*Samuel White**

KEEPING THE PEACE OF THE iREALM

'As Themistocles sailed along the coasts, wherever he saw places at which the enemy must necessarily put in for shelter and supplies, he inscribed conspicuous writings on stones, some of which he found to his hand there by chance, and some he himself caused to be set near the inviting anchorages and watering-places. In these writings he solemnly enjoyed upon the Ionians, if it were possible, to come over to the side of the Athenians who were risking all in behalf of their freedom; but if they could not do this, to damage the Barbarian cause in battle, and bring confusion among them.' [1]

'[I]t turns out that one can penetrate a state's information networks in the simplest way through Internet channels in addition to the traditional channels of radio, television and the mass media.' [2]

Abstract

Digital connections and the ubiquity of cyberspace have undermined Australia's historic defence system: our distance from other nations. Increasingly, this new vulnerability is being covertly exploited by foreign actors. Accordingly, the Commonwealth government has determined that the Australian Defence Force ('ADF') is to prepare to counter these new threats in the grey zone. Yet, little has been written on the legal authorities for, and constraints on, the utilisation of the ADF in this context. This article explores one microcosm example of the multitude of threats

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1 Plutarch, *The Lives of Noble Grecians and Romans*, tr John Dryden (Encyclopaedia Britannica, 1952) 98.

2 Keir Giles, NATO Defence College, *Handbook of Russian Information Warfare* (Fellowship Monograph No 9, November 2016) 34.

that Australia might face in the coming century — foreign interference operations targeting domestic voting infrastructure and the information environment.

This article will canvass the viability of the internal security prerogative, the so-called sister prerogative to the war prerogative, to authorise the use of the ADF in counter-interference operations. This is an important area to explore, noting that interference operations will often fall within the 'domestic violence' threshold for the ADF to be permitted to be called out under pt IIIAAA of the *Defence Act 1903* (Cth). This article first looks at the nature of the internal security prerogative of 'keeping the peace of the realm', and how it is constrained by federalism in the Australian context. This requires a historical exploration of both Anglo-Saxon and Australian domestic military deployments. This article then explores the principle of desuetude as a rule of extinguishment, and whether it is applicable to this little-used prerogative power. It then concludes by arguing for a re-interpretation of the legal foundations for earlier ADF operations — such as the Bowral call-out in 1978 and the 2002 Commonwealth Heads of Government Meeting ('CHOGM') deployment — in accordance with the prerogative, rather than under an implied nationhood power.

I Introduction

Foreign state and non-state actors conducting interference operations[3] is not a new phenomenon; nor, too, is the use of information in warfare, as a resource, environment and weapon.[4] However, historically, there have been some buffer zones. Themistocles, in bringing war along the Ionian coast and attempting to foster insurgencies amongst the Hellenes living under Persian control, understood the demoralising effect his writings on stones would have upon his enemies. Yet he was restricted to choosing locations which he knew to be popular, to prevail upon populations in general, sweeping terms, presumably limited to one language, and to hoping that the target population could read his writings.

This has all changed. Now, rather than simply writing a message on stones at popular watering holes, foreign interference operations can leverage the ubiquity of the internet in order to deliver personally tailored, micro-targeted messages to individuals in their homes. This is the real threat that the digital age has brought: not the death

3 Interference operations can be defined as 'covert, deceptive and coercive activities'. This is to be distinguished from influence operations, which are transparent. See Attorney-General's Department (Cth), *What Is the Difference between 'Foreign Influence' and 'Foreign Interference'?* (Foreign Interference Transparency Scheme Factsheet No 2, February 2019) <https://www.ag.gov.au/integrity/publications/factsheet-2-influence-vs-interference>.

4 See, eg, John Keegan, *Intelligence in War: Knowledge of the Enemy from Napoleon to Al-Qaeda* (Hutchinson Press, 2003).

and disruption that for nearly 25 years been hypothesised,[5] but the ability to connect to individuals, insidiously, at any time of the day.[6] This was best recognised by Chief of the Russian General Staff, Valery Gerasimov, who opined as early as 2013 that

> [t]he very 'rules of war' have changed. The role of nonmilitary means of achieving political and strategic goals has grown, and, in many cases, they have exceeded the power of force of weapons in their effectiveness.
>
> …[T]echnologies [may be used] for influencing state structures and the population with the help of information networks.[7]

But how do interference operations actually work? One method is cyber-enabled interference operations targeting voting infrastructure, being high value, low-cost operations. Interference in voting infrastructure can occur in multiple ways: by direct tampering with the process by which the votes are tallied; by directly changing the election results (such as changing a vote from party A to party B); or through remotely altering the final votes (not changing the number of votes physically, but, for example, simply the announcement of the end result). It can also aim to crash electoral servers at critical moments through distrusted denial of service attacks, in order to spread doubt as to the legitimacy of the result. Elections and referendums are often targeted, as 'they are opportunities when significant political and policy change occurs and they are also the means through which elected governments derive their

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5 See generally Alvin Toffler, *The Third Wave* (William Morrow, 1980); Edward Waltz, *Information Warfare: Principles and Operations* (Artech House, 1st ed, 1998). There are only two known instances of physical destruction from a cyber attack — the destruction caused by Stuxnet, and apparent damage caused to a German blast furnace: see Kim Zetter, 'An Unprecedented Look at Stuxnet, the World's First Digital Weapon', *Wired* (online, 11 March 2014) <https://www.wired.com/2014/11/countdown-to-zero-day-stuxnet/>; 'Hack Attack Causes "Massive Damage" at Steel Works', *BBC News* (online, 22 December 2014) <https://www.bbc.com/news/technology-30575104>. Several major cyber attacks, most notably at Saudi Aramco (with the virus Shamoon) and Sony (with the virus WannaCry) have rendered computers inoperable, but that was as a result of changes in software that were difficult to reverse, rather than damaged hardware: see Marwa Rashad, 'Saudi Aramco Sees Increase in Attempted Cyber Attacks', *Reuters* (Web Page, 7 February 2020) <https://www.reuters.com/article/saudi-aramco-security-idUSL8N2A6703>; Brian Barrett, 'DoJ Charges North Korean hacker for Sony, WannaCry, and More', *Wired* (online, 9 June 2018) <https://www.wired.com/story/doj-north-korea-hacker-sony-wannacry-complaint/>.

6 The use of information as a resource, environment and weapon in the 21st century is an emergent capability 'still seeking both language and concepts to become normative for discussions of warfare': Edward Morgan and Marcus Thompson, Center for Strategic and International Studies, *Building Allied Interoperability in the Indo-Pacific Region: Information Warfare* (Discussion Paper No 3, October 2018) 6.

7 Valery Gerasimov, 'The Value of Science Is in the Foresight: New Challenges Demand Rethinking the Forms and Methods of Carrying out Combat Operations' (2016) 96(1) *Military Review* 23, 24, 27.

legitimacy'.[8] The low cost of such interference operations is compounded by the fact that, sometimes, it is simply the *act* of interfering in elections that results in a strategic effect being achieved: long-term erosion in confidence in a targeted government,[9] leading to destabilisation; or creating a permissive environment.[10]

Another method of interference involves cyber-enabled operations corrupting the information environment. Under this method, interference operations aim to target the information environment around government decisions: proceedings in political bodies (such as the House of Representatives or the Senate); and those behind closed doors of registered political parties. Such operations can also interfere with individual representatives or even potential representatives.[11] Traditional 'hierarchical models of information distribution (from government, from national broadcasters, from mainstream media) are replaced by a proliferation' and spectrum of social media forums.[12] This makes infiltrating, and interfering with, the information environment even easier.

This is not a theoretical risk. In 2017, the former Commonwealth Director-General of Security, Duncan Lewis stated that '[f]oreign powers are clandestinely seeking to shape the opinions of members of the Australian public, of our media organisations and our government officials in order to advance their country's own political objectives',[13] on a scale and intensity that 'exceeds any similar operations launched against the country during the Cold War, or in any other period'.[14] From this, and other concerns on foreign interference, a trifecta of legislation was introduced with sweeping amendments, and proscriptions of new offences: the *Foreign Influence Transparency Scheme Act 2018* (Cth); the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth); and the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth). But this

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8 Sarah O'Connor et al, Australian Strategic Policy Institute, *Cyber-Enabled Foreign Interference in Elections and Referendums* (Report No 41/2020, October 2020) 5.

9 See Fergus Hanson et al, Australian Strategic Policy Institute, *Hacking Democracies: Cataloguing Cyber-Enabled Attacks on Elections* (Report No 16/2019, May 2019), which builds on the framework in Zoe Hawkins, Australian Strategic Policy Institute, *Securing Democracy in the Digital Age* (Report, 29 May 2017).

10 The notion of a permissive environment is a Russian strategic concept, which correlates to forcing a target to be unable to respond in a manner that they wish, either through controlling their access to information (and thus their understanding of the situation) or through undermining their capacity to respond: see Giles (n 2) 22–3.

11 *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*'). See at div 92.

12 Jake Wallis and Thomas Uren, Submission No 2 to Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, (13 March 2020) 3.

13 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 24 October 2017, 129 (Duncan Lewis, Director-General of Security).

14 Duncan Lewis, 'Address to the Lowy Institute' (Speech, Lowy Institute, 4 September 2019).

legislation has failed to deter those seeking to conduct interference operations. Two years later, in late 2019, Lewis declared that foreign interference poses an 'existential threat to Australia' and is 'by far the most serious issue going forward' for Australian security.[15]

So what is Australia to do? In responding to situations generally, there are four levers of national power available to the Commonwealth government, namely, 'diplomatic, informational, military and economic'.[16] This article approaches the issue through the military lever. Conduct that amounts to cyber-enabled interference operations entails only razor-thin differences between valid online activism, illegal criminal conduct, and the modern hybrid warfare that Gerasimov prophesised. Questions about the appropriateness of a military response to what might simply be viewed as criminal activity are bound to arise. However, there is significant risk associated with regarding interference operations as merely criminal acts, for '[h]aving accepted continued harassment as the new normal puts the onus on the defender to risk escalation to end harassment; it has to shift from deterrence to the much harder act of compulsion'.[17]

Luckily, the decision has been made already by the Commonwealth government. Noting the changing security landscape in the *2020 Defence Strategic Update* to the *2016 Defence White Paper*,[18] the ADF has been tasked with preparing to counter 'non-geographic threats in cyberspace',[19] and with expanding its capabilities by 'working closely with other arms of Government'.[20] This, in turn, requires the ADF to acquire capabilities able to 'deliver deterrent effects against a broad range of threats, including preventing coercive or grey-zone activities from escalating to conventional conflict'.[21] Accordingly, in January 2020, the Australian Army established the position of 'cyber specialist', allowing the Army to develop highly technical capabilities to meet modern operational requirements, including counter-interference operations. This initiative would appear only to be growing.[22]

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15 Ibid.

16 Joint Chiefs of Staff (US), *Strategy* (Joint Doctrine Note No 1-18, 25 April 2018) vii.

17 Martin C Libicki, 'The Convergence of Information Warfare' in Christopher Whyte, A Trevor Thrall and Brian M Mazanec (eds), *Information Warfare in the Age of Cyber Conflict* (Routledge, 2020) 21, 21.

18 Department of Defence, *2020 Defence Strategic Update* (Report, 2020) ('*2020 Defence Strategic Update*').

19 Department of Defence, *2016 Defence White Paper* (Report, 2016) 34 [1.19] ('*2016 White Paper*').

20 *2020 Defence Strategic Update* (n 18) 25 [2.13].

21 Ibid 27–9 [2.24]. See also at 33–4 [3.3].

22 See, eg, Kate Banville, 'ADF Bolsters Cyber Defences with New Specialist Role', *Townsville Bulletin* (online, 18 October 2020) <https://www.townsvillebulletin.com.au/news/adf-bolsters-cyber-defences-with-new-specialist-role/news-story/6d57523163458cf6641b1c743d0bffbf>.

Yet, little has been written on the legal authorities and constraints on the utilisation of the ADF in countering interference operations.[23] Noting that the voting infrastructure and information environment is inherently domestic, this article will focus upon domestic law to the exclusion of international legal remedies and authorities that might empower Australia to respond to interference operations. In any event, the view has emerged that international law is neither useful nor productive in this context.[24] Therefore, this article will focus upon the executive power of the Commonwealth, and the internal security prerogative found in s 61 of the *Constitution*. The focus upon this specific prerogative, which may operate outside of instances of emergency — in which the common law doctrine of necessity would suffice as legal authority for action[25] — is important. Whilst the prerogative has been accepted in the United Kingdom, no Australian court has yet mirrored that acceptance. In the absence of clear legal authorities, what remains is effectively a 'secret prerogative [which] is an anomaly — perhaps the greatest of anomalies'.[26] This article seeks to rectify this anomaly.

In order to demonstrate that such a power exists, this article will canvass the leading case on the internal security prerogative, and address its critiques and criticisms, arguing that many academics oppose an internal security prerogative on the basis of policy, rather than law. This article addresses one of the key critiques of the internal security prerogative — that it has been created, rather than discovered. In doing so, it canvasses the history of the use of organs of the state to Keep the Peace of the Realm. It then addresses both how and when a prerogative may evolve, and whether the internal security prerogative has fallen into desuetude. Finally, this article will address how federalism affects the operationalisation of the ADF domestically. Although the implied freedom of political communication is discussed, it is not the focus of the article or argument.[27] Further, the article will not discuss in detail any constitutional limitations upon executive power such as the principle of

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23 The closest would appear to be Hywel Evans and Andrew Williams, 'ADF Offensive Cyberspace Operations and Australian Domestic Law: Proprietary and Constitutional Implications' (2019) 47(4) *Federal Law Review* 606.

24 Except, perhaps, through actions against foreign measures that amount to retorsion or counter-measures: see generally Dale Stephens, 'Influence Operations and International Law' (2020) 19(4) *Journal of Information Warfare* 1; Duncan Hollis, 'The Influence of War: The War for Influence' (2018) 32(1) *Temple International and Comparative Law Journal* 31; Michael Schmitt, 'Virtual Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law' in Christopher Whyte, A Trevor Thrall and Brian M Mazanec (eds), *Information Warfare in the Age of Cyber Conflict* (Routledge, 2020) 186.

25 See generally Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (ANU Press, 2017) 187–8 ('*Crown and Sword*').

26 Walter Bagehot, *The English Constitution*, ed Paul Smith (Cambridge University Press, 2001) 49.

27 See *Chief of Defence Force v Gaynor* (2017) 246 FCR 298, 314–315 [68]–[72] (Perram, Mortimer and Gleeson JJ). See also Gerard Carney, 'A Comment on How the Implied Freedom of Political Communication Restricts the Non-Statutory Executive Power' (2018) 43(2) *University of Western Australia Law Review* 255, 266.

legality,[28] nor the question whether the prerogative has been abrogated by statute.[29] Although important, they are outside the scope of this article. Neither will this article deal with checks and balances on exercises of prerogative power — the 'ancient and coarse', or the 'modern and delicate' — that have historically accompanied discussions of the use of the military against its own people.[30] Finally, this article will not canvass the capabilities, tactics, techniques, and procedures that the ADF may employ in counter-interference operations, as it is concerned with legal possibilities rather than technical plausibility. At any rate, these capabilities are classified and fall outside the remit of any public works.

II Legal and Policy Framework

There are three overlapping constitutional provisions relevant to the ADF conducting counter-information operations. They are ss 51(vi) (the defence power), 61 (from which the executive power of the Commonwealth emanates), and 119 (that the Commonwealth shall protect the states against invasion and domestic violence). This article will focus solely upon available prerogative powers under s 61, for two key reasons.

The first is that the executive power of the Commonwealth is the primary source of power for ADF operations and the most relied upon in combat operations.[31] Accordingly, it deserves the most attention. The second key reason is that, as recent operations have demonstrated, there will always be situations where statutory powers for ADF operations (as may be legislated under s 51(vi)) may not be appropriately drafted for the issue at hand, and executive power will, inevitably, be viewed as an alternate legal authority.[32] In the absence of legislative authority, the High Court has indicated that the Commonwealth Executive only has power to interfere with the

28 See generally Chief Justice Robert French, 'The Courts and the Parliament' (Speech, Queensland Supreme Court Seminar, 4 August 2012), which raises the interesting issue of whether the principle of legality would be wide enough to encompass international obligations.

29 The importance of this topic is increasingly being acknowledged: see Peta Stephenson, 'The Relationship between the Royal Prerogative and Statute in Australia' (2021) 44(3) *Melbourne University Law Review* (forthcoming); Anthony Gray, 'The Australian Government's Use of the Military in an Emergency and the *Constitution*' (2021) 44(1) *University of New South Wales Law Journal* 357, 385.

30 Bagehot (n 26) 210. Bagehot identifies the ancient and coarse model as charging a responsible minister with treason and executing them, or the modern and delicate method of simply dismissing the minister: at 210–11.

31 See Cameron Moore, 'Military Law and Executive Power' in Robin Creyke, Dale Stephens and Peter Sutherland (eds), *Military Law in Australia* (Federation Press, 2019) 98.

32 See, eg, the incredibly prescriptive provisions of the *Biosecurity Act 2015* (Cth) and the suggestion of reliance upon Commonwealth executive power in Shreeya Smith, 'The Scope of a Nationhood Power to Respond to COVID-19: Unanswered Questions', *AUSPUBLAW* (Blog Post, 13 May 2020) <https://auspublaw.org/2020/05/the-scope-of-a-nationhood-power-to-respond-to-covid-19/>.

legal rights of persons if it is exercising its *prerogative* powers. As Gageler J stated in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*[33] ('*Plaintiff M68/2015*'),

> [a]n act done in the execution of a prerogative executive power is an act which is capable of interfering with legal rights of others. … Subject to statute, and to the limited extent to which the operation of the common law accommodates to the continued existence of 'those rights and capacities which the King enjoys alone' and which are therefore properly to be categorised as prerogative, the Executive Government must take the civil and criminal law as the Executive Government finds it, and must suffer the civil and criminal consequences of any breach.[34]

Leslie Zines has similarly commented that the Commonwealth's prerogative powers 'such as the declaration of war and peace, the alteration of national boundaries, acts of state, the pardoning of offenders and various Crown immunities and privileges, are capable of interfering with … legal rights and duties of others'.[35]

Having canvassed the importance of executive power, it is necessary to discuss its nature and scope. For some, executive power is elusive, for it is 'described but not defined in sec[tion] 61'[36] of the *Constitution*, which reads as follows:

> **61 Executive power**
>
> 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.[37]

The executive power of the Commonwealth can be divided into three categories: statutory, non-statutory (the prerogative), and a power that is neither statutory nor a prerogative (the nationhood power). Recent case law, however, may have implications for the nomenclature of non-statutory executive power. In *Attorney-General (Cth) v Ogawa*,[38] the Full Court of the Federal Court held that prerogative powers

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33 (2016) 257 CLR 42 ('*Plaintiff M68/2015*').

34 Ibid 98 [135] (citations omitted).

35 James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 374–5.

36 *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 440 (Isaacs J) ('*Wooltops Case*'). See also *Davis v Commonwealth* (1988) 166 CLR 79, 92–3 (Mason CJ, Deane and Gaudron JJ) ('*Davis*'); *Ruddock v Vadarlis* (2001) 110 FCR 491, 501 [30] (Black CJ) ('*Tampa Case*'); George Winterton, 'The Limits and Use of Executive Power by the Government' (2003) 31(3) *Federal Law Review* 421, 423–4.

37 *Constitution* s 61.

38 (2020) 384 ALR 474 (Allsop CJ, Flick and Griffiths JJ) ('*Ogawa*').

are 'preferably described as the exercise of the Commonwealth executive power'.[39] Such a holistic approach to the executive power of the Commonwealth is useful from a practitioner's perspective — it matters not which sub-branch of executive power is relied upon; one may simply designate it as the executive power of the Commonwealth. But from an academic perspective, there is merit in retaining a tripartite definition, so as to help delineate between a power that is prerogative and a power arising from nationhood.

When analysing the executive power conferred by s 61, it has become common practice to adopt the distinction drawn by George Winterton, between the 'breadth' and 'depth' of that power.[40] This practice was adopted by Gageler J in *Plaintiff M68/2015*, who explained 'breadth' to relate to 'the subject matters with respect to which the Executive Government of the Commonwealth is empowered to act having regard to the constraints of the federal system',[41] whilst depth denotes 'the precise actions which the Executive Government is empowered to undertake in relation to those subject matters'.[42] It can moreover be understood to limit the Executive's ability to undertake coercive activities. The reference to 'coercive activities' in turn reflects a number of fundamental constitutional principles, many of which derive from English case law and core constitutional authorities such as: the *Magna Carta 1215*; the *Petition of Right 1628*; the *Habeas Corpus Act* 1640, 16 Car 1, c 10; the *Bill of Rights 1689*, 1 Wm & M sess 2, c 2; and the *Habeas Corpus Act 1816*, 56 Geo 3, c 100. As Brennan J observed in *Re Bolton; Ex parte Beane*,[43]

> [m]any of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force.[44]

These fundamental constitutional principles were developed in the context of historical struggles between the Crown and the Parliament in England, which resulted in the Parliament establishing limits on the executive's non-statutory power. Critically, these limitations are most restrictive when it comes to the 'internal', rather than 'external', aspects of society.

So what depth, then, is there for the ADF to undertake counter-interference operations? Answering this requires ascertaining whether counter-interference operations would amount to force. Force, as a concept, is rather hard to define in

39 Ibid 487 [64].

40 George Winterton, *Parliament, The Executive and the Governor-General* (Melbourne University Press, 1983) 21.

41 *Plaintiff M68/2015* (n 33) 96 [130].

42 Ibid.

43 (1987) 162 CLR 514.

44 Ibid 520–1.

a military context — does the mere presence of ADF members constitute force? It seems prudent to go to publicly available ADF policy addressing the issue at first instance.

Generally speaking, as a matter of Defence policy, the use of the military within Australia falls into two broad categories: Defence Assistance to the Civil Community ('DACC') and Defence Force Aid to the Civil Authority ('DFACA'). DACC relates to 'where there is no likelihood that Defence personnel will be required to use force, or potential use, of force (including intrusive or coercive acts)'.[45] Force, in turn, is defined within the *Defence Assistance to Civil Community Manual* to include 'the restriction of freedom of movement of the civil community whether there is physical contact or not'.[46] But this is merely a policy statement, and would appear contextual on ADF members being in a public space (as opposed to restricting civilians entering Defence premises). It is implicit in the pattern of public DACC activities that the mere presence of ADF members, unarmed, would not be thought to constitute force, and would seem to occur under the prerogative relating to the command, control and disposition of the ADF found within s 68 of the *Constitution*.[47] This is a live issue, and discussed in more depth below with respect to Operation COVID-19 Assist.

In order to counter interference operations, it may be necessary for ADF members, by the direction of the government, to undertake coercive and intrusive measures in the virtual and physical realm. This would constitute more than a simple presence and accordingly falls under DFACA. Table 1 provides some examples of unclassified cyber operations that could be undertaken to counter interference operations.

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45 Department of Defence, *Defence Assistance to Civil Community Manual*, 17 August 2020, [6.1] ('*DACC Manual*'). For discussion on the concept see Elizabeth Ward, 'Call out the Troops: An Examination of the Legal Basis for Australian Defence Force Involvement in "Non-Defence" Matters' (Research Paper No 8/1997–98, Department of the Parliamentary Library, 2012) 63. Sir Victor Windeyer questioned whether such a threshold should be the determinant of the need for and the lawfulness of an order by the Governor-General: Victor Windeyer, 'Opinion on Certain Questions Concerning the Position of Members of the Defence Force when Called out to Aid the Civil Power' in Bruce Debelle (ed), *Victor Windeyer's Legacy: Legal and Military Papers* (Federation Press, 2019) 211, 211–16. I have addressed this question elsewhere: see Samuel White, 'Military Intervention in Australian Industrial Action' (2020) 31(4) *Public Law Review* 423.

46 *DACC Manual* (n 45) ch 6 [6.13(a)].

47 Examples of DACC, historically, include military aid in bushfires, floods and storms or the use of specialist military personnel and equipment for explosive ordnance disposal. It has also included helicopters or fighter jets appearing at motorsport events, helicopters or skydivers appearing at football matches, or bands appearing at ceremonial functions. See *DACC Manual* (n 45) chs 3, 4. There are grey zones, however, such as what has happened at least on one occasion when the ADF assisted Victoria Police in breaching motorcycle gang safe houses: see 'Army, Police Raid Melbourne Property in Ongoing Operation Targeting Outlaw Motorcycle Gangs', *ABC News* (online, 12 October 2013) <https://www.abc.net.au/news/2013-10-12/police-and-adf-raid-bikie-property-in-melbourne/5018414>.

Table 1: Cyber Self-Help Courses of Action[48]

Cyber Self-Help	Non-Cyber Equivalent
Tracer routes/Tracebacks	Public surveillance/security cameras
Responding to hostile IP addresses with logic bombs	Dangerous perimeters/electric fence
Automatic response to cyber probes/honeypots/ tarpits	Booby traps
Reasonable damage to hacker hardware	Proactive destruction of a dangerous item
Tracking and collecting stolen data	Theft of property — chasing a criminal into a private third party house
Installing/embedding malware or virus to be remote activated if stolen	Interference with private property
Kill switches[49]	Denial of the right to communicate or move

These operations, if conducted in a non-cyber environment, could violate common law rights to protection from negligence and trespass to the person,[50] the common law right to liberty from false imprisonment and the writ of habeas corpus,[51] and common law rights in relation to private property protected by the tort of trespass and other torts.[52]

The only relevant statutory provisions that may provide legal authority for the ADF to conduct these operations are found within pt IIIAAA of the *Defence Act 1903* (Cth) ('*Defence Act*'). Part IIIAAA supplies 'the mechanics for the deployment of the ADF in aid of the civil authorities'.[53] There is a clear issue, however, with relying upon pt IIIAAA to authorise ADF action for counter-interference operations. In order to conduct a 'call out' of the ADF under this statutory regime, there must be a threat of 'domestic violence'.[54] The term has no clear definition in the *Defence Act* or the *Constitution*, nor has it received any Australian jurisprudential commentary. At its best, the Addendum to the relevant Explanatory Memorandum notes that domestic violence

48 The table is a collation of information and terms found within Wyatt Hoffman and Steven Nyikos, 'Governing Private Sector Self-Help in Cyberspace: Analogies from the Physical World' (Paper, Carnegie Endowment for International Peace, December 2018) 9–24.

49 William D Toronto, 'Fake News and Kill-Switches: The US Government's Fight to Respond to and Prevent Fake News' (2018) 79(1) *Air Force Law Review* 167, 177.

50 See, eg, *Binsaris v Northern Territory* (2020) 380 ALR 1, 6–7 [25] (Gageler J).

51 *Plaintiff M68/2015* (n 33) 104–5 [159]–[162] (Gageler J).

52 See, eg, *Coco v The Queen* (1994) 179 CLR 427, 435–6 (Mason CJ, Brennan, Gaudron and McHugh JJ).

53 HP Lee, 'Military Aid to the Civil Power' in HP Lee et al (eds), *Emergency Powers in Australia* (Cambridge University Press, 2nd ed, 2018) 218, 226.

54 Samuel C Duckett White and Andrew Butler, 'Reviewing a Decision to Call out the Troops' (2020) 99(1) *AIAL Forum* 58.

> refers to *conduct that is marked by great physical force and would include a terrorist attack, hostage situation, and widespread or significant violence*. Part IIIAAA uses the term 'domestic violence' as this is the term used in section 119 of the *Constitution* …[55]

Yet, the same Addendum further notes that '[p]eaceful protests, industrial action or civil disobedience would not fall within the definition of "domestic violence"'.[56]

Recently, Anthony Gray has attempted to advocate for 'narrow' and 'broad' interpretations of the constitutional term.[57] Gray, in a somewhat disconnected manner, appears to try link jurisprudential developments in the concept of 'domestic violence' between individuals in relationships to the constitutional concept of 'domestic violence'.[58] Gray then posits that a 'liberal', and 'non-literal' interpretation of domestic violence should be applied,[59] which recognises that the meaning of words in the *Constitution* can change over time.[60] There is some benefit to this, despite an erroneous link between the alternate meanings of domestic violence and the incorrect and dangerous conclusions drawn from them with respect to the use of the military in Operation COVID-19 Assist.[61]

In making this assessment of whether and how the interpretation of constitutional terms should change, it is useful to utilise what Professor Jonathan Crowe has termed a 'counterfactual' analysis tool.[62] The first step is to assess the lexical meaning of the term, at the time of enactment. The term comes from the *United States Constitution* art IV § 4, where the provision is read to include instances of 'local uprisings, insurrections or internal unrest … which may also threaten the existence or institutions of the states'.[63]

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55 Addendum to Explanatory Memorandum, Defence Amendment (Call out of the Australian Defence Force) Bill 2018 (Cth) 2 [165A] (emphasis added) ('Addendum to Explanatory Memorandum').

56 Ibid.

57 Gray (n 29) 362–4.

58 Ibid.

59 Ibid.

60 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 495 [22] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

61 See Gray (n 29) 373 where Gray concludes that the nature and scale of the global health emergency in Operation COVID-19 Assist, and the bushfires of Operation Bushfire Assist 2019 2020, would meet the threshold of domestic violence.

62 Jonathan Crowe and Peta Stephenson, 'An Express Constitutional Right to Vote? The Case for Reviving Section 41' (2014) 36(2) *Sydney Law Review* 205, 229. For a detailed argument in support of this approach see Jonathan Crowe, 'The Role of Contextual Meaning in Judicial Interpretation' (2013) 41(3) *Federal Law Review* 417.

63 Peta Stephenson, 'Fertile Ground for Federalism: Internal Security, the States and Section 119 of the *Constitution*' (2015) 43(2) *Federal Law Review* 289, 298 ('Fertile Ground for Federalism?'). For further guidance on the meaning of 'domestic violence' see Michael Head, *Calling out the Troops: The Australian Military and Civil Unrest* (Federation Press, 2009) 16–18 ('*Calling out the Troops*').

The next step, according to Crowe and Stephenson, is 'to identify the broader contextual factors that underpin those meanings'.[64] It is clear from the constitutional drafting and debates, history of statutory operationalisation of the section, Parliament's intent in the Explanatory Memorandums, and American jurisprudence that domestic violence is concerned with conduct which would rupture the social fabric.[65] A counterfactual question can then be posed: would the Framers have intended for domestic violence to cover attempts to actively target voting infrastructure? Perhaps. Would the Framers have intended for domestic violence to cover attempts to corrupt the information environment? Most likely not. What, then, for operations that fall below this threshold?

It is clear that Parliament presumes that there exists an executive power outside of the statutory regime that may allow for DFACA operations domestically.[66] Part IIIAAA is subject to an express limitation that it 'does not affect any utilisation of the Defence Force that would be permitted or required, or any powers that the Defence Force would have, if this Part were disregarded'.[67] This is further mirrored in the *Defence Regulation 2016* (Cth) ('*Defence Regulation*') which applies to situations where the ADF is called out 'other than [those] under Part IIIAAA of the [*Defence*] *Act*'.[68] Meanwhile, reference to an internal security prerogative was found historically within the oath taken upon enlistment in the ADF, which, until 1964, included promising to 'cause Her Majesty's peace to be kept and maintained'.[69]

But these statutory provisions merely presume such a power; they do not create it. A search must be undertaken to assess the nature and ambit of any such manifestation of the executive power of the Commonwealth.

III An Internal Security Prerogative

What this article is concerned with is the depth of action that any internal security prerogative might provide. It deliberately does not look to address the applicability of the war prerogative, which, like any prerogative, can evolve, and is at its core concerned

64 Crowe and Stephenson (n 62) 229.

65 Windeyer (n 45) 284 [17].

66 The extent to which this is applicable, however, is questionable. A similar provision within the *Maritime Powers Act 2013* (Cth) was dismissed as a tool of statutory interpretation of Parliamentary intent in *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514: at 538 [41] (French CJ), 564–5 [141] (Hayne and Bell JJ), 601–2 [283] (Kiefel J).

67 *Defence Act 1903* (Cth) s 51ZD ('*Defence Act*').

68 *Defence Regulation 2016* (Cth) reg 69(1)(a) ('*Defence Regulation*').

69 Windeyer (n 45) 278. Upon enlistment, ADF members take an oath or affirmation to serve Her Majesty the Queen, swearing that 'I will resist Her enemies and faithfully discharge my duty according to law': ibid sch 1 cl 1.

with the application of lethal force against declared enemies extra-territorially.[70] Its applicability is limited. Nor too, does this article look at the prerogative of command and control of the armed forces, recognised by the House of Lords in *China Navigation Co Ltd v Attorney-General*.[71] There, the House of Lords found that linked to the war prerogative was a prerogative that provided for the management of war, even if war was not occurring. In argument, counsel for the respondent referred to a passage from Joseph Chitty's *Prerogatives of the Crown*,[72] that

> the King is at the head of his army and navy, is alone entitled to order their movements, to regulate their internal arrangements, and to diminish, or, during war, increase their numbers, as may seem to His Majesty most consistent with political propriety.[73]

Thirty years later, the House of Lords in *Chandler v Director of Public Prosecutions*[74] reaffirmed the position, considering the issue of protestors entering a military base and preventing the movement of troops. Lord Devlin stated:

> So long as the Crown maintains armed forces for the defence of the realm, it cannot be in its interest that any part of them should be immobilised. …
>
> It is by virtue of the Prerogative that the Crown is the head of the armed forces and responsible for their operation.[75]

This position has also been upheld in New Zealand,[76] and there seems no reason to suggest that it would not be the case in Australia, as a general rule.[77] The prerogative of command, however, does not find its constitutional home in s 61, but rather in s 68. There are some important, and significant, consequences of this. Section 68 of the *Constitution* reads: 'The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.' Unaltered since federation, the words seem clear and unambiguous enough.

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70 See, eg, *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 115 (Viscount Radcliffe) ('*Burmah*') where it was noted that the prerogative is enlivened when there is an 'outbreak or imminence of war, provided that it carried with it the threat of imminent invasion or attack'.

71 [1932] 2 KB 197 ('*China Navigation Co*').

72 See Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (Joseph Butterworth and Son, 1820) ('*Prerogatives of the Crown*').

73 *China Navigation Co* (n 71) 207. Chitty (n 72) was subsequently referred to with approval: *China Navigation Co* (n 70) 242, 246 (Slesser LJ).

74 [1964] AC 763.

75 Ibid 807.

76 See *Curtis v Minister of Defence* [2002] 2 NZLR 744, 752 [24]–[26] (Tipping J for the Court).

77 Such a position is advocated in Moore, *Crown and Sword* (n 25) 90–1.

Yet, there is much to be read both in, and between, the lines. As distinct from many other provisions that refer to the Governor-General in Council, s 68 does not require such decisions to be made by an Order-in-Council.[78] As such, Sir Victor Windeyer opined:

> It follows that orders by the Governor-General to the Defence Force, including calling it out, are given by virtue of the authority of command in chief. That does not mean that His Excellency may act without ministerial advice. He must act on the advice of a responsible minister …[79]

The reference to calling out should be read as reference to the highest level of *domestic* military operations — the calling out of the Defence Force to aid the civilian authority.[80] But it is unclear whether the prerogative power with respect to the control and disposition of the forces is itself a source of authority to engage in coercive actions directed at persons outside the armed forces. Sir Victor wrote in an era before any judicial findings had been made in the United Kingdom upon the existence of an internal security prerogative, as discussed in more depth below. His statement, then, was in accordance with contemporary legal thinking, but is now outdated. If *Attorney-General v Nissan*[81] is to be followed, the prerogative of command under s 68 is reserved for administration, not warfighting. It is preferable, then, to focus upon a prerogative that is solely concerned with the use of force domestically, in keeping the peace of the realm, namely, the internal security prerogative.

But prior to discussing any possible depth of action the internal security prerogative may provide, the near-ritualistic discussion of the meaning and nature of the term 'prerogative' must be engaged in. This ritual is performed increasingly 'self-consciously and semi-ironically'.[82] In this article, the term 'prerogative' is used in a strict, Blackstonian sense, in terms of 'those rights and capacities which the king enjoys alone, in contradistinction to others, and not those which he enjoys in common with any of his subjects'.[83]

78 As required under s 63 of the *Constitution*.

79 Windeyer (n 45) 215. See also Sir Ninian Stephen, 'The Governor-General as Commander-in-Chief' (1984) 14(4) *Melbourne University Law Review* 563, 571, quoted in *Millar v Bornholt* (2009) 177 FCR 67, 77 [27] (Logan J).

80 See Samuel White, 'Military Intervention in Australian Industrial Action' (n 45).

81 [1970] AC 179. See at 213 (Lord Reid). His Lordship preferred not to reach a view on whether this prerogative power provided lawful authority for British officers to acquire a hotel in Cyprus as part of a peacekeeping operation.

82 Thomas Poole, 'The Strange Death of Prerogative in England' (2018) 43(2) *University of Western Australia Law Review* 42, 45.

83 William Blackstone, *Commentaries on the Laws of England*, ed Wilfrid R Prest et al (Oxford University Press, 2016) bk 1, 155.

There two interpretations are by no means the only interpretation.[84] Dicey's interpretation is popular in the UK,[85] but as Munro has noted, it is a rather careless articulation which has proven unfortunately resilient[86] which fails to acknowledge the concept of the duality of the Crown. Blackstone's writing, in contradistinction, is popular in Australia and has been accepted by members of the High Court on several occasions.[87] It is important, however, to note that the prerogative does not just encompass coercive powers, 'but also a series of capacities and attributes, with widely differing subject matter'.[88] It is thus an umbrella term, varying from the power to grant honours and awards,[89] and mercy,[90] to declaring and conducting war.[91]

Notwithstanding this, the question remains of the extent to which a prerogative could be relied upon for utilising the ADF in countering interference operations in the grey zone. It is important to note that the existence of prerogative powers in emergencies short of war has not been authoritatively established.[92] Such powers have been described as 'remarkably abstruse'.[93] There is no definitive list of prerogatives, despite attempts to produce one.[94] Accordingly, whilst the High Court has emphasised that 'the ambit of the executive power of the Commonwealth cannot begin from a premise that the ambit of that executive power must be the same as the

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84 Noel Cox, *The Royal Prerogative and Constitutional Law: A Search for the Quintessence of Executive Power* (Routledge, 2020) 47–8 ('*The Royal Prerogative and Constitutional Law*').

85 *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508, 526 (Lord Dunedin) ('*De Keyser*'); *Burmah* (n 70) 99 (Lord Reid); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398 (Lord Fraser) ('*GCHQ*'); *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, 139–40 [47]–[48] (Lord Neuberger PSC, Baroness Hale DPSC, Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge JJSC).

86 Colin R Munro, *Studies in Constitutional Law* (Butterworths, 1987) 160.

87 *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278, 320 (Evatt J); *Davis* (n 36) 108 (Brennan J); *Plaintiff M68/2015* (n 33) 97 [133] (Gageler J).

88 Benjamin B Saunders, 'Democracy, Liberty and the Prerogative: The Displacement of Inherent Executive Power by Statute' (2013) 41(2) *Federal Law Review* 363, 367.

89 See Noel Cox, 'The Royal Prerogative in the Realms' (2007) 33(4) *Commonwealth Law Bulletin* 611.

90 See *Ogawa* (n 38).

91 See *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344.

92 Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16(4) *Public Law Review* 279, 287; Carney (n 27) 266.

93 Stanley A De Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books, 7th ed, 1994) 566 n 13.

94 See generally Chitty (n 72). The closest that can be found is Ministry of Justice (UK), *Review of the Executive Royal Prerogative Powers* (Final Report, 2009) 26–7, which recognises a prerogative of internal security.

ambit of British executive power',[95] it remains that '[c]onsideration of the executive power of the Commonwealth will be assisted by reference to British constitutional history'.[96] This is a clear endorsement of the view that, when addressing the extent of the executive power of the Commonwealth, an autochthonous interpretation is to be taken over a historical one.[97] Thus, although modern case law can be helpful in understanding the relevance of the respective prerogative power, any search for a prerogative must take us back to an era prior to the Glorious Revolution of 1688; for, whilst it can adapt to new circumstances, 'it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative'.[98]

Luckily, this search has already been undertaken both by academics writing in the 17th and 18th centuries, and more recently by the English courts. Chitty said that the King 'may do various acts growing out of sudden emergencies',[99] which appears relevant to internal security as well. The emphasis on, and acceptance of, a state of emergency was critical for scholars such as John Allen in his *Rise and Growth of the Royal Prerogative in England*,[100] and Arthur Berriedale Keith in his *The King and the Imperial Crown*.[101] Allen went so far as to remark that emergencies could include abuse of monarchical power, relief from which included restoring peace to the realm by overthrowing the monarch.[102] Reflecting on their line of academic thinking, modern scholar Peter Rowe sees that the use of military force domestically can be justified on the basis of a prerogative power emerging from the common law doctrine of necessity.[103]

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95 *Williams v Commonwealth [No 2]* (2014) 252 CLR 416, 469 [81] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

96 Ibid.

97 See generally Peter Gerangelos, 'Section 61 of the *Commonwealth Constitution* and an "Historical Constitutional Approach": An Excursus on Justice Gageler's Reasoning in the *M68* Case' (2018) 43(2) *University of Western Australia Law Review* 103. This approach is supported in Catherine Dale Greentree, 'The Commonwealth Executive Power: Historical Constitutional Origins and the Future of the Prerogative' (2020) 43(3) *University of New South Wales Law Journal* 893.

98 *British Broadcasting Corporation v Johns* [1965] Ch 32, 79 (Diplock LJ) ('*Johns*'), quoted in *Tampa Case* (n 36) 501 [30] (Black CJ). This position is a little misleading in that it suggests the Glorious Revolution froze prerogative powers when, in fact, in the *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352 it had already been held that the powers could not expand.

99 Chitty (n 72) 50.

100 John Allen, *Inquiry into the Rise and Growth of the Royal Prerogative in England* (Longman, Brown, Green, and Longmans, 1849) ('*Rise and Growth of the Royal Prerogative in England*').

101 A Berriedale Keith, *The King and the Imperial Crown: The Powers and Duties of His Majesty* (Longmans, Green, 1936) ('*The King and the Imperial Crown*').

102 Allen (n 100) 87.

103 Peter J Rowe, *Defence: The Legal Implications* (Brassey's, 1987) 44–7.

This requirement of a state of emergency, however, was overturned by developments in the common law in the late 20th century. One consequence of the inner-city riots of the early 1980s in the United Kingdom was the establishment, by the Home Office, of a central store of plastic batons and tear gas rounds, to be made available to chief officers of police in situations of serious public disorder.[104] In Home Officer Circular 40/1986, the Home Secretary announced that the store may be made available to those in need without the approval of the local police authority.[105] This announcement displeased a local police authority, which applied for a declaration to the effect that, to that extent, the circular was ultra vires.[106] This application was refused by the Divisional Court, and an appeal dismissed by the Court of Appeal, in *Northumbria Police Authority*, it being held, inter alia, that the circular could be justified under the Royal prerogative.

Relevantly, the Court of Appeal in *Northumbria Police Authority* affirmed that the Crown has a prerogative power to do what is necessary to keep the peace of the realm, against both actual and threatened disturbances.[107] This arose from a finding that the Crown owes a prerogative duty to keep those under its allegiance safe from physical attack within its dominions.[108] This duty, importantly, was applicable at all times and not only in times of emergency. In dispensing with evidence to the contrary, Nourse LJ held that 'a prerogative of keeping the peace within the realm existed in mediaeval times, probably since the Conquest [of William I]',[109] and that '[t]here is no historical or other basis for denying to the war prerogative a sister prerogative of keeping the peace within the realm'.[110] This would imply that the depth of action authorised by the prerogative is identical to that under the war prerogative, which, in the Australian context, would empower members of the ADF to apply lethal force and destroy property in the conduct of war-like operations. Indeed, Nourse LJ explicitly noted that the armed forces could exercise the internal security prerogative.[111] His Lordship continued that, with the exception of statutory abridgement, the internal security prerogative 'has not been surrendered by the Crown in the process of giving its express or implied assent to the modern system of keeping the peace through the agency of independent police forces'.[112] Although there is no approval of this case so far in Australia, such a position would seem to be supported by other authorities.[113]

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104 *R v Home Secretary of State for the Home Department, Ex parte Northumbria Police Authority* [1989] 1 QB 26, 26–8 ('*Northumbria Police Authority*').

105 Ibid.

106 Ibid 33.

107 Ibid 44 (Croom-Johnson LJ).

108 Ibid 46.

109 Ibid 59.

110 Ibid 58.

111 Ibid 51.

112 Ibid 58–9.

113 Viscount Radcliffe in *Burmah* (n 70) said that the prerogative of protecting public safety was not necessarily confined to the imminence or outbreak of war: at 114–15, quoted in *Northumbria Police Authority* (n 104) 55 (Purchas LJ). See also *Qarase*

It remains the accepted and oft-used power for DFACA operations within the United Kingdom by military forces.[114]

Many civil libertarians have taken issue with the decision in *Northumbria Police Authority.* One issue is the lack of historical justification for the finding that the prerogative exists; Robert Ward argued that the Court of Appeal deserved '[f]ull marks … for creative thinking', and that the result was erroneous.[115] But simply because a court has not been asked to make a determination on the existence of a prerogative does not mean that the prerogative power does not exist. Historically, courts were reluctant to review exercises of the Crown's prerogative power on the basis of justiciability, with decisions relating to the 'defence of the country' and 'national security' generally treated as non-justiciable.[116] James I summarised the position well when His Royal Highness suggested that the 'Prerogative of the Crown … is no subject for the tongue of a Lawyer'.[117]

The English courts' willingness to review exercises of prerogative powers shifted in 1985, as a result of the decision in *GCHQ*.[118] The House of Lords concluded that the question whether a particular exercise of prerogative power is justiciable would depend on the nature and subject matter of the particular prerogative power being exercised.[119] English courts have subsequently emphasised that caution must be taken when relying on cases concerning the Crown's prerogative powers which were determined prior to the *GCHQ* decision.[120] Relevantly, *Northumbria Police Authority* was determined in 1989. There seems no reason to find fault in their Lordships' legal reasoning on this basis, although it is expanded upon with concurrence below.

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v Bainimarama [2009] FJCA 9, in which the Court of Appeal of Fiji overturned a decision that a *coup d'état* was brought about by a valid exercise of the reserve powers of the President, on the basis that the *Constitution of the Republic of Fiji* deals expressly with reserve powers, and had thus displaced any relevant prerogative: at [93]–[94] (Powell, Lloyd and Douglas JJA). The *Australian Constitution* does not contain equivalent provisions, and would appear not to have displaced the prerogative on that basis.

114 Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report* (Report, October 2009) 26 [102].

115 Robert Ward, 'Baton Rounds and Circulars' (1988) 47(2) *Cambridge Law Journal* 155, 156.

116 See *Minister of Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 277 (Bowen CJ, Sheppard J agreeing at 280).

117 See Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 379–80, quoting Johann P Sommerville (ed), *King James VI and I: Political Writings* (Cambridge University Press, 1994) 212–14.

118 *GCHQ* (n 85).

119 Ibid 399–400 (Lord Fraser, Lord Brightman agreeing at 424), 407 (Lord Scarman), 410–11 (Lord Diplock), 417–19 (Lord Roskill).

120 See, eg, *Belhaj v Straw* [2017] AC 964, 1102 [95] (Lord Mance JSC); *Al-Jedda v Secretary of State for Defence* [2011] QB 773, 822–3 [206]–[208] (Elias LJ).

British academics have criticised the decision in *Northumbria Police Authority* as being 'more policy than principle'.[121] Further still, it has been argued that the decision failed to mark the limits of the internal security prerogative, and that it is thus normatively undesirable.[122] Yet, for the most part, these criticisms are *lex ferenda*, rather than *lex lata.* It is clear that both the Divisional Court and Court of Appeal considered that the Crown held a prerogative power to keep the peace of the realm, importantly, *where no emergency exists*.

If a prerogative is established, courts must take notice of it.[123] Logically, considering that s 61 of the *Constitution* is informed by the British common law,[124] it would appear common sense that, an internal security prerogative having been affirmatively upheld within the United Kingdom (thereby being found to have existed in 1688), it concomitantly exists within Australia, regardless of the absence of any case law. This being so, it is not for academics to argue that such a prerogative does not exist, but for Parliament either to displace it through legislation, or to allow it to exist unregulated.[125] Yet, it would appear that, despite what would seem to be a rather clear-cut prerogative, there are Australian academics who consider its existence doubtful.[126]

Thus, this article will aim, axiomatically, to justify the existence of the internal security prerogative within Australia, despite the clear case law and history that confirms its existence in the United Kingdom. In doing so, it will use the opportunity to outline the depth of action that this prerogative may provide legal authority for, with specific reference to counter-interference operations.

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121 Conor Gearty, 'The Courts and Recent Exercises of the Prerogative' (1987) 46(3) *Cambridge Law Journal* 372, 374. See also Christopher Vicenzi, *Crown Powers, Subjects and Citizens* (Bloomsbury, 1998).

122 Ward (n 115) 156. See also Sebastian Payne, 'The Royal Prerogative' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 77.

123 Noel Cox, *The Royal Prerogative and Constitutional Law* (n 84) 15 n 80.

124 See *Plaintiff M68/2015* (n 33) 96–100 [129]–[142] (Gageler J). See also *Davis* (n 36) 92 (Mason CJ, Deane and Gaudron JJ) quoted in *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 62 [131] (French CJ) ('*Pape*'); *Williams v Commonwealth* (2012) 248 CLR 156, 372 [588] (Kiefel J) ('*Williams*').

125 The latter option being apparently taken by the British government: see *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2019] UKIPTrib IPT 17 186 CH.

126 See, eg, Anne Twomey, 'Pushing the Boundaries of Executive Power: *Pape*, the Prerogative and Nationhood Powers' (2010) 34(1) *Melbourne University Law Review* 313, 319–20; Rob McLaughlin, 'The Use of Lethal Force by Military Forces on Law Enforcement Operations: Is There a "Lawful Authority"?' (2009) 37(3) *Federal Law Review* 441, 444–5 n 12. There are, however, some who do support the proposition. See generally Moore, *Crown and Sword* (n 25) ch 4. See also HE Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984) 466–7. Finally, see Stephenson, 'The Relationship between the Royal Prerogative and Statute in Australia' (n 29).

A *The History of Keeping the Peace of the Realm*

As a historical entity, 'the prerogative can only fully be understood in its more recent manifestations through taking a long-term perspective'.[127] It is arguable that, so long as the polis as a concept has existed, there has also existed a prerogative right to utilise the military, internally, for the good of the people.[128] This power necessarily has ranged from tasks where no force was used (such as the construction of aqueducts and roads), to the use of force to maintain the peace (such as enforcing quarantines and destroying property in order to stop the spread of a fire),[129] to the use of lethal force to suppress riots and insurrections.

1 *Prior to Conquest*

It is fitting, then, noting the etymological origins of the term prerogative that a discussion of the internal security prerogative begins with Rome.[130] Within the era of the Roman Republic, any military operation was required to be conducted against a legally defined enemy — *justus hostis* — who enjoyed rights within warfare. These rights, however, were not extended to bandits, pirates, rebels and slaves who undermined internal peace and security.[131]

In contradistinction, the Anglo-Saxon or Germanic tradition held that rather than swearing a universal oath, '[e]very member of a German state [was] bound by duty, as well as by regard to self-preservation, to defend the community to which he belonged; and if he betrayed or deserted its interests, he was punished with death'.[132] Every German chief was voluntarily surrounded by a hand of followers and companions — a *comitatus,* or warband.[133] A King had a reciprocal 'right to

127 Andrew Blick, 'Emergency Powers and the Withering of the Royal Prerogative' (2014) 18(2) *International Journal of Human Rights* 195, 195.

128 This aligns with the maxim *salus populi suprema lex* advocated in 1905 by the then Attorney-General, Robert Garran, in respect of the Commonwealth's power to control submarine cables and private telegraph lines: RR Garran, 'Opinion No 217' in Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, with Opinions of Solicitors-General and the Attorney-General's Department* (Australian Government Publishing Service, 1981) vol 1, 259–60.

129 See *Burmah* (n 70).

130 See Blackstone (n 83) bk 1, 214.

131 See, eg, Wouter G Werner, 'From Justus Hostis to Rogue State: The Concept of the Enemy in International Legal Thinking' (2004) 17(2) *International Journal for the Semiotics of Law* 155, 158, 167.

132 Allen (n 100) 57.

133 Cornelius Tacitus, *The Complete Works of Tacitus: The Annals, the History, the Life of Cnaeus Julius Agricola, Germany and its Tribes, a Dialogue on Oratory*, ed Moses Hadas, tr Alfred John Church and William Jackson Brodribb (Modern Library, 1942) 715–16.

the service of any of his subjects in any station or capacity he cho[se]'.[134] This was operationalised through the *fyrd*, in which men were obliged to aid the suppression of riots and civil disturbances in accordance with the principle that 'each civic grouping should be responsible for the maintenance of order within its own area'.[135] Those in the *fyrd*, necessarily, could use force up to and including lethal force, lawfully.

2 *After the Conquest*

The two different concepts of internal security — Roman and Germanic — were merged after the Norman Conquest of England, under William the Bastard who firmly established feudal law — a combination of Christian, Roman and Germanic law.[136]

The Anglo-Saxon traditions of keeping the peace of the realm through the *fyrd* continued unchanged after the Conquest,[137] but was subsumed by the positions of Justice of the Peace, and Lord Lieutenant.[138] They could utilise the *posse comitatus* to ensure the orders of Henry I, son of William the Conqueror, were obeyed. Henry, under authority of his absolute Royal prerogative, decreed: 'I establish my firm peace throughout the whole kingdom and command that it henceforth be maintained.'[139] The importance of the control and security of land, as a prerogative of a ruler, gathered support during the Middle Ages, when, in periods of revolt, a feudal lord could declare war in order to retain order — similar to the Roman tradition.[140]

The use of localised governance continued unchanged until the civil administration of Britain under the Lord Protector, Oliver Cromwell. Under the Lord Protector, the eponymously named 'London Scheme' was introduced, establishing a military commission in London with authority to raise troops for the suppression of 'rebellions, insurrections, tumults and unlawful assemblies' through the potentially lethal use of force.[141] This scheme was quickly adopted in major population centres.[142]

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134 *Marks v Commonwealth* (1964) 111 CLR 549, 573 (Windeyer J) ('*Marks*'), citing *R v Larwood* (1694) 1 Ld Raym 29; 91 ER 916; *Duke of Queensberry's Case* (1719) 1 P Wms 582; 24 ER 527.

135 Anthony Babington, *Military Intervention in Britain: From the Gordon Riots to the Gibraltar Incident* (Routledge, 1990) ix.

136 MH Keen, *The Laws of War in the Late Middle Ages* (Routledge, 1st ed, 1965) 72.

137 Babington (n 135).

138 Ibid.

139 Henry I, 'Henry I: Coronation Charter (1100)' in Carl Stephenson and Frederick George Marcham (eds), *Sources of English Constitutional History: A Selection of Documents from AD 600 to the Present* (Harper & Row, 1937) vol 1, 46, 48.

140 See Keen (n 136) 48; Allen (n 100) 85–6, 111, 121.

141 Babington (n 135) 3.

142 Over the course of its history, the etymology of the phrase 'call out' has developed: see generally Windeyer (n 45). In the United States, the phrase remains 'calling forth': see *United States Constitution* art I § 8 cl 15. See also *Martin v Mott*, 25 US (12 Wheat) 19 (1827).

In 1688, the 'Glorious Revolution' resulted in William of Orange being placed on the English throne.[143] The new regent, retitled William III, utilised the troops stationed in London in an attempt to disband highwaymen who plagued the countryside,[144] reflecting that the use and direction of soldiers and sailors remained at the Crown's discretion.[145] These members of the armed forces were required to use force in order to disband the internal security threat. Neither the military nor the navy fell under civilian jurisdiction at this time; rather, they were directly answerable to the Crown, and their use domestically was a simple extension of the Crown's prerogative power.[146]

As the conditions of the 18th century fuelled mass protests, the now British military were increasingly used as riot controllers.[147] Rarely of national or political character, these civil disturbances were often in protest of a local grievance or food shortage. Military intervention, sometimes including the use of lethal force, was justified on the basis of the Royal prerogative of keeping the peace of the realm.[148]

The death of Queen Anne in 1714 led to government apprehension of riots over the accession of George I. Accordingly, a statute was introduced which imposed a duty upon public officer holders (such as magistrates, sheriffs or mayors), whenever 12 or more individuals were gathered, to read the following proclamation:

> Our sovereign Lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George, for preventing tumults and riotous assemblies. God save the King.[149]

The *Riot Act 1714*, 1 Geo 1 sess 2, c 5 ('*Riot Act*') — as the statute was — also imposed a duty on any of the King's subjects of age and ability to seize individuals who remained for more than an hour after the proclamation was read.[150] In 1781, the Chief Magistrate of London was charged with a criminal breach of duty in failing to

143 *Bill of Rights 1688*, 1 Wm & M sess 2, c 2 art 7: 'That the raising or keeping [of] a standing army within the kingdom in time of peace unless it be with consent of Parliament is against law'.

144 Babington (n 135) 4.

145 Ibid 5.

146 Ibid 4.

147 Ibid 3.

148 Ibid.

149 *Riot Act 1714*, 1 Geo 1 sess 2, c 5. One charge read in 1830 apparently failed 'because the magistrate who read … [it] omitted the words "God save the King"': Commissioners on Criminal Law, *Fifth Report* (Report, 1840) 100.

150 A historical search has suggested that the first instance of the proclamation being read was in Southern Ireland in 1717: see Babington (n 135) 5.

order a military intervention with respect to the Gordon Riots.[151] In *R v Pinney*,[152] the difficulty of the position was expounded by Littledale J:

> Now a person, whether a magistrate, or peace-officer, who has the duty of suppressing a riot, is placed in a very difficult situation, for if, by his acts, he causes death, he is liable to be indicted for murder or manslaughter, and if he does not act, he is liable to an indictment on an information for neglect; he is, therefore, bound to hit the precise line of his duty: … that, difficult as it may be, he is bound to do.[153]

Once again, the *Riot Act* simply placed a positive duty upon servants of the Crown to keep the peace of the realm, by imbuing them with an iota of executive power. Accordingly, there is strong evidence to suggest that, both prior to and after the Norman conquest of England, there was a prerogative right to use force, including lethal force, domestically, to keep the peace of the realm.[154]

3 *Australia*

The effect of this historical and legislative evolution in England was brought to the British colony of New South Wales after colonisation in Sydney.[155] During the first 100 years after colonisation, troops aided the civil power in a variety of ways, but primarily through conducting killings of Aboriginal Australians, under the legal premise of keeping the peace of the realm.[156] As Australia was settled under the premise of terra nullius, the British government refused to accept that any frontier conflict was 'war', for to do so would effectively recognise the sovereignty of Aboriginal Australians.[157] As the legal reasoning at the time went, Aboriginal Australians had become British subjects, and thus any armed attacks were *criminal* acts of misbehaving British subjects.[158] The only basis for the colonial armed forces

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151 See *R v Pinney* (1832) 5 Car & P 254; 172 ER 962.

152 Ibid.

153 Ibid 270. Lieutenant-Colonel Thomas Brereton was court martialled, having failed to charge the mob in the Bristol Riots under which the mayor, Charles Pinney, was also charged. Lieutenant-Colonel Brereton committed suicide before the conclusion of the court martial.

154 See, eg, Twomey (n 136) 325–6.

155 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 34−5 (Brennan J) ('*Mabo [No 2]*').

156 See Timothy Bottoms, *Conspiracy of Silence: Queensland's Frontier Killing-Times* (Allen & Unwin, 2013) 32–5; Richard G Fox and Jodie E Lydeker, 'The Militarisation of Australia's Federal Criminal Justice System' (2008) 32(5) *Criminal Law Journal* 287, 290–1; David Mackay, 'Far-Flung Empire: A Neglected Imperial Outpost at Botany Bay 1788–1801' (1981) 9(2) *Journal of Imperial and Commonwealth History* 125, 132–3.

157 John Connor, 'The Frontier War that Never Was' in Craig Stockings (ed), *Zombie Myths of Australian Military History* (2010) 10, 11. See also *Mabo [No 2]* (n 155) 141, 144 (Dawson J).

158 Ibid.

to conduct domestic operations would appear to be found in the internal security prerogative.[159]

The role of the British Army personnel posted to the colony remained relatively constant, until after the establishment of police forces in the 19th century,[160] at which time it shifted to acting in 'aid to the civil power', rather than being the only effective instrument of that power.[161]

The most notable uses of colonial armed forces were in industrial strikes.[162] Although not as infamous as the Eureka Stockade, the Queensland Shearers' Strike of 1891 had important constitutional consequences. 'The Shearers' Strike arose in response to the "Pastoralists Agreement", which, among other things, eroded the wages and working conditions of shearers, which the unions had … been striving hard to improve.'[163] The unionised shearers refused to sign the Agreement and in 1891 they withheld their labour from the pastoralists. In response to the Shearers' Strike, the pastoralists imported non-unionised labour from other colonies, and a conflict subsequently ensued between the unionised and non-unionised shearers.[164] Off the back of reports which suggested that the conflict could escalate, the Premier of Queensland, Sir Samuel Griffith, deployed troops from the Queensland Defence Force for 'special service' in aid of the civil power. From 20 February 1891 to 30 April 1891, a total of 1,442 troops were called out to areas where the unionists were concentrated.[165] A historical search reveals that s 119 of the Australian *Constitution* was originally introduced by Sir Samuel, on or around March 1891 in light of this experience.[166]

Accordingly, it is clear that there existed a prerogative power to keep the peace of the realm, outside of emergencies, from pre-Norman England through to the federation of Australia. The prerogative power would appear to have provided lawful authority for the use of force, including lethal force, for both civilians and members of the armed forces. This reflects the fact that the Crown 'has an interest in all … [its] subjects; and is so far entitled to their services that in case of sudden invasion or formidable insurrection … [it] may legally demand and enforce their personal

159 See 'Proclamation: By His Excellency Sir Thomas Brisbane', *Sydney Gazette and New South Wales Advertiser* (Sydney, 19 August 1824) 1: made on 14 August 1824 in response to the Wiradjuri Resistance.

160 See Gary Mason, *The Official History of The Metropolitan Police: 175 Years of Policing London* (Carlton Press, 2004).

161 Hugh Smith, 'The Use of Armed Forces in Law Enforcement: Legal, Constitutional and Political Issues in Australia' (1998) 33(2) *Australian Journal of Political Science* 219, 219, 231.

162 White, 'Military Intervention in Australian Industrial Action' (n 45).

163 Stephenson, 'Fertile Ground for Federalism?' (n 63) 294.

164 Stuart Swensen, *The Shearers' War: The Story of the 1891 Shearers' Strike* (University of Queensland Press, 1989) 5.

165 Ibid.

166 John La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 62.

assistance'.[167] This entitlement, relevantly, does not extend to compelling subjects to go overseas for warlike purposes.

4 *Evolution?*

The Royal prerogative is a flexible power that evolves to meet new circumstances, providing flexibility in situations that may require it.[168] But how far can it evolve, and what is the test (if any) to ascertain whether any such evolution has occurred?

Although the prerogative, being part of the common law, necessarily holds the ability to evolve to novel situations, the line between evolution and creation may be a fine one. Equally unclear is the test to apply to determine when a prerogative has evolved. One test to apply is to look at whether the *expectation* of the citizens has changed. Winterton's example for this test is the questionable prerogative power of the Crown to open and read postal articles, and its potential evolution as a lawful authority to intercept telephone calls. The objectives of both intercepting letters and intercepting phone calls are the same 'protecting state security and preventing and detecting crime'[169] yet Winterton opined at the time that the sender's expectations are different. A letter sent can always be intercepted; a phone call is expected to be private.[170] This example, arguably, is one that is no longer relevant with the clear social expectation that data will be collected and mined from online interactions — hence the popularity of encrypted telecommunication applications. But the test is a useful one to apply.

So, can the internal security prerogative evolve to the digital domain? Within Australia, the use of the ADF in domestic security operations has been characterised by 'deeply held, even if imperfectly understood, reservations'.[171] This perhaps reflects the isolated nature of the ADF from civilian society, or historical aversion that Anglo-Saxon culture has held towards the military, which — prior to the creation of a standing army — primarily comprised '[t]he dregs of society … the rogues and vagabonds, the destitute, the condemned felons, and the prisoners from the gaols'.[172] It perhaps also reflects the tension in colonial Australia, between the free colonisers supported by the colonial government and the military, and the convicts.[173] Yet there also remains an expectation that the use of military force can, and will, be applied in

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167 *Marks* (n 134) 573–4 (Windeyer J), quoting Chitty (n 72) 18. Justice Windeyer believed that the principle was no longer applicable; however, in the same decision, Kitto J (with whom Taylor J agreed) was of the opinion that it was: *Marks* (n 135) 557 (Kitto J, Taylor J agreeing at 558).

168 See *Northumbria Police Authority* (n 104) 44 (Croom-Johnson LJ), 55 (Purchas LJ), 56, 58−9 (Nourse LJ); George Winterton, 'The Prerogative in Novel Situations' (1983) 99(3) *Law Quarterly Review* 408.

169 Winterton (n 168) 408–9

170 Ibid.

171 Margaret White, 'The Executive and the Military' (2005) 28(2) *University of New South Wales Law Journal* 438, 438.

172 Babington (n 135) 2.

173 Robert Hughes, *The Fatal Shore* (Vintage Books, 1st ed, 2003) 301.

situations that demand it. Accordingly, and applying Winterton's test (noting that it has not been accepted by any court and indeed is a rather high threshold) it is logical to find that the internal security prerogative can and should be considered to have evolved into keeping the peace of the 'iRealm'. Citizens expect that their government is able to take action to counter and neutralise a threat, thereby keeping the peace of the realm. The history outlined above demonstrates that there is an expectation that military force can and will be applied, domestically, outside situations of riot and insurrection. Indeed, if British courts have accepted that the war prerogative can evolve to encompass new technology and new methods of warfare,[174] then there seems no reason to deny that evolution to its 'sister prerogative', the internal security prerogative.[175]

But the history of the internal security prerogative so far has developed only against a backdrop of a unitary system;[176] it has not addressed the effects of federalism. Indeed, as 'developments that will occur in Britain are developments that will be informed and moulded by a radically different constitutional setting'[177] it is necessary to shift attention to the concept of a federal realm. This is a question that has rarely been grappled with.[178]

IV A Federal Realm

Federalism can be constructed across two axes — a design axis (dualist or integrated), and a constitutional axis (separation of powers).[179] Australia, relevantly, is a dualist federation, dividing spheres of responsibility between state and federal governments along thematic lines. For the most part, thematic divisions increase clarity of roles and responsibilities. However, with respect to interference operations, the theme can become rather blurred.

As Anne Twomey notes, '[f]ederation did not transform Australia into an independent sovereign nation. It merely consolidated six colonies into one federated larger colony.'[180] The status of these colonies can be viewed in contra-distinction to its

174 *De Keyser* (n 85) 565 (Lord Sumner); *Re a Petition of Right* [1915] 3 KB 649, 666 (Warrington LJ).

175 *Northumbria Police Authority* (n 104) 58 (Nourse LJ).

176 Cheryl Saunders, 'Executive Power in Federations' in Amnon Lev (ed), *The Federal Idea: Public Law between Governance and Political Life* (Hart, 2017) 145–64. See also Cox, *The Royal Prerogative and Constitutional Law* (n 84).

177 KM Hayne, 'Non-Statutory Executive Power' (2017) 28(4) *Public Law Review* 333, 337.

178 Zines merely notes that any such delineation would be difficult, but also that he hopes that, as a matter of civil libertarianism, the decision in *Northumbria Police Authority* (n 104) is not followed: Zines (n 92) 287.

179 Cheryl Saunders, 'Executive Power in Federations' (n 176) 156–7.

180 Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006) 18 ('*The Chameleon Crown*').

Empire sister on the other side of the Pacific — Canada. In Canada, the separate colonies had sunk to the position of provinces, subordinated to the Canadian Federal Government. These provinces represented the Queen through Lieutenant-Governors, individuals appointed by the Governor-General. The *Australian Constitution*, however, deliberately rejected the subordination of the colonies and the states therefore retained their ability to appoint Governors. This difference was, and is, rather significant. One indicator at the time of Empire of the status of colonies was whether or not the administrators were 'sterling' or 'currency' — British born, or colony born.[181] State Governors, coming from 'the lesser nobility' and historically liaising directly with the Colonial Office were *prima facie* more sovereign rather than 'the Lieutenant-Governors of the Canadian Provinces [who] were of local origins and had no direct relations with the United Kingdom'.[182]

Communication rights came to the fore particularly with federation approaching, through the delineation of what fell within a state's interest, and what fell within the Commonwealth's interest. In November 1900, the British Secretary of State for the Colonies wrote to the individual Australian colonial Governors, informing them that any correspondence back to the Colonial Office on matters that were a Commonwealth interest would be required to include the Commonwealth as a recipient, for awareness.[183]

The first test of this divide — state or Commonwealth interest — came in 1902 when the Dutch Government sought action from the British Government for lack of action taken by South Australia to arrest the crew of a Dutch ship, in breach of treaty obligations with respect to deserters.[184] The British Government directly communicated with the Commonwealth Government for a situation report, noting that internal security and public order fell within the remit of the State. The Secretary of State for the Colonies, having taken submissions on the matter, concluded that as the matter fell within external affairs and treaties, it was a Commonwealth matter.[185]

This tension of external affairs and defence (clearly Commonwealth interests) and the maintenance of civil order (a state affair) would routinely emerge in the appropriate recipients for communiques on issues such as permission of foreign warships to land in State ports, or riots.[186] It is a tension that still remains.

A *Whose Peace?*

After federation, s 119 of the *Constitution* had important consequences for the scope of the role of the armed forces, and of the Commonwealth generally, in exercising

181 Hughes (n 173) 88.

182 Twomey, *The Chameleon Crown* (n 180) 21.

183 Ibid 20.

184 Ibid 21.

185 Ibid 22.

186 Ibid.

a right to keep the peace of the realm. Section 119 reads: 'The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.'[187] The provision must be read in conjunction with part of its sister provision, s 114: 'A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force.'

Although described as the 'wallflower of the *Constitution*',[188] s 119 (combined with s 114) is anything but. It has the effect of confirming the right of the states and territories to regulate matters of their own general public order, which has been recognised by the High Court.[189] Yet s 119 also states that domestic violence is a matter that can flow into the Commonwealth's area of responsibility on the application of a state. Accordingly, when discussing any internal security prerogative, it is necessary to distinguish between peace as concerns the Commonwealth, and peace as concerns the states. John Quick and Robert Garran discuss this tension in *The Annotated Constitution of the Australian Commonwealth*:

> 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.[190]

The above passage, outlining so-called 'Commonwealth interests', was quoted with approval by Dixon J in *R v Sharkey*[191] ('*Sharkey*').

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187 *Constitution* s 119.

188 Stephenson, 'Fertile Ground for Federalism? ' (n 63) 290.

189 See *A-G (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644, 653−4 (Viscount Haldane LC, Lord Dunedin, Lord Shaw and Lord Moulton). See also John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 964; Herbert Vere Evatt, *The Royal Prerogative* (Law Book, 1987) 226−38; Zines (n 92) 287; (2005) 16(4) *Public Law Review* 279, 287 ('*The Inherent Executive Power of the Commonwealth*'); Cheryl Saunders, 'The Australian Federation: A Story of Centralization of Power' in Daniel Halberstam and Mathias Reimann (eds), *Federalism and Legal Unification* (Springer, 2014) 87.

190 Quick and Garran (n 189) 964 (emphasis added).

191 (1949) 79 CLR 121, 151.

However, it is argued by some that the executive cannot do that which could not be legislated for.[192] Given this,[193] it is well to note that the concept of 'Commonwealth interests' may already be found in legislation. Part IIIAAA of the *Defence Act* is one example. Part IIIAAA does not, however, define the term 'Commonwealth interests'. Some interpretive help on this nebulous concept may be found in the Addendum to the Explanatory Memorandum, referred to above. There, it is suggested that the term is to be read as including 'the protection of Commonwealth property or facilities …, the protection of Commonwealth public officials as well as visiting foreign dignitaries or heads of State and, major events, like the Commonwealth Games or G20'.[194]

A broader definition can be found in a separate statute — specifically, s 100.4 of the *Criminal Code* (Cth),[195] which provides much more detail as to what an 'interest of the Commonwealth' constitutes. This provision was introduced after the referral from the states to the Commonwealth of powers for the purposes of counter-terrorism.[196] Section 100.4(5), in turn, attempts to codify non-exhaustively what the Commonwealth views as its interest when there is no consent from a state or territory. It reads:

> (5) Without limiting the generality of subsection (4), this Part applies to the action or threat of action if:
>
> (a) the action affects, or if carried out would affect, the interests of:
>
> (i) the Commonwealth; or
>
> (ii) an authority of the Commonwealth; or
>
> (iii) a constitutional corporation; or
>
> (b) the threat is made to:
>
> (i) the Commonwealth; or
>
> (ii) an authority of the Commonwealth; or
>
> (iii) a constitutional corporation; or

192 See, eg, *Plaintiff M68/2015* (n 33) 42; Moore (n 31) 98; Winterton (n 40) 29–30.

193 The Commonwealth could, perhaps, pass legislation that consents to the conferral, by a state or territory in a demonstration of co-operative federalism, of coercive powers which the Commonwealth itself could not have legislated for: see, eg, *R v Hughes* (2000) 202 CLR 535, 554–5 [38]–[39] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

194 Addendum to Explanatory Memorandum (n 55) 2 [163A], 3 [189A]. This is mirrored in the Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 15 [38].

195 *Criminal Code* (n 11).

196 In accordance with the referral power under s 51 (xxxvii) of the *Constitution*.

(c) the action is carried out by, or the threat is made by, a constitutional corporation; or

(d) the action takes place, or if carried out would take place, in a Commonwealth place; or

(e) the threat is made in a Commonwealth place; or

(f) the action involves, or if carried out would involve, the use of a postal service or other like service; or

(g) the threat is made using a postal or other like service; or

(h) the action involves, or if carried out would involve, the use of an electronic communication; or

(i) the threat is made using an electronic communication; or

(j) the action disrupts, or if carried out would disrupt, trade or commerce:

(i) between Australia and places outside Australia; or

(ii) among the States; or

(iii) within a Territory, between a State and a Territory or between 2 Territories; or

(k) the action disrupts, or if carried out would disrupt:

(i) banking (other than State banking not extending beyond the limits of the State concerned); or

(ii) insurance (other than State insurance not extending beyond the limits of the State concerned); or

(l) the action is, or if carried out would be, an action in relation to which the Commonwealth is obliged to create an offence under international law; or

(m) the threat is one in relation to which the Commonwealth is obliged to create an offence under international law.

The above provisions attempt to capture all relevant provisions of the *Constitution* and the enumerated heads of power under s 51, and the existence of Commonwealth executive power in these areas is straightforward enough. Indeed, in these instances, questions about federalistic spheres of influence are automatically resolved.[197] To this, one could add Quick and Garran's riots and federal mail, 'the protection of trading and financial corporations, banks and insurance companies as well as the

197 Windeyer (n 45).

protection of federal legislative, executive, judicial, administrative and military institutions, public authorities and statutory bodies'.[198]

B *Can the Commonwealth 'Protect Itself' against Interference Operations?*

Of more pressing concern are instances that are not automatically resolved, such as ADF operations to counter interference operations. Are such operations more analogous to ordinary policing functions within a state? Or are they more similar to military operations and internal security? The closer they are to the former, the more likely the High Court is to find that this is a matter within the ordinary competence of the states, and therefore not within the sphere of responsibility of the Commonwealth. The difference between interference operations as a crime (a public order issue, for the states) or as a defence issue (a form of war and within the remit of the Commonwealth) is eerily similar to the tensions felt with Dutch deserters in 1902.

This paper argues that interference operations are a defence issue, rather than a simple public order issue, although the difference is razor thin. Indeed, from the perspective of a cyber warrior, the method may amount to a crime on a technical basis (software tools and logistic support) similar to terrorism. *Thomas v Mowbray* would support the proposition that it can remain a Commonwealth issue, despite being a prima facie public order issue.[199] If particular notice is given to military strategists and leading commentators on war studies, the potential for interference operations to supersede traditional kinetic warfare can be clearly seen. As Gerasimov noted above, and both the respective Australian and British Chiefs of Defence Forces have recently accepted, warfare is changing.[200] Interference operations are most likely best categorized as a form of warfare, and thus within the remit of Commonwealth responsibility as enumerated under the Constitution, rather than a simple law and order concern.[201] Such a discussion however is political and without a clear position from the High Court, simply conjecture.

Another school of constitutional thinking is that there is inherent power within the Commonwealth to protect itself. As I have covered elsewhere, it is not necessary that a Commonwealth interest requires a statute.[202] It is logical that there are some non-statutory interests of the Commonwealth, such as its continued existence (reflecting that a constitution should not be a suicide pact). This aligns with the common law maxim *salus populi surprema lex* — the welfare of the people is the paramount law.[203]

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198 Zines (n 92) 289.

199 (2007) 233 CLR 307, 308.

200 See generally Alvin Toffler, *The Third Wave* (William Morrow, 1980).

201 For Australia, see General Angus Campbell, 'War in 2025' (Speech, ASPI Canberra, 13 June 2019). For the British perspective, see General Nick Carter, 'Launch of the Integrated Operating Concept' (Policy Exchange, 30 September 2020) <https://www.gov.uk/government/speeches/chief-of-the-defence-staff-general-sir-nick-carter-launches-the-integrated-operating-concept>.

202 Samuel White, 'A Shield for the Tip of the Spear' (2021) 49(2) *Federal Law Review* 210, 213–14.

203 Garran (n 128) 259–60.

How far can this concept go? It is difficult to envisage a situation of civil order in the modern, globally connected world where some aspect of a Commonwealth interest would not be threatened or endangered.[204] Clearly, the threat posed by foreign interference operations is one that would ostensibly touch upon a Commonwealth interest, be it constitutional provisions,[205] a method of delivery that touches upon Commonwealth legislation,[206] or, accepting this article's earlier proposition, the good of the people. Using the example of interference operations targeting voting infrastructure, any operation that touched on federal elections would necessarily fall within the ambit of Commonwealth interests. It is arguable that, on this broad approach, these interests extend to foreign interference operations that affect *state* voting infrastructure. This is because the *Constitution* requires, as does federalism as a concept, stable states and territories with elected representatives. Any interference with these elections could thus be said to affect the Commonwealth, as discussed by Quick and Garran. On this broad approach, AV Dicey's concept that '[f]ederal government means weak government' perhaps might not be correct anymore.[207]

Could this also extend to protecting the information environment? Whilst 'it is conventional wisdom that the *Australian Constitution* does not expressly guarantee a right to vote',[208] the reasoning underpinning the implied freedom of political communication would appear to suggest a non-statutory Commonwealth interest in ensuring the 'marketplace of ideas' remains uncorrupted by foreign influence.[209]

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204 See, eg, *Victoria v Commonwealth* (1975) 134 CLR 338, 412–13 (Jacobs J) ('*AAP Case*'). His Honour stated that:

> The growth of national identity results in a corresponding growth in the area of activities which have an Australian rather than a local flavour. Thus, the complexity and values of a modern national society result in a need for co-ordination and integration of ways and means of planning for that complexing and reflecting those values.

205 Which gives Parliament the power 'to make laws for the peace, order, and good government of the Commonwealth with respect to: postal, telegraphic, telephonic, and other like services': *Constitution* s 51(v).

206 See *Radiocommunications Act 1992* (Cth); *Telecommunications Act 1997* (Cth).

207 See AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th ed, 1915) 167. See also Cheryl Saunders, 'Executive Power in Federations' (n 176) 145.

208 Crowe and Stephenson (n 62). This article is particularly useful in discussing the nuanced decisions around s 41 of the *Constitution*, and the resisted implication of a *right* to vote. See also *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1.

209 These concepts denote the philosophical rationale for freedom of expression, using the analogy of the economic concept of a free market, where ideas can be traded and accepted. It presumes that individuals will, if exposed to information, seek out and value 'truth' over falsehoods. John Milton, in arguing against British censorship laws some years earlier said 'though all the winds of doctrine are let loose to play upon the earth … whoever knew truth put to the worse in a free and open encounter? … [T]ruth must always prevail in a fair fight with falsehood?': Isaiah Berlin, 'John Stuart Mill and the Ends of Life' in John Gray and GW Smith (eds), *JS Mill On Liberty: In Focus* (Routledge, 1991) 131, 144.

The High Court has stated that the implied freedom of political communication exists to enable 'the people to exercise a free and informed choice as electors',[210] and revolves around the principles of representative democracy, as implied within ss 7, 24, 64 and 128 of the *Constitution.* However, the implied freedom has not invalidated legislation seeking to enhance the electoral process by 'ensuring that one voice does not drown out others' in political discourse.[211]

The desire to protect the information environment, specifically with respect to elections, was addressed by the High Court in *Smith v Oldham* ('*Smith*').[212] Subsequent to federation, electoral legislation was introduced,[213] prohibiting newspapers and other publishers from publishing anonymously written articles on matters of the election. In an eerily accurate statement over a century ago, Isaacs J scathingly remarked:

> The vote of every elector is a matter of concern to the whole Commonwealth, and all are interested in endeavouring to secure not merely that the vote shall be formally recorded in accordance with the opinion which the voter actually holds, free from intimidation, coercion and bribery, but that the voter shall not be led by misrepresentation or concealment of any material circumstance into forming and consequently registering a political judgment different from that which he would have formed and registered had he known the real circumstances.
>
> … For an opinion into which a man has been tricked or misled, even innocently, is a double wrong. It means not merely a loss to the side on which he would otherwise have cast the vote, but it also strengthens their opponents.[214]

His Honour then continued, 'the public injury, so far as political results are concerned, *is as great when the opinion of the electorate is warped by reckless, or even careless, misstatements, as when they are knowingly untrue; in each case the result is falsified*'.[215]

It thus seems that the High Court's interpretation of the *Constitution* supports the proposition that the Commonwealth is empowered, through legislation, to protect the intangible information environment. The very recent High Court case

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210 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), quoted in *McCloy v New South Wales* (2015) 257 CLR 178, 193–4 [2], 206 [42] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*').

211 *McCloy* (n 210) 206 [43] (French CJ, Kiefel, Bell and Keane JJ), citing *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 144–5, 159, 175, 188–91, 239.

212 (1912) 15 CLR 355 ('*Smith*').

213 *Commonwealth Electoral Act 1902* (Cth), later amended by *Commonwealth Electoral Act 1911* (Cth).

214 *Smith* (n 212) 362.

215 Ibid 362–3 (emphasis added).

of *LibertyWorks Inc v Commonwealth* confirms this against the modern threat of interference operations.[216] In *LibertyWorks*, the compulsive provisions within the new *Foreign Influence Transparency Scheme Act 2018* (Cth) ('*FITS Act*') as a precondition to engaging in political communication with the public, or a section of the public[217] was challenged as unduly restricting the implied freedom of political communication. This legislation was part of the trifecta of Acts passed, noted at the outset of this paper, that sought to address the threat of foreign interference. Noting the Australian government's intent that the legislation empowered the 'sunlight' of activities[218] to act as a disinfectant to disinformation[219] a majority of the Court found in favour of the provisions and their constitutionality.[220] Importantly, the majority expressly affirmed and cited the above observations in *Smith*.[221]

Whilst the underlying premise of the Australian government's response to foreign interference may be questioned (that individuals will rationally seek and prefer true and correct information),[222] it is important that the High Court has consistently affirmed that the information environment is a key underpinning concept of the *Constitution*.[223] Obviously, the cases are concerned with restrictions on legislation, rather than as an authority for executive action. The legislation being of a Commonwealth nature, it follows from the above discussion that there is a prima facie Commonwealth interest. But it is axiomatic that there need be legislation for such an integral part of the *Constitution*, and representative democracy. This position necessarily must be qualified by a clear statement that there has been little judicial approval of any power of the Commonwealth to protect its interests.[224]

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216 [2021] HCA 18 ('*LibertyWorks*').

217 Ibid [92] (Gageler J).

218 Ibid [57] (Kiefel CJ, Keane and Gleeson JJ); [104] (Gageler J); [122] (Gordon J); [206] (Edelman J).

219 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13147 (Malcolm Turnbull, Prime Minister).

220 *LibertyWorks* (n 216).

221 Ibid 20 [59] (Kiefel CJ, Keane and Gleeson JJ).

222 See Philip M Napoli, 'What If More Speech Is No Longer the Solution?' (2017) 70(1) *Federal Communications Law Journal* 55. See also Trevor Thrall and Andrew Armstrong, 'Bear Market? Grizzly Steppe and the American Marketplace of Ideas' in Christopher Whyte, Trevor Thrall and Andrew Armstrong (eds), *Information Warfare in the Age of Cyber Conflict* (Routledge, 2020) 73, 78: '[t]he marketplace of ideas model is undeniably elegant and compelling, an Enlightenment-era cocktail of Bayesian opinion formation, free speech, and capitalism. Unfortunately, its most foundational premise is false'.

223 See *LibertyWorks* (n 216) [249] (Steward J). Interestingly, the newly appointed Steward J made comments in obiter that his Honour's belief in the implied freedom was arguable.

224 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 ('*Communist Party Case*'); *AAP Case* (n 204); *Davis* (n 36); *Tampa Case* (n 36).

An alternate test as to when it is appropriate for the Commonwealth to intervene to protect its interests, specifically with the military, has appeared within academic thinking. The position is best advocated by Peter Johnston:

> An alternative approach in determining when resort to the [Australian] Defence Force is constitutionally justifiable [to operate domestically] is to focus on the *gravity of the risk* and the *nature of the persons* engaged in breaking a Commonwealth law, instead of the *kind* of Commonwealth interest entailed. No one would quibble about calling in specialist military units to counter terrorist assaults, for example …[225]

Johnston's test, in other language, can be summarised as a *nature and scale* test, and would appear to be supported by the High Court's decision in *Pape v Federal Commissioner of Taxation*[226] ('*Pape*'), in which the majority relevantly approved comments in *Davis v Commonwealth.*[227] Their Honours held that the existence of Commonwealth executive power is clearest where there is no competition with the states in respect of the matter the subject of the purported power. Where there is a contest, consideration is given to the comparative capacity of the states and the Commonwealth to engage in the activity in question.[228]

Continuing to use the example of Commonwealth and state elections, it is clear that the use of the ADF to protect a federal election does not involve competition with the states, in the sense discussed above. Yet, it is arguable that Commonwealth intervention may be justified in response to threats of a certain *nature* and of a sufficient *scale*. Arguably, in case of threats to voting infrastructure from digital interference operations (such as distributed denial of service attacks, or manipulation of voting data), the Commonwealth may intervene. This intervention would be on the basis that only the Commonwealth may have the capabilities to respond to interference operations through the use of specialised organs such as the ADF and the Australian Signals Directorate. This logic further applies to the information environment, although it is necessary to make this assessment on a case-by-case basis.[229] Such a position is reflected within the relevant statutory considerations for calling out the ADF domestically, namely, that the authorising Ministers must take into account the

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225 Peter W Johnston, '*Re Tracey*: Some Implications for the Military-Civil Authority Relationship' (1990) 20(1) *University of Western Australia Law Review* 73, 79 (emphasis in original).

226 *Pape* (n 124).

227 *Pape* (n 124) 62 [131] (French CJ), quoting *Davis* (n 36) 93–4 (Mason CJ, Deane and Gaudron JJ), 111 (Brennan J). See also *Pape* (n 124) 90 [239] (Gummow, Crennan and Bell JJ), quoting *Davis* (n 36) 93–4 (Mason CJ, Deane and Gaudron JJ).

228 Ibid 60–2 [127]–[131] (French CJ), 90 [239] (Gummow, Crennan and Bell JJ).

229 See *Davis* (n 36) 111 (Brennan J): '[t]he variety of [Commonwealth] enterprises or activities which might fall for consideration preclude the a priori development of detailed criteria'.

nature of the domestic violence threat and the capabilities of the ADF before the authorising Ministers may be satisfied that the ADF should be called out.[230]

IV Survival of the Prerogative

Having canvassed and addressed the existence, limits and federal operationalisation of a Commonwealth internal security prerogative, it remains to be seen whether the final hurdle can be surmounted — whether the prerogative power has fallen foul of the principle of desuetude. As the prerogative is founded on usage, it is a contradiction of terms to have a power that has fallen into disuse.[231]

A *The Principle of Desuetude*

Walter Bagehot, in *The English Constitution*, noted that, on its face, any review of prerogative powers would conclude that the Crown holds many plenary powers which 'waver between reality and desuetude, and which would cause a protracted and very interesting legal argument if … [the Crown] tried to exercise them'.[232] Having argued that the internal security prerogative exists, and has been not been displaced by the *Defence Regulation*, the final issue for this article to address is whether the principle of desuetude applies — that principle is that long disuse effectively extinguishes a prerogative.[233]

This is not an accepted doctrine — it has been held that disused prerogatives are lost,[234] though it is also said that they are not lost by disuse.[235] A middle ground would appear to be the reasons of Lord Simon in *McKendrick v Sinclair*,[236] in discussing whether, by reason of disuse, the action of assythment in Scottish law had been extinguished. His Lordship observed:

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230 See *Defence Act* (n 67) ss 33–6. For an analysis of this decision-making process: see White and Butler (n 54). Realistically speaking, however, this is a political decision, and whether the nature and scale of any foreign interference operation is deemed to warrant Commonwealth intervention would depend on the political environment of the day. Officially, there have been six requests for ADF assistance under pt IIIAAA of the *Defence Act* (n 67), with all six denied on the basis that the authorising Ministers did not reach the requisite state of mind under ss 33–6: see Stephenson, 'Fertile Ground for Federalism?' (n 163) 290–1, citing HP Lee, *Emergency Powers* (Law Book, 1984) 202.

231 Allen (n 100) 158.

232 Bagehot (n 26) 49.

233 See especially *South Australia v Victoria* (1911) 12 CLR 667, 703 (Griffith CJ, Barton J agreeing at 706) ('*Boundaries Case*'): '[t]he Prerogative may … be regarded as having … fallen into abeyance'.

234 Ibid.

235 *Burmah* (n 70) 101 (Lord Reid).

236 (1972) SC (HL) 25.

> The true doctrine … is that a rule of the English common law, once clearly established, does not become extinct merely by disuse, and remains capable of recrudescence in *propitious* circumstances, *but not when it would be grossly anomalous and anachronistic* … But the maxim *cessante ratione cessat ipsa lex* is also part of English law. If a rule of English common law cannot become as dead as the dodo, it can at least go into a cataleptic trance like Brünnhilde or Rip van Winkle or the Sleeping Beauty. In such a state the rule in question cannot … be revived at the mere call of any passing litigant, but only if its appropriate moment has come again to operate *usefully and without gross anomaly*.[237]

Given the paucity of military intervention in Australia, one might think that the 'revival' of an internal security prerogative would need to pass under the principle of desuetude. However, as expanded upon below, there have been clear historical uses of Australian military forces under this prerogative, albeit without the clear designation of its nomenclature. It is problematic, however, to rely upon past practice as *indicia* of legality. As Heydon J in *Pape* stated decisively:

> Executive and legislative practice cannot make constitutional that which would otherwise be unconstitutional. Practice must conform with the *Constitution*, not the *Constitution* with practice. The fact that the executive and legislative practices may have generated benefits does not establish that they are constitutional.[238]

In the absence of any specific authority, practice may provide a guide as to what is accepted as lawful. There is merit, therefore, in areas of legal ambiguity, to look at past practice to see whether or not there was legal controversy or subsequent specific statutory regulation in response. Indeed, it is not just academia that utilises past practice as a litmus test — the High Court considered practice as a guide in *Pape*[239] and *Williams*.[240] There is implicit support therefore for looking at past practice. To that end, this article considers: the 1949 Coalminers' Strike; the 1969 secessionist agitation in Papua New Guinea; the 1978 Bowral call-out; and the 2002 CHOGM and 2003 visit of the President of the United States. It is noted that at least some of these events have been considered by legal scholars before, though it is emphasised that that has not been done in respect of the question whether the internal security prerogative has fallen into desuetude.

1 *The 1949 Coalminers' Strike*

In April 1949, Australian troops were used in unloading coal from an Indian ship which had been blacklisted by the communist controlled Miners' Federation in New South Wales and Victoria.[241] The *National Emergency (Coal Strike) Act 1949* (Cth) was assented to on 29 June 1949 to prevent the funding of the strike. Whilst

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237 Ibid 60–1 (emphasis added) (citations omitted).

238 *Pape* (n 124) 209 [598].

239 Ibid 24–5 (French J), 74 (Gummow, Crennan and Bell), 122 (Hayne and Kiefel JJ).

240 *Williams* (n 124) 340 (Crennan J), 369 (Kiefel J).

241 Margaret White (n 171) 448.

not requested by New South Wales, the low level of coal reserves, and the potentially communist-inspired nature of the strike, would appear to have given rise to a Commonwealth interest in the sense described above. Interstate trade was no doubt affected, since

> more than 500,000 wage and salary earners in the several States were progressively thrown out of work. Reserves of coal had been practically nil, and of alternative fuels scanty. Much of heavy industry ground to a standstill. Electricity was sharply rationed in at least three States. Domestic gas was rationed to an hour a day in Melbourne and Sydney. Electric train and tram services ran at skeleton strength.[242]

Subsequently, troops were sent by the Commonwealth to work in the mines in a strike substitution capacity. Such a deployment is on its face a de facto DACC tasking. In positioning the troops, it was agreed that the maintenance of law and order, and *ipso facto* the use of force, would remain the responsibility of the New South Wales constabulary forces. There was, however, a furore raised by the Australian military personnel on being deprived of their arms. Accordingly, it was agreed that the troops could carry their weapon systems in the rail and road movements and could guard their own camps, but would remain unarmed whilst working.[243] The fact that they were armed effectively made the deployment a de jure DFACA deployment.

The deployment of troops in this instance proceeded on the premise of ensuring the supply of coal, rather than of preserving law and order in the area.[244] This control of the coal supply, however, was viewed as a necessary precaution in order to prevent a breakdown of the peace (of the realm, it may be said) that might occur if industry ground to a halt. Subsequent academic commentary has suggested the use of the military in this situation would be authorised by Commonwealth executive power;[245] and Dr Evatt, the Attorney-General during the strikes, later commended the 'strong executive action to defend the people against specific disruptive activities'[246] which is simply another method of stating *salus populi suprema lex.*

2 *The 1970 Suppression of the Secessionist Movements in the Territory of Papua New Guinea*

A second instance of the internal security prerogative arguably authorising the use of force for domestic operations, although not much discussed in Australian history, occurred in 1970.

242 LF Crisp, *Ben Chifley: A Biography* (Longmans, 1961) 362.

243 Margaret White (n 171) 448.

244 Windeyer (n 45) 232.

245 Ward (n 45).

246 HV Evatt, 'Danger to All Citizens', *The Herald* (Melbourne, 6 May 1950).

The then-Administrator of New Guinea sought military assistance from the Commonwealth in response to secessionist agitation in Rabaul.[247] At the time of the civil unrest, Papua New Guinea was a territory of the Commonwealth of Australia. In July 1970, the Governor-General of Australia, Sir Paul Hasluck, signed an Order-in-Council calling out the members of the Australian Army's Pacific Island Regiment 'to render aid to the civil power'.[248]

The order empowered the Administrator of the Territory, in the event that police lost or feared losing control of law and order, to permit the Regiment to use lethal force. Orders-in-Council are a legal instrument issued under prerogative power, and reflects that the legal basis for the call out was a perceived prerogative power of internal security.

3 *The 1978 Bowral Call-Out*

The third, more widely known, instance of the ADF aiding the civil authority concerned the bomb explosion outside the Hilton Hotel in Sydney, on 13 February 1978; three men were killed with a further nine injured.[249] The blast occurred before the opening of the Commonwealth Heads of Government Regional Meeting ('CHOGRM'). Subsequently, the Governor-General, by Order-in-Council, called out the ADF on the advice of the Executive Council.[250] 1900 troops were called out in a security force role, occupying the town of Bowral, New South Wales, during a visit by CHOGRM.[251] The call-out may well have been justified under what Dixon J in *Sharkey* coined the duty and power of the Commonwealth 'not to protect the State, but to protect itself'.[252]

The Hilton bombing and subsequent Bowral call-out remains '[t]he only major mobilisation of troops in an urban setting in Australia's history'.[253] Indeed, '[o]ne local newspaper said the "virtual siege conditions" were reminiscent of "Franco's Spain"'.[254] Anthony Blackshield summarised the position as follows:

> In terms of our popular social traditions, the idea is very firmly entrenched that the use of armed forced within the realm in peacetime is 'not cricket'. It is this longstanding social tradition that really underlies the disquiet surrounding the

247 RJ May, *The Changing Role of the Military in Papua New Guinea* (Australian National University, 1993) 39.

248 Robert J O'Neill, *The Army in Papua-New Guinea: Current Role and Implications for Independence* (Australian National University Press, 1971) 1–2, 4.

249 Justice Robert Hope, Parliament of Australia, *Protective Security Review* (Paliamentary Paper No 397, 15 May 1979) 1, 258.

250 Commonwealth, *Gazette: Special*, No S 30, 14 February 1978.

251 See Hope (n 249) 1 [1.2]; Head, *Calling out the Troops* (n 63) 44.

252 *Sharkey* (n 191) 151 (Dixon J).

253 Head, *Calling out the Troops* (n 63) 49.

254 Ibid 11, quoting *Southern Highland News* (Bowral, 15 February 1978) 1.

> events at Bowral. But as soon as one asks whether this social tradition is reflected in any legal tradition that might be invoked as a constitutional restraint on the use of armed forces, one is plunged into an esoteric maze of uncertainties.[255]

This 'maze' was navigated by Sir Victor Windeyer's Opinion, annexed to Justice Robert Hope in his *Protective Security Review* ('*Hope Review*') which, inter alia, found the use of the ADF to have been valid on the basis of the inherent power of the Commonwealth to protect its interests.[256] Windeyer stated that the Commonwealth had the inherent power to 'employ members of its Defence Force "for the protection of its servants or property or the safeguarding of its interests"'.[257] This was because, prima facie, such power was an incident of nationhood:

> The power of the Commonwealth Government to use the armed Forces at its command to prevent or suppress disorder that might subvert its lawful authority arises fundamentally, I think, because the *Constitution* created a sovereign body politic with the attributes that are inherit in such a body. The Commonwealth of Australia is not only a federation of States. It is a nation.[258]

Specifically to s 61, Windeyer continued:

> The ultimate constitutional authority for the calling out of the Defence Force in … [Bowral] was thus the power and the duty of the Commonwealth Government to protect the national interest and to uphold the laws of the Commonwealth. Being by order of The Governor-General, acting with the advice of the Executive Council, it was of unquestionable validity.[259]

It should be recollected that the *Northumbria Police Authority* case at this point had not been decided (and thus an internal security prerogative had not been identified nor accepted by the House of Lords, nor by legal historians). Windeyer's opinion was thus in keeping with the legal theory at the time. His discussion of the implied nationhood power as the legal authority can and should be built upon by a discussion of an internal security prerogative. This would help navigate the legal tension in identifying what depth of action the implied nationhood power can provide, in accordance with Winterton's test.

4 *2002 CHOGM and 2003 POTUS Visit*

Operation Guardian II — the operation with respect to the 2002 CHOGM at Coolum — established the framework for the use of force by the Royal Australian Air Force and authorised the shooting down of civilian aircraft by fighter jets in order

255 Anthony Roland Blackshield, 'The Siege of Bowral: The Legal Issues' (1978) 4(9) *Pacific Defence Reporter* 6.

256 Windeyer (n 45).

257 Ibid, 279, quoting *Australian Military Regulations 1927* (Cth) reg 415.

258 Ibid.

259 Ibid 280.

to prevent a suicidal crash, in the wake of the September 11 attacks in the United States. These security provisions were mirrored when the President of the United States visited Australia in 2003.[260] Although a contingent call-out was authorised and enacted under pt IIIAAA of the *Defence Act*, the statutory provisions at the time did not include any ability to authorise lethal force in air operations. No clear legal basis was provided for the operations.[261]

Unlike the 1978 Bowral call-out, which occurred ad hoc, these two air operations 'were planned well in advance for a foreseeable threat'.[262] Although the prerogative as to the disposition and arming of the forces would have authorised the take-off of the flights, and while self-defence could authorise the destruction of the aircraft in response to an actual attack, these air operations arguably went beyond the scope of these sources of power. It is difficult to see what legal authority, outside of an internal security prerogative, could have authorised such action. This view would appear to be shared by other academics.[263]

5 *Operation COVID-19 Assist*

In combating the most destructive public health emergency in living memory (COVID-19), Prime Minister Morrison utilised the ADF as part of Australia's response to a domestic crisis.[264] As the pandemic continued to unfold, reliance upon military personnel increased significantly and Operation COVID-19 Assist was announced on 1 April 2020.[265] The operation constituted the largest deployment of ADF since the Second World War and comprised of seven state and territory based task groups.

At its peak, several thousand ADF personnel were deployed in support of Operation COVID-19 Assist.[266] The role of each task group varied depending upon each jurisdictional need but included assistance to health workers in contact tracing,

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260 See, eg, 'RAAF Poised to Shoot down Stray Aircraft', *The Sydney Morning Herald* (online, 28 August 2003) <https://www.smh.com.au/national/raaf-poised-to-shoot-down-stray-aircraft-20030828-gdharj.html>.

261 See Department of Defence, Submission No 6 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005* (6 February 2006) 3.

262 Moore, *Crown and Sword* (n 25) 199.

263 Ibid 199–200. Cf Simon Bronitt and Dale Stephens, '"Flying under the Radar": The Use of Lethal Force against Hijacked Aircraft: Recent Australian Developments' (2007) 7(2) *Oxford University Commonwealth Law Journal* 265, 265, 267–9.

264 Prime Minister Morrison stated that 'we are in a war against this virus and all Australians are enlisted to do the right thing': Interview with Prime Minister of Australia The Honourable Scott Morrison MP (Tara Brown, 60 Minutes, 22 March 2020).

265 Linda Reynolds, 'Expansion of ADF Support to COVID-19 Assist' (Media Release, Department of Defence, 1 April 2020).

266 Department of Defence, 'Defence Response to COVID-19', *Defence News* (online, 12 October 2020) <https://news.defence.gov.au/national/daily-update-defence-response-covid-19>.

the provision of assistance to law enforcement agencies as part of quarantine and isolation compliance in areas of international arrivals and border control.[267] It was stressed by the Minister of Defence that all stages of the operation were DACC policy (thus not permitting the ADF members to use coercive powers at any time).[268]

As aforementioned, DACC policy clearly defines force as including 'the restriction of freedom of movement of the civil community whether there is physical contact or not'.[269] This is what support to law enforcement to ensure quarantine and isolation compliance is. The use of the ADF in quarantine and isolation compliance, outside of the *Biosecurity Act 2015* (Cth), logically falls within a DFACA setting by Defence's own policy construct. This is not to say that the operation is illegal; this paper has demonstrated that there is a clear non-statutory lawful authority for the conduct of these operations. But it is demonstrative that, regardless of recent arbitrary and paradoxical policy guidelines, the internal security prerogative has not fallen into disuse. To the contrary, it would appear to have been a basis, if not the only plausible basis, for several historical and recent uses of the ADF. It is suggested, therefore, that the prerogative exists, and continues to exist, and may be used by the Commonwealth to protect the peace of the iRealm.

V Conclusion

This article has highlighted and justified that there exists a clear non-statutory executive power of the Commonwealth to utilise the ADF in order to keep the peace of the realm, extending to authorising the use of force. This power is necessarily distinct from maintaining public order — which falls clearly within state responsibility — but is one concerned with public *security* — which falls less clearly within the Commonwealth's. It did so by tracing the history of this prerogative, from its English beginnings to more recent incidents in Australia. It was argued that, in the Australian federal context, the prerogative extends to counter-interference operations by the Commonwealth. Finally, it was contended that the prerogative has not been abrogated by statute, nor has it fallen into desuetude.

Reliance upon non-statutory executive power to maintain security is not a popular option. Robert French has said that executive power is both nurtured and bound in anxiety — 'anxiety which *fuels* expansive approaches to its content and anxiety *about* expansive approaches to its content'.[270] This anxiety is even more pronounced when

267 Linda Reynolds, 'Defence Provides Additional Assistance in Response to COVID-19' (Media Release, Department of Defence, 23 March 2020).

268 Linda Reynolds, 'Defence Support to Mandatory Quarantine Measures Commences' (Media Release, Department of Defence, 29 March 2020); Department of Defence, 'A Message from Lieutenant General Frewen' *Defence News* (online, 31 April 2020) <https://news.defence.gov.au/national/message-lieutenant-general-john-frewen>.

269 *DACC Manual* (n 45) [6.13(a)].

270 Robert French, 'Executive Power in Australia: Nurtured and Bound in Anxiety' (2018) 43(2) *University of Western Australia Law Review* 16, 16.

it comes to non-statutory executive power — some consider the prerogative power 'to be an obscure relic of an undemocratic past, and a potential threat to civil liberties'.[271] Arguments are raised that the prerogative should be abrogated, and placed on a statutory footing. Yet, it should not be dismissed. It is a flexible power that may evolve to meet new circumstances, providing flexibility in situations that may require it. The importance of flexibility is not to be understated. In an era of hyper legislation and limited 'legislative mission command'[272] unintended consequences can include the displacement of executive power. The internal security prerogative would not appear to be one such victim, for now.

Accepting that an internal security prerogative exists in Australia (as it does in the United Kingdom), albeit necessarily influenced by the Australian federal context, is not only consistent with the original concept of executive power when the *Constitution* was drafted, but helps to navigate the tension that has arisen as to the nature and scope of the implied nationhood power. One view is that the nationhood power is an inherent, separate part of the executive power flowing from s 61 of the *Constitution*.[273] Another is that it is simply an erroneous interpretation of the Royal prerogative.[274] Those in the latter camp focus upon the Convention Debates, and that s 61 was drafted on the assumption that the prerogative formed the essence of the non-statutory executive power.[275] At the 1897 Australasian Federal Convention in Adelaide, Sir Edmund Barton characterised the executive power as 'primarily divided into two classes: those exercised by the prerogative … and those which are ordinary Executive Acts'.[276] The argument thus goes that to rely upon an implied nationhood power to provide any depth is legally erroneous, and is contrary to the accepted proposition that the Crown's prerogatives cannot expand.[277] As such, it is

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271 Benjamin B Saunders (n 88) 363. See also Keith Syrett, 'Prerogative Powers: New Labour's Forgotten Constitutional Reform?' (1998) 13(1) *Denning Law Journal* 111; Thomas Poole, 'United Kingdom: The Royal Prerogative' (2010) 8(1) *International Journal of Constitutional Law* 146, 147.

272 Mission command is a military doctrinal concept that aims to place trust within junior officers and non-commissioned officers to respond to their superior officer's orders. It allows junior members with the choice of *means* to reach a specified *end*. On the concept of legislative mission command see Justice John Logan, 'Mission Command: Some Additional Thoughts on its Relevance to Policing and the Rule of Law' (Address, Queensland Police Headquarters, 15 February 2018) 2–3.

273 See, eg, *Pape* (n 124) 83 [215] (Gummow, Crennan and Bell JJ).

274 See Gerangelos (n 97) 107–9, 140. One of the better summaries of this school of thought.

275 See Michael Crommelin, 'The Executive' in Gregory Craven (ed), *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (Legal Books, 1986) bk 6, 127, 131–2.

276 *Official Report of the Australasian Federal Convention Debates*, Adelaide, 19 April 1897, 910 (Edmund Barton).

277 *Johns* (n 98) 79 (Diplock LJ).

argued that the implied nationhood power should and can only be interpreted as simply expanding the breadth, 'in a federal sense', of executive power.[278]

Yet the High Court has also accepted that a power exists that gives 'capacity to engage in *enterprises and activities* peculiarly adapted to the government of a nation'.[279] It would appear, then, to be a power to act, rather than to make laws, and is 'akin to the capacities of the Commonwealth as a person'.[280] Due to its inherent nature, the nationhood power can only be invoked in a manner consistent with Australia's federal structure, as canvassed above; namely, 'the existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive … action involves no real competition with State executive … competence'.[281] This would appear identical to an internal security prerogative, and in situations that require force to be used, it may be more appropriate for academics to argue for reliance upon an internal security prerogative, with historic checks and balances, rather than the nebulous concept of an implied nationhood power. At any rate, for the practitioner, it suffices to say that the executive power of the Commonwealth arguably extends to keeping the peace of the iRealm.

278 See Gerangelos (n 97) 108–9.

279 *AAP Case* (n 204) 397 (Mason J) (emphasis added).

280 Twomey (n 126) 338.

281 *Davis* (n 36) 93–4 (Mason CJ, Deane and Gaudron JJ).