Samuel White and Cameron Moore***

CALLING OUT THE ADF INTO THE GREY ZONE

> 'If there is a community need the government has a duty to use whatever power is available to meet it. It is the High Court's function, not the government's, to draw the line. … If any question of morality arises it does so when governments use constitutional excuses for failing to fulfil mandates given to them by the people.'[1]

Abstract

The Australian government has determined that the Australian Defence Force ('ADF') will prepare to counter non-geographic threats in a range of operational environments, including cyberspace. This article explores the viability of constitutional executive power to authorise the use of the ADF in counter cyber interference operations. Specifically, it looks to address the breadth and depth of the nationhood power as a lawful authority for operations outside of s 119 of the *Constitution*. This is an important area to explore, noting that interference operations will often fall below the 'domestic violence' threshold conventionally required to call out the troops.

This article addresses the manner in which executive power can enable and support ADF operations from a jurisprudential and operational perspective. With reference to earlier ADF operations such as the Bowral call out in 1978 and the 2002 Commonwealth Heads of Government Meeting deployment, this article argues that executive power could provide a capability and legal authority for a suite of operations that may be seen as otherwise breaching Australian law.

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1 Edward Gough Whitlam, 'The Labor Government and the Constitution' in Gareth Evans (ed), *Labor and the Constitution 1972–1975* (Heinemann Educational Books, 1977) 305, 314.

I Introduction

This article explores how the Australian Defence Force ('ADF') may be deployed domestically below the constitutional threshold of 'domestic violence'.[2] Specifically, it addresses the emerging threat of interference operations (those covert, corrupt or clandestine operations that seek to change opinions) which are unlikely to meet this high threshold.[3] It does not engage with the policy construct that surrounds domestic deployments of ADF, and directs readers to a separate policy analysis conducted by the lead author.[4] This area is understudied for three reasons. First, the threat of interference operations is only slowly being recognised.[5] Second, the use of the military domestically in Australia has been neglected from military scholarship due to a thankful lack of need.[6] Third, the nature and ambit of the nationhood power is only slowly being grappled with.[7] An earlier paper on this topic addressed the viability of utilising the Royal prerogative as a legal authority; however, the existence and applicability of the internal security prerogative is controversial, and has been dismissed by Australian academic Leslie Zines, on the basis of being normatively undesirable.[8]

If the Royal prerogative of 'keeping the peace of the realm' is not to be accepted as a viable legal basis, it is important to discuss other elements of Commonwealth executive power.[9] This is because the domestic use of the ADF, as part of a Commonwealth response to a domestic emergency, is increasingly considered a viable

2 A prequel to this article looked at the viability of the internal security prerogative, or the Royal prerogative of keeping the peace of the realm, for the ADF to use force in situations outside of emergencies. See Samuel White, 'Keeping the Peace of the iRealm' (2021) 42(1) *Adelaide Law Review* 101.

3 *Criminal Code Act 1995* (Cth) s 92.2 ('*Criminal Code Act*'). See also 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 Samuel White, *Keeping the Peace of the Realm* (LexisNexis, 2021) 121–3.

5 See Duncan B Hollis, 'The Influence of War: The War for Influence' (2018) 32(1) *Temple International and Comparative Law Journal* 31.

6 Some academic commentary, with varying legal strength, has been made. See especially Michael Head, *Calling out the Troops: The Australian Military and Civil Unrest: The Legal and Constitutional Issues* (Federation Press, 2009) ('*Australian Military and Civil Unrest*') although that work has now been overtaken by statutory reform.

7 Peta Stephenson, 'Nationhood and Section 61 of the *Constitution*' (2018) 43(2) *University of Western Australia Law Review* 149, 153 ('Nationhood and Section 61').

8 Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16(4) *Public Law Review* 279, 280 ('Inherent Executive Power').

9 *A-G (Cth) v Ogawa* (2020) 384 ALR 474 (Allsop CJ, Flick and Griffiths JJ) uses the nomenclature 'Constitutional executive power': at [68]. This article maintains more nuanced language to help distinguish between nationhood and prerogative powers.

solution by the Commonwealth government.[10] More specifically, the recent *2020 Defence Strategic Update*[11] and *Australia's Cyber Security Strategy 2020*[12] have both noted the importance of the ADF in countering cyber threats. This is unsurprising, considering the constitutional provision for federal intervention, and a history of doing so.[13] The ADF, as per recent domestic operations, demonstrates an ability to conduct operations without the need for external logistical support.[14] Additionally, the ADF has a large pool of well-trained personnel as well as unique capabilities to counter non-routine threats.[15] This makes the ADF the Commonwealth government's 'go to' agency to assist states and territories in resolving large scale domestic disasters.[16]

While there are civilian agencies that may be more focused on countering cyber threats, it is also clear that the Commonwealth government sees the use of the ADF as an option in countering cyber threats as well. Whether the ADF is best suited for this role or not, the question remains as to what legal authority there may be for the ADF to carry it out. As both authors have noted in previous publications, it is important that the legal frameworks surrounding emerging threats be articulated, or at least explored, in order to empower and protect both citizens and 'citizens in uniform'.[17] This work continues in this vein.

Accordingly, this article is divided as follows. First, it outlines the nature of the threat, before explaining the existing legal interpretations of Australian domestic operations. Often, discussion revolves around the concept of 'domestic violence' under s 119 of the *Constitution*. This article, however, argues that the nationhood power is a valid non-statutory source of executive power to enable counter-cyber operations, absent domestic violence. It considers the history and ambit of the nationhood power, its jurisprudential evolution, as well as the practical issue of delineating its breadth, and, perhaps more importantly, its depth in countering interference operations.

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10 Scott Morrison and David Littleproud, 'Bushfire Relief and Recovery' (Joint Media Release, Department of Defence, 4 January 2020).

11 Department of Defence (Cth), *2020 Defence Strategic Update* (Report, 1 July 2020) 36 ('*DSU*').

12 Department of Home Affairs (Cth), *Australia's Cyber Security Strategy 2020* (Report, 6 August 2020) 32 [67].

13 See generally White, *Keeping the Peace of the Realm* (n 4) 33–81.

14 *DSU* (n 11) 22.

15 Ibid 25.

16 Australian National Audit Office, *Emergency Defence Assistance to the Civil Community* (Audit Report No 24, 16 April 2014) 12.

17 Samuel C Duckett White, 'A Soldier by Any Other Name: A Reappraisal of the "Citizen in Uniform" Doctrine in Light of Part IIIAAA of the *Defence Act 1903* (Cth)' (2019) 57(2) *Military Law and Law of War Review* 279. See also Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (ANU Press, 2017) ('*Crown and Sword*'). The term relates to the idea that Service personnel still retain their civilian rights, even when in military uniform.

II Interference Operations in the Grey Zone

The difficulty with scholarly analysis of domestic security operations lies within the interpretation of one key constitutional provision: s 119. Noting the term 'domestic violence' has been analysed to refer to instances of 'tearing the social fabric'.[18] The provision reads:

> **119 Protection of States from invasion and violence**
>
> The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.[19]

Although described as the 'wallflower of the *Constitution*',[20] the provision is anything but that. It can be interpreted as a reaffirmation of the enumerated powers doctrine, and a confirmation of the reserve powers of state authority. Such a reading suggests that the ADF cannot be deployed below this threshold. Yet, it can also be read as a non-exhaustive grant of federal power. Either way, without any legislation addressing the domestic deployment of ADF members below the threshold of domestic violence, a gap currently exists in lawful authorities. Nowhere does this tension come into play more than with the emerging threat of interference operations.

As noted above, Australia defines interference operations as covert, corrupt or coercive measures that attempt, *inter alia*, to affect the exercise of an Australian democratic or political right or duty.[21] Whilst cyber-enabled interference operations may seek to corrupt the information environment through hack-and-leak operations, amongst others, the ADF is more likely to be employed against a more direct threat: cyber-enabled interference operations targeting voting infrastructure. This article will use this example to draw out the relevant legal issues, although there could be others: such as the use of ransomware to disable critical infrastructure;[22] or botnet attacks to disable the banking, telecommunications or transport systems.[23]

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18 Or, more simply, 'tearing the social fabric' refers to riots that go beyond the capacity of police. Sir 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, 224.

19 *Constitution* s 119.

20 Peta Stephenson, 'Fertile Ground for Federalism? Internal Security, the States and Section 119 of the *Constitution*' (2015) 43(2) *Federal Law Review* 289, 290 ('Fertile Ground for Federalism?').

21 See above n 3.

22 Edwina Seselja, 'Cyber Attack Shuts Down Global Meat Processing Giant JBS', *ABC News* (online, 1 June 2021) <https://www.abc.net.au/news/2021-05-31/cyber-attack-shuts-down-global-meat-processing-giant-jbs/100178310>.

23 This is similar to what occurred in Estonia in 2007. See Damian McGuinness, 'How a Cyber Attack Transformed Estonia', *BBC News* (online, 27 April 2017) <https://www.bbc.com/news/39655415>.

Electoral interference operations aim to exploit the ubiquity and vulnerability of digital connections and remotely alter elections and referenda.[24] They can also aim to crash electoral servers at critical moments through distributed denial of service attacks (DDoS), in order to spread doubt as to the legitimacy of the votes. Elections and referenda 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 legitimacy'.[25] Their low cost is compounded by the fact that sometimes, it is simply the *act* of interfering in elections which results in a strategic effect being achieved: long term erosion in confidence in a targeted government.[26]

In 2017, the former Director-General of Security (head of the Australian Security Intelligence Organisation), 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',[27] on a scale and intensity that 'exceeds any similar operations launched against the country during the Cold War, or in any other period'.[28] This is corroborated by open source material published by leading social media companies, who monitor their sites for instances of malicious social manipulations.[29]

These operations fall below most international legal thresholds, particularly notions of use of force, breach of sovereignty, and prohibited intervention.[30] They may further fall below domestic legal thresholds, such as the constitutional concept of domestic violence. This is a typical grey zone tactic.

There is no common definition of 'grey zone' activities and operations, for it is a relative term relying on ambiguity and uncertainty. Its relativity, in turn, is to known legal and policy frameworks of the day. The term therefore encompasses a range of activities designed to coerce countries in ways that seek to avoid military

24 Sarah O'Connor et al, *Cyber-Enabled Foreign Interference in Elections and Referendums* (Report No 41, October 2020) 1.

25 Ibid 5.

26 Fergus Hanson et al, *Hacking Democracies: Cataloguing Cyber-Enabled Attacks on Elections* (Report No 16/2019, May 2019) 4; Zoe Hawkins, *Securing Democracy in the Digital Age* (Report, 29 May 2017).

27 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 24 October 2017, 128 (Duncan Lewis).

28 Duncan Lewis, *ASIO Annual Report 2019–20* (Report, 4 September 2019) 3.

29 Facebook, *Threat Report: The State of Influence Operations 2017–20* (Report, May 2021).

30 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 N Schmitt, '"Virtual" Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law' (2018) 19(1) *Chicago Journal of International Law* 30, 32.

conflict,[31] which, in turn, could cross the threshold of international law between war and peace. This threshold is set rather high, best epitomised by Lassa Oppenheim's works on war and peace.[32] Grey zone operations do not respect binary distinctions between peace and war. They aim to exploit publicly stated and acknowledged policy gaps between peace and war, but also other cleavages within society, such as between components of a federal system of government, where public order and defence responsibilities are likely to be ill-defined.

A *Likely Tasks for the ADF*

It is significant then that the Commonwealth government has ordered the ADF to prepare to counter these operations. A plausible scenario in which the government might rely upon the ADF to conduct counter cyber-enabled interference operations could be a sustained cyber attack on the tally room on a federal or state election night, along with the communications supporting it, casting into the doubt the legitimacy of the election result in relation to an election. This could occur on such a scale that it is beyond the capacity of the agencies normally tasked with counter cyber-enabled operations to cope.

The agencies that are normally meant to counter cyber attacks are the Australian Security Intelligence Service ('ASIS'), the Australian Signals Directorate ('ASD') and the Australian Geospatial-Intelligence Organisation ('AGO'). Section 476.6 of the *Criminal Code Act 1995* (Cth) ('*Criminal Code Act*') identifies these agencies as having this role through the immunity it provides.

The immunity for these agencies has historically been in relation to their roles *outside* of Australia, which is where their focus lies. Whilst cyber-enabled interference operations are very likely to be acts of foreign interference, the effects in question occur domestically, as can more general cyber actions. It is very possible that these agencies would not have sufficient capacity, or immunity, to address the full range of potential domestic cyber-enabled interference operations. The ADF could fill this gap in an emergency, particularly in relation to interference operations directed against the Commonwealth government's information infrastructure.

The problem is that most of the likely actions in response could be criminal offences under pt 10.7 of the *Criminal Code Act*, hence the immunity for ASIS, AGO and ASD in relation to a *computer-related act, event, circumstance or result*. This is defined as:

> an act, event, circumstance or result involving:
>
> (a) the reliability, security or operation of a computer; or
>
> (b) access to, or modification of, data held in a computer or on a data storage device; or

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31 *DSU* (n 11) 12 [1.4]–[1.5].

32 Lassa Oppenheim, *International law: A Treatise* (Perlego, 2nd ed, 2012) vol 1.

> (c) electronic communication to or from a computer; or
>
> (d) the reliability, security or operation of any data held in or on a computer, computer disk, credit card, or other data storage device; or
>
> (e) possession or control of data held in a computer or on a data storage device; or
>
> (f) producing, supplying or obtaining data held in a computer or on a data storage device.[33]
>
> …
>
> **Division 477 — Serious computer offences**
>
> 477.1 Unauthorised access, modification or impairment with intent to commit a serious offence
>
> …
>
> 477.2 Unauthorised modification of data to cause impairment
>
> …
>
> 477.3 Unauthorised impairment of electronic communication[34]

As no immunities currently exist, any individual undertaking activities pursuant to tasking by the Australian Commonwealth government of the ADF to respond to potential cyber threats would, at the moment, risk breaching statutory provisions. Some examples discussed below illustrate the difficulty.

The ADF may utilise traceroutes, which are a tool used to track packets sent along an internet protocol network originating from the home network that employs the traceroute.[35] The analogue equivalent would be the use of intelligence, surveillance and reconnaissance units to follow potential criminals, at the behest of the civilian authority.[36] The ADF could utilise the data gained in these traceroutes to build user profiles on possible individuals and organisations that conduct interference operations, so as to allow the Commonwealth to prepare to exercise its powers to execute and maintain a law of the Commonwealth.

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33 *Criminal Code Act* (n 3) s 476.6(10) (definition of 'computerrelated act, event, circumstance or result').

34 Ibid ss 477.1–477.3.

35 Wyatt Hoffman and Steven Nyikos, 'Governing Private Sector Self-Help in Cyberspace: Analogies from the Physical World' (Working Paper, Carnegie Endowment for International Peace, December 2018) 14.

36 Information gathering has already occurred under non-statutory executive power by ADF personnel. Notably, the evidence collected supported the Commonwealth's litigation in *Commonwealth v Tasmania* (1983) 158 CLR 1. See: Commonwealth, *Parliamentary Debates*, Senate, 21 April 1983, 41 (Senator Durak) (Senator Evans); Commonwealth, *Parliamentary Debates*, Senate, 5 May 1983, 249–50, 255–6, 257–8 (Senator Walters) (Senator Evans).

Further, logic bombs are coding that result in aggressive action external to the network (like responding with packets that freeze or damage systems).[37] In an analogue sense, it is perhaps closest to creating a dangerous perimeter or electric fence, without providing any notice. Responding to hostile IP addresses with logic bombs risks affecting the reliability, security or operation of data held in or on a computer and other storage devices, rendering such conduct an illegal act.[38] A third option for particularly dire circumstances would be the use of kill switches to shut down segments of the internet, or particular telecommunication or radio-communication frequencies.[39] Such an action goes to the heart of the operation of a computer and would be prohibited. It may further violate common law protections of the body,[40] and, violate common law rights in relation to private property which are protected by the tort of trespass and other torts.[41] Also, as there has been little to no research conducted in this area, it is unclear to what extent the ADF could be ordered to write comments on social media posts in an attempt to counter the interference being caused. This form of domestic operation has occurred in Israel,[42] and might be a plausible model under the current concept of 'spontaneous volunteers'[43] — that being, the ADF member acting as a 'citizen in uniform'.

Generally speaking, however, as there is no other source of statutory power for the ADF, the only authority upon which the ADF could conduct these actions would be a valid exercise of Commonwealth executive power. It is not for an ADF member to refuse an order which is not manifestly unlawful. ADF members have an obligation to obey orders[44] and obedience to the directions of government ensures that the ADF remains apolitical and subservient.[45] This article will now discuss how the nationhood power aspect of constitutional executive power may provide a source of legal authority for the three aforementioned options for ADF counter cyber-enabled interference operations.

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37 Hoffman and Nyikos (n 35) 17.

38 Ibid 21.

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

40 *Binsaris v Northern Territory* (2020) 270 CLR 549, 561 [25] (Gageler J).

41 *Coco v The Queen* (1994) 179 CLR 427, 435 (Mason CJ, Brennan, Gaudron and McHugh JJ).

42 Israel utilises its diaspora, connecting pro-Israeli citizens and military in a civic-military centre to conduct hasbara, defined as 'explaining': see Peter Singer and Emerson Brooking, *LikeWar: The Weaponization of Social Media* (Mifflin Harcourt, 2018) 198. For the Israeli Supreme Court case that dealt with its constitutionality, see *Adalah Legal Center for Arab Minority Rights in Israel v State Attorney's Office* [2021] HCJ 7486/19 (Supreme Court of Israel).

43 *Royal Commission into Natural Disaster Arrangements* (Report, 28 October 2020) 192, [7.29] ('*NDA Royal Commission*').

44 *Defence Force Discipline Act 1982* (Cth) s 29.

45 Moore, *Crown and Sword* (n 17) 93–8.

III Reconciling Constitutional Provisions

Commonwealth executive power is elusive, for it is 'described but not defined in sec[tion] 61'[46] 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.[47]

To claim that this provision adequately describes the power would be a generous statement. It is anything but described; indeed, Commonwealth executive power is not 'amenable to exhaustive definition'.[48] It has been held, however, that the term includes at least three forms of Commonwealth executive power: statute, the prerogative, and the implied nationhood power. This article is concerned with the last category, the so-called 'nationhood power', derived as an implication from the character and status of the Commonwealth as a national government, as well as the express aspect of the power which 'extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth'.[49] The term 'execution' is attributable to Sir Samuel Griffith, who successfully inserted the term in the 1891 Sydney Convention, assuring delegates the clause was 'quite free from ambiguity'.[50] For the most part, it is rather straightforward and just relates to 'the doing of something immediately prescribed or authorized' by the *Constitution* or Commonwealth laws.[51] As held in *Re Tracey; Ex parte Ryan*, in relation to the defence power under s 51(vi) of the *Constitution*, although the work of law enforcement 'is not the ordinary function of the armed services' it is still permissible.[52] So too was the interdiction undertaken by a Naval Officer in *HMAS Aware* 10 nautical miles from the baseline of the Gulf of Carpentaria found permissible, on the basis that the ADF was enforcing the laws of the Commonwealth.[53]

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

47 *Constitution* s 61.

48 *Davis* (n 46) 107 (Brennan J).

49 Windeyer (n 18) 211–6. See Nicholas Condylis, 'Debating the Nature and Ambit of the Commonwealth's Non-Statutory Executive Power' (2015) 39(2) *Melbourne University Law Review* 385.

50 *Official Report of the Australasian Federal Convention Debates*, Sydney, 6 April 1891, 778 (Sir Samuel Griffith).

51 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 230 (Williams J) ('*Communist Party Case*'), quoting *Wooltops Case* (n 46) 432.

52 (1989) 166 CLR 518, 540 (Mason CJ, Wilson and Dawson JJ).

53 *Li Chia Hsing v Rankin* (1978) 141 CLR 182, 195.

On the other hand, the maintenance limb of Commonwealth executive power, specifically manifested in the nationhood power, really is not at all free from ambiguity. Justice Williams defined the term as 'the protection and safeguarding of something immediately prescribed or authorised by the *Constitution* or Commonwealth laws'.[54] As expanded upon below, it may extend further than this. The real question is — to what extent?

Discussions surrounding the nationhood power have been described as trying to answer 'the question yet written'.[55] Indeed, even its nomenclature is a matter of debate — the majority judgment in *Pape v Commissioner of Taxation* ('*Pape*') seemed anxious to eschew any reference to this form of power as a 'nationhood power', assiduously avoiding giving it a name or description.[56] It has, however, been referred to in later judgments and academic literature as the nationhood power, and as such, this naming convention will be continued for ease of reference.[57]

The notion of maintaining the *Constitution* would logically extend to protecting the Commonwealth from overthrow or subversion,[58] and protecting the rule of law.[59] A broader interpretation of the inherent nationhood power finds its origins in the judgment of Mason J in the *AAP Case*.[60] His Honour held that 'the Commonwealth enjoys, apart from its specific and enumerated powers, certain implied powers which

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54 This was adopted in relation to the 'execution and maintenance' of Commonwealth laws in *Re Residential Tenancies Tribunal (NSW), Ex parte Defence Housing Authority* (1997) 190 CLR 410, 464 (Gummow J).

55 James A Thomson, 'Executive Power, Scope and Limitations: Some Notes from a Comparative Perspective' (1983) 62(3) *Texas Law Review* 559, 561.

56 What is to be understood from this judgment is that the High Court of Australia avoided the use of the term 'nationhood power'. The whole judgment stands for this negative point: *Pape v Commissioner of Taxation* (2009) 238 CLR 1 ('*Pape*'). The nationhood power has been described as 'the power that dare not be named' in Anne Twomey, 'Pushing the Boundaries of Executive Power: *Pape*, The Prerogative and Nationhood Powers' (2010) 34(1) *Melbourne University Law Review* 313, 317.

57 See, eg: *Williams v Commonwealth* (2012) 248 CLR 156, 267 [240] (Hayne J) ('*Williams*'); *Williams v Commonwealth [No 2]* (2014) 252 CLR 416, 454 [23] (French CJ, Hayne, Kiefel, Bell and Keane JJ) ('*Williams [No 2]*'); George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983); PH Lane, *Lane's Commentary on the Australian Constitution* (LBC Information Services, 2nd ed, 1997) 130–1; Gabriël A Moens and John Trone, *Lumb & Moens' The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 7th ed, 2007) 209; Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentaries and Materials* (Federation Press, 4th ed, 2006) 534–45; Jennifer Clarke et al, *Hanks' Australian Constitutional Law: Materials and Commentaries* (LexisNexis Butterworths, 8th ed, 2009) 1034–7. Cf Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 414–15, where it is referred to as the 'implied national power'.

58 *Pape* (n 56) 83 (Gummow, Crennan and Bell JJ).

59 Twomey (n 56) 314, 331.

60 *Victoria v Commonwealth* (1975) 134 CLR 338, 397 ('*AAP Case*').

stem from its existence and its character as a polity'.[61] This position was adopted by the majority in the *Pape* case.[62] That aspect of the Commonwealth's executive power is 'to be measured by reference to Australia's status as a sovereign nation'[63] and encompasses powers necessary for 'the protection of the body politic or nation of Australia'.[64] It enables the Commonwealth executive 'to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'.[65]

There has been clear approval of the nationhood power by the High Court of Australia in *Pape*, which concerned the validity of payments made to taxpayers under the *Tax Bonus Act 2009* (Cth). The payments were part of a Commonwealth government fiscal stimulus package designed to counter the effects of the global financial crisis. The question was whether s 61 of the *Constitution*, in combination with the incidental power under s 51(xxxix), authorised the *Tax Bonus Act 2009* (Cth). The majority judgments strongly confirmed the existence of a nationhood power. Justices Gummow, Crennan and Bell went so far as to say that the fiscal response to the crisis was 'somewhat analogous to determining a state of emergency in circumstances of a natural disaster', for which only the national government had the means to respond.[66] Importantly French CJ saw this power as not just a power to legislate:

> While history and the common law inform its content, … [section 61] is not a locked display cabinet in a constitutional museum. It is not limited to *statutory powers and the prerogative*. It has to be capable of serving the proper purposes of a national government.[67]

This reflects an earlier principle of constitutional interpretation expressed by Isaacs J, that it was indeed the High Court's duty to 'recognize the development of the Nation and to apply established principles to the new positions which the Nation in its progress from time to time assumes'.[68] This is because 'it is 350 years and a civil war too late for the Queen's court to broaden the prerogative'.[69] Using this framework, it is important to remember that, at the time of the Glorious Revolution 350 years ago (after which there could be no new prerogatives of the Crown), federalism was not a concept that was recognised, nor were cyber interference operations.

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61 Ibid.

62 *Pape* (n 56) 50 [95], 61 [129], 63 [133] (French CJ), 87–8 [228] (Gummow, Crennan and Bell JJ), 116 [329] (Hayne and Kiefel JJ), 177–81 [511]–[520] (Heydon J).

63 *Ruddock* (n 46) 542 [191] (French J).

64 *Pape* (n 56) 83 [215] (Gummow, Crennan and Bell JJ).

65 *AAP Case* (n 60) 397 (Mason J).

66 *Pape* (n 56) 89 [233].

67 Ibid 60 [127] (emphasis added).

68 *Wooltops case* (n 46) 438.

69 *BBC v Johns* [1965] Ch 32, 79 (Diplock LJ).

IV Breadth and Depth

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.[70] This practice was adopted by Gageler J in *Plaintiff M68/2015*, who explains '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',[71] whilst 'depth' denotes 'the precise actions which the Executive Government is empowered to undertake in relation to those subject matters'.[72] It can moreover be understood to limit the Commonwealth executive government's ability to undertake 'coercive activities'. Although not strictly adhered to as a model for analysis by the Court[73] it remains 'a helpful conceptual framework for explaining and understanding the relationship between nationhood and s 61 of the *Constitution*'.[74]

A *Breadth — Commonwealth Interest*

Due to its inherent nature, the nationhood power can only be invoked in a manner consistent with Australia's federal structure. The federal sphere of responsibility is generally coincident with the Commonwealth's legislative powers.[75] Consequentially, Mason J held that

> there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity

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70 Winterton, *Parliament, the Executive and the Governor-General* (n 57).

71 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 96 [130] (Gageler J) ('*Plaintiff M68/2015*'), quoting Winterton, *Parliament, the Executive and the Governor-General* (n 57) 29, 111.

72 *Plaintiff M68/2015* (n 71) 96 [130], quoting Winterton, *Parliament, the Executive and the Governor-General* (n 57) 29, 11.

73 *Williams [No 2]* (n 57). On this point, French CJ in *Williams* (n 57) 188–9 referred approvingly to the following passage in *AAP Case* (n 60) 378–9, where Gibbs J stated:

> > According to s 61 of the Constitution, the executive power of the Commonwealth 'extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth'. Those words limit the power of the Executive and, in my opinion, make it clear that the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth.
>
> In the same paragraph French CJ also stated:
>
> > Barwick CJ said that the Executive 'may only do that which has been or could be the subject of valid legislation' [at 362] … The content of executive power as Mason J explained it 'does not reach beyond the area of responsibilities allocated to the Commonwealth by the *Constitution*' [at 396].
>
> See also *Williams* (n 57): at 229–32 (Gummow and Bell JJ), 271–2 (Hayne J), 302–8 (Heydon J), 364, 371 (Kiefel J).

74 Stephenson, 'Nationhood and Section 61' (n 7) 153.

75 *AAP Case* (n 60) 362 (Barwick CJ), 379 (Gibbs J), 396–7 (Mason J), 405–6 (Jacobs J).

> to engage in enterprises and activities *peculiarly adapted to the government* of a nation and which *cannot otherwise be carried on for the benefit of the nation*.[76]

These issues must thus be dealt with.

1 *Peculiarly Adapted*

What then, are the criteria for determining what executive power flows from the existence and character of the Commonwealth as a national government? The short answer is that there are none. A logical starting point then, is to note the federal distribution of military power under the *Constitution*. Section 114 precludes a state from raising or maintaining any naval or military force 'without the consent of the Parliament of the Commonwealth'[77] and commentary suggests that s 119 places a corresponding duty on the Commonwealth to protect states from invasion; or domestic violence.[78]

It is clear that the *Constitution* assumes that some internal disturbances, namely domestic violence, can flow into the Commonwealth's area of responsibility. This is reflected in the Addendum to the Explanatory Memorandum to the Defence Amendment (Call out of the Australian Defence Force) Bill 2018 ('Addendum to the 2018 Explanatory Memorandum'), which explains that domestic violence

> 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*, which deals with state requests for assistance in responding to domestic violence.[79]

Notably, the same Addendum to the 2018 Explanatory Memorandum further states that:

> Peaceful protests, industrial action or civil disobedience would not fall within the definition of 'domestic violence'.[80]

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76 Ibid 397 (emphasis added).

77 *Constitution* s 114.

78 The extent to which s 119 acts as a protection against federal intervention, or a grant of federal power, is open for debate, see Moore, *Crown and Sword* (n 17) 165–7. On the topic more generally in the American context, see Jay S Bybee, 'Insuring Domestic Tranquility: *Lopez*, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause' (1997) 66(1) *George Washington Law Review* 1, 33.

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

80 Ibid.

The threshold of domestic violence is thus clearly intended only for situations that rise above simple breaches of public order, which is the responsibility of the states.[81] With respect to cyber-enabled interference operations, there are only razor-thin differences between valid online activism, illegal criminal conduct and modern hybrid warfare.[82] Determining whether cyber-enabled interference operations amount to domestic violence will be an inherently political call, like all classifications of belligerency.[83] Yet, it is clear that the term 'domestic violence' envisages a sui generis state of affairs — above a mere riot. It is highly unlikely that low-level, non-physical interference operations which had no kinetic effect would ever amount to what is a rather high threshold.

Could cyber-enabled foreign interference operations amount to an invasion, for the purposes of s 119? Like its sister term 'domestic violence', 'invasion' is undefined. However, we assert that this term is clearly linked to the notions of physical, kinetic violence and the intrusion (or planned intrusion) of foreign armed forces on Australian soil. Such a possible course of action by a foreign State is best highlighted by Hugh White in his book, *How to Defend Australia*.[84] This form of invasion is unlikely to happen given the difficulty of invading such a large continent over such long distances by sea and air. Whilst a dynamic interpretation could allow for interference operations to fall under the notion of 'invasion', in the absence of significant physical damage, this would be tenuous.

Yet below this threshold it is clear that there exists a power for the Commonwealth to protect itself. This is the focus of the paper; therefore, it is necessary to identify the definition of a Commonwealth interest (that needs protecting). Part IIIAAA of the *Defence Act 1903* (Cth) ('*Defence Act*'), operationalising s 119 of the *Constitution*, relevantly includes provisions that allow for the ADF to be called out in instances where domestic violence would, or would be *likely to*, affect a Commonwealth interest within a state or territory.[85] It is a distinct concept from a state or territory call out, and is a useful starting point in exploring what Parliament believes the breadth of Commonwealth jurisdiction is in a state or territory.

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81 See, eg, *Wooltops Case* (n 46) 443. For further guidance on the meaning of 'domestic violence', see: Head, *Australian Military and Civil Unrest* (n 6) 16. Michael Head, 'Calling out the Troops: Disturbing Trends and Unanswered Questions' (2005) 28(2) *University of New South Wales Law Journal* 479, 481, 505 ('Calling out the Troops'); Stephenson, 'Fertile Ground for Federalism?' (n 20) 298.

82 See, eg, Tom Uren, 'US Pipeline Hack Exposes Major Vulnerabilities', *The Strategist* (online, 27 May 2021) <https://www.aspistrategist.org.au/us-pipeline-hack-exposes-major-vulnerabilities/>.

83 Samuel C Duckett White and Andrew Butler, 'Reviewing a Decision to Call out the Troops' (2020) 99(1) *Australian Institute of Administrative Law Forum* 58. See also Robert McLaughlin, 'Whither Recognition of Belligerency?', *Leiber Institute Series* (Web Page, 17 September 2020) <https://lieber.westpoint.edu/whither-recognition-of-belligerency/>.

84 See generally Hugh White, *How to Defend Australia* (La Trobe University Press, 2019).

85 *Defence Act 1903* (Cth) s 33(1)(i) ('*Defence Act*').

Part IIIAAA fails to provide any definition for the phrase 'Commonwealth interest'. Some interpretive help may be found in the Addendum to the 2018 Explanatory Memorandum, where the term is to be read as including

> the *protection of*: *Commonwealth property or facilities*; Commonwealth public officials; visiting foreign dignitaries or heads of state; and, major national events, including the Commonwealth Games or G20.[86]

This idea of properties and facilities can be traced to the judgment of Dixon J in *R v Sharkey*,[87] who cited from John Quick and Robert Garran with approval:

> 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.[88]

Justice Dixon's statement is highly instructive, and provides a clear authority particularly with respect to federal citizenship and the right of an elector to record votes at federal elections. As the High Court has advised, 'the existence of powers deduced from the establishment and nature of the Commonwealth as a polity is clearest where Commonwealth executive action involves no real competition with the states'.[89] On this basis, a cyber attack on a federal election would clearly be a Commonwealth interest which the Commonwealth could act unilaterally to protect.

In addition, one line of academic thinking suggests that where a Commonwealth law has been affected then, *ipso facto*, a Commonwealth interest has been affected.[90] This would canvass, for the interference scenario, a suite of telecommunication provisions and associated criminal acts, as well as espionage offences even if it

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86 Addendum to the 2018 Explanatory Memorandum (n 79) 2 [163A] (emphasis added). See also *Criminal Code Act* (n 3) s 100.4.

87 (1949) 79 CLR 121, 151 ('*Sharkey*').

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

89 See *Davis* (n 46) 93 (Mason CJ, Deane and Gaudron JJ).

90 Michael White, *Australian Offshore Laws* (Federation Press, 2nd ed, 2009) 113. It may be that a Commonwealth interest does not necessarily require a statute: see Head, 'Calling out the Troops' (n 81).

occurred within a state or territory.[91] This article argues further that a Commonwealth interest may not even require a statute.[92] The protection of Cabinet highlights this. Cabinet is not a statutory body nor a constitutional construct — it is a creature of convention. To argue therefore that Commonwealth interests are limited purely to enumerated constitutional provisions would be unnecessarily inflexible.

At a very minimum, in our view, a Commonwealth interest not based in statute would be the preservation of the *Constitution* and the Australian polity.[93] The preservation of the polity would also extend to external affairs and relations with other nations. Indeed, one of the constitutional bases put forward to justify the 1978 Bowral call out was Australia's obligations under the *Convention on the Protection and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents*.[94] Further, there is a clear public expectation for the ADF to operate and assist, as reflected in the strategic documents outlined above, and discussions arising out of the recent Operation Bushfire Assist 2019 and Operation COVID-19 Assist.[95] This expectation itself could possibly amount to a Commonwealth interest.

Accordingly, it should be argued that the nationhood power extends to the protection of the information environment, and the protection of critical decision points in representative democracy, even if there is no explicit constitutional provision. It is unlikely to extend to the entire information environment — if it were possible to quantify. An appropriate (and narrow) test to support whether the information environment was a Commonwealth interest would be to look at whether the interference operation affected a Commonwealth election.[96]

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91 See *Criminal Code Act* (n 3) pts 10.6, 10.7.

92 Justice Robert M Hope, Parliament of Australia, *Protective Security Review* (Parliamentary Paper No 397, 15 May 1979) 152.

93 Further, a broad interpretation of the phrase could include the common law maxim *salus populi surprema lex*, meaning 'the welfare of the people is the paramount law'. This position is supported, admittedly from a distance, by the position of the then Attorney-General, Robert Garran, when reflecting on s 63(f) of the *Defence Act*: 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 ('Legal Opinion 217').

94 This had been implemented in domestic law by the *Crimes (International Protected Persons) Act 1976* (Cth): Hope (n 92) [3.13].

95 See, eg, Lucia Stein, 'Scott Morrison Says He Shouldn't Have Gone to Hawaii, and Other Moments from the David Speers Interview on the Fires', *ABC News* (online, 12 January 2020) <https://www.abc.net.au/news/2020-01-12/scott-morrison-fires-interview-with-david-speers-key-moments/11860990>. See the level of public expectation of the ADF discussed in: *NDA Royal Commission* (n 43) 187–93.

96 The recent case of *LibertyWorks Inc v Commonwealth* (2021) 391 ALR 188 indeed dealt with the issue of interference operations and the implied freedom of political communication. See also White, 'Keeping the Peace of the iRealm' (n 2).

2 *Not Otherwise Be Carried On*

The second limb is to make an assessment of whether the operation could be carried on by state authorities. Quite simply, Commonwealth elections are a Commonwealth responsibility. The judgment of Gummow, Crennan and Bell JJ in *Pape* can be cited with relevant approval:

> The Executive Government is the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale here. This power has its roots in the executive power exercised in the United Kingdom up to the time of the adoption of the *Constitution* but in form today in Australia it is *a power to act on behalf of the federal polity*.[97]

Although some states may have significantly more capabilities in cyber security and cyber protection, the Commonwealth for the moment would appear best placed to respond to interference operations. The Australian Cyber Security Centre, based within the ASD, provides both training and guidance on cyber security.[98] Its role is to monitor cyber threats, and to act as early warning for Australian individuals and businesses. This reflects that although capabilities differ across states and territories, the Commonwealth has the capacity and resources to not only be able to respond to interference operations, but even to identify them occurring across state borders.

B *Depth*

This article will now turn to the equally (if not more) important discussion of what the depth of action the nationhood power can authorise. Such arguments fall into a narrow or wider interpretation, which are both canvassed below.

1 *A Narrow Interpretation*

A narrow interpretation of nationhood power, as advocated by Peta Stephenson, is that it merely expands the breadth of Commonwealth executive power; not the depth.[99] Accordingly, under a narrow interpretation, the only powers that the ADF could rely upon to conduct counter interference operations would be the powers of members of the ADF as ordinary citizens.

Regarding domestic operations, ADF members and other Defence officials arguably stand in a different position from regular civilians. As ADF members must follow orders, Cameron Moore observes that 'when well-armed, equipped, uniformed and

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97 *Pape* (n 56) 89 [233] (emphasis added).

98 Australian Signals Directorate, 'About the ACSC', *Australian Cyber Security Centre* (Web Page, October 2020) <https://www.cyber.gov.au/acsc>.

99 Peta Stephenson, 'Statutory Displacement of the Prerogative in Australia' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 203.

organised members of the ADF exercise any of the powers of an ordinary citizen it is not the same as any ordinary citizen exercising these powers'.[100] Even so, the High Court has made clear that in the absence of other non-statutory powers and authorities such as prerogative or arguably nationhood power, ADF members operating under their powers as ordinary citizens are still subject to laws of general application.[101]

That being the case, when conducting counter interference operations under a narrow interpretation of nationhood power, ADF members only have the same ability as a civilian to engage in conduct that would not infringe legislation or the common law.[102] This may extend to requesting social media sites to remove content and individuals on the basis that it fails to abide by their own internal policy.[103] In extreme circumstances, under a narrow interpretation of the power, ADF members may also rely upon the defences of necessity, sudden and extraordinary circumstances, or self-defence.[104]

2 *A Wide (and Preferable) Interpretation*

The narrow interpretation is not the sole interpretation of nationhood power. A majority of the commentary surrounding the nationhood power focuses 'on the extent to which it can support facultative measures — for instance, Commonwealth spending, or the establishment of bodies for national purposes such as the celebration of the Bicentenary'.[105] The High Court has also made clear that the nationhood

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100 Moore, *Crown and Sword* (n 17) 178.

101 *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344, 356–7 (Dixon J); *A v Hayden* (1984) 156 CLR 532, 562. See Zines, 'Inherent Executive Power' (n 8) 279–80.

102 *Plaintiff M68/2015* (n 71) 98 [135].

103 Such as Israel's 'Iron Dome of Truth' as reported in Peter Singer and Emerson Brooking, *LikeWar: The Weaponization of Social Media* (Houghton Mifflin Harcourt, 2018) 200.

104 For the defences of arresting a person or preventing crime, see, eg: *Crimes Act 1900* (ACT) s 349ZC; *Criminal Code Act 2002* (ACT) s 41; *Crimes Act 1914* (Cth) s 3Z; *Criminal Code Act 1983* (NT) ss 27(e), 33; *Criminal Code Act 1899* (Qld) ss 25, 266; *Criminal Code Act 1924* (Tas) s 39; *Criminal Code 1913* (WA) ss 25, 243. For the defences of self-defence, necessity or sudden and extraordinary emergency, see, eg: *Zecevic v DPP* (Vic) (1987) 162 CLR 645, 660; *R v Loughnan* [1981] VR 443, 448; *Criminal Code Act 2002* (ACT) s 42; *Criminal Code Act 1995* (Cth) ss 10.3, 10.4; *Crimes Act 1900* (NSW) ss 418–22 (noting that New South Wales has codified the law of self-defence); *Criminal Code Act* (NT) s 28(f); *Criminal Code Act 1899* (Qld) ss 31(1)(c), 271(1), 272, 273; *Criminal Code Act* 1924 (Tas) s 46; *Crimes Act 1958* (Vic) ss 9AB–9AF; *Criminal Code 1913* (WA) ss 31(3), 248, 249, 250; see 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.

105 Shreeya Smith, 'The Scope of a Nationhood Power to Respond to COVID-19: Unanswered Questions', *Australian Public Law* (Blog Post, 13 May 2020) <https://www.auspublaw.org/2020/05/the-scope-of-a-nationhood-power-to-respond-to-covid-19/>.

power is a power that gives 'capacity to engage in *enterprises and activities* peculiarly adapted to the government of a nation'.[106] It would appear, then, that the nationhood power is a power for the Commonwealth to take action for the benefit of Australia; even if that action may be coercive.[107]

Previous cases indicate that the Commonwealth executive government has inherent authority to respond to internal or external threats.[108] As aforementioned, Dixon J believed that federal rights could be protected against domestic violence (with corresponding force) without requests from state or territories. In *R v Kidman*, Isaacs J took this wide interpretation further, describing the nationhood power as a power linked to an 'inherent right of self-protection',[109] which 'carries with it — except where expressly prohibited — all necessary powers to protect itself and punish those who endeavour to obstruct it'.[110] *Pape* has made clear that such powers should be interpreted widely and 'according to no narrow conception of the functions of the central government of a country in the world today'.[111] Thus, this avoids the government having a lacuna in power.

There have been instances of the nationhood power being relied upon to counter violent acts of terrorism within Australia. In 2002 and 2003, fighter jets conducted combat air patrols to protect visiting dignitaries. Operation Guardian II — the operation with respect to the 2002 Commonwealth Heads of Government summit at Coolum — established the operational 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 to prevent a suicidal crash. These security provisions were mirrored a year later when the President of the United States visited in 2003.[112] The statutory provisions at the time did not include any ability to authorise lethal force in air operations, nor did it provide for contingent call outs at the time. No legal basis was established for the operations except to fulfil Australia's legal obligations to protect visiting heads of state.[113]

106 *Pape* (n 56).

107 Ibid.

108 See *R v Kidman* (1915) 20 CLR 425 ('*Kidman*'); *Ex parte Johnson; Re Yates* (1925) 37 CLR 36, 94; *Burns v Ransley* (1949) 79 CLR 101, 116; *Sharkey* (n 84) 148–9; *Communist Party Case* (n 51) 116 (Fullagar J), 187–8 (Dixon J); *Church of Scientology v Woodward* (1982) 154 CLR 25, 54.

109 *Kidman* (n 108) 440.

110 Ibid 444–5.

111 *Pape* (n 56) 61 [87].

112 Department of Defence (Cth), Submission No 6 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Defence Legislation Amendment (Aid to Civilian Authorities) Bill (2005)* (6 February 2006) 10 ('Submission No 6').

113 See generally: *Crimes (Internationally Protected Persons) Act 1976* (Cth); Submission No 6 (n 112) 3.

The concept, however, has been subject to extra-judicial commentary. Sir Victor Windeyer found, in his annex to Justice Robert Hope's *Protective Security Review* written in the aftermath of the 1978 Bowral call out, 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'.[114] 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.[115]

Accordingly,

> the ultimate constitutional authority for the calling out of the Defence Force … 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.[116]

At its widest interpretation then, the nationhood power should be interpreted to allow for minimum necessary coercive and intrusive action, in order to protect a Commonwealth interest from an actual or threatened incident, for matters that are for the benefit of the nation. The force used would need to be reasonable, depending on the scale or nature of the threat. Whilst some may argue that this is normatively undesirable, just as they do with the clear but contested concept of an internal security prerogative, there must be a power that allows for a government to respond to incidents. As Andrew Blick notes: '[s]ome functions of government are universal. They are so important to the basic cohesion of a society that they are common across different time periods, systems and geographic locations'.[117] One such area is ensuring the integrity of the nation in the process of choosing its government through the electoral process.

With respect to countering interference operations then, a wider interpretation of the nationhood power would authorise a wider suite of operations, provided they were necessary and reasonable. In addition to actions identified elsewhere that could be taken under the internal security prerogative (being the preservation of the peace, in the public space),[118] the nationhood power more than likely would allow

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114 Windeyer (n 18) 211, quoting *Australian Military Regulations 1927* (Cth) reg 415.

115 Ibid 211, 279.

116 Ibid 280.

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

118 *R v Home Secretary of State for the Home Department; Ex parte Northumbria Police Authority* [1989] 1 QB 26.

for actions historically reserved for Orders-in-Council under s 63 of the *Defence Act*. This provision empowers the Governor-General '[s]ubject to the provisions of this Act [to] do all matters and things deemed by him or her to be necessary or desirable for the efficient defence and protection of the Commonwealth or of any State'.[119] Historic advice on the provision, by the Secretary of the Attorney-General's Department Robert Garran in 1905, advised that the provision 'is little more than a confirmation, as regards the power of the Executive, of the common law maxim *salus populi surprema lex*'.[120] In modern lexicon, this maxim codifies the breadth and depth of the relevant executive powers, including the nationhood power. Relevantly for counter interference operations, the provision authorised the Commonwealth to interfere with or control the working of submarine cables, and private telegraph lines, in times of war or other emergency.

Equally, on at least two occasions during the First World War, Orders-in-Council appear to have been made under s 63(1)(f) of the *Defence Act* authorising Commonwealth officials to exercise intrusive powers against persons and property. One Order-in-Council provided for members of the armed forces and members of the constabulary to be authorised to enter and search houses, buildings and vessels for the purpose of seizing and carrying away 'arms, explosives, military stores, naval stores, telephones, or wireless apparatus, or enemy documents' considered to be prejudicial to the welfare of the Commonwealth.[121] Another Order-in-Council directed that all merchant ships entering specified major ports 'shall be subject to examination in accordance with the Examination Service for the control of mercantile traffic'.[122]

The digital applications of these analogue examples are easy to make, and a wide interpretation of the nationhood power would hold that an Order-in-Council under the legislative provision would not be necessary (although obviously would be preferable). The nationhood power could also likely extend to mail (now email) interception and modification,[123] so long as the emergency threshold had been met.

The purpose of the nationhood power, implied within s 61 of the *Constitution*, is to ensure and maintain the integrity of the Commonwealth, encompassing the federal and state realms. The nationhood power would be the appropriate power here because, without an identifiable enemy, there would be no basis to exercise powers under the war prerogative.[124] Interference operations in essence are a modern form of fifth-column operations to attack the state from within. The nationhood power should extend to counter such operations.

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119 *Defence Act* (n 85) s 63(1)(f).

120 Garran, 'Legal Opinion 217' (n 93).

121 Commonwealth, *Commonwealth of Australia Gazette*, No 84, 22 October 1914, 2383.

122 Commonwealth, *Commonwealth of Australia Gazette*, No 50, 3 August 1914, 1336.

123 George Winterton, 'The Prerogative in Novel Situations' (1983) *Law Quarterly Review* 99(3) 407, 409.

124 Moore, *Crown and Sword* (n 17) 231–5.

V Limitations on Nationhood Power

As Winterton warned, '[o]nce the *Constitution* ceases to be the criterion of legality, logically there is no limit to executive power, other than the balance of military force within the nation'.[125] Indeed, even with respect to s 63 of the *Defence Act*, in the *Clothing Factory Case* Starke J stated that the provision — a codification of the nationhood power — 'doubtless gives the Governor-General the widest discretion' but added that '[t]he exercise of the Governor-General's discretion must be confined within the constitutional power of the Commonwealth'.[126] It is important to note the limitations then to possible actions taken. So, then, what are the limits of the nationhood power?

The *Constitution* was written on a palimpsest, not a *tabula rasa*.[127] It must be interpreted against the backdrop of fundamental, yet implied, constitutional doctrines including parliamentary supremacy and responsible government. The limits of the executive power are also not easy to delineate, but there are some fundamental rules. Any use of the executive power must be consistent with the basal considerations arising from the federal distribution of powers between the Commonwealth, and the states.[128] Further, the implied freedom of political communication would appear, through *obiter* in various judgments, to act as a limit on executive power.[129] For the ADF to act in response to a cyber attack therefore, a stated above, would require a scale of emergency as envisaged in *Pape.* As quoted above from Gummow, Crennan and Bell JJ:

> The Executive Government is the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale here. This power has its roots in the executive power exercised in the United Kingdom up to the time of the adoption of the *Constitution* but in form today in Australia it is a power to act on behalf of the federal polity.[130]

Chief Justice French saw that the measures in response to the global financial crisis in *Pape* were 'peculiarly within the capacity and resources of the Commonwealth

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125 George Winterton, 'The Concept of Extra-Constitutional Executive Power in Domestic Affairs' (1979) 7(1) *Hastings Constitutional Law Quarterly* 1, 10.

126 *A-G (Vic) ex rel Victorian Chamber of Manufactures v Commonwealth* (1935) 52 CLR 533, 566 ('*Clothing Factory Case*'). Similarly, a very broad view of s 63(1)(f) was adopted earlier by Higgins J in *Kidman v Commonwealth* (1925) 37 CLR 233, 247–8.

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

128 *Williams [No 2]* (n 57) 469 [83]; *Pape* (n 56) [127].

129 See generally 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.

130 *Pape* (n 56) 89 [233].

Government'.[131] Similarly, the use of the ADF would need to meet this test before it could act in response to a cyber attack. There would also need to be a threshold of emergency to justify the use of the ADF where the statutory powers of the relevant civilian agencies were inadequate to cope with the cyber attack.

Critically — unlike under the war prerogative — in the absence of an enemy, there would also be no legal authority to use lethal force.[132] The only exception would be in terms of the criminal law of self-defence.

Still, it is important to recall the position of Isaacs J, where his Honour held that 'the *Constitution* … is not so impotent a document as to fail at the very moment when the whole existence of the nation it is designed to serve is imperilled'.[133] When Isaacs J spoke, in 1916, this moment often was characterised by the kinetic destruction of a nation's military and naval forces, the invasion of land and the raising of the victor's flag in the capital of the enemy. Today, to live without the internet is to challenge the existence of the nation. Very few individuals, let alone businesses and government organisations, can operate in a degraded telecommunications environment. Confidence within, and the security of, the information environment, particularly in relation to elections, is core to the continued existence of representative government.

VI So What? Legislative Amendments

Validly, the question may be raised as to why legislation should not be introduced that plugs this gap, noting that the grey zone it creates has been argued to be a national security threat. There are undeniably benefits in the establishment of a legislative framework to underpin the internal deployment of the ADF.[134] First, codification brings clarity of both the powers and the jurisdiction. As for powers, it is unclear just how much the prerogative powers can evolve from the medieval battlefield on which they were forged, to the modern battlespace (becoming so called 'rusty weapons').[135] As for jurisdiction, the *Royal Commission into National*

131 Ibid 63 [133].

132 Moore, *Crown and Sword* (n 17) 198–200.

133 *Farey v Burvett* (1916) 21 CLR 433, 451.

134 David Letts and Rob McLaughlin, 'Military Aid to the Civil Power' in Robin Creyke, Dale Stephens and Peter Sutherland (eds), *Military Law in Australia* (Federation Press, 2019) 171. By way of example, civilian emergency service agencies possess a wide range of powers and legal protections, as articulated in state and territory legislation, to assist in the completion of their duties. In contrast, ADF members, when providing Defence Assistance to the Civil Community, do not possess powers beyond those of an ordinary citizen. See David Letts, 'Sending in the Military? First Let's Get Some Legal Questions Straightened Out', *The Canberra Times* (online, 7 January 2020) <https://www.canberratimes.com.au/story/6570161/sending-in-the-military-first-lets-get-some-legal-issues-straightened-out/>.

135 *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 122 (Viscount Radcliffe).

Natural Disaster Arrangements highlighted that confusion continues to exist between Commonwealth and state government stakeholders in relation to the role, functions, capabilities and constraints of the ADF in the Defence Assistance to the Civil Community and the Defence Aid to the Civil Authority roles.[136]

Equally, there are arguments that the codification of the internal security prerogative would improve accountability, and make clear the thresholds and triggers to be enacted.[137] As Michael Eburn, an advocate for Commonwealth legislation in relation to emergencies, notes:

> In the absence of counter-disaster legislation there is no process for a formal declaration of disaster or emergency at the national level, and no clear authorisation to waive the application of the 'normal' law or to take extraordinary action that is warranted by the emergency. The Commonwealth may be forced to rely on the historical prerogative power of the Crown, now encompassed in the phrase 'the Executive power of the Commonwealth' and provided for in section 61 of the Australian *Constitution*.[138]

The nationhood power can also be covered under Michael Eburn's quote. The codification of the gap does offer the ability to clarify powers and defences applicable to ADF members. This is one of the major benefits of pt IIIAAA of the *Defence Act,* with its clear defence of superior orders in juxtaposition to the common law.[139]

However, codification does not always bring the clarity it seeks. Part IIIAAA, since its enactment in 2000, was subject to sweeping and major reforms in 2006, and again in 2018, in a bid to

> streamline the legal procedures for call out of the ADF and to enhance the ability of the ADF to protect states, self-governing territories, and Commonwealth interests, onshore and offshore, against domestic violence, including terrorism.[140]

The repeated changing of the statute — not always to expand or contract powers but instead to make the procedures more legible for those exercising them — surely cannot be argued as easing confusion. Further, provisions within pt IIIAAA are even still subject to confusion — such as the extent of 'incidental powers', or the applicability of the defence of superior orders which is complicated and legally

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136 See *NDA Royal Commission* (n 43) 186.

137 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, 266.

138 Michael Eburn, *Emergency Law* (Federation Press, 4th ed, 2013) 149.

139 For the common law defence of superior orders, see *A v Hayden* (1984) 156 CLR 532.

140 Explanatory Memorandum, Defence Amendment (Call out of the Australian Defence Force) Bill 2018 (Cth) 2 [3], as corroborated in the Second Reading Speech for the Bill: Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2018, 6746 (Christian Porter, Attorney-General).

technical (such as the meaning and extent of manifestly unlawful). In many ways, the statute fails to reflect what might actually occur on the battlefield.[141]

If there is to be codification then, let it be drafted with the principle of mission command at the forefront.[142] Mission command is a military doctrinal concept that aims to place trust within junior officers and non-commissioned officers to achieve the intent of their superior officer's orders. It grants junior officers the choice of *means* in order to reach a specified *end*. In the legislative context, it would allow for the designated purpose of the legislation — such as biosecurity and control of public health emergencies — to be achieved by any number of public or private organisations, rather than proscriptively dictating the exact method.

Even then, to quote Cameron Moore in *Military Law in Australia*:

> The current age of legality has such a strong emphasis on precise and certain powers, with increasing volumes of statute and lengthier judgments on the need for authority for executive actions. An approach by the ADF of acting and then waiting to see what the legal consequences might be, if there are any, is strongly at odds with this. The nature of the ADF's role, however, requires such an approach to some extent. The command and discipline of the ADF are meant to enable it to deal with the chaotic uncertainty of war and civil strife, whether at home or overseas. It is foreseeable that these events will occur, hence the existence of a defence force, but the course that such events take is far from foreseeable. Broad and imprecise powers permit a greater flexibility of response. It is not possible to prescribe in advance for every contingency. Terrorist attacks from the air or the need to detain civilians in East Timor were not foreseen, yet they demanded significant responses from the ADF for which there was no statutory authority. The nature of war, internal and external security operations, and command of the forces to respond to them, mean that [any] related non-statutory powers would be inherently unsuited to legislative codification.[143]

Enactment of legislation would complete the recommendations of Justice Hope's review into domestic security operations, conducted over half a century ago,[144]

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141 Samuel White, 'A Shield for the Tip of the Spear' (2021) 49(2) *Federal Law Review* 210–30.

142 Mission command is a military doctrinal concept that aims to place trust within junior officers and non-commissioned officers, to achieve the intent of their superior officer's orders. It allows junior members with the choice of *means* in order to reach a specified *end*. For the concept of legislative mission command, see Justice John Logan, 'Mission Command: Some Additional Thoughts on its Relevant to Policing and the Rule of Law' (Address, Queensland Police Headquarters, 15 Feburary 2018).

143 Cameron Moore, 'Military Law and Executive Power' in Robin Creyke, Dale Stephens and Peter Sutherland (eds), *Military Law in Australia* (Federation Press, 2019) 69, 77.

144 Justice Hope recommended that the ADF internal security operations be conducted under a statutory basis, as there was significant uncertainty (and legal risk) with relying upon common law powers: Hope (n 92) 175.

but to go down the path of codification seems to imply that a valid exercise of constitutional executive power is somehow outside the bounds of accountability. An exercise of the executive power is no longer, as King James I remarked, a subject which is inappropriate 'for the tongue of a Lawyer'.[145] The exercise of the Royal prerogative has been subject to coarse as well as delicate checks and balances in the common law,[146] as well as a clear intent within the *Constitution* for officers of the Commonwealth — which any Minister exercising such prerogative power would constitute — to be justiciable in the High Court.[147]

Significantly, the Commonwealth Parliament has just amended the *Defence Act* to provide immunity from civil and criminal liability for ADF members acting at the direction of the Minister in civil emergencies.[148] The Explanatory Memorandum to the Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020 (Cth) establishes that this is to grant ADF members similar protections to state emergency services personnel.[149] The legislation does not identify the source of the authority for the Commonwealth to act but, as there is no statutory power, it can only be the executive power found in s 61 of the *Constitution*. This is prudent because, as discussed, recent experience has made very clear that it is not possible to predict in advance through legislation what sort of emergency powers might be required in future. The immunity is limited to emergencies which are of a national scale however and the wording of the relevant provisions in the *Defence Act* closely reflects the threshold established in *Pape*:[150]

> the nature or scale of the natural disaster or other emergency makes it necessary, *for the benefit of the nation*, for the Commonwealth, through use of the ADF's or Department's special capabilities or available resources, to provide the assistance.[151]

This protection may be valuable for ADF members engaged in counter cyber-enabled interference operations, should the interference rise to the level of an

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145 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.

146 Walter Bagehot, *The English Constitution* (Chapman & Hall, 2nd ed, 1873) 22. A clear historical example of the use of coarse checks and balances was the impeachment and execution for treason of Thomas Wentworth, the 1st Earl of Strafford, in 1641 for supporting Charles I (as the Crown, which could do no wrong, could not commit treason itself). For a discussion on that topic and the consequential shift in jurisprudence, see Geoffrey Robertson, *The Tyrannicide Brief: The Story of the Man Who Sent Charles I to the Scaffold* (Random House, 2010) 54–7.

147 *Constitution* s 75(v).

148 *Defence Act* (n 85) s 123AA(1).

149 Explanatory Memorandum, Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020 (Cth) 3 [6]–[7].

150 *Pape* (n 56) 89 [233].

151 *Defence Act* (n 85) s 123AA(2)(a) (emphasis added).

emergency. While the Commonwealth will remain liable for actions beyond its power, it would not matter as much for ADF members whether they were operating under the authority of the nationhood power, the prerogative, or as ordinary citizens, even if in uniform.

VII Conclusion

Although the next threat is unknown, it is beneficial to address the ability and capacity of the Commonwealth executive government to respond to the threats of the 21st century. One such threat is interference operations, moulded and shaped by the ubiquity of the internet. In countering these threats of modern information warfare, including the weaponisation of information, the Australian government has determined that the ADF is to prepare to counter non-geographic threats in cyber-space,[152] and to expand its capabilities in a manner that is consistent with a whole of government approach.[153] 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'.[154]

It would be a strange and undesirable outcome if the ADF could not assist in repelling or responding to cyber attacks on Australian elections. While modern applications of Dixon J's reiterated statement are still emerging, it is clear that any interference with a federal elector's rights can and should be protected, with force if necessary. Domestic law and policy, however, has not adapted to meet this change to the ADF's force posture. Even so, it is important to remember that it is a fundamental principle of Australian democracy that the military is subordinate to the civilian government. It does what the civilian government tells it to do, even if the source of authority in executive power may be unclear.[155] The ADF should therefore be expected to act in accordance with the direction of the civilian government to assist, be it on land, sea, air, or online to counter cyber interference operations. The nationhood power should provide the necessary constitutional authority for the ADF to do so, as a matter of the breadth of the executive power under s 61, and the recent amendments to the *Defence Act* to protect ADF members should operate to ameliorate the uncertainties of the depth of that power.

152 Department of Defence (Cth), *2016 Defence White Paper* (Report, 25 February 2016) 34 [1.19].

153 *DSU* (n 11) 25, 33 [3.3].

154 Ibid 27–8 [2.24].

155 See Moore, *Crown and Sword* (n 17) 91–9.