ALARMED, BUT NOT ALERT IN THE 'WAR ON TERROR'? THE HIGH COURT, *THOMAS V MOWBRAY* AND THE DEFENCE POWER

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I Introduction

On 2 August 2007 the High Court handed down its judgment in *Thomas v Mowbray*. The case concerned the constitutional validity of the terrorism control order regime contained in the Commonwealth *Criminal Code*, as used against a Victorian man, Jack Thomas. While the decision dealt with a number of significant constitutional issues, this paper focuses on the Court's use of the Commonwealth's defence power to provide a foundation for the constitutional validity of the impugned legislation. This is, arguably, the most important aspect of the decision. Specifically, the writer argues the following: (i) that the Court's enlarged conception of the defence power was inconsistent with the text of the placitum; (ii) that the Court failed properly to perform the task of characterisation to determine whether the impugned legislation was within the scope of the defence power; and (iii) that the Court, in its invocation of the defence power, mischaracterised the nature of the threat posed to Australia by Jihadist terrorism.[2] In relation to (i)

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[2] The term 'Jihadist terrorism' follows the usage of Goldsmith: see Andrew Goldsmith, 'Preparation for Terrorism: Catastrophic Risk and Precautionary Criminal Law' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 59. It has been chosen in preference to the term 'Islamic terrorism' to avoid the problematic use of the adjective 'Islamic': '[I]t is…irredeemably problematic…to conceive of their being a Muslim response to, or a Muslim view of, anything. No such singular thing exists': Waleed Aly, 'Muslim Communities: Their Voice in Australia's Anti-Terrorism Law and Policy' in Lynch, MacDonald and Williams at 198.

above, the writer reviews the work of Saul and Lindell on the Court's conception of the defence power in *Thomas v Mowbray*, and endorses Saul's 'quantum of harm' test as an appropriate means of defining the boundaries of the defence power. However, in contrast to Saul, the writer's endorsement of Saul's 'quantum of harm' test is not made by reference to the responsibilities of the States in combating crime, but by reference to the text of s 51(vi) itself. Finally, the writer juxtaposes the Court's decision in *Thomas v Mowbray*, in the context of the so called 'war on terror', with the Court's earlier 1951 decision in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 ('*Communist Party Case*'), in the context of the 'threat' posed by communism during the Cold War. The writer concludes that the Court's decision in *Thomas v Mowbray* is likely to suffer in historical comparison with the Court's decision in the *Communist Party Case*.

II The Impugned Legislation

The provisions impugned in *Thomas v Mowbray* (2007) 233 CLR 307 are to be found in Part 5.3 of the *Criminal Code Act 1995* (Cth) ('the Code'). Part 5.3 of the Code is headed 'Terrorism' and was inserted in the Code in 2003 by the *Criminal Code Amendment (Terrorism) Act 2003* (Cth). The *Criminal Code Amendment (Terrorism) Act 2003* (Cth) was enacted by the Commonwealth pursuant to referrals of legislative power by the Parliaments of the States, including the Victorian Parliament.[3] In 2005, the *Anti-Terrorism Act (No. 2) 2005* (Cth) inserted a new Division 104 into Part 5.3 of the Code. This new division provided for a person to be restrained by a judicially imposed 'control order', notwithstanding the absence of any allegation of the commission of any criminal offence.

Division 104 is entitled 'Control Orders'. Subdivision B of Division 104 (ss 104.2 to 104.5 inclusive) provides for the making of an 'interim control order' by a federal court. The critical provision in *Thomas v Mowbray* was s 104.4 which provides as follows:

> 104.4 ***Making an interim control order***
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> (1) The issuing court may make an order under this section in relation to the person, but only if:
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> (a) the senior AFP member has requested it in accordance with section 104.3; and

[3] *Terrorism (Commonwealth Powers) Act 2003* (Vic).

(b) the court has received and considered such further information (if any) as the court requires; and

(c) the court is satisfied on the balance of probabilities:

(i) that making the order would substantially assist in preventing a terrorist act; or

(ii) that the person has provided training to, or received training from, a listed terrorist organisation; and

(d) the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

(2) In determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary and reasonably appropriate and adapted, the court must take into account the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances).

(3) The court need not include in the order an obligation, prohibition or restriction that was sought by the senior AFP member if the court is not satisfied as mentioned in paragraph (1)(d) in respect of that obligation, prohibition or restriction.

The operation of section 104.4 is, in part, derived from the definitions of 'terrorist organisation' and 'terrorist act' which are contained elsewhere in Part 5.3.

The term 'terrorist act' is defined in sub-section 100.1(1) of the Code:

terrorist act means an action or threat of action where:

(a) the action falls within subsection (2) and does not fall within subsection (3); and

(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

(c) the action is done or the threat is made with the intention of:

(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

(ii) intimidating the public or a section of the public.

Sub-sections (2) and (3) then read:

(2) Action falls within this subsection if it:

(a) causes serious harm that is physical harm to a person; or

(b) causes serious damage to property; or

(c) causes a person's death; or

(d) endangers a person's life, other than the life of the person taking the action; or

(e) creates a serious risk to the health or safety of the public or a section of the public; or

(f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:

(i) an information system; or

(ii) a telecommunications system; or

(iii) a financial system; or

(iv) a system used for the delivery of essential government services; or

(v) a system used for, or by, an essential public utility; or

(vi) a system used for, or by, a transport system.

(3) Action falls within this subsection if it:

(a) is an advocacy, protest, dissent or industrial action; and

(b) is not intended:

(i) to cause serious harm that is physical harm to a person; or

(ii) to cause a person's death; or

(iii) to endanger the life of a person, other than the person taking the action; or

(iv) to create a serious risk to the health or safety of the public or a section of the public.

A 'terrorist organisation' is defined in section 102.1 as being either 'an organisation that is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act' or 'an organisation that is specified by the regulations as being a terrorist organisation'.

III *Thomas v Mowbray* — the Factual Background and Antecedent Litigation

A *R v Thomas*

In November 2004, Joseph Terrence Thomas, an Australian citizen and resident of Williamstown in Victoria, was charged with a number of terrorism offences under Part 5.3 of the Code, and one count of possessing a falsified Australian passport contrary to section 9A(1)(e) of the *Passports Act 1938* (Cth). These charges related to his travelling to Pakistan and Afghanistan in 2001 where he undertook paramilitary training in a camp run by Al Qa'ida. Al Qa'ida, although not a listed terrorist organisation at the time Thomas received training from it, was retroactively declared a listed terrorist organisation under section 4A of the *Criminal Code Regulations 2002* (Cth).[4] Thomas was tried in the Supreme Court of Victoria in February 2006 and convicted of the *Passports Act* offence and one count of intentionally receiving funds from a terrorist organisation contrary to s 102.6(1) of the Code. He was acquitted of other charges which related to the alleged provision of resources to a terrorist organisation. Subsequently, Thomas successfully appealed against his convictions.[5] On the application of the Commonwealth Director of Public Prosecutions, the Victorian Court of Appeal then adjourned for a further hearing on the question of whether there should be directed acquittals, or an order for a retrial, in relation to the offences against s 102.6(1) of the Code and the *Passports Act*.[6]

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4 For a discussion of the history of the listing of Al Qa'ida as a terrorist organisation, see *Thomas v Mowbray* (2007) 233 CLR 307, 491-2 [549] (Callinan J), 471 [486] (Hayne J).

5 The convictions were quashed on 18 August 2006 by the Victorian Court of Appeal: *R v Thomas* (2006) 14 VLR 475.

6 *R v Thomas* (2006) 14 VLR 475, 509. On 20 December 2006 the Court of Appeal ordered a retrial: see *R v Thomas (No.3)* (2006) 14 VLR 512. In 2008, after a further unsuccessful challenge by Thomas to his retrial (see *R v Thomas (No. 4)* [2008] VSCA 107 (Unreported, Maxwell P, Buchanan and Vincent JJA, 16 June 2008)), Thomas was retried and acquitted, on 23 October 2008, of the charge of intentionally receiving funds from a terrorist organisation, and found guilty of the charge of being in possession of a falsified passport (see Kate Hagan, 'Jack Thomas goes free after six year battle against terrorism charges', *The Age* (Melbourne) 24 October 2008, 7). Thomas was ultimately sentenced on 29 October 2008 to a nine month term of imprisonment for the *Passports Act* offence, with 265 days reckoned as already having been served, leaving only five days to serve for

B *Jabbour v Thomas*

While the Victorian Court of Appeal was adjourned on the question of whether it should direct acquittals, or order a retrial, Australian Federal Police Officer Ramzi Jabbour made application for an interim control order against Thomas pursuant to Division 104 of the Code. This application was granted by Federal Magistrate Mowbray on 27 August 2006.[7] Critical to Mowbray FM's decision was that Thomas, on his own admission, had received training from Al Qa'ida in 2001-2002.[8]

Under the interim control order, various restrictions were placed on Thomas's liberty. These included a curfew which required him to be at home between midnight and 5am each day, a condition to report three times a week to the police and a prohibition on his communicating with numerous listed individuals.[9] The hearing to confirm the control order pursuant to section 102 of the Code was subsequently adjourned, pending a High Court challenge by Thomas to the constitutionality of Division 104.

IV *Thomas v Mowbray* — the High Court judgment

A *Introduction*

The High Court, by a majority of five to two (Gleeson CJ, Heydon, Callinan, Gummow and Crennan JJ, with Hayne and Kirby JJ dissenting) upheld the constitutional validity of Division 104. Of the two minority Justices, only Kirby J found the impugned legislation to be invalid both as lacking a constitutional head of legislative power, and as violating the separation of powers doctrine; Hayne J only found the impugned provisions to be invalid on the latter ground.

The heads of power relied upon by the Commonwealth in argument were (i) the defence power [s 51(vi)], (ii) the external affairs power [s 51(xxix)], (iii) the referral power [s 51(xxxvii)], and the 'nationhood power' [s 51(xxxix) in combination with s 61]. All receive some detailed

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which he was released on a $1000 recognisance (see 'Thomas walks free', *The Age* (Melbourne) 30 October 2008, 2).

7 *Jabbour v Thomas* [2006] FMCA 1286 (27 August 2006).

8 Ibid [10]-[35].

9 For details of the restrictions placed on Thomas see *Thomas v Mowbray* (2007) 233 CLR 307, 492-5 [554] (Callinan J).

consideration, save for the nationhood power,[10] although the defence power was the primary head of power invoked by the Court.

B *The Ambit of the Defence Power as Defined in* Thomas v Mowbray

1 *Introduction*

Thomas argued that the impugned legislation was not supported by the defence power, as (i) the power is exclusively confined to combat acts of aggression or threats emanating from a foreign power (as opposed to those emanating from private terrorist groups such as Al Qa'ida), and (ii) that the acts of aggression or threats must be directed towards the body politic, rather than individuals, or a section of the public, or the public generally.[11] Thomas's first argument was rejected by all Justices of the Court; whereas the second argument was rejected by all Justices save for Kirby J.

2 *External and Internal Threats*

Prior to *Thomas v Mowbray*, the 'basic connotation' of the defence power related to external threats,[12] with internal threats falling within the ambit of the 'nationhood power' (to the extent that their curtailment was a Commonwealth responsibility),[13] or within the powers of the various State Governments with respect to domestic 'law and order'. Thus, in the *Communist Party Case*, Fullagar J opined 'the "defence" to which s 51(vi) refers is the defence of Australia against external enemies: it is concerned with war and the possibility of war with an extra-Australian nation or organism'.[14]

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10 Cf ibid 402 [268] (Kirby J).

11 See ibid 313, 362 [141]-[142] (Gummow and Crennan JJ), 452 [424] (Hayne J).

12 Gabriel Moens and John Trone, *Lumb & Moens' The Constitution of the Commonwealth of Australia Annotated* (6th ed, 2006) 105 [239]. See also *Communist Party Case* (1951) 83 CLR 1, 259, 268 (Fullagar J), 191-2, 194 (Dixon J), 216 (Williams J).

13 Moens and Trone, above n 11, 105 [239]. See also Geoffrey Lindell, 'The Scope of the Defence and Other Powers in the Light of *Thomas v Mowbray*' 10(3) *Constitutional Law and Policy Review* 42, 43.

14 *Communist Party Case* (1951) 83 CLR 1, 259. See also *Communist Party Case* at 194 (Dixon J).

This basic connotation of the defence power, as related to Australia's defence against its external enemies, was likely informed by the circumstances in which defence power cases were litigated. As noted by Hayne J in *Thomas v Mowbray*, 'apart from the *Communist Party Case* and *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177, the decisions of [the High Court] about the defence power have for the most part focused upon issues presented in the context of either the First or the Second World War'.[15] Nevertheless, prior to *Thomas v Mowbray*, there was some authority for the extension of the defence power to matters of internal, as well as external security.[16] Importantly, this enlarged conception of the defence power is endorsed in *Thomas v Mowbray*.

There was clearly an external aspect to the alleged terror threat posed by Thomas, given his training outside Australia with an international terrorist organisation.[17] However, *Thomas v Mowbray* provides unanimous authority for the proposition that 'there need not always be an external threat to enliven the [defence] power'.[18] For Gummow and Crennan JJ (with whom Gleeson CJ, Heydon J and Callinan J agreed)[19] the defence power extends to 'the defence of the realm',[20] a notion which is inclusive of both internal and external threats:[21] '…there was a long history in English law before the adoption of the constitution which concerned defence of the realm against threats posed internally as well as by invasion from abroad by force of arms'.[22] Moreover, the

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15 *Thomas v Mowbray* (2007) 233 CLR 307, 449 [411].

16 *Re Aird; Ex parte Alpert* (2004) 220 CLR 308, 318 [28] (McHugh J), 327-8 [61] (Gummow J); *Farey v Burvett* (1916) 21 CLR 433, 440 (Griffith CJ).

17 *Thomas v Mowbray* (2007) 233 CLR 307, 451 [419], 457 [437], 458-9 [442] (Hayne J).

18 Ibid 395 [251] (Kirby J). See also at 503 [583] (Callinan J).

19 Ibid 511 [611] (Heydon J), 324-5 [6]-[7] (Gleeson CJ), 503 [583] (Callinan J). Hayne J declined to express an opinion on this point: at 451 [419] but see at 456-7 [434]-[435].

20 *Farey v Burvett* (1916) 21 CLR 433, 440 (Griffith CJ) as referred to in *Thomas v Mowbray* (2007) 233 CLR 307, 360 [137] (Gummow and Crennan JJ).

21 *Thomas v Mowbray* (2007) 233 CLR 307, 360-1 [137]-[138] (Gummow and Crennan JJ).

22 Ibid 361 [140] (Gummow and Crennan JJ). However, Gummow and Crennan JJ did not explain how pre-1901 English history is necessarily relevant to the interpretation in 2007 of a written constitution drafted in

threat need not come from another nation state, nor even from an enemy organised as a collective or group.[23]

3 *Whether the Threat Must be to the Nation State or Other Bodies Politic Within the Federation*

Thomas's argument that the defence power is confined solely to threats posed to the Australian bodies politic, rather than to threats to the safety of the public generally, would, if successful, have placed some aspects of the impugned legislation outside the ambit of the defence power. For example, the definition of 'terrorist act' in s 100.1 of the Code includes actions or threats of actions which are done with the 'intention of intimidating the public or a section of the public' (as opposed to 'coercing or influencing by intimidation the government of the Commonwealth or of a state or a foreign country').[24] Thomas's argument was rejected by all Justices of the Court except Kirby J.

For Gummow and Crennan JJ (with whom Callinan J[25] and Gleeson CJ agreed[26]), the body politic incorporates the people: 'the notion of a "body politic" cannot sensibly be treated apart from those who are bound together by that body politic'.[27] Quoting Harrison Moore with

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the final years of the 19th century and enacted in 1900. Nor did any of the other majority justices address this issue: the relevance of pre 1901 English history was just assumed. Interestingly, Kirby J, the sole dissentient on the question of the applicability of the defence power to the impugned legislation, also placed considerable emphasis on matters of English history. However, for Kirby J, historical considerations served to reinforce his restricted construction of the defence power: see at 395 [251], 402 [267].

23 Ibid 361-2 [139]-[141] (Gummow and Crennan JJ), 324-5 [7] (Gleeson CJ) (agreeing with Gummow and Crennan JJ), 511 [611] (Heydon J) (agreeing with Gleeson CJ and Gummow and Crennan JJ). See also at 503 [583], 504 [588] (Callinan J), 395 [250], 398-9 [259] cf 449 [413], 456-8 [434]-[438], 458-9 [442] (Hayne J), 395 [250]-[251] (Kirby J)

24 See definition of 'terrorist act' in section 100.1 of the Code, paragraph (c) (ii) and (c)(i) respectively.

25 *Thomas v Mowbray* (2007) 233 CLR 307, 504 [588].

26 Ibid 324-5 [6]-[7].

27 Ibid 362 [142] (Gummow and Crennan JJ).

approval,[28] Gummow and Crennan JJ noted that 'the Commonwealth of Australia…[is] a union of the people and not of their governments'.[29]

For Hayne J, the defence power related primarily to bodies politic, but the facts of modern international warfare (and, by inference, international terrorism) made the distinction between the defence of bodies politic and the defence of civilian populations 'unhelpful'.[30] Moreover, Hayne J drew a connection between Australia's foreign policy interests and its defence interests: as the apprehended terrorist acts relevant to the making of the control order in *Jabbour v Thomas* were intended to influence Australia's foreign policy, they fell within the defence power:

> They are laws with respect to naval and military defence because, *in their particular operation in this case*, they provide measures directed to preventing the application of force to persons or property in Australia that is sought to be applied for the purpose of changing the federal polity's foreign policy. [31]

Only Kirby J was prepared to restrict the ambit of the defence power to threats to bodies politic.[32] For Kirby J, this restriction on the scope of the defence power related not just to the text of the placitum itself, that is, 'the defence *of the Commonwealth* and *of the several States*' (emphasis added),[33] but also from the necessity to read the constitution as a whole, with particular reference to s 119 of the constitution which grants the Commonwealth the power on request of the Executive Government of a State to quell 'domestic violence'.[34] In direct contrast to Gummow and Crennan JJ's joint judgment, Kirby J asserted that the history and culture of nations with a British heritage has, since the time of Cromwell, disavowed the use of military forces in civilian tasks, or to quell internal threats.[35]

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28 Ibid 362 [143] referring to Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) 67.

29 *Thomas v Mowbray* (2007) 233 CLR 307, 362 [143].

30 Ibid 458 [441] (Hayne J). See also at 458 [440] (Hayne J).

31 Ibid 459-60 [444] (emphasis added).

32 Ibid 395 [251] (Kirby J).

33 Ibid 393 [245], 394-5 [249] (Kirby J).

34 Ibid 394-5 [249] (Kirby J).

35 Ibid 388-9 [233] (Kirby J). Kirby J's assertion appears to be partially

Kirby J was prepared to concede that the phenomenon of terrorism could threaten the bodies politic within the federation and that, therefore, some sort of anti-terrorism legislation could be validated with respect to the defence power.[36] However, the defence power could not save Division 104, given the definition of 'terrorist act' in s 100.1 of the Code included actions done with the intention of 'intimidating the public or a section of the public'.[37]

4 *The Relevance of the Distinction Between War and Peace*

Traditional conceptions of the defence power have emphasised a clear distinction between times of war and times of peace.[38] Given

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contradicted by the frequent and uncontroversial peaceful use of the military in national emergencies, such as floods, cyclones and earthquakes. In relation to the use of the military 'within the realm' to quell internal threats however, there appears to be a longstanding popular social tradition against such a use, although '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 the armed forces, one is plunged into an esoteric maze of uncertainties': Anthony Blackshield, 'The Siege of Bowral — The Legal Issues' (1978) 4 *Pacific Defence Reporter* 6 as discussed in Michael Head, 'The Military Call-Out Legislation — Some Legal and Constitutional Questions' (2001) 29 *Federal Law Review* 273, 278-82. Re s 119 of the constitution and the legality of the use of the military to quell 'domestic violence' within a State, *contra* Kirby J, Quick and Garran, cite with approval the 1895 US case of *Re Debs* 158 US 564 (1895), which concerned industrial action by Debs and other officers of a trade union against trains belonging to a private company engaged in inter state commerce: 'if the emergency arises, the army of the nation, and all its militia, are at the service of the Nation to compel obedience to its laws' (*Re Debs* 158 US 564 (1895), 582 (Brewer J)): John Quick and Robert Garran, *Annotated Constitution of the Commonwealth of Australia* (1901) 965. More controversially, the army were also 'called out' by the Governor-General to provide security in the aftermath of the 1978 'Hilton Hotel Bombings': see Harold Rentree, *The Executive Power of the Commonwealth of Australia* (1984) 468; see also Ed. Note, 'Legal and Constitutional problems of protective security arrangements in Australia' (1978) 52 *Australian Law Journal* 296; Head at 282-4.

36 *Thomas v Mowbray* (2007) 233 CLR 307, 400 [263], 411 [296].

37 See definition of 'terrorist act' in Section 100.1 of the Code, specifically paragraph (c).

38 *Communist Party Case* (1951) 83 CLR 1, 195 (Dixon J) ('Hitherto a marked distinction has been observed between the use of the [defence]

the expansive Commonwealth powers that have been validated by the High Court in times of war, including powers of executive detention,[39] this distinction has been used to legitimise the High Court's defence power decisions in times of war as exceptional, and hence reconcilable with constitutional principle and the rule of law.[40] The scope of the 'elastic' defence power 'waxes and wanes',[41] growing to its fullest extent during a time of war, whereas in times of peace its scope is much more limited, albeit that the defence power has been used to support a range of measures both in peacetime and throughout periods of post war reconstruction.[42]

In *Thomas v Mowbray*, the Court, save for Kirby J, de-emphasized the significance of the distinction between war and peace in delimiting the scope of the defence power. For Gummow and Crennan JJ, the distinction was not important because terrorism fell squarely within the scope of the defence power, irrespective of the 'fluid nature' of the power.[43] For both Callinan J and Hayne J, the distinction between war and peace was of diminished importance because of the unprecedented threat posed by terrorism in the contemporary world. As described by Callinan J:

> Populations today are both more numerous and more concentrated. They, and property both personal and public, are more vulnerable. Modern weapons, and not just such horrific ones as nuclear bombs, germs and chemicals, are more efficient and destructive than ever before. The means of international travel and communication are more readily open to exploitation by terrorists than in the past…In argument, the plaintiff was asked to identify any historical precedent for this frightening combination of circumstances. It is not surprising that he was unable to do so. The scale

power in war and in peace'); *Farey v Burvett* (1916) 21 CLR 433, 441 (Griffith CJ); *Thomas v Mowbray* (2007) 233 CLR 307, 449 [411] (Hayne J) cf *Communist Party Case* at 268 (Fullagar J).

39 Eg *Lloyd v Wallach* (1915) 20 CLR 299; *Little v Commonwealth* (1947) 75 CLR 94; *Ex parte Walsh* [1942] ALR 359.

40 *Communist Party Case* (1951) 83 CLR 1, 195 (Dixon J), 268 (Fullagar J).

41 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4th ed, 2006) 852.

42 See generally, ibid 850-83.

43 *Thomas v Mowbray* (2007) 233 CLR 307, 363 [146].

> and almost inestimable capacity of accessible, modern, destructive technology to cause harm render attempts to draw analogies with historical atrocities…unconvincing.[44]

V Defining the Boundaries of the Defence Power

A *The Contributions of Saul and Lindell*

According to Lindell, in essence, 'the concept of defence does not stipulate the entity or body against whom action is taken to defend or resist attack'.[45] Moreover, 'the reliance on the second limb of s 51(vi) [that is 'the control of the forces to execute and maintain the laws of the Commonwealth'] highlights the relevance of the defence power for dealing with internal disturbances and disorder'.[46] Lindell maintains that this is also consistent with the use of military forces in English legal history to quell such civil disorder.[47] The High Court's decision in *Thomas v Mowbray* simply effects a 'relocation of the federal authority to deal with internal disorder and violence'[48] from the 'incidental and national implied powers'[49] to the defence power. In Lindell's view, this shift is relatively[50] unproblematic:

> On reflection…it probably does not matter much whether the powers to deal with internal threats directed to both governments and the public are located in the defence power or the incidental and national implied powers. Both sets of powers are, after all, purposive, and will involve difficult questions of degree and also proportionality — but with

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44 Ibid 342 [544] (Callinan J) (citations omitted). See also at 314-5 [439] (Hayne J) ('The increased capacity of small groups to carry out threats of widespread harm to persons and property may further obscure the distinction between war and peace').

45 Lindell, above n 12, 44.

46 Ibid.

47 Ibid.

48 Ibid 48.

49 Ibid 45. The 'incidental and national implied powers' are identified by Lindell as 'the incidental powers of legislation in s 51(xxxix) of the constitution when read in conjunction with s 61 regarding the exercise of the executive power of the Commonwealth and other express and implied legislative powers contained in ss 51 and 52': at 42.

50 Ibid 44.

> a much lower degree of judicial scrutiny than is usually encountered with other powers.[51]

Saul, in contrast, is far less sanguine about the Court's broad conception of the defence power. After describing Callinan J's 'general caution' about an overzealous resort to the defence power as 'apposite',[52] he states:

> The Court's reasoning on the defence power suffers from a failure to articulate any clear boundary (or division of competencies) between regular law enforcement responses to violent crime (including most instances of modern terrorism) — and in relation to which the States and Territories have precedence — and the exceptional powers of the Commonwealth to defend the nation against more extreme or existential threats. The Court has permitted Commonwealth laws to intrude into what was hitherto regarded as within the competence of the States, and radically lowered the threshold of application of the defence power… [I]t has interfered in the constitutional settlement, tipping the balance further in favour of the Commonwealth.[53]

Saul also finds Kirby J's attempts to articulate the boundary of the defence power by reference to threats directed at the bodies politic (as opposed to the 'specific individuals or groups within the bodies politic so named')[54] as inappropriate: 'force is ultimately applied to individuals and their property, not to an abstract body politic, and it is clear that killing people and destroying property are the principle means of attacking the Commonwealth and the States'.[55] Saul, therefore,

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51 Ibid 44-5.

52 Ben Saul, 'Terrorism as Crime or War: Militarising Crime and Disrupting the Constitutional Settlement?' (2008) 19 *Public Law Review* 20, 26.

53 Ibid.

54 *Thomas v Mowbray* (2007) 233 CLR 307, 395 [251].

55 Saul, above n 51, 27 (footnotes deleted). Saul perhaps casts Kirby J's conception of the defence power in an overly simplistic light, as Kirby acknowledges that the defence power can extend to the protection of individual persons and their property, with the following proviso: 'a law, to be supported by s 51(vi), must, of its general character, be addressed to protecting the identified bodies politic in some way or other, directly or indirectly': *Thomas v Mowbray* (2007) 233 CLR 307, 393 [246] (footnote omitted).

proposes a different criterion to demarcate the boundary of the defence power: '[a] preferable test might be based on the scale, gravity, severity of quantum of harm or anticipated harm — as opposed to the identity of the targets or the victims (as in Kirby J's test), or the particular methods used'.[56]

B *A Critique of Saul and Lindell — Revisiting the Text of the Defence Power*

1 *Introduction*

After *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Work Choices Case*') it is hard to see the continuing relevance of concerns about the 'federal balance' in defining the limits of Commonwealth power.[57] The writer therefore maintains that Saul's focus on the effect of an enlarged and ill-defined defence power on the 'competencies' of the States, their 'precedence' in regular law enforcement responses to violent crime, 'the constitutional settlement' and the 'tipping of the balance' is misplaced, both as an argument for so limiting the defence power, and as a foundation for some sort of limiting principle or criterion. By contrast, the writer ultimately endorses Saul's 'quantum of harm' test, not by reference to the responsibilities of the States in combating 'crime' (or, as described by Kirby J, the preservation of 'the essential "police powers" of the states'[58]), but by reference to the text of s 51(vi) itself.

2 *The First Limb of the Defence Power — 'The Defence of the Commonwealth and of the Several States'*

It has long been understood that the words 'naval' and 'military' (as appearing before the word 'defence' in s 51(vi)) are words of extension, rather than of limitation.[59] However, as emphasised by Kirby J in *Thomas*

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56 Saul, above n 51, 27.

57 See Oscar Roos, 'From Labour's Pain Comes Labor's Gain? The High Court's decision in the *Work Choices Case* and the Commonwealth's Corporations Power' (2007) 11 *Southern Cross University Law Review* 81, 97-8.

58 *Thomas v Mowbray* (2007) 233 CLR 307, 401 [264] (Kirby J).

59 *Farey v Burvett* (1916) 21 CLR 433, 440 ('[T]he words 'naval' and 'military' are not words of limitation, but rather of extension, showing that the subject matter includes all kinds of war-like operations') (Griffith CJ); see also *Thomas v Mowbray* (2007) 233 CLR 307, 457 [436] (Hayne J).

v Mowbray,[60] 'defence' must still be defence *of the Commonwealth and of the several states* to fall within the text of the placitum.

One may accept, both as a matter of practicality[61] and as a matter of political theory,[62] that the boundary between the bodies politic named in the placitum and the people of those bodies politic is blurred: harm, or a threat of harm, to the people of the Commonwealth or of the several states may, in certain circumstances, be indistinguishable from harm, or a threat of harm, to the Commonwealth or the States themselves. However, not all harm, or threats of harm, to the public welfare can be so characterised: *ad absurdum* the defence power cannot be invoked to validate all Commonwealth legislative measures which operate to protect individuals, or even a significant portion of the population, from each and every risk, however slight or remote: 'the defence power is indeed a power for *defence* and not a more general power for security or public safety'.[63] It is submitted that Saul's 'quantum of harm' test provides a useful way to identify the sort of exceptional, 'catastrophic terrorism'[64] that would support the invocation of the first limb of the defence power, that is legislative measures for 'the defence of the Commonwealth and of the several states'.

As discussed by Saul, the adoption of a 'quantum of harm' test would have direct consequences for the validity of the impugned legislation in *Thomas v Mowbray*.[65] If the risk of catastrophic harm to the Australian public is the critical justification for the invocation of the defence power, then the definition of 'terrorist act' needs to be far more stringent than the mere requirement of 'intimidation' of the public, or sections thereof[66] in order to satisfy it.

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60 *Thomas v Mowbray* (2007) 233 CLR 307, 393 [245], 394-5 [249] (Kirby J).

61 See ibid 362 [142] (Gummow and Crennan JJ).

62 See ibid 362 [143] (Gummow and Crennan JJ).

63 Saul, above n 51, 27. Similarly, many threats to the wellbeing of persons living within Australia emanate from outside of Australia — the influx of heroin, the risk of many infectious diseases and climate change being but three — but this does not means that Commonwealth legislation combating those external threats, of itself, falls within the ambit of 'defence'.

64 See Goldsmith, above n 1, 61-4.

65 Saul, above n 51, 25-6.

66 See Code, s 100.1 re the definition of 'terrorist act', paragraph (c)(ii).

3 *The Second Limb of the Defence Power — 'The Control of the Forces to Execute and Maintain the Laws of the Commonwealth'*

The second limb of the defence power refers to 'the control of the forces to execute and maintain the laws of the Commonwealth'. According to Lindell, '[t]he reliance on the second limb of s 51(vi) highlights the relevance of the defence power for dealing with internal disturbances, and disorder even though it only explicitly refers to the "laws of the Commonwealth"'.[67]

An almost identical phrase to that which appears in the second limb of the defence power appears in s 61 of the constitution: '[t]he executive power of the Commonwealth…extends to *the execution and maintenance of this Constitution, and of the laws of the Commonwealth'*. This extension of Commonwealth Executive power in s 61 has been used to justify Commonwealth executive initiatives in the area of national security;[68] *mutatis mutandis*, consistently with Lindell, it may be argued that the reference to 'execute and maintain of the laws of the Commonwealth' in the second limb of s 51(vi) can be used to extend the Commonwealth's legislative power to matters of national security, bypassing, for example, the 'express incidental power' contained in s 51(xxxix).

On closer examination, however, there are a number of flaws in this ready transposition. First, s 51(vi) refers only to the execution and maintenance *of the laws of the Commonwealth*, whereas s 61 refers additionally to the execution and maintenance *of the constitution*. While the former phrase as it appears in the second limb of s 51(vi) may provide some textual justification for laws focused on the prevention of

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67 Lindell, above n 12, 44.

68 On the basis that s 61 either incorporates the common law prerogatives relating to self preservation, or provides a separate source for such power: see *R v Hush; Ex parte Devanny* (1932) 48 CLR 487, 506 (Rich J); *Burns v Ransley* (1949) 79 CLR 101, 109 (Latham CJ); *R v Sharkey* (1949) 79 CLR 121, 157-8 (McTiernan J); *Communist Party Case* (1951) 83 CLR 1, 211-12 (McTiernan J), 231 (Williams J); George Winterton, *Parliament, the Executive and the Governor-General* (1983) 31-4.

outbreaks of violence[69] (so called 'preventive justice'[70] as 'maintaining the laws of the Commonwealth'[71]), it is the latter phrase — 'maintenance of the Constitution' — that has been used as the textual justification for broader national security measures. As put by Brennan J in *Davis v Commonwealth* (1988) 166 CLR 79:

> Section 61 refers not only to the execution and maintenance of the laws of the Commonwealth…; it also refers to 'the execution and maintenance of this Constitution'… [T]he phrase 'maintenance of the Constitution' imports the idea of Australia as a nation… [T]he function that the phrase assigns…relates not only to the institutions of government, *but more generally to the protection and advancement of the Australian nation*.[72]

It is submitted that the distinction between the execution and maintenance of 'the laws of the Commonwealth' (*Constitution*, s 51(vi)) and 'the execution and maintenance of th[e] Constitution' (*Constitution*, s 61) militates against s 51(vi) being used as a broader 'national security' head of legislative power. [73]

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69 Although note that s 119 of the constitution appears to limit the Commonwealth's capacity to intervene to protect a State against 'domestic violence' without the request of the Executive Government of the relevant State, where that violence does not affect matters otherwise falling within Commonwealth power, or is not also directed at Commonwealth institutions: see *R v Sharkey* (1949) 79 CLR 121, 151 (Dixon J); *Thomas v Mowbray* (2007) 233 CLR 307, 394-5 [247]–[249] (Kirby J); Moens and Trone, above n 11, 428. It is highly unlikely, however, that an outbreak of violence within a State would be so confined. Section 119 has been infrequently invoked and has been described as being 'of little practical importance': see Margaret White, 'The Executive and the Military' (2005) 28(2) *University of New South Wales Law Journal* 438, 445.

70 See *Thomas v Mowbray* [2006] HCA Trans 660 (5 December 2006), 4081.

71 For an explanation of the expression 'the laws of the Commonwealth', as it appears in s 61 of the constitution, see *Communist Party Case* (1951) 83 CLR 1, 216 (Williams J) ('The words "the laws of the Commonwealth" refer to the system of laws enacted under the constitution and, so to speak, to the constitution in action').

72 *Davis v Commonwealth* (1988) 166 CLR 79, 109-110 (emphasis added). See also Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2nd ed, 2006), 137, 141-2.

73 Textual distinctions have proven to be critical in the construction of other

Secondly, and more specifically with reference to the matters before the court in *Thomas v Mowbray*, the second limb of s 51(vi) refers expressly to the 'control of the forces', as antecedent to the phrase 'to execute and maintain the laws of the Commonwealth'. Even if one accepts that 'the forces' referred to in the second limb of s 51(vi) encompass the Australian Federal Police[74] (the only 'forces' relevant to the operation of Division 104), Division 104 of the Code entails not 'the control of the forces' (that is, their deployment) in order to quell civil disorder or unrest, but the use of a legal regime, sanctioned by judicial order, to prevent the likely commission of terrorist related criminal offences.

The role of 'the forces' with respect to Division 104 is to prosecute an application for a control order. A relevant contrast can be drawn with a statute which confers a power of arrest, which then requires executive action to be effective: for example, the making of an arrest by a police officer under the statutory conferral of power, in order to achieve an objective, such as the maintenance of public order in the face of a civil disturbance. Division 104 is *not* analogous to such a power. Rather, it is the making of the control order *by a court*, as a purported exercise of *judicial* (*contra* executive) power that gives the order its force, and the judicial

provisions of the constitution: see, eg, *New South Wales v Commonwealth* (1990) 169 CLR 482 ('*Incorporation Case*') re the significance of the past particle 'formed' used adjectivally in s 51(xx) of the constitution; *R v Bernasconi* (1915) 19 CLR 629 and *R v Archdall & Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128 re s 80 of the constitution and the significance of the words 'trial on indictment' as severely constricting the scope of the right to trial by jury.

74 The writer has been unable to find any direct authority on this point, that is, whether 'the forces' referred to in the second limb of s 51(vi) include the police forces, whether Federal or State. It is submitted that given that the words 'naval' and 'military' in the first limb of the placitum have been interpreted as words of extension and not limitation (*Farey v Burvett* (1916) 21 CLR 433, 440 (Griffith CJ)), and that the heads of Commonwealth legislative power are generally construed broadly (see, eg, *Jumbunna Coal Mine, NL v Victorian Coal Miners Association* (1908) 6 CLR 309, 367-8 (O'Connor J)), it is likely that 'the forces' would be interpreted to encompass at least the Australian Federal Police, which is the relevant police force with respect to Division 104 cf *Thomas v Mowbray* (2007) 233 CLR 307, 504 [588] (Callinan J). The writer notes, however, that this expansive interpretation of the word 'forces' in s 51(vi) to incorporate the Commonwealth police forces sits uneasily alongside ss 68, 114 of the constitution which refer only to naval and military forces.

order is of itself (assuming compliance with it) sufficient to achieve its objectives.[75] Division 104 does not, therefore, involve the '*control* of the forces' (beyond the trite observation that the Commonwealth Attorney-General's approval is required as a prerequisite to a police application for a control order)[76] in order to maintain and execute the laws of the Commonwealth': 'national security' is maintained through the creation of a novel legislative regime of preventative restraints on liberty which are imposed by a court, not the police force, or *a fortiori* any military forces.

VI The Defence Power and the Impugned Legislation — Characterisation and Proportionality

As noted by Saul:

> [I]n many other liberal democracies, constitutions have a great deal to say about the exercise (and abuse) of emergency powers; our constitution, by comparison, has very little to say on such matters, absent some robust implication that might be drawn from the Federal separation of powers, or the 'assumption' of the rule of law. Hence, 'in the absence of sophisticated rights based arguments for evaluating anti-terrorism laws, those faced with arguably excessive laws are left with little on which to hang their challenges'.[77]

The defence power *is* a purposive head of power.[78] Thus, 'a notion of proportionality is involved in relating ends to means':[79] 'what is required is that a measure can reasonably be regarded as one that

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[75] Hence the majority's reference to the ancient powers *of a court* to bind persons over to keep the peace, as an analogy to meet the argument that the making of such orders is, *per se*, excluded from the judicial function: *Thomas v Mowbray* (2007) 233 CLR 307, 356 [116] (Gummow and Crennan JJ), 379-80 [16] (Gleeson CJ).

[76] Code, s 104.2.

[77] Saul, above n 51, 21 (citations omitted).

[78] *Stenhouse v Coleman* (1944) 69 CLR 457, 471 (Dixon J).

[79] *Thomas v Mowbray* (2007) 233 CLR 307, 359 [135] (Gummow and Crennan JJ). See also *Thomas v Mowbray* at 390 [236] (Kirby J), 504 [588] (Callinan J); *Polyukhovich v Commonwealth* ('*War Crimes Case*') (1991) 172 CLR 501, 592-3 (Brennan J). For a general discussion of this point, see Peter Hanks, Patrick Keyser and Jennifer Clarke, *Australian Constitutional Law* (7th ed, 2004) 45; Blackshield and Williams, above n 44, 852-3.

might achieve a defence objective'.[80] It is therefore imperative that the notion of proportionality is rigorously deployed by the High Court in determining the validity of legislation passed purportedly in pursuance of the power, as, to adopt Saul's phraseology, within the Australian constitutional framework, there is little else upon which to hang a challenge to excessive laws.

In *Thomas v Mowbray* the High Court fails properly to apply a principle of proportionality in assessing the constitutionality of the impugned legislation. The most striking example of this failure appears in the joint judgment of Gummow and Crennan JJ. Their Honours sweepingly conclude, in relation to the critical definition of 'terrorist act' contained in section 100.1 of the Code, that '[w]hat is proscribed by that definition *falls within a central conception* of the defence power',[81] and that '[p]rotection from a 'terrorist act' as defined *necessarily* engages the defence power.[82] In the writer's view, these are extraordinary assertions, given the breadth of the activities encompassed in the definition of 'terrorist act' in the Code. [83]

Several aspects of the legislation impugned in *Thomas v Mowbray* show evidence of legislative overreach in so far as the legislation may be characterised as 'sufficiently connected'[84] to the defence power. For example, the provision in s 104.4(1)(c)(ii) of the Code, which makes reference to 'a person [who] has provided training to or received training from a listed terrorist organisation', would, on its face, appear to extend to any and every form of 'training' (including, for example, language training, or training in relation to cultural activities such as cooking).[85] Moreover, any application of a test of proportionality must take into account the adverse effect of an impugned provision upon well recognised human rights, as informing an assessment of what

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80 Blackshield and Williams, above n 40, 852.

81 *Thomas v Mowbray* (2007) 233 CLR 307, 363 [146] (emphasis added).

82 Ibid (emphasis added).

83 Saul, above n 51, 25 ('[I]t requires a considerable conceptual leap to uncritically accept that the wide range of acts of varying gravity encompassed by the Australian definition of terrorism uniformly attract the application of the defence power.').

84 See, eg, *Cunliffe v Commonwealth* (1994) 182 CLR 272, 314 (Brennan J), 351 (Dawson J).

85 See discussion at *Thomas v Mowbray* (2007) 233 CLR 307, 470 [482] (Hayne J).

is *reasonably* appropriate and adapted to a legitimate end.[86] Many of the legislative provisions relating to control orders have significant human rights implications. For example, given its expansive coverage, s 104.4(1)(c)(ii) of the Code could have a significant and deleterious effect on freedom of association.[87] Apart from Kirby J,[88] none of the Justices in *Thomas v Mowbray* grapple with this issue.

VII The Defence Power and the 'War on Terror'

A *Introduction*

In the course of his judgment in *Thomas v Mowbray*, Callinan J cautioned:

> Too ready and ill-considered an invocation of the defence power …[may] have the capacity to inflict serious damage upon a democracy. It is for this reason…that courts must scrutinise very carefully the uses to which the power is sought to be put.[89]

It was precisely Dixon J's concern about the superseding of 'democratic institutions'[90] that underlay his emphasis in the *Communist Party Case* on the existence of 'serious armed conflict' as being critical in 'reconciling [the defence power] with constitutional principle'.[91] By contrast, the Court's conception of the defence power in *Thomas v Mowbray* was no longer limited by reference to external threats, the waging of war in

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86 See, eg, *Davis v Commonwealth* (1988) 166 CLR 79, 99 (Mason CJ, Deane and Gaudron JJ) re the right to freedom of expression.

87 See *R v Khawaja* [2006] OJ 4245 for an illustration of an application of a test of proportionality in relation to terrorist offences, in the context of the protections afforded by the Canadian *Charter of Rights and Freedoms*. For a discussion of *R v Khawaja* see Kent Roach, 'The Case for Defining Terrorism with Restraint and without Reference to Political or Religious Motive' in Lynch, MacDonald and Williams, above n 1, 39, 46-7. For a further discussion of the excessive breadth of the anti-terrorism laws, see Patrick Emerton, 'Australia's Terrorism Offences — A Case Against' in Lynch, MacDonald and Williams, above n 1, 75, 78-80.

88 *Thomas v Mowbray* (2007) 233 CLR 307, 440 [379].

89 Ibid 506 [590].

90 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187 (Dixon J).

91 Ibid 195. See also at 187 (Dixon J).

a conventional sense, or to the protection of bodies politic as distinct from the public. It was therefore critical, in *Thomas v Mowbray*, for the Court to consider (in Callinan J's words) 'the uses to which the [defence] power was sought to be put' by the Commonwealth.

B *Lessons from History — Communism and Terrorism*

1 Thomas v Mowbray *cf Communist Party Case*

(a) Introduction – Callinan J's reassessment of the Communist Party Case

In *Thomas v Mowbray* Callinan J seeks to diminish the importance of the High Court's 'epochal',[92] 1951 decision in the *Communist Party Case* by emphasising the significance of evidentiary issues as being critical to the Court's determination that the *Communist Party Dissolution Act 1950* (Cth) was invalid.[93] Notwithstanding the degree of deference normally shown by the judicial arm of government to the Executive and Legislature on matters of national security and defence,[94] according to Callinan J, on the material available to the Court at the time of the litigation of the *Communist Party Case*, there was a decisive lack of proof concerning the threat posed to the Commonwealth by the Communist movement.[95] Aspects of the *Communist Party Case* can therefore be re-evaluated in the light of 'revelatory history':[96] 'only

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92 J M Bennett, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* (1980) 71; see also George Winterton, 'The Significance of the Communist Party Case' (1992) 18 *Melbourne University Law Review* 630, 653 ('[P]robably the most important [decision] ever rendered by the [High] Court.').

93 *Thomas v Mowbray* (2007) 233 CLR 307, 484 [530]-487 [533] *contra* 384 [222], 393 [244] (Kirby J).

94 See eg, *Little v Commonwealth* (1947) 75 CLR 94; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; cf *Church of Scientology v Woodward* (1982) 154 CLR 25, 74-6 (Brennan J); *Communist Party Case* (1951) 83 CLR 1, 193 (Dixon J). Matters relating to national security may be non-justiciable in any event: see Michael Head, *Administrative Law* (2nd ed, 2008) 118-121; Chris Finn, 'The concept of 'justiciability' in administrative law' in Matthew Groves and HP Lee (eds), *Australian Administrative Law* (2007) 143.

95 *Thomas v Mowbray* (2007) 233 CLR 307, 486 [533] (Callinan J).

96 Ibid 503 [584] (Callinan J). In particular, Callinan J demonstrates an enthusiasm for the sole minority judgment of Latham CJ in the *Communist Party Case* as '…in a sense more perceptive and alive to the gravity of

after the collapse of the Iron Curtain nearly 40 years later…[were] all of the designs of the communist state upon the rest of the world, and the ruthlessness with which it was prepared to pursue them, …fully realised and acknowledged'.[97] Judicial notice could not therefore be taken of these designs in 1950-51, when *Communist Party Case* was litigated and decided.

(b) The 'Cold War' and the Communist Party Case

In drawing an historical comparison between the High Court decisions in the *Communist Party Case* and *Thomas v Mowbray*, it must be noted that there are some significant differences between the legislation invalidated in the *Communist Party Case*, and the legislative provisions upheld as constitutionally valid by the High Court in *Thomas v Mowbray*.[98] More dissimilarities emerge, however, when the two decisions are evaluated in a broader historical context.

In 1951, in the early years of the Cold War, the High Court remained dispassionately resolute in the face of Commonwealth assertions of the threat posed to constitutional government by the Communist movement. Notwithstanding the nuclear capability of the Communist government of the Soviet Union, the internationalist and revolutionary objectives of the Australian Communist Party, the faithful transposition of those objectives into the recitals of the *Communist Party Dissolution Act 1950* (Cth), and the deference normally shown by the Court to the other arms of government on matters of national security,[99] the majority of the

direct and indirect internal threats inspired externally, and the different manifestations of war and warfare in an unsettled and dangerous world': at 505 [589].

97 Ibid 486 [533]. See also at 504-5 [589] (Callinan J).

98 Most significantly, the *Communist Party Dissolution Act 1950* (Cth) operated, in part, *ad nominatim*: the legal interests of organisations and persons were affected by reference to their connection with 'communism', 'without any external test of liability upon which the connection of the provisions with the [defence] power will depend' (*Communist Party Case* (1951) 83 CLR 1, 198 (Dixon J)). By contrast, the definition of 'terrorist act' in the Code, s 100.1 refers both to motive and effect, the latter in terms of intimidation or coercion. Additionally, the power conferred by Division 104 is exercised judicially, rather than by the executive, and is reviewable through the normal judicial review process.

99 See, eg, *Little v Commonwealth* (1947) 75 CLR 94; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Church of*

High Court[100] were not persuaded that the threat posed by Communism in Australia in 1950 was sufficient to enlarge the defence power to the extent that it could be used to validate the *Communist Party Dissolution Act*.

In the *Communist Party Case* the Court held that the Commonwealth Executive could not legislatively be granted a non-reviewable power[101] to declare a body of persons an 'unlawful association' on its being satisfied that the body's continued existence posed a threat to national security,[102] 'without any external test of liability upon which the connection of the provisions with the [defence] power will depend'.[103] Such a power would be extraordinary and 'appropriate only to a time of serious armed conflict'.[104] While 'what the defence power will enable the Parliament to do at any given time depends upon what the exigencies of the time may be considered to call for or warrant,'[105]

> … [a]t the date of the royal assent [20 October 2006] Australian forces were involved in the hostilities in Korea, but the country was not on a war footing, and, although the hostilities were treated as involving the country in a contribution of force, the situation bore little relation to one in which the application of the defence power expands because the Commonwealth has become responsible for the conduct of a war.[106]

Scientology v Woodward (1982) 154 CLR 25, 74-6 (Brennan J); *Thomas v Mowbray* (2007) 233 CLR 307, 354 [107] (Gummow and Crennan JJ); Head, above n 93, 118-121 cf *Communist Party Case* (1951) 83 CLR 1, 194 (Dixon J).

100 Dixon, McTiernan, Williams, Webb and Fullagar JJ, Latham CJ dissenting.

101 *Communist Party Case* (1951) 83 CLR 1, 178-80 (Dixon J). The view that the opinion of the Governor-General could not be judicially examined appears to be no longer correct: see *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; *FAI Insurances v Winneke* (1982) 151 CLR 342.

102 *Communist Party Dissolution Act 1950* (Cth), s 5(2).

103 *Communist Party Case* (1951) 83 CLR 1, 198 (Dixon J).

104 Ibid 195 (Dixon J).

105 Ibid (Dixon J).

106 Ibid 196 (Dixon J).

Significant internal disturbances, such as the 1949 coal miners' strike, with its alleged involvement of communist agitators and organisers, although alluded to in the recitals to the *Communist Party Dissolution Act 1950* (Cth)[107] and in the judgment of Dixon J,[108] were also insufficient to extend the operation of the defence power to support legislation of the character of the *Communist Party Dissolution Act 1950* (Cth).[109] Nor were these internal events sufficient to enliven what Dixon and Fullagar JJ referred to in their judgments as 'the other power',[110] even though that power was specifically directed 'against subversive conduct and designs'.[111]

2 *Communism and Terrorism — Comparing Threats*

Both within Australia and internationally, the Communist movement had, as one of its express objectives, the overthrow of existing systems of parliamentary government.[112] The Communist movement therefore, posed a direct internal and external challenge to the Western liberal democracies. This challenge can be contrasted directly with the threat posed by terrorism in the context of the 'war on terror'.

Legislation dealing specifically with the threat posed by terrorism, such as Part 5.3 of the *Code*, has been passed as a direct consequence of the terrorist attacks on U.S. soil on 11 September 2001.[113] While terrorism, as

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[107] See recitals 7, 8 and 9 in the preamble to the *Communist Party Dissolution Act 1950* (Cth) as set out in the judgment of Latham CJ in the *Communist Party Case*: ibid 133-4.

[108] Ibid 197 (Dixon J) ('So far as the internal affairs of this country enter into the question whether events had extended the operation of the defence power, it is enough to refer to the serious dislocations of industry that have occurred ...')

[109] Ibid 196-7 (Dixon J).

[110] See ibid 192 (Dixon J), 266 (Fullagar J). The 'other power' referred to in the *Communist Party Case* has been more recently identified 'in a more expansive and benevolent guise as the "nationhood power"': see Blackshield and Williams, above n 40, 871.

[111] *Communist Party Case* (1951) 83 CLR 1, 192 (Dixon J). See also at 259-61 (Fullagar J).

[112] See *Communist Party Case* 1951) 83 CLR 1, 196-7 (Dixon J), 208, 210 (McTiernan J).

[113] Lindell, above n 12, 42; John Von Doussa, 'Reconciling Human Rights and Counter-Terrorism — A Crucial Challenge' (2006) 13 *James Cook University Law Review* 104, 108.

has been observed by numerous commentators, is itself nothing new,[114] the terrorists who perpetrated these attacks were Islamic and linked with the Al Qa'ida organisation. It was the threat posed by Jihadist terrorism within Australia, specifically the association of Jack Thomas with the Al Qa'ida organisation and its leader, Osama bin Laden, which precipitated the application for a control order against Jack Thomas. Additionally, the only groups listed as banned terrorist organisations under Australian law are connected to Muslims and Islam.[115] It is therefore legitimate to assess the invocation of the defence power in *Thomas v Mowbray* by reference to the objectives and activities of Jihadist terrorism, as articulated by organisations such as Al Qa'ida.

Jihadist terrorism is typified by a number of objectives. They include the following: (i) resisting or repelling what is regarded as secular Western interference in nations with a majority Muslim population, particularly since the post-September 11 U.S. led interventions in Iraq and Afghanistan; and (ii) forcing Western nations to change their foreign policy with respect to the recognition of Israel and the perceived oppression of the Palestinian population in the Middle East.[116] These objectives are to be achieved partly through the killing of civilians and members of the military of the United States, and of those countries which are allied to the U.S ('the Zionist-Crusaders alliance and their collaborators'[117]). As put by the apparent leader of Al Qa'ida, Osama bin Laden:

> The ruling to kill Americans and their allies — civilians and military — is an individual duty for every Muslim who can do it in any country in which it is possible to do it, *in order to*

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[114] See, eg, Lindell, above n 12, 42; Justice Michael McHugh, 'Terrorism legislation and the Constitution' (2006) 28 *Australian Bar Review* 117, 133-4.

[115] Aly, above n 1, 201.

[116] See, eg, *Thomas v Mowbray* (2007) 233 CLR 307, 445 [400] (Hayne J) ('Policies pursued by the United States in the Middle East were said… to be "a clear proclamation of war against God, his Messenger, and the Muslims"…religious scholars throughout Islamic history have agreed that jihad is an individual duty *when an enemy attacks Muslim countries.*' (emphasis added)).

[117] Osama bin Laden, 'Declaration of War Against the Americans Occupying the Land of the Two Holy Places' in Cronin (ed), *Confronting Fear: A History of Terrorism* (2002) 403.

> *liberate the al-Aqsa Mosque and the holy mosque [Mecca] from their grip, and in order for their armies to move out of all the lands of Islam,* defeated and unable to threaten any Muslim.[118] (emphasis added)

In contrast, therefore, to the objectives of the international Communist movement, Jihadist terrorists do not aim to achieve internal, political revolution in Western countries such as Australia, nor to achieve an Islamic revolution in Western nations by replacing their secular, liberal governments with theocratic Islamic rule. Rather, the objectives of Al Qa'ida terrorism are trenchantly territorial,[119] as exemplified by bin Laden's invocation of the medieval crusades in characterising what he regards as the unjust interference of Western nations in the Muslim world.[120]

C *The Unfortunate Application of the Defence Power in the 'War on Terror'*

In light of the Bali bombings, the September 11 attacks and the London and Madrid bombings, it must be acknowledged that the means adopted to achieve Al Qa'ida's objectives do pose a direct threat to the lives of Australian civilians. However, despite the concerns expressed by some of the members of the High Court in *Thomas v Mowbray*,[121] the

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[118] Ibid 405. See also the statement of the special case in *Thomas v Mowbray* as extracted in Hayne J's judgment: *Thomas v Mowbray* (2007) 233 CLR 307, 448 [409] ('Al Qa'ida has made statements threatening acts in Australia, and against Australians…The purpose of such acts has been said to be to have the United States of America, and its allies including Australia, end "their centuries-long war against Islam and its people" and have "their armies *leave all the territory of Islam,* defeated, broken and unable to threaten any Muslim"*…[T]he acts threatened would be done with the intention of coercing or influencing by intimidation the government of the Commonwealth to change its foreign policies*.') (emphasis added).

[119] See Robert Pape, *Dying to Win: The Strategic Logic of Suicide Terrorism* (2005) 102-125 and note contrast with item (8) of the nine factors submitted by the Commonwealth Solicitor-General as characterising the 'new and evil' threat posed by terrorism: see *Thomas v Mowbray* (2007) 233 CLR 307, 396 [253] ('The growth of fanatical ideological movements which encompass the destruction of Western civilisation and, in particular, Australia, or elements of it.').

[120] Bin Laden, above n 116.

[121] *Thomas v Mowbray* (2007) 233 CLR 307, 490 [544] (Callinan J), 525 [647]-[649] (Heydon J), 457-8 [438]-[439] (Hayne J). See also the comments of

dispassionately and rationally assessed risk of sudden death or injury as a result of a terrorist attack in Australia is almost unarguably of a lesser order of magnitude than the risk of death or injury posed by motor vehicles, the outbreak of disease, the use and abuse of drugs or even organised crime.[122] Moreover, at the time of the making of the control order against Thomas, Australia was at a so called 'medium level' of terrorist alert,[123] meaning (vaguely and unhelpfully) that a terrorist attack within Australia *could* occur (!)[124]

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the then Commonwealth Attorney-General Philip Ruddock who oversaw the enactment of the relevant provisions of the Code: Philip Ruddock, 'Law as a Preventative Weapon Against Terrorism' in Lynch, MacDonald and Williams, above n 1, 8 ('There is no point in having a constitution and its various protections if nobody is around to live under it').

122 See John Mueller, 'A False Sense of Insecurity' (Fall, 2004) *Regulation* 42-6; Carmen Lawrence, *Fear and Politics* (2006) 76-7; *contra* Ruddock re control orders: 'This approach is justified in the light of the *enormous* threat which terrorism poses to our security'(emphasis added): Ruddock, above n 120, 4. For a further discussion of the difficulties of assessing the possibility of a major terrorist attack, see Goldsmith, above n 1, 61.

123 *Thomas v Mowbray* (2007) 233 CLR 307, 392 [241] (Kirby J); See also *Australian National Security National Counter-Terrorism Alert System* Australian Government <http://www.ag.gov.au/agd/WWW/NationalSecurity.nsf/Page/Information for Individuals National Security Alert System National Counter-Terrorism Alert System> at 9 December 2008.

124 Attorney-General (Cth) Robert McClelland, 'New National Counter-Terrorism Alert System' (Media Release, 30 September 2008). A 'medium' level of terrorist alert, can be contrasted (on Australia's current four tier scale) with a 'low' level ('terrorist attack is not expected'), a 'high' level ('terrorist attack is likely') and an 'extreme' level ('terrorist attack is imminent or has occurred'): see National Counter-Terrorism Committee, *National Counter Terrorism Plan* (2005) [3.3]. According to the Commonwealth Government's National Counter-Terrorism Alert System, Australia has remained at a 'medium level' of terrorist alert since 2003: see *Australian National Security National Counter-Terrorism Alert System* Australian Government <http://www.ag.gov.au/agd/WWW/NationalSecurity.nsf/Page/Information for Individuals National Security Alert System National Counter-Terrorism Alert System> at 9 December 2008. By contrast, the UK control order regime, upon which the Commonwealth legislation was largely based, draws a distinction between 'non derogating' and 'derogating' control orders, the latter being orders which are incompatible with an individual's right to liberty under Article 5 of the *European Convention on Human Rights* ('the ECHR') (*Prevention of Terrorism Act 2005* (UK)

The Court's use of the defence power in *Thomas v Mowbray* erroneously equates the threat posed by terrorism to Australia and other Western societies with that of the threat of insurrection or a war against Australia's sovereign governments.[125] Hence, Gummow and Crennan JJ's discussion of the scope of the defence power by historical reference to the 'defence of the realm against threats posed internally as well as invasion from abroad by force of arms',[126] and the law of treason ('the "levying of war" against the sovereign in his or her realm')[127] is of only slight, if not spurious, relevance to the instant issue in *Thomas v Mowbray*, namely whether the defence power supported legislation restricting the liberties of Jack Thomas, given his admitted association with Al Qa'ida.

In contrast to the rhetorical hyperbole of the 'war on terror', Australian civilians are not living within Australia in a state of 'war'. As observed by Dyzenhaus and Thwaites:

> Western legal orders are not living in a time of emergency or terror, despite the best efforts of our leaders to convince us otherwise. Additionally, the idea that the way to deal with the challenges to the West sharpened by the events of 9/11 is by waging a 'war on terror' was from the beginning, and is ever more, preposterous. There are, of course, many people in the world who face a daily situation of wartime emergency in which their lives are wrecked by fear of real terror. But it is important to keep in mind that among them are the peoples

s 1(2)(a)). Derogating control orders can only be made where it appears to the issuing court that there is a public emergency in respect of which there is a designated derogation from the whole or a part of Article 5 of the ECHR (*Prevention of Terrorism Act 2005* (UK) s 4(3)(c)). It is a matter of speculation whether the conditions imposed under the control order made against Thomas would amount to a deprivation of liberty incompatible with the terms of Article 5 of the ECHR. If so, under UK legislation, the imposition of those conditions would require a public emergency (that is a state of 'public emergency threatening the life of the nation' (EUHR, Article 15)) such that a derogating control order could be made.

125 *Thomas v Mowbray* (2007) 233 CLR 307, 361-2 [140] (Gummow and Crennan JJ).

126 Ibid 361 [140] (Gummow and Crennan JJ). See also *Farey v Burvett* (1916) 21 CLR 433, 440 (Griffith CJ).

127 *Thomas v Mowbray* (2007) 233 CLR 307, 361 [140] (Gummow and Crennan JJ).

> of Iraq and Afganistan, whose present situation is directly attributable to the fact that foreign policy in much of the West since 9/11 has been based on this preposterous idea.[128]

In short, the resort to notions of war, insurrection or 'defence of the realm' mischaracterises the nature of the terrorist threat and may undermine the effectiveness of our attempts to minimize the risk of domestic terrorist attacks.[129] As summarised by Arkin:

> It is intellectually shallow to compare terrorists…with our enemies during the Cold War or the Second World War, who could have destroyed our societies…*Every time we pretend we are fighting for our survival* we not only confer greater power and importance to terrorists then they deserve, but we also at the same time act as their main recruiting agent by suggesting that they have the slightest potential for success.[130]

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[128] David Dyzenhaus and Rayner Thwaites, 'Legality and Emergency — The Judiciary in a Time of Terror' in Lynch, MacDonald and Williams, above n 1, 9. The umbrella term 'Western legal orders' should not be used to obscure the different threats faced by the various liberal democratic societies to which that term might be applied. These different threats may, in turn, justify different legal responses. One would expect, for example, that there would be less justification for counter terrorist preventative detention in New Zealand, which currently assesses its risk of experiencing a terrorist attack as 'low' (see New Zealand Government, *Protecting New Zealand from Terrorist Acts* New Zealand Security Intelligence Service <http://www.nzsis.govt.nz/work/terrorism.aspx> at 10 December 2008) than is the case in Australia or the United Kingdom, both of which nations were actively involved in the US led invasion and occupation of Iraq commencing in 2003, and which assess themselves as being at the higher risk of terrorist attack (re Australia, see above n 122 and n 123, and re the UK, see Intelligence.gov.uk, *Threat Levels: The System to Assess the Threat from International Terrorism* <http://www.intelligence.gov.uk/threat levels.aspx> at 12 December 2008.

[129] See Von Doussa, above n 112.

[130] William Arken, 'Goodbye War on Terrorism, Hello Long War', *Washington Post* (Washington) 26 January 2006 as extracted in Parvez Ahmed, 'Terror in the Name of Islam — Unholy War, Not Jihad' (2007-2008) 39(3) *Case Western Reserve Journal of International Law* 759, 760-1 (emphasis added).

VIII Conclusion

According to Dyzenhuas and Thwaites 'the history of the judiciary in times of emergency and alleged emergency is a dismal one of judges deferring to executive claims',[131] although the High Court's decision in the *Communist Party Case* stands as 'one honourable exception'[132] to that dismal record. Speaking extra-curially, former High Court Justice Michael McHugh has observed, 'it is difficult to believe that Australia would have been so politically free a country as it is today if the High Court had upheld the validity of the legislation challenged in the *Communist Party Case*'.[133] Unfortunately, the judgement of history will almost certainly not be so kind with respect to the High Court's decision in 2007 in *Thomas v Mowbray*.

The High Court's decision in *Thomas v Mowbray*, in so far as the decision relates to the defence power, suffers from numerous failings. First, the Court's broad conception of the defence power, as applied to Division 104 of the Commonwealth Criminal Code, is inconsistent with the text of the placitum, which refers to 'the control of the forces' 'to execute and maintain the laws of the Commonwealth'. Secondly, notwithstanding that the defence power is a purposive head of power, the Court failed to apply any test of proportionality in determining whether the impugned provisions of the Code could be supported by the power. Thirdly, in invoking the defence power with respect to the threat posed by Jihadist terrorism to Australia, the Court misleadingly compares the threat to threats of insurrection or treason. These failings may be of enduring significance, given the apparent permanency of the global 'war on terror' and the continued absence of any Federal Charter of Rights to restrain our governments from its over zealous prosecution.

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131 Dyzenhaus and Thwaites, above n 127, 9.

132 Ibid.

133 In a paper delivered to the Australian Bar Association Conference: see *Al-Kateb v Godwin* (2004) 219 CLR 616 [149] (Kirby J).