'Enemies Foreign and Domestic'[1]
Thomas v Mowbray and the New Scope of the Defence Power

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Introduction

The attacks of 11 September 2001 demonstrated the capacity of small groups to inflict civilian casualties on a scale previously known only in wartime. Since 9/11 and the resulting so-called "war on terror", jurists have grappled with the implications of modern terrorism for conventional understandings of war and defence. For example, while the International Court of Justice has held that self-defence under the United Nations Charter[2] cannot be invoked by a State in response to an attack by non-State actors,[3] this remains highly contested in international law.[4] Similarly, there is considerable debate about the minimum threshold for belligerency in international humanitarian law and whether terrorists are combatants under the laws of war.[5]

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1 United States military officers swear an oath to protect the US Constitution from enemies 'foreign and domestic'. The oath sworn by Australian soldiers includes no comparable phrase.

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2 *Charter of the United Nations*, art 51. *United Nations Charter*, opened for signature June 26, 1945 182 UNTS 51 (entered into force Oct. 24, 1945) art 51.

3 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14; *Case Concerning Armed Activities on the Territory of the Congo (Congo v Uganda)* [2005] ICJ Rep 7.

4 Christopher Greenwood, 'International Law and the 'War Against Terrorism' (2002) 78 *International Affairs* 301, 305-308; William Lietzau, 'Old Laws, New Wars: Jus ad Bellum in an Age of Terrorism' (2004) 8 *Max Planck United Nations Year Book* 383, 389-395.

5 See generally Michael Scharf, 'Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects' (2004) 36 *Case Western Reserve Journal of International Law* 359; Jordan Paust, 'War and Enemy Status After 9/11: Attacks on the Laws of War' (2003) 28 *Yale Journal of International Law* 325.

Novel questions have also been posed for domestic legal systems, including Australia's. In 2007 in *Thomas v Mowbray*[6] the High Court examined the scope of the Commonwealth's defence power in s 51(vi) of the *Constitution* and its capacity to support legislation on the subject of terrorism. *Thomas* was the first High Court challenge to the validity of any of the 44 anti-terror laws passed by the federal Parliament after 2001. At issue was whether the control order regime inserted in 2005 into the Commonwealth Criminal Code (in the *Criminal Code Act 1995* (Cth)) was constitutionally valid. By a margin of 5:2, the Court held that it was. The result rested primarily on the Court's interpretation of the separation of judicial power brought about by Chapter III of the *Constitution*. While the case turned mainly on the question of constitutional limitations, the Court also found it necessary to examine sources of legislative power, including the defence, external affairs[7] and referral[8] powers in s 51.

The High Court decision in *Thomas* has far-reaching implications for future laws based on the defence power and, in turn, for Australian democracy. This article examines the prior jurisprudence on s 51(vi) and the impact of *Thomas* on those doctrines. In particular, we analyse in detail the judgments in *Thomas* and the key themes that emerge. Notwithstanding Kirby J's dissent, the statements of the Court in relation to the defence power reflect a surprising degree of consensus. We argue that the High Court has developed a new, 21st century conception of the defence power able to be deployed against perceived internal threats.

The Defence Power

Section 51(vi) of the *Constitution* provides that:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... [t]he naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.

There are two limbs to the defence power: first, the power to defend the Commonwealth and the States; and second, the power to legislate for the forces required to execute and maintain Commonwealth laws. The words

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6 (2007) 81 ALJR 1414 ('*Thomas*').

7 *Constitution*, s 51(xxix). For discussion of the external affairs power aspect of *Thomas*, see Ben Saul, 'Terrorism as Crime or War: Militarising Crime and Disrupting the Constitutional Settlement' (2008) 19 *Public Law Review* 5, 28-30; Geoffrey Lindell, 'The Scope of the Defence and Other Powers in the Light of *Thomas v Mowbray*' (2008) 10(3) *Constitutional Law and Policy Review* 42, 45.

8 *Constitution*, s 51(xxxvii).

'naval and military' in the first limb might appear to confine the power to measures with a direct relationship to naval and military forces.[9] Sawer, for example, has suggested that this restrictive view represents the more natural interpretation of the text, although he acknowledged that the High Court was unlikely to adopt this view.[10] Since *Farey v Burvett*[11] in 1916, the High Court has accepted that these are words of extension rather than limitation. This approach to s 51(vi) has remained remarkably constant, notwithstanding that *Farey v Burvett* predated the *Engineers' Case*[12] and the latter decision's emphasis on text-based interpretation.

After nearly a century of jurisprudence on the scope of the defence power, many of the cases have involved wartime controls on labour or economic production.[13] During World War II, for example, there were at least 17 major cases considering the scope of the power.[14] Thus s 51(vi) has been particularly influenced by the imperatives of federal government action in the context of two world wars. Given this, it is not surprising that the case law generally reflects a perspective of defence as protection from external threats emanating from foreign nation-States. Even *Australian Communist Party v Commonwealth*, [15] which considered the validity of laws directed against the domestic activities of the Australian Communist Party, may be seen in this light. Although Australia was about to engage in hostile action in Korea when the *Communist Party Dissolution Act 1950* (Cth) was enacted, the Court held that the situation was one of relative peace and therefore insufficient to support the Commonwealth law. Indeed Dixon J's view that Australia was not on a war footing was clearly informed by the proximate experience of World War II.[16] Thus, even the *Communist Party Case* was premised in part on the view that the defence power is a power to be applied to protect the nation against external State enemies, and possibly their agents acting within Australia.

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9 *Farey v Burvett* (1916) 21 CLR 433, 465 (Gavan Duffy and Rich JJ).

10 Geoffrey Sawer, 'The Defence Power of the Commonwealth in Time of War' (1946) 20 *Australian Law Journal* 295, 300.

11 (1916) 21 CLR 433.

12 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers' Case*').

13 See, e.g, *Pidoto v Victoria* (1943) 68 CLR 87; *Stenhouse v Coleman* (1944) 69 CLR 457.

14 Sawer, above n 10.

15 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 ('*Communist Party Case*').

16 Ibid 196.

Most defence power cases have only considered the first limb of the power.[17] However, the second limb may also be relevant to questions of defence against terrorism. It may be read as providing for a power to guard against internal threats, either alone or in combination with other constitutional powers such as the executive power in s 61[18]and the incidental power in s 51(xxxix).[19] In the *Communist Party Case*, a number of the judges, including Latham CJ, Dixon and Fullagar JJ, accepted that the Commonwealth possesses a self-protection power under the *Constitution*.[20] However, none of the justices appeared to regard the second limb of s 51(vi) as its source, or at least not by itself. Latham CJ, for example, described a 'power to make laws to protect the existence of constitutional government' based on a combination of the executive power in s 61 and the incidental power in s 51(xxxix).[21] Dixon and Fullagar JJ preferred to find a power of self-protection as inherent in the very existence of the Commonwealth and the Australian polity.[22]

The most distinctive feature of the defence power is that it waxes and wanes according to the threat faced by the nation. As Dixon J stated in *Andrews v Howell*:

> In dealing with that constitutional power, it must be remembered that, though its meaning does not change, yet unlike some other powers its application depends upon facts, and as those facts change so may its actual operation as a power enabling the legislature to make a particular law ... The existence and

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17 See e.g *Farey v Burvett* (1916) 21 CLR 433; *Andrews v Howell* (1941) 65 CLR 255. Cf *Li Chia Hsing v Rankin* (1978) 141 CLR 182 in relation to defence personnel enforcing fisheries laws and see also Justice Margaret White, 'The Executive and the Military' (2005) 28 *UNSW Law Journal* 438, 445.

18 Section 61 provides: 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.'

19 Section 51(xxxix) provides that 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ...[m]atters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.' See *Re Aird; Ex parte Alpert* (2004) 220 CLR 308, 327-328 (Gummow J); Lindell, above n 7, 44.

20 See also *Burns v Ransley* (1949) 79 CLR 101; *R v Sharkey* (1949) 79 CLR 121; Nathan Hancock, *Terrorism and the Law in Australia: Legislation, Commentary and Constraints*, Research Paper No 12 2001-02 (2002) 44.

21 *Communist Party Case* (1951) 83 CLR 1, 141 (Latham CJ).

22 Ibid 187-188, 260. Dixon J noted the need for strict limits on any such implied power.

> character of hostilities, or a threat of hostilities, against the Commonwealth are facts which will determine the extent of the operation of the power.[23]

Commentators have identified at least three phases in which the defence power operates: wartime, peacetime and a transitional phase.[24] In wartime, the scope of the power becomes sufficiently broad to support all measures necessary for the conduct of hostilities. During World War II it expanded so far as to almost enable unitary rule by the Commonwealth. The High Court has held that in war it can include the power to legislate to control aspects of social and economic life that would ordinarily be regarded as having only the slightest connection to defence.[25] Thus in wartime the Commonwealth has been held to have the power to regulate, for example, the prices of all goods and services[26] conditions of employment in all industries,[27] the sale of alcohol[28] and even Christmas advertising.[29] On the other hand, regulation of university admissions[30] and lighting in all industrial premises[31] was held to be beyond the scope of the power.

In peacetime, s 51(vi) will generally support only measures with a more direct relationship to defence, such as 'preparation [for] war, the organization, management and supply of armed forces and the conduct of warlike operations'.[32] The power has also been held to support a system of military justice because this is necessary to keep order within the defence forces.[33] In the *Shipping Board Case*, it was found that the Commonwealth Shipping Board was not entitled under the defence power

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23 (1941) 65 CLR 255, 278.

24 Sawer, above n 10; Geoffrey Sawer, 'The Transitional Defence Power of the Commonwealth' (1949) 23 *Australian Law Journal* 255; Geoffrey Sawer, 'Defence Power of the Commonwealth in Time of Peace' (1953) 6 *Res Judicatae* 214. In relation to these three phases and whether there might also be a fourth phase, preparation for war, see DP Derham, 'The Defence Power' in Justice R Else-Mitchell, *Essays on the Australian Constitution* (2nd ed, 1961) 157.

25 *R v Foster* (1949) 79 CLR 43, 81.

26 *Victorian Chamber of Manufactures v Commonwealth (Price Regulations)* (1943) 67 CLR 335.

27 *Australian Woollen Mills v Commonwealth* (1944) 69 CLR 476.

28 *De Mestre v Chisholm* (1944) 69 CLR 51.

29 *Ferguson v Commonwealth* (1943) 66 CLR 432.

30 *R v University of Sydney; Ex parte Drummond* (1943) 67 CLR 95.

31 *Victorian Chamber of Manufactures v Commonwealth (Industrial Lighting Regulations)* (1943) 67 CLR 413.

32 *R v Foster* (1949) 79 CLR 43, 81.

33 See e.g. *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Aird; Ex parte Alpert* (2004) 220 CLR 308.

to enter a contract to supply six steam turbo-alternators. [34] The High Court held that the Board could not undertake general manufacturing and engineering activities in order to subsidise naval facilities and ensure adequate training for staff. Yet in the *Clothing Factory Case* the High Court held that a clothing factory could produce non-military uniforms as this was incidental to its production of naval and military equipment and uniforms.[35] Hence, although peacetime measures will need to be related to a defence purpose to rely on the power, it would appear that they need not be strictly necessary for defence. It will be enough if they are 'merely helpful'.[36]

In the *Communist Party Case*, Fullagar J distinguished between the primary and secondary aspects of the power.[37] The primary aspect, he suggested, could support measures directly related to defence, which will always be within power even in peacetime. The secondary aspect allows measures indirectly connected to defence to be brought within power in times of war. Although this classification has not always been applied by other members of the High Court, it is another useful way of looking at the waxing and waning aspect of the power.

The High Court has also made allowance for the transition between war and peace. It has accepted that some wartime measures need to continue in peacetime in the interests of social and economic order. Accordingly, wartime laws based on s 51(vi) to regulate economic production or labour will not suddenly become invalid due to the cessation of hostilities.[38] Similarly, peacetime measures may continue where they are legitimately incidental to past exercises of the defence power. In *Sloan v Pollard*, [39] for example, the High Court held that a peacetime prohibition on the sale of cream was valid because it was required under a wartime agreement made for a defence purpose between the Australian and UK Governments. Yet there are limits, and the High Court has found that all such transitional measures must ultimately end even though the effects of a conflict like World War II might 'continue for centuries'.[40]

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34 *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1 ('*Shipping Board Case*').

35 *Attorney-General (Vic) v Commonwealth* (1935) 52 CLR 533 ('*Clothing Factory Case*').

36 Geoffrey Sawer, 'Defence Power of the Commonwealth in Time of Peace' (1953) 6 *Res Judicatae* 214.

37 *Communist Party Case* (1951) 83 CLR 1, 253-254.

38 *R v Foster* (1949) 79 CLR 43, 84.

39 *Sloan v Pollard* (1947) 75 CLR 445; see also Derham, above n 24, 167.

40 *R v Foster* (1949) 79 CLR 43, 81.

The orthodox approach as developed from the case law is to define the scope of s 51(vi) in terms of different wartime or peacetime "phases".[41] However, this may fail to adequately explain the scope of the defence power during wars – such as the Gulf War of 1991, the Iraq War of 2003 or the so-called "war on terror" – that involve Australian troops but not directly the defence of territorial Australia. Indeed, the words 'naval and military defence' in s 51(vi) have been given such little weight by the High Court that a real or perceived escalation of terrorist activity within Australia might expand the defence power even in the absence of a formally declared "war".[42] Whether this was indeed the case had not yet been determined by the High Court prior to its decision in *Thomas*.

Irrespective of the current scope of the defence power, it is clear that the power, like that over external affairs, is granted under the Constitution for a purpose rather than in respect of a subject matter.[43] To assess legislative validity under s 51(vi), it is thus necessary to determine whether the relevant legislation is 'capable of being reasonably considered to be ... appropriate and adapted'[44] to the purpose of defence. Notwithstanding some controversy over the application of proportionality analysis to subject matter powers, even critics of proportionality have accepted its relevance to purposive powers like that over defence.[45]

That which is proportionate in times of war may not be proportionate in times of peace.[46] Accordingly, factual assessments will be central to the validity of laws under s 51(vi). This gives rise to problems of evidence: how is the Court to determine such facts? Formal war and peace may be relatively easy to define but international relations are often characterised by conflict without a formal declaration of war.

The doctrine of judicial notice is typically used by the High Court to supply facts upon which to determine the scope of the defence power and the validity of any law purportedly enacted under the power. Where a matter reaches the High Court directly rather than on appeal, which is usually the case for questions of constitutional validity, absent agreement as to the facts between the parties, judicial notice can be the only means

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41 See, for example, Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Cases and Materials* (4th edition, 2006), ch 18.

42 Ibid 870.

43 *Stenhouse v Coleman* (1944) 69 CLR 457, 471 (Dixon J).

44 *Richardson v Forestry Commission* (1988) 164 CLR 261, 311-312 (Deane J).

45 *Leask v Commonwealth* (1996) 187 CLR 579, 600-602 (Dawson J).

46 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 593 (Brennan J).

of the Court having access to facts upon which to base its decision. As Dixon J explained the doctrine in *Stenhouse v Coleman*:

> If the form of the power makes the existence of some special or particular state of fact a condition of its exercise, then, no doubt, the existence of that state of fact may be proved or disproved by evidence like any other matter of fact. But ordinarily the court does not go beyond matters of which it may take judicial notice. This means that for its facts the court must depend upon matters of general public knowledge.[47]

While judicial notice is readily accepted at this level of generality, its application in particular cases remains problematic. For example, facts that are common knowledge will be known to the Court, whereas other facts central to the determination of the case may require the Court to undertake its own enquiries and thus be outside the doctrine.[48] It can also be unclear whether all of the judges have access to the same facts and whether the parties are entitled to make submissions to contradict conclusions that the Court is seeking to draw.[49]

Matters of national security may raise particular complexities, especially in relation to terrorism. First, the doctrine of judicial notice may leave the Court with inadequate information upon which to evaluate threats to national security. In particular, some of the most pertinent information will not be common knowledge, or even be ascertainable in reputable works or reports, but may only be known to the military or the intelligence services.[50] What is common knowledge may also prove to be incorrect in a highly contested and politicised field like national security in which participants have been known to distort public perceptions through the use of propaganda. There may thus be a gap between the "facts" that can be known by judicial notice and the full set of information required to accurately evaluate a security threat and the resulting scope of the defence power.

Second, modern terrorism poses problems of definition.[51] In international humanitarian law, States have generally maintained a distinction between

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47 (1944) 69 CLR 457, 469. See also *Communist Party Case* (1951) 83 CLR 1, 196 (Dixon J).

48 Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 478.

49 Ibid.

50 *Stenhouse v Coleman* (1944) 69 CLR 457, 469 (Dixon J); *Communist Party Case* (1951) 83 CLR 1, 198 (Dixon J); see also Derham, above n 24, 181.

51 See generally Ben Saul, *Defining Terrorism in International Law* (2006); Ben Golder and George Williams, 'What is 'Terrorism'? Problems of Legal Definition' (2004) 27 *UNSW Law Journal* 270.

acts of terrorism and armed conflict.[52] Terrorists are not regarded as combatants and cannot claim combatant immunity.[53] Yet the distinction between terrorism and conventional forms of insurgency may become blurred when terrorists use both military and non-military methods. While some acts committed by terrorists, such as attacking military facilities or personnel, may be readily comparable to conventional defence threats, others will more closely resemble ordinary criminal acts, such as murder or kidnapping, There is thus nothing intrinsic to terrorist acts that suggests a necessary connection to defence in all circumstances, It may be correspondingly difficult to determine when the threat posed by terrorism is sufficiently serious to justify recourse to the defence power.

These problems of constitutional interpretation and characterisation are magnified by the wide discretion commonly afforded by the judiciary to the executive over matters of defence and national security. Certain governmental functions tend to be regarded as exclusively within the competence of the executive. These include those functions historically undertaken by the sovereign, especially in relation to the conduct of diplomacy and war. Thus the power to declare war, while not specified in the Constitution, is generally viewed as the exclusive prerogative of the executive and is considered to come within s 61.[54] Questions about the judgment of the executive in declaring war or entering treaties will generally not be justiciable. However, where such functions are exercised through legislative power, such as the defence and external affairs powers in s 51, the validity of legislation will necessarily be justiciable by reference to the requirements of the *Constitution.*

As a matter of both principle and practicality, Australian courts have traditionally given considerable deference to the executive in matters of national security.[55] This reflects the recognition by the courts that, in matters that may affect the survival of the nation, decisions should be left to the arm of government that is best placed to make them. It also reflects the fact that it may be impractical, or even undesirable, to place

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52 *Prosecutor v Limaj* (2005) International Criminal Tribunal for the former Yugoslavia, Case No IT-03-66-T, 36 <www.un.org/icty/limaj/trialc/judgement/lim-tj051130-e.pdf> at 2 July 2008.

53 Paust, above n 5.

54 See Geoffrey Lindell, 'The Constitutional Authority to Deploy Australian Military Forces in the Coalition War against Iraq' (2002) 5 *Constitutional Law and Policy Review* 46, 47; George Williams, 'The Power to Go to War: Australia in Iraq' (2004) 15 *Public Law Review* 5.

55 *Communist Party Case* (1951) 83 CLR 1, 198 (Dixon J); see also Sawer, above n 10, 297.

information vital to national security before the courts. Thus courts will be reluctant to second guess the executive in matters of defence.

The High Court has held that there are limits to deference, as demonstrated most forcefully by the *Communist Party Case*. In that case, the Court considered the *Communist Party Dissolution Act 1950* (Cth), by which the Menzies Government sought to dissolve the Australian Communist Party, enable appointment of a receiver to dispose of its property and made various acts, including party membership, punishable by imprisonment.[56] The Act allowed other organisations to be declared unlawful with similar legal consequences.[57] The Court, with only Latham CJ dissenting, struck down the legislation. Significantly, it held that Parliament could not, by the recitals in the impugned legislation about the extent of the national security threat posed by domestic communism, provide conclusive evidence as to constitutional facts upon which the legislation depended for its validity. It was stated that the 'validity of a law or of an administrative act done under a law cannot be made to depend on the opinion of the law-maker, or the person who is to do the act'.[58] As Fullagar J famously summarised, 'a stream cannot rise higher than its source'.[59] Consistent with longstanding principles of judicial review, legislative validity must be determined only by the courts, even if those same courts through doctrines like judicial notice and by applying a high degree of deference give considerable leeway to the Commonwealth in any assessment of constitutional validity.

The *Communist Party Case* is the most significant of Australia's defence power cases. Given that it dealt with fundamental liberties and the use of the defence power to respond to perceived domestic threats, it was also highly relevant to the High Court's consideration of like issues in *Thomas*.

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56 See generally George Winterton, 'The Significance of the *Communist Party Case*' (1992) 18 *Melbourne University Law Review* 630; Zines, above n 48, 225-226.

57 Winterton, above n 56; Zines, above n 48, 225-226.

58 *Communist Party Case* (1951) 83 CLR 1, 258 (Fullagar J). Disagreement remains over whether the opinion of an administrative decision maker can be made conclusive in wartime: see generally Winterton, above n 56, 652-653.

59 Ibid 258.

Background to *Thomas*

In late 2005, as part of a number of changes agreed to by the Council of Australian Governments[60] in the wake of the 7 July London bombings, Division 104 was added to Part 5.3 of the Criminal Code. The agreement of the Council, followed by the passage of legislation through each State Parliament, was considered necessary because it was unclear whether the Commonwealth had sufficient legislative power to enact Division 104 . It was thought that a referral of power from the States would put this issue beyond doubt.[61] Prior to *Thomas*, there were widespread doubts about whether the defence power could be used to enact such laws.[62]

Division 104 enables control orders to be imposed on a person. Such orders may impose a variety of obligations, prohibitions and restrictions on a person for the purpose of protecting the public from a terrorist act. By order of a court, they allow the Australian Federal Police to monitor and restrict the activities of people who pose a terrorist risk to the community without having to wait to see whether this risk materialises. Control orders may last up to a year, and may be renewed.

On 27 August 2006, Mowbray FM (the first defendant) issued an Interim Control Order (ICO) in respect of Joseph (Jack) Thomas. The order was issued under s 104.4 of the Commonwealth Criminal Code, which states:

> **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
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> (b) the court has received and considered such further information (if any) as the court requires; and
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> (c) the court is satisfied on the balance of probabilities:
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> (i) that making the order would substantially assist in preventing a terrorist act; or
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> (ii) that the person has provided training to, or received training from, a listed terrorist organisation; and

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60 Council of Australian Governments, Communiqué: *Special Meeting on Counter Terrorism* (2005) <http://www.coag.gov.au/meetings/270905/coag270905.pdf> at 16 May 2008.

61 This approach had been agreed previously with the States in 2002: see Daryl Williams and James Renwick, 'The War Against Terrorism: National Security and the Constitution' (2002) *Bar News: The Journal of the NSW Bar Association*, Summer 2002/2003, 42, 43-44.

62 See COAG, above n 60; ibid 44; see also Andrew Lynch and Alexander Reilly, 'The Constitutional Validity of Terrorism Orders of Control and Preventative Detention' (2007) 10 *Flinders Journal of Law Reform* 105, 107-108.

(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 Code defines terrorism in s 100.1 as follows:

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-ss (2) and (3) provide that:

(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 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.

The grounds for issuing the order included Thomas' undertaking of weapons training with Al-Qaeda in 2001. The order imposed a range of conditions on Thomas, such as requiring him to remain at his residence between midnight and 5.00am each day and to report to police three times a week.[63] Although these might not appear to be significant restrictions upon Thomas' liberty, it must be remembered that they were not punishments for any offences. Rather they were preventative measures permitted under the Code.

Thomas had been tried for terrorism offences under Pt 5.3 of the Code and other offences under the *Passports Act 1938* (Cth). At trial, he was acquitted of two offences but was found guilty of receiving funds from a terrorist organisation and of possessing a false passport. These convictions were subsequently set aside by the Victorian Court of Appeal. The Commonwealth sought and obtained the contested ICO while the Court of Appeal was considering whether there should be a retrial. The retrial was granted, and in October 2008 Thomas was acquitted in relation to the charge of receiving funds from a terrorist organisation, but the possession of a false passport conviction was upheld.

Thomas presented particular difficulties in relation to evidence because it came as a 'special case' before the High Court, not as an appeal. A special case is 'an adjunct to proceedings involving the original jurisdiction' of the Court.[64] As there is no appeal, there are no findings of fact from a lower court upon which the High Court can rely. In a special case, the evidence before the Court is primarily the evidence agreed between the parties, although the Court is also permitted to draw inferences of fact or law by virtue of judicial notice.[65]

The plaintiff Thomas made several submissions in respect of the defence power. First, that it is limited to defence against threats from foreign States. Second, that the words 'the Commonwealth and the several States' in s 51(vi) necessarily limit the Commonwealth to defence of the bodies

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63 *Thomas* (2007) 81 ALJR 1414, 1422-1423 (Gleeson CJ).

64 Ibid 1469 (Kirby J).

65 *High Court Rules 2004* (Cth), reg 27.08.

politic, rather than citizens or inhabitants of the nation and their property.[66] Third, that the words 'naval and military defence' confine the power to naval and military activities and hence cannot underpin broader activities to protect the community.[67]

The Commonwealth argued in response that the Interim Control Orders regime in Div 104 was supported by the defence power. It further submitted that the second limb of the defence power, either alone or combined with ss 51(xxxix) and 61, empowers it to legislate to protect the nation. This, it said, provided the constitutional foundation for Div 104 and other anti-terrorism measures.[68]

The High Court Judgments in *Thomas*

In *Thomas*, the High Court held that the challenged ICO legislation was valid by 5:2, with Kirby and Hayne JJ dissenting[69] Both judges dissented[70] because they held that the legislation breached the requirement of Chapter III of the *Constitution* that only federal courts may exercise the judicial power of the Commonwealth and that federal courts may not exercise non-judicial power.[71]

The ICO provisions were part of a number of new anti-terrorism measures passed following a State referral of power under the reference power in s 51(xxxvii) of the *Constitution*. The referral of powers was sought because the Commonwealth could not be certain that its existing powers, including the defence power, would be sufficient to enact the new laws. In *Thomas*, Kirby J was the only member of the Court to hold that the referral was inadequate.[72] Although Hayne J[73] also found it necessary to consider the reference power, he appears to have done so only for the sake of completeness as he concluded that the legislation could be supported by s 51(vi).

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66 *Thomas* (2007) 81 ALJR 1414, 1447 (Gummow and Crennan JJ).

67 Ibid 1446 (Gummow and Crennan JJ).

68 Ibid 1463 (Kirby J).

69 Ibid.

70 Ibid 1493 (Kirby J), 1520 (Hayne J).

71 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. See Saul, above n 7, 22-24. For a more detailed discussion on the separation of judicial power and the control order provisions in the lead-up to *Thomas*, see Lynch and Reilly, above n 62.

72 *Thomas* (2007) 81 ALJR 1414, 1460.

73 Ibid 1508.

Some of the judgments also considered the external affairs power. In particular, Gummow and Crennan JJ held that the legislation might not be supported by the defence power to the extent that it seeks to protect other countries, and therefore felt compelled to consider s 51(xxix). They found that any such legislative gaps would be covered by the external affairs power.[74]

Is the power directed only to threats by foreign States?

In regard to the defence power, the High Court found by 6:1, with Kirby J dissenting, that the ICO law was valid under the power, either by itself or together with the external affairs power. An important question that arose for consideration was whether s 51(vi) only empowers legislation directed at external threats emanating from nation-States. All of the judges agreed that s 51(vi) is not thus confined, although Kirby J took the view that it is subject to other limitations.

Agreeing on the whole with the reasons of Gummow and Crennan JJ, Gleeson CJ stated that:

> The power to make laws with respect to the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth, is not limited to defence against aggression from a foreign nation; it is not limited to external threats; it is not confined to waging war in a conventional sense of combat between forces of nations ... [75]

In reaching this conclusion, Gleeson CJ cited Professor Greenwood's observation that non-State actors, such as terrorist groups, are increasingly capable of attacks of comparable lethality to those by States. Similar views on the destructive capacity of non-State actors were expressed by Hayne J and Callinan J in their separate judgments.[76]

Gummow and Crennan JJ held that the defence power would be sufficient to sustain the impugned legislation, except for certain provisions that could only be supported by the external affairs power. The defence power, they held, includes the power to anticipate and to prevent internal violence, such as might be caused by terrorist attacks. They cited English legal history in support of their view. Before the adoption of the *Australian Constitution*, English law had long been concerned with protecting the sovereign from internal threats, including armed

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74 Ibid 1448-1449.

75 Ibid 1424.

76 Ibid 1506, 1527.

insurrection.[77] Given that interim control orders are directed to prevent internal violence, they were held to be within the central conception of the defence power. Accordingly, Gummow and Crennan JJ considered it unnecessary to discuss a possible basis of power under s 61, s 51(xxxix), or a combination of the two.[78]

Hayne J held that the impugned legislation would have been valid under s 51(vi) if not for its infringement of Chapter III of the *Constitution*.[79] He pointed to the difficulty in distinguishing between external and internal forms of terrorism, but concluded in any event that the present case involved an external threat.[80] Although Hayne J held that the central purpose of the defence power is 'protection of the Commonwealth from external enemies', he rejected any suggestion that the defence power is confined to external defence of the nation or to protecting against attacks from other nation States. [81] Thus, even if he had regarded the relevant terrorist threat in *Thomas* as internal, it seems likely that he would have reached a similar conclusion in respect of s 51(vi). The impugned provisions, he said,

> would be engaged where it is agreed or alleged that the plaintiff undertook paramilitary training overseas, with a group or body based outside Australia, which has expressed the intention to prosecute political, religious or ideological aims by the application of violence done with the intention of having Australia comply with those aims.[82]

Callinan J found that defence 'is not something of concern to a nation only in times of a declared war. ... Threats to people and property against which the Commonwealth may, and must defend itself, can be internal as well as external'.[83] He further held that the defence power is vested in the Commonwealth in order to defend the nation in a way that individual states cannot. Of the seven justices, Callinan J took perhaps the most expansive view of s 51(vi):

> [t]he real question in every case will be, is the Commonwealth or its people in danger, or at risk of danger by the application of force, and as to which the Commonwealth military and naval forces, either alone or in conjunction with

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77 Ibid 1446.

78 Ibid 1447-1448.

79 Ibid 1507, 1517, 1520.

80 Ibid 1503.

81 Ibid 1505, 1506.

82 Ibid 1506.

83 Ibid 1535.

> the State and other federal agencies, may better respond, than State police and agencies alone.[84]

By contrast, Kirby J adopted the most restrictive view:

> Clearly, the defence power expressed in the *Australian Constitution* is to be read, limited by the conventionally narrow functions ascribed to defence forces in most polities that trace their constitutional tradition to that of Britain. The constitutional culture of such countries has long been properly suspicious of any notion that defence forces are available to be deployed at the government's will in civilian tasks and to safeguard the nation from itself. Not since Cromwell has our constitutional tradition seen the military taking a leading part in civilian affairs. The *Australian Constitution* keeps it that way.[85]

Notwithstanding this, Kirby J held that s 51(vi) is not limited in the manner suggested by the plaintiff. The first limb of s 51(vi), he said, presumes the existence of hostilities. Historically, this has entailed war or some comparable conflict with a foreign State. However, he considered that the meaning of constitutional terms cannot be fixed in time and today defence must include roles like international peacekeeping. Although Kirby J reached this conclusion in the context of the first limb, it was clear from his consideration of the second limb that it might enable measures against internal threats provided they posed a danger to Australia's constitutional system. [86] Accordingly, Kirby J did not regard defence under either limb as being confined to threats emanating from foreign States or other external agents.[87]

Is the power confined to the defence of the bodies politic?

The plaintiff argued that the words 'of the Commonwealth and of the several States' in s 51(vi) necessarily limits the power to defence of these bodies politic rather than to the defence of persons or property.[88] This was rejected by the High Court, with only Kirby J finding the power to be so limited. Gummow and Crennan JJ, with whom Gleeson CJ and Heydon J agreed, held that the 'notion of a 'body politic' cannot sensibly be treated apart from those who are bound together by that body politic, this being English law for centuries'.[89] Moreover, the compact between government and governed that sustains the body politic 'cannot be

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84 Ibid 1536.

85 Ibid 1463.

86 Ibid 1468.

87 See *Thomas* (2007) 81 ALJR 1414, 1465, 1467.

88 Ibid 1447 (Gummow and Crennan JJ).

89 Ibid 1447.

weakened and must be strengthened by the system of representative government for which the *Constitution* provides'.[90]

Hayne J accepted that the defence power is 'concerned centrally with defence of the Australian bodies politic'. However, he described as 'unhelpful' the plaintiff's distinction between the bodies politic and its citizens or inhabitants. He noted that 'in war, force is ultimately applied to persons and property'.[91] In Hayne J's view, the more relevant question, therefore, must be whether such force is applied with the aim of imposing political objectives. He found that he defence power will only be engaged where such objectives are present.

Kirby J was the only judge to accept the plaintiff's submission. Failure to confine s 51(vi) to the bodies politic, he said, would make the reach of the power 'effectively unlimited'.[92] He found that:

> This is a fundamental distinction grounded in the constitutional text. It does not mean that s 51(vi) *never* extends to the defence or protection of individual persons and their property. However, it recognises that a law, 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.[93]

Meaning of 'naval and military defence'

The plaintiff also sought to restrict Commonwealth power by reference to the words 'naval and military' in s 51(vi). This argument was always unlikely to succeed given the accepted approach since *Farey v Burvett*. Only some of the judges addressed this argument.

Gummow and Crennan JJ reaffirmed the view that these are words of extension, not limitation.[94] Kirby J appeared to favour a similar reading, consistent with his long-standing rejection of originalism.[95] Hayne J also rejected the plaintiff's submission in this respect, focusing instead on 'naval and military defence' as indicative of the kinds of threats against which the power is directed. The relevance of these words, he held, was to show that the central purpose of the power is external protection.[96]

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90 Ibid 1447 (Gummow and Crennan JJ).
91 Ibid 1507.
92 Ibid 1467.
93 Ibid 1466.
94 Ibid 1446.
95 Ibid 1465, 1467.
96 Ibid 1506.

However, this did not mean that the power was limited only to such protection.

Constitutional facts and evidence

Given that the defence power waxes and wanes according to the exigencies of any threat, the ascertainment of constitutional facts can be particularly significant for determining the scope of the power. Only Kirby, Callinan and Heydon JJ focused upon the evidentiary issues to any significant extent. Of all the judges, only Kirby J held that the Commonwealth had failed to establish the necessary factual basis to support its reliance on the power.[97]

Callinan J stated that constitutional facts must be proven unless they can be ascertained by judicial notice or by reference to widely accepted historical or official sources.[98] He discussed international terrorism at length, holding that the facts were sufficient to establish the existence of a threat to the nation with which the plaintiff was apparently associated.[99]

Kirby J concluded that the facts underpinning the "war on terror" did not constitute hostilities for the purposes of the first limb of the defence power:

> The language of war might be deployed for reasons of political rhetoric. But it cannot convert the subject matter of legislation into a character that it does not, in fact, possess. Without more, the identified events did not call forth the first limb of s 51(vi).[100]

Kirby J accepted that, under the second limb, the threat posed by Al-Qaeda might support Div 104 in the right circumstances. However, he held that the available constitutional facts, based on the evidence of the parties and judicial notice, did not establish a sufficient threat to ground Div 104 in the present case.[101] In doing so, Kirby J noted the particular difficulties that may arise in a special case where the facts have not been determined in a lower court.[102]

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97 Ibid 1468-1469.

98 Ibid 1522.

99 Ibid 1525-1527.

100 Ibid 1465-1466.

101 Ibid 1468-1469.

102 In cases involving the original jurisdiction of the Court, Kirby J suggested that unless the parties are agreed on the facts the Commonwealth should bear the onus of proving the constitutional facts required to show validity: *Thomas* (2007) 81 ALJR 1414, 1469-1470.

Having largely concurred with the findings of Gleeson CJ and Gummow and Crennan JJ,[103] Heydon J chose to concentrate on evidentiary considerations. Modern High Court authority, he said, supports the view that a law's validity and scope 'cannot be made to depend on the course of private litigation'.[104] Thus the Court is not limited solely to constitutional facts proven by evidence presented by the parties:

> This Court ... has ultimate responsibility for the resolution of challenges to the constitutional validity of legislation, one way or the other, and cannot allow the validity of challenged statutes to remain in limbo. It therefore has the ultimate responsibility for the determination of constitutional facts which are crucial to validity.[105]

Heydon J held that there was ample factual material from which to infer the required constitutional facts to support the Commonwealth's submissions. He further held that, where such material is central to validity, the parties must be allowed to make submissions on it.[106] However, the plaintiff, he said, had notice of this material and did not contradict it except by occasional assertion. Accordingly, Heydon J rejected the plaintiff's submissions that the Court could not go beyond the facts agreed between the parties in the special case.[107]

The New Scope of the Defence Power

An expanded defence power

The High Court's decision in *Thomas* represents a major expansion in the defence power, the majority rejecting all of the limitations proposed by the plaintiff. Significantly, the 'bodies politic' limitation favoured by Kirby J[108] was not supported by any other judge.

Notwithstanding the words of the constitutional text, the case law makes clear that the first limb of the defence power is not centred exclusively on the armed forces, their training and material needs, whether at a time of war or peace. Acceptance of the purposive nature of the defence power has necessarily permitted legislation on matters beyond the immediate subject of defence.

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[103] Ibid 1540.

[104] Ibid 1542; see also *Gerhardy v Brown* (1985) 159 CLR 70, 142 (Brennan J).

[105] *Thomas* (2007) 81 ALJR 1414, 1543.

[106] Ibid 1547.

[107] Ibid 1547, 1549.

[108] Ibid 1466-1467.

Thus it has always been possible, at least in theory, that laws on policing might be laws about defence. This was made clear in *Thomas*, where the Court held that it was unnecessary to consider sufficiency of connection to the defence power because the terrorist acts proscribed by the Criminal Code brought the legislation within the central conception of the power.[109] The Court accepted that the current terrorist threat was sufficient to enliven the power even though the factual circumstances fell well short of actual war.

Yet, prior to *Thomas*, the High Court had implicitly required that legislation have at least an indirect connection to military defence to come under the first limb of s 51(vi). Historically, defence laws have been connected in some way to the prosecution of an actual war or to related preparations, with the greater the threat, the more remote the permitted connection between the legislation's subject matter and military defence.[110] In other words, defence has primarily been understood in terms of a relationship to formal, organised defence forces. It is difficult, therefore, to see *Thomas* as anything other than a significant extension of prior High Court jurisprudence that confined peacetime uses of the defence power to laws directly connected to the defence forces or the maintenance of Australia's military capacity.

Any analysis of the defence power discussion in *Thomas* is complicated by the fact that many of the judges did not adequately distinguish between the first and second limbs of s 51(vi). While the second limb was central to the argument advanced by the Commonwealth,[111] this was only significant for Kirby J, who held that Div 104 could not be a valid first limb law outside of wartime without a clear defence connection.[112] However, the majority appears to have accepted that the ICO regime was valid under the first limb. Hayne J, who was part of the majority for the purposes of his conclusions about s 51(vi), explicitly accepted that the impugned statute would be a valid law with respect to the naval and military defence of the Commonwealth except for its inconsistency with Chapter III.[113]

The two limbs are nevertheless conceptually distinct. Although some threats may conceivably enliven both, this will often not be the case. For

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[109] Ibid 1448 (Gummow and Crennan JJ).

[110] See *Communist Party Case* (1951) 83 CLR 1, 185 (Dixon J).

[111] See *Thomas* (2007) 81 ALJR 1414, 1463 (Kirby J).

[112] Ibid 1468.

[113] Ibid 1507.

example, not all threats to Australia's defence may undermine the nation's constitutional arrangements or target institutions of government. While the High Court has long accepted the existence of a power to protect the constitutional polity and its institutions, there is no consensus as to its proper basis or its limits. In the *Communist Party Case*, the majority accepted the existence of a power to protect against subversion, but considered it to be based on a combination of ss 61 and 51(xxxix), or possibly a more fundamental constitutional implication.[114] In this context, subversion involved activities capable of being characterised as interfering with the execution or maintenance of the Commonwealth or its laws. Williams and Webb JJ held that the defence power also includes the power to protect against some kinds of internal attack, mainly those intended to interfere with war preparations.[115] Only Latham CJ in dissent envisaged that the defence power could be used more generally to protect constitutional government .[116] Thus, he was the only judge who clearly accepted that the first or second limb of the defence power includes the power outside of wartime to protect against internal attack. Significantly, none of the judges in the *Communist Party Case* considered the second limb as a separate basis of legislative power in its own right.

After *Thomas*, it is now possible to empower policing laws under the first limb of the defence power. As the kinds of internal protection measures that might have attracted the second limb of the defence power are available under the first, the distinction made in the constitutional text may now be redundant. The same might also be said of earlier discussions about the existence of an implied or incidental power based on s 51(vi) alone or in combination with ss 61 or 51(xxxix).[117] Moreover, it will not be necessary to demonstrate that anti-terrorism legislation is directed to terrorist activities that impair the execution or maintenance of the Commonwealth or its laws.

Thomas has removed much of the prior uncertainty about whether anti-terrorism laws can be supported by the defence power. The decision provides a solid foundation for any future expansion in federal anti-

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[114] (1951) 83 CLR 1, 187-188 (Dixon J), 211-212 (McTiernan J), 231-232 (Williams J), 260-261, 266 (Fullagar J), 275, 277 (Kitto J).

[115] Ibid 226 (Williams J), 243-244 (Webb J). However, such sabotage would bear a clear relation to the subject of defence.

[116] Ibid 141-143. He also accepted that the defence power applies to internal attacks, although he was referring primarily to wartime or other emergency situations.

[117] Ibid 1447 (Gummow and Crennan JJ). See also Lindell, above n 7, 8, 14.

terrorism laws beyond the scope of the many new laws passed since 2001.

A 21st century defence power

Thomas is particularly important because it established that the defence power may be invoked to deal with both external and internal threats. The High Court has redefined the defence power in a way that marks a significant break with past understandings of the power. In some ways, this was inevitable. From the earliest cases, the High Court has eschewed textual limitations on the power in the interests of giving broad reign to the requirements of national security. Given this, it was always going to be difficult to limit the power in light of contemporary threats to Australian security. This is compounded by the purposive nature of the power, which can make the power of wider scope than subject matter powers.

In *Thomas*, the High Court held that the first limb of s 51(vi) can support anti-terrorism laws involving a policing response and without any obvious connection to military defence. This suggests that, in modern times, the constitutional meaning of defence has expanded to enable defensive measures against threats that are paramilitary in nature. The more difficult question is whether it is possible to invoke the defence power to respond to conduct that is merely criminal.

It is not surprising that the High Court held Div 104 to be valid under s 51(vi). Indeed, in the wake of terrorist attacks that included the deaths of 88 Australians in the 2002 Bali bombings, it would have been remarkable if the High Court had told the Commonwealth that the constitutional meaning of 'defence' does not extend to measures to protect Australians from similar domestic attacks. Whatever its legal merits, such an outcome would have been politically and socially unpalatable.

Today, terrorists linked to Al-Qaeda are said to be pursuing a new transnational caliphate and are prepared to kill Islamic and non-Islamic people without distinction.[118] Theirs is a paramilitary campaign that uses both conventional and non-conventional weapons. They regard non-military targets as legitimate in order to further their political ends. Given that Australians have already been subjected to such attacks in Bali, and that further attacks on the Australian mainland are possible, it is not difficult to accept that the defence power extends to protecting

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[118] See generally Daniel Benjamin and Steven Simon, *The Age of Sacred Terror* (2002).

Australians from comparable domestic attacks. Moreover, the express purpose of past terrorist attacks has been *inter alia* to alter the policies of western governments. To the extent that this is one of the reasons for attacking Australians, this would appear to be sufficient to enliven the second limb of the defence power. Although Kirby J held that Div 104 was not valid, he accepted that laws directed to protecting Australia from such violence could be valid under this limb in the right circumstances.[119]

Terrorism encompasses a range of activities, only some of which will necessitate defence action rather than merely a law enforcement response.[120] Yet the majority in *Thomas* did not address the defence-crime distinction. Accordingly, it has not attempted to limit the circumstances in which terrorism will validly empower a defence response. Callinan J, for example, said only that laws within the defence power cannot be demonstrably excessive,[121] which can be seen merely as an aspect of the requirement that legislation must be reasonably appropriate and adapted to its object. Terrorist acts that cause serious harm to persons or property will fall within the Criminal Code, provided that they also meet the terrorism definition, including the necessary elements of intent.[122] Thus after *Thomas* it is clear that other measures to prevent comparable harm, even on a relatively small scale, might attract the defence power.

Kirby and Hayne JJ held in the present case that the doctrine of the separation of judicial power provides a partial answer to the lack of effective limits on the defence power. Another approach might have been to look more closely at questions of proportionality. The Court could have considered more closely whether the control orders regime was reasonably appropriate and adapted to the purpose of defence, especially in light of the broad definition of 'terrorist act' within the Code.

The danger arising from the *Thomas* decision is that it may permit the militarisation of responses to ordinary crimes. Alert to this problem, Kirby J sought to rein in the defence power. However, it is difficult to accept the 'bodies politic' limitation proposed by him in respect of both

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[119] *Thomas* (2007) 81 ALJR 1414, 1468. Kirby J held, however, at 1468-1472 that Div 104 was not valid under the second limb because of insufficient constitutional facts and because it went beyond maintenance of the *Constitution*, Commonwealth laws or institutions.

[120] Saul, above n 7, 25, 26.

[121] *Thomas* (2007) 81 ALJR 1414, 1536.

[122] *Criminal Code Act 1995* (Cth), s 100.1.

limbs. Conventional military attacks against Australia will necessarily be directed at persons and property as a means of changing the power relations between Australia and the hostile State.[123] Similarly, terrorist attacks that target civilians are usually motivated by the desire to affect the political will of a community. Killing people, damaging property and sowing fear may be the means to change the existing constitutional order or, at the very least, to promote changes in government policy.

While it is relatively easy to accept that the Commonwealth should be empowered to respond to actions such as those attributed to Thomas, who was alleged to have received military training in Afghanistan, more difficult situations may arise in future. In particular, governments and parliaments may seek to regulate ideas or speech where the connection to actual physical harm is likely to be far more difficult to judge. Isolated criminal acts may be caught within a wide legislative net even though they do not pose any significant threat to the Commonwealth or its people.

With its decision in *Thomas*, the High Court has refashioned the defence power for the 21st century. It has adapted the defence power to a world of more complex threats and rightly rejected the notion that the defence power is only available to protect against external threats from nation States. However, the majority in *Thomas* has not provided sufficient means by which to check this broader power. Unfortunately, in times of heightened community anxiety about terrorism, the absence of such limits can too readily lead to measures that erode fundamental rights without sufficient corresponding benefits to security. A better approach would have been both for the Court to more rigorously apply the proportionality test and to clearly define the nature of the threat to be defended against.[124] It should have held that, to invoke the defence power, such threats must either be military in nature or be capable of causing harm on a comparable scale.

Ghosts of the Communist Party Case

One of the more remarkable features of the *Thomas* judgments was the debate between Kirby and Callinan JJ over the significance of the *Communist Party Case*. Although Callinan J did not seek to dispute the result in that case, he made much of the threat posed by communism in the 1950s and drew comparisons to the present terrorist threat.[125] The

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[123] See *Thomas* (2007) 81 ALJR 1414, 1507 (Hayne J).

[124] See Saul, above n 7, 28.

[125] *Thomas* (2007) 81 ALJR 1414, 1524, 1535.

result in the *Communist Party Case*, he suggested, might have been different had the Commonwealth done more to establish the facts asserted in legislative recitals. He also rebuked the majority in that case for having paid 'insufficient critical attention' to internal threats and the relevance of the defence power for dealing with these.[126] On this basis, Callinan J suggested that the judgment of Latham CJ should be preferred to the majority judgments.[127] By contrast, Kirby J drew parallels between the overreaction to communism during the Cold War and current responses to terrorism.[128] He also emphasised the importance of the *Communist Party Case* as a watershed for civil liberties and the role of the court as 'guardian of the abiding values that lie at the heart of the *Constitution*'.[129] He was correspondingly critical of Latham CJ.

This debate reflects not just questions of legal and historical significance. Rather, it is about questions of value and policy preference that are not readily resolved by resort to legal argument. Callinan J's historical conclusions are strained when one considers Australian history in the wake of the *Communist Party Case*.[130] The Communist Party was not abolished, and yet it did not overthrow the Australian State nor ever pose a significant threat of doing so.

Overall, the *Communist Party Case* can be seen as an iconic statement about the importance of judicial review in the modern Australian democracy.[131] It is also worth remembering the words of Dixon J in the *Communist Party Case*:

> History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.[132]

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126 Ibid 1535.

127 Ibid 1536.

128 Ibid 1461.

129 Ibid 1466.

130 See Helen Irving, 'The High Court Fails History Test in Thomas Judgment' (2007) 45(8) *Law Society Journal* 54; George Williams, 'Reading the Judicial Mind: Appellate Argument in the *Communist Party Case*' (1993) 15 *Sydney Law Review* 1; George Williams, 'The Suppression of Communism by Force of Law: Australia in the Early 1950s' (1996) 42 *Australian Journal of Politics and History* 220.

131 Cf Roger Douglas, 'A Smallish Blow for Liberty? The Significance of the Communist Party Case' (2001) 27 *Monash University Law Review* 253.

132 (1951) 83 CLR 1, 187.

This is a reminder of the High Court's role in reconciling present needs with the continuity of the rule of law. Given the deference of courts to the executive across the defence power cases, the *Communist Party Case* stands for the proposition that there are some things that governments are not entitled to do without the most compelling of circumstances. This is a lesson indeed worth remembering in the present "war on terrorism".

It is possible to accept the majority's general reasoning in *Thomas* on the defence power and yet remain profoundly uncomfortable about the things that were not said. It is not clear that the general requirement of proportionality will be sufficient to place reasonable limits on internal uses of the defence power, especially in situations where governments seek to overstate the security threat. There are relatively few checks on legislative power in the *Constitution*, especially when it comes to questions of liberty and human rights. Indeed, in the absence of a national Bill or Charter of Rights, there may be no effective legal means in Australia of ensuring that legislative restrictions on fundamental freedoms do not exceed what is necessary in the circumstances.

Conclusion

Thomas is the most important defence power case since the *Communist Party Case* in 1951. Prior to *Thomas*, it was possible that the defence power would not support anti-terrorism laws. The referral of State powers was undertaken as insurance against this possibility.

To differing extents, all of the judges recognised that we live in an age where the distinctions between war and peace, combatants and non-combatants, are less clear than ever. Accordingly, *Thomas* provides a new conception of the defence power that is better suited to the harsh realities of war and national security in the 21st century.

This broad new power is not without difficulties. First, the extent to which a particular terrorist threat is sufficient to sustain recourse to the defence power will be hard to ascertain. Would the ICO regime have been valid if the threat posed by Al-Qaeda had been less publicly notorious? Second, in relation to terrorism, the executive will often be basing its threat assessments on intelligence information. In such circumstances, judicial deference to the executive may readily become a recipe for an easy expansion of power. This was underscored by the recent full Federal Court decision in *Hussain v Minister for Foreign*

Affairs, [133] a case in which the Court confirmed that the Minister could take away the applicant's passport on the basis of an ASIO security assessment that was not made available to him, his lawyers or the Court. Third, *Thomas* represents a further shift of legislative power to the Commonwealth and enables it to create further terrorism offences and restrictions of liberty. It may also open the way for greater use of military forces for internal security purposes. As noted by Kirby J, many of the English-speaking democracies have been rightly suspicious of such an outcome because it is inimical to democratic and personal freedoms. Fourth, the majority in *Thomas* failed to establish any new limits on the power to offset its greater availability in circumstances falling far short of war. In particular, the Court did not distinguish between ordinary crimes that might meet the terrorism definition and terrorist conduct of sufficient seriousness to call forth the defence power.

Thomas represents a major addition to prior defence power cases that had held that the scope of the power is defined by the extent of the threat facing the nation. Unfortunately, the actual threat posed by terrorism to the Australian nation and community is hard to define and to quantify. Given that clear information about terrorist capabilities is elusive, determining the extent of the threat may be virtually impossible, not to mention inadmissible in the High Court. With no conceivable end in sight to the "war on terror", Australia's highest Court may have reached the right result in *Thomas* on the validity of the impugned law, but could have been more cautious in ascribing such a wide ambit to the Commonwealth's defence power.

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[133] [2008] FCAFC 128 (Unreported, Weinberg, Bennett and Edmonds JJ, 15 July 2008). A UK-born Australian Muslim had his passport cancelled by the Foreign Minister on the basis of a security certificate from the Attorney-General. The Court held that the applicant could not challenge the certificate, or the ASIO assessment on which it was based, because there was no statutory requirement to disclose the reasons for the Minister's decision. See also Richard Ackland, 'Meanwhile, Down South One Slips Past The Keeper', *The Sydney Morning Herald*, 18 July 2008.