

## REVIEW OF HIGH COURT CONSTITUTIONAL CASES 2007

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### I INTRODUCTION

The 2007 High Court term saw 10 cases that dealt significantly with constitutional issues. Some were relatively unremarkable, while others exposed the fault lines of constitutional interpretation that run through the Court and the inconsistency in approach that is often taken.<sup>1</sup> The constitutional cases of 2007 fall largely within the following subject areas: judicial power; the defence power; the right to vote; and the federal distribution of legislative power.

Chapter III of the *Constitution* again dominated the constitutional issues raised in the High Court in 2007. It was the subject of substantive argument in five of the ten constitutional cases heard by the Court. First, there was *Bodruddaza v Minister for Immigration and Multicultural Affairs*<sup>2</sup> which provided a sequel to the privative clause litigation in 2003.<sup>3</sup> The Court discussed the importance of section 75(v) of the *Constitution* and struck down an attempt to limit the discretion of the High Court to extend time limits for the bringing of actions.

In *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board*<sup>4</sup> and *Visnic v Australian Securities and Investment Commission*<sup>5</sup> the High Court considered whether the administrative bodies in question were exercising the judicial power of the Commonwealth. It held that they were not. The judgments discussed the various indicia of judicial and non-judicial powers, and drew a distinction between punishment and disciplinary proceedings.

Two further cases considered the exercise of judicial power in a defence context. In *White v Director of Military Prosecutions*<sup>6</sup> a majority of the High Court continued to uphold the exercise of judicial power by military courts outside of Chapter III of the *Constitution*. In *Thomas v Mowbray*<sup>7</sup> a majority of

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1 For an analysis of the 'deep divisions within the High Court on fundamental principles of constitutional interpretation' in the previous year See Leslie Zines, 'The High Court and the Constitution in 2006' (2007) 30 *University of New South Wales Law Journal* 174, 187.

2 (2007) 228 CLR 651.

3 See *Plaintiff S157/2002* (2003) 211 CLR 476.

4 (2007) 234 ALR 618.

5 (2007) 234 ALR 413.

6 (2007) 235 ALR 455 ('*White*').

7 (2007) 237 ALR 194.

the Court upheld the validity of laws that confer on federal courts the power to impose ‘control orders’ as a measure of preventative action under anti-terrorism legislation. The exercise of such a power was held to fall within the notion of ‘judicial power’ and not breach the principle of the separation of powers.

Two cases concerned voting rights. The first, *Bennett v Commonwealth*<sup>8</sup> concerned the validity of a Commonwealth law that required voters for the Norfolk Island legislative assembly to be Australian citizens. The Court held that such a law fell within the scope of the territories power and that it did not breach principles of representative government. The second, *Roach v Electoral Commissioner*<sup>9</sup> concerned the disqualification of all full-time prisoners from voting in Commonwealth elections. In contrast with *Bennett*, a majority of the Court found the law to be invalid because it breached the constitutional requirements of representative government, but accepted the validity of a previous law that banned prisoners from voting if they were serving a term of three years or more.

The prominent theme of federalism in 2006 was more muted in 2007. It lurked in the background in *Thomas v Mowbray* beneath the High Court’s consideration of the scope of the defence and external affairs powers with respect to anti-terrorism laws. Only the dissent of Kirby J in that case brought the federalism issues out into the open.<sup>10</sup> Federalism concerns were also raised by Callinan J in his dissent in *Australian Consumer and Competition Commission v Baxter Healthcare Pty Ltd*.<sup>11</sup> This was not strictly a constitutional case, as it was argued on the basis of statutory interpretation. However, it is notable for three things: its effective overruling of *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*<sup>12</sup> on the subject of derivative Crown immunity; Justice Kirby’s denial that the States and Commonwealth are manifestations of the Crown;<sup>13</sup> and Justice Callinan’s use of federalism as an aid to the interpretation of the *Trade Practices Act 1974* (Cth).<sup>14</sup>

Federalism arose more directly in *Attorney-General (Vic) v Andrews*<sup>15</sup> where the High Court considered the interpretation of the exclusory phrase ‘other than State insurance’ in section 51(xiv) of the *Constitution*. A majority of the Court upheld the validity of the Commonwealth law in question, employing a narrow and technical approach to achieve this result. Justice Kirby, dissenting, with whom Callinan J agreed, placed particular emphasis on the relevance of federalism principles in interpreting a constitutional provision that carves out an area from Commonwealth legislative power and leaves it to the States.<sup>16</sup>

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8 (2007) 235 ALR 1 (‘*Bennett*’).

9 (2007) 239 ALR 1 (‘*Roach*’).

10 (2007) 237 ALR 194, [259]–[267] (‘*ACCC v Baxter*’) (Kirby J).

11 (2007) 237 ALR 512.

12 (1979) 145 CLR 107 (‘*Bradken*’).

13 (2007) 237 ALR 512, [108] (Kirby J).

14 *Ibid* [146]–[164] (Callinan J).

15 (2007) 233 ALR 389 (‘*Andrews*’).

16 *Ibid* [92], [104] (Kirby J), [167], [178] (Callinan J).

The odd-case-out of this collection is *Attorney-General (NT) v Chaffey*.<sup>17</sup> It was a fairly standard section 51(xxxi) type of case, although it occurred in the Northern Territory under the equivalent provision in section 50 of the *Northern Territory (Self-Government) Act 1978* (Cth). It therefore did not address the vexing issue of the application of section 51(xxxi) in the Territory. The most interesting aspect of this case is a comment by Kirby J suggesting that section 51(xxxi) jurisprudence may have become too complex and subtle and hinting that the time might be ripe for the reconsideration of ‘the purposes of the “just terms” guarantee’.<sup>18</sup>

What can we make of this collection of 10 cases? First, it shows that the Commonwealth is still very successful as a party before the High Court, especially in cases that involve the expansion of Commonwealth power at the expense of the States. The Commonwealth continues to encounter trouble, however, when it attempts to impose procedural limits on the High Court’s jurisdiction or to limit the democratic freedoms of individuals.

More interesting, however, is that this collection of 10 cases shows that the same judges in the same short period of time took different approaches to constitutional interpretation to achieve quite different results. The High Court’s constitutional jurisprudence of 2007 at times either relied upon or rejected resort to:

- precedent;
- first principles;
- original intent;
- history;
- text and structure;
- international sources;
- federalism;
- constitutional implications; and
- evolutionary or ‘dynamic’ interpretation.

On a number of occasions, these approaches or influences were raised in conflict with each other, and the outcome differed according to the nature of the case.

## II PRECEDENT AND THE RETURN TO FIRST PRINCIPLES

The weight given to precedent varied in the High Court’s 2007 constitutional judgments. In *White*, the majority followed both precedent and history to find that military courts may exercise judicial power outside Chapter III where its

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<sup>17</sup> (2007) 237 ALR 373.

<sup>18</sup> (2007) 237 ALR 373, [36]–[37] (Kirby J).

exercise is supported by the defence power.<sup>19</sup> Justices Gummow, Hayne and Crennan stressed that Parliament was entitled to rely on the correctness of earlier decisions in enacting its laws.<sup>20</sup> Justice Kirby, however, considered that the only proper response was to ‘return to basics and to test the impugned law against the language and structure of the Constitution itself’.<sup>21</sup> Justice Kirby similarly resorted to first principles in *ACCC v Baxter*<sup>22</sup> and *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board*, where he observed that simply to apply passages from past reasons ‘is to risk losing one’s constitutional bearings.’<sup>23</sup>

In *ACCC v Baxter*, a majority of the Court overturned the authority of *Bradken*<sup>24</sup> concerning derivative Crown immunity, but did so by reference to subsequent cases that affected the scope of the principle in *Bradken*<sup>25</sup> and changed statutory circumstances.<sup>26</sup> Justice Callinan, however, took the view that subsequent statutory changes or cases did not weaken the force of *Bradken* as a binding authority and that it should be upheld.<sup>27</sup>

The dispute over the continuing authority of *Bradken* in *ACCC v Baxter* was open and the judgments fully considered the point and gave reasons in relation to it. In contrast, one complaint made by dissenting judges in 2007 against the action of the majority was that instead of expressly overruling a previous decision and taking responsibility and giving reasons for that overruling, the majority too often left authority standing while chipping away at its application. It was argued that this leads to considerable uncertainty as to the status of prior authorities, undermining the certainty and predictability that is meant to be derived from the principle of *stare decisis*.

For example, in *Andrews*,<sup>28</sup> Kirby J complained that the Court while professing to accept the authority of *Bourke v State Bank of New South Wales*,<sup>29</sup> had in fact reversed the effect of its application. He saw this as proof of the judicial indifference to established authority of the High Court.<sup>30</sup> He was concerned that prior authorities were circumvented or neutered without being expressly reconsidered and overruled, concluding that this was another discouraging decision for the observance of unchallenged past authority of the Court.<sup>31</sup>

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19 (2007) 235 ALR 455, [14] (Gleeson CJ). See also [50]–[51] (Gummow, Hayne and Crennan JJ).

20 Ibid [57] (Gummow, Hayne and Crennan JJ).

21 (2007) 235 ALR 455, [140] (Kirby J).

22 (2007) 237 ALR 512, [87]–[88], [91]–[131] (Kirby J).

23 (2007) 234 ALR 618, [63] (Kirby J).

24 (1979) 145 CLR 107.

25 *ACCC v Baxter* (2007) 237 ALR 512, [52], [58] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

26 Ibid [63]–[70], [75] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

27 Ibid [157], [160] (Callinan J).

28 (2007) 233 ALR 389.

29 (1990) 170 CLR 276.

30 *Andrews* (2007) 233 ALR 389, [104] (Kirby J).

31 Ibid [164] (Kirby J).

Another example arose in *Thomas v Mowbray*.<sup>32</sup> Prior to that case, the defence power had been used to deal with the defence of Australia from external threats of war and invasion<sup>33</sup> while internal violence, described in the *Constitution* as ‘domestic violence’, was a matter for State criminal laws and State police forces. Section 119 of the *Constitution* provides that the Commonwealth shall protect every State, on the application of the Executive Government of the State, against domestic violence. Thus the armed forces could generally only be brought in to deal with violence within a State, if the State Government so requested. In the ordinary course, such matters were to be dealt with by State laws and police.<sup>34</sup>

If internal violence were, however, a threat to the Commonwealth Government, its officers or functions, then it was the ‘nationhood power’ (as it is now known) that was employed to support laws concerning matters such as sedition, sabotage and treason. This power was either derived from the executive power in section 61, which includes the power for the Commonwealth to protect itself, in combination with the supporting legislative power in section 51(xxxix) of the *Constitution*,<sup>35</sup> or alternatively was inherent in, and implied from, Australia’s nationhood.<sup>36</sup> Thus in the cases of *R v Sharkey*<sup>37</sup> and *Burns v Ransley*,<sup>38</sup> laws used against communists who declared that they would support Soviet forces if they invaded Australia, were supported by this nationhood power, not the defence power.<sup>39</sup> Distinctions were also drawn between the defence power and the nationhood power, in the *Communist Party Case*,<sup>40</sup> with neither being considered sufficient to support the validity of legislation dissolving the Australian Communist Party. Justices Dixon and Fullagar regarded the defence power as concerning the protection of the Commonwealth from external threats.<sup>41</sup> Matters of ‘internal order’ other than those involving Commonwealth functions or powers and the security of the organs of government, were regarded as falling ‘within the province of the States’.<sup>42</sup>

In *Re Tracey; Ex parte Ryan*, the High Court rejected the notion that the defence power could support a law that excluded the application of State criminal

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32 (2007) 237 ALR 194.

33 See, eg, *Farey v Burvett* (1916) 21 CLR 433, 440–1 (Griffith CJ); *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177, 226 (McTiernan J).

34 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) 964; *R v Sharkey* (1949) 79 CLR 121, 151 (Dixon J).

35 *Burns v Ransley* (1949) 79 CLR 101, 109–10 (Latham CJ); *R v Sharkey* (1949) 79 CLR 121, 135 (Latham CJ), 157–8 (McTiernan J), 163 (Webb J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 212(‘*Communist Party Case*’) (McTiernan J), 259–60 (Fullagar J), 275 (Kitto J).

36 *R v Sharkey* (1949) 79 CLR 121, 148 (Dixon J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 261 (Fullagar J).

37 (1949) 79 CLR 121.

38 (1949) 79 CLR 101.

39 (1949) 79 CLR 101, 109 (Latham CJ), 116 (Dixon J); (1949) 79 CLR 121, 135 (Latham CJ), 148 (Dixon J), 157 (McTiernan J), 163 (Webb J). Justice Webb also noted that it was argued that the laws in question were supported by s 51(vi), but he found it unnecessary to rely on the defence power: at 163. Justice Williams seemed to place limited reliance on the defence power, as an adjunct to the incidental power, in dealing with the security of the Commonwealth as a body politic, rather than as a territory: at 159–60.

40 (1951) 83 CLR 1, 186 (Dixon J), 212 (McTiernan J), 259–60 (Fullagar J), 275 (Kitto J).

41 (1951) 83 CLR 1, 194 (Dixon J), 259 (Fullagar J).

42 *R v Sharkey* (1949) 79 CLR 121, 150, 151–2 (Dixon J).

laws by ordinary courts to persons who had been tried for a similar offence by a military tribunal.<sup>43</sup> Justices Brennan and Toohey noted that:

An object of the defence power is the preservation of the civil government of the Commonwealth and the several States a characteristic of which is the administration of the criminal law by the ordinary courts. To the extent that the civil courts are prohibited from exercising their jurisdiction, that object is defeated.<sup>44</sup>

In summary, prior to *Thomas v Mowbray* the defence power was used to defend Australia against external threats, while internal violence was dealt with by State criminal laws or, if it affected the Commonwealth Government, its officers or functions, by Commonwealth laws enacted under the nationhood power. This position was overturned by the Court in *Thomas v Mowbray*, with scarcely a reference to this prior history and precedent. Justices Gummow and Crennan (with whom Gleeson CJ and Heydon J agreed) rejected the notion that the defence power was confined to dealing with external threats.<sup>45</sup> Their reasons for reaching this conclusion are difficult to identify<sup>46</sup> but appear to be encompassed by a number of quotations from disparate sources. The first was from the American founding father Alexander Hamilton, who in discussing the powers to raise armies, build and equip fleets, and govern, support and direct the operations of these military forces, noted that ‘these powers’ should not be limited because it is impossible to foresee future risks.<sup>47</sup> This quotation does not go beyond military matters and does not address whether the defence power or the military should deal with domestic acts of violence by civilians.

The second quotation was from Griffith CJ in *Farey v Burvett* who had stated that the words ‘naval’ and ‘military’ should be extended to include ‘all kinds of warlike operations’.<sup>48</sup> Chief Justice Griffith added that the word ‘defence’ includes all acts of such a kind as might be done in the United Kingdom for the purposes of the defence of the realm. In *Thomas v Mowbray*, Gummow and Crennan JJ appeared to imply that Griffith CJ accepted, by this statement that the defence power could be used to deal with all kinds of threats, be they external or internal. However, in the very next paragraph in *Farey v Burvett*, following this quotation, Griffith CJ made clear that he was dealing only with the external threat of war. He said:

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43 (1989) 166 CLR 518, 547 (Mason CJ, Wilson and Dawson JJ), 576 (Brennan and Toohey JJ).

44 (1989) 166 CLR 518, 576 (Brennan and Toohey JJ). See also *Re Colonel Aird; Ex parte Alpert* (2004) 220 CLR 308, [107] (Kirby J).

45 (2007) 237 ALR 194, [141] (Gummow and Crennan JJ). Chief Justice Gleeson and Heydon J agreed: at [6], [611]. Note, however, the view of Hayne J that as the case did not concern any wholly ‘internal’ threat, it was not necessary or appropriate to examine the issues that might arise if the defence power were engaged to legislate with respect to such a threat: at [419]. See also *Re Colonel Aird; Ex parte Alpert* (2004) 220 CLR 308, [28] (McHugh J), [61] (Gummow J).

46 In reaching their conclusion that s 51(vi) is not concerned only with meeting foreign threats of aggression, their Honours referred to the ‘reasons given above’: (2007) 237 ALR 194, [141].

47 *Ibid* [136] (Gummow and Crennan JJ), quoting from Alexander Hamilton, John Jay and James Madison, *The Federalist* (1788).

48 *Ibid* [137] (Gummow and Crennan JJ), quoting from *Farey v Burvett* (1916) 21 CLR 433, 440 (Griffith CJ).

This, then, is the subject matter with respect to which power to legislate is given. It includes preparation for war in time of peace, and any such action in time of war as may conduce to the successful prosecution of the war and defeat of the enemy. This is the constant and invariable meaning of the term.<sup>49</sup>

Justices Gummow and Crennan then referred to the history in England of using the law, such as the law of treason, to deal with internal insurrections as well as external threats.<sup>50</sup> This, of course, is irrelevant to the interpretation of specific and limited heads of legislative power in a federation. In the United Kingdom there is no such notion as a ‘defence power’ as opposed to a power to enact a criminal law, as the Westminster Parliament has plenary legislative power. However, it is worth pointing out that in the United Kingdom and Australia treason and sedition are crimes,<sup>51</sup> not military offences,<sup>52</sup> which are ordinarily tried in civilian courts. Such laws have been regarded in the past, at the Commonwealth level, as being supported by section 61 and section 51(xxxix) of the *Constitution*, rather than the defence power.<sup>53</sup> A reference to the crime of treason in the United Kingdom does nothing to support the proposition that section 51(vi) can be used to enact laws concerning domestic violence within Australia.

Their Honours then turned to consider the power derived from sections 61 and 51(xxxix) of the *Constitution* to protect the Commonwealth and the *Constitution* from domestic attack. They ignored precedent and the long history of the use of sections 61 and 51(xxxix) to support laws concerning matters such as sedition and treason,<sup>54</sup> observing simply that ‘the defence power itself is sufficient legislative support’ for the provisions in question without the need for recourse to any other power.<sup>55</sup> They added, cryptically, that it was unnecessary to consider the scope of the nationhood power discussed in *Davis v Commonwealth*.<sup>56</sup> It is unclear whether this is a signal that the ‘nationhood power’ is to be done away with altogether in the future, and its content redistributed into a wider interpretation of other heads of power, or whether this is a reaction to some

49 *Farey v Burvett* (1916) 21 CLR 433, 440–1 (Griffith CJ).

50 (2007) 237 ALR 194, [140] (Gummow and Crennan JJ).

51 See, eg, *Treason Act 1351*, 25 Edw 3, c 2; *Treason Felony Act 1848*, 11 & 12 Vict, c 12; *Criminal Code* (Cth) div 80 (and formerly *Crimes Act 1914* (Cth) s 24–24D); *Crimes Act 1900* (NSW), s 12; *Criminal Law Consolidation Act 1935* (SA), s 7, *Crimes Act 1958* (Vic), s 9A.

52 Under the *Defence Force Discipline Act 1982* (Cth), treason is a ‘Territory offence’, meaning that it is a civilian criminal offence in the Jervis Bay Territory that may be tried in certain circumstances by a military tribunal if the accused is a member of the Defence Forces or a ‘Defence civilian’. Section 61 provides that treason may only be tried as a ‘Territory offence’ with the consent of the Director of Public Prosecutions. See also *Armed Forces Act 2006* (UK), s 42 and sch 2 cl 12, which also notes the civilian crime of treason.

53 *Burns v Ransley* (1949) 79 CLR 101, *R v Sharkey* (1949) 79 CLR 121.

54 See also Simon Bronnitt and James Stellios, ‘Sedition, Security and Human Rights: “Unbalanced” Law Reform in the “War on Terror”’ (2006) 30 *Melbourne University Law Review* 923.

55 (2007) 237 ALR 194, [145] (Gummow and Crennan JJ).

56 (1988) 166 CLR 79 (*Davis*). Note that in *Davis*, the High Court recognised and accepted the use of the nationhood power to support legislation against subversive or seditious conduct in cases such as *Burns v Ransley* and *R v Sharkey*: *Davis* 166 CLR 79, 94, 99 (Mason CJ, Deane and Gaudron JJ), 102 (Wilson and Dawson JJ), 110 (Brennan J).

earlier arguments that the nationhood power cannot be used in a coercive manner.<sup>57</sup>

While the *Communist Party Case*<sup>58</sup> is best remembered for the principle that the Commonwealth may not recite itself into power, it is also authority for two related propositions: first, that the defence power expands in a time of war and contracts in a time of peace;<sup>59</sup> and secondly, that the defence power is 'purposive' in nature,<sup>60</sup> so that a court must determine whether a law is 'reasonably capable' of aiding defence and whether the measures used are 'reasonably appropriate' for that purpose.<sup>61</sup>

Justice Dixon noted that the necessities of war, and perhaps the imminence of war, are such as to expand the defence power so that the Commonwealth may organise the resources of the nation, control the economy, raise, equip and maintain forces on a scale formerly unknown and exercise 'the ultimate authority in all that the conduct of hostilities implies'.<sup>62</sup> However, he did not regard the same necessities as applying in a time of 'ostensible peace'. He concluded:

Whatever dangers are experienced in such a period and however well-founded apprehensions of danger may prove, it is difficult to see how they could give rise to the same kind of necessities. The Federal nature of the Constitution is not lost during a perilous war. If it is obscured, the Federal form of government must come into full view when the war ends and is wound up. The factors which give such a wide scope to the defence power in a desperate conflict are for the most part wanting.<sup>63</sup>

Justice McTiernan noted that 'the Constitution has not specifically given the Parliament power to make laws for the general control of civil liberties and it cannot be regarded as incidental to the purpose of defence to impose such a control in peace time'.<sup>64</sup> In the absence of a war, or imminent war, with the Soviet Union, he did not consider that the defence power could support preventive measures against communists.<sup>65</sup>

Justice Williams contended that 'in peace time the legislation, to be reasonably capable of aiding defence, must be reasonably necessary for the purpose of preparing for war'.<sup>66</sup> He later applied an early form of the currently accepted proportionality test, observing that a court must consider whether it was 'reasonably necessary to legislate with respect to such conduct in the interests of defence and whether such means were reasonably appropriate for the purpose'.<sup>67</sup>

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57 *Commonwealth v Tasmania* (1983) 158 CLR 1, 203 (Wilson J), 252–3 (Deane J). Note, however, that in *Davis*, Mason CJ, Deane and Gaudron JJ held that the nationhood power could be used to enact coercive laws: (1988) 166 CLR 79, 99.

58 (1951) 83 CLR 1.

59 *Ibid* 195 (Dixon J), 206–7 (McTiernan J), 222 (Williams J), 239 (Webb J), 253 (Fullagar J), 273 (Kitto J).

60 *Ibid* 142 (Latham CJ), 185 (Dixon J), 253 (Fullagar J), 272–3 (Kitto J).

61 *Ibid* 225 (Williams J). See also 207 (McTiernan J), 268 (Fullagar J). The test was later described in terms of proportionality in *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177, 226 (McTiernan J).

62 (1951) 83 CLR 1, 202 (Dixon J).

63 *Ibid* 202–3 (Dixon J).

64 *Ibid* 207 (McTiernan J).

65 *Ibid* 208 (McTiernan J).

66 *Ibid* 223 (Williams J).

67 *Ibid* 225 (Williams J).



Despite Australia's involvement in military action in Korea and the very real fears of communist revolutionary activity both within Australia and abroad, a majority of the High Court held in the *Communist Party Case* that legislation banning the Australian Communist Party was not supported by the defence power. Even at the height of World War II, when Australia was at its greatest risk of hostile invasion, the High Court held that the *National Security (Subversive Associations) Regulations 1940* (Cth) were invalid because they were not supported by the defence power.<sup>68</sup>

Since the *Communist Party Case*, the High Court has consistently treated the defence power as 'purposive' in nature<sup>69</sup> and applied a proportionality test to determine whether a law is supported by the defence power.<sup>70</sup> That test is whether a law may be reasonably considered as appropriate and adapted to fulfil or advance the purpose of the defence of the Commonwealth and the States. As Brennan J stated in *Polyukhovich v Commonwealth*:

In times of war, laws abridging the freedoms which the law assures to the Australian people are supported in order to ensure the survival of those freedoms in times of peace. In times of peace, an abridging of those freedoms – in this case, freedom from a retrospective criminal law – cannot be supported unless the Court can perceive that the abridging of the freedom in question is proportionate to the defence interest to be served. What is necessary and appropriate for the defence of the Commonwealth in times of war is different from what is necessary or appropriate in times of peace.<sup>71</sup>

In *Thomas v Mowbray*, however, Gummow and Crennan JJ concluded that they did not need to consider the expanding or contracting scope of the defence power because the definition of 'terrorist act' falls within the central conception of the defence power and therefore protection from a 'terrorist act' necessarily engages the defence power.<sup>72</sup> While they accepted that the defence power is purposive in nature,<sup>73</sup> they did not appear to apply a proportionality test to decide whether a law that provided for the abridgement of freedom by the imposition of control orders was proportionate to the defence interest to be served. Only Kirby J expressly applied a proportionality test.<sup>74</sup> Three Justices referred to the fact that

68 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116. These regulations had been used to declare the Jehovah's Witnesses to be 'prejudicial to the defence of the Commonwealth and the efficient prosecution of the war' and to dissolve their organisations and confiscate their property. They had also been used in 1940 to ban the Communist Party, but the ban was withdrawn in December 1942: George Winterton, 'The Communist Party Case', in Hoong Phun Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 109, 110.

69 See, eg, *Richardson v Forestry Commission* (1988) 164 CLR 261, 326 (Dawson J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 89 (Dawson J); *Cunliffe v Commonwealth* (1993) 182 CLR 272, 322–3 (Brennan J), 355 (Dawson J); *Leask v Commonwealth* (1996) 187 CLR 579, 591 (Brennan CJ), 606 (Dawson J); *Re Pacific Coal; Ex parte Construction Forestry Mining and Energy Union* (2000) 203 CLR 346, [204] (Gummow and Hayne JJ).

70 A proportionality test applies to all purposive powers, including the defence power: *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 597 (Gaudron J); *Polyukhovich v Commonwealth* (1991) 172 CLR 501 592–3 (Brennan J), 684 (Toohey J), 697 (Gaudron J). A proportionality test also applies to the nationhood power: *Davis v Commonwealth* (1988) 166 CLR 79, 100 (Mason CJ, Deane and Gaudron JJ).

71 (1991) 172 CLR 501, 592–3 (Brennan J).

72 (2007) 237 ALR 194, [146] (Gummow and Crennan JJ).

73 *Ibid* [135] (Gummow and Crennan JJ). See also [221] (Kirby J), [425] (Hayne J), [597] (Callinan J).

74 *Ibid* [259], [261], [296] (Kirby J).

the judge, in issuing a control order, must be satisfied on the balance of probabilities that each of the restrictions imposed on a person's freedoms must be reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act.<sup>75</sup> In doing so, they appeared to accept that this criterion satisfied the proportionality test required to support the connection between a law and the defence power.<sup>76</sup> Yet this criterion does not address whether the law can be considered reasonably appropriate and adapted to fulfil the purpose of the defence of the Commonwealth and the States.

Justice Callinan considered that the application of the defence power in this case was 'so right and obvious that reference to authority is really unnecessary'.<sup>77</sup> He saw the 'real question in every case' as being whether the Commonwealth or its people were in danger, or at risk of danger, by the application of force and whether the Commonwealth military and naval forces could respond better than State police and agencies alone.<sup>78</sup> If this were indeed the 'real question', then it would be doubtful that the relevant control order provisions in Division 104 of the *Criminal Code* (Cth) would satisfy it, as they are enforceable by the civil authorities (being police and courts) and do not involve the exercise of power by Commonwealth military and naval forces. If the Commonwealth military and naval forces could respond better to the perceived threat by imposing and enforcing control orders, this was not recognised or authorised by the law in question.

The majority appears to have assumed in its reasoning that terrorism involves war-like acts of violence against which the country needs defending, and that such acts therefore fall within the defence power. In most cases this assumption might well be correct. The difficulty with this assumption, however, is twofold.

First, the definition of 'terrorist act' in the *Criminal Code* is very broad, covering violence to people and serious damage to property that is done with the intention of advancing a political, religious or ideological cause and with the intention of coercing or influencing by intimidation a government, the public or a section of the public.<sup>79</sup> It could therefore potentially cover anti-abortion activists, animal rights activists and anti-Family Court activists who commit violence or damage property for religious or ideological reasons with the intention of intimidating the government into changing its laws or policies. It could even arguably cover the Cronulla riots of 2005, during which there was serious violence and damage to property by organised groups publicising political views

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75 Ibid [9] (Gleeson CJ), [444] (Hayne J), [588] (Callinan J). Justice Callinan came the closest to applying the proportionality test, but did so by reference to the purpose of protection against terrorism, not defence.

76 In contrast, Gummow and Crennan JJ appeared to regard this statutory test as being applied outside the context of constitutional law: *ibid* [103] (Gummow and Crennan JJ).

77 *Ibid* [585] (Callinan J).

78 *Ibid* [588] (Callinan J). Compare *Re Aird; Ex parte Alpert* (2004) 220 CLR 308, [160], where Callinan and Heydon JJ noted the absence of any supportive fact that Australia was at war with any other nation or that it was a period of any waxing of the defence power or that there existed any international emergencies which required an expansive view to be taken of the defence power at the time, and *New South Wales v Commonwealth* (2006) 229 CLR 1, [809] (Callinan J).

79 *Criminal Code* s 100.1.

about race and immigration and seeking to intimidate a section of the public.<sup>80</sup> The definition of ‘terrorist act’ is therefore not confined to war-like acts of violence, but extends to local and civil unrest that many would accept is not appropriately dealt with by the armed forces.

The second problem is that it is not a question of whether or not the people of Australia should be protected from acts of terrorism – of course they should. The real question is whether, in a representative democracy, it is appropriate to use military force and power to deal with internal acts of violence or whether such matters should be left to the police and the courts.<sup>81</sup> Historically, matters such as riots or attacks on Family Court judges have been dealt with by the police and courts under ordinary civilian laws, without invoking the defence power or the involvement of the military. The High Court of 1950 was not prepared to abandon such a distinction between civil and military power, unlike its successor in 2007.

Some might argue that it makes no difference whether the Commonwealth Parliament obtains its legislative power to deal with terrorism through the defence power, the ‘nationhood power’ or through State references, as long as it has the power. However, the source of the power is important. If it is the defence power in section 51(vi) that supports the enactment of laws that impose offences or permit preventative detention or the imposition of control orders with regard to ‘terrorist acts’, as defined above, then the Court in *White* tells us that such matters could then be tried before a military court by military judges or officers<sup>82</sup> outside of the protection of Chapter III of the *Constitution* and, by logical extension, people could be held in preventative detention in military prisons. While the provisions in question in *Thomas v Mowbray* conferred the power to impose control orders on Chapter III courts, not military courts, the High Court, by finding that those provisions were supported by the defence power, opened the way for the future use of military courts and the defence forces to deal with such matters. Moreover, it did not need to do so in order to ensure that the Commonwealth had sufficient legislative power to support such laws, as the ‘nationhood power’ and the State references under section 51(xxxvii) provided sufficient legislative power to support anti-terrorism laws. The disregard of precedent and history was therefore unnecessary as well as unwise.

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80 Note the view of Dixon J that the Commonwealth could only intervene in a riot within a State if the riot interfered with Commonwealth functions, such as the carriage of federal mails or inter-state commerce, or otherwise threatened the security of the Commonwealth Government: *R v Sharkey* (1949) 79 CLR 121, 151 (Dixon J).

81 Note Callinan J’s earlier suggestion that the ‘use of military forces, the imposition in effect of martial law in a democracy, except perhaps in times of external threat or civil insurrection, is anathema to democracy itself...’: *New South Wales v Commonwealth* (2006) 229 CLR 1, [809].

82 See the discussion of courts martial at: (2007) 235 ALR 455, [92]–[95] (Kirby J).

### III ORIGINAL INTENT, HISTORY AND TEXT AND STRUCTURE

The use of the Convention Debates of the 1890s in constitutional interpretation is now widespread throughout the Court and virtually undisputed. Substantial discussion of the Convention Debates occurred in *Andrews*,<sup>83</sup> *Roach*,<sup>84</sup> *Thomas v Mowbray*<sup>85</sup> and *White*.<sup>86</sup> Only in *White* did Heydon J sound a warning that references to what the framers did or did not intend must be 'taken to have referred to what the language drafted by the framers meant', rather than their subjective intentions.<sup>87</sup>

Original intent is therefore tied to the meaning that the text of the *Constitution* had at the time of its enactment, rather than the individual views of the framers of the *Constitution*.<sup>88</sup> Reference to the Convention Debates is therefore only one means of ascertaining that meaning. Use is often made by the Court of other British and colonial laws of the nineteenth century that give a context to the use of language in the *Constitution* itself, and the assumptions upon which particular provisions were based.

It is in this context that the High Court's history wars take place. What weight should be placed upon history as opposed to other matters, such as the text and structure of the *Constitution*? To what extent is post-1900 history relevant to the interpretation of the *Constitution*? The response of Justices to these questions has varied. For example, the long history of the use of courts-martial was crucial to the decision of the High Court in *White*.<sup>89</sup> The plain text and structure of the *Constitution*, which clearly provide for the vesting of the judicial power of the Commonwealth in Chapter III courts, not military courts, was overcome by the history of the use of military courts that do not meet the requirements of Chapter III.<sup>90</sup>

Justice Heydon contended that references to history should be understood 'as referring to history up to the time of federation ... for later history and practice, and later perceptions of what was or is necessary, cannot affect the construction of at least those parts of the constitutional language as enacted in 1900 which are relevant to the present problem'.<sup>91</sup> This was presumably a response to Kirby J's argument that 'understandings of constitutional expressions in 1900 do not control the attribution of meaning to them today'.<sup>92</sup>

In *Roach*, in contrast, history and original intent were overridden by the majority's 'dynamic' interpretation of representative government and subsequent

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83 (2007) 233 ALR 389, [7]–[9] (Gleeson CJ), [174]–[175] (Callinan J).

84 (2007) 239 ALR 1, [63]–[67] (Gummow, Kirby and Crennan JJ), [122]–[125] (Hayne J).

85 (2007) 237 ALR 194, [605]–[606] (Callinan J).

86 (2007) 235 ALR 455, [7]–[8] (Gleeson CJ), [237], [241] (Callinan J).

87 *Ibid* [246] (Heydon J).

88 *Cole v Whitfield* (1988) 165 CLR 360, 385.

89 (2007) 235 ALR 455, [9] (Gleeson CJ), [50]–[54] (Gummow, Hayne and Crennan JJ).

90 *Ibid* [124]–[129] (Kirby J).

91 *Ibid* [247] (Heydon J). Cf the use of post-1900 sources in *XYZ v Commonwealth* (2006) 227 CLR 532, [165]–[170] (Callinan and Heydon JJ). See also Zines, above n 1, 183.

92 (2007) 235 ALR 455, [195] (Kirby J).

changes to the franchise.<sup>93</sup> Justice Hayne, dissenting, noted that ‘history provides the only certain guide’ and that the original meaning of sections 7, 8, 24 and 30 of the *Constitution* must prevail. His Honour argued that while changes in facts might affect the meaning of phrases such as ‘foreign power’ or ‘postal, telegraphic, telephonic and other like services’, which are directed at factual matters, the phrase ‘directly chosen by the people’ is a standard, the content of which does not change over time.<sup>94</sup>

In *Thomas v Mowbray*, post-1900 history played a dual role. It was considered to be relevant to the question of whether courts may issue orders for preventative justice.<sup>95</sup> It was also considered to a limited extent in ascertaining a connection between the facts and the defence power.<sup>96</sup> Justice Callinan noted the theory that all works of history are affected by inevitable personal bias. He accordingly warned that judges should be cautious and diligent to ensure natural justice in cases in which recourse to historical writings is to be made.<sup>97</sup>

#### IV THE USE OF FOREIGN SOURCES AND INTERNATIONAL LAW

The use of foreign legal sources and international law in constitutional interpretation has proved more controversial. While British and colonial laws were considered by the Court to be relevant in ascertaining the context in which constitutional provisions were drafted,<sup>98</sup> the Court was divided upon the use of authorities from other jurisdictions or international law in constitutional interpretation.

At one end of the interpretative spectrum, Kirby J in cases such as *Bennett*,<sup>99</sup> and *White*,<sup>100</sup> freely considered the effect of the International Covenant on Civil and Political Rights (‘ICCPR’) in undertaking constitutional interpretation. He also considered numerous laws from other sources, ranging from German workers’ compensation laws<sup>101</sup> to Swedish laws concerning military discipline<sup>102</sup> and anti-terrorism laws in Belize.<sup>103</sup>

In the middle range, we see some judges referring to international or foreign sources as collateral support for constitutional propositions already established, but not necessarily dictating or influencing that outcome. For example, in *Roach*,

93 (2007) 239 ALR 1, [7] (Gleeson CJ), [45] (Gummow, Kirby and Crennan JJ).

94 *Ibid* [162] (Hayne J).

95 (2007) 237 ALR 194, [66], [116], [121] (Gummow and Crennan JJ), [330]–[337] (Kirby J).

96 *Ibid* [413]–[415] (Hayne J), [543]–[553] (Callinan J).

97 *Ibid* [524] (Callinan J).

98 See, eg, *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, [35]–[43].

99 (2007) 235 ALR 1, [143]–[150] (Kirby J).

100 (2007) 235 ALR 455, [135]–[136] (Kirby J). See also the discussion of international human rights law in *Thomas v Mowbray* (2007) 237 ALR 194, [379]–[382] (Kirby J).

101 *Attorney-General (Vic) v Andrews* (2007) 233 ALR 389, [123]–[127] (Kirby J).

102 *White v Director of Military Prosecutions* (2007) 235 ALR 455, [201] (Kirby J).

103 *Thomas v Mowbray* (2007) 237 ALR 194, [280] (Kirby J). See also [372]–[378] regarding anti-terrorism measures in the UK, Canada and the US.

Gleeson CJ, Gummow, Kirby and Crennan JJ discussed authorities from Canada and the European Court of Human Rights.<sup>104</sup>

At the other end of the spectrum Hayne J rejected the relevance of these foreign sources as there was no similarity with the Australian provisions and context.<sup>105</sup> Justice Heydon went even further, attacking the use in constitutional interpretation of international instruments such as the ICCPR and the European Convention on Human Rights and foreign sources such as the Canadian Charter and the South African Constitution. He pointed out that none of these instruments influenced the framers of the *Constitution*, for all postdated federation. Further, he noted that the language they employ is radically different from that used in the *Constitution*.<sup>106</sup>

Justice Heydon also expressed deep scepticism about taking into account the interpretation of the ICCPR by the United Nations Human Rights Committee, suggesting that the Court might need to know which countries were represented on the Committee, the standing of their representatives, and the role and influence of Australia on the Committee's proceedings. Justice Heydon concluded by declaring that Australian law 'does not permit recourse to these materials' in constitutional interpretation. He conducted a judicial headcount and concluded that out of all the Justices of the High Court who had considered whether international law could be used to limit Commonwealth legislative power, 21 had denied that it could be so used, and only one supported the proposition.<sup>107</sup>

## V FEDERALISM

The (non) relevance of federalism to constitutional interpretation, which was a prominent theme in 2006,<sup>108</sup> was more notable for its lack of consideration by a majority of the High Court in 2007. Justice Kirby continued his support for the maintenance of federal arrangements under the *Constitution* in his dissenting judgments in *Andrews*<sup>109</sup> and *Thomas v Mowbray*.<sup>110</sup> In *Andrews* he complained of the serious disturbance to the constitutional federal balance committed by a majority of the Court and the 'seemingly never-ending accretions to federal legislative power' that have been upheld.<sup>111</sup>

Justice Callinan also sought to apply federalist principles in constitutional interpretation in his dissenting judgments in *Andrews*<sup>112</sup> and *ACCC v Baxter*.<sup>113</sup> What is interesting, however, is his Honour's lack of concern about federalism in

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104 (2007) 239 ALR 1, [13]–[18] (Gleeson CJ), [100]–[101] (Gummow, Kirby and Crennan JJ). See also [55]–[62], regarding colonial authorities.

105 *Ibid* [166] (Hayne J).

106 *Ibid* [181] (Heydon J).

107 *Ibid* [181] (Heydon J).

108 Zines, above n 1, 175–81.

109 (2007) 233 ALR 389, [92]–[93], [104]–[105], [117]–[120] (Kirby J).

110 (2007) 237 ALR 194, [259] (Kirby J). See also *ACCC v Baxter* (2007) 237 ALR 512, [140] (Kirby J).

111 (2007) 233 ALR 389, [104], [105] (Kirby J).

112 *Ibid* [178] (Callinan J).

113 (2007) 237 ALR 512, [156], [158]–[164] (Callinan J).

*Thomas v Mowbray* with respect to the application of the defence power. In the past, well after the *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*,<sup>114</sup> federal balance was taken into account by the High Court when interpreting the defence power. For example, Williams J noted in *Marcus Clark & Co Ltd v The Commonwealth* that in ‘times of peace, the legislative powers normally exclusively vested in the States should not lightly be encroached upon by an extended application of the defence power’.<sup>115</sup> In an unanimous judgment in *R v Foster; Ex parte Rural Bank of NSW*,<sup>116</sup> the High Court acknowledged that while a narrow or pedantic test should not be applied to the defence power, nor must it be treated so broadly as to give the Commonwealth Parliament a general law making power. The Court was concerned that the ‘deliberate acceptance by the people of a Federal system of government upon the basis of the division of powers set forth in the Constitution’ would be undermined and a unitary system of government effectively established, if such an interpretative approach were taken.<sup>117</sup>

More recently, in *Re Tracey; Ex parte Ryan*, a majority of the High Court struck down a law which provided that where a person had been acquitted or convicted by a military tribunal, the person was not liable to be tried by a civil court for substantially the same offence. Chief Justice Mason, Wilson and Dawson JJ concluded that ‘it is clearly beyond the defence power and the incidental power of the Parliament to interfere in this manner with the exercise by State courts of their general criminal jurisdiction’.<sup>118</sup> Justices Brennan and Toohey also considered that ‘the defence power must stop short of any interference with the exercise by the civil courts of their jurisdiction to administer the law of the land’.<sup>119</sup>

Justice Callinan took a similar approach in *New South Wales v Commonwealth*. He appeared to be seeking grounds to read down the defence power, saying:

The use of military forces, the imposition in effect of martial law in a democracy, except perhaps in times of external threat or civil insurrection, is anathema to democracy itself, and yet, if s 51(vi) is to be construed too generally and textually or literally, and without reference to other provisions of the *Constitution*, including perhaps that all of the powers are to be exercised to make laws for the good (democratic) government of the Commonwealth, that result might conceivably follow.<sup>120</sup>

Yet in *Thomas v Mowbray*, Callinan J took the view that the defence power applies if the Commonwealth or its people are in danger and if the military and

114 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (‘Engineers’ Case’).

115 (1952) 87 CLR 177, 240 (Williams J). See also *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (1942) 66 CLR 452, 509 (Latham CJ); *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 162–3 (Williams J); *Shrimpton v Commonwealth* (1945) 69 CLR 613, 623 (Latham CJ); *R v Sharkey* (1949) 79 CLR 121, 151 (Dixon J); *Queensland Newspapers Pty Ltd v McTavish* (1951) 85 CLR 30, 54 (Williams J).

116 (1949) 79 CLR 43.

117 *Ibid* 83. See also *Marcus Clark & Co Ltd v The Commonwealth* (1952) 87 CLR 177, 261 (Kitto J).

118 (1989) 166 CLR 518, 547 (Mason CJ, Wilson and Dawson JJ).

119 *Ibid* 576 (Brennan and Toohey JJ).

120 (2006) 229 CLR 1, [809] (Callinan J).

naval forces might better respond to that risk of danger than State police and agencies alone.<sup>121</sup> He was not concerned that this would be ‘anathema to democracy itself’. Nor was he concerned that Australia was not at war and it was not a period of the waxing of the defence power, as he had been in *Re Aird; Ex parte Alpert*<sup>122</sup> in 2004.

Curiously, in *Thomas v Mowbray*, Callinan J added the following federal dimension to his view:

In any event, there is a further possible solution, and again my view on it is tentative only, that the States might themselves enact anti-terrorism laws, better able to be maintained and enforced by the military forces and other federal agencies than State agencies, and seek to have them maintained and carried into effect by and with the concurrence of the Commonwealth as an aspect of the ‘naval and military defence ... of the several States’ within the meaning of s 51(vi) of the Constitution.<sup>123</sup>

The States, of course, have enacted anti-terrorism laws, as one aspect of their cooperative agreement with the Commonwealth on terrorism.<sup>124</sup> It is not clear, however, why or how such laws could be better maintained and enforced by military forces and federal agencies rather than State police and the courts. Where Commonwealth involvement is necessary, the States can always refer matters to the Commonwealth, which they have already done in relation to some aspects of terrorism.<sup>125</sup>

## VI LEGALISM, DYNAMIC INTERPRETATION AND THE DRAWING OF CONSTITUTIONAL IMPLICATIONS

In its 2007 constitutional cases, the High Court did not consistently approach constitutional interpretation from a narrow legalistic point of view, nor did it take a broad, overarching approach that draws on contemporary values and constitutional implications. In practice, the majority chose different approaches to meet the different facts of the cases confronted.

*Andrews* is a prime example of a majority of the Court taking a technical, narrow and legalistic approach to a constitutional issue. The question here was whether a Commonwealth law that allowed Optus to join a Commonwealth workers’ compensation scheme so that it was no longer obliged to insure against workers’ compensation liability with a State Government insurer was a law with respect to State insurance. The majority concluded that it was not the Commonwealth’s law itself, but section 109 of the *Constitution* which had the

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121 (2007) 237 ALR 194, [588] (Callinan J).

122 (2004) 220 CLR 308, [160] (Callinan J).

123 (2007) 237 ALR 194, [608] (Callinan J).

124 See, eg, *Terrorism (Police Powers) Act 2002* (NSW); *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Police Powers) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Community Protection) Act 2003* (Vic); *Terrorism (Preventative Detention) Act 2006* (WA); *Terrorism (Extraordinary Powers) Act 2005* (WA).

125 See, eg, *Terrorism (Commonwealth Powers) Act 2002* (NSW); *Terrorism (Commonwealth Powers) Act 2002* (Qld); *Terrorism (Commonwealth Powers) Act 2002* (SA); *Terrorism (Commonwealth Powers) Act 2002* (Tas); *Terrorism (Commonwealth Powers) Act 2002* (WA); *Terrorism (Commonwealth Powers) Act 2003* (Vic).



effect of terminating the obligation of Optus to insure with a State insurer. Hence the Commonwealth law was not one about State insurance.<sup>126</sup> The argument that an effect can be attributed to section 109 that does not affect the content or characterisation of the Commonwealth law that triggered section 109 is far from convincing.

The majority also observed that the effect of section 109 was to remove the liability to pay workers compensation at the State level and that the obligation to insure with the State insurer was contingent upon that liability.<sup>127</sup> By separating the causes and effects of the Commonwealth's law, it could be regarded as a law concerning workers compensation only, even though its consequences affected State insurance. While one can understand how this conclusion was reached, it is a highly technical 'Barwickian' approach, reminiscent of the dark days of the bottom of the harbour, when form prevailed over substance.

This led Kirby J to lament that to 'divorce the substantive rights to workers compensation from the insurance obligations involves a degree of unreality that ill becomes this court'.<sup>128</sup> He saw this case as a further illustration of the High Court's tendency to uphold Commonwealth legislative power over the States, even where there was an express constitutional provision carving State insurance out of Commonwealth legislative power.

An intermediate case in this spectrum of constitutional interpretation is *Bennett*. There, the majority observed that providing a system of representation for Norfolk Island that was unfair or idiosyncratic might have adverse political consequences, but the Court is instead concerned with questions of constitutional power.<sup>129</sup> Their Honours stated that some forms of discrimination in voting rights 'may be unjust or unwise, or inconsistent with currently held democratic values' but that this does not necessarily mean they are unlawful. They noted that discrimination by reference to a minimum voting age is acceptable, as is discrimination on the basis of Australian citizenship.<sup>130</sup> The Court affirmed the scope of the territories' power in section 122 of the *Constitution* to support such a law.

Justice Kirby ultimately agreed. However, he raised the more difficult question of whether a Commonwealth law, which provided that only male residents could vote for the Norfolk Island Legislative Assembly, would be valid. In such a case, any implication drawn from the requirement that the Commonwealth Parliament be directly chosen by the people would not appear to apply to representation in the Norfolk Island Legislative Assembly. Section 122 of the *Commonwealth Constitution* would not appear to be impliedly limited by sections 7 and 24.

Undeterred, Kirby J was prepared to contemplate a *Kable*<sup>131</sup> type argument. It ran as follows:

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126 (2007) 233 ALR 389, [88] (Gummow, Hayne, Heydon and Crennan JJ).

127 Ibid [86] (Gummow, Hayne, Heydon and Crennan JJ).

128 Ibid [156] (Kirby J).

129 *Bennett* (2007) 235 ALR 1, [32] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

130 Ibid [38] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also [108] (Kirby J).

131 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

Because a territory such as [Norfolk Island] is contemplated by s 122 as being one in respect of which 'representation' in the Australian Parliament might be allowed, any form of representative government enacted by federal law and practised in [Norfolk Island] would have to be such as rendered the territory potentially suitable for representation in the kind of parliament created for the Commonwealth.<sup>132</sup>

While the majority did not follow Kirby J on this gambol down the path of constitutional implication, it did so in *Roach*.<sup>133</sup> Here, voting rights were again at issue. Two problems confronted the Court. First, sections 8, 30 and 51(xxxvi) of the *Constitution* clearly conferred on the Commonwealth Parliament the legislative power to determine the franchise. Secondly, at the time the *Constitution* came into force, it not only contemplated as acceptable but actually imposed a franchise, based on State electoral laws, that was not universal and which in some cases involved the disqualification of numerous groups, including women, Aboriginal people, members of the army, navy and police forces, prisoners, the mentally incapacitated, those in charitable institutions, habitual drunkards and incorrigible rogues, idle and disorderly persons, wife-beaters and men who had not satisfied orders for the maintenance of their wife or children.<sup>134</sup>

While sections 7 and 24 of the *Constitution* require the Commonwealth Parliament to be directly chosen by the people, the more explicit sections 8 and 30, by setting the initial franchise by reference to State laws until Parliament otherwise provided, permitted the imposition of such disqualifications. Moreover, the Convention Debates also showed that the extent of the franchise, including female suffrage, was to be left to the Parliament, subject to the protection afforded to State voters by section 41.<sup>135</sup> The High Court, having interpreted section 41 so narrowly as to render it ineffective,<sup>136</sup> was now left with the dilemma of how the *Constitution* might be interpreted to protect the franchise.

A majority of the Court responded to this dilemma by drawing implications from the *Constitution* and reinterpreting constitutional provisions to give them a modern meaning quite different from their original meaning. Chief Justice Gleeson reinterpreted the phrase 'directly chosen by the people' as requiring universal suffrage and providing constitutional protection of the right to vote.<sup>137</sup> Justices Gummow, Kirby and Crennan drew from the principle of representative government an implied 'limitation on legislative power derived from the text and structure of the Constitution'.<sup>138</sup>

The majority then faced the even greater difficulty of how to deal with exceptions. If the reference to 'the people' or the principles of representative government require that there be a universal franchise, what power does

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132 *Bennett* (2007) 235 ALR 1, [107] (Kirby J).

133 (2007) 239 ALR 1.

134 See, eg, *Parliamentary Electorates and Elections Act 1893* (NSW), s 23.

135 Section 41 was described by Gummow, Kirby and Crennan JJ as 'somewhat delphic': *Roach* (2007) 239 ALR 1, [70].

136 *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254. See also Anne Twomey, 'The Federal Constitutional Right to Vote in Australia' (2000) 28 *Federal Law Review* 125.

137 *Roach* (2007) 239 ALR 1, [7] (Gleeson CJ).

138 *Ibid* [86] (Gummow, Kirby and Crennan JJ).

Parliament have to detract from that universal franchise? If there were no power to make exceptions, then the existing exclusion of the mentally incompetent, prisoners, non-citizens and persons under 18 years of age would be invalid. Chief Justice Gleeson pointed to the need for a 'substantial reason' for exclusion. It must not be 'arbitrary'. There needs to be a rational connection between the definition of the excluded group and the identification of community membership or the capacity to exercise free choice.<sup>139</sup> Prisoners, according to the Chief Justice, may be excluded from the franchise because their conduct has manifested 'such a rejection of civic responsibility as to warrant temporary withdrawal of a civic right'.<sup>140</sup>

Justices Gummow, Kirby and Crennan also saw the necessity for a 'substantial' reason, but in doing so employed the test of whether the disqualification was 'reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government'.<sup>141</sup> This test is drawn from *Lange v Australian Broadcasting Corporation*,<sup>142</sup> in which the Court unanimously redefined the criteria by which derogations from the application of the implied freedom of political communication are to be upheld. Curiously, the test is not in the same form as that set out in *Lange*,<sup>143</sup> nor does it adopt the revised formulation of the test from *Coleman v Power*, which provided that the law must serve a 'legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'.<sup>144</sup> Their Honours gave no reasons for the different formulation used in *Roach*, and left uncertain whether this new test should be used in all future cases in which proportionality issues arise or whether it is confined to cases concerning voting rights.

Chief Justice Gleeson and Gummow, Kirby and Crennan JJ all concluded that a serious level of culpability in prisoners could justify their disqualification from voting, but that the disqualification of all full-time prisoners failed to evince a sufficient assessment of culpability to justify the disqualification.<sup>145</sup> The disqualification of prisoners with three years sentences, however, was acceptable.<sup>146</sup>

Drawing such a distinction, of course, is a matter of policy and discretion. It is already drawing a fairly long bow to argue that prisoners may be disqualified from voting because their crimes involve the rejection of civic responsibility. This potentially opens up further questions as to whether some types of crime involve a rejection of civic responsibility, but others do not, and whether other non-criminal actions, such as refusing to pay maintenance to support one's

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139 Ibid [8] (Gleeson CJ).

140 Ibid [8] (Gleeson CJ).

141 Ibid [85] (Gummow, Kirby and Crennan JJ).

142 (1997) 189 CLR 520 ('Lange').

143 Ibid 567.

144 (2004) 220 CLR 1, [92]–[96] (McHugh J), [196] (Gummow and Hayne JJ), [211] (Kirby J).

145 *Roach* (2007) 239 ALR 1, [19] (Gleeson CJ), [90]–[95] (Gummow, Kirby and Crennan JJ).

146 Ibid [19], [23]–[24] (Gleeson CJ), [102] (Gummow, Kirby and Crennan JJ).

children or not undertaking jury duty, or indeed, refusing to vote, amount to a greater rejection of civic responsibility. Moreover, whether imprisonment itself is a sufficient indication that the offender has committed a crime that warrants disqualification, or whether a sentence of three years, or eight months and three days suffices, is purely a matter for political assessment. There is no legal criterion by which it can be measured.

One of the factors that appears to have influenced the majority was that section 44(ii) of the *Constitution* only disqualifies from being a Member of Parliament any person who is under sentence or subject to be sentenced for an offence punishable by imprisonment for one year or longer.<sup>147</sup> Justices Gummow, Kirby and Crennan were concerned that this meant the grounds for disqualifying voters were more stringent than those for disqualifying Members and Senators from sitting in the Commonwealth Parliament, even though the latter have greater responsibilities than voters.<sup>148</sup> They looked back to colonial electoral laws to ‘explain the common assumptions’ upon which the provisions of the *Constitution* were based. Their Honours drew from their study of the colonial constitutional history the conclusion that ‘the same notions of attain for treason and conviction for felony or other infamous crime founded grounds for disqualification of electors, candidates and legislators’.<sup>149</sup> Hence, they concluded that there ought to be a degree of symmetry or ‘harmony’ between provisions disqualifying voters and provisions disqualifying Members of Parliament from sitting.

However, by the 1890s, the period during which the *Constitution* was drafted, a good case can be made for the exact opposite conclusion. In New South Wales, for example, the disqualification criteria for voters were much more stringent than for elected Members of the New South Wales Legislative Assembly. The *Constitution Act 1855* (NSW) provided that a Member of the New South Wales Legislative Assembly shall be disqualified from sitting and his<sup>150</sup> seat vacated if he ‘be attainted of treason or be convicted of felony or any infamous crime’.<sup>151</sup> In contrast, a voter would be disqualified from voting if he was ‘in prison under any conviction’; had been ‘convicted of any crime or offence wherever committed, for which, if the same had been committed in New South Wales, he might have been lawfully sentenced to death or penal servitude’ and had not received a free pardon or served the sentence; had in the previous six months been imprisoned for an aggregate period of three months; or within the past year had been convicted of being ‘an habitual drunkard, an idle and disorderly person, or incorrigible rogue, or a rogue and vagabond’.<sup>152</sup> Thus any length of imprisonment disqualified a voter, but not a Member of Parliament. While a New South Wales Member of Parliament had to be qualified to vote at the time of his election,<sup>153</sup> a higher level of culpability was required before his seat could be

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147 Ibid [20] (Gleeson CJ), [51]–[54] (Gummow, Kirby and Crennan JJ).

148 Ibid [90] (Gummow, Kirby and Crennan JJ). See also [20] (Gleeson CJ).

149 Ibid [62] (Gummow, Kirby and Crennan JJ).

150 In the 1890s in NSW, females were excluded from voting or being elected as Members of Parliament.

151 *Constitution Act 1855* (NSW) 18 & 19 Vic c 54, sch 1, s 26.

152 *Parliamentary Electorates and Elections Act 1893* (NSW) s 23(iv).

153 *Constitution Act 1855* (NSW) 18 & 19 Vic c 54, sch 1, s 16.

vacated during the term for which he was elected. Hence a disparity between the grounds for disqualifying voters and Members of Parliament in the *Commonwealth Constitution* ought not to have been surprising or concerning.

Indeed, there is still a disparity between the disqualification of voters and Members of Parliament in New South Wales.<sup>154</sup> Persons are disqualified from voting in New South Wales elections if they are serving a sentence of 12 months or more,<sup>155</sup> whereas Members of Parliament are only disqualified if they are convicted of an offence punishable by imprisonment for five years or more or life, or an infamous crime.<sup>156</sup> In some cases this distinction or ‘disharmony’<sup>157</sup> imposes a harsher test on voters, as a voter sentenced to 12 months imprisonment for an offence of violence would be disqualified from voting but a Member of Parliament, sentenced for the same term and for the same offence would not be disqualified, by virtue of the conviction or sentence, from sitting in Parliament unless the maximum punishment for the offence was imprisonment for five years or more.<sup>158</sup> In other cases the harsher test applies to Members, as a Member could be disqualified from sitting if convicted of an infamous crime (being a crime involving deceit, such as fraud, forgery, perjury or bribery) even if imprisoned for one month or not at all.<sup>159</sup>

The further point to make here is that there is a significant difference between being convicted of an offence ‘punishable’ by a particular term and the actual sentence the prisoner receives. The vast majority of sentences are significantly less than the maximum sentence by which an offence is ‘punishable’. Thus, while section 44(ii) of the *Commonwealth Constitution* provides for the disqualification of Members who have been sentenced for ‘any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer’, this would cover persons sentenced to imprisonment for one week or 30 days, as long as the maximum potential sentence is 12 months or more. These persons would fall within the category of short-term prisoners that the majority in *Roach* considered it would be arbitrary to disqualify from voting.<sup>160</sup>

The dissenters, Hayne and Heydon JJ, focussed upon the constitutional method employed by the majority. Justice Hayne pointed out that if one tries to give the phrase ‘directly chosen by the people’ content according to ‘generally accepted Australian standards’ then there is a difficulty in how those standards are ascertained. The obvious way of determining them would be to allow the

154 See also the current disparity in Western Australia between the *Constitution Acts Amendment Act 1899* (WA) s 32, which disqualifies Members of Parliament convicted of an indictable offence for which the penalty is imprisonment for more than five years and s 18(1)(c) of the *Electoral Act 1907* (WA), which disqualifies voters who are serving any sentence of imprisonment.

155 *Parliamentary Electorates and Elections Act 1912* (NSW) s 21(b).

156 *Constitution Act 1902* (NSW) s 13A(1)(e).

157 (2007) 239 ALR 1, [90] (Gummow, Kirby and Crennan JJ).

158 Note that if a Member were in prison serving a sentence he or she could become disqualified under s 13A(1)(s) for failing to attend the House for a whole session, unless excused. He or she could also be expelled. Note also that the Member would be disqualified as an elector, and therefore from being elected as a Member of Parliament, if an election took place during the period of imprisonment. See further Anne Twomey, *The Constitution of New South Wales* (2004) ch 8.

159 See also *ibid* 427–30.

160 (2007) 239 ALR 1, [23] (Gleeson CJ), [91] (Gummow, Kirby and Crennan JJ).

popularly elected representatives of the people in the Parliament to decide. However, the limitation on legislative power would then have no content.<sup>161</sup> His Honour argued that political or popular acceptability ought not to be the criteria for determining the content of constitutional expressions.

Justice Heydon agreed with Hayne J and warned against too readily testing and seeking to apply the test of whether legislation is ‘reasonably appropriate and adapted’ to the fulfilment of a particular purpose.<sup>162</sup> He also pointed out that if Commonwealth electoral laws are invalid for disqualifying prisoners, amongst other groups, because such laws do not permit the Parliament to be directly ‘chosen by the people’, then the 1902 electoral law must have been invalid and ‘every federal election in our history apart from the first one would have been held under invalid electoral laws’.<sup>163</sup> His Honour considered this outcome ‘highly improbable’, although no doubt this will not dissuade litigants-in-person from attempting to run the argument.

This does, however, point to the difficulty of timing in ‘dynamic’ constitutional interpretation. What if a law affecting the franchise was considered valid at the time that it was enacted, as the notion of a ‘universal franchise’ had not yet taken such strong root as to affect the meaning of ‘chosen by the people’? At what point does it lose its validity?

For example, section 30FD of the *Crimes Act 1914* (Cth) provides that a member of the executive of an unlawful association, at the date of its declaration as unlawful by a court, shall not be entitled to vote for seven years.<sup>164</sup> Section 30A declares to be an unlawful association any body of persons which advocates or encourages the overthrow by force or violence of the established government of the Commonwealth, the States, or any other ‘civilized country’, or which advocates the destruction or injury of property used in trade or commerce with other countries or among the States.<sup>165</sup> Section 30FD was enacted in 1932,<sup>166</sup> at a time when the Commonwealth franchise was not yet ‘universal’ as it was still denied to Aboriginal people, and others based on race. Was it valid when enacted? Has it since become invalid? Does membership of an unlawful association involve such a rejection of civic responsibility as to justify disqualification from the right to vote for seven years? Does the perceived need to expand the defence power to combat terrorism offences overcome the constitutional implication protecting the universality of the franchise? Given the High Court’s varying approaches to constitutional interpretation, a result could not be confidently predicted.

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161 Ibid [159] (Hayne J).

162 Ibid [178] fn 150 (Heydon J).

163 Ibid [183] (Heydon J).

164 Note the recommendations that s 30FD be amended or repealed: Human Rights Commission, ‘Review of *Crimes Act 1914* and other Crimes Legislation of the Commonwealth’ Report No 5 (October 1983) 7; Sir Harry Gibbs, Ray Watson and Andrew Menzies, *Review of Commonwealth Criminal Law*, Fifth Interim Report (1991) [38.2]–[38.9]; Australian Law Reform Commission, *Fighting Words*, Report 104 (July 2006) 98.

165 See also Roger Douglas, ‘Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth *Crimes Act*’ (2001) 22 *Adelaide Law Review* 259.

166 *Crimes Act 1932* (Cth) s 7.

## VII CONCLUSION

The High Court's 2007 term provided not only a wide variety of constitutional cases, but a wide range of approaches to them in terms of constitutional method and interpretation. It is not possible to place the Court in a box and attribute certain defining characteristics to it. Majorities change and so do approaches to constitutional questions depending upon the issues raised and their current context, be it terrorism, judicial power or voting rights. The Gleeson Court, on its day, can be more liberal or revolutionary than the Mason Court or more legalistic than the Barwick Court. The 2007 term of the High Court has proved no exception.