

THE EXECUTIVE AND THE MILITARY

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I SYNOPSIS

This paper considers the use of the Australian Defence Force by the Commonwealth Executive in respect of civilian security and non-defence activities, including law enforcement outside Australia's land boundaries.

The constitutional framework of that use is considered, specifically in s 51(vi), s 61, s 68 and s 119, with passing reference to s 51(xxix) (the external affairs power) and s 51 (xxxix) (the incidental power) of the *Constitution*, and the 2000 amendments to the *Defence Act 1903*. Some past instances of internal military use by the executive will be mentioned.

II INTRODUCTION

There are deeply held, even if imperfectly understood, reservations in the Australian community about the employment of the military within Australia, apart, of course, from ceremonial occasions and natural disaster operations.¹ In his report,² commissioned after the call-out of troops to protect participants at Commonwealth Heads of Government Regional Meeting ('CHOGRM') at Bowral in 1978 after the Hilton bombing, Justice Robert Hope wrote:

Use of the military other than for external defence, is a critical and controversial issue in the political life of a country and the civil liberties of its citizens. 'An armed disciplined body is in its essence dangerous to Liberty: undisciplined, it is

* Supreme Court of Queensland, Commander RANR. I wish to acknowledge the assistance of my associate, Ms Kylie-Maree Weston-Scheuber BMus (QUT) BA LLB (Hons) (UQ), in the original research for this paper, which was presented to the Annual Public Law Weekend: The Australian Constitution in Troubled Times at the Australian National University, 7-9 November 2003.

1 They derive from the constitutional struggles of the 17th century culminating in the *Petition of Right* of 1628 which made it unconstitutional for the Crown to impose martial law on civilians: William Searle Holdsworth, *A History of English Law*, X 711 (1922), and also from memories or stories of strike-breaking by the military.

2 Commonwealth, *Protective Security Review Report (unclassified version)*, Parl Paper No 397 (1979) ('Hope Report'). Although written 25 years ago, Chapter 10 of Justice Robert Hope's report is a comprehensive analysis of the use of the Defence Force for internal civilian security and well repays revisiting both for its clarity and, with respect, practical recommendations.

ruinous to Society.’ Given that there must be a permanent Defence Force, it is critical that it be employed only for proper purposes and that it be subject to proper control.³

It is beyond the scope of this paper to consider the history of martial law.⁴ Australia has no recorded experience of invoking martial law since Federation, although there were instances when it was invoked in some of the colonies.⁵

III RELEVANT PROVISIONS IN THE *CONSTITUTION*

In Australia’s federal system primary responsibility for maintaining internal law and order lies with the States; no express legislative head of power confers any such general power on the Commonwealth. On Federation, the constitutional arrangement required the States not to raise or maintain any naval or military force without the consent of the Commonwealth Parliament.⁶ The Commonwealth took over the responsibility of protecting ‘every State against invasion’ and, at the request of the ‘Executive Government of the State’, ‘against domestic violence’.⁷

The provisions in the *Constitution* immediately relevant to the relationship between the executive and the Defence Force are:

s 51 The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-...

(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.

3 Ibid [10.10], quoting Edmund Burke, *Works* vol V 17 (1815). Similarly, Sir Robert Mark in his report to the Commonwealth on the organisation of police resources in the Commonwealth, tabled in Parliament on 13 April 1978, said ‘military aid to the civil power can be an unnecessary emotive procedure in free societies, especially those in which it has rarely been invoked’. Quoted in an editorial comment in (1978) 52 *Australian Law Journal* 299.

4 As is the case so often in matters of legal history, particularly with a military aspect, it is unnecessary to go further than Sir Victor Windeyer. He was invited by Senator Peter Durack, the then Commonwealth Attorney-General, to advise Justice Robert Hope concerning the position of members of the Australian Defence Force when called out in aid of the civil power. Sir Victor’s opinion includes a succinct history of military aid to the civil power: Appendix 9 to the *Hope Report*, above n 2, [17]–[20]. See also: Holdsworth, above n 1, 705 ff, and ‘Martial Law Historically Considered’ (1902) 18 *Law Quarterly Review* 117; Frederick Pollock, ‘What is Martial Law?’ (1902) 18 *Law Quarterly Review* 152. These contributions would appear to have been prompted by the Privy Council decision in *Marais v The General Officer Commanding the Lines of Communication and the Attorney-General* [1902] AC 109, concerning a civilian in South Africa kept in military custody; Steven Greer, ‘Military Intervention in Civil Disturbances: The Legal Basis Reconsidered’ (1983) *Public Law* 573; Hoong Phun Lee, *Emergency Powers* (1984) 210 ff; and the joint judgment of Brennan and Toohey JJ in *Re Tracey* (1988–1989) 166 CLR 518, 554 ff.

5 Lee, above n 4, 223; S D Lendrum, ‘The “Coorong Massacre”: Martial Law and The Aborigines At First Settlement’ (1977) 6 *Adelaide Law Review* 26.

6 The ‘naval and military defence’ departments of each State were transferred to the Commonwealth on a date proclaimed by the Governor-General, *Constitution of the Commonwealth of Australia*, s 69.

7 *Constitution of the Commonwealth of Australia*, s 119.

- s 61 The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth.
- s 68 The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.
- s 114 A State shall not, without the consent of Parliament of the Commonwealth, raise or maintain any naval or military force ...
- s 119 The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

IV THE EXECUTIVE POWER OF THE COMMONWEALTH

The Australian Defence Force falls within the executive arm of government. The executive power of the Commonwealth is vested in the Queen and exercisable by the Governor-General.⁸ It is this provision which is the principal source of power relied on to support the use of the Defence Force as an aid to the civil power and community. Its scope has often been discussed, but never defined.⁹

As Mason J observed in *Barton v The Commonwealth*:¹⁰

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

Chief Justice Barwick noted, in *Victoria v The Commonwealth* ('AAP Case'), considering s 61, '[w]ith exceptions that are not relevant to this matter and which need not be stated, the executive may only do that which has been or could be the subject of valid legislation'.¹¹

Justice Mason, in the same case, discussing s 61, observed:

Although the ambit of the power is not otherwise defined by Ch. II it is evident that in scope it is not unlimited and that its content does not reach beyond the area of responsibilities allocated to the Commonwealth by the *Constitution*, responsibilities which are ascertainable from the distribution of powers, more particularly the distribution of legislative powers, effected by the *Constitution* itself and the character and status of the Commonwealth as a national government. The provisions of s. 61 taken in conjunction with the federal character of the *Constitution* and the distribution of powers between the Commonwealth and the

8 *Constitution of the Commonwealth of Australia*, s 61.

9 *Davis v The Commonwealth* (1988) 166 CLR 79 ('Davis') (Mason CJ, Deane and Gaudron JJ), 92. It was recently considered in *Ruddock v Vadarlis* (2001) 110 FLR 491.

10 (1974) 131 CLR 477, 498.

11 (1975) 134 CLR 338, 362.

States make any other conclusion unacceptable.¹²

The words ‘the maintenance of this *Constitution* and of the laws of the Commonwealth’ represent the greatest potential source for the executive to support an expanded role for the Defence Force within Australia, but it cannot be that *any* matter or situation of national interest or concern will attract power to the Commonwealth.¹³ One important question is whether s 61 is confined to action authorised by the prerogative or whether it offers a wider scope, at least where there is no contrary legislation.¹⁴

Warnings have been given about the danger of giving broad, unspecified power to the executive. At a time when there was a genuinely-held concern within large sections of the Australian community about the danger global communism presented to the Australian way of life, which is paralleled today in the fear of widespread acts of terrorism, Dixon J warned:

History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected. In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend.¹⁵

Professor Winterton has argued that:

under our system of government involving the rule of law, and responsible and representative government, s. 61 should not, if at all possible, be interpreted in such a way as would create a field of executive independence from parliamentary control. As Jackson J. once remarked: ‘With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations’.¹⁶

It is clear that the executive is entitled to intervene by use of the Defence Force in circumstances where Commonwealth laws or property (or whatever expanded or contracted meaning is given to ‘interests’) are threatened, or where there is a threat to Australia as a nation. This would certainly extend to action in respect of a direct attack on Commonwealth interests, for example, through a significant terrorist attack.¹⁷ The executive, when acting under s 61, is not required to wait for the necessary request from a State, as is the case under s 119. Section 119 is of limited use in the modern context, given that it is difficult to envisage a situation so serious that a State needed assistance, which its own

12 Ibid, 396–7. See also *Davis v The Commonwealth* (1988) 166 CLR 79, where the Court was divided as to whether s 61 conferred any power on the Commonwealth to legislate beyond those powers assigned to it in the *Constitution*. Toohey J would have limited any implied power to steps necessary to protect the existence of the body politic: 117, and Wilson and Dawson JJ, as not beyond the combination of powers actually expressed, including the incidental power, 102.

13 *Victoria v The Commonwealth* (1975) 134 CLR 338, 362 (Barwick CJ).

14 George Winterton, *Parliament, the Executive and the Governor-General* (1983) 32.

15 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 187–8.

16 Above n 14, 33–4.

17 Christopher Doogan, ‘Defence Powers under the Constitution’ (1981) 31 *Defence Force Journal* 31.

resources could not provide, other than natural disasters, and which did not also involve Commonwealth interests.¹⁸

The interplay between s 119 and s 61 is encapsulated in a passage from Quick and Garran, cited by Dixon J in *R v Sharkey*:¹⁹

The Federal Authority is not required or empowered to interfere to protect a State against domestic violence, except on the application of the Executive Government of the State ... If, however, domestic violence within a State is of such a character as to interfere with the operations of the Federal Government, or with the rights and privileges of federal citizenship, the Federal Government may clearly, without a summons from the State, interfere to restore order. Thus if a riot in a State interfered with the carriage of the federal mails, or with inter-state commerce, or with the right of an elector to record his vote at federal elections, the Federal Government could use all the force at its disposal, not to protect the State, but to protect itself. Were it otherwise, the Federal Government would be dependent on the Governments of the States for the effective exercise of its powers.²⁰

On 7 September 2000, the Commonwealth Parliament passed the *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000*.²¹ This legislation empowers the Prime Minister, Defence Minister and the Attorney-General to advise the Governor-General to call out the Defence Force in circumstances of 'domestic violence', which will be discussed below.

V THE ROLE OF THE GOVERNOR-GENERAL

The 'other' executive power of the Governor-General in relation to the Defence Force is s 68. Under it, the Governor-General is vested with the 'command in chief' of the naval and military forces of the Commonwealth. Despite this lofty description, the writings of constitutional lawyers overwhelmingly indicate that the role of the Governor-General in relation to the Defence Force is confined by the principles of responsible government.²² It has been suggested that the role of the Governor-General is more appropriately to ensure that the elected government does not use the military as a political tool,²³ although how this might be achieved in the face of clear ministerial advice is difficult to envisage.

18 Ibid 38.

19 (1949) 79 CLR 121, 151.

20 John Quick & Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 964.

21 It was in anticipation of apprehended terrorist attacks at the Sydney Olympic Games.

22 An excellent analysis is to be found in Winterton, above n 14. An entertaining examination of s 68 is 'The Governor-General as Commander-in-Chief' republished in (1984) 14 *Melbourne University Law Review* 563, being an address by Sir Ninian Stephen when Governor-General to the Graduation Course No 27/83 of the Joint Services Staff Course, Canberra 21 June 1983. More general observations were made by Sir Zelman Cowen in an address to the Royal United Service Institution of Victoria 24 June 1993, published No 148 May/June 2001 *Australian Defence Force Journal* 21.

23 Gaynor Hartnell, *Canberra Papers on Strategy and Defence* No 27 (1983) Ch 8, cited in Sir Ninian Stephen, above n 22, 565.

Section 68, placed in its historical context, indicates the non-personal nature of the Governor-General's role. Although originally governors in British colonies exercised powers as commanders of military forces in addition to their gubernatorial duties, those powers were eventually recognised as being titular in nature only. This was confirmed in the *Revised Regulations for the Colonial Service* of 1892,²⁴ which stated that, '[t]he Governor of a colony, though bearing the title of Captain General or Commander-in-Chief, is not, without special appointment from Her Majesty, invested with the command of Her Majesty's regular forces in the colony'.²⁵

The Constitutional Convention debate in 1898 reveals that the delegates well-understood the limited role of colonial governors. Sir Ninian Stephen observed:

it would have been strange indeed had this gathering of civilians intended to give to the Governor-General, the Sovereign's representative in Australia, a military authority which the Sovereign herself lacked and which was not possessed by the Australian colonial governors with whom they had worked during their own political careers. That it was not their intention becomes apparent when one finds the very point to have been the subject of detailed debate during the final Constitutional Convention, held in Melbourne in 1898. That debate reveals not only that all who spoke on both sides were agreed but that the Governor-General's title as Commander-in-Chief should confer no more than titular command.²⁶

Alfred Deakin suggested that the words 'acting under the advice of the Executive Council' should be included in s 68 to remove any doubt. Edmund Barton opposed the amendment, not because he disagreed with Deakin's view, but because he thought that that was already the effect of the words used. Sir Ninian Stephen observed:

One may regret that considerations of elegance of drafting and, perhaps, fear of being regarded in Whitehall as constitutionally naive led to this omission and thus left room for misconceptions about the effect of s. 68.²⁷

He considered that no question of any reserve power lurks within the terms of s 68 and that practical considerations make it essential, even if constitutional ones did not require it, that the Governor-General should have no independent discretion conferred upon him by that section.²⁸

There may be an issue about the means by which the Governor-General should call out the Defence Force, although that is laid to rest for the time being by the specified procedures in the 2000 amendments to the *Defence Act*. The Bowral call-out in 1978 was done by Order-in-Council: the Governor-General acting 'with the advice of the federal Executive Council'.²⁹ As Sir Victor Windeyer noted, if the Governor-General calls out any part of the Defence Force to protect a State against domestic violence pursuant to the *Defence Act*, he must act on the

24 Revised Regulations for the Colonial Service 1892 II, 10 and 11, reproduced as Colonial Regulations Part II, regs 105 et seq.

25 Sir Ninian Stephen, above n 22, 566.

26 Ibid 569.

27 Ibid 571.

28 Ibid 577. See also Quick and Garran, above n 20, 713–14.

29 In the Order-in-Council itself, set out in the *Hope Report*, above n 2, 278.

advice of the Executive Council.³⁰ Where the Governor-General gives orders to the Defence Force, including calling it out, he does so as commander-in-chief and need only act on the advice of the responsible minister.³¹ The *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* goes further and requires the Governor-General, when making (or revoking) an order to call out the Defence Force to protect Commonwealth interests, to act on the advice of Executive Council or, in an emergency, the relevant Minister.³²

VI SECTION 119

As part of the federal compact s 119 requires that the Commonwealth ‘shall protect every State against invasion, and on the application of the Executive Government of the State, against domestic violence’. Section 114 prevents the States from raising or maintaining naval or military forces. The power and duty to protect against invasion may be exercised by the federal executive on its own motion according to its own judgment and discretion, but it is neither entitled, nor empowered, to protect a State against domestic violence except when requested by that State’s executive.³³ Section 119 preserves the right of States to deal with domestic unrest themselves before requesting assistance from the Commonwealth.

Although the Commonwealth has called upon the armed forces for internal security a number of times in the last century, s 119 has infrequently been invoked. In fact, it would appear that the Commonwealth has been reluctant to act under s 119 even when requests for assistance have been made by States. The Premier of NSW, Mr Wran, would have preferred the Commonwealth to act pursuant to a request under s 119 for the Bowral call-out in 1978 but the Prime Minister, Mr Fraser, declined to do so.³⁴ On six occasions in the early twentieth century, a number of States called upon the Commonwealth for military assistance in times of strike and expected violence.³⁵ On none of these occasions did the Commonwealth provide that assistance. The criterion applied by the Commonwealth in these early cases would appear to have been the capacity of State police to control the domestic violence³⁶ and concluded that the disturbances were not beyond the resources of the relevant State.³⁷ The

30 By virtue of the *Acts Interpretation Act 1901*; *Hope Report*, above n 2, Appendix 9, 280.

31 *Hope Report*, above n 2, 281.

32 *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* (Cth) s 51A.

33 Quick and Garran, above n 20, 964.

34 Lee, above n 4, 209. The point is made that the call-out was not to protect the people of New South Wales, but the visiting heads of state: Quick and Garran, above n 20, 210.

35 Lee, above n 4, 201–3; Brian Dugan Beddie and Sue Moss, *Some Aspects of Aid to the Civil Power in Australia*, Occasional Monograph No 2 Department of Government, Faculty of Military Studies, University of New South Wales (1982).

36 Lee, above n 4, 202–3.

37 The Administrator of Papua New Guinea sought military assistance from the Commonwealth over disturbances in Rabaul in 1969. In July 1970, the Governor-General signed an Order-in-Council calling out those members of the Defence Force serving in Papua New Guinea to protect the Territory against domestic violence. The Commonwealth was not constrained by the *Constitution* but even so proceeded very much as if it were acting under s 119, Beddie and Moss, above n 35, 51 ff.

mechanism in s 119 has been of little practical importance and is unlikely to be utilised in the foreseeable future.³⁸

VII SECTION 51(VI)

The defence power contained in s 51(vi) of the *Constitution* gives the Commonwealth Parliament power to make laws with respect to the ‘naval and military defence of the Commonwealth and of the several States, and *the control of the forces to execute and maintain the laws of the Commonwealth*’ (emphasis added). It is this latter aspect of s 51(vi) which is an important source of power for the executive when employing the Defence Force in aid of its objectives but is limited to laws falling within the Commonwealth’s legislative competence. In *Li Chia Hsing v Rankin*,³⁹ the High Court found that there was no constitutional objection to the employment of a member of the Defence Force to arrest persons suspected of committing breaches of the *Fisheries Act 1952*. There was scant discussion of the argument that this constituted an abuse of the defence power. A factor, no doubt, was that even if illegality had been made out, it would not have rendered the evidence of the naval officer inadmissible; rather the magistrate would have had discretion to exclude his evidence under the principles enunciated in *Bunning v Cross*.⁴⁰ Only Murphy J expressed any reservation about such a use of the Defence Force: ‘[t]here may be serious questions as to how far the defence forces may properly be involved in civil affairs but this is not the occasion to consider such a question’.⁴¹

In *Re Tracey*,⁴² which concerned the validity of a provision of the *Defence Force Discipline Act 1982* granting immunity in the civil courts to a serviceman dealt with in a service tribunal, Mason CJ, Wilson and Dawson JJ said, ‘[i]t seems to us that the content of that phrase [‘the control of the forces’] relates to the work of law enforcement. It is not the ordinary function of the armed services to “execute and maintain the laws of the Commonwealth”’.⁴³ Justices Callinan and Heydon in *Re Colonel Aird; Ex parte Alpert*⁴⁴ observed at [160]:

Those words on their face simply mean that the control of the forces may extend to the enforcement of the laws of the Commonwealth itself, even though that could involve military intrusion into civil affairs otherwise unacceptable internally.

It has been suggested that a combination of Justice Murphy’s comment in *Li Chia Hsing* and the analysis by the members of the court in *Re Tracey*, which led to the conclusion that members of the military forces are not beyond the reach of

38 ‘Call out the Troops: An Examination of the Legal Basis for Australian Defence Force Involvement in “Non-Defence” Matters’ (Australian Parliamentary Research Paper No 8, Parliament of Australia 1997–98) 33.

39 (1978) 141 CLR 182 (*Li Chia Hsing*).

40 (1978) 141 CLR 54.

41 (1978) 141 CLR 182, 203.

42 (1989) 166 CLR 518.

43 Ibid 540.

44 (2004) 78 ALJR 1451.

the civil law, leaves open the prospect that resort to the Defence Force for law enforcement purposes internally is restricted to aid in times of extraordinary events, such as civil commotion or emergency.⁴⁵

Professor Shearer has noted⁴⁶ that navies are not intended for law enforcement but for national defence and that undue diversion from their primary role is undesirable. As he observed, the powers of naval officers (or any member of the Defence Force) to arrest persons, at least in common law countries, are no greater than those of an ordinary citizen. He noted the traditional reluctance to use armed forces in the enforcement of laws against citizens. In the United States, the *Posse Comitatus Act* forbids the use of the US Army or Air Force to enforce domestic law. This prohibition, Shearer notes, is extended as a matter of policy to the Navy and Marine Corps.⁴⁷ The *Customs Act 1901* contains provisions concerning the power to chase foreign ships for boarding.⁴⁸ It provides that, 'consistent with international law', necessary and reasonable force may be used to board a foreign ship and, where necessary, 'after firing a gun as a signal, firing at or into the chased ship to disable it or compel it to be brought to for boarding' is permitted. Shearer questions whether shooting into the pursued ship is consistent with contemporary international law, referring to the arbitral decisions concerning the *Red Crusader* and *SS I'm Alone*;⁴⁹ that tension may be of significant concern to ships' captains.

VIII AID TO THE CIVIL COMMUNITY AND CIVIL POWER

What then are the circumstances in which the executive will be entitled to call upon the military? They fall into two broad categories identified in Defence Instructions. The first, and less controversial, is as aid to the civil community and comprises the provision of Defence personnel, equipment and facilities to perform tasks which are primarily the responsibility of civil authorities or organisations, and for which the civilian community lacks the necessary

45 Peter Johnston, 'Re Tracey: Some Implications for the Military–Civil Authority Relationship' (1990) 20 *Western Australia Law Review* 73, 78.

46 Ivan Anthony Shearer, 'The Development of International Law with Respect to the Law Enforcement Roles of Navies and Coast Guards in Peacetime' in Schmitt and Green (eds), *The Law of Armed Conflict into the Next Millennium*, US Naval War College International Study, 71 (1998) 429.

47 It is interesting to note the retention by the United States of the mediaeval Latin expression *posse comitatus* which was a raising by the sheriff of the county of all able-bodied men above the age of 15 to deal with riots and other breaches of the peace, see the *Hope Report*, above n 2, 284. Shearer, above n 46, 453, cites M O'Connor who listed 38 States in 1996–1997 as maintaining a coast guard service which carried out such law enforcement roles and 12 more with the coast guard contained within the Navy.

48 Now s 184B, which has been modified to exclude aircraft, since Shearer, above n 46, was writing.

49 *Report of the Commission of Inquiry into the Red Crusader Incident* (1962) 35 ILR 485 and *SS I'm Alone Case* (Canada v United States of America) (Special Agreement of 23 January 1924) (1935) 3 RIAA 1610 in Shearer, above n 46, 447. See also Daniel Patrick O'Connell (Ivan Anthony Shearer ed), *The International Law of the Sea*, II (1984) 1070 ff. Establishing whether the boarding of *FV Viarsa* in the South Atlantic in September 2003 involved the use of force will need to await the litigation.

resources or equipment, such as natural disasters,⁵⁰ search and rescue operations, rendering harmless explosives or providing ceremonial services to the community. The second, and more contentious, is giving aid to the civil power where the Commonwealth utilises the Defence Force to supplement, or supplant, regular law enforcement agencies.

The differences are reflected in the two types of Defence Instructions which deal with the Defence Force's provision of aid to the civil authorities.⁵¹ Those relating to assistance to the civil community form an unclassified document dealing with the provision of Defence Force personnel, equipment and facilities to assist in the performance of obligations of civil authorities where the necessary resources are lacking. Constitutional justification for such use would be sourced in s 61 together with s 51(xxxix). Although the argument would not be as straightforward as in *Davis*⁵² it might conceivably be characterised as 'a lawful activity ... calculated to advance the national interest', as Brennan J said in *Davis*.⁵³

Aid to the civil power was first introduced into Australian Military Regulations in 1927.⁵⁴ The current Defence Instructions is a restricted document; the public first knew of the existence of these instructions when they were tabled in Parliament in 1983. Where force may be used it is said to be a requirement that the Defence Force be 'called out' by order of the Governor-General in Council.⁵⁵ It seems likely that these regulations and instructions are binding in nature only for internal Defence Force purposes.⁵⁶

IX EXAMPLES OF EXECUTIVE UTILISATION OF THE MILITARY

A Industrial Disputes

Calling out the Defence Force in times of industrial dispute is controversial. The use of the Defence Force to suppress demonstrations and picketers might well be perceived as an infringement of civil liberties, while the substitution of Defence Force personnel for striking workers may be seen as an interference with

50 Lee, above n 4, 224, quoting General Stretton's account of the Cyclone Tracey disaster in Darwin in *The Furious Days* (1976), discusses the difficult position of soldiers being used to guard warehouses, shops and petrol depots against looters. General Stretton instructed that the troops would not carry arms, there would be a police officer in every group and the soldier's authority would come from a citizen's duty under common law, at 82–83.

51 See 'Call Out the Troops', above n 38, 10 ff for details as they were then, and also the *Hope Report*, above n 2, 144, 281 and 297.

52 (1988) 166 CLR 79. The Court was unanimous that the Bicentenary commemoration was a matter falling within the peculiar province of the Commonwealth in its capacity as the national and federal government.

53 *Ibid.*, 110.

54 Beddie and Moss, above n 35, 3.

55 'Call out the Troops', above n 38, 11.

56 Peter Bayne, 'Policy Guidelines and Law – Some Instructions' (1991) 65 *Australian Law Journal* 607, 610.

the right of workers to take industrial action embodied in certain International Labour Organisation conventions to which Australia is a party, as well as contrary to modern industrial relations legislation which promotes conciliation and arbitration. Unless there is a request for assistance by a State, bringing s 119 into play, it might be thought that the actions of striking workers would need to have a significant effect on Commonwealth interests before the executive would be entitled to call out the Defence Force. However, the 2000 amendments to the *Defence Act* clearly envisage that such use may occur, although the use of Reserve Defence Force members is expressly excluded.

1 *The 1949 Coalminers' Strike*

In April 1949, Federal troops were committed by the Prime Minister to break the coalminers' strike in New South Wales and Victoria. At no stage did the New South Wales, Victorian or Commonwealth Governments contemplate reliance on s 119. Troops were involved initially in unloading coal from an Indian ship blacklisted by the union. From 1 August members of the Army and Air Force were sent to work in the open-cut mines in New South Wales.⁵⁷ Troops carried arms in their road and rail movements and to guard their camps, but were unarmed and under police protection whilst working in the mines.⁵⁸ Although Commonwealth interests were not directly affected by the strike, interstate trade was significantly affected in that reserves of coal were very low, heavy industry had almost stopped and electricity and gas were being rationed. The Commonwealth presumably acted under the executive power to protect its own interests.

The use of the Army for strike-breaking placed great pressure on its resources, reducing the regular services to a minimum. Disputes also arose as to whether beer could be brought for the troops from interstate, given the beer shortage existing in the mining areas. Despite moves by the NSW Minister for Justice to prohibit the importation of beer on the ground that there should be no discrimination against local inhabitants, beer was brought in following a protestation that the troops would break camp and go to the Hunter River Valley which the Vice Chief of General Staff said 'is notorious for cheap bad wines and the effect of these on the troops may well lead to disturbances which it is highly desirable to avoid'.⁵⁹

Beddie and Moss suggest that the relative success of military deployment in the 1949 coalminers' strike was largely due to the political conditions of the time (both the Commonwealth and NSW had Labor Governments), and, in particular, by strong anti-communist sentiment within the community since the strike was said to be communist-inspired.⁶⁰ The deployment of troops was thus successful in a way it was not four years later in the Bowen waterfront dispute.

⁵⁷ Beddie and Moss, above n 35, 41.

⁵⁸ 'Call Out the Troops', above n 38, 20–21.

⁵⁹ Beddie and Moss, above n 35, 39 ff and 46.

⁶⁰ Ibid 46–47.

B Intervention on the Waterfront at Bowen 1953

In 1953 army troops were sent to Bowen in Queensland to help alleviate a labour shortage on the docks which had resulted in a backlog of sugar and meat waiting to be unloaded. A decision was made by certain members of the Commonwealth Cabinet to send the troops to Bowen. This was done under conditions of extreme secrecy and brought condemnation from the Waterside Workers' Federation, the Australian Railways Union and the ACTU. It was seen as an affront to Queensland's autonomy. Eventually the troops were withdrawn. The Commonwealth, seeking to justify its actions, referred to the wartime precedent for using troops to assist on the wharves, overlooking that the workers in those cases had consented to the use of troops and there had been an acute shortage of labour at that time.⁶¹

The calling out of troops in Bowen has been described as an 'error of judgment' and was widely perceived to open the doors to unrestricted intervention by the executive in industrial disputes.⁶² From a constitutional perspective, it is difficult to see the justification for the action. It was unlikely that there could be any threat to Commonwealth interests as a result of a backlog of sugar and meat except in the most contrived fashion. This is reflected in the fact that the Commonwealth withdrew troops from Bowen in early September rather than the end of September as had previously been envisaged.⁶³

C Civil Unrest/Threat to the Nation

1 Bowral Call-Out 1978

In February 1978, the Governor-General by Order-in-Council called out the Army, following an explosion outside the CHOGRM at the Hilton Hotel in Sydney. This was the first time since Federation that the Commonwealth had intervened in the administration of law and order within a State, despite six previous unsuccessful requests by the States.⁶⁴ One thousand troops were utilised as a security force in Bowral, where the next phase of the CHOGRM meeting was to be held, and to guard transport links between Sydney and Bowral. This did not occur pursuant to s 119, although the Premier, Mr Wran, concurred with the actions taken. Neither was it taken under s 5(vi). The view expressed by Sir Victor Windeyer, advising Justice Robert Hope, was that the constitutional authority for the executive action was 'the power and the duty of the Commonwealth Government to protect the national interest and to uphold the laws of the Commonwealth': a reference to s 61 and the inherent power associated with the creation of Australia as a sovereign body politic.⁶⁵ Further, Australia had passed the *Crimes (International Protected Persons) Act 1976* to implement the *Convention on the Protection and Punishment of Crimes against*

61 Ibid 49–50.

62 Ibid 50.

63 Ibid 50–1.

64 Ibid 31–2.

65 *Hope Report*, above n 2, 279.

Internationally Protected Persons including Diplomatic Agents,⁶⁶ which brought in to play the external affairs power. The action was said to be for the protection of heads of foreign governments.

Concerns expressed about the legal basis for the Defence Force exercising law enforcement powers internally and the liability of members of the Defence Force in respect of civilians⁶⁷ have been extensively addressed in the 2000 amendments to the *Defence Act*, which will be discussed below.

2 *Use of Troops During the Olympic Games 2000*

Preparations were made prior to the 2000 Olympic Games in Sydney for the large-scale deployment of members of the Defence Force who would engage in 'security tasks' and provide 'general support' to the NSW police force.⁶⁸ The basis for this deployment was supposedly the threat of terrorism posed by such a high profile and large-scale event. Throughout the event, SAS troops were said to be on 24-hour notice with procedures in place to be brought in at several minutes' notice. There was, in the event, no need for troops to use force during the Olympics. The *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000*, passed shortly prior to the Olympics, is discussed below.

3 *The Tampa Incident*

The facts of the *Tampa* incident are set out sufficiently for this article in the Full Federal Court judgment of French J, although subsequent investigations need to be referred to for a more accurate understanding of what occurred.⁶⁹ In brief, in late August 2001, the *Tampa*, a Norwegian vessel, rescued 433 people (described as 'rescuees' in the judgment) from a sinking boat in the Indian Ocean at the request of the Australian Government. The Master of the *Tampa* planned to take the rescuees to Indonesia, some of them objected, so he then sailed for Christmas Island. Having been refused permission to dock by the Australian Government, the ship later sailed into Australian territorial waters and remained off Christmas Island. The Australian Government sent SAS troops to secure the vessel and eventually reached an agreement with the Governments of New Zealand and Nauru to receive the rescuees for processing as refugees. On 31 August 2001, the Victorian Council for Civil Liberties and a solicitor, Eric Vadarlis, filed applications for *habeas corpus* in the Federal Court on behalf of the rescuees. The rescuees were transferred to *HMAS Manoora* and transported to New Guinea while waiting for the first instance decision of North J.⁷⁰

The use of SAS troops on the *Tampa* could, arguably, be characterised as assisting persons on board ship in time of distress but there may be a sense of

66 *Convention on the Protection and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents*, opened for signature 14 December 1973, Australian Treaty Series 1977 No 18 (entered into force 20 February 1977).

67 'Call Out the Troops', above n 38, 31 and the *Hope Report*, above n 2, Appendix 9.

68 The following information is taken from Michael Head, 'Olympic Security: Police and Military plans for the Sydney Olympics: a case for concern' (2000) 25 *Alternative Law Journal* 131.

69 *Ruddock v Vadarlis* (2001) 110 FCR 491, 522.

70 *Ibid* [133]–[147] (French J). They were actually landed in Nauru and detained in a detention camp.

unease at such apparently aggressive assistance because, although the troops served a partly humanitarian purpose by bringing food and medical assistance, the use of force was also involved and the ship's captain had not given permission for armed personnel to board his ship.

The executive sought to justify its conduct constitutionally by relying on the prerogative power under s 61 to exclude, expel or detain aliens. The extent of the prerogative was canvassed in the Federal Court at first instance and on appeal, but there was no unanimity about its ambit.⁷¹ Justice French, who, with Beaumont J, constituted the majority in the Full Court, concluded:

In my opinion, the Executive power of the Commonwealth, absent statutory extinguishment or abridgement, would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect such exclusion. This does not involve any conclusion about whether the Executive would, in the absence of statutory authority, have a power to expel non-citizens other than as an incident of the power to exclude. The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the *Constitution*, the ability to prevent people not part of the Australian community from entering.⁷²

Chief Justice Black, in dissent, concluded that there was no residual prerogative power to exclude unlawful non-citizens from entering Australia and the power to protect Australia's borders in time of peace derived only from statute. Even if there had been some residual prerogative vested in the executive he found that the *Migration Act 1958* covered the field.⁷³

It is faintly arguable that Australia was fulfilling its international obligations to assist a ship in distress pursuant to the 1982 *Convention on the Law of the Sea* and certain International Maritime Organisation conventions. However, Professor Rothwell has concluded that Australia's response to the *Tampa*, in law of the sea terms, is difficult to justify.⁷⁴

X DEFENCE ACT AMENDMENTS 2000

Discussion of the background and passage of this legislation can be found in Michael Head's paper.⁷⁵ As he points out, the legislation had bipartisan support

71 It is outside the scope of this paper to analyse the approaches to the prerogative but see Simon Evans, 'The Rule of Law, Constitutionalism and the MV Tampa' (2002) 13 *Public Law Review* 94.

72 *Ruddock v Vadarlis* (2001) 110 FCR 491, 543.

73 *Ibid* 498.

74 Donald Rothwell, 'The Law of the Sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal Sovereignty' (2002) 13 *Public Law Review* 118 at 123–27. There are many publications on the *Tampa* incident, including (2002) *Public Law Review: The Tampa Issue*, June, Martin Tsamenyi & Chris Rahman (eds), *Protecting Australia's Maritime Borders: The MV Tampa and Beyond*, Woollongong Papers on Maritime Policy No 13 (2002); Michael William Duckett White, 'MV Tampa Incident and Australia's Obligations' (2002) 122 *Maritime Studies* 7; and 'MV Tampa Incident and Shipping Obligations of a Coastal State' (2003) 43 *Indian Journal of International Law* 314. See also O'Connell, above n 48, 855–57.

75 Michael Head, 'Military Call Out Legislation – Some Legal and Constitutional Questions' (2001) 29 *Federal Law Review* 273.

and was passed quickly through the Commonwealth Parliament in anticipation of the Sydney Olympic Games. A proposal to include a sunset clause was rejected. So far as research reveals no orders have been made under the Act.⁷⁶

The relevant provisions are in Part III AAA: Utilisation of Defence Force to Protect Commonwealth Interests, and States and Self-Governing Territories, against Domestic Violence.⁷⁷ Domestic violence has the same meaning as in s 119 of the *Constitution* which, against the history of refusal by the Commonwealth to give such assistance to the States, and the interpretation of a similar clause in the *United States Constitution*⁷⁸ will mean, it might be suggested, that there must be a significant danger to the polity beyond the resources of the police – Commonwealth, State or Territory – to meet.

The new provisions are said, in s 51Y, not to derogate from any other power to utilise the Defence Force or any other powers that the Defence Force would otherwise have. Statements attributed to Labor spokesmen in the Parliamentary debate that the legislation would place new restrictions on the use of the military are, therefore, incorrect.⁷⁹

The provisions are arranged according to the object of protection: Commonwealth interests in s 51A; States in s 51B, and self-governing Territory in s 51C. The Governor-General may, by written order, call out the Defence Force and direct the Chief of the Defence Force to utilise the Defence Force ‘to protect the Commonwealth interests against domestic violence’.⁸⁰ The preconditions for making such an order are that the authorising Ministers, who are the Prime Minister, the Minister for Defence and the Attorney-General, must be satisfied that:

- (a) domestic violence is occurring *or is likely* to occur in Australia; and
- (b) if the domestic violence is occurring or is likely to occur in a State or self-governing Territory – the State or Territory is not, or is unlikely to be, able to protect Commonwealth interests against the domestic violence; and
- (c) the Defence Force should be called out and the Chief of the Defence Force should be directed to utilise the Defence Force to protect the Commonwealth interests against the domestic violence; and
- (d) either Division 2 [recapturing buildings; freeing hostages] or Division 3 [general security area declarations], or both, and Division 4 [use of force; seizing dangerous things] should apply in relation to the order (*italics added*).

The Reserve Forces may not be called out or utilised in connection with an industrial dispute.⁸¹ If the domestic violence is in a State or Territory, as in s 51A(1)(b), the Governor-General may make the order whether or not the

76 Ibid 275. Head, apparently relying on a report in a Sydney newspaper, says that SAS troops were deployed undercover without Commonwealth executive approval but the National Security Committee subsequently approved the deployment without reference to the *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000*.

77 *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* (Cth).

78 Quick and Garran, above n 20, 964-5.

79 Head, above n 75, 276.

80 *Defence Act 1903* (Cth) s 51A. To the same effect: ss 51B and 51C.

81 *Defence Act 1903* (Cth) s 51A(2).

Government of the State (or Territory) requests the order⁸² and, if it does not, an authorising Minister must, subject to urgency provisions in ss 3A, consult with that Government about the making of the order before the Governor-General makes it.

The order must state under which section it was made, identifying the State (or Territory), the Commonwealth interests and the domestic violence and state that Division 2 or 3, or both, and Division 4 apply, and that the order comes into force when it is made and ceases after a specified period (which must not be more than 20 days). If the Minister ceases to be satisfied of the things set out in s51A(1)(a)–(d) the Governor-General must revoke the order.

In making or revoking the order or deciding whether he is satisfied in an emergency situation, the Governor-General is to act with the advice of Executive Council or, in an emergency, the authorising Minister.

The conditions for making an order to protect a State or Territory against domestic violence are the same as for the protection of Commonwealth interests and similarly refer to domestic violence ‘that is occurring or is likely to occur in the State’.⁸³

The Chief of the Defence Force is obliged to utilise the Defence Force

in such manner as is reasonable and necessary, for the purpose of protecting the Commonwealth interests specified in the order, in the State or Territory specified in the order, against the domestic violence specified in the order.⁸⁴

Similarly, the Chief of the Defence Force is obliged to utilise the Defence Force for the purpose of protecting the State or Territory specified. The Chief of the Defence Force is subject to any direction that the Minister might give from time to time ‘as to the way in which the defence force is to be utilised’.⁸⁵

Section 51F recognises that the role of the Defence Force is subordinate to the civil authority insofar as the Chief of the Defence Force must, ‘as far as is reasonably practicable’, ensure that the Defence Force cooperates with the police force of the State or Territory and is not utilised for any particular task unless a member of the police force requests in writing that it be so utilised. Such requirements neither oblige nor permit the Chief of the Defence Force to transfer ‘to any extent’ command of the Defence Force to the State or the Territory or to a police force.⁸⁶

82 That is, where the Commonwealth interests are at risk.

83 *Defence Act 1903* (Cth) s 51B(1).

84 *Defence Act 1903* (Cth) s 51D.

85 *Defence Act 1903* (Cth) s 51E.

86 *Defence Act 1903* (Cth) s 51F.

An important restriction on the utilisation of the Defence Force is found in section 51G. The Chief of the Defence Force must not:

- (a) stop or restrict any protest, dissent, assembly or industrial action, except where there is a reasonable likelihood of the death of, or serious injury to, persons or serious damages to property; or
- (b) utilise the ... Reserve Forces unless the Minister, after consulting the Chief of the Defence Force, is satisfied that sufficient numbers of the Permanent Forces are not available.

Justice Robert Hope had recommended that permanent members of the Defence Reserve Forces be included and that recommendation seems sufficiently accommodated.⁸⁷

Members of the Defence Force are given special power by s 51I to recapture premises, a place, a means of transport, to free any hostage, to detain a person who is believed to have committed an offence, to evacuate persons, to search premises and to seize dangerous things. These powers may only be exercised if authorised in writing by the Minister, unless there is a sudden and extraordinary emergency.

The authorising Minister may in writing declare a specified area to be a general security area. The declaration must be published by television and radio, in the Gazette and forwarded within 24 hours to the Presiding Officer of each House of the Parliament for tabling. Each House must sit within 6 days from the receipt of the statement. It might be commented that six days is rather a long time to wait to recall Parliament if there was such an emergency that a police service could not deal with it. The failure to comply with any of those conditions does not make the declaration ineffective.

Sections 51L – 51P give members of the Defence Force powers similar to those of the police under, for example, State drug laws of search and seizure. Section 51R, which confers power in relation to persons in charge of means of transport, permits, in (e), the compulsion of a person to comply with a direction about transport. The extent of the compulsion is not spelt out but is subject to Division 4 and in particular s 51T dealing with the use of force. A member of the Defence Force may, in exercising any power conferred by the Act: ‘use such force against persons and things as is reasonable and necessary in the circumstances’.⁸⁸

However a member of the Defence Force must not, in using force against a person,

- (a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the member believes on reasonable grounds that doing that thing is necessary to protect the life of, or to prevent serious injury to, another person (including the member); or
- (b) subject the person to greater indignity that is reasonable and necessary in the circumstances.

This would, in (a), seem to reflect the provisions in the Code States relating to self-defence and defence of others, and be reflective of the common law. Of some concern is the further provision in sub-s 3:

⁸⁷ *Hope Report*, above n 2, 176 at fn 1.

⁸⁸ *Defence Act 1903* (Cth) s 51T.

In addition, if a person is attempting to escape being detained by fleeing, a member of the Defence Force must not do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the person has, if practicable, been called on to surrender and the member believes on reasonable grounds that the person cannot be apprehended in any other manner.⁸⁹

This may not, I would venture to suggest, be consistent with either the Code provisions or the common law. Members of the Defence Force have not been given police powers.

There is no suggestion that the law relating to superior orders which is found in s 31(2) of the Queensland and Western Australian Criminal Codes and in s 38(1) of the Tasmania Criminal Code, in the common law, and in s 14 of the *Defence Force Discipline Act 1982*, is in any way changed by these provisions. That is, a person is not criminally responsible for an act or omission if the person does or omits to do the act in obedience to the order of a superior which the person is bound to obey unless the order is manifestly unlawful.

Members of the Defence Force exercising powers under these provisions must wear uniform and have clear identification.⁹⁰ If a member of the Defence Force fails to comply with any obligations imposed under Divisions 2, 3 or 4 'the member is not, or is taken not to have been entitled to exercise the power'.⁹¹ This is a very serious withdrawal of protection and will require the utmost attention to detail in regulations and instructions to Defence Force members who are about to engage on a call-out.

Justice Robert Hope had recommended amendments to the *Defence Act* that a call-out should be utilised only on the request of a commissioner of a police force, the Government of a State or Territory or when the Prime Minister was satisfied that members of the Defence Force were needed. He proposed a limitation of 50 on the number of personnel who could be used at any one time without specific direction. He recommended that Defence Force members be special Commonwealth police officers with all their powers. The recognition and emphasis in Justice Robert Hope's draft legislation of the undesirability of using members of the Defence Force for civil protection purposes in Australia is not reflected in the amendments to the *Defence Act*. This could have been achieved by expressions such as, 'armed members of the Defence Force shall not be used ... otherwise than pursuant to and in accordance with the provisions of this section'.⁹²

The principal constitutional criticism of the amendments is the inclusion of the words 'or is likely to occur' in the reference to domestic violence. I can see no difficulty so far as the protection of Commonwealth interests is concerned. The mere use of the expression 'domestic violence' does not incorporate s 119 even though it does suggest some meaning to be derived from that section. However, it is a clear departure from s 119 so far as the amendments relate to the States. Both Lee and Blackshield suggest that the *threat* of domestic violence is encompassed within s 119.⁹³ Blackshield focuses on the word 'protect' in s 119 while Lee

89 *Defence Act 1903* (Cth) s 51T(3).

90 *Defence Act 1903* (Cth) s 51S.

91 *Defence Act 1903* (Cth) s 51W.

92 *Hope Report*, above n 2, 340.

93 Lee, above n 4, 204 and Anthony Roland Blackshield, 'The Siege of Bowral – The Legal Issues' (1978) 4 *Pacific Defence Reporter* 6.

argues that, since there could be a response to a threat of *invasion* lawfully, no different meaning should be accorded to domestic violence. Neither construction is particularly compelling but the magnitude of the threat and its nature will govern the outcome of any constitutional challenge, particularly any practical blurring between the *likelihood* of a threat and its *actuality*.⁹⁴

XI CONCLUSION

Constitutional opinion supports the view that the Commonwealth executive can use ‘all the force at its disposal’,⁹⁵ including the Defence Force, to protect itself and its interests. Commonwealth interests include breaches of the laws of the Commonwealth and would clearly include offences set out in the *Crimes Act 1914* (Cth), for example, interference with the transport of passengers or goods between States and prevention of federal voting. Commonwealth interests would also extend to interests not protected by statute. Justice Robert Hope gave an example of supply of fuel to an Australian naval vessel or a visiting United States nuclear warship.⁹⁶ As has been mentioned, s 119 appears for the moment to be, and is likely to remain, unutilised.

A more important question is whether the Defence Force *should* be used for Australian civilian security. The response may be dependant upon whether the Defence Force is used within Australia’s land borders or at sea, particularly beyond the territorial sea. The primary role for the Defence Force is the defence of Australia against external threats. In the absence of an adequately equipped coast guard service few objections have been raised about the use of the Defence Force in a law enforcement role at sea. It usually involves action against non-Australian citizens or residents in alleged breaches of Australia’s fisheries, smuggling, and illegal drugs laws, but the *Tampa* and ‘children overboard’ incidents demonstrated the way in which the Defence Force can be used and embroiled in the political arena – an undesirable place for it.

Members of the Defence Force are not, primarily, trained to confront unarmed civilians who are in a state of heightened anxiety. The powers and responsibilities of members of the Defence Force engaged in those tasks need to be clearly defined, I would suggest, in legislation rather than in Defence Instructions.

I would suggest that it is only in exceptional circumstances that the Defence Force should be used internally in aid of the civil power. Sir Robert Mark recommended that the Defence Force was the appropriate body to deal with terrorist activity involving an armed assault of any complexity, such as a tactical battle, because the degree of training, experience, fitness, and sophisticated

94 Head, above n 75, suggests that the amendments permit the Commonwealth to send in the Defence Force without consent of a State in defence of a State, 287. This is not so. The Commonwealth can do so to protect Commonwealth interests. Section 51B requires the request of the executive of a State consistently with s 119 if the Defence Force is to protect a State (or Territory).

95 Quick and Garran, above n 20, 964, quoted with approval by Dixon J in *R v Sharkey* (1949) 79 CLR 121, 151.

96 *Hope Report*, above n 2, 152.

weaponry is higher than amongst members of the police services.⁹⁷ Further, as he noted, 'the gun is a divisive factor in the relationship between police and public in any society'.⁹⁸ The type of situation in which armed Defence Force personnel might be likely to be used are:

- the assault of buildings, aircraft, etc seized and held by terrorists with or without hostages, which is envisaged in s 51I of the *Defence Act*;
- cordoning or protecting areas where terrorists may seek to enter by violence, for example, an airport, see s 51K of the *Defence Act*;
- situations involving large or remote areas generally outside police control or requiring special skills or equipment where the police are unable to do what is required.⁹⁹

Police have training and experience in Australia in crowd control, riots and other incidents where civilians are involved and violence may erupt. Members of the Defence Force do not. Police are the appropriate enforcement authority to contain violence within Australia. If the Defence Force is utilised in aid of the civil power, the legal position of its members vis-à-vis civilians is still not resolved, notwithstanding various provisions in the *Defence Act*, *Defence Force Discipline Act* and the decision in *Re Tracey*. Their position may involve, particularly if utilised at sea, issues of conformity with international law, as well as issues of compliance with the laws of the States and Territories.

Two highly respected reports, that of Justice Robert Hope assisted by Sir Victor Windeyer, and that of Sir Robert Mark, emphasised that it was only in extraordinary circumstances that the Defence Force should be utilised by the executive in aid of the civil power.¹⁰⁰ The use of the Defence Force for what might arguably be described as political purposes which do not command significant multi-partisan support within Australia would be a development to be deplored, and would put members of the Defence Force, particularly senior members, in a most awkward position.¹⁰¹

97 'Report of the Minister for Administrative Services on the Organisation of Police Resources in the Commonwealth Area and the Detailed Matters' (1978) quoted in the *Hope Report*, above n 2, 158.

98 Ibid.

99 *Hope Report*, above n 2, 162.

100 Neither considered use of the Defence Force outside Australia's land boundaries.

101 Report of Independent Assessor to Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, Canberra, 21 August 2000 (Stephen Odgers).