authorised by the Foreign Minister. What is crucial to note is that such authorisation is completely at the Foreign Minister's discretion.¹⁹⁹ The availability of such uncontrolled discretion should have no redeeming effect. To conclude otherwise would be to breach the principle laid down in the *Communist Party Case*²⁰⁰ by allowing a member of the Executive to determine when the constitutional prohibition against bills of attainder applied.

In conclusion, like the funding offence under the *Criminal Code*, it is a vexed question whether the offence making illegal the provision of assets to informal listed entities constitutes a bill of attainder. The argument for invalidity, however, is stronger with respect to the offence making illegal the use of, or dealing with, such entities' assets.

197 See above nn 113–114 and accompanying text.

198 See above nn 115–132 and accompanying text.

199 *Charter of United Nations Act 1945* (Cth) s 22.

200 (1951) 83 CLR 1, 258 (Fullagar J).

2 Organisations Proscribed by Regulation

To recapitulate, the *Charter of UN Act* empowers the Governor-General to proscribe entities by regulation.²⁰¹ An entity can be proscribed by regulation only if it has been directly or indirectly identified pursuant to a UNSC decision that Australia is obliged to carry out that was made under Chapter VII of the *Charter of the United Nations*. Such a decision must also relate to terrorism and the dealing of assets.²⁰² Such proscriptions may also occur by way of incorporating lists found in such decisions or made pursuant to such decisions.²⁰³

Much of the discussion relating to organisations proscribed by executive listing applies. The entities that can be legally proscribed are not necessarily involved in 'terrorism' or other wrongful conduct. Moreover, these entities can, in some situations, be informal groupings. As the earlier discussion argued, it follows that the offences under the *Charter of UN Act*, when they apply to organisations proscribed by regulation that are informal groupings, in effect single out members of such organisations.

For the same reasons that apply to listed entities that are informal groupings, it is seriously arguable that the offence prohibiting the using of, or dealing with, an organisation's assets is a bill of attainder in such situations. Similarly, it is a fraught question whether the offence prohibiting the provision of assets to such an organisation can be similarly characterised.

IV CONCLUSION

In a speech made in April this year that canvassed the *Criminal Code* proscription regime,²⁰⁴ federal Attorney-General, Phillip Ruddock, insisted that the 'Constitution provides a rule of law framework for the counter terrorism law to operate'.²⁰⁵ Specifically, Mr Ruddock claimed that '[i]t is through the separation of powers in particular that the rule of law is protected'.²⁰⁶

The constitutional questions surrounding the proscription regimes clearly call into question the sincerity of these statements. While both the *Criminal Code* and *Charter of UN* proscription regimes are properly supported by a head (or heads) of power, their conformity with the separation of judicial power and the implied freedoms of political communication and association is much less certain. With both regimes, it is an open question whether they comply with the implied freedoms of political communication and association. Importantly, there is a

201 *Charter of United Nations Act 1945* (Cth) s 18(1).

202 *Charter of United Nations Act 1945* (Cth) s 18(1)–(2).

203 *Charter of United Nations Act 1945* (Cth) s 18(3).

204 Philip Ruddock, Commonwealth Attorney-General, 'A New Framework: Counter-Terrorism and the Rule of Law' (Speech delivered at the Sydney Institute, Sydney, 20 April 2004) 8–9 <<http://www.ag.gov.au/www/MinisterRuddockHome.nsf/Alldocs/RWPB046617DB08691D9CA256E7D000ED953?OpenDocument>> at 15 November 2004.

205 *Ibid* 2.

206 *Ibid* 3.

reasonable case for claiming that both regimes give rise to bills of attainder in some situations.

V POSTSCRIPT

The *Anti-Terrorism Act (No 2) 2004* (Cth) was passed close to the time of completing this article. This Act inserted into the *Criminal Code* an offence of associating with members and other persons connected with proscribed ‘terrorist organisations’. Because of time constraints, this offence has not been examined in this article.²⁰⁷

For the same reason, several High Court decisions have not been properly integrated into this article. Three of them were handed down as this article was about to go to the printers, namely, *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS*,²⁰⁸ *Fardon v Attorney-General for the State of Queensland*,²⁰⁹ and *Baker v The Queen*.²¹⁰

The other two, *Coleman v Power*²¹¹ and *Mulholland v Australian Electoral Commission*²¹² were delivered as this article was close to completion. Two key points should, however, be noted in relation to these two judgments. First, these decisions do not materially affect the reasoning and conclusions reached in this article in relation to the implied freedom of political communication. In both cases, the High Court affirmed the *Lange* test although four High Court judges proposed a slight rewording of the test in *Coleman v Power*.²¹³

The argument for an implied freedom of political association that is distinct from the implied freedom of political communication is, however, much weaker in light of *Mulholland*. Chief Justice Gleeson found it unnecessary to decide whether there was such a freedom.²¹⁴ Justice McHugh repeated his earlier statements endorsing the existence of such a freedom.²¹⁵ His Honour was joined by Kirby J who accepted:

207 For discussion of this offence, see Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-terrorism Bill (No 2) 2004* (2004) 17–34.

208 [2004] HCA 49 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 7 October 2004).

209 [2004] HCA 46 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 1 October 2004).

210 [2004] HCA 45 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 1 October 2004).

211 [2004] HCA 39 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 1 September 2004).

212 [2004] HCA 41 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 8 September 2004).

213 [2004] HCA 39 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 1 September 2004) [92] (McHugh J), [196] (Gummow and Hayne JJ), [211] (Kirby J).

214 *Mulholland v Australian Electoral Commission* [2004] HCA 41 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 8 September 2004) [42] (Gleeson CJ).

215 *Ibid* [114] (McHugh J).

a freedom of association and a freedom to participate in federal elections extending to the formation of political parties, community debate about their policies and programmes, the selection of party candidates and the *substantially uncontrolled right of association by electors to associate with political parties* and to communicate about such matters with other electors.²¹⁶

Justices Gummow and Hayne, with whom Heydon J agreed, on the other hand, were of the view that:

[a] freedom of association to some degree may be a corollary of the freedom of communication formulated in *Lange* ... But that gives the principle contended for by the appellant no additional life to that which it may have from a consideration later in these reasons of *Lange* and its application to the present case.²¹⁷

Justice Callinan seems to have rejected any implied freedom of political association. His Honour's reasoning in this respect was, however, remarkably brief and largely consisted of the claim that such an implication 'fall[s] far short of being necessary'.²¹⁸ In sum, *Mulholland* indicates that four members of the High Court are disposed against finding an implied freedom of political association that is separate from the implied freedom of political communication.

216 Ibid [284] (Kirby J) (emphasis added).

217 Ibid [148] (Gummow and Hayne JJ), [364] (Heydon J).

218 Ibid [335] (Callinan J).