HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

JOSEPH TERRENCE THOMAS PLAINTIFF

AND

GRAHAM MOWBRAY, FEDERAL MAGISTRATE & ORS DEFENDANTS

Thomas v Mowbray [2007] HCA 33
2 August 2007
M119/2006

ORDER

The questions stated in the further amended special case filed on 15 February 2007 be answered as follows:

(1)

Q. *Is Division 104 of the Criminal Code invalid because it confers on a federal court non-judicial power contrary to Chapter III of the Commonwealth Constitution?*

A. *Subdivision B of Division 104 is valid; otherwise inappropriate to answer.*

(2)

Q. *Is Division 104 of the Criminal Code invalid because in so far as it confers judicial power on a federal court, it authorises the exercise of that power in a manner contrary to Chapter III of the Commonwealth Constitution?*

A. *Subdivision B of Division 104 is valid; otherwise inappropriate to answer.*

(3)

Q. *Is Division 104 of the Criminal Code invalid because it is not supported by one or more express or implied heads of legislative power under the Commonwealth Constitution?*

A. Subdivision B of Division 104 is valid; otherwise inappropriate to answer.

(4)

Q. Who should pay the costs of the special case?

A. The plaintiff should pay the costs of the Commonwealth of the special case.

Representation

R Merkel QC and S G E McLeish and K L Walker for the plaintiff (instructed by Robert Stary & Associates)

Submitting appearance for the first defendant

T M Howe for the second defendant (instructed by Australian Government Solicitor)

D M J Bennett QC, Solicitor-General of the Commonwealth and H C Burmester QC with T M Howe, S P Donaghue and G J D del Villar for the third defendant (instructed by Australian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with C L Conley intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor for Western Australia)

M G Sexton SC, Solicitor-General for the State of New South Wales with J G Renwick intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for New South Wales)

C J Kourakis QC, Solicitor-General for the State of South Australia with B C Wells and S A McDonald intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor's Office (SA))

CATCHWORDS

Thomas v Mowbray

Constitutional law (Cth) – Div 104 of the *Criminal Code* (Cth) confers power on Ch III courts to make interim control orders imposing obligations, prohibitions and restrictions upon an individual for the purpose of protecting the public from a terrorist act – The plaintiff is subject to an interim control order made by the first defendant, Mowbray FM, at the application of the second defendant, an officer of the Australian Federal Police – Whether the interim control order was validly made against the plaintiff.

Constitutional law (Cth) – Legislative power – Defence – Whether Div 104 is a law with respect to defence – Whether the defence power is limited to defence against external threats – Whether the defence power is limited to defence of the Commonwealth and the several States as bodies politic – Whether the defence power extends to defence against non-state actors – Relevance of purposive power.

Constitutional law (Cth) – Legislative power – External affairs – Whether Div 104 is a law with respect to external affairs – Relevance of relations with foreign countries – Relevance of definition of "the public" in Div 104 including the public of a foreign country – Whether Div 104 concerns a "matter or thing" external to Australia – Whether Div 104 implements a treaty obligation.

Constitutional law (Cth) – Legislative power – Matters referred by the Parliament of a State – Whether Div 104 is a law supported by the *Terrorism (Commonwealth Powers) Act* 2003 (Vic) – Presumption against alteration of common law rights.

Constitutional law (Cth) – Judicial power – Meaning of judicial power – Justiciable controversy – Whether Div 104 confers jurisdiction upon a Ch III court to make an interim control order – Whether power conferred by Div 104 gives rise to a justiciable controversy – Whether Div 104 concerns non-justiciable matters – Relevance of political matters – Meaning of "non-justiciable".

Constitutional law (Cth) – Judicial power – Meaning of judicial power – Whether interim control order proceedings involve the exercise of judicial power – Whether reposing the power to make an interim control order in a Ch III court imparts a judicial character to that power – Relevance of historical analogues to power conferred by Div 104.

Constitutional law (Cth) – Judicial power – Meaning of judicial power – Discretion – Whether the criteria in Div 104 impermissibly concern non-judicial matters – Whether the criteria in Div 104 repose a discretion in the court making an interim control order – Relevance of "legal criteria" – Relevance of "policy" – Meaning of "may" – Meaning of "reasonably necessary".

Constitutional law (Cth) – Judicial power – Meaning of judicial power – Future conduct – Whether Div 104 impermissibly confers power upon a Ch III court to make orders by reference to future risks or conduct rather than by reference to past conduct or existing rights and obligations.

Constitutional law (Cth) – Judicial power – Exercise of judicial power – Whether Div 104 compels the exercise of judicial power in a manner contrary to Ch III – Relevance of ex parte hearing – Relevance of standard of proof – Relevance of withholding evidence – Relevance of restrictions upon personal liberty – Relevance of historical analogues to power conferred by Div 104.

Evidence – Constitutional facts – Manner in which constitutional facts are to be established – Scope of judicial notice in constitutional cases.

Words and phrases – "constitutional fact", "control order", "defence", "external affairs", "judicial notice", "judicial power", "jurisdiction", "legal criteria", "matter", "naval and military defence", "non-justiciable", "policy", "procedural fairness", "reasonably appropriate and adapted", "reasonably necessary", "terrorism", "terrorist act".

Constitution, ss 51(vi), 51(xxix), 51(xxxii), 51(xxxvii), 68, 69, 71, 75, 76(ii), 76(iii), 77(i).
Acts Interpretation Act 1901 (Cth), s 15C.
Criminal Code (Cth), Div 104, s 100.8.
Terrorism (Commonwealth Powers) Act 2003 (Vic).
High Court Rules 2004, r 27.08.5.

1 GLEESON CJ. The first defendant, a Federal Magistrate, on 27 August 2006 made an interim control order, under the *Criminal Code* (Cth) ("the Criminal Code"), against the plaintiff. The grounds on which the order was made were summarised in Sched 2 of the order as follows:

> "1. Mr Thomas has admitted that he trained with Al Qa'ida in 2001. Al Qa'ida is a listed terrorist organisation under section 4A of the *Criminal Code Regulations* 2002, made under the *Criminal Code Act* 1995. Mr Thomas also admitted that while at the Al Qa'ida training camp he undertook weapons training, including the use of explosives and learned how to assemble and shoot various automatic weapons.
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> 2. There are good reasons to believe that given Mr Thomas has received training with Al Qa'ida he is now an available resource that can be tapped into to commit terrorist acts on behalf of Al Qa'ida or related terrorist cells. Training has provided Mr Thomas with the capability to execute or assist with the execution directly or indirectly of any terrorist acts.
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> 3. Mr Thomas is vulnerable. Mr Thomas may be susceptible to the views and beliefs of persons who will nurture him during his reintegration into the community. Mr Thomas's links with extremists such as Abu Bakir Bashir, some of which are through his wife, may expose and exploit Mr Thomas's vulnerabilities.
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> 4. Furthermore, the mere fact that Mr Thomas has trained in Al Qa'ida training camps, and associated with senior Al Qa'ida figures, in Afghanistan is attractive to aspirant extremists who will seek out his skills and experiences to guide them in achieving their potentially extremist objectives.
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> 5. The controls set out in this interim control order statement will protect the public and substantially assist in preventing a terrorist act. Without these controls, Mr Thomas's knowledge and skills could provide a potential resource for the planning or preparation of a terrorist act."

2 The interim control order was made under Pt 5.3, Div 104, subdiv B, s 104.4 of the Criminal Code. The order required the plaintiff to remain at his residence in Williamstown, Victoria, between midnight and 5 am each day unless he notified the Australian Federal Police of a change of address. It also required him to report to the police three times each week. It required him to submit to having his fingerprints taken. He was prohibited from leaving Australia without the permission of the police. He was prohibited from acquiring or manufacturing explosives, from communicating with certain named individuals, and from using certain communications technology. The order was made ex parte. In the

ordinary course, a hearing in the Federal Magistrates Court would have taken place within a short time in order to decide whether to confirm or revoke or vary the order (s 104.5(1A), s 104.12, s 104.12A, s 104.14). In the events that have occurred, including the present challenge to the validity of the legislation, no such hearing has yet occurred. There are pending criminal proceedings against the plaintiff in the Supreme Court of Victoria, which may be part of the explanation for the delay in holding a hearing. It is not suggested by the parties that such delay has any bearing on the outcome of the proceedings in this Court. It is simply to be noted that the interim order has subsisted for a much longer time than is contemplated by the legislation.

3 The plaintiff commenced proceedings in this Court to quash the interim control order on the ground that Div 104 of the Criminal Code is wholly invalid. The grounds of asserted invalidity are reflected in the questions asked in a special case, which are as follows:

1. Is Division 104 of the Criminal Code invalid because it confers on a federal court non-judicial power contrary to Chapter III of the Commonwealth Constitution?

2. Is Division 104 of the Criminal Code invalid because in so far as it confers judicial power on a federal court, it authorises the exercise of that power in a manner contrary to Chapter III of the Commonwealth Constitution?

3. Is Division 104 of the Criminal Code invalid because it is not supported by one or more express or implied heads of legislative power under the Commonwealth Constitution?

4. Who should pay the costs of the special case?

4 As to question 3, the legislation itself (s 100.3(1)) invokes the powers directly conferred on the Parliament by s 51 of the Constitution, which include the defence power (s 51(vi)) and the external affairs power (s 51(xxix)), and, in addition, the powers that the Commonwealth Parliament has when matters have been referred to it by the Parliaments of States under s 51(xxxvii). The Parliaments of the States, in order to support a national scheme of anti-terrorist legislation, have referred matters to the Parliament of the Commonwealth, and a number of States have intervened in these proceedings to contend that those references sustain the challenged legislation. The plaintiff argues that they do not. The Commonwealth argues, among other things, that it is unnecessary to rely on them.

5 All the powers referred to in s 51 are conferred subject to the Constitution and, therefore, subject to Ch III of the Constitution. This is the basis of questions 1 and 2, which appear to me to raise the principal issues in the case.

6 I agree with Gummow and Crennan JJ that, subject to questions 1 and 2, the legislation is supported by the defence power and the external affairs power. It is therefore unnecessary to deal with the arguments concerning the references of matters by the States. The extent, if any, to which other anti-terrorist provisions of the Criminal Code depend upon the references by the States does not arise for consideration. I also agree with the reasons given by Gummow and Crennan JJ for their conclusion as to question 3, and would add only some brief points on that topic.

7 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; and it is not limited to protection of bodies politic as distinct from the public, or sections of the public. Professor Greenwood wrote[1]:

> "Since the events of 11 September showed – if, indeed, the matter were ever in any doubt – that a terrorist organization operating outside the control of any state is capable of causing death and destruction on a scale comparable with that of regular military action by a state, it would be a strange formalism which regarded the right to take military action against those who caused or threatened such consequences as dependent upon whether their acts could somehow be imputed to a state. ... [T]he famous *Caroline* dispute, which is still regarded as the classical definition of the right of self-defence in international law, shows that an armed attack need not emanate from a state."

8 The object of Div 104 is to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act (s 104.1). The definition of terrorist act (s 100.1) requires three elements for an action or threat of action to be a terrorist act. First, the action must fall within a certain description, and must not be of a kind excluded by another description. The inclusory aspect of the definition is that the action must (to put it briefly) cause death, serious physical harm, or serious damage to property, endanger life, create a serious risk to public health or safety, or seriously interfere with or disrupt certain vital systems. The exclusory aspect of the definition excludes advocacy, protest, dissent or industrial action that is (to put it briefly) not intended to cause death or serious injury, or endanger life or public safety. The second necessary element is that the action is done, or the threat of action is made, with the intention of advancing a political, religious or

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1 Greenwood, "International Law and the 'War Against Terrorism'", (2002) 78 *International Affairs* 301 at 307-308.

ideological cause. The third necessary element is that the action is done, or the threat of action is made, with the intention of coercing, or influencing by intimidation (to put it briefly), a government, or of intimidating the public or a section of the public.

9 A control order has the purpose of protecting the public from a terrorist act. An interim control order, of the kind with which this case is concerned, may be requested only with the Attorney-General's written consent, and the person requesting the consent must either consider on reasonable grounds that the order sought would substantially assist in preventing a terrorist act or suspect on reasonable grounds that the person in relation to whom the order is sought has provided training to, or received training from, a listed terrorist organisation. The court's power to make an interim control order is conditioned on two matters (s 104.4). First, the court must be satisfied on the balance of probabilities that making the order would substantially assist in preventing a terrorist act, or that the person has provided training to, or received training from, a listed terrorist organisation. Secondly, the court must be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act. Those words are important in the arguments relating to questions 1 and 2, and it will be necessary to come back to them. On the question of power, however, they repeat the legislative object: protecting the public from an apprehended terrorist act. That is not only the purpose of the legislation generally, it is the purpose to which the control order must be directed, and with which it must conform. This is in the specific context of prevention of a terrorist act, or dealing with a person who has trained with a terrorist organisation. The level of risk of the occurrence of a terrorist act, and the level of danger to the public from an apprehended terrorist act, will vary according to international or local circumstances. Assuming, for the moment, that the legislative criterion for the sufficiency of the connection between the control order and the protection of the public from a terrorist act is not otherwise invalid (a point to which I shall return), the existence of that criterion means that the legislation is supported by the defence power supplemented, where necessary, by the external affairs power.

10 I turn now to questions 1 and 2. Since the arguments on these questions concern what may be described as separation of powers issues, it is convenient to begin with a passage from the joint judgment in the *Boilermakers' Case*[2]:

> "There are not a few subjects which may be dealt with administratively or submitted to the judicial power without offending against any

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2 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 278 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

> constitutional precept arising from Chap III. It may be too that the manner in which they have been traditionally treated or in which the legislature deals with them in the particular case will be decisive ...
>
> The point might be elaborated and many illustrations, particularly from the bankruptcy jurisdiction, might be given. But enough has been said to show how absurd it is to speak as if the division of powers meant that the three organs of government were invested with separate powers which in all respects were mutually exclusive."

11 Their Honours went on to cite, as containing a statement of the "true position", a work by Professor Willoughby[3], who wrote:

> "Generally speaking, it may be said that when a power is not peculiarly and distinctly legislative, executive or judicial, it lies within the authority of the legislature to determine where its exercise shall be vested."

12 A familiar example of a governmental power that is sometimes exercised legislatively, sometimes administratively, and sometimes judicially is control of land use. In New South Wales, for example, such controls are sometimes dealt with directly by an Act of Parliament or delegated legislation, sometimes administratively by a Minister or by local government authorities, and sometimes by the Land and Environment Court. We are now accustomed to dissolution of marriage by court order, but there was a time when marriages were dissolved by statute. Compensating victims of accident or crime could be done administratively or judicially. In New Zealand, claims by accident victims, of a kind that for many years have formed a large part of the work of Australian courts, are dealt with by a no-fault compensation scheme outside the court system. Many penalties are imposed administratively, although there is usually a capacity for judicial review or litigious contest. Deciding whether a governmental power or function is best exercised administratively or judicially is a regular legislative exercise. If, as in the present case, Parliament decides to confer a power on the judicial branch of government, this reflects a parliamentary intention that the power should be exercised judicially, and with the independence and impartiality which should characterise the judicial branch of government.

13 No one has argued that it is beyond the legislative capacity of any Australian Parliament, State or federal, to provide for the making of control orders where they are found to be necessary for the purpose of protecting the public from terrorist acts. For the reasons already given, subject to questions 1

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3 Willoughby, *The Constitutional Law of the United States*, 2nd ed (1929) at 1619-1620.

and 2, it is within the power of the federal Parliament to do so. If it were only within the power of the State Parliaments, while no Ch III issue would arise, at least directly[4], it would still be possible to ask whether the power is peculiarly or distinctively either legislative, or executive, or judicial. The essential nature of the power does not vary according to whether it is exercised by a State or federal Parliament, although the consequences may be different, and the manner in which powers have been traditionally treated by State, as well as federal, authorities may be significant.

14 It will be necessary to deal with an argument that the particular legislative conditions established by the Criminal Code for making a control order are such that control orders cannot be made by a Ch III court in the exercise of the judicial power of the Commonwealth. There is, however, an anterior question to be resolved, which is whether the essential nature of control orders is such that the power to make them cannot be conferred by the legislature upon the judicial branch of government for the reason that such orders are distinctively legislative or executive.

15 The plaintiff's written submissions contend that Div 104 confers non-judicial power on a federal court in that it confers upon the court the power to determine what legal rights and obligations should be created, rather than the power to resolve a dispute about existing rights and obligations by determining what those rights and obligations are, and the power to deprive a person of liberty on the basis of what that person might do in the future, rather than on the basis of a judicial determination of what that person has done. It is said that, by reason of those characteristics of a control order, the governmental power that is exercised when such an order is made is peculiarly or distinctively legislative or executive, and therefore not a power that may be conferred upon the judiciary. The power to restrict or interfere with a person's liberty on the basis of what that person might do in the future, rather than on the basis of a judicial determination of what the person has done, which involves interfering with legal rights, and creating new legal obligations, rather than resolving a dispute about existing rights and obligations, is in truth a power that has been, and is, exercised by courts in a variety of circumstances. It is not intrinsically a power that may be exercised only legislatively, or only administratively. If it were otherwise, the federal Parliament would lack the capacity to confide an exercise of such power to the judicial branch of government. In *Fardon v Attorney-General (Qld)*[5] the Court was concerned with State legislation which conferred on the Supreme Court of Queensland a power to detain in custody certain prisoners who had served their sentences. The power of detention was "to ensure adequate protection of the

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4 cf *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

5 (2004) 223 CLR 575.

community"[6] and a court was required to decide whether there was "an unacceptable risk that the prisoner will commit a serious sexual offence"[7]. McHugh J said[8]:

> "[W]hen determining an application under the Act, the Supreme Court is exercising judicial power. ... It is true that in form the Act does not require the Court to determine 'an actual or potential controversy as to existing rights or obligations'. But that does not mean that the Court is not exercising judicial power. The exercise of judicial power often involves the making of orders upon determining that a particular fact or status exists. It does so, for example, in the cases of matrimonial causes, bankruptcy, probate and the winding up of companies. The powers exercised and orders made by the Court under this Act are of the same jurisprudential character as in those cases. The Court must first determine whether there is 'an unacceptable risk that the prisoner will commit a serious sexual offence'. That is a standard sufficiently precise to engage the exercise of State judicial power. Indeed, it would seem sufficiently precise to constitute a 'matter' that could be conferred on or invested in a court exercising federal jurisdiction."

16 Those observations apply to the legislation in question in this case. Two familiar examples of the judicial exercise of power to create new rights and obligations which may restrict a person's liberty are bail, and apprehended violence orders. The restraints imposed on the plaintiff by the order made against him are similar to conditions commonly found in a bail order. Of course, there are differences between bail and a control order, but the example of bail shows that imposition of restrictions of the kind imposed on the plaintiff is not foreign to judicial power. Apprehended violence orders have many of the characteristics of control orders, including the fact they may restrain conduct that is not in itself unlawful. For example, an apprehended violence order may forbid a person to approach another person, or to attend a certain place. As a matter of history, apprehended violence orders have their origin in the ancient power of justices and judges to bind persons over to keep the peace. Blackstone, in his *Commentaries*, wrote of what he called "preventive justice". He said[9]:

> "This preventive justice consists in obliging those persons, whom there is probable ground to suspect of future misbehaviour, to stipulate with and to

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6 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q), s 3.

7 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q), s 13(2).

8 (2004) 223 CLR 575 at 596-597 [34].

9 Blackstone, *Commentaries on the Laws of England*, (1769), Bk IV at 248.

> give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour. This requisition of sureties has been several times mentioned before, as part of the penalty inflicted upon such as have been guilty of certain gross misdemeanours: but there also it must be understood rather as a caution against the repetition of the offence, than any immediate pain or punishment."

17 These analogies are not exact, but the argument for the plaintiff is that the power involved in making anti-terrorist control orders is exclusively non-judicial and, in its nature, antithetical to the judicial function. Put another way, the argument is that, even assuming it is within the power of the federal Parliament to legislate for such restraints upon the liberty of individuals, the power to make control orders cannot be given to judges. The corollary appears to be that it can only be exercised by the executive branch of government. The advantages, in terms of protecting human rights, of such a conclusion are not self-evident. In *Fardon*[10], I indicated that the exercise of powers, independently, impartially and judicially, especially when such powers affect the liberty of the individual, would ordinarily be regarded as a good thing, not something to be avoided. An argument, as a matter of policy, that legislation for anti-terrorist control orders ought to be subject to some qualification in aid of the human rights of people potentially subject to such orders is one thing. An argument that the making of such orders should be regarded as totally excluded from the judicial function is another. At all events, to return to the passage from the *Boilermakers' Case* cited earlier, powers relevantly similar to those given by Div 104 traditionally have been, and are, exercised by the judiciary. They are not exclusively or distinctively administrative. To decide that such powers are exclusively within the province of the executive branch of government would be contrary to our legal history, and would not constitute an advance in the protection of human rights.

18 Alternatively, it was argued that the restriction on liberty involved in the power to make a control order is penal or punitive in character, and the governmental power involved exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. In a sense this is the reverse of the earlier argument, but with an added qualification: according to this argument, only courts may impose restraints on liberty of the kind here involved, but they may do so only as an incident to deciding or punishing criminal guilt. In *Chu Kheng Lim v Minister for Immigration*[11], it was said that it would be beyond the legislative power of the Parliament to invest the Executive with an arbitrary

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10 (2004) 223 CLR 575 at 586 [2].

11 cf (1992) 176 CLR 1 at 28.

power to detain citizens in custody. The reason given was that the involuntary detention of a citizen in custody by the state is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. Exceptions were acknowledged. Examples of executive detention pursuant to statutory authority include quarantine, and detention under mental health legislation[12]. It may be accepted that control orders may involve substantial deprivation of liberty, but we are not here concerned with detention in custody; and we are not concerned with executive detention. We are concerned with preventive restraints on liberty by judicial order. *Fardon* was an example of preventive detention in custody pursuant to judicial order. Apprehended violence orders made by judicial officers also involve restrictions on liberty falling short of detention in custody. It is not correct to say, as an absolute proposition, that, under our system of government, restraints on liberty, whether or not involving detention in custody, exist only as an incident of adjudging and punishing criminal guilt. It is true that the circumstances under which restraints on liberty may be imposed by judicial order other than as an incident of adjudging and punishing criminal guilt are carefully confined, both by the Parliament and by the courts, but we are here dealing with a different argument. The proposition on which the plaintiff's argument depends is too broad.

19 A narrower argument for the plaintiff turns upon the Criminal Code's criteria for the making of a control order. This argument looks at the legal incidents of the power as expressed in the Criminal Code, and asserts that such power is antithetical to the judicial function and cannot be conferred on the federal judiciary consistently with Ch III. In particular, the argument points to the stipulation that a control order may be made only if the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act. The court is required to make findings that may relate to whether one or more persons are contemplating a terrorist act, whether or not a person has skills, information or other resources that could be employed by the persons who are contemplating a terrorist act to achieve their purpose, and whether the subject of the proposed order has received terrorist training. The court must make inferences and predictions as to whether the skills, information or other resources of the subject of the proposed order are capable of facilitating the commission of the contemplated terrorist act, whether the persons planning a terrorist act are likely to be able to make use of those skills or other resources, and whether the making of a control order would substantially assist in preventing the terrorist

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12 It is not necessary to decide in this case the limits of these exceptions, or whether their disparate character calls into question the accuracy of the formulation of general principle.

act. The requirement that a court consider whether each of the obligations imposed by a control order is both reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public was the subject of debate. A requirement of that kind would sometimes be described as a requirement of proportionality[13]. Judgments about proportionality often require courts to evaluate considerations that are at least as imprecise as those involved in formulating a control order.

20 Much attention was given in argument to the expression "reasonably necessary". That expression is commonly used both by judges and in legislation. It is useful to consider examples, because they show the kinds of judgmental evaluation which are commonly undertaken in the judicial process.

21 A well-known example of judicial use of "reasonably necessary" is in the common law doctrine of restraint of trade. In *McEllistrim v Ballymacelligott Co-operative Agricultural and Dairy Society*[14], Lord Birkenhead LC said:

> "A contract which is in restraint of trade cannot be enforced unless (a) it is reasonable as between the parties; (b) it is consistent with the interests of the public.
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> ...
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> My Lords, so much guidance has been given by this House in recent decisions to those whose duty it is to understand the criteria by which one tests the meaning of 'reasonableness between the parties', that little need be added upon this point. The real test is, as your Lordships have so often pointed out, does the restriction exceed what is reasonably necessary for the protection of the covenantee? To make the matter particular your Lordships have to reach a conclusion as to whether [the restriction] impose[s] upon the appellant a greater degree of restraint than the reasonable protection of the respondents requires."

22 That passage has been adopted and applied by this Court in many cases, including *Heron v Port Huon Fruitgrowers' Co-operative Association Ltd*[15], and *Buckley v Tutty*[16]. It must be one of the most familiar passages in judicial

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13 cf *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 196-200 [31]-[40].

14 [1919] AC 548 at 562-563.

15 (1922) 30 CLR 315 at 323-324.

16 (1971) 125 CLR 353 at 376.

statements of common law principle. It uses "reasonably necessary", and explains what that means. Translating it to the present context, the court has to consider whether the relevant obligation, prohibition or restriction imposes a greater degree of restraint than the reasonable protection of the public requires. So familiar was the principle stated by the Lord Chancellor that when the United Kingdom Parliament, and later the Australian Parliament, legislated with respect to restrictive trade practices, they applied the concept of reasonable necessity of restrictions[17]. The *Trade Practices Act* 1974 (Cth) uses the concept of reasonable necessity in ss 44ZF, 51AB, 51AC, 65C, 65D, Pt X Div 6 s 10.29, Div 7 s 10.41, Div 9 s 10.52, and s 152DB. For example, in s 51AB, the court may consider what conditions are reasonably necessary for the protection of the legitimate interests of a particular corporation. In s 65C, the question is whether requirements are reasonably necessary to prevent or reduce risk of injury to any person.

23 The defence of lawful justification for inducing a breach of contract was summarised by Jordan CJ in *Independent Oil Industries Ltd v The Shell Co of Australia Ltd*[18]. He said that "an act which would in itself be wrongful as infringing some legal right of another person may be justified if shown to be no more than reasonably necessary for the protection of some actually existing superior legal right in the doer of the act". This Court recently considered and applied that statement in *Zhu v Treasurer of New South Wales*[19]. In particular, it discussed what it referred to as "the 'reasonably necessary' test". In doing so, it referred to an English decision[20] concerning s 21(1) of the *Restrictive Trade Practices Act* 1956 (UK) which was about whether restrictions were reasonably necessary to protect the public against injury. There, Devlin J referred to an earlier decision of Buckley J[21], who interpreted "reasonably necessary or proper" in the *Settled Land Act* 1890 (UK) to include conduct which although not absolutely necessary was consistent with what a reasonable and prudent person would do.

24 In Australian constitutional law, reasonable necessity has been adopted as a legal criterion of validity of legislation. In *North Eastern Dairy Co Ltd v Dairy*

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17 As to the United Kingdom, see Wilberforce, Campbell and Elles, *The Law of Restrictive Trade Practices and Monopolies*, 2nd ed (1966) at 385, 387.

18 (1937) 37 SR (NSW) 394 at 415.

19 (2004) 218 CLR 530 at 587-590 [161]-[171].

20 *In re Chemists' Federation Agreement (No 2)* [1958] 1 WLR 1192; [1958] 3 All ER 448.

21 *Stanford v Roberts* [1901] 1 Ch 440 at 444.

Industry Authority of NSW[22], Mason J said that regulation of interstate trade to protect the public from health risks would not contravene s 92 of the Constitution so long as the detriment to interstate trade was reasonably necessary to protect public health and safety. In *Australian Capital Television Pty Ltd v The Commonwealth*[23], Mason CJ said of restrictions on certain forms of communication that the court had to determine whether the restrictions were reasonably necessary to serve the public interest which the restrictions sought to serve. In *Levy v Victoria*[24], Toohey and Gummow JJ expressed their conclusion by saying that there was no greater curtailment of the constitutional freedom of communication than was reasonably necessary to serve the public interest in the safety of citizens, and that the curtailment was reasonably capable of being seen as appropriate and adapted to that end.

25 In the law of real property, the concept of reasonable necessity is familiar. The grant of an easement carries with it the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment[25]. The *Conveyancing Act* 1919 (NSW) in s 88K provides that the court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement. The expression was construed in *117 York Street Pty Ltd v Proprietors of Strata Plan No 16123*[26].

26 In stating the powers of the legislature, courts have spoken in terms of reasonable necessity. In *Egan v Willis*[27], Gaudron, Gummow and Hayne JJ referred to the established principle that the Legislative Council of New South Wales has such powers, privileges and immunities as are reasonably necessary for the proper exercise of its functions. The Privy Council, in *Barton v Taylor*[28], in 1886 said: "Whatever, in a reasonable sense, is necessary for these purposes, is impliedly granted whenever any such legislative body is established by competent authority."

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22 (1975) 134 CLR 559 at 615.

23 (1992) 177 CLR 106 at 143.

24 (1997) 189 CLR 579 at 614-615.

25 *Jones v Pritchard* [1908] 1 Ch 630 at 638.

26 (1998) 43 NSWLR 504.

27 (1998) 195 CLR 424 at 453-454 [48].

28 (1886) 11 App Cas 197 at 203.

27 It is not difficult to see where Parliament found the language of s 104.4(1)(d) of the Criminal Code. The language is taken from a long line of decisions of this Court, and of English courts, and from local and foreign statutes[29]. Against this background of judicial and legislative usage it cannot plausibly be suggested that the standard of reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public is inherently too vague for use in judicial decision-making.

28 Is there, nevertheless, something about the threat of terrorism, or the matters of inference and prediction involved in considering terrorist threats and control orders, that renders this subject non-justiciable, or in some other way inherently unsuited to be a subject of judicial decision? What has been said above as to the variety of contexts in which courts have addressed issues of reasonable necessity, and of proportionality, seems to suggest otherwise. Furthermore, predictions as to danger to the public, which are commonly made against a background of the work of police, prison officers, public health authorities, welfare authorities, and providers of health care, are regularly part of the business of courts. In *Veen v The Queen [No 2]*[30] this Court spoke of the role of protecting the public involved in sentencing. The topic was considered in a different context in *Fardon*[31], where it was pointed out that the standard of an unacceptable risk of harm, used in the Queensland legislation there in question, had been used by this Court in *M v M*[32], a case about parental access to children. Reference was earlier made to apprehended violence orders, and to the restraints on liberty which they may involve. I am unable to accept that there is a qualitative difference between deciding whether an angry person poses an unacceptable risk to his or her family, or to the community or some section of the community, or whether a sexually dysfunctional man poses an unacceptable risk to women, and deciding whether someone who has been trained by terrorists poses an unacceptable risk to the public. The possibility that the person will do what he or she has been trained to do, or will be used as a "resource" by others who have been so trained, is capable of judicial evaluation. I do not accept that these issues are insusceptible of strictly judicial decision-making.

29 It was argued that the power conferred, or purportedly conferred, by Div 104 was not judicial because orders made by an issuing court were said not

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29 The 2002 edition of the American publication *Words and Phrases*, vol 36A at 223-230 cites 83 United States cases construing "reasonably necessary" in American statutes.

30 (1988) 164 CLR 465.

31 (2004) 223 CLR 575 at 593 [22], 606 [60], 657 [225].

32 (1988) 166 CLR 69 at 78.

to be enforceable by that court. In my view, the ordinary powers of Ch III courts to punish contempt are not excluded by Div 104. The relevant principle is that stated in *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW*[33]:

> "When the legislature finds that a specific question of a judicial nature arises but that there is at hand an established court to the determination of which the question may be appropriately submitted, it may be supposed that if the legislature does not mean to take the court as it finds it with all its incidents including the liability to appeal, it will say so. In the absence of express words to the contrary or of reasonably plain intendment the inference may safely be made that it takes it as it finds it with all its incidents and the inference will accord with reality."

30 Finally, it was argued that, even if Div 104 confers judicial power, it purports to require that power to be exercised in a manner inconsistent with the essential character of a court or inconsistent with the nature of judicial power. This argument fails. We are here concerned with an interim control order which was made ex parte, pursuant to subdiv B, but, as has been pointed out, in the ordinary case a confirmation hearing would have been held before now. Applications for control orders are made in open court, subject to the power to close the court under the court's general statutory powers. The rules of evidence apply. The burden of proof is on the applicant. Prior to the confirmation hearing, the subject of a control order is given the documents that were provided to the Attorney-General for the purpose of seeking consent to the application for the interim order, together with any other details required to enable the person to respond (s 104.12A). The confirmation hearing involves evidence, cross-examination, and argument (s 104.14). The court has a discretion whether to revoke or vary or confirm the order (s 104.14). An appeal lies in accordance with the ordinary appellate process that governs the issuing court's decisions. The outcome of each case is to be determined on its individual merits. There is nothing to suggest that the issuing court is to act as a mere instrument of government policy. On the contrary, the evident purpose of conferring this function on a court is to submit control orders to the judicial process, with its essential commitment to impartiality and its focus on the justice of the individual case. In particular, the requirements of s 104.4, which include an obligation to take into account the impact of the order on the subject's personal circumstances, are plainly designed to avoid the kind of overkill that is sometimes involved in administrative decision-making. Giving attention to the particular circumstances of individual cases is a characteristic that sometimes distinguishes judicial from administrative action.

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33 (1956) 94 CLR 554 at 560.

31 We are not concerned in this case with particular issues as to procedural fairness that could arise where, for example, particular information is not made available to the subject of a control order or his or her lawyers. Issues of that kind, if they arise, will be decided in the light of the facts and circumstances of individual cases. We are here concerned with a general challenge to the validity of Div 104. That challenge should fail.

32 I would answer questions 1, 2 and 3 by holding that subdiv B of Div 104 is valid. I would answer question 4: "The plaintiff".

33 GUMMOW AND CRENNAN JJ. The plaintiff is subject to an interim control order made under Div 104 of the *Criminal Code* (Cth)[34] ("the Code") by the Federal Magistrates Court (Mowbray FM, the first defendant) on 27 August 2006. The order was made upon the ex parte application of the second defendant, an officer of the Australian Federal Police ("the AFP"). In this Court, the Commonwealth is joined as the third defendant. Evidence at the hearing of the ex parte application was presented on affidavit and by a sworn witness and submissions were made by counsel for the second defendant.

34 A hearing for the confirmation of the interim order has been adjourned by consent in the Federal Magistrates Court to await the outcome of the present proceeding in this Court. However, the legislative scheme is that interim orders, having been made ex parte, should come as soon as practicable before the issuing court in an inter partes proceeding for confirmation, revocation or other disposition.

35 Part 5.3 of the Code is headed "Terrorism" and was introduced by the *Criminal Code Amendment (Terrorism) Act* 2003 (Cth) ("the 2003 Act"). It replaced Pt 5.3 in the form initially enacted by the *Suppression of the Financing of Terrorism Act* 2002 (Cth) ("the 2002 Act"). Division 104 is headed "Control orders" and was added to Pt 5.3 by the *Anti-Terrorism Act (No 2)* 2005 (Cth) ("the 2005 Act")[35].

36 Before the Full Court is a Further Amended Special Case agreed by the parties pursuant to r 27.08 of the High Court Rules. The plaintiff seeks affirmative answers to questions asking whether Div 104[36] is invalid, whether for want of support by s 51 of the Constitution, or, even if so supported, for failure to observe the restraints imposed by Ch III upon the heads of legislative power in s 51.

37 The Attorneys-General for New South Wales, South Australia and Western Australia intervened with submissions largely but not entirely consistent with those made by the Commonwealth.

38 Paragraphs 5 and 6 of the Special Case state:

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34 The *Criminal Code* is contained in the Schedule of the *Criminal Code Act* 1995 (Cth). Division 104 is contained in Pt 5.3.

35 Schedule 4, Pt 1, Item 24.

36 More precisely, the 2005 Act, Sched 4, Pt 1, Item 24, which inserted Div 104 into the Code.

"The Plaintiff is and was at all material times an Australian citizen.

In March 2001, the Plaintiff left Australia and travelled to Pakistan, and then to Afghanistan. Whilst in Afghanistan, he undertook paramilitary training at the Al Farooq training camp for a period of three months. This training included training in the use of firearms and explosives."

39 There is no challenge to the standing of the plaintiff. The reasons given in *Croome v Tasmania*[37] and *Re McBain; Ex parte Australian Catholic Bishops Conference*[38] indicate that at least with respect to the interim control order provisions the plaintiff has standing in respect of a matter arising under the Constitution or involving its interpretation. As will appear, the interim control order made in respect of the plaintiff, whilst in force when this Special Case was placed before the Full Court, has a finite life. Nevertheless, the plaintiff's standing would not be lost were the control order to lapse. The restraints to which the plaintiff had been subjected during the life of the order would remain sufficient for him to retain standing to challenge the validity of the order.

40 A different situation is presented by the provisions for confirmation of interim orders. These have yet to be applied to the plaintiff but the plaintiff seeks to establish that Div 104 as a whole is invalid. It will be necessary to consider whether relief in such broad terms would be appropriate.

41 There is not before this Court any dispute as to whether, assuming the validity of Div 104, the Federal Magistrate acted within jurisdiction in making the interim control order or whether that order can or should be confirmed.

42 Much attention in submissions, written and oral, was devoted to criticising or supporting the making of the interim order on the evidence then presented to the Federal Magistrate. However, save to the extent that this material may be indicative of constitutional facts underpinning the validity of the legislation, it is of limited utility for present purposes.

"Terrorist act"

43 The object of Div 104 is stated in s 104.1 (which constitutes subdiv A) as being:

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37 (1997) 191 CLR 119.

38 (2002) 209 CLR 372.

"to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act".

44 What is a "terrorist act"? Section 100.1 of the Code contains various definitions of terms used in Pt 5.3. These include a lengthy definition of "terrorist act". This was introduced by the 2003 Act. A "terrorist act" is defined as "an action or threat of action" which has specified characteristics. The action must be done or the threat made with an intention answering two criteria. First, there must be the intention of "advancing a political, religious or ideological cause". Secondly, there must be an intention which is expressed in the alternative. The first alternative is "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". The second is "intimidating the public or a section of the public". The reference to "the public" is stated to include a reference to the public of a country other than Australia (s 100.1(4)(b)). The action which is committed or threatened also must answer one or more of six criteria listed in sub-s (2) of s 100.1[39]. Action falls outside the definition if it be

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39 These are as follows:

"(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".

(Footnote continues on next page)

"advocacy, protest, dissent or industrial action" and is not intended to cause serious harm that is physical harm to a person, or a person's death, or to endanger the life of a person other than the person taking the action, or to create a serious risk to the health or safety of the public or a section of the public (sub-s (3)).

45 It will be necessary later in these reasons to consider further the definition of "terrorist act". It is sufficient to note here that it is the political, religious or ideological motivation and the intention to intimidate governments or the public (ie elements of the body politic) which distinguishes the acts in question from acts in pursuit of private ends, which come within established offences against the person or property, or those relating to firearms or explosives.

46 It should be said immediately that the outcome of this Special Case does not turn upon the validity of the definition of "terrorist act", as supported, for example, by s 51(vi) of the Constitution. What is at stake is the validity of substantive provisions which incorporate the definition, in particular Div 104 of the Code and the interim control order provisions of subdiv B thereof (ss 104.2-104.5).

Interim control orders

47 Subdivision B (ss 104.2-104.5) of Div 104 is headed "Making an interim control order". Sections 104.2 and 104.3 make detailed provision for the consent by the Attorney-General to the making by a senior member of the AFP of a "request" in relation to a person for "an interim control order" to be made by "an issuing court"[40]. The last expression is defined in s 100.1 as meaning the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court. The information upon which the senior AFP member relies must be sworn or affirmed by that person (s 104.3).

48 Section 104.4 and s 104.5 are critical provisions. They contemplate, although they do not specify in terms, an ex parte procedure. The issuing court "may make" an interim control order in the terms specified in s 104.5, but only if the criteria specified in s 104.4 are satisfied. Among other matters, the order must set out a summary of the grounds on which the order is made (par (h) of

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The persons and property in question may be situated within or outside Australia (sub-s (4)).

40 Subdivision C (ss 104.6-104.11) is headed "Making an urgent interim control order" and provides in certain circumstances for the making of applications by a senior AFP member without first obtaining the consent of the Attorney-General under s 104.2.

s 104.5(1)) and must state that the order does not begin to be in force until it is served personally on the person to whom it relates (par (d)).

49 The obligations, prohibitions and restrictions that may be imposed upon a person by the order are specified in s 104.5(3). They include an obligation to permit the taking of photographs of the person, and prohibitions or restrictions upon the person being at specified areas or places, leaving Australia, communicating or associating with specified individuals, accessing or using specified forms of telecommunication, including the internet, carrying out specified activities in respect of the person's work or occupation, and possessing or using specified articles or substances, and also requirements to wear a tracking device, and to report to specified persons at specified times and places.

50 Subdivision D (ss 104.12-104.17) is headed "Confirming an interim control order". An interim control order must specify a day, being as soon as practicable but at least 72 hours after the making of the order, on which the person the subject of the order may attend the court; the court may confirm the order (with or without variation), revoke it or declare it void (ss 104.5, 104.14). A confirmed control order must be in force for a specified period ending no more than 12 months after the day on which the interim control order was made, but successive control orders may be made in respect of the same person (s 104.16). Section 104.32 is a "Sunset provision"[41].

51 Subdivision G (s 104.27) creates a criminal offence of contravening a control order. But the Commonwealth correctly accepts that this supplements rather than displaces the contempt power enjoyed by the issuing courts as Ch III courts[42].

The jurisdiction of issuing courts

52 Before proceeding further, several points now should be made respecting the jurisdiction of the issuing courts.

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41 It states:

> "(1) A control order that is in force at the end of 10 years after the day on which this Division commences ceases to be in force at that time.
>
> (2) A control order cannot be requested, made or confirmed after the end of 10 years after the day on which this Division commences."

42 *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 395 [16], 428 [109].

53 First, the provisions respecting issuing courts must be read with pars (a) and (b) of s 15C of the *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act"):

> "Where a provision of an Act, whether expressly or by implication, authorizes a civil or criminal proceeding to be instituted in a particular court in relation to a matter:
>
> (a) that provision shall be deemed to vest that court with jurisdiction in that matter;
>
> (b) except so far as the contrary intention appears, the jurisdiction so vested is not limited by any limits to which any other jurisdiction of the court may be subject".

54 When s 104.4 is read with s 15C of the Interpretation Act, it answers (subject to a submission by the plaintiff respecting repugnancy to Ch III which is considered below) the description of a law made by the Parliament "defining" the jurisdiction of any federal court other than the High Court with respect to matters arising under a law made by the Parliament, within the meaning of ss 76(ii) and 77(i) of the Constitution[43].

55 Secondly, the vesting of jurisdiction provided for in par (a) of s 15C brings with it all the incidents of the exercise of jurisdiction by the federal court in question[44]. Those incidents include the selection of the judicial officer to hear any particular proceeding solely in accordance with the internal arrangements of the court. The exercise of jurisdiction necessarily includes, as the Commonwealth accepts, the ordinary appellate structure of the issuing court as well as that of this Court provided by s 73(ii) of the Constitution. Paragraph (b) of s 15C has the effect of removing from the investment of jurisdiction any limits to which any other jurisdiction of the federal court otherwise may be subject. That expansion is subjected by par (b) itself to the appearance of a contrary intention. No such intention appears in Div 104 of the Code.

56 Thirdly, interim control order proceedings "are taken to be interlocutory proceedings for all purposes", including s 75 of the *Evidence Act* 1995 (Cth)

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43 cf *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 165-166.

44 See *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 560; *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at 491 [7]; *Civil Aviation Safety Authority v Boatman* (2004) 138 FCR 384 at 394.

(s 104.28A). Section 75 provides that, in interlocutory proceedings, the hearsay rule does not apply if evidence of the source of the hearsay evidence is adduced by the party leading it. The classification of interim control order proceedings as interlocutory for all purposes has a further, and broader, significance. Applications made ex parte are a species of interlocutory proceeding which attract well-settled principles. One concerns the need for promptitude in making such applications and the serious consequence of delay. Another concerns the rigorous requirement for a full and frank disclosure of material facts; the subject is authoritatively discussed by Lindgren J in *Hayden v Teplitzky*[45]. Further, an interlocutory order is liable to be discharged if the party by or for whom the order was obtained publicly misrepresents its effect[46].

57 Fourthly, there was no disagreement in the submissions on one aspect of the construction of s 104.4. This is cast in a form earlier described by Fullagar J in *Insurance Commissioner v Associated Dominions Assurance Society Pty Ltd* ("the *Associated Dominions Assurance Case*")[47], when considering the winding-up and judicial management provisions of the *Life Insurance Act* 1945 (Cth) ("the Life Insurance Act"), as first requiring the satisfaction of stipulated criteria, with an "ultimate discretion" not controlled by any of those criteria. Section 104.4(1), in that regard, uses the phrase "[t]he issuing court may make an order ... but only if ...". No party or intervener submitted that s 104.4(1) conferred a jurisdiction the exercise of which was imperative if the stipulated criteria were satisfied[48]. Rather, where, as here, the order is interlocutory and made on an ex parte application, there are strong considerations that "may" is not used in an imperative sense and is used to accommodate the discretionary considerations which generally attend the making of orders on ex parte applications. Further, with respect to statutes assented to after the commencement of s 33(2A) of the Interpretation Act[49] a provision that a court "may" do a particular act or thing reposes a discretion in the court.

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45 (1997) 74 FCR 7 at 11-12.

46 *Meat and Allied Trades Federation of Australia (Queensland Division) Union of Employers v Australasian Meat Industry Union of Employees (Queensland Branch)* (1989) 90 ALR 187.

47 (1953) 89 CLR 78 at 90.

48 cf *Leach v The Queen* (2007) 81 ALJR 598 at 608 [38]; 232 ALR 325 at 337; *John Fairfax Publications Pty Ltd v Gacic* [2007] HCA 28 at [28].

49 Sub-section (2A) was added by Sched 1 of the *Statute Law (Miscellaneous Provisions) Act* 1987 (Cth) which commenced on 18 December 1987.

58 The fifth point is one to which it will be necessary to return, for it is central to the submissions of the Commonwealth respecting validity. It is sufficient at this stage to observe that remarks by Gaudron J in *Sue v Hill*[50] are in point. Statutory criteria for curial decision may be expressed in broad terms but still be susceptible of application in the exercise of the judicial power of the Commonwealth.

59 Further, as Kitto J explained in *R v Spicer; Ex parte Australian Builders' Labourers' Federation* ("the *Builders' Labourers' Case*")[51]:

> "The reason for concluding in some such cases that the judicial character of the repository imparts a judicial character to the power is simply that the former provides a ground for an inference, which in those cases there is nothing or not enough in other considerations to preclude, that the power is intended and required to be exercised in accordance with the methods and with a strict adherence to the standards which characterise judicial activities."

The second and third points made above respecting the nature and incidents of the jurisdiction of the issuing courts indicate the necessity for a strict adherence by the issuing courts to the standards which characterise judicial activities. Contrary to the submissions by the plaintiff, the legislation does not stipulate observance of any lesser standards.

Division 104 and Ch III of the Constitution

60 We put to one side, at this stage, the submission that Div 104 is invalid for lack of support by any head of legislative power of the Parliament, and turn directly to consider Ch III of the Constitution.

61 As with many of the disputes concerning Ch III that have reached this Court, the issues presented in this case at bottom turn upon a view of the role of Ch III in the plan laid out in the Constitution for the development of a free and confident society. It has been well said that Ch III gives practical effect to the assumption of the rule of law upon which the Constitution depends for its

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50 (1999) 199 CLR 462 at 520-521 [145]-[149]. See further the reasons of McHugh, Gummow, Hayne and Heydon JJ in *Baker v The Queen* (2004) 223 CLR 513 at 531-532 [40]-[42].

51 (1957) 100 CLR 277 at 305. See also the remarks of Gaudron J in *Nicholas v The Queen* (1998) 193 CLR 173 at 208-209 [74].

efficacy[52]. But what does the rule of law require? Hence much of the debate in submissions presented in the present case.

62 The submissions by the plaintiff respecting the judicial power of the Commonwealth were directed particularly to subdiv B of Div 104 and to the provisions for the making of interim control orders. If subdiv B falls, then the provisions respecting confirmation of interim orders in subdiv D would lack the necessary substratum and would fall also. However, if subdiv B is valid it may not necessarily follow that subdiv D also is valid. That consideration should inform the extent of declaratory relief consequent upon a decision that subdiv B is valid.

63 One of the grounds upon which the plaintiff submits that Div 104 of the Code is invalid is that it confers on federal courts, being the issuing courts, non-judicial power contrary to Ch III of the Constitution. A second ground is that, in so far as Div 104 does confer judicial power, it authorises the exercise of that power in a manner contrary to Ch III. We turn to consider the first ground.

Non-judicial power

64 Section 104.4 should be set out. It states:

> "(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:
>
> (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
>
> (d) the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be

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52 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351-352 [30].

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."

65 The submissions by the plaintiff respecting the repugnancy of subdiv B to Ch III require close attention to the terms of s 104.4(1), in particular to satisfaction on the balance of probabilities respecting the matters mentioned in pars (c) and (d) thereof. An interim control order must state that the issuing court is satisfied of the matters in pars (c) and (d) (s 104.5(1)(a)). Section 104.4(2) requires the issuing court to take into account the impact of the obligations, prohibitions and restrictions on the personal circumstances of the individual concerned. This was described in submissions as involving a "balancing exercise" by the issuing court. At the forefront of the plaintiff's case are arguments challenging the sufficiency of the matters mentioned in pars (c) and (d) of s 104.4(1) and the requirements of s 104.4(2) to provide adequate or permissible criteria for the exercise of the judicial power of the Commonwealth.

66 In *White v Director of Military Prosecutions*[53] reference was made by Gummow, Hayne and Crennan JJ to the importance which has been attached in the decisions respecting Ch III to the presence or absence of an understanding at the time of the adoption of the Constitution of the treatment of a particular class or type of function as apt for exercise by a court. The Commonwealth supports its case for validity by reference to what it contends is the long history of what are at least analogous functions to the making of interim control orders and to their exercise by English and colonial courts. Consideration of these particular submissions may be put to one side for the present.

67 Reference also was made in *White* to the development of various theories or descriptions of judicial power which are expressed in general and ahistorical

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53 [2007] HCA 29 at [45]-[47].

terms[54]. An example was given of the distinction drawn between arbitral and judicial power, with emphasis upon the power of enforcement attending the latter but not the former.

68 The particular issues respecting the alleged attempt to confer upon the issuing courts power other than the judicial power of the Commonwealth which were pressed by the plaintiff may be approached by taking as a starting point the following passage in the joint judgment of Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[55]:

> "Harrison Moore wrote that under the Australian Constitution there was, between legislative and executive power on the one hand and judicial power on the other, 'a great cleavage'[56]. The function of the federal judicial branch is the quelling of *justiciable controversies*, whether between citizens (individual or corporate), between citizens and executive government (in civil and criminal matters) and between the various polities in the federation[57]. This is discharged by ascertainment of facts, *application of legal criteria* and the exercise, where appropriate, of judicial discretion[58]. The result is promulgated in public and implemented by binding orders. The institutional separation of the judicial power assists the public perception, central to the system of government as a whole, that these controversies have been quelled by judges acting independently of either of the other branches of government." (emphasis added)

69 The plaintiff's submissions emphasise in particular the absence of at least two of the characteristics identified in that passage in *Wilson*. These are the

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54 [2007] HCA 29 at [49].

55 (1996) 189 CLR 1 at 11.

56 Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 101, quoted by Evatt J in *Victorian Stevedoring & General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 117. The learned author added: "The danger of the usurpation of judicial power by the Legislature or the Executive furnishes a long chapter in our constitutional history which is familiar to every student."

57 In addition, there are certain traditional species of jurisdiction which do not require the quelling of controversies: see *R v Davison* (1954) 90 CLR 353 at 368.

58 *Fencott v Muller* (1983) 152 CLR 570 at 608.

requirements of a "*justiciable controversy*" and of the provision by the legislation in question of "*legal criteria*" to be applied by the court.

70 The plaintiff submits that (a) critical criteria in s 104.4 are concerned with subjective and political questions best suited for determination by the executive and unsuited for determination by the judiciary and (b) the task required by s 104.4 of balancing the need to protect the public with the circumstances of the individual is not governed by objective standards or criteria. We turn to consider submission (b), then submission (a) and will then consider the remaining submissions respecting Ch III.

Absence of legal criteria?

71 Is there in s 104.4 an absence of legal standards or criteria governing the exercise of the jurisdiction conferred upon the issuing courts, something, as remarked in *Wilson*, which is necessary for the functioning of the federal judicial branch? The issue thus raised was treated in argument as if the existence of such standards is an essential requirement of legislation for it to attract the exercise of the judicial power of the Commonwealth spoken of particularly in s 71 of the Constitution. The issue may be expressed somewhat differently, as being whether s 104.4 (read with s 15C of the Interpretation Act) is a law which is adequate to "define" what is "the jurisdiction" of the issuing courts, within the sense of s 77(i) of the Constitution, or whether it fails to do so because it is an attempt to delegate to the issuing courts the essentially legislative task of determining "the content of a law as a rule of conduct or a declaration as to power, right or duty"[59].

72 In what follows, it will be assumed that no relevant distinction is presented between these two expressions of the issue. What is critical is the presence in s 104.4 of what may be said to be adequate legal standards or criteria. It should be said at once that the case law shows acceptance of broadly expressed standards.

73 In its form when considered in the *Builders' Labourers' Case*, s 140 of the *Conciliation and Arbitration Act* 1904 (Cth) included among criteria for the curial disallowance of the rules of registered organisations the terms "oppressive" and "tyrannical". This, as Dixon CJ put it, was one of the "considerations", no one of them apparently being "necessarily decisive", which supported the holding of invalidity[60]. When the section was recast in terms which survived challenge in

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59 *The Commonwealth v Grunseit* (1943) 67 CLR 58 at 82. See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 512-513 [101]-[102].

60 *Builders' Labourers' Case* (1957) 100 CLR 277 at 289-290.

R v Commonwealth Industrial Court; Ex parte The Amalgamated Engineering Union, Australian Section ("the *Amalgamated Engineering Union Case*")[61] there was a prohibition of rules which were "oppressive, unreasonable or unjust". However, Kitto J (with whom Dixon CJ agreed) said of the new s 140[62]:

> "It must be conceded that the words 'oppressive', 'unreasonable' and 'unjust', in relation to conditions, obligations or restrictions imposed by a rule upon applicants for membership or upon members, describe attributes which are not demonstrable with mathematical precision, and are to be recognized only by means of moral judgments according to generally acknowledged standards. There is a degree of vagueness about them which, in the context of the former section, assisted the conclusion that the intention was to confer on the Court a general administrative discretion for the amelioration of rules. But the notions which the words convey, more readily to be associated with administrative than with judicial decisions though they be, *must be conceded, having regard to the nature of criteria with which courts are familiar in other fields, to be not so indefinite as to be insusceptible of strictly judicial application; and their employment in the present context is not sufficient to show, against the strong indications which there are to the contrary, that the Court is intended to exercise its power under the section otherwise than judicially*." (emphasis added)

Similar conclusions should be reached respecting the presence in s 104.4(1) of the phrases "would substantially assist in preventing a terrorist act" and "protecting the public from a terrorist act".

74 The entry by the Parliament into the field of business regulation (by legislation including the Life Insurance Act and the *Trade Practices Act* 1965 (Cth)) and the field of matrimonial causes (by the *Matrimonial Causes Act* 1959 (Cth) ("the Matrimonial Causes Act")) was attended by the creation of new heads of federal jurisdiction the exercise of which was governed by broadly expressed standards. Indeed, in the *Associated Dominions Assurance Case*[63], Fullagar J said of the absence from s 59 of the Life Insurance Act of criteria to guide the exercise of curial discretion to make a winding-up order:

> "I cannot say that I have felt any serious difficulty as to the general principles which should guide the Court in exercising its discretion under

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61 (1960) 103 CLR 368.

62 (1960) 103 CLR 368 at 383.

63 (1953) 89 CLR 78 at 90; cf *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151.

> s 59. With regard to the ultimate discretion, I think the general conception to be applied is that which is inherent in the words 'just and equitable' in the Companies Acts. Those words are wide and vague, but they have become very familiar, and they have been judicially considered on many occasions."

In *Mikasa (NSW) Pty Ltd v Festival Stores*[64] the Court rejected an argument that the absence of specified criteria by which the court was to decide whether or not to enjoin engagement in retail price maintenance was fatal to validity of the relevant provision.

75 In *Cominos v Cominos*[65] the Court upheld the validity of provisions of the Matrimonial Causes Act which provided in wide terms for the making of maintenance orders (s 84), "just and equitable" property settlements (s 86), and ancillary orders "necessary to make to do justice" (s 87). When considering s 86 Mason J remarked[66]:

> "To authorize a court to make an order where it is just and equitable to do so creates a judicial discretion exercisable after a consideration of all the circumstances relevant to the making of the order and in accordance with principle. The conferment of such an authority is not inconsistent with the exercise of judicial power."

76 There is apparent in these cases an appreciation that in the course of the 20th century State legislation had established regimes to regulate and modify property and contractual rights and obligations by reference to broadly expressed criteria and to provide for the exercise by State courts of jurisdiction to implement the legislation[67]. An early appreciation both of the frequency of State legislative intervention of this nature and of its importance for the future operation of federal jurisdiction is to be found in the reasons of Williams J in *Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd*[68]. There his Honour gave seven examples from the statute law of New

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64 (1972) 127 CLR 617.

65 (1972) 127 CLR 588.

66 (1972) 127 CLR 588 at 608 (footnote omitted).

67 See, generally, Dietrich, "Giving Content to General Concepts", (2005) 29 *Melbourne University Law Review* 218 at 233-236 in the section headed "General Concepts Operating 'At Large' through Statute".

68 (1943) 67 CLR 25 at 54-56.

South Wales as it stood in 1943. In *Peacock* the Court upheld the conferral of federal jurisdiction under the National Security (Contracts Adjustment) Regulations[69], made under the *National Security Act* 1939 (Cth). The grounds for curial variation or cancellation of a contract included satisfaction on the part of the court that by reason of circumstances attributable to the war, performance of the contract had become or was likely to become "inequitable or unduly onerous" to the party seeking relief.

77 Sir Owen Dixon was not a party to the decision in *Peacock*. His subsequent reasons in the *Builders' Labourers' Case*[70] and his silence in *Cooney v Ku-ring-gai Corporation*[71] upon the rejection by Kitto, Taylor, Menzies and Windeyer JJ of limitations upon the use of the injunctive remedy in public law, restrictions which he had earlier favoured[72], evince a dissatisfaction with the course legislation was taking and some resistance to the adaptation of Ch III jurisprudence to accommodate it.

78 It should be added that criteria for judicial decision-making may involve the prevention or occurrence of future consequences by steps taken by the executive branch of government in the exercise of its powers. Mandatory court orders may stipulate, for their full effectiveness, the exercise of such powers. A well-known example is the form of specific performance decree set out in the report of *Butts v O'Dwyer*[73]. The defendants were obliged to seek the approval of the Minister administering the *Crown Lands Consolidation Act* 1913 (NSW) to the transfer of lease and, if that was forthcoming, to complete the transfer to the plaintiff.

79 In assessing whether the courts have adequate legal standards or criteria "for the purpose of protecting the public from a terrorist act" it is relevant to note, not only that a judicial procedure has been laid down, but also that the orders which may be made are a familiar part of judicial power to make orders restraining the liberty of the subject, for the purposes of keeping the peace or preserving property. Orders, which are not orders for punishment following conviction, but which involve restraints upon the person to whom they are

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69 SR 1942 No 65.

70 (1957) 100 CLR 277.

71 (1963) 114 CLR 582.

72 *Attorney-General (ex rel Lumley) and Lumley v T S Gill & Son Pty Ltd* [1927] VLR 22.

73 (1952) 87 CLR 267 at 289-290.

directed, can be made after a judicial assessment of a future risk. Such orders are familiar in the context of binding over orders discussed later in these reasons, and in the context of statutory protection orders made for the prevention of future violence. In addition to the injunctive relief available under ss 68B and 114 of the *Family Law Act* 1975 (Cth) ("the Family Law Act"), every State and Territory has enacted legislation with powers to make and tailor orders for the protection of targets of violence against those who have either perpetrated or threatened it[74].

"Policy" considerations

80 Something should be said here of the significance of criteria for curial determination which fix upon considerations of "policy". What is meant by the use of that word? In its general sense, a policy is a principle or course of action which is adopted or proposed, particularly by the legislature and by the executive in its administration of legislation. But in the case law there also appears, for example, in the restraint of trade doctrine and the principles respecting relief against penalties and forfeitures, the policy of the law upon various aspects of the conduct of commerce. *Magill v Magill*[75] concerned the policy of the law respecting the application of the law of tort to intimate personal relationships.

81 In *Australian Communist Party v The Commonwealth*[76] Kitto J declared that "[t]he courts have nothing to do with policy", but spoke too broadly. Where legislation is designed to effect a policy, and the courts then are called upon to interpret and apply that law, inevitably consideration of that policy cannot be excluded from the curial interpretative process. No principle of the separation of the judicial power from that of the other branches of government should foreclose that activity, for it is apt to lead to the just determination of controversies by the courts.

82 Statutes implement particular legislative choices as to what conduct should be forbidden, encouraged, or otherwise regulated. It is a commonplace

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74 See, for example, *Crimes Act* 1900 (NSW), ss 562AE and 562AI; *Domestic and Family Violence Protection Act* 1989 (Q), s 13; *Domestic Violence Act* 1994 (SA), s 4; *Family Violence Act* 2004 (Tas), s 16; *Crimes (Family Violence) Act* 1987 (Vic), s 4; *Restraining Orders Act* 1997 (WA), ss 34 and 35; *Domestic Violence and Protection Orders Act* 2001 (ACT), s 8; *Domestic Violence Act* (NT), s 4.

75 (2006) 81 ALJR 254; 231 ALR 277. See also *Cattanach v Melchior* (2003) 215 CLR 1.

76 (1951) 83 CLR 1 at 277.

that statutes are to be construed having regard to their subject, scope and purpose. Much attention now is given by the courts, when engaged on that task, to placing the law in question in its context and to interpreting even apparently plain words in the light of the apprehended mischief sought to be overcome and the objects of the legislation[77].

83 The context in which the Parliament enacted Pt 5.3 of the Code includes matters of "general public knowledge"[78] set out in the Special Case. Paragraph 32 of the Special Case lists recent terrorist attacks including the attacks in the United States of America on 11 September 2001, described in par 32(c) as follows:

> "On 11 September 2001, four planes were hijacked. Two of the planes were flown into the towers of the World Trade Centre in New York, resulting in the eventual collapse of both towers and the death of 2752 people. A third plane was flown into the Pentagon in Washington, the headquarters of the US military, killing 189 people. A fourth plane crashed south of Pittsburgh when the passengers attempted to overpower the hijackers, killing 40 people. The fourth plane had been heading towards Washington, not its scheduled destination of San Francisco."

84 Paragraph 35 of the Special Case lists major terrorist attacks occurring after 11 September 2001 which have resulted in significant numbers of civilian deaths. These include the simultaneous bombing of two locations in Bali on 12 October 2002 and the separate bombings in Bali on 1 October 2005, which together killed at least 222 civilians and injured many others; attacks on the transport network in Madrid on 11 March 2004, during which 10 bombs were exploded on four trains in three stations during the morning rush hour, in which 191 people were killed and at least 1,800 others injured; a car bomb detonated by a suicide bomber outside the Australian Embassy in Jakarta on 9 September 2004, which resulted in the killing of 11 people and injuring more than 160 others; attacks on the London transport system on 7 July 2005, in which three bombs were detonated by suicide bombers on underground trains, while a fourth later exploded on a double-decker bus, which killed 52 people and injured more than 770 others; and an attack in Mumbai in India on 11 July 2006 in which over 200 people were killed and at least 700 people injured.

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77 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

78 *Stenhouse v Coleman* (1944) 69 CLR 457 at 469 per Dixon J; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 255 per Fullagar J.

85 It is also a matter of general public knowledge that many of these attacks on major urban targets were carried out by persons with some training and skills in handling explosives and a willingness to die in the course of the attack. Many such attacks have been explained, by those claiming responsibility for them, by reference to jihad, a term encompassing bellicosity, based at least in part on religious considerations, the use of which is not confined to a single nation state[79].

86 Shortly after the attacks in the United States of America, on 28 September 2001 the Security Council of the United Nations unanimously adopted Resolution 1373, par 2(b) of which requires all States to "[t]ake the necessary steps to prevent the commission of terrorist acts".

87 The mischief to which the legislation is directed has been apprehended both within, and beyond, the Commonwealth of Australia and has been dealt with by legislatures of other nation states.

88 Courts are now inevitably involved on a day-to-day basis in the consideration of what might be called "policy", to a degree which was never seen when earlier habits of thought respecting Ch III were formed. Care is needed in considering the authorities in this field. The vantage point from which the issues were presented is significant. The issue may be whether a power reposed by statute in an administrative or regulatory body is invalid because there is an attempted conferral of the judicial power of the Commonwealth. Here, the presence of criteria which give a prominent part to considerations of policy points against an attempted conferral of judicial power, and so in favour of validity. An example is the importance attached by the Corporations and Securities Panel, whose functions and powers were upheld in *Precision Data Holdings Ltd v Wills*[80], to the maintenance of an efficient competitive and informed share market. This appeared to this Court to be a manifestation of commercial policy and a matter which supported the validity of the legislation and the authority of the Panel.

89 Earlier, in the *Tasmanian Breweries Case*[81] it had been argued, unsuccessfully, that the Trade Practices Tribunal was attempting to exercise judicial power because its functions were analogous to the development and

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79 Holmes (ed), *The Oxford Companion to Military History*, (2001) at 466-467.

80 (1991) 173 CLR 167.

81 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 365-366.

implementation by the courts of public policy in the restraint of trade doctrine. It was in the course of rejecting that submission and upholding the validity of the powers of the Tribunal that Windeyer J said[82]:

> "I do not doubt that in considering the public interest the Trade Practices Tribunal should have regard, among other things, to the same general considerations of reasonableness in reference to the public interest as a court would if asked by a party to an agreement to declare it unenforceable because in unreasonable restraint of trade. Nevertheless, in applying the idea of public interest, as adumbrated by the [*Trade Practices Act* 1965 (Cth)], the Tribunal is more at large than is a court exercising the judicial power and asking what are the limits of reasonableness."

90 Of the *Builders' Labourers' Case* Mason and Murphy JJ later (and with respect correctly) observed[83]:

> "True, it was said in that case that the discretion given by s 140 was not a judicial discretion but was based 'wholly on industrial or administrative considerations' (per Dixon CJ[84]) and involved 'considerations of industrial policy' (per Taylor J[85]). We do not regard these observations as indicating that the mere requirement that a court take into account considerations of industrial policy in exercising a discretion is of itself enough to stamp that discretion with the character of a non-judicial function. The observations were made in a context in which there were other grounds supporting the conclusion reached by the Court."

91 The following statement by Professor Zines, made after a review of a number of the decisions in this Court, is in point[86]:

> "Any standard or criterion will have a penumbra of uncertainty under which the deciding authority will have room to manoeuvre – an area of choice and of discretion; an area where some aspect of policy will inevitably intrude. The degree of vagueness or discretion will be affected

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82 (1970) 123 CLR 361 at 401.

83 *R v Joske; Ex parte Shop Distributive and Allied Employees' Association* (1976) 135 CLR 194 at 217.

84 (1957) 100 CLR 277 at 289.

85 (1957) 100 CLR 277 at 310.

86 Zines, *The High Court and the Constitution*, 4th ed (1997) at 195.

> by what is conceived to be the object of the law and by judicial techniques and precedents. Given a broad standard, the technique of judicial interpretation is to give it content and more detailed meaning on a case to case basis. Rules and principles emerge which guide or direct courts in the application of the standard."

92 The federal judges exercising the jurisdiction conferred by the interim control order provisions will bring to their consideration of whether "making the order would substantially assist in preventing a terrorist act" (s 104.4(1)(c)(i)) and of the particular form of an order, both matters of common knowledge, some of which we have referred to above, and the facts and circumstances disclosed in the evidence on the particular application for an order. From consideration of the legislation on a case by case basis it may be expected that guiding principles will emerge, a commonly encountered phenomenon in judicial decision-making.

93 It is true that an interim control order may depend for its effectiveness upon activities of the police and intelligence services. However, the presence of these considerations in a predictive assessment which founds relief of a *quia timet* nature is not repugnant to the exercise of federal judicial power.

Conclusions respecting alleged inadequate criteria

94 The plaintiff's argument sought, in effect, to sidestep the general significance of these remarks by stigmatising the exercise of the curial function under s 104.4 of the Code. The making of interim control orders was said to be so dominated, if not controlled, by the implementation of the legislative policy respecting the "response" by the Parliament to terrorist acts and apprehended acts of terrorism, that it limited to a constitutionally impermissible degree any judicial power to apply objectively determinable criteria. That view of the legislation should not be accepted.

95 Section 104.4 is not so expressed as to be insusceptible of strictly judicial application. The context, discussed earlier in these reasons under the heading "The jurisdiction of issuing courts", indicates that issuing courts are intended to exercise judicially and not otherwise these powers with respect to interim control orders. The importance of these considerations in favouring validity appears in the passage from the judgment of Kitto J in the *Amalgamated Engineering Union Case*[87] which has been set out above.

96 There are two matters identified in par (c) of s 104.4(1) as to at least one of which the issuing court must be satisfied on the balance of probabilities. The

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87 (1960) 103 CLR 368 at 383.

second matter, the receipt by the person in question of training from or the provision of training to "a listed terrorist organisation", presents issues of fact to be considered on the evidence presented. There is also a question of construction. This is whether the involvement with what is now a listed organisation must have occurred whilst it was so listed, or whether, as the Commonwealth submits, involvement at a time before the listing may suffice. The latter is the better view, given the subject, scope and purpose of Div 104. What is of immediate importance from a vantage point in Ch III of the Constitution is that the resolution of such issues of construction undoubtedly may be entrusted to a Ch III court.

97 The first matter in par (c) of s 104.4(1) is that "making the order would substantially assist in preventing a terrorist act". It is true, as the plaintiff stressed in his submissions, that the person subjected to the order may be someone other than the prospective perpetrator of a terrorist act. The making of an order nevertheless may be of substantial assistance in preventing that act.

98 It is true also that the definition of "terrorist act" is detailed and contains terms which may give an area of choice and discretion in evaluating the weight of the evidence tendered on the application of the interim control order. But, as explained in these reasons, that does not foreclose the exercise of strictly judicial techniques of decision-making.

99 Judicial techniques must then be applied to each proposed obligation, prohibition and restriction. Section 104.4(1) requires in par (d) that each of these be measured against what is "reasonably necessary" and also against what is "reasonably appropriate and adapted" for attainment of the purpose of public protection from a terrorist act. This is weighed with the impact upon the circumstances of the person in question as a "balancing exercise" (s 104.4(2)).

100 The term "reasonable" which thus is a significant integer in s 104.4 is one with which courts are well familiar. This term has provided what is the great workhorse of the common law. One commentator has remarked, with some cogency, that this general concept, which draws its determinative force from the circumstances of each action on the case, yet has perhaps the most significant determinative role of all the general concepts which underpin common law doctrines[88].

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88 Dietrich, "Giving Content to General Concepts", (2005) 29 *Melbourne University Law Review* 218 at 238-240.

101 In *McCulloch v Maryland*[89] the Supreme Court of the United States said of the term "necessary":

> "Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. ... [The word 'necessary'] has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports."

102 In par (d) of s 104.4(1) the phrase is "reasonably necessary" and is well apt for application as a legal criterion. That paragraph also uses the phrase "reasonably appropriate and adapted" to achieve the designated purpose. That phrase has its provenance in another well-known passage in *McCulloch*[90]:

> "The court, in inquiring whether congress had made a selection of constitutional means, is to compare the law in question with the powers it is intended to carry into execution; not in order to ascertain whether other or better means might have been selected, for that is the legislative province, but to see whether those which have been chosen have a natural connection with any specific power; whether they are adapted to give it effect; whether they are appropriate means to an end."

103 This notion of sufficient connection between the desired end and the means proposed for its attainment may have its origins in constitutional law, but it is capable of judicial application elsewhere. Section 104.4(1) is an example. So also is the use made of notions of reasonable necessity and "reasonably appropriate and adapted" in the balancing exercise required of the issuing court by s 104.4(2).

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89 4 Wheat 316 at 413-414 [17 US 159 at 203] (1819).

90 4 Wheat 316 at 357 [17 US 159 at 177] (1819). See also *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 344; *Farey v Burvett* (1916) 21 CLR 433 at 440; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 199-200 [39]-[40].

Non-justiciable?

104 In the end, the plaintiff's case respecting the failure to confer upon the issuing courts the exercise of the judicial power of the Commonwealth must come down to a proposition that s 104.4 seeks to draw the issuing court into adjudication of non-justiciable matters.

105 "Non-justiciable" is a slippery term of indeterminate reference. It may be used with respect to Ch III of the Constitution in identifying the absence of the constitutional competence of this Court to restrain or otherwise intervene in some of the activities entrusted to the Parliament by Ch I and the Executive by Ch II. The special position accorded in *R v Richards; Ex parte Fitzpatrick and Browne*[91] to the privileges of the Senate and the House of Representatives established by s 49 of the Constitution is one example. Another is the holding in *R v Governor of South Australia*[92] that mandamus cannot lie to compel exercise by State Governors of powers conferred by the Constitution, specifically with respect to Senate elections.

106 The term "non-justiciable" may be applied in a more particular sense. Even if the plaintiff has standing in respect of the controversy sought to be agitated in a Ch III court, nevertheless there will be no "matter" if determination of the controversy would require adjudication of obligations and undertakings which depend entirely on political sanctions and understandings[93]. Examples are agreements and understandings between governments in the Australian federation[94] and between Australia and foreign governments[95].

107 It is not for an issuing court to enter upon any dispute as to the assessment made by the executive and legislative branches of government of the "terrorist threat" to the safety of the public before the enactment of the 2002 Act, the 2003 Act and the 2005 Act[96]. But to the extent that this assessment is reflected in the

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91 (1955) 92 CLR 157.

92 (1907) 4 CLR (Pt 2) 1497.

93 *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 370.

94 *South Australia v The Commonwealth* (1962) 108 CLR 130 at 141.

95 *Gerhardy v Brown* (1985) 159 CLR 70 at 138-139.

96 *Gerhardy v Brown* (1985) 159 CLR 70 at 138-139; cf *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 44-45, 53-54.

terms of legislation, here Div 104 of the Code, and questions of the interpretation and application of that law arise in the exercise of jurisdiction by an issuing court, no violence is done to Ch III of the Constitution. The issuing court is concerned with a "matter" arising under a law which was preceded by a political assessment, but is not itself making or challenging that assessment.

108 The question of what is requisite for the purpose of protecting the public from a terrorist act may found a political assessment and lead to the enactment of legislation. That legislation may confer jurisdiction upon a federal court and stipulate as a criterion for the making of an order the satisfaction of the issuing court, on the balance of probabilities – a distinctively judicial activity – that each proposed obligation, prohibition and restriction would be reasonably necessary and appropriate and adapted – other familiar terms of judicial discourse – for that purpose of public protection.

109 The protection of the public as a purpose of decision-making is not alien to the adjudicative process. For example, it looms large in sentencing after the determination of criminal guilt. In *Veen v The Queen [No 2]*[97] Mason CJ, Brennan, Dawson and Toohey JJ observed:

> "However, sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform."

110 The objection by the plaintiff to the engagement of issuing courts in the assessment of risk to the public is a restatement of the objection to conferral of jurisdiction in terms said to be too broad to found the exercise of the judicial power of the Commonwealth. That submission should not be accepted.

Exercise of power in a manner contrary to Ch III

111 The plaintiff sought to extract from remarks of Gaudron J in *Nicholas v The Queen*[98] support for something like a "due process" requirement from the text and structure of Ch III. The decisions of the Court have not gone so far[99].

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97 (1988) 164 CLR 465 at 476.

98 (1998) 193 CLR 173 at 208-209 [74].

99 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 411 [247].

But it may be accepted for present purposes that legislation which requires a court exercising federal jurisdiction to depart to a significant degree from the methods and standards which have characterised judicial activities in the past may be repugnant to Ch III. Do the provisions of the Code concerning interim control orders oblige issuing courts to act in a manner inconsistent with the essential character of a court or with the nature of judicial power? It then becomes necessary in the present case to consider the complaints which the plaintiff makes respecting the processes and outcome of applications for interim control orders.

112 First, the plaintiff points to the ex parte nature of such applications. But ex parte applications are no novelty, and the scheme of the legislation, as already noted, is to provide in the very short term for a contested confirmation hearing if the person in question wishes to proceed in that way.

113 Secondly, the plaintiff complains that the standard of proof stipulated in s 104.4(1) is no more than satisfaction on the balance of probabilities. The Commonwealth, correctly, accepts that this does require application of the principles in *Briginshaw v Briginshaw*[100]. Further, the choice of the standard or burden of proof may be fixed by the Parliament without it being repugnant to Ch III[101].

114 Thirdly, complaint is made of the restrictions imposed upon personal liberty *quia timet* and without adjudication of criminal guilt. In *Fardon v Attorney-General (Qld)*[102] Gummow J rejected a submission by the Commonwealth and accepted the proposition that, "exceptional cases" aside, "the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts"[103]; Gummow J distinguished from committal to custody to await trial (one of the "exceptional cases") detention by reason of apprehended conduct and upon a *quia timet* judicial determination as being equally offensive to Ch III[104].

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100 (1938) 60 CLR 336.

101 *Nicholas v The Queen* (1998) 193 CLR 173 at 188-190 [23]-[24], 203 [55], 234-236 [152]-[156]; 272-274 [234]-[238].

102 (2004) 223 CLR 575.

103 (2004) 223 CLR 575 at 612 [80].

104 (2004) 223 CLR 575 at 613 [84].

115 The plaintiff sought to transmute what was said in *Fardon* (to which we adhere) into the broader proposition that any deprivation of liberty entailed by the terms of an interim control order could not be imposed by a court exercising the judicial power of the Commonwealth.

116 Detention in the custody of the State differs significantly in degree and quality from what may be entailed by observance of an interim control order. Moreover, as the Commonwealth and several of the interveners emphasised, some analogy is provided by examples in the English legal tradition of the imposition by curial order of preventative restraints. One such was the power of justices of the peace, on the application of the person threatened to bind over to keep the peace those whose activities threatened to break it, and on the justices' own motion to bind over generally to be of good behaviour. This species of "preventative justice" to maintain order and preserve the public peace was part of the legal inheritance of the Australian colonies and is discussed with much learning by Bray CJ and by Zelling J in *R v Wright; Ex parte Klar*[105].

117 Section 81 of the *Judiciary Act* 1903 (Cth) provides:

> "The Justices of the High Court, and the Judges and magistrates of the several States and Territories who are empowered by law to authorize arrests for offences against the laws of the Commonwealth, shall have the like authority to hold to security of the peace and for good behaviour in matters arising under the laws of the Commonwealth as may be lawfully exercised by any Judge or Magistrate of the respective States and Territories in other cases cognisable before them."

118 A more severe preventative remedy was that provided in Chancery on the grant of the writ of supplicavit. This might be granted upon complaint by a suitor of abuse and threats to life by another suitor; the contemnor was taken into custody, subject to release upon provision of security for good behaviour[106]. The use of the term "contemnor" is indicative of the affinity to the law respecting contempts of court.

119 The plaintiff emphasised that the breaches of the peace apprehended under the old law were breaches by the person subjected to the order. That is true also of the injunctive remedy for the personal protection of a party to a marriage now

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105 (1971) 1 SASR 103.

106 Story, *Commentaries on Equity Jurisprudence, as administered in England and America*, 13th ed (1886), vol 2, §1477. See also *Baynum v Baynum* (1746-47) Amb 63 [27 ER 36].

provided by s 114(1)(a) of the Family Law Act, but not necessarily of the power to grant an injunction "in relation to the property of a party to the marriage" (s 114(1)(e)).

120 The assistance provided by historical considerations may not, and does not here, furnish any immediate analogy to the modern legislative regime which is now under challenge. However, it is worth noting that the jurisdiction to bind over did not depend on a conviction and it could be exercised in respect of a risk or threat of criminal conduct against the public at large[107]. In asking a court to exercise the preventative jurisdiction it was necessary to place before the court material which enabled it to conclude that in the absence of an order there was a risk of a breach of the peace[108].

121 The matters of legal history relied upon do support a notion of protection of public peace by preventative measures imposed by court order, but falling short of detention in the custody of the State. The plaintiff's submission that such legislation is repugnant to Ch III should be rejected.

122 The fourth submission by the plaintiff on this branch of his case is that Div 104 authorises issuing courts to disregard the requirements of procedural fairness. Subdivision D of Div 104 provides for confirmation of interim control orders. Section 104.12A imposes a requirement upon an AFP member to disclose to the person in question details required for that person to understand and respond to the case to be put for confirmation of the order (s 104.12A(2)(a)(iii)). However, s 104.12A(3) excludes from that requirement any information the disclosure of which "is likely ... to prejudice national security" within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act* 2004 (Cth) ("the Security Information Act"). That expression is so defined in that statute as to require a real and likely, not merely a remote, possibility of prejudice by the disclosure to the defence, security, international relations or law enforcement interests of Australia; the latter three expressions are then further defined.

123 The plaintiff submits that the exclusion made by s 104.12A(3) of the Code is invalid as repugnant to the exercise of federal jurisdiction.

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107 *Lansbury v Riley* [1914] 3 KB 229.

108 Archbold, *Pleading, Evidence and Practice in Criminal Cases*, 42nd ed (1985) at 628-629 [5-116]; see also Archbold, *Criminal Pleading, Evidence and Practice*, (2007) at 606 [5-121a].

124 To meet that submission the Commonwealth refers to authorities, in particular the passage in the joint judgment of Gibbs CJ, Wilson, Brennan and Dawson JJ in *Alister v The Queen*[109] as follows:

> "The disposal of any point in litigation, without the fullest argument on behalf of the parties, is a course to which every court reacts adversely, however untenable the point in issue may first appear, and however unlikely it is that argument will assist it. The present case evokes the same reaction. But it is the inevitable result when privilege is rightly claimed on grounds of national security."

Nevertheless, there may remain a question whether in the terms used in the Security Information Act the Parliament has sought to over-reach the bounds of the understanding of "national security" in passages such as that from *Alister*.

125 There is no challenge in this proceeding to the validity of the provisions of the Code which pick up the definitions in the Security Information Act just mentioned. To rule now upon the validity of s 104.12A(3) of the Code could embarrass the operation of the Security Information Act. Further, s 104.12A(3) (and the other provisions of subdiv D) is yet to be engaged in respect of the plaintiff and no concrete case respecting the operation of the "national security" provision in that sub-section is presented. In these circumstances, no relief of a declaratory nature respecting the validity of subdiv D of Div 104 should be made. The preferable course is to limit any such relief to the validity of the provisions which have been immediately engaged, those in subdiv B, respecting interim orders[110].

126 Subject to these qualifications, the attack on validity based upon Ch III of the Constitution should be rejected.

Section 51 of the Constitution

127 There remain for consideration the grounds upon which the plaintiff denies any support for subdiv B of Div 104 in the heads of legislative power found in s 51 of the Constitution.

128 Schedule 1 to the 2003 Act introduced s 100.3 which is said to identify the constitutional basis for the operation of Pt 5.3. Division 104 was later inserted in

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109 (1984) 154 CLR 404 at 469.

110 cf *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355-357 [45]-[49]; *Smith v ANL Ltd* (2000) 204 CLR 493 at 510-511 [39].

Pt 5.3 by the 2005 Act. Section 100.3 is accepted by the parties as applicable to Div 104.

129 Sub-section (1) of s 100.3 states:

> "The operation of this Part in a referring State is based on:
>
> (a) the legislative powers that the Commonwealth Parliament has under section 51 of the Constitution (other than paragraph 51(xxxvii)); and
>
> (b) the legislative powers that the Commonwealth Parliament has in respect of matters to which this Part relates because those matters are referred to it by the Parliament of the referring State under paragraph 51(xxxvii) of the Constitution."

The plaintiff resides in Victoria and that State answers the description of "a referring State": *Terrorism (Commonwealth Powers) Act* 2003 (Vic).

130 Section 51(xxxvii) of the Constitution provides that the Parliament shall, subject to the Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

> "Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law".

131 It is convenient to defer consideration of the reliance placed upon the reference power to a consideration of the other heads of legislative power upon which the Commonwealth relies. These are the defence power (s 51(vi)), the external affairs power (s 51(xxix)) and what is identified as the "implied power to protect the nation".

<u>The defence power</u>

132 The essential elements in the definition of "terrorist act" in s 100.1 of the Code include the advancement of a political, religious or ideological cause by coercing Australian governments or by influencing them by intimidation, or by intimidating the Australian public or a section of it. Does this proceed upon too wide a view of the defence power?

133 Paragraph (vi) of s 51 reads:

> "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".

134 The use of the term "defence" invites further inquiries, first, who or what is to be defended; secondly, against what activity; and thirdly, by what means is the defence to be provided?

135 In the decisions of this Court concerning s 51(vi), it has been said from time to time that the power is purposive in nature and that a notion of proportionality is involved in relating ends to means. This is because par (vi) of s 51 is considered to be one of the few instances, referred to by Dawson J in *Leask v The Commonwealth*[111], where power is conferred by s 51 not "by reference to subject matter" but by reference to "aims or objectives". In that regard, what has been said in this Court respecting the defence power was foreshadowed, with respect to the Constitution of the United States, by Alexander Hamilton. In No 23 of *The Federalist*, Hamilton wrote[112]:

> "This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms as simple as they are universal; the *means* ought to be proportioned to the *end*; the persons, from whose agency the attainment of any *end* is expected, ought to possess the *means* by which it is to be attained." (original emphasis)

136 In the same issue of *The Federalist* Hamilton also made sapient observations respecting what was involved in the notion of defence; these should be set out because they provide a backdrop for consideration of the limitations upon the reach of the defence power in the Australian Constitution for which the plaintiff contends. Hamilton wrote[113] that one of the principal purposes to be answered by the Union was "the common defence of the members; the preservation of the public peace, as well against internal convulsions as external attacks" and went on:

> "The authorities essential to the common defence are these: to raise armies; to build and equip fleets; to prescribe rules for the

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111 (1996) 187 CLR 579 at 600.

112 Hamilton, Madison and Jay, *The Federalist*, Wright (ed), (1961) at 200.

113 Hamilton, Madison and Jay, *The Federalist*, Wright (ed), (1961) at 199-200.

> government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them*. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defence." (original emphasis)

137 In a not dissimilar vein, during World War I Griffith CJ said in *Farey v Burvett*[114]:

> "As to the suggested limitation by the context, the words 'naval' and 'military' are not words of limitation, but rather of extension, showing that the subject matter includes all kinds of warlike operations. The concluding words cannot have any restrictive effect, unless they are read as an exhaustive definition of all that may be done, which is an impossible construction. In my opinion the word 'defence' of itself includes all acts of such a kind as may be done in the United Kingdom, either under the authority of Parliament or under the Royal Prerogative, for the purpose of the defence of the realm, except so far as they are prohibited by other provisions of the Constitution."

138 The plaintiff prefers the statement by Gavan Duffy and Rich JJ in their dissenting judgment in *Farey*[115]:

> "The words 'the public safety and the defence of the realm' are very different from the words 'the naval and military defence of the Commonwealth': the one phrase clearly suggests defence by means of naval and military operations, while the other is as broad and general as could be devised for the purpose of embracing all means for securing the safety of the community."

But that view of s 51(vi) should not be accepted.

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114 (1916) 21 CLR 433 at 440.

115 (1916) 21 CLR 433 at 466.

139 In the *Communist Party Case*, Dixon J said that the "central purpose" of the power is "the protection of the Commonwealth from external enemies"[116], and Fullagar J said of the defence power[117]:

> "[I]t is concerned with war and the possibility of war with an extra-Australian nation or organism."

Is the defence of the Commonwealth and the several States of which s 51(vi) of the Constitution speaks concerned exclusively with defence against external threats to those bodies politic, typically by the waging of war by nation states, as occurred in 1914 and 1939?

140 Such a limited view of the power is not reflected in the recent discussion in the joint judgment in *New South Wales v Commonwealth*[118]. Further, there was a long history in English law before the adoption of the Constitution which concerned defence of the realm against threats posed internally as well as by invasion from abroad by force of arms[119]. Thus, the law of treason fixed among other things upon the "levying of war" against the sovereign in his or her realm[120]. In this context, the levying of war in the realm required an insurrection accompanied by force, for an object of a public or general nature[121]. In the report in Douglas of the trial at Bar in the Court of King's Bench of Lord George Gordon, after the Gordon Riots, the following appears[122]:

> "The case, on the part of the prosecution, was; that the prisoner, by assembling a great multitude of people, and encouraging them to surround the two Houses of Parliament, and commit different acts of violence,

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116 (1951) 83 CLR 1 at 194.

117 (1951) 83 CLR 1 at 259.

118 (2006) 81 ALJR 34 at 94 [212]; 231 ALR 1 at 63-64.

119 See, for example, *The Riot Act* of 1715 (1 Geo I, stat 2, c 5) which was directed to preventing "tumults" and "riotous assemblies" which disturbed "the publick peace".

120 See the text of *The Treason Act* of 1351 (25 Edw III, Stat 5, c 2) set out in *Joyce v Director of Public Prosecutions* [1946] AC 347 at 365.

121 3 Coke's Institutes §§9, 10; *R v Frost* (1839) 9 Car & P 129 at 161 [173 ER 771 at 785].

122 *R v Lord George Gordon* (1781) 2 Dougl 590 at 592 [99 ER 372 at 373].

> particularly burning the Roman Catholic Chapels, had endeavoured to compel the repeal of an Act of Parliament.
>
> Lord Mansfield[123], when he began to sum up the evidence, stated to the jury, that it was the unanimous opinion of the Court, that an attempt, by intimidation and violence, to force the repeal of a law, was a levying war against the King; and high treason." (footnotes omitted)

The analogy with the essential elements of the definition of "terrorist act" in s 100.1 of the Code will be apparent.

141 It is against this background that the plaintiff (with some support from New South Wales on this branch of the case) nevertheless makes the following submissions respecting the defence power. The first, that s 51(vi) is concerned only to meet the threat of aggression from a foreign nation, should not be accepted, for the reasons given above.

142 Next, the plaintiff points to the words "the Commonwealth and the several States" as indicative of that which is being defended. This is said to be those "collective" bodies politic rather than the citizens or inhabitants of the Commonwealth or the States and their property. That submission should not be accepted. The notion of a "body politic" cannot sensibly be treated apart from those who are bound together by that body politic. That has been so in English law for centuries. For example, the preamble to *The Ecclesiastical Appeals Act* of 1532[124] stated that the realm of England was:

> "governed by one supreme head and King ... unto whom a body politic compact of all sorts and degrees of people ... be bound and owe to bear, next to God, a natural and humble obedience".

The obverse of that obedience and allegiance was the sovereign's obligation of protection. This notion of a compact sustaining the body politic cannot be weakened and must be strengthened by the system of representative government for which the Constitution provides[125].

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123 In the course of the Gordon Riots, Lord Mansfield's house on Bloomsbury Square was sacked and the contents burned in the Square: Heward, *Lord Mansfield*, (1979) at 157-158.

124 24 Hen VIII, c 12.

125 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-560.

143 The terms of the preamble to the *Commonwealth of Australia Constitution Act* 1900 (Imp)[126] supply a link between Tudor conceptions of the State and those of the modern system of representative government. The preamble states that what is to be established will be "under" the Crown and the Constitution, but identifies this as coming about upon agreement of the people of the Australian colonies "to unite in one indissoluble Federal Commonwealth". That is to say, the creation of this new body politic implemented, by Imperial statute, popular agreement. This emphasised, as Harrison Moore wrote[127], that:

> "[T]he Commonwealth of Australia, being a union of the people and not of their governments, is no mere confederacy."

144 One consequence of a restrictive view of the scope of the defence power, exemplified by statements that it is concerned with wars waged by external enemies, has been the assertion of a power, stemming from s 61 and the incidental power in s 51(xxxix), to legislate "for the protection of [the Parliament] and the Constitution against domestic attack". This was how Fullagar J put it in the *Communist Party Case*[128].

145 The interim control order system may be said to be directed to apprehended conditions of disturbance, by violent means within the definition of "terrorist act", of the bodies politic of the Commonwealth and the States rather than to violent conditions which presently apply. But three things should be said here. First, restrictions aimed at anticipating and avoiding the infliction of the suffering which comes in the train of such disturbances are within the scope of federal legislative power. Secondly, in that regard the defence power itself is sufficient legislative support without recourse to any implication of a further power of the kind identified by Fullagar J in the *Communist Party Case*. (It is unnecessary to consider the scope of the "nationhood" power discussed by Mason CJ, Deane and Gaudron JJ in *Davis v The Commonwealth*[129].)

146 Thirdly, much attention has been given in various decisions, concerned particularly with the waging in World War I and World War II of "total war" and the "mobilisation" of economic resources, to the fluid nature of the defence power. The plaintiff emphasises the concentration in such decisions upon the

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126 63 & 64 Vict, c 12.

127 Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 67.

128 (1951) 83 CLR 1 at 259. See also the judgment of Dixon J in *Burns v Ransley* (1949) 79 CLR 101 at 116.

129 (1988) 166 CLR 79 at 92-95.

judicial assessment, as matters of constitutional fact, of facts said to be sufficient to connect the legislation in question with the head of power in s 51(vi). This approach to validity is readily understood in considering laws fixing the price of bread in 1916[130], regulating in 1945 the manufacture of fly-spray[131] and protecting tenancies for residential accommodation in 1951[132]. But this concentration upon sufficiency of connection is not called for when dealing with the interim control order system. This turns upon the operation of the definition of "terrorist act". What is proscribed by that definition falls within a central conception of the defence power, as explained in these reasons. Protection from a "terrorist act" as defined necessarily engages the defence power.

147 The vice of the *Communist Party Dissolution Act* 1950 (Cth), that it was, as Dixon J put it, "not addressed to suppressing violence or disorder" and did not "take the course of forbidding descriptions of conduct" with "objective standards or tests of liability upon the subject"[133], does not appear in the interim control order regime.

148 The plaintiff's submissions respecting the defence power should be rejected.

The external affairs power

149 What has been said above respecting the application of the interim control order system for the purpose of protection from a terrorist act requires qualification. As remarked earlier, when describing the definition in s 100.1 of the Code of "terrorist act", the object of coercion or intimidation may be the government of a foreign country or of a part thereof and "the public" includes reference to the public of a country other than Australia.

150 There may be limits to the defence power which are crossed by the inclusion of governments of foreign states and expanded notions of "the public". However that may be, here the external affairs power (s 51(xxix)) comes into play.

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130 *Farey v Burvett* (1916) 21 CLR 433.

131 *Wertheim v The Commonwealth* (1945) 69 CLR 601.

132 *Queensland Newspapers Pty Ltd v McTavish* (1951) 85 CLR 30.

133 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 192. Fullagar J spoke of the *Communist Party Case* in similar terms in *Marcus Clark & Co Ltd v The Commonwealth* (1952) 87 CLR 177 at 253.

151 The pursuit and advancement of comity with foreign governments and the preservation of the integrity of foreign states may be a subject matter of a law with respect to external affairs. In *XYZ v Commonwealth*[134], Gleeson CJ noted (with evident approval) that it was accepted that the external affairs power at least includes power to make laws in respect to matters affecting Australia's relations with other countries. The commission of "terrorist acts" in the sense defined in s 100.1 of the Code is now, even if it has not been in the past, one of these matters.

152 In *Suresh v Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada said[135]:

> "It may once have made sense to suggest that terrorism in one country did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid."

The Court added[136]:

> "First, the global transport and money networks that feed terrorism abroad have the potential to touch all countries, including Canada, and to thus implicate them in the terrorist activity. Second, terrorism itself is a worldwide phenomenon. The terrorist cause may focus on a distant locale, but the violent acts that support it may be close at hand. Third, preventive or precautionary state action may be justified; not only an immediate threat but also possible future risks must be considered. Fourth, Canada's national security may be promoted by reciprocal cooperation between Canada and other states in combating international terrorism."

153 Further, in *XYZ*, Gummow, Hayne and Crennan JJ[137] referred to the important statement by five members of the Court in the *Industrial Relations Act Case*[138]:

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134 (2006) 80 ALJR 1036 at 1044 [18]; 227 ALR 495 at 502-503.

135 [2002] 1 SCR 3 at 50.

136 [2002] 1 SCR 3 at 50.

137 (2006) 80 ALJR 1036 at 1046 [30]; 227 ALR 495 at 505.

138 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 485 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

> "Of course the scope of the legislative power is not confined to the implementation of treaties. The modern doctrine as to the scope of the power conferred by s 51(xxix) was adopted in *Polyukhovich v The Commonwealth*[139]. Dawson J expressed the doctrine in these terms[140]:
>
> > '[T]he power extends to places, persons, matters or things physically external to Australia. The word "affairs" is imprecise, but is wide enough to cover places, persons, matters or things. The word "external" is precise and is unqualified. If a place, person, matter or thing lies outside the geographical limits of the country, then it is external to it and falls within the meaning of the phrase "external affairs".'
>
> Similar statements of the doctrine are to be found in the reasons for judgment of other Justices: Mason CJ[141]; Deane J[142]; Gaudron J[143]; and McHugh J[144]. They must now be taken as representing the view of the Court."

The legislative scheme in Div 104 of the Code for prevention through the interim control order system of "terrorist acts" done or threatened with the intention of coercing or influencing by intimidation the government of a foreign country or part thereof or intimidating the public or a section of the public of a foreign country is a law with respect to a "matter or thing" which lies outside the geographical limits of Australia. The "matter or thing" is the apprehended intimidation or injury to the government or public of a foreign country.

Conclusion

154 When what has been said above respecting the defence power and the external affairs power is taken with the earlier treatment in these reasons of the judicial power of the Commonwealth, the conclusion is that subdiv B of Div 104 of the Code, which deals with the making of interim control orders, is valid. This

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139 (1991) 172 CLR 501.

140 *Polyukhovich* (1991) 172 CLR 501 at 632.

141 *Polyukhovich* (1991) 172 CLR 501 at 528-531.

142 *Polyukhovich* (1991) 172 CLR 501 at 599-603.

143 *Polyukhovich* (1991) 172 CLR 501 at 695-696.

144 *Polyukhovich* (1991) 172 CLR 501 at 712-714.

makes it unnecessary to consider the degree to which the legislation may be further supported by reliance on the reference power in s 51(xxxvii) of the Constitution.

155 As earlier noted, the Special Case asks whether Div 104 as a whole is invalid. An answer should be given that subdiv B of Div 104 is valid and that it is inappropriate to give any broader answer to the question. The plaintiff should pay the costs of the Commonwealth of the Special Case.

156 KIRBY J. The further amended special case before the Court seeks orders which would invalidate provisions of the *Criminal Code* (Cth) ("the Code"). The provisions were enacted by the Federal Parliament in stated pursuance of the Commonwealth's response to "terrorism"[145]. The case raises three substantive questions concerning whether Div 104 of the Code is a valid law of the Commonwealth. Division 104 was inserted into Pt 5.3 of the Code by the *Anti-Terrorism Act (No 2)* 2005 (Cth) ("the Act")[146].

157 In my view Div 104, as enacted, lacks an established source in federal constitutional power. It also breaches the requirements of Ch III of the Constitution governing the judicial power of the Commonwealth. Division 104 is therefore invalid. This Court should answer the questions stated accordingly.

INTRODUCTION

Terrorism and terrorist acts

158 Terrorism is not a new phenomenon[147]. Conduct sharing features now associated with "terrorism" has occurred for centuries. Before the passage of the Act in 2005, the Federal Parliament had addressed "terrorism" on a number of occasions. The clearest example followed a bombing that occurred at the Sydney Hilton Hotel during a Commonwealth Regional Heads of Government Meeting in February 1978. In response to that event, the Prime Minister, Mr Malcolm Fraser, announced the establishment of the Protective Security Review[148]. Justice R M Hope was commissioned to conduct the review, which was to consider "the whole area of protective security in Australia, including measures to counteract terrorism"[149] ("the Hope Review").

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145 For the purposes of Australian domestic law, a "terrorist act" is defined in the Code, s 100.1.

146 The Act, s 3 and Sched 4.

147 See *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 at 53-54 [94]-[95]; Young, "Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation", (2006) 29 *Boston College International and Comparative Law Review* 23 ("Young") at 24, 27-29; Saul, *Defining Terrorism in International Law*, (2006) ("Saul") at 1-7; Hocking, *Terror Laws: ASIO, counter-terrorism and the threat to democracy*, (2004) ("Hocking") at 1-12.

148 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 23 February 1978 at 152-155.

149 Hope, *Protective Security Review: Report*, Parliamentary Paper No 397/1979, unclassified version, (1979) at 271 (Appendix 7 – Terms of Reference).

159 The report of the Hope Review was delivered in May 1979. It contained a number of conclusions on the subject of "terrorism". Specifically, it provided the following description of "terrorism"[150]:

> "1. *Terrorism* is a policy intended to strike with terror those against whom it is adopted, and a *terrorist* is anyone who attempts to further his views by a system of coercive intimidation.
>
> 2. Although acts of terrorist violence may be indistinguishable in many respects from acts of violence carried out by irrational or other people, they can often be distinguished by their ferocity, by the difficulty of bringing them under control and by the national and international repercussions they may cause. Terrorist violence may also involve a greater risk to the general public."

160 In Chapter 2 of the Hope Review, which dealt explicitly with "terrorism", Justice Hope explained the contemporary nature of the terrorist threat, as then appearing[151]:

> "Although terrorism has burgeoned in the last two decades, it is of course no new thing. ... Two features, superficially distinct but doubtless interconnected, distinguish contemporary terrorists from their precursors. First, there is the effect of recent technological developments, international travel giving terrorists world-wide mobility, improved mass communications providing them an access to a world-wide audience, the increasing availability of weapons and explosives, and vulnerabilities in a society increasingly dependent on changing technologies. Secondly, as J Bowyer Bell has pointed out, although:
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> > 'there is not a single transnational conspiracy against order, and there is little likelihood that a viable world conspiracy will coalesce, there is a revolutionary medium or milieu that permits and encourages the exchange of aid and comfort between parties as diverse as Basques and Turks, Irish and Arabs. The prospect is that there will continue to be contacts and co-operation between groups.'"

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150 Hope Review at xv.

151 Hope Review at 16-17 [2.20] citing J Bowyer Bell, Columbia University. See Bell, *Transnational Terror*, (1975) at 75. See also Hope Review at 9-10 [2.2]-[2.3].

161 The Hope Review contained extracts from an opinion obtained from Sir Victor Windeyer[152], a past Justice of this Court. The opinion addressed constitutional and legal questions[153]:

> "A crime ordinarily is a particular act, done voluntarily and with intent to perform it and, in some instances with also a specific purpose intended to be accomplished by it. But terrorism ... is not defined by reference to specific deeds, but in general terms, the 'use of violence'; and not with a specific intent, but with an ulterior object, 'for political ends', a most imprecise term – or for 'the purpose of putting the public or a section of the public in fear'. This would appear to make criminal responsibility depend upon an ulterior intention or motive, an unusual ingredient of a criminal act. It could be difficult to establish it in some cases if 'political ends' do not include sectarian antipathy, private revenge or the promotion of some cause unrelated to any apparent political purpose.
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> ...
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> [I]f 'terrorism' is to be a new entry in the list of crimes, and if putting the public in fear is a form of this crime, it would be better to provide that the offence consists of an act of violence that created such fear, or was calculated to do so, rather than making a 'purpose' the essential criterion. The result, or the probable result, of a deed is usually readily apparent: but the purpose of the doer may not always be discoverable."[154]

162 In this regard, Sir Victor Windeyer's opinion repeated the old warning that law should primarily attach to acts because "the devil himself knows not the thought of man"[155].

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152 "Opinion of Sir Victor Windeyer, KBE, CB, DSO on certain questions concerning the position of members of the defence force when called out to aid the civil power", reproduced as Appendix 9 to Hope Review ("Windeyer Opinion, Hope Review").

153 Windeyer Opinion, Hope Review at 291-292. See also Young (2006) 29 *Boston College International and Comparative Law Review* 23 at 58-59.

154 Table 2 of Appendix 11 of the Hope Review at 306 recorded that 2,690 international terrorist incidents had occurred between 1968 and 1977. Appendix 12 at 311-313 recorded the number of incidents (265) of politically motivated violence and vandalism in Australia over the period 1963-1977. A selection of motivations listed included "anti war/conscription", "anti apartheid", "anti uranium/environment" and "aboriginal rights".

155 *Year Book* (1477) 17 Edw IV 1. See also *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159 at 182 [65].

The special case

163 The present proceedings were commenced in the original jurisdiction of this Court by Mr Joseph Thomas (the plaintiff)[156]. They followed a decision on 27 August 2006 by Mowbray FM (the first defendant) to issue an interim control order with respect to the plaintiff under Div 104 of the Code. The order was subject to a confirmation hearing, originally listed for 1 September 2006. That hearing was subsequently adjourned at the plaintiff's request pending the outcome of these proceedings. By order of Hayne J on 31 October 2006, a special case, agreed between the parties, was referred to the Full Court for hearing. As later amended, it is the case now before this Court.

164 The questions raised by the special case challenge the constitutional validity of Div 104 and, consequently, the validity of the order to which the plaintiff is subject. First, the plaintiff complains that Div 104 is invalid because it confers non-judicial power on a federal court. Secondly, and alternatively, in so far as Div 104 confers judicial power, the plaintiff submits that it does so in a manner incompatible with Ch III of the Constitution. Thirdly, the plaintiff contends that Div 104 is not supported by any express or implied head of federal legislative power. If any of these submissions were made good, it would render Div 104 invalid under the Constitution and release the plaintiff from the constraints of the order.

165 The questions were stated in the foregoing order. However, the third question is the proper starting point. Given that federal legislative power is read "subject to" the Constitution (including Ch III) it is first necessary, in point of logic, to determine whether Div 104 is supported by a head of power. Only if it is, do the questions of incompatibility with Ch III arise.

The legislation

166 *Origins of the laws*: With the exception of some provisions in the law of the Northern Territory[157] and other minor instances[158], prior to 2001 there was no

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156 Constitution, ss 75(iii) and (v), 76(i); *Judiciary Act* 1903 (Cth), s 30(a).

157 *Criminal Code Act* (NT), ss 50-55. Those provisions entered into force on 1 January 1984. See further Williams, "The rule of law and the regulation of terrorism in Australia and New Zealand", in Ramraj, Hor and Roach (eds), *Global Anti-Terrorism Law and Policy*, (2005) 534 at 538.

158 See Rose and Nestorovska, "Australian counter-terrorism offences: Necessity and clarity in federal criminal law reforms", (2007) 31 *Criminal Law Journal* 20 ("Rose and Nestorovska") at 24-25.

substantial terrorism-related legislation, as such, in Australia. The legislative framework was fundamentally altered following events that occurred in the United States of America on 11 September of that year and subsequent bombings in Bali in Indonesia and other attacks, including those occurring in Madrid, Jakarta and London, attributed in each of these cases to Islamist terrorists. In response, in Australia, the Federal Parliament enacted comprehensive measures aimed at suppressing terrorist acts and punishing terrorists[159].

167 *Evolution of Pt 5.3 of the Code*: Part 5.3 of the Code, which deals with terrorism, was first inserted by Sched 1 of the *Suppression of the Financing of Terrorism Act* 2002 (Cth). Schedule 1 of the *Criminal Code Amendment (Terrorism) Act* 2003 (Cth) later repealed that Part and substituted a revised Pt 5.3. The new provisions followed a referral to the Federal Parliament by each of the Australian States, pursuant to s 51(xxxvii) of the Constitution, of certain powers relating to terrorist acts[160]. The reason for the referral of power was explained in the Explanatory Memorandum to the Bill that became the *Terrorism (Commonwealth Powers) Act* 2003 (Vic) ("the Referring Act"):

> "The Commonwealth Constitution does not give the Parliament express powers to regulate terrorist acts. It derives the authority to make such laws from a patchwork of constitutional powers. Using its existing powers the Commonwealth Parliament enacted a series of offences, in 2002, relating to terrorism which are all linked to the commission of a 'terrorist act'. These offences are located in Part 5.3 of the *Commonwealth Criminal Code*.

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159 See, for example, *Security Legislation Amendment (Terrorism) Act* 2002 (Cth); *Suppression of the Financing of Terrorism Act* 2002 (Cth); *Border Security Legislation Amendment Act* 2002 (Cth); *Telecommunications Interception Legislation Amendment Act* 2002 (Cth); *Criminal Code Amendment (Terrorist Organisations) Act* 2002 (Cth); *Criminal Code Amendment (Suppression of Terrorist Bombings) Act* 2002 (Cth); *Criminal Code Amendment (Terrorism) Act* 2003 (Cth); *ASIO Legislation Amendment Act* 2003 (Cth); *Criminal Code Amendment (Terrorist Organisations) Act* 2004 (Cth); *Anti-terrorism Act* 2004 (Cth); *Anti-terrorism Act (No 2)* 2004 (Cth); *Anti-Terrorism Act* 2005 (Cth); *Anti-Terrorism Act (No 2)* 2005 (Cth); *Telecommunications (Interception) Amendment Act* 2006 (Cth); *ASIO Legislation Amendment Act* 2006 (Cth). See further Lynch and Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws*, (2006).

160 *Terrorism (Commonwealth Powers) Act* 2002 (NSW); *Terrorism (Commonwealth Powers) Act* 2003 (Vic); *Terrorism (Commonwealth Powers) Act* 2002 (SA); *Terrorism (Commonwealth Powers) Act* 2002 (Q); *Terrorism (Commonwealth Powers) Act* 2002 (WA); *Terrorism (Commonwealth Powers) Act* 2002 (Tas).

> The patchwork of existing Commonwealth constitutional powers supporting these terrorism offences is extensive and complex but may result in unforeseen gaps in their constitutional support. The States may eliminate doubts about the extent of the Commonwealth's constitutional power to enact the terrorism offences by referring matters to the Commonwealth Parliament. ...
>
> All other States have passed comparable Acts."

168 *Introduction of Div 104*: Divisions 104 and 105 of the Code were inserted by Sched 4 of the Act. They commenced on 15 December 2005. Division 104 is headed "Control orders". Division 105 concerns "Preventative detention orders".

169 The new Divisions followed discussions at a special meeting on counter-terrorism of the Council of Australian Governments (COAG), held in September 2005[161]. At that meeting, "COAG considered the evolving security environment in the context of the terrorist attacks in London in July 2005 and agreed that there [was] a clear case for Australia's counter-terrorism laws to be strengthened". It was COAG's view that "[a] terrorist attack in Australia continues to be feasible and could occur". The Act received the Royal Assent on 14 December 2005.

170 *The scheme of Div 104*: The object of Div 104 of the Code is explained in s 104.1:

> "The object of this Division is to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act."

As the key provisions of Div 104 are set out or summarised in other reasons, it is unnecessary for me to repeat their terms[162]. It suffices to state again only the most significant provisions.

171 *Making an interim control order*: The provisions relating to the making of a control order are contained in subdiv B of Div 104. The critical provision is s 104.4[163].

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161 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 2005 at 102-104.

162 See reasons of Gummow and Crennan JJ at [43]-[51]; reasons of Callinan J at [564]-[581].

163 For the text of this provision see the reasons of Gummow and Crennan JJ at [64]; reasons of Callinan J at [572].

172 Section 104.4 must be read alongside the definition of "terrorist act" provided by s 100.1 of the Code. This definition is also vital to an understanding of the issues[164].

173 An application for an interim control order may be made ex parte. Indeed, Div 104 assumes that ex parte proceedings will be routine[165]. Whilst the exercise of the judicial power of the Commonwealth is ordinarily performed in public in the presence of all parties and ex parte proceedings in private are comparatively rare, exceptional circumstances are not required by Div 104 for the making of such orders in private. Pursuant to s 104.5(1)(e), upon issuing the interim control order, the issuing court must "specify a day on which the person [subject to the order] may attend the court" for the court to either confirm (with or without variation) the interim order, declare the interim order void or revoke the interim order.

174 Subdivision D of Div 104 contains the procedure to be followed in confirming an interim control order. It will be necessary to refer to aspects of this subdivision later. For present purposes, it is sufficient to notice that s 104.12(1) requires the interim order to be served by an Australian Federal Police ("AFP") member personally on the person subject to the order as soon as practicable after the interim order is made and at least 48 hours before the date specified for the confirmation hearing.

175 The obligations, prohibitions and restrictions that may be imposed on a person by virtue of a control order are contained in s 104.5(3). Self-evidently, they are substantial impositions on the liberty of the person subject to the order[166].

The facts

176 On 25 August 2006, having obtained the consent of the Federal Attorney-General, Federal Agent Ramzi Jabbour (the second defendant) applied for an interim control order in relation to the plaintiff. In seeking the consent of the

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164 The definition is reproduced in the reasons of Callinan J at [566]. See also reasons of Gleeson CJ at [8]; reasons of Gummow and Crennan JJ at [44]; reasons of Hayne J at [404]; cf Rose and Nestorovska (2007) 31 *Criminal Law Journal* 20 at 26-30.

165 Reasons of Gummow and Crennan JJ at [48].

166 See *Jabbour v Thomas* (2006) 165 A Crim R 32 at 39 [50].

Attorney-General to make the application, the second defendant made the following representation[167]:

> "I consider on reasonable grounds that the interim control order in the terms requested in this affidavit would substantially assist in preventing a terrorist act and, in addition, I suspect on reasonable grounds that the person has received training from a listed terrorist organisation, namely Al Qa'ida. Al Qa'ida is a listed terrorist organisation under section 4A of the *Criminal Code Regulations 2002* made under the *Criminal Code Act 1995*."

177 The application was heard by Mowbray FM on 26 August 2006. His Honour delivered ex tempore reasons the next day and made the order issuing the interim control order[168]. He acknowledged that the critical paragraphs of s 104.4(1) of the Code were (c) and (d)[169]. He had to be satisfied, on the balance of probabilities, that the order would substantially assist in preventing a terrorist act *or* that the plaintiff had provided training to or received training from a listed terrorist organisation[170]. If so satisfied on either one of these grounds, he had to also be satisfied[171], on the balance of probabilities, that "each of the obligations, prohibitions and restrictions to be imposed" on the plaintiff was "reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act"[172].

178 Mowbray FM noted that the second defendant was "directly responsible for the management and command of AFP national counter terrorism operations" and had "been involved in counter terrorism investigations since January 2002"[173]. In his opinion, the second defendant could therefore "be taken to be an

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167 (2006) 165 A Crim R 32 at 33 [3].

168 An edited version of the judgment is reported as *Jabbour v Thomas* (2006) 165 A Crim R 32.

169 (2006) 165 A Crim R 32 at 34 [7]-[9].

170 See the Code, ss 104.4(1)(c)(i) and 104.4(1)(c)(ii). Note also reasons of Hayne J at [480]-[487].

171 See the Code, s 104.4(1)(d).

172 See (2006) 165 A Crim R 32 at 34 [8].

173 (2006) 165 A Crim R 32 at 37 [36].

expert in matters relating to terrorism and terrorist acts"[174]. After considering the evidence of the second defendant, Mowbray FM concluded[175]:

> "I am satisfied on the balance of probabilities in the terms of s 104.4(1)(c)(i) of [the Code] that a making of an interim control order would substantially assist in preventing a terrorist act.
>
> [The plaintiff] has admitted that he trained with Al Qa'ida in 2001. Al Qa'ida is a listed terrorist organisation ... under [the Code]. ...
>
> It is therefore very clear that in the terms of s 104.4(1)(c)(ii) of [the Code] the [plaintiff] has received training from a listed terrorist organisation.
>
> ...
>
> The controls set out in the interim control orders which I propose to make will protect the public and substantially assist in preventing a terrorist act. Without these controls the [plaintiff's] knowledge and skills could provide a potential resource for the planning or preparation of a terrorist act."

179 The obligations, prohibitions and restrictions imposed on the plaintiff by Mowbray FM pursuant to the interim control order are described in other reasons[176]. I will not repeat them here.

180 Mowbray FM elected not to include an obligation which would have required the plaintiff to attend specified counselling[177]. He did not accept that such an obligation satisfied the precondition outlined in s 104.4(1)(d) of the Code[178]. Mowbray FM also expressed concern about the number of individuals with whom, it was proposed, the plaintiff should be prohibited from

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174 (2006) 165 A Crim R 32 at 37 [36]. It will be necessary later to consider the nature of the evidence of the second defendant relied upon by Mowbray FM in making the interim order. See below at [255]-[261].

175 (2006) 165 A Crim R 32 at 38-40 [45]-[62].

176 See reasons of Gleeson CJ at [2]; reasons of Callinan J at [554].

177 Subject to the Code, s 104.5(6).

178 (2006) 165 A Crim R 32 at 39 [52]-[56].

communicating or associating[179]. As a result of this intimation, for the purposes of the interim order, the second defendant undertook to reduce the list to 50 names.

181 For completeness, it should be observed that, in November 2004, the plaintiff had been arrested and charged with offences against Pt 5.3 of the Code and against the *Passports Act* 1938 (Cth). In the Supreme Court of Victoria, the plaintiff was tried and found guilty by a jury of one count of intentionally receiving funds from a terrorist organisation[180] and one count of possessing a falsified Australian passport[181]. The jury found him not guilty of other charges[182], which related to allegedly providing resources to a terrorist organisation[183]. On 18 August 2006, the resulting convictions of the plaintiff were quashed by order of the Court of Appeal of Victoria (Maxwell P, Buchanan and Vincent JJA). That order was made on the basis that admissions, attributed to the plaintiff during an interview with AFP officers and others in Pakistan in March 2003, should not have been admitted in the trial[184]. The Court of Appeal adjourned for a further hearing the question of whether there should be an order for a retrial[185].

182 Pursuant to the Court of Appeal's order, the plaintiff was released from custody. The move to obtain the control orders against him followed within a week. This sequence of events inevitably gave rise to an appearance, in the plaintiff's case, of action by the Commonwealth designed to thwart the ordinary operation of the criminal law and to deprive the plaintiff of the benefit of the liberty he temporarily enjoyed pursuant to the Court of Appeal's orders. Subsequently, on 20 December 2006, and in the light of supervening events, the

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179 The list was approximately 300 pages long. See (2006) 165 A Crim R 32 at 39 [56]-[57].

180 The Code, s 102.6(1).

181 Pursuant to *Passports Act* 1938 (Cth), s 9A(1)(e). See *R v Thomas (No 3)* (2006) 14 VR 512 at 513 [1].

182 The Code, s 102.7(1).

183 *R v Thomas (No 3)* (2006) 14 VR 512 at 513 [1].

184 See *R v Thomas (No 3)* (2006) 14 VR 512 at 513 [2]-[3]; *R v Thomas* (2006) 14 VR 475.

185 *R v Thomas* (2006) 14 VR 475 at 509 [120].

Court of Appeal directed that a retrial be had of certain charges against the plaintiff[186].

The issues

183 The questions reserved for the opinion of this Court are set out in other reasons[187]. Pursuant to those questions, three substantive issues arise for the decision of the Court. In the order previously explained, the issues are:

(1) *The validity of Div 104 issue*: Whether federal legislative power, either express or implied, exists to support the validity of Div 104. Specifically, whether Div 104 of the Code may rely for its validity either on the reference power (s 51(xxxvii)), the defence power (s 51(vi)), the nationhood power (s 51(xxxix) read in conjunction with s 61 of the Constitution), or the external affairs power (s 51(xxix));

(2) *The conferral of non-judicial power issue*: Whether Div 104 of the Code is invalid because it purports to confer power on a federal court that is not characterised as part of "the judicial power of the Commonwealth"; and

(3) *The compatibility with Ch III issue*: Whether, to the extent that Div 104 purports to confer judicial power on a federal court, it provides for the exercise of that power in a manner that is incompatible with the requirements for the exercise of federal judicial power provided for in Ch III of the Constitution.

LEGISLATIVE POWER

The referral of State powers

184 *The reference power*: The primary source of legislative power for the enactment of Div 104, relied on by the Commonwealth and evident on the face of Pt 5.3[188], was the power derived from the referral of legislative powers to the Federal Parliament by the relevant State Parliament. In this case that was the Parliament of the State of Victoria, acting pursuant to s 51(xxxvii) of the Constitution.

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186 *R v Thomas (No 3)* (2006) 14 VR 512 at 521 [37]-[38].

187 See eg reasons of Gleeson CJ at [3].

188 See the Code, ss 100.3, 100.4(2)-(6).

185 For Div 104 to be supported by s 51(xxxvii), it must constitute an "express amendment" of Pt 5.3 of the Code[189]. The text of Pt 5.3, as substituted in the Code by the *Criminal Code Amendment (Terrorism) Act* 2003 (Cth), was referred pursuant to s 51(xxxvii) of the Constitution by s 4(1)(a) of the Referring Act and identical references by the Parliaments of all of the other States. The text of Pt 5.3, as then enacted by the Federal Parliament, was identical to that contained in Sched 1 of the Referring Act. However, significantly for the plaintiff's argument, that Schedule did not include reference to Div 104.

186 Pursuant to s 4(1)(b) of the Referring Act, the matters referred also included:

> "the *matter of terrorist acts, and actions relating to terrorist acts*, but only to the extent of the making of laws with respect to that matter by making *express amendments* of the *terrorism legislation* or the criminal responsibility legislation" (emphasis added).

187 It is in this context that the Referring Act defines "express amendment" as follows[190]:

> "'express amendment' of the *terrorism legislation* or the *criminal responsibility legislation* means the direct amendment of the text of the legislation (whether by the insertion, omission, repeal, substitution or relocation of words or matter) by Commonwealth Acts, but does not include the enactment by a Commonwealth Act of a provision that has or will have substantive effect otherwise than as part of the text of the legislation".

188 The phrase "terrorism legislation" is defined in the Referring Act to mean[191]:

> "the provisions of Part 5.3 of [the Code] enacted in the terms, or substantially in the terms, of the text set out in Schedule 1 and as in force from time to time".

189 The critical question therefore becomes whether the meaning of express amendment extends to the insertion of an entire new Division, in this case

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189 See Referring Act, s 4(1)(b).

190 Referring Act, s 3 (emphasis added).

191 Referring Act, s 3.

Div 104. During the course of argument, it was submitted that it was "clear"[192] that the Referring Act extended so far. I do not accept that submission[193].

190 *The corporations legislation is distinguishable*: To support its argument, the Commonwealth, with the support of the intervening States, relied heavily on one precedent said to be analogous, namely the reference of power from the State Parliaments to support the enactment of the *Corporations Act* 2001 (Cth). Relevantly, that reference of power included a Victorian statute: the *Corporations (Commonwealth Powers) Act* 2001 (Vic) ("the Corporations Referral"). It was suggested that the Corporations Referral contained provisions almost identical to s 4(1)(b) of the Referring Act relied on in this case, specifically in the definition of "express amendment"[194].

191 Relevantly, s 4(1)(b) of the Corporations Referral refers:

> "the matters of the formation of corporations, corporate regulation and the regulation of financial products and services, but only to the extent of the making of laws with respect to those matters by making *express amendments of the Corporations legislation*" (emphasis added).

192 In the same way, s 4(1)(b) of the Referring Act permits the making of "express amendments of the terrorism legislation". There is, however, one important distinction. This relates to the manner in which "terrorism legislation" and "Corporations legislation" are respectively defined. The definition of "terrorism legislation", set out above[195], is to be contrasted with the definition of "Corporations legislation" in s 3 of the Corporations Referral:

> "'Corporations legislation' means Commonwealth Acts enacted in the terms, or substantially in the terms, of the *tabled text* and as in force from time to time" (emphasis added).

193 The "tabled text" in the Corporations Referral is also defined in s 3:

> "'tabled text' means the text of the following proposed Bills for Commonwealth Acts, comprised in two or more documents (each bearing identification as 'part of the tabled text') as tabled by or on behalf of the

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192 [2007] HCATrans 078 at 15366-15375.

193 cf reasons of Gleeson CJ at [4]-[6]; reasons of Gummow and Crennan JJ at [127]-[131]; reasons of Hayne J at [446]-[456].

194 See Corporations Referral, s 3.

195 Above at [188].

> Attorney General of New South Wales in the Legislative Assembly of New South Wales at any time during the period between the giving of notice of motion for leave to introduce the Bill for the Corporations (Commonwealth Powers) Act 2001 of that State in that Legislative Assembly and the second reading of that Bill in that Legislative Assembly –
>
> (a) Corporations Bill 2001;
>
> (b) Australian Securities and Investments Commission Bill 2001".

194 The point of distinction is thus clear. The "terrorism legislation" in issue in this case is specifically *contained* within the Referring Act, whereas in the Corporations Referral, the Victorian Parliament *refers* to provisions that had been tabled in the New South Wales Legislative Assembly[196]. The distinction affects the definition and specification of the State legislative power that was surrendered by referral to the Federal Parliament.

195 *Terms and context of the enactment*: The Commonwealth accepted that the word "amend" in so far as it related to "express amendment" in s 4(1)(b) of the Referring Act "has to take its meaning from the context" in which it appears[197]. The context in which the Referring Act was enacted is decidedly different from that which existed when the Corporations Referral was enacted. In the latter case, the Victorian Parliament was content to define the "Corporations legislation" by reference to provisions that were tabled in the Parliament of another State. By way of contrast, the present Referring Act specifically included the "terrorism legislation" as a Schedule to the Act. It could not have been more particular or more explicit.

196 Notwithstanding the identical terms of each referral ("the matter[s] of ... but only to the extent of the making of laws ... by making express amendments of the ... legislation") those terms take on a more confined meaning in the present case. Thus, "express amendment" is qualified not only by the *matters* referred in s 4(1)(b) but also by the form of the *legislation* defined in s 4(1)(b), by reference to which only express amendments may be made.

197 In a constitutional referral of powers in the Australian federation, it is one thing to provide for the making of "express amendments" to identified legislation contained in the Schedule to the enactment constituting that referral. It is another

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196 See Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 March 2001 at 303.

197 See [2007] HCATrans 078 at 13865-13871.

thing altogether to provide in the referral for the making of "express amendments" to legislation not contained in the enactment constituting the referral, but rather, in documents tabled in another Parliament at some other time.

198 In *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd*[198], this Court confirmed that, in referring constitutional power, "the Parliament of the State must express its will and it must express its will by enactment"[199]. Indeed, it had earlier been speculated whether[200]:

> "State Parliaments could refer a matter 'not only with the limitation that the Commonwealth law should not do this or that, but even with the stipulation that the only law authorised by the reference should be a law in the exact form specified in the referring Act'".

199 The Victorian Parliament's Referring Act, applicable to the present case, has far greater specificity than the Corporations Referral. This is hardly surprising, given the nature of the subject-matter of the present referral. Counter-terrorism legislation, of its nature, seriously diminishes liberty. In this instance, there was thus an acute need to ensure greater clarity and precision in the Referring Act. The decision of the Victorian Parliament to include the entirety of the proposed Pt 5.3 of the Code as a Schedule to the enactment containing the referral was the way, with exactness, that such clarity and precision were achieved.

200 The restricted nature of the referral from the Victorian Parliament is also apparent from the second reading speech of the Victorian Attorney-General in support of the Bill that became the Referring Act[201]:

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198 (1964) 113 CLR 207.

199 (1964) 113 CLR 207 at 226 per Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ.

200 See "Commonwealth Powers Bill: A Repletion of Opinions", (1943) 16 *Australian Law Journal* 323 at 325, referring to arguments made by the Commonwealth legal advisers (Sir Robert Garran, Sir George Knowles and Professor K H Bailey) in respect of the Commonwealth Powers Bill produced following a Constitutional Convention in Canberra in December 1942. See also *Australian National Airways* (1964) 113 CLR 207 at 209-210.

201 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 25 March 2003 at 525.

> "The bill provides for safeguards to protect Victoria's interests while fully supporting the Commonwealth in securing effective national terrorism offences. The bill provides for a referral of power that is limited to only that necessary to enact terrorism offences in the same form, or substantially the same form, as the present commonwealth terrorism offences and to amend them as required."

201 These observations are markedly different from the second reading speech of the Victorian Premier in 2001 in support of the Bill that became the Corporations Referral. That speech highlighted the substantially different context in which that Act was proposed and enacted, aimed at "achieving an effective, uniform system of corporate regulation across Australia"[202]. As noted by the Premier, the Corporations Referral was specifically designed to support a "national scheme for the regulation of corporations, companies and securities"[203]. The Premier also spoke about the capacity of the Victorian Parliament to terminate the reference and the resulting importance of the "corporations agreement"[204].

202 A comparison of the respective purposes of the two referrals by the Victorian Parliament demonstrates the difference both in the *context* and in the precise terms of the *enactment* of the referrals. The Corporations Referral was designed to support a national corporations law and the enactment of two comprehensive federal statutes. It was accompanied by a detailed intergovernmental agreement. This was a wholly different background when compared to the present Referring Act. It concerned a particular Part of the Code, designed to *create* terrorist offences and to permit the *prosecution* of those committing terrorist acts. The intergovernmental agreement that facilitated the Referring Act makes this difference plain[205]:

> "The Prime Minister, Premiers and Chief Ministers agreed on 5 April 2002 to take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power so that the Commonwealth may enact specific, jointly-agreed legislation. It was agreed that the new Commonwealth legislation will incorporate roll

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202 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 March 2001 at 302.

203 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 March 2001 at 302.

204 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 March 2001 at 304.

205 Agreement on Counter-terrorism Laws, (2004), Annexure AE to the special case.

> back provisions to ensure that it does not override State or Territory law where that is not intended, and that the Commonwealth will have power to amend the new legislation in accordance with provisions similar to those which apply under Corporations arrangements. It was further agreed that any amendment based on the referred power will require consultation with, and agreement of, States and Territories, and that this will be contained in the legislation."

203 *Division 104 is not supported by s 51(xxxvii)*: It follows from these peculiarities of the referral of power that Div 104 is not supported by s 51(xxxvii). This is because of two limitations inherent in the definition given to the phrase "express amendment", read in the context of the terms of the Referring Act and the circumstances in which it was enacted.

204 First, to be valid on this basis, Div 104 must constitute an *express* amendment of the "terrorism legislation", which is defined as that enacted in the terms, or substantially in the terms, of the text set out in Sched 1 of the Referring Act. Secondly, the express amendment must be a "direct amendment" of the "terrorism legislation", as so defined. Although this may include the "insertion" of text, that term should be construed *ejusdem generis* with the preceding words "direct amendment", read together with the requirement that the amendment be to the "terrorism legislation". This requires that a more restrictive meaning be given to the term "insertion".

205 In the result, Div 104 did not amount to a direct amendment of the terrorism legislation. Rather, it was an addition to the scope and function of Pt 5.3 of the Code by federal law alone. The original text of the Referring Act referred matters relating to the regulation, definition and punishment of terrorist acts. However, Divs 104 and 105 relate to the *prevention* of terrorist acts and the control and detention of particular persons in order to protect the public from *potential* terrorist acts. The purpose and object underlying the Referring Act, in so far as it was directed at providing federal legislative power to prosecute perpetrators of terrorist acts, is therefore notably different[206] from the object and purpose of the added Divisions introduced by the Act[207].

206 To draw this conclusion is not to deny that this Court should construe s 51(xxxvii) of the Constitution "with all the generality which the words used

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206 See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 2005 at 102.

207 See *Interpretation of Legislation Act* 1984 (Vic), s 35(a).

admit" or to imply into par (xxxvii) "any implications concerning the ... reference"[208]. It is merely to acknowledge that[209]:

> "[T]he Parliament of the State must express its will and it must express its will by enactment. How long the enactment is to remain in force as a reference may be expressed in the enactment. It none the less refers the matter. Indeed the matter itself may involve some limitation".

207 Whilst the Referring Act extended to "actions relating to terrorist acts", it was explicitly stated that such a reference was limited only to making "express amendments of the terrorism legislation"[210]. The legislative text, through the precise definitions of "express amendment" and "terrorism legislation", charted the boundaries of the express amendments to Pt 5.3 of the Code that will come within the terms of the reference[211]. The insertion of Div 104 exceeded those limitations. It follows that, absent a further reference of power, Div 104 cannot rely for its validity on s 51(xxxvii) of the Constitution. Division 104 was never supported by any further reference of powers from the State of Victoria.

208 *Presumption of not altering common law rights*: The foregoing conclusion is based on no more than an analysis of the language and history of the Referring Act. However, in this case, the conclusion is confirmed by the presumption[212] that Australian legislation is not ordinarily taken to invade fundamental common law rights[213] or to contravene the international law of human rights[214], absent a clear indication that this is the relevant legislative

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208 *Australian National Airways* (1964) 113 CLR 207 at 225-226 per Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ.

209 *Australian National Airways* (1964) 113 CLR 207 at 226.

210 Referring Act, s 4(1)(b).

211 cf *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 564-566 [46]-[52].

212 See Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) at 176-177 [5.16], 188-189 [5.29].

213 See *Potter v Minahan* (1908) 7 CLR 277 at 304; *Coco v The Queen* (1994) 179 CLR 427 at 437, 446; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 381 [89]; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577-578 [19]-[21], 643 [241].

214 See *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363; *Zachariassen v The Commonwealth* (1917) 24 CLR 166

(Footnote continues on next page)

purpose. As explained below, Div 104 of the Code directly encroaches upon rights and freedoms belonging to all people both by the common law of Australia and under international law[215].

209 Given the uncertainties inherent in the Referring Act, its provisions should be given a narrower meaning than might otherwise be the case. Such an approach is necessary and appropriate given the nature of the legislation in question and the long-standing approach to such questions of construction, reaching back to the earliest days of the Court[216]. The Referring Act was enacted for the purpose of referring legislative power from the State Parliament of Victoria to the Federal Parliament. A failure on the part of this Court to adhere to established principles of interpretation would enlarge federal legislative powers at the expense of those of the States[217]. Through the provision for control orders and preventative detention, it would also result in the abrogation or diminution of rights and liberties ordinarily belonging to individuals in this country. While this may have been a purpose of the Federal Parliament in introducing Div 104 in the first place[218], it is not apparent from the enactment of the original reference that the identical purpose was shared by the Victorian Parliament.

210 The State of Victoria did not intervene in this Court to suggest otherwise or to support the Commonwealth's submissions. In so far as other States did so, and concurred in the Commonwealth's interpretation, their submissions are not conclusive. It is critical to the constitutional design apparent in s 51(xxxvii) that the referral of power there envisaged is made by the Parliament of the State concerned, not merely by the Executive Government. Parliament represents all the electors in the State. The fact that the Government of a State might be willing to accept a wider reference of power to the Federal Parliament than the State Parliament has enacted is not determinative of what that Parliament has done. That remains for decision, ultimately by this Court, having regard to the

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at 181; *Polites v The Commonwealth* (1945) 70 CLR 60 at 69, 75, 77, 79; *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10 at 31; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38; *Coco* (1994) 179 CLR 427 at 437; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287-288.

215 See below at [379]-[382].

216 *Jumbunna* (1908) 6 CLR 309 at 363-364.

217 cf *New South Wales v Commonwealth* ("*Work Choices*") (2006) 81 ALJR 34; 231 ALR 1; *Attorney-General (Vic) v Andrews* (2007) 81 ALJR 729; 233 ALR 389.

218 See below at [381]-[382].

terms in which the will of the State Parliament concerned has been expressed and other relevant considerations.

211 *The relevance of s 100.8 of the Code*: Section 100.8 of the Code should be noted:

> "Approval for changes to or affecting this Part
>
> (1) This section applies to:
>
> (a) an express amendment of this Part (including this section); and
>
> (b) an express amendment of Chapter 2 that applies only to this Part (whether or not it is expressed to apply only to this Part).
>
> (2) An express amendment to which this section applies is not to be made unless the amendment is approved by:
>
> (a) a majority of the group consisting of the States, the Australian Capital Territory and the Northern Territory; and
>
> (b) at least 4 States."

212 Section 100.8 does not cause me to qualify the foregoing conclusions. The provision is expressed as a political undertaking. It is not a legally enforceable one. To the extent that s 100.8 purports to determine the outcome of these proceedings or control any future actions of the Federal Parliament, it is invalid[219]. The problem with the terms of s 100.8 was anticipated by the Victorian Attorney-General in his second reading speech on the Bill that became the Referring Act[220]:

> "Clause 100.8 of schedule 1 reflects the commonwealth's commitment to obtain the agreement of a majority of states and territories (including four states) to any amendment of its terrorism offences.
>
> There is a continuing debate between the commonwealth and some states regarding the inclusion of a clause to the same effect as clause 100.8 in this bill or whether the consultation requirement is adequately

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219 See reasons of Hayne J at [456]; cf reasons of Callinan J at [602]-[607].

220 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 25 March 2003 at 525.

> expressed in an intergovernmental agreement. As the government has no wish to delay implementation of the national scheme, this bill conforms with the bills passed by the other states and does not include such a clause. Should agreement be reached between the states and the commonwealth in the future to incorporate such a provision, state legislation could be amended at that time."

213 Reliance upon s 100.8 of the Code, both by the Commonwealth and by the intervening States, is not only unlawful. It is also circuitous. On the one hand, the Commonwealth and the intervening States argue that the original reference of power, specifically s 4(1)(b) of the Referring Act, supports Div 104 of the Code in its entirety. On the other hand, it would appear that a COAG meeting, with the affirmative support of a majority of the governments of the States, was to be a necessary political precondition to any significant amendments to Pt 5.3 of the Code. This was so despite the fact that s 51(xxxvii) refers to "matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States" and not to matters referred by the Executive Governments "of any State or States". The modern tendency of governments in Australia to identify themselves with the Parliaments, at the cost of the respect owed to those Parliaments, is of no effect when a matter comes before this Court. Our obligation is to give effect to the Constitution. As the language of the Constitution makes clear, the reference power belongs to the Parliaments of the States and only to those Parliaments.

214 Curiously, s 100.8 of the Code and the COAG agreement purport to qualify s 4(1)(b) of the Referring Act. That is to say, "express amendments" appear to include ultimately only those amendments agreed to by the Executive Governments of the States. Yet this is not what s 51(xxxvii) of the Constitution provides. If the scope of s 4(1)(b) were as wide as the Commonwealth and the intervening States submitted, there would have been no requirement, legal or otherwise, for a fresh COAG meeting or agreement prior to enacting Div 104. Upon this theory, Div 104 was capable of enactment without any of the meetings, formal communiqués or other events occurring subsequent to the enactment of the Referring Act.

215 It follows that the "consent" envisaged by s 100.8 of the Code, even when obtained inferentially by meetings and other such representations, is no substitute for a referral of constitutional power by a State Parliament. Such a referral is plainly a serious constitutional step. I have heard of legislation made effective by reference to a Ministerial press release. However, I decline to interpret the provisions of s 51(xxxvii) of the Constitution to permit the parliamentary reference of constitutional power to be achieved without any relevant parliamentary involvement, as by the use of communiqués by heads of government alone.

216 Approval of a proposed text by COAG, by State Premiers and Territory Chief Ministers (or, as ultimately occurred in the case of Victoria, the Secretary of the Victorian Department of Premier and Cabinet), was apparently intended to convey the consent of the State or Territory concerned. These government officials must be reminded that constitutional power in Australia is derived ultimately from the people who elect Parliaments. The alteration of the allocation of constitutional powers must therefore either involve the people as electors directly (under s 128 of the Constitution) or, exceptionally, it must involve their representatives in the several Parliaments (as provided by s 51(xxxvii) and (xxxviii)). It cannot be achieved merely by the actions of governments and governmental officials.

217 It follows that the insertion of Div 104 in Pt 5.3 of the Code is not supported by the initial reference of power by the Parliament of the State of Victoria, relevant to the case of the plaintiff. The insertion of that Division did not constitute an express amendment of the terrorism legislation, as defined in the Referring Act. Nor was there any subsequent referral of such power by the Parliament concerned.

218 *Relevance of termination and review*: Although I accept that the Referring Act permits the termination of the reference by Victoria[221], so long as the Governor in Council provides at least three months notice[222], this does not affect the interpretation of the reference according to its terms. Obviously, a power to terminate a referral of constitutional power does not arise unless the power has been referred in the first place[223]. Nor is the interpretation of the Referring Act affected in any way by the fact that Div 104 contains a sunset provision[224] and is to be reviewed by COAG in 2010[225]. These are political, not legal, arguments.

219 *Conclusion: reference unavailing*: The Commonwealth's reliance on the reference power therefore fails. Division 104 of the Code cannot derive its validity from that head of constitutional power. This is an important conclusion because, manifestly, the Division was drafted upon the assumption that, in

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221 Referring Act, s 5.

222 Referring Act, s 5(2).

223 cf [2007] HCATrans 078 at 14035.

224 The Code, s 104.32.

225 The Act, s 4.

practice, it would secure its constitutional validity and effect from State referrals of power to the Commonwealth[226].

The defence power

220 *Ambit of the defence power*: The foregoing conclusion obliges this Court to consider the alternative heads of federal legislative power invoked to determine whether they support Div 104 in its entirety[227]. Foremost amongst these is s 51(vi), the defence power. Save for one exception, that power has traditionally been viewed in this Court against the backdrop of war, that is, the traditional armed conflicts that arise between nation-states.

221 The question is posed as to what extent, and subject to what limitations, the purposive nature and elasticity of s 51(vi) affords legislative power to the Federal Parliament to enact laws providing for the prevention of terrorist acts[228]. Clearly, the defence power is stated in very broad terms. It empowers the Federal Parliament 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".

222 Given the absence of a formal declaration of war at the time the Act was given Royal Assent[229], the reasoning of this Court in *Australian Communist Party v The Commonwealth* ("the *Communist Party Case*")[230] is particularly apposite to the present case. In many respects, the contemporary concerns about "terrorism" are analogous to the fears earlier expressed about communism

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226 See the Code, ss 100.3, 100.4(2)-(6); cf reasons of Callinan J at [568].

227 See the Code, s 100.3.

228 See *Farey v Burvett* (1916) 21 CLR 433 at 440-441; *Andrews v Howell* (1941) 65 CLR 255 at 278; *Stenhouse v Coleman* (1944) 69 CLR 457 at 471; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 273-274; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 597. See also *Marcus Clark & Co Ltd v The Commonwealth* (1952) 87 CLR 177 at 218, 256; Zines, *The High Court and the Constitution*, 4th ed (1997) ("Zines") at 222-223.

229 See *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 191-192, 195, 268, 275, 278.

230 (1951) 83 CLR 1. See also *Marcus Clark* (1952) 87 CLR 177.

leading to the enactment of the *Communist Party Dissolution Act* 1950 (Cth) ("the Dissolution Act")[231].

223 Suggestions were made during argument that, at its core, this Court's decision in the *Communist Party Case* was limited to the facts and evidence adduced in that matter and did not establish any general principle relevant to these proceedings[232]. Nothing could be further from the truth. As the report shows, two questions were stated for the opinion of the Court in the *Communist Party Case*. The first asked whether the validity of the Dissolution Act depended upon a judicial determination or ascertainment of the facts stated in the recitals to that Act. The Court held that it did not. The second question then asked whether the Dissolution Act was invalid in whole or in part as that Act affected the plaintiffs in those proceedings. That question was answered "Yes". The Act was held to be invalid in its entirety. Specifically, it was held to fall outside the defence power[233].

224 *A notable omission?*: This Court's reasons in the *Communist Party Case* held that the Federal Parliament could not "'recite itself' into power"[234]. Yet it is notable that s 51(vi) was not specifically relied on as the source of power on which the validity of the provisions in question were to be sustained[235]. To the extent that Div 104 is not supported by the s 51 powers, including s 51(vi), the reference power was intended to provide the necessary legislative power for the Federal Parliament[236]. Indeed, the Code contemplates a reduced operation for

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231 The recitals to the Dissolution Act stated, inter alia, that the Australian Communist Party was "an integral part of the world communist revolutionary movement", and was engaged "in activities or operations designed to bring about the overthrow or dislocation of the established system of government of Australia and the attainment of economic, industrial or political ends by force, violence, intimidation or fraudulent practices". See also Zines at 225-226.

232 See [2007] HCATrans 076 at 8484-8487, 10080-10086; cf at 10799-10884.

233 See *Communist Party Case* (1951) 83 CLR 1 at 9-10, 191-192, 197-198, 200; reasons of Hayne J at [428]-[431].

234 *Communist Party Case* (1951) 83 CLR 1 at 206 per McTiernan J. See also at 222, 263-265. The doctrine is commonly expressed by reference to the maxim "the stream cannot rise above its source": see *Heiner v Scott* (1914) 19 CLR 381 at 393 per Griffith CJ, cited in Zines at 219.

235 See further the Code, s 100.3(1).

236 The Code, s 100.3(1)(b).

Pt 5.3 in non-referring States[237]. This is in stark contrast to the preamble to the Dissolution Act. That law contained nine preambular legislative recitals, several of them referring explicitly to matters of defence[238]. Despite such specificity, those recitals were found insufficient to engage the defence power. By invoking the reference power to support the validity of the law that is now challenged, might it not be inferred that the Federal Parliament doubted the capacity of its other sources of legislative power (including the defence power) to support the measures provided for in the Act? Had it intended to rely on the defence power would it not have said so? Was it necessary to calibrate the provisions of the Code more carefully for non-referring States if the defence power was always there and available to sustain Pt 5.3 in its entirety[239]?

225 *The need for constitutional facts*: In the *Communist Party Case*, Williams J observed[240]:

> "[I]t is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation."

The nature of the inquiry demanded in this passage had earlier been explained by Dixon J in *Andrews v Howell* in the particular context of reliance upon the defence power[241]:

> "The existence and character of hostilities, or a threat of hostilities, against the Commonwealth are facts which will determine the extent of the operation of the power. Whether it will suffice to authorize a given measure will depend upon the nature and dimensions of the conflict that calls it forth, upon the actual and apprehended dangers, exigencies and course of the war, and upon the matters that are incident thereto."

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237 The Code, s 100.4(2)-(6); cf reasons of Callinan J at [568].

238 See reasons of Hayne J at [427]; *Communist Party Case* (1951) 83 CLR 1 at 200-203 per Dixon J.

239 See *Communist Party Case* (1951) 83 CLR 1 at 189; the Code, s 100.4(2)-(6); cf reasons of Callinan J at [568].

240 (1951) 83 CLR 1 at 222 per Williams J, affd in *Hughes and Vale Pty Ltd v New South Wales [No 2]* (1955) 93 CLR 127 at 165. See also *Shrimpton v The Commonwealth* (1945) 69 CLR 613 at 629-630.

241 (1941) 65 CLR 255 at 278. See also *Stenhouse* (1944) 69 CLR 457 at 471-472.

226 In *Sue v Hill*[242], Gleeson CJ, Gummow and Hayne JJ affirmed that "the determination of constitutional facts is a central concern of the exercise of the judicial power of the Commonwealth". That is, "neither Parliament nor the Executive [can] make a conclusive determination on an issue, factual or legal, on which constitutionality depend[s]"[243]. Ultimately, that determination is the responsibility of this Court. It remains so where the constitutionality of a law is in question, despite the tender of certificates issued by the Executive of the Commonwealth on which this Court would otherwise ordinarily rely. So much was confirmed recently in *Attorney-General (Cth) v Tse Chu-Fai*[244]:

> "In *Shaw Savill & Albion Co Ltd v The Commonwealth*, Dixon J spoke of 'the exceptional rule giving conclusive effect to official statements' and to those matters of fact 'which the Executive is authorised to decide', such as 'the existence of a state of war, the recognition of a foreign state, the extent of the realm or other territory claimed by the Crown, or the status of a foreign sovereign'.
>
> There is a fundamental question under Ch III of the Constitution of the competence of the Executive (even with respect to those facts identified by Dixon J) to determine conclusively the existence of facts by certificate where they are disputed constitutional facts."

227 The purposive nature of the power referred to in s 51(vi) of the Constitution ensures that the demonstration of sufficient constitutional facts is paramount for its engagement[245]. In *Stenhouse v Coleman*[246], Dixon J affirmed that the phrase "'a law with respect to the defence of the Commonwealth' is an expression which seems rather to treat defence or war as the purpose to which the legislation must be addressed". That is[247]:

> "[H]owever it may be expressed, whether by the words – 'scope', 'object', 'pith', 'substance', 'effect' or 'operation', the connection of the [law] with defence can scarcely be other than purposive, if it is within the power. ...

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242 (1999) 199 CLR 462 at 484 [38].

243 Kenny, "Constitutional Fact Ascertainment", (1990) 1 *Public Law Review* 134 ("Kenny") at 155.

244 (1998) 193 CLR 128 at 149 [53]-[54] (citations omitted).

245 *Andrews v Howell* (1941) 65 CLR 255 at 278.

246 (1944) 69 CLR 457 at 471.

247 *Stenhouse* (1944) 69 CLR 457 at 471.

> For apparently the purpose must be collected from the instrument in question, the facts to which it applies and the circumstances which called it forth. ... They are considerations arising from matters about which, in case of doubt, courts can inform themselves by looking at materials that are the subject of judicial notice."

228 It is important to understand the distinction that may arise, in this context, between facts of which this Court may take "judicial notice", and "constitutional facts"[248]:

> "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. It may be that in this respect the field open to the court is wider than has been commonly supposed".

229 This Court is the guardian of the Constitution and the final arbiter of legislative constitutionality[249]. The validity of the legislation now presented, specifically Div 104, must be judged in the normal way. For this, I derive guidance from what was said by Fullagar J in the *Communist Party Case*[250]:

> "If the great case of *Marbury v Madison* had pronounced a different view, it might perhaps not arise even in the case of the Commonwealth Parliament; and there are those, even to-day, who disapprove of the doctrine of *Marbury v Madison*, and who do not see why the courts, rather than the legislature itself, should have the function of finally deciding whether an Act of a legislature in a Federal system is or is not within power. But in our system the principle of *Marbury v Madison* is accepted as axiomatic, modified in varying degree in various cases (but never

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248 *Stenhouse* (1944) 69 CLR 457 at 469 per Dixon J. See also *Breen v Sneddon* (1961) 106 CLR 406 at 411-412; *Queensland v The Commonwealth* (1989) 167 CLR 232 at 239; *Levy v Victoria* (1997) 189 CLR 579 at 598-599; Kenny (1990) 1 *Public Law Review* 134 at 154.

249 *Communist Party Case* (1951) 83 CLR 1 at 262-263; *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 at 118; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564. See also *Kartinyeri* (1998) 195 CLR 337 at 381 [89]; *Plaintiff S157/2002* (2003) 211 CLR 476 at 492 [31], 513-514 [103]-[104].

250 (1951) 83 CLR 1 at 262-263 (citation omitted).

> excluded) by the respect which the judicial organ must accord to opinions of the legislative and executive organs."

230 *The general conception of s 51(vi)*: The defence power has two aspects (or limbs). The first speaks of the "defence of the Commonwealth and of the several States". The second is directed towards the "control of the forces to execute and maintain the laws of the Commonwealth". This second aspect, either on its own, or in conjunction with the implied nationhood power (s 51(xxxix) and s 61 of the Constitution), purportedly gives s 51(vi) a wider application to protect "[t]he continued existence of the community under the Constitution"[251]. This aspect of s 51(vi) is of special importance when the power is invoked during "peacetime". In such cases, this Court must decide whether "the secondary aspect of the defence power [has], in the circumstances ... arisen in sufficient degree to authorise" the measure in question[252]. The Court recognises that[253]:

> "[A] situation falling short of actual war may so expand the scope of the defence power as to enable the Parliament to legislate with respect to subject matters which have *ex facie* no relation to naval and military defence."

231 Almost three decades ago, Justice Hope suggested the potential of the second aspect of s 51(vi) to support some federal laws directed at combating and preventing terrorism[254]:

> "[T]he second limb of s 51(vi) may be an important source of legislative power for the Commonwealth in law and order matters generally, and countering terrorism in particular."

232 The critical requirement is therefore for an "objective test" by which the "connection, or want of connection, with the defence power may be seen or ascertained" judicially[255]. It will be necessary in due course to consider the

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251 *Communist Party Case* (1951) 83 CLR 1 at 141 per Latham CJ. See also at 188 per Dixon J.

252 Zines at 226; see also *Marcus Clark* (1952) 87 CLR 177 at 215-216, 253-254.

253 *Marcus Clark* (1952) 87 CLR 177 at 253.

254 Hope Review at 32 [3.16].

255 *Marcus Clark* (1952) 87 CLR 177 at 215-216. See also *Communist Party Case* (1951) 83 CLR 1 at 198, 201-202; Zines at 225-229.

nature of the test contained within Div 104 and whether it validly engages this aspect of the defence power[256].

233 The Commonwealth characterised the second aspect of s 51(vi) as supporting the Commonwealth's "power to protect the nation"[257]. Such a power, it argued, arose either by virtue of a constitutional implication, a combination of s 51(xxxix) and s 61 or a combination of those constitutional provisions with s 51(vi)[258]. A question arises as to the extent to which such a power extends beyond the defence power. The Commonwealth argued that, in this case, where the suggested threat involved a "very clear physical threat by human beings to cause damage"[259], that fact could, if proved, fall within s 51(vi). It is unnecessary to decide whether a wider national protective power exists to defend the nation against other threats and dangers, for example, pandemics, drought, social or even health issues (obesity was mentioned). For the Commonwealth, the dangers presented in this case were of a more conventional, less esoteric, kind. 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. Although the law challenged in these proceedings does not contemplate the domestic deployment of the military, the interpretation of the ambit of the defence power adopted in this case must be consistent with the foregoing principle.

234 *Reading the defence power in context*: The plaintiff submitted that, in its context, s 51(vi) was to be read with the other provisions of the Constitution in which the words "naval and military" appear. I agree with that submission. It is consistent with the established doctrine of this Court that the heads of federal legislative power are "intended to be construed and applied in the light of other provisions of the Constitution"[260]. It follows that several provisions of the Constitution must be considered:

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256 See below at [238]-[252].

257 See reasons of Hayne J at [405].

258 See *Burns v Ransley* (1949) 79 CLR 101; *R v Sharkey* (1949) 79 CLR 121.

259 See [2007] HCATrans 076 at 10028. See generally at 9975-10031.

260 *Bank of NSW v The Commonwealth* ("the *Bank Nationalisation Case*") (1948) 76 CLR 1 at 185 per Latham CJ.

(1) s 51(xxxii), which empowers the Federal Parliament to make laws with respect to "the control of railways with respect to transport for the naval and military purposes of the Commonwealth";

(2) s 68, which vests the command in chief of the naval and military forces in the Governor-General;

(3) s 69, which provided for the transfer of State departments to the Commonwealth, including naval and military defence;

(4) s 114, which prohibits the States from raising naval or military forces without the consent of the Federal Parliament; and

(5) s 119 of the Constitution should also be noticed. It says: "The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence."

235 Finally, and most critically, s 51 requires that par (vi) be read, like other legislative powers, "subject to [the] Constitution". This includes Ch III. Irrespective of how wide s 51(vi) is found to be, it remains part of the "one coherent instrument"[261] that is the Constitution. Even if Div 104 of the Code were supported by the defence power, it would nonetheless be invalid if it infringed the requirements of Ch III.

236 *The defence power waxes and wanes*[262]: In assessing whether the facts of the present case enliven either of the two aspects of s 51(vi), it is useful to recall what Brennan J said in *Polyukhovich v The Commonwealth*[263]:

> "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 ... cannot be supported unless the Court can perceive that the

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261 *Lamshed v Lake* (1958) 99 CLR 132 at 154; cf *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 372-373 [130]-[131]; *Work Choices* (2006) 81 ALJR 34 at 145 [491]; 231 ALR 1 at 133.

262 Contrast *Farey* (1916) 21 CLR 433 at 441; *R v Foster* (1949) 79 CLR 43 at 81.

263 (1991) 172 CLR 501 at 592-593, citing *Richardson v Forestry Commission* (1988) 164 CLR 261 at 326 per Dawson J.

> 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".

237 This Court has upheld laws deemed incidental, or preparatory, to the "war effort". However, such laws have had to bear a clear and recognisable link to a war potentially to be fought against foreign nation-states[264]. When a war threatens the very existence of the Commonwealth the defence power may emerge as "the pivot of the Constitution". The power then becomes the "*ultima ratio* of the nation"[265]. However, "[w]hen actual hostilities have ceased the scope of application of the defence power necessarily diminishes"[266]. In *R v Foster*, only four years after the end of the Second World War, this Court said[267]:

> "The effects of the past war will continue for centuries. The war has produced or contributed to changes in nearly every circumstance which affects the lives of civilized people. If it were held that the defence power would justify any legislation at any time which dealt with any matter the character of which had been changed by the war, or with any problem which had been created or aggravated by the war, then the result would be that the Commonwealth Parliament would have a general power of making laws for the peace, order and good government of Australia with respect to almost every subject. ...
>
> On the other hand, this Court ... should be careful now and in the future ... not to take a narrow view of the problems with which the

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264 See *Farey* (1916) 21 CLR 433; *Attorney-General (Vict) v The Commonwealth* (1935) 52 CLR 533; *Silk Bros Pty Ltd v State Electricity Commission of Victoria* (1943) 67 CLR 1; *Ferguson v The Commonwealth* (1943) 66 CLR 432; *Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25; *de Mestre v Chisholm* (1944) 69 CLR 51; *Miller v The Commonwealth* (1946) 73 CLR 187; cf *The Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1; *R v University of Sydney; Ex parte Drummond* (1943) 67 CLR 95; *Victorian Chamber of Manufactures v The Commonwealth (Industrial Lighting Regulations)* (1943) 67 CLR 413; *Wertheim v The Commonwealth* (1945) 69 CLR 601.

265 *Farey* (1916) 21 CLR 433 at 453 per Isaacs J; cf Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, (2006).

266 *Foster* (1949) 79 CLR 43 at 81.

267 (1949) 79 CLR 43 at 83 per Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ.

> Commonwealth Government has to deal when it is entrusted with the supreme responsibility of the defence of the country.
>
> The solution of the difficulties thus presented cannot be achieved by the application of any mechanical hard and fast rule. It is not possible to do more than lay down general principles and to apply them to the circumstances, varying in time and place, which are to be found in a modern community."

These remarks apply to the present case.

238 *The first aspect of s 51(vi): "naval and military defence"*: The first aspect of s 51(vi) refers to laws with respect to "the naval and military defence of the Commonwealth and of the several States". This limb assumes the existence of hostilities directed against the Commonwealth or the States. Traditionally, the existence of such hostilities would involve a war or some other analogous conflict involving a foreign nation-state. The purpose for which this aspect of the power was originally conceived was the use of force to defend Australia against a foreign nation-state.

239 Over time, the defence force has come to be used in a variety of other circumstances, including international peacekeeping and peace enforcement and in the provision of humanitarian assistance[268]. This represents a natural accretion to the understanding of the legislative powers of the Federal Parliament, included within the language of the text and as appropriate to the application of that text to contemporary conditions. It is a basic mistake of constitutional interpretation to confine the text of the Constitution to the meaning it was thought to convey at the time when it was originally adopted[269]. Of its nature, as a basic instrument of government, a constitution adapts to new and unforeseen circumstances – to the full extent that the specificities of the text permit.

240 *No state of "war" existed at the time Div 104 was enacted*: The operation of s 51(vi) is "not confined to time[s] of war"[270]. It is nevertheless important to

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268 See reasons of Hayne J at [414]-[416].

269 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 522-523 [111].

270 *Communist Party Case* (1951) 83 CLR 1 at 253-254 per Fullagar J, citing *Farey* (1916) 21 CLR 433 at 453 per Isaacs J. See also *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 132-133 per Latham CJ; *Hume v Higgins* (1949) 78 CLR 116 at 133-134 per Dixon J; *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 585; *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 328 [63] per Gummow J.

characterise the environment existing at the time Div 104 was enacted in order to identify properly the reach of the defence power in this case[271].

241 As at 14 December 2005, when the Act here in question received Royal Assent, there had been no relevant formal declaration of war[272]. The special case notes that since 2003, the Executive Government has placed Australia at what is described as a "medium" level of alert. A "medium" level of alert is taken to signify that a terrorist attack "could" occur within Australia. This is distinct from a "low" (terrorist attack is "not expected"); "high" (terrorist attack is "likely"); or "extreme" (terrorist attack is "imminent or has occurred") classification. However, neither these classifications, nor the "terrorist attacks" occurring in other countries before, on, and after 11 September 2001, constituted a war-like environment for the purposes of s 51(vi). 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).

242 The date on which the Bill that became the Dissolution Act was introduced into Federal Parliament was the first day on which Australian forces landed in Korea during the Korean War[273]. This was one of the hostilities in which Australian forces were engaged during the Cold War. Yet it is apparent

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271 See, for example, *Communist Party Case* (1951) 83 CLR 1 at 195, 206-207, 227-230, 258-259 and also *Lloyd v Wallach* (1915) 20 CLR 299; *Ex parte Walsh* [1942] ALR 359; *Polyukhovich* (1991) 172 CLR 501 at 592-593.

272 It should be noted that, following the attacks in the United States on 11 September 2001, the United States of America and Australia invoked Art IV of the ANZUS Treaty. Article IV provides:

> "Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.
>
> Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security."

273 See Blackshield and Williams, *Australian Constitutional Law and Theory*, 4th ed (2006) at 870; Winterton, "The *Communist Party* Case", in Lee and Winterton (eds), *Australian Constitutional Landmarks*, (2003) ("Lee and Winterton") 108 at 115-124.

from the reasons of Dixon J in the *Communist Party Case* that this fact was regarded as insufficient to enliven s 51(vi)[274]:

> "At the date of the royal assent Australian forces were involved in the hostilities in Korea, but the country was not of course upon a war footing, and, though the hostilities were treated as involving the country in a contribution of force, the situation bore little relation to one in which the application of the defence power expands because the Executive Government has become responsible for the conduct of a war. I think that the matter must be considered substantially upon the same basis as if a state of peace ostensibly existed."

243 The analysis of s 51(vi) in the present case should proceed on a parallel footing, consistent with Dixon J's approach, but adapted to such new circumstances as fall within the proved "constitutional facts" or other facts of which the Court may take judicial notice.

244 With all respect, I do not accept that Latham CJ's dissent in the *Communist Party Case* gains latter day authority because his political and diplomatic experience exceeded that of his colleagues[275]. Dixon J too had very considerable diplomatic experience both during and after the War, working in wartime in close collaboration with Allied war leaders[276]. He was to prove more aware of the lessons of history involving the misuse of executive powers[277]. He also proved more capable of approaching the issue, as this Court should, as a legal and constitutional one – as guardian of the abiding values that lie at the heart of the Constitution.

245 *"Defence" as defence of bodies politic*: Unquestionably, s 51(vi) speaks of "defence of the Commonwealth and of the several States" or "the control of the forces to execute and maintain the laws of the Commonwealth". Both aspects of par (vi) assume that it is "the Commonwealth" or "the several States" that are being defended – the bodies politic. It is not, as such, individual persons or their property or other interests.

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274 (1951) 83 CLR 1 at 196.

275 Reasons of Callinan J at [589].

276 Ayres, *Owen Dixon*, new ed (2007) at 115-218.

277 *Communist Party Case* (1951) 83 CLR 1 at 187: "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."

246 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[278].

247 Arguably, s 119 of the Constitution signposts the limits to the ambit of s 51(vi). That section has never been specifically invoked[279]. It would seem that the closest the Commonwealth came to acting under s 119 was following the Hilton Hotel bombing in 1978. In the event, the defence forces eventually became involved but following an Order-in-Council of the Governor-General[280].

248 While s 119 is properly characterised as a provision imposing a special duty and, of itself, does not exhaust federal legislative power or require that such power be read down where otherwise available[281], the section remains instructive when considering s 51(vi) in the context of the one coherent constitutional instrument. Irrespective of its characterisation[282], s 119 assumes that, ordinarily, the reach of federal legislative power, including the defence power, excludes areas of civil government and matters usual to "police powers", including those of the States[283]. Section 119 provides that the Commonwealth may protect a

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278 See *Marcus Clark* (1952) 87 CLR 177 at 261-262. See also *Communist Party Case* (1951) 83 CLR 1 at 188-189; Hope Review at 29-30 [3.7]; *Dennis v United States* 341 US 494 at 587-588 (1951) per Douglas J (diss). Cf reasons of Hayne J at [442].

279 See White, "The Executive and the Military", (2005) 28 *University of New South Wales Law Journal* 438 ("White") at 444-445.

280 See Windeyer Opinion, Hope Review at 278-279. See also Australia, House of Representatives, *Parliamentary Debates* (Hansard), 23 February 1978 at 159, cited in "Legal and constitutional problems of protective security arrangements in Australia", (1978) 52 *Australian Law Journal* 296 at 298.

281 See Johnston, "*Re Tracey*: Some Implications for the Military-Civil Authority Relationship", (1990) 20 *University of Western Australia Law Review* 73 ("Johnston") at 81, citing Blackshield, "The Siege of Bowral – The Legal Issues", (1978) 4(9) *Pacific Defence Reporter* 6 at 6-9; "Legal and constitutional problems of protective security arrangements in Australia", (1978) 52 *Australian Law Journal* 296.

282 See Johnston (1990) 20 *University of Western Australia Law Review* 73 at 77, where it was suggested that s 119 may amount to an implied prohibition.

283 See Hope Review at 32-33 [3.18].

State against "domestic violence" on "the application of the Executive Government of the State"[284]. However, the maintenance of civil order and individual internal security otherwise ordinarily rests with the States and their agencies, normally the police[285].

249 To permit s 51(vi) to extend to the protection of all persons and all property would therefore sit uncomfortably with s 119. It is only where "invasion" or "domestic violence" threatens not only a State or States, but the operation of the Federal Government itself, that federal legislative powers are enlivened in the absence of an application by a State under s 119[286]. The failure to confine s 51(vi) to protection of the bodies politic would expand the reach of the defence power in an effectively unlimited way[287]. Consistent with the Constitution's overall design, such an interpretation should be rejected if the Constitution is to retain any semblance of an instrument of defined and limited government.

250 *"Defence" beyond purely external threats*: Traditionally, the defence power has been concerned with a "response to hostile activity, actual or potential, from external sources"[288]. Today, it is clear that s 51(vi) is not limited to defence against a foreign nation-state or even necessarily against external threats. The circumstances enlivening s 51(vi) are constantly changing and evolving. As both McHugh J and Gummow J acknowledged in *Re Aird; Ex parte Alpert*[289], "internal forces" or "domestic violence" may, exceptionally, threaten the security of the Commonwealth[290]. For some time, it has been recognised that "there are

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284 See further White (2005) 28 *University of New South Wales Law Journal* 438; Johnston (1990) 20 *University of Western Australia Law Review* 73 at 75-81.

285 See *Sharkey* (1949) 79 CLR 121 at 151; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) ("Quick and Garran") at 964-965. Section 119 was modelled on Art IV, §4 of the United States Constitution.

286 See *Sharkey* (1949) 79 CLR 121 at 151-152; Quick and Garran at 964; White (2005) 28 *University of New South Wales Law Journal* 438 at 444.

287 See *Dennis v United States* 341 US 494 at 587-588 (1951) per Douglas J (diss).

288 *Re Aird* (2004) 220 CLR 308 at 327-328 [61] per Gummow J (Gleeson CJ and Hayne J agreeing at 314 [9] and 356 [156] respectively). See further *Communist Party Case* (1951) 83 CLR 1 at 195 per Dixon J, 259 per Fullagar J.

289 (2004) 220 CLR 308 at 318 [28], 327-328 [61].

290 See also *Adelaide Company of Jehovah's Witnesses* (1943) 67 CLR 116 at 132, 137; *Communist Party Case* (1951) 83 CLR 1 at 259.

many ways, short of war, 'in which a country can be weakened and the overthrow of its government planned and organised by clandestine activity of a wholly or substantially domestic origin'"[291].

251 For the purposes of s 51(vi), I will therefore accept that there need not always be an external threat to enliven the power. However, the threat, in whatever way it is characterised, must be directed at the bodies politic. This is the characteristic that lifts the subject-matter of s 51(vi) of the Constitution to a level beyond that of particular dangers to specific individuals or groups or interests *within* the bodies politic so named. It is a vital constitutional distinction. Its origin is found in the text. But it is reinforced by the strong constitutional history involving the strictly limited deployment of defence personnel in domestic affairs which was the background (and shared assumption) against which the constitutional text was written and intended to operate. This Court should maintain and uphold that historical approach. It should do nothing to undermine it. Any departure invites great danger, as the constitutional history of less fortunate lands, including some that once shared our tradition, has repeatedly demonstrated.

252 *First aspect of s 51(vi) does not support Div 104*: The words "naval and military" in the first limb of s 51(vi) are not, of course, frozen in time[292]. Self-evidently, such "forces" would include the naval, army and now air forces. They would now also include peacekeeping forces deployed overseas. Nevertheless, unquestionably, the first aspect of s 51(vi) speaks of the "naval and military defence of the Commonwealth and of the several States". It assumes that it is the Commonwealth and the several States that are being defended – again not individuals or groups or their interests or property. It follows that the concern of the first aspect of s 51(vi) is defence, not security. In the present case, therefore, the first aspect of s 51(vi) is not enlivened by Div 104. By its terms, that Division is not directed towards the protection of the bodies politic of the Commonwealth and the States. It is directed at the protection of people and of property within the bodies politic. It therefore falls outside the first aspect of s 51(vi).

253 *Is Div 104 supported by the second aspect of s 51(vi)?*: The Commonwealth submitted that there were nine "factors" which, taken together,

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291 Lee, Hanks and Morabito, *In the Name of National Security: The Legal Dimensions*, (1995) at 21, citing Commonwealth, Royal Commission on Intelligence and Security, *Fourth Report*, (1977), vol 1 at 16. See also Greenwood, "International Law and the 'War Against Terrorism'", (2002) 78 *International Affairs* 301 at 307.

292 See further *Farey* (1916) 21 CLR 433 at 440 per Griffith CJ. See also at 452.

demonstrated something "new and evil which Australia has to defend [itself] against"[293]. These factors were said to constitute a particular vulnerability for modern civilisation, notably Western civilisation, including Australia. Of necessity, they called forth either the second aspect of s 51(vi) or that power in conjunction with the implied power to protect the security of the nation. The nominated factors were as follows:

(1) The ready availability of explosive substances, highly toxic poisons, germs and other weapons or things that can be used as weapons;

(2) The proximity of cities with very large localised populations with people concentrated in a small area;

(3) The very high value Australian society places on human life;

(4) The dependency of modern Australian society on a variety of types of infrastructure;

(5) The value placed by Australian society on a number of "iconic" structures;

(6) The fact that infrastructure and "iconic" structures, including water supplies, can be easily destroyed by explosives or poisoned;

(7) The particular vulnerability of aviation, and, to a lesser degree, ships, buses and trains;

(8) The growth of fanatical ideological movements which compass the destruction of Western civilisation and, in particular, Australia, or elements of it; and

(9) The archetypical examples of the combination of these factors, which include the events of 11 September 2001 (in the United States) and recent terrorist events in Bali, Madrid, London, Nairobi and Dar es Salaam, and Jakarta.

254 In light of these factors, the threat in the present case was said to come both from outside and from within Australia, from a force that may not be organised as a nation but certainly has cross-national operations. That force threatened violence and it had specifically mentioned Australia. To this extent, the suggested threat was said to be analogous to the types of activity that the

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293 See [2007] HCATrans 076 at 9075. See also at 8786-8814, 9808-9810. Cf reasons of Heydon J at [647]-[648].

defence of Australia has traditionally involved[294]. So conceived, the threat has both an external and potentially internal element. It is organised to some degree. It involves violence. All of these elements represented potential dangers to Australia's constitutional system which, in given circumstances, this country would be entitled to protect and defend itself from.

255 *The constitutional fact difficulty*: Although the "threat" to which Div 104 of the Code was said to respond might conceivably be characterised as the Commonwealth argued, the critical question remaining is whether, in the circumstances of the special case, sufficient constitutional facts were established to sustain the enactment of a federal law in the form of the Act on this basis. This was an issue repeatedly stressed by members of the Court during argument. In many respects, it arose because of the way in which the facts were stated by the agreement of the parties in the special case. Thus, the parties agreed on the following paragraph in relation to "Interpretation":

> "2. In this Special Case, unless otherwise expressly stated it is agreed by the parties that:
>
> (a) any statements stated in paragraphs 3 to 47 to have been made were made or were likely to have been made as stated or alleged but there is no agreement between the parties as to the truth of the matters stated; and
>
> (b) any documents referred to in paragraphs 3 to 47 were or were likely to have been published as stated or alleged but there is no agreement between the parties as to the truth of the matters contained in the documents."

256 Paragraphs 3 to 47 of the special case include background materials in relation to the plaintiff, the control order made in respect of him, the world security environment, material related to the reference of power, and sundry international materials. The disclaimer referred to in par 2 presents a substantial difficulty in isolating "agreed facts" that demonstrate the likelihood of an established threat being carried into effect. This is a technical point in the proceedings as they stand at this time; but it is a vital one. The special case is not an appeal. The facts have not been found. They are not recorded in a judicial decision reached in an earlier trial. They have not been re-determined by an intermediate court. The special case is an adjunct to proceedings involving the original jurisdiction of this Court. The parties (including the Commonwealth) have been content to invite this Court to decide important constitutional questions on the basis of agreed facts. However, when they are examined, those

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294 See also reasons of Hayne J at [411]-[422].

facts are not agreed to be true. They are only agreed as being asserted[295]. This is not the Court's fault. It represents nothing more than the state of the Court's record.

257 There is a further difficulty of giving weight to the findings made by Mowbray FM in his reasons for issuing the interim control order against the plaintiff. That difficulty arises from the one-sided nature of the information presented to the Federal Magistrate at that stage of proceedings. A like difficulty caused the Supreme Court of Canada, in *Charkaoui v Canada (Citizenship and Immigration)*[296], to hold unanimously that certain "certificates" of the Executive Government of Canada, forbidding entry of persons into Canada on security grounds, were constitutionally invalid. That Court pointed out that the arrangements for hearings in camera and ex parte and without the person whose liberty was affected (or that person's lawyer) having access to relevant evidence, meant that the subject of the order was not able to know the case he had to meet. The Court said[297]:

> "Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?"

258 In the present case, this Court has not been provided with a copy of the affidavit containing the information sworn by the second defendant that was reportedly annexed to the request seeking the interim control order in the first place[298]. That affidavit, presented both to the Attorney-General and to Mowbray FM, contained all of the information relied on by the second defendant in seeking the order. Moreover, the findings of Mowbray FM do not, of themselves, provide any constitutional facts for the purposes of determining the validity of Div 104. As agreed by all parties, the findings could not be given effect without first ascribing validity to all or part of Div 104. I would not challenge or doubt the agreement of the parties, all of whom were well represented. Nor would I impose on the facts the taxonomy of categories which Heydon J favours[299]. The anterior question of validity thus first remains to be answered.

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295 Contrast reasons of Callinan J at [520]-[553].

296 2007 SCC 9.

297 *Charkaoui* 2007 SCC 9 at [64].

298 Pursuant to the Code, s 104.2(3).

299 Reasons of Heydon J at [614], [629]-[639], [642].

259 In determining whether, in addition to any evidence presented by the parties, constitutional facts exist to call forth s 51(vi) to support Div 104, this Court may "inform [itself] by looking at materials that are the subject of judicial notice"[300]. That is, this Court may have regard to "matters of general public knowledge"[301]. While from such knowledge I am satisfied, in a general way, that a "threat" exists that might enliven s 51(vi) of the Constitution, I am not convinced that the actual provisions of Div 104 are appropriate and adapted (that is, proportionate) to meet this threat. Div 104, in my opinion, travels far beyond responding to such a threat. It intrudes seriously, and as I would find without any valid reference of the constitutional powers that would otherwise be applicable to such matters, upon the police powers of the States. It also intrudes upon areas of civil governance normally regulated under our Constitution by State law. It is the overreach of Div 104 that ensures that the Division is not supported by par (vi) of s 51.

260 In drawing this conclusion, I am confined to the constitutional facts presented to this Court. They illustrate, once again, the need for greater clarity in the way such facts may be derived by courts in constitutional adjudication[302]. Such facts have to be ascertained in the serious duty of resolving a constitutional challenge affecting the liberty of a litigant. They cannot be invented by courts out of thin air. In the original jurisdiction of this Court, unless facts or opinions are conceded, they have to be proved. Where their proof is necessary to support the validity of a federal law which is challenged, it is not unreasonable to expect that the Commonwealth will, in default of agreement, prove the necessary constitutional facts. The Commonwealth is the best-resourced litigant in the nation. It has access to lawyers of the highest talent. It has reason to uphold legislation, where it chooses to do so[303]. It is always supposed to act as a model litigant, in the tradition of the Crown. There has been some attention to this topic elsewhere[304]. This Court's approach to constitutional fact ascertainment in this

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300 *Stenhouse* (1944) 69 CLR 457 at 471.

301 *Stenhouse* (1944) 69 CLR 457 at 469 per Dixon J. See also *Breen* (1961) 106 CLR 406 at 411-412; *Queensland v The Commonwealth* (1989) 167 CLR 232 at 239; *Levy* (1997) 189 CLR 579 at 598-599; Kenny (1990) 1 *Public Law Review* 134 at 154.

302 cf reasons of Hayne J at [399]-[403], [508]-[510].

303 cf *Ruhani v Director of Police* (2005) 222 CLR 489 at 557-558 [222]-[225].

304 See Kenny (1990) 1 *Public Law Review* 134 at 162-165; Zines at 225-229.

case sits rather uncomfortably with the constitutional role that the Court is expected to perform[305] and with the practice of comparable courts[306].

261 Given the changing character of "war" and "defence" of the Commonwealth and the States in Australia and the contemporary threats and vulnerabilities that s 51(vi) may conceivably respond to, the deficiencies in the proof of the necessary facts leave a gap in these proceedings. In adversarial litigation the initiative to bridge that gap cannot come from the court. It is up to the parties to tender any evidence that they allege is relevant to the proper determination of the constitutional question in the case. If they fail to do this and cannot sufficiently invoke judicial notice (general knowledge) they must face the consequences[307]. Those consequences may include the failure to establish what might otherwise have been provable, namely the existence of threats to the polities of Australian government that render laws such as Div 104 of the Code necessary, appropriate and adapted (ie proportionate) to the provisions enacted by the Federal Parliament.

262 *The invalid overreach of Div 104*: The plaintiff submitted that the definition of "terrorist act" in s 100.1 of the Code extended beyond protection of the Australian polities as such to address protection of *sections* of the Australian public and the public of *foreign* countries and even sections of the public of such other countries, and property and electronic systems whether in Australia or not. There is force in this submission. Clearly, Div 104 is not directed exclusively towards the defence of the institutions of government of the Commonwealth and the States. It is designed to protect persons and property, both foreign and domestic. Whether such protection of persons and property is necessarily within, or incidental or proportionate to, the protection of the Australian units of government, as such, is not established in these proceedings by the evidence before this Court. It is not a matter upon which I would be prepared to guess or speculate or to rely on judicial notice which would necessarily be dependent on the sometimes coloured, emotional and disputable public media coverage of such issues.

263 It may be accepted that, in certain instances, "terrorist acts", as defined, could indeed threaten the bodies politic of the Commonwealth and the States, accepting that as the requisite criterion[308]. The Commonwealth argued that the

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305 Since *Marbury v Madison* 5 US 137 at 177 (1803) per Marshall CJ.

306 See Kenny (1990) 1 *Public Law Review* 134 at 163. See also at 137-149 for an analysis of the approach taken in the United States Supreme Court.

307 cf reasons of Heydon J at [620], [629]-[639].

308 cf *Re Aird* (2004) 220 CLR 308 at 327-328 [61] per Gummow J.

object of "terrorist acts" against the public, individuals and their property, was for the ultimate purpose of attacking and destroying the polity[309]. According to this argument, targeting innocent civilians was intended to reduce popular support for the government, to create instability amongst the political parties, to threaten the economic sustainability of the country and, ultimately, to force the government either to change its policies or be overthrown. Depending on the evidence or matters proper to judicial notice, that might sometimes be the case. Nevertheless, Div 104 is not a properly calibrated law, drafted with the essential constitutional limitation provided by s 51(vi) in mind. Doubtless this was because, as drafted, Div 104 was expected to draw its constitutional validity from a referral of State powers – an attempt which was ventured but, as I would hold, has failed.

264 As drafted, Div 104 proceeds outside the proper concerns of s 51(vi) and into areas of ordinary civil government. The plaintiff was correct to say that, if the Constitution were intended to empower the Commonwealth to make laws for the general safety and protection of the Australian public, irrespective of the source of danger and its targets, it could readily have said so. These being within the essential "police powers" of the States, the rubric of "naval and military defence" is a singularly inapt expression to use to attribute such powers to the Commonwealth.

265 Numerous examples spring to mind that fall within the statutory definition of a "terrorist act" but which demonstrate the overreach of Div 104 in this respect. Any number of actions that have hitherto been lawful and would be regarded as non-terroristic might be done with the intention of "intimidating the public or a section of the public". Moreover, drawing a line between acts designed to coerce or intimidate an Australian government for a political, religious or ideological cause (thus falling within the definition) and pure advocacy, protest, dissent or industrial action (falling outside of the definition) could be difficult[310]. In the latter case, such acts nevertheless remain "terrorist

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309 cf *Dennis v United States* 341 US 494 at 587-588 (1951) per Douglas J (diss).

310 In this respect, see Windeyer Opinion, Hope Review at 291-292 [31]-[32] and also Hope Review at 310-313. It is significant that the causes of politically motivated violence and vandalism in Australia identified for the period 1963-1977 included "anti war/conscription", "anti apartheid", "anti uranium/environment" and "aboriginal rights", all legitimate subjects of lawful protest and demonstration. I agree with the difficulty, noted by Hayne J, arising in distinguishing acts of violence that are performed to advance particular motivations: see reasons of Hayne J at [442].

acts" if they are intended to "endanger the life of a person" or "create a serious risk to the health or safety of the public or a section of the public"[311].

266 It follows that the plaintiff was correct in saying that the scope of Div 104 is far broader than the preservation of the constitutional structure and the institutions of government, or the maintenance and execution of the laws of the Commonwealth. As drafted, Div 104 is a law with respect to political, religious or ideological violence of whatever kind. Potentially, it is most extensive in its application. Even reading the Division down to confine it to its Australian application, it could arguably operate to enable control orders to be issued for the prevention of some attacks against abortion providers, attacks on controversial building developments, and attacks against members of particular ethnic groups or against the interests of foreign governments in Australia. In the past, Australia, like other, similar countries, has seen attacks of all of these kinds. All of them are potentially the proper matter of laws. However, under the Constitution they are laws on subjects for which the States, and not the Commonwealth, are responsible except, relevantly, where the specific interests of the Commonwealth or the execution and maintenance of federal laws are involved. Division 104 exhibits a seriously over-inclusive operation. It does not purport to be a law with respect to the interests of the Commonwealth or for the execution or maintenance of federal laws, or about the maintenance of the nation's system of government. Division 104 is a federal law with respect to a far wider and more general subject. It is one with large consequences for individual liberty. It therefore attracts strict scrutiny from this Court.

267 To uphold the strictly limited internal deployment and engagement of the defence power in Australia (which historically dates back to the constitutional memories of the military rule of Cromwell), this Court should reject the Commonwealth's emotive arguments. It should adhere to long-established and textually reinforced notions obliging the containment of the defence power. There is no reason to conclude that the deployment of State police power is insufficient. If federal direction is required, it can, subject to the Constitution, be lawfully secured by a valid reference of such powers by the State Parliaments.

268 *Conclusion: outside defence power*: For these reasons, Div 104 of the Code is not supported by either aspect of s 51(vi) nor by the implied nationhood power. In so far as the Commonwealth relied on those heads of power, its arguments should be rejected. On such constitutional facts as have been proved and such general knowledge as the Court can properly rely on, the invocation of s 51(vi) is not sustained.

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311 The Code, s 100.1. See also Rose and Nestorovska (2007) 31 *Criminal Law Journal* 20 at 25-27.

The external affairs power

269 *Propounded elements of the power*: The Commonwealth next submitted that Div 104 was supported by the external affairs power in s 51(xxix) of the Constitution. That submission was advanced on the bases that Div 104 of the Code:

(1) Implements a treaty obligation;

(2) Affects Australia's relations with other countries;

(3) Deals with the broader subject of "terrorism", which is a matter of international concern; and

(4) Is supported, in part, by the geographic externality principle.

270 *Treaty obligation: Security Council Resolution 1373*: The Commonwealth's principal submission in relation to s 51(xxix) was that Div 104 implemented a binding treaty obligation. Relying on the authority of the Court[312], it argued that there was an obligation of "sufficient specificity" contained in United Nations Security Council Resolution 1373 ("Resolution 1373"), to which Div 104 gave effect so as to bind Australia and to support federal laws enacted to give effect to that obligation.

271 The Charter of the United Nations[313] ("the Charter"), signed on 26 June 1945, established the Security Council as the body within the United Nations Organisation ("the UN") with "primary responsibility for the maintenance of international peace and security"[314]. By virtue of Art 25 of the Charter, Member States of the UN "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter"[315]. Australia is such a Member State.

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312 *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1; *Richardson* (1988) 164 CLR 261; *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416.

313 The Charter was signed on 26 June 1945. It entered into force generally on 24 October 1945 and for Australia on 1 November 1945: [1945] ATS 1. See also *Charter of the United Nations Act* 1945 (Cth), s 5.

314 Charter, Art 24(1).

315 See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ 16 at 53-54 [116]; *Prosecutor v Tadic (Jurisdiction)* (1995) 105 ILR 419 at 467 [31].

272 As the institution with primary responsibility for the maintenance of international peace and security[316], the Security Council has extremely broad powers[317]. Thus, Ch VII of the Charter permits the Security Council to take collective measures, including the use of force, in response to threats to or breaches of the peace. By virtue of Art 103 of the Charter, decisions made by the Security Council, including any obligations imposed by it, prevail over inconsistent treaty obligations otherwise owed by States under international law[318].

273 On 28 September 2001, the Security Council unanimously adopted Resolution 1373. That Resolution constituted a response to the attacks in the United States on 11 September 2001, including in New York, the seat of the UN itself. The preambular clauses to the Resolution reflect the strong disapproval of the attacks and the felt need to take steps to combat terrorism:

> "*The Security Council*,
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> ...
>
> *Reaffirming* ... its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, DC and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

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316 Charter, Art 24(1); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Jurisdiction and Admissibility*, Judgment, [1984] ICJ 392 at 431-432 [89], 434-435 [95].

317 See particularly the Charter, Arts 39-43; *Tadic* (1995) 105 ILR 419 at 465-468 [28]-[32].

318 Article 103 states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." See also Vienna Convention on the Law of Treaties, Art 30(1), which entered into force for Australia and generally on 27 January 1980: [1974] ATS 2; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Provisional Measures, Order of 14 April 1992, [1992] ICJ 3 at 126 [42]; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)*, Preliminary Objections, Judgment, [1998] ICJ 115 at 140; *Nicaragua* [1984] ICJ 392 at 440 [107].

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

…

Acting under Chapter VII of the Charter of the United Nations".

274 The first paragraph of Resolution 1373 deals with the financing of terrorist acts. It requires States to adopt a number of measures in this respect. The Commonwealth's submission relied principally on the second paragraph, specifically par 2(b). To understand par 2(b), it is necessary to recite the paragraph in full:

"2. *Decides also* that all States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing

> counterfeiting, forgery or fraudulent use of identity papers and travel documents".

275 It is par 2(b), which requires States to "[t]ake the necessary steps to prevent the commission of terrorist acts"[319], that is said to impose the relevant obligation attracting the external affairs power in the Constitution to support Div 104[320] of the Act. If this is correct, it will remain necessary to consider whether Div 104 is appropriate and adapted (proportionate) to implement this international treaty obligation so as to be supported by s 51(xxix). However, before considering this question, several observations should first be made about Resolution 1373 itself.

276 The process within the Security Council that led to the adoption of Resolution 1373 has been described, in uncontroversial terms, as follows[321]:

> "Soon after the terrorist attacks of 11 September 2001, the Security Council exercised its enforcement powers under Chapter VII of the UN Charter to compel all States to adopt wide-ranging counter-terrorism measures. Yet, terrorism was not defined in resolutions after 11 September, nor were lists of terrorists established. The lack of definition was deliberate, since consensus on key Resolution 1373 depended on avoiding definition."

Not only is the phrase "necessary steps to prevent the commission of terrorist acts" in par 2(b) of Resolution 1373 extremely broad. The phrase is contained within a Resolution that itself contains no definition of "terrorism"[322].

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319 In *McCulloch v Maryland* 17 US 316 at 415 (1819), Marshall CJ discussed the meaning of "necessary" in a constitutional context, indicating that one such synonym was "conducive". See generally at 413-416.

320 The paragraph continues "including by provision of early warning to other States by exchange of information". As submitted by the plaintiff, only six of the thirteen treaties identified by the Commonwealth as relating to terrorism make any reference to an obligation to "prevent" terrorism. None of these treaties extend the suggested obligation any further than Resolution 1373.

321 Saul at 48 (citations omitted).

322 See also Young (2006) 29 *Boston College International and Comparative Law Review* 23 at 43-44.

277 In October 2004, Security Council Resolution 1566 ("Resolution 1566") recalled that the following acts are "under no circumstances justifiable"[323]:

> "[C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism".

278 Although not expressly framed as a definition of "terrorism", Resolution 1566 represents one of many efforts of the international community to define acts constituting "terrorism". The efforts have not as yet produced an internationally agreed definition. Nevertheless, the definition of "terrorist act", within Div 104 of the Code, is clearly broader than that apparently mandated by the Security Council either in Resolution 1373 or Resolution 1566[324].

279 Resolution 1373 established a Counter-Terrorism Committee ("CTC") to monitor State compliance with its terms[325]. By par 8 of the Resolution, the Security Council expressed "its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter". Resolution 1373 called upon Member States to report to the CTC on the steps taken by them to implement the Resolution[326]. According to Dr Ben Saul, a study of State reports to the CTC indicates wide divergences in the responses to the Resolution[327]:

> "Analysis of State reports reveals three main patterns in national criminal responses to terrorism: 87 States lack special terrorism offences and hence use ordinary offences; 46 States have *simple generic* terrorism offences; and 48 States have *composite generic* terrorism offences."

280 Dr Saul notes that, of those States that have "composite generic terrorism offences", Australia is one of few States that "define terrorism as violence for a

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323 See Resolution 1566, par 3; Saul at 247; Young (2006) 29 *Boston College International and Comparative Law Review* 23 at 45-46.

324 See Saul at 247-248.

325 Resolution 1373, par 6. See also Saul at 236-238.

326 Resolution 1373, par 6.

327 Saul at 264 (citation omitted, original emphasis).

political or other motive, aiming to (a) coerce a government or international organization, or (b) intimidate a population or civilians"[328]. The other States in this category were said to be Belize, Canada, Pakistan, the United Kingdom (investigative powers only), and New Zealand (emergency powers only)[329]. Dr Saul also notes that 86 States "prosecute terrorism as ordinary crime, without any special terrorism offences"[330].

281 Various restrictions on compliance with resolutions of the Security Council need to be noted. While the Security Council's powers are broad, the Charter is itself authority for the proposition that the Security Council is not exempt from international law. Relevantly, the Council's decisions must comply with the Purposes and Principles of the UN[331]. These include the requirement to maintain international peace and security "in conformity with the principles of justice and international law"[332] and the need to ensure "respect for human rights and for fundamental freedoms"[333]. This qualification to the Security Council's powers is reinforced by the text of Art 25 of the Charter. By that Article, Member States agree to carry out *only* those decisions of the Security Council made "in accordance with the present Charter".

282 *Does Div 104 implement a treaty obligation?*: Resolutions adopted by the Security Council may undoubtedly contain obligations binding on Member States, such as Australia. By virtue of Art 103 of the Charter, they assume a higher status than most other obligations owed under international law[334]. Through its enactment under Ch VII of the Charter, and its use of mandatory language in pars 1, 2, 5, 6 and 9, Resolution 1373 was one such resolution. Clearly, it is binding on Australia as a party to the Charter but subject always, within Australia, to any relevant limitations or restrictions of the Australian Constitution[335].

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328 Saul at 267-268.

329 See Saul at 268 fn 626.

330 Saul at 264.

331 Charter, Art 24(2).

332 Charter, Art 1(1).

333 Charter, Art 1(3).

334 See above at [272].

335 *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582-583; *Charter of the United Nations Act* 1945 (Cth), s 5.

283 For the purposes of s 51(xxix) of the Constitution, under which Div 104 may be deemed a valid law of the Federal Parliament if it properly implements an obligation owed by Australia under international law, it is obviously necessary to keep in mind that "it is a *constitution* we are expounding"[336]. Nevertheless, the intended obligation must be characterised as one possessing "sufficient specificity" so as to attract a relevant head of the municipal legislative power[337].

284 The words relied upon in Resolution 1373 fail the "specificity" requirement previously explained by this Court[338]. It may be conceded that "[i]nternational agreements are commonly 'not expressed with the precision of formal domestic documents as in English law'"[339]. Yet where, as here, the supposed obligation is "stated in general and sweeping terms" and a large number of means "might be adopted to give it effect"[340], it is doubtful that it can support specific legislation enacted by the Federal Parliament as a treaty obligation by virtue of s 51(xxix). That paragraph does not afford the Federal Parliament a plenary power over the subject-matter of a treaty to which Australia is a party[341]. Professor Zines explains, in terms that I would endorse[342]:

> "Accepting ... that the agreement by nations to take common action in pursuit of a common objective amounts to a matter of external affairs, the objective must, nonetheless, be one in relation to which *common* action can be taken. Admittedly, this raises questions of degree; but a broad objective with little precise content and permitting widely divergent policies by parties does not meet the description." (emphasis in original)

285 These words, written primarily by reference to the obligations derived from a treaty on a given subject-matter, normally drafted with a degree of precision over an extended time and subject to formal provisions of signature and

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336 *McCulloch* 17 US 316 at 407 (1819) per Marshall CJ (original emphasis).

337 *Industrial Relations Act Case* (1996) 187 CLR 416 at 486.

338 See eg *Industrial Relations Act Case* (1996) 187 CLR 416 at 486.

339 See *The Tasmanian Dam Case* (1983) 158 CLR 1 at 261, citing Wynes, *Legislative, Executive and Judicial Powers in Australia*, 5th ed (1976) at 299. See also Zines at 288-289.

340 Zines at 291. See also *Industrial Relations Act Case* (1996) 187 CLR 416 at 486.

341 *Industrial Relations Act Case* (1996) 187 CLR 416 at 486-487; Zines at 291.

342 Zines at 291, cited in *Industrial Relations Act Case* (1996) 187 CLR 416 at 486.

ratification, apply with even greater force in the case of a resolution, even one of the Security Council, which (as here) lacks the features of specificity, particularity, definitions and express obligations such as are common in most treaties. The requirement to "[t]ake the necessary steps to prevent the commission of terrorist acts", arising out of Resolution 1373 and Art 25 of the Charter, is a phrase of almost limitless reach. It provides no guidance for this Court to "ascertain whether [Div 104] is [a law] giving effect to it"[343]. The requirement does not provide a specific constitutional basis for the Commonwealth to pursue any goal that it might regard as preventative[344]. As Dixon J observed in *R v Burgess; Ex parte Henry*[345]:

> "[U]nder colour of carrying out an external obligation the Commonwealth cannot undertake the general regulation of the subject matter to which it relates."

286 The response of different countries to Resolution 1373, together with the reports made by Australia to the CTC, are proof of the variety of possible reactions by Member States to the "obligations" imposed by that Resolution[346]. In enacting Div 104 of the Code, there was no indication to, or by, the Federal Parliament that the Division or the Act was purporting to implement obligations said to derive from Resolution 1373[347].

287 The conclusion that the words in par 2(b) of Resolution 1373 are insufficiently specific to support the validity of Div 104 is reinforced by the fact that other operative provisions of the Resolution expressly require States to criminalise specific conduct under domestic law[348]. Indeed, Resolution 1373 has

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343 Zines at 291.

344 See Zines at 292.

345 (1936) 55 CLR 608 at 674-675. See also Australian Law Reform Commission, *Review of Sedition Laws*, Discussion Paper No 71, (2006) at 84-85 [5.8]-[5.11].

346 Note the reports of the Permanent Australian Mission to the United Nations, annexed to: S/2001/1247; S/2002/776; S/2003/513; S/2003/1204; S/2005/90; S/2005/671. The last of these reports was submitted in October 2005, before the enactment of Div 104.

347 cf *Richardson* (1988) 164 CLR 261 at 326; *Industrial Relations Act Case* (1996) 187 CLR 416 at 487.

348 Resolution 1373, pars 1(b), 2(e).

been interpreted by the General Assembly as being principally concerned with the "criminalisation" of nominated terrorist acts[349].

288 In its submissions on this aspect of its argument, the Commonwealth referred to a decision of Brooke LJ in *R (Al-Jedda) v Secretary of State for Defence*[350]. The decision was cited as authority for the proposition that, in certain instances, by virtue of Art 103 of the Charter, Security Council obligations might prevail over the observance of fundamental human rights. The case concerned the internment of Mr Al-Jedda, a person of dual British and Iraqi nationality, initiated by British forces operating in Iraq. Brooke LJ held that Mr Al-Jedda's right to due process under Art 5(1) of the European Convention on Human Rights was qualified by Security Council Resolution 1546 (2004) ("Resolution 1546"). The decision was mainly addressed to questions not relevant in these proceedings, namely, the application of the European Convention on Human Rights in the context of Resolution 1546. It contains some observations which I would respectfully doubt, to the effect that, in given cases, resolutions of the Security Council may override the requirements of international human rights law to which the Charter arguably subjects such resolutions. In any case, the decision concluded that a specific provision in Resolution 1546, relied on by the United Kingdom Government, had "qualified" the usual requirement for "due process" before a person's "important right to liberty" is removed (or intentionally diminished)[351].

289 In Resolution 1373 and other resolutions contained in the materials annexed to the special case, the Security Council has not expressly sanctioned the elements of Div 104 so far as they may contravene established principles of international law[352]. The reasons of Brooke LJ do not therefore assist in the resolution of the Australian constitutional question now before this Court.

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349 See General Assembly Resolution A/Res/60/43 (6 January 2006), par 10: "*Urges* all States that have not yet done so to consider, as a matter of priority, and in accordance with Security Council resolutions 1373 (2001), and 1566 (2004) of 8 October 2004, becoming parties to the relevant conventions and protocols ... and calls upon all States to enact, as appropriate, the domestic legislation necessary to implement the provisions of those conventions and protocols, to ensure that the jurisdiction of their courts enables them to bring to trial the perpetrators of terrorist acts, and to cooperate with and provide support and assistance to other States and relevant international and regional organizations to that end".

350 [2006] 3 WLR 954 (CA). See at 974-982 [55]-[87].

351 See [2006] 3 WLR 954 at 980-981 [80], 982 [86]-[87].

352 See further below at [379]-[382].

290 It follows that reliance on Resolution 1373 to support the constitutional validity of Div 104 of the Code under s 51(xxix) fails. Paragraph 2(b) of Resolution 1373 did not amount to an obligation of sufficient specificity, such as might sustain the validity of Div 104 based on s 51(xxix) of the Constitution. Consequently, it is unnecessary to consider whether Div 104 was appropriate and adapted (proportionate) to par 2(b). However, in my view, the Commonwealth would have faced serious difficulties in establishing constitutional proportionality having regard to the considerations identified above that would be relevant to that question.

291 *Other limbs of s 51(xxix) do not support Div 104*: The Commonwealth acknowledged that the geographic externality aspect of the external affairs power, in so far as it applies, would, if proved, only uphold particular aspects of Div 104. The relevant provisions would be those involving control orders aimed at preventing a terrorist attack done to the public, or directed at the public, *outside* Australia. Given that the geographic externality principle, to the extent that it exists[353], would not sustain the whole (or most) of the Act, I will not consider it in this case. Self-evidently, the provisions of Div 104 of the Code addressed to conduct outside Australia were not intended to operate separately from the remaining provisions addressed to internal activities. Separate consideration of that issue is therefore unjustified.

292 The Commonwealth argued, however, that the Act was supported by the recognised attribute of s 51(xxix) of the Constitution concerning matters that affect Australia's relations with other countries. Whilst I do not doubt that "terrorism" is a matter of concern to the community of nations, I do not accept that declaring Div 104 invalid, if that result were otherwise required, would affect Australia's international relations. Courts in other countries have considered, or are considering, questions similar to those raised in these proceedings. Those courts have not refrained from declaring invalid laws that purport to deal with "terrorism" where such laws are found to offend municipal constitutional requirements[354]. Neither should this Court. This conclusion is reinforced by the divergence already described in international State practice in response to Resolution 1373 and to terrorism generally.

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353 cf *XYZ v Commonwealth* (2006) 80 ALJR 1036 at 1062 [117], 1076-1082 [180]-[206]; 227 ALR 495 at 527, 546-554.

354 See, for example, *M v Secretary of State for the Home Department* [2004] 2 All ER 863; *A v Secretary of State for the Home Department* [2005] 2 AC 68; *Secretary of State for the Home Department v JJ* [2006] EWHC 1623 (Admin); [2006] 3 WLR 866 (CA); *Khawaja* (2006) 42 CR (6th) 348 at 387 [87]; *Charkaoui* 2007 SCC 9; *Rasul v Bush* 542 US 466 (2004); *Hamdan v Rumsfeld* 165 L Ed 2d 723 (2006); *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893.

293 The doctrine of "international concern" was not specifically argued as a basis for the validity of the Act under s 51(xxix) of the Constitution. The Commonwealth indicated that there was no reason to rely on that limb in this case given that its arguments would sustain reliance of s 51(xxix) on other aspects of that power. However, in the event that the doctrine of international concern would independently sustain Div 104, the Commonwealth invoked the same reasons proffered in respect of the limb concerning Australia's relations with other countries. For the reasons that I have already advanced, it is unnecessary for me to consider the operation of the doctrine of international concern[355]. It lends no additional, specific support to the constitutionality of Div 104.

294 *Conclusion: external affairs power unavailing*: The invocation of the external affairs power to support the impugned law should also be rejected.

General conclusion: Div 104 of the Code lacks constitutional support

295 The result of the foregoing analysis is that each of the constitutional sources nominated by the Commonwealth to sustain the validity of Div 104 of the Code fails. The reference power might, subject to what follows in relation to Ch III of the Constitution, have afforded a valid source of constitutional power to the Federal Parliament. However, in the circumstances, by the way in which the reference of power was attempted, the insertion of Div 104 did not fall within the relevant power to make express amendments to the terrorism legislation, as defined in the Referring Act. There was no further referral of power from the State Parliament concerned. Significantly, that State did not intervene in this Court to argue the contrary.

296 Subject to what follows, the defence power might indeed have sustained a federal counter-terrorism law of a particular kind. However, the provisions of Div 104 were not drafted in a way appropriate and adapted to the preservation and defence of the Commonwealth and State *polities*, as required by the terms in which that constitutional power is expressed. Division 104 extends beyond the ambit of the defence power into matters concerned with police powers. In default of a valid referral or express amendment of the Constitution, those powers remain generally the subject-matter of diverse State, not federal, laws. As well, the constitutional facts to invoke the defence power were not established in this case by the agreement of the parties recorded in the special case. Nor were they otherwise proved by evidence adduced by the Commonwealth or established by judicial notice. For analogous reasons, the implied nationhood power fails to provide a valid source of legislative power to enact Div 104. The

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355 cf *XYZ v Commonwealth* (2006) 80 ALJR 1036; 227 ALR 495.

external affairs power will not do the necessary constitutional work, principally for lack of specificity in the propounded sources.

297 The result is that the Division fails in its entirety for the lack of an established head of constitutional power to support its enactment by the Federal Parliament. That conclusion is consistent, in the context of this new legislation, with the approach and conclusion of the majority of the Court in the *Communist Party Case*, where similar heads of power and like arguments were deployed, without success[356]. The applicable question in the special case should thus be answered in favour of the plaintiff. It is fatal, without more, to the validity of the interim control order which the plaintiff challenges.

JUDICIAL POWER: NON-JUDICIAL FUNCTIONS

Non-judicial functions cannot be exercised by Ch III courts

298 *The first judicial power issue*: The foregoing conclusion is a minority one. However, as the case is unquestionably important, it is proper that I should express my opinion on the remaining two issues that arise out of the plaintiff's arguments based on the requirements of Ch III of the Constitution.

299 What follows assumes, contrary to the conclusions that I have expressed on the first issue, that on one or more of the propounded bases, Div 104 was made within federal legislative power. Such power remains "subject to [the] Constitution", including Ch III. Does the Division conform to the provisions and requirements of that Chapter? First, is it an impermissible attempt to confer non-judicial functions on a federal court?

300 *The governing principle*: In arguing his first contention based on Ch III of the Constitution, the plaintiff relied on the second limb of the constitutional principle stated by this Court in *R v Kirby; Ex parte Boilermakers' Society of Australia* ("*Boilermakers*")[357]:

> "Chap[ter] III does not allow a combination with judicial power of functions which are not ancillary or incidental to its exercise but are foreign to it."[358]

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356 Douglas, "Cold War Justice? Judicial Responses to Communists and Communism, 1945-1955", (2007) 29 *Sydney Law Review* 43 at 55-57.

357 (1956) 94 CLR 254 at 296 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

358 The following passage from the United States Supreme Court decision in *Muskrat v United States* 219 US 346 at 355 (1911) was cited with approval: "The

(Footnote continues on next page)

301 The ruling, encapsulated in the foregoing principle, was a long time in gestation. It was pronounced over three strong dissenting opinions in this Court[359]. The principle was adopted despite an acknowledgment of "the very evident desirability of leaving undisturbed assumptions that [had] been accepted as to the validity"[360] of the powers hitherto exercised by the Commonwealth Court of Conciliation and Arbitration. This Court emphasised that convenience, history and common assumptions could not relieve it "of its duty of proceeding according to law in giving effect to the Constitution which it is bound to enforce"[361]. The applicable principle was ultimately based on a view as to the separation of the judicial power to which the Constitution gives effect[362].

302 On appeal to the Privy Council, the principle stated in *Boilermakers* was unequivocally endorsed. Their Lordships explained[363]:

> "[I]n a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard."

303 Whatever doubts have existed[364], and may persist, about the limits of this rule, its central idea is part of the settled doctrine of this Court[365]. There are

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power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other." See at 292 where the joint reasons stated that "the judicature of the Commonwealth should stand in the same position".

359 See Wheeler, "The *Boilermakers* Case", in Lee and Winterton 160 at 160-161, 163, 166-169.

360 *Boilermakers* (1956) 94 CLR 254 at 295.

361 *Boilermakers* (1956) 94 CLR 254 at 295.

362 Constitution, ss 1, 61, 71. See *Boilermakers* (1956) 94 CLR 254 at 275-276.

363 *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 540-541; [1957] AC 288 at 315.

364 See the separate dissenting reasons of Williams, Webb and Taylor JJ in *Boilermakers* (1956) 94 CLR 254 at 301-302, 306, 314-315, 317, 325-327, 329, 333, 337-343. See also *R v Joske; Ex parte Australian Building Construction Employees & Builders' Labourers' Federation* (1974) 130 CLR 87 at 90 per Barwick CJ; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 113 [52].

365 *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 81 ALJR 1155 at 1166-1167 [59]-[63]; 234 ALR 618 at 631-632.

recognised qualifications. The rule is necessarily indeterminate to some extent, given the difficulty of affording a precise content to the judicial power of the Commonwealth in particular cases[366]. The exclusivity of federal judicial power, and its separation from executive and legislative power, is also obscured by the so-called "chameleon doctrine". These difficulties arise in the instant case. However, no party to these proceedings challenged the principle expressed in *Boilermakers*[367]. It is the duty of this Court to apply the doctrine and to characterise Div 104 so as to determine whether it confers power that is neither part of "the judicial power of the Commonwealth" nor ancillary or incidental to that power[368]. If it does, the law is, to that extent, constitutionally invalid. In addition, even if Div 104 properly confers "judicial power", the Court must determine whether the incidents of the power, so conferred, are otherwise incompatible with Ch III. This is the second contention based on Ch III of the Constitution.

304 *The nature of judicial power*: The starting point for consideration of the first Ch III issue is the oft-cited definition of "judicial power" expressed by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*[369]:

> "[T]he words 'judicial power' as used in s 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property."

305 As I observed in *White v Director of Military Prosecutions*[370], this formulation contains three primary elements. They are the existence of a controversy[371], concerning existing legal rights and duties[372], and a capacity to

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366 See *Breckler* (1999) 197 CLR 83 at 113-114 [53], 124-126 [78]-[81]. See also reasons of Hayne J at [464].

367 But see below at [339]-[344]; cf reasons of Hayne J at [472].

368 See *Breckler* (1999) 197 CLR 83 at 124-125 [78].

369 (1909) 8 CLR 330 at 357.

370 [2007] HCA 29 at [118].

371 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 267.

372 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 442-443, 464; cf *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141.

reach a conclusive determination about such rights and duties[373]. I agree with Hayne J that the "notion of 'arbitrament upon a question as to whether a right or obligation in law exists' lay at the centre of the conception that was described" by Griffith CJ[374].

306 The definition of Griffith CJ in *Huddart Parker* is not an exhaustive one. Judicial power has been described as an "amorphous" notion[375]. In *Brandy v Human Rights and Equal Opportunity Commission*, four members of this Court explained[376]:

> "Difficulty arises in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic. Moreover, there are functions which, when performed by a court, constitute the exercise of judicial power but, when performed by some other body, do not[377]. ... One is tempted to say that, in the end, judicial power is the power exercised by courts and can only be defined by reference to what courts do and the way in which they do it, rather than by recourse to any other classification of functions. But that would be to place reliance upon the elements of history and policy which, whilst they are legitimate considerations, cannot be conclusive.
>
> ... Another important element which distinguishes a judicial decision is that it determines existing rights and duties and does so according to law. That is to say, it does so by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative discretion."

307 Despite the difficulty, sometimes, of identifying with precision the features and limitations of the judicial power, there can be no doubt that the

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373 *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530 at 543; [1931] AC 275 at 296; *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 198-199.

374 Reasons of Hayne J at [465]-[466], citing *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 per Kitto J.

375 *Tasmanian Breweries* (1970) 123 CLR 361 at 396.

376 (1995) 183 CLR 245 at 267-268. See also *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189.

377 See *R v Davison* (1954) 90 CLR 353 at 368.

doctrine requires its separation, once identified, from other governmental powers and, as well, its deployment in federal cases only by courts as envisaged by the Constitution. Such separation serves vital constitutional purposes. They are purposes protective of liberty and defensive of the right to have important decisions decided, and decided only, by courts acting in court-like ways[378].

308 With these considerations in mind, I turn to the functions purportedly conferred on federal courts by Div 104 of the Code.

309 *The power to be exercised under Div 104*: As already described, s 104.4 states the functions of the issuing court in making an *interim* control order[379]. No new criterion is to be applied by the court when extending or confirming the order[380]. Section 104.4 thus supplies the substantive content of the power to be exercised at all stages during the life of the order. Pursuant to s 104.4(1)(d), federal courts are asked ultimately to determine:

> "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*" (emphasis added).

310 Before determining this question, the federal court concerned must be satisfied, also on the balance of probabilities, that: (1) the making of the order would substantially assist in preventing a terrorist act[381]; *or* (2) the person (proposed to be subject to the order) has provided training to, or received training from, a listed terrorist organisation[382]. These are alternative requirements. For an interim order to be made, it is sufficient that the court is satisfied (1) that it would substantially assist in preventing a terrorist act (s 104.4(1)(c)(i)); *and* (2) that the measures imposed are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act (s 104.4(1)(d)). In determining that those conditions exist for such an order to be granted, the issuing court is not required to direct attention to the person to be subject to the order. Section 104.4 does not require an individual subject to a control order to have been "trained by terrorists"[383]. The court must merely be

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378 *Albarran* (2007) 81 ALJR 1155 at 1173-1174 [98]-[99]; 234 ALR 618 at 641.

379 Above, these reasons at [171]-[175]; reasons of Gummow and Crennan JJ at [62].

380 The Code, s 104.14(7); reasons of Hayne J at [479], [480].

381 The Code, s 104.4(1)(c)(i).

382 The Code, s 104.4(1)(c)(ii).

383 cf reasons of Gleeson CJ at [28].

satisfied that each aspect of the order is reasonably necessary to protect the public.

311 As in the facts in this case, an issue may arise about the particular form of training with which s 104.4(1)(c)(ii) is concerned[384]. There is also a serious question as to whether s 104.4(1)(c)(ii) speaks of training with an organisation that is listed as a terrorist organisation at the time in which the training is said to have taken place[385]. It is unnecessary to decide these questions. Concerning the plaintiff, Mowbray FM arguably based his ultimate decision on the footing that the order would "substantially assist in preventing a terrorist act"[386]. Although it was asserted that the involvement of the plaintiff in training with Al Qa'ida was one of the grounds on which the interim control order was made[387], this is not an established fact. In any event, the plaintiff's challenge is to the validity of Div 104. If the Division is invalid, it necessarily follows that the order made by Mowbray FM is invalid.

312 *Is there an ascertainable judicial standard?*: By virtue of s 104.4(1)(d) of the Code, the Federal Parliament has given to the judiciary the task of determining what is reasonably necessary for the protection of the public from what is inferentially held to be a threat to one or more of the polities of the Australian Commonwealth. In a context such as the present and with the stated consequences, there are serious problems with the standard so expressed.

313 The phrase "reasonably necessary, and reasonably appropriate and adapted" appears elsewhere in the federal statute book[388]. Thus, s 3ZQO(2)(b) of the *Crimes Act* 1914 (Cth) allows a Federal Magistrate to issue a notice requiring the production of documents where the Federal Magistrate is satisfied, on the balance of probabilities, that this is "reasonably necessary, and reasonably appropriate and adapted", for the purpose of investigating a serious offence.

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384 See generally Rose and Nestorovska (2007) 31 *Criminal Law Journal* 20 at 32-40, 44.

385 See reasons of Hayne J at [485]-[486].

386 See above at [178].

387 Reasons of Hayne J at [484].

388 Note also the use of "necessarily" and its interpretation in income tax legislation. See reasons of Hayne J at [490] and the reasons of Gleeson CJ in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 199-200 [39]. See also reasons of Gleeson CJ at [20]-[27].

314 The formulation is also used in s 4 of the *Quarantine Act* 1908 (Cth), which defines "quarantine". By s 4(2) of that Act, that definition is not intended to limit directions or actions arising from Ministerial authorisation or authorisation by the executive head of a national response agency that is "reasonably appropriate and adapted" either to "the control and eradication of the epidemic" or "to the removal of the danger of the epidemic". In that context, it is for the Minister, or a delegate of the Minister, first to determine what is "reasonably appropriate or adapted" to countering the epidemic or danger at hand.

315 Likewise, by s 90AE(3) of the *Family Law Act* 1975 (Cth), the Family Court's power to make orders under s 90AE(1) or (2) of that Act is limited, relevantly, to those orders that are "reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage".

316 However, leaving aside the difficulties inherent in the words "reasonably necessary"[389], and that most unlovely and opaque phrase "reasonably appropriate and adapted"[390], federal courts are asked by s 104.4(2) of the Code to perform an indeterminate balancing exercise. On the one hand, the courts are required to have regard to whether each obligation sought to be imposed is "reasonably necessary, and reasonably appropriate and adapted" for the purpose of protecting the public from a terrorist act. On the other hand, they 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)". At the same time, by legal principles binding on them, such courts are effectively required to choose measures that will cause the *least* incursion upon the civil liberties of the person who is to be subject to such an order[391].

317 Critically, the relevant federal court is asked to determine what is reasonably necessary *for the protection of the public*. This is not a court's normal function. Traditionally, it is a function performed by the executive or legislature by expressing, with greater precision, any norms or standards which the judiciary may later be asked to enforce, directed to that end. In the *Communist Party Case*[392], Kitto J explained:

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389 cf reasons of Gleeson CJ at [20]-[27].

390 cf *Coleman v Power* (2004) 220 CLR 1 at 90-91 [234]-[236]; *Mulholland* (2004) 220 CLR 181 at 266 [247].

391 cf *Polyukhovich* (1991) 172 CLR 501 at 592-593.

392 (1951) 83 CLR 1 at 272. See also reasons of Hayne J at [504]-[505].

> "This Court has always recognized that the Parliament and the Executive are equipped, as judges cannot be, to decide whether a measure will in practical result contribute to the defence of the country, and that such a question must of necessity be left to those organs of government to decide."

318 It is true that courts "must frequently apply vague and indeterminate criteria which involve imprecise conclusions, moral judgments, evaluative assessments and discretionary considerations"[393]. However, it is essential that such activities as are assigned to courts "are nonetheless proper to their functions as courts"[394].

319 In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*[395], in a constitutional context analogous to that presented by the present proceedings, Windeyer J explained why federal legislation, at least since *Boilermakers*, has, almost without exception, refrained from attempting to confer powers and discretions upon federal courts by reference solely to criteria as nebulous as "the public interest"[396]:

> "The public interest is a concept which attracts indefinite considerations of policy that are more appropriate to law-making than to adjudication according to existing law. The [Trade Practices] Act directs the Tribunal as to matters it is to 'take into account' in considering what the public interest requires. The generality of these matters prevents their providing objectively determinable criteria. In the result the jurisdiction of the Tribunal to make determinations and orders depending upon its view of where the public interest lies and what the public interest requires seems to be an exercise of a legislative or administrative function of government rather than of the judicial power."

320 Writing in the context of the United States Constitution, which in this respect bears comparison to our own, Professor Frederick Green, as long ago as 1920, explained the point succinctly[397]:

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393 *Breckler* (1999) 197 CLR 83 at 126 [83].

394 *Breckler* (1999) 197 CLR 83 at 126 [83].

395 (1970) 123 CLR 361.

396 (1970) 123 CLR 361 at 400, see also at 377; *Breckler* (1999) 197 CLR 83 at 126 [83]; *Cattanach v Melchior* (2003) 215 CLR 1 at 34-35 [75].

397 Green, "Separation of Governmental Powers", (1920) 29 *Yale Law Journal* 369 ("Green") at 378 (citations omitted, original emphasis), referred to in *Tasmanian Breweries* (1970) 123 CLR 361 at 402.

> "To grant a right because it is expedient to grant it is to make law. A statute which directs a court to grant a right upon proof that it *ought* to be granted is void as attempting to confer legislative power. A court cannot be empowered to incorporate a city upon finding that the city *ought* to be incorporated, or 'that the interests of the inhabitants will be promoted'; but may have power to create a drainage district on petition and proof that the drains will be useful. It may determine what location has been granted a street-railway and enter an order fixing it; but it is not within judicial power, as has been held, to determine what location, motive power and track will be the *proper* ones, and issue license to use them. Power to issue licenses to *fit* persons has generally been upheld. The principle is clear, but matters of fact and of expediency blend."

321 Bearing these considerations in mind, it is clear to me that, in its context, s 104.4 of the Code does not afford an ascertainable test or standard[398]. The unsuitability of the stated standard for judicial ascertainment is not remedied by s 104.4(1)(b). Under that provision, a court may only issue a control order if it has "received and considered such further information (if any) as [it] requires". This role also sits uncomfortably with the ordinary procedures followed in the adversarial system of justice observed in Australian courts. Although a federal court "might constitutionally be vested" with the power to make or review an order, such courts are not ordinarily required "to *collect* [the] evidence" that determines, at the outset, whether the order is to be either promulgated or reviewed[399].

322 I accept that considerations of the "public interest" or "public policy" are sometimes applied in legal, including judicial, contexts. However, such considerations can easily be distinguished from the judicial standard that federal courts are asked to exercise in giving effect to s 104.4(1)(d) and (2) of the Code[400]. The court in question here is not asked to take into account considerations of public policy. It is asked to determine what is necessary for

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398 See *R v Spicer; Ex parte Waterside Workers' Federation of Australia* (1957) 100 CLR 312 at 317; cf reasons of Hayne J at [502].

399 See Green (1920) 29 *Yale Law Journal* 369 at 382 (emphasis added).

400 See *Wilkinson v Osborne* (1915) 21 CLR 89 at 97; *A v Hayden* (1984) 156 CLR 532 at 571; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 257 [25]; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 602 [17]; *Cattanach v Melchior* (2003) 215 CLR 1 at 33-35 [73]-[75], 85 [232]-[233]; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 16 [31]-[32].

"protecting the public". This criterion is not merely one of the factors to be considered. It is the *only* factor. The role of determining what is "reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act", balanced against the individual rights of the person subjected to the order, is at odds with the normative function proper to federal courts under the Constitution. I agree with Hayne J that the stated criteria "would require the court to apply its own idiosyncratic notion as to what is just"[401]. The court would be required to make its decision without the benefit of a stated, pre-existing criterion of law afforded by the legislature. In the present context and with the consequences that follow, the stated criteria attempt to confer on federal judges powers and discretions that, in their nebulous generality, are unchecked and unguided. In matters affecting individual liberty, this is to condone a form of judicial tyranny alien to federal judicial office in this country. It is therefore invalid.

323 *The creation of rights and responsibilities*: In *Precision Data Holdings Ltd v Wills*[402], in unanimous reasons, this Court stated[403]:

> "[I]f the object of the adjudication is not to resolve a dispute about the existing rights and obligations of the parties by determining what those rights and obligations are but to determine what legal rights and obligations should be created, then the function stands outside the realm of judicial power."

324 This statement reflects one facet of the historical conception of "judicial power". It is concerned with *existing* legal rights and duties[404]. Put another way, it involves the process of determining whether a right or obligation *exists* in the

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401 See reasons of Hayne J at [516], citing the reasons of Gaudron J in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 231 [59].

402 (1991) 173 CLR 167.

403 (1991) 173 CLR 167 at 189 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. See also *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 666.

404 See *Huddart Parker* (1909) 8 CLR 330 at 357; *Tasmanian Breweries* (1970) 123 CLR 361 at 396-397. See also *United Engineering Workers' Union v Devanayagam* [1968] AC 356 at 384-385; *Prentis v Atlantic Coast Line* 211 US 210 at 226 (1908).

particular circumstances, not whether it *should* exist or should be judicially *imposed*[405]. I accept that[406]:

> "It is simply not the case that the creation of new rights and duties is necessarily outside the concept of judicial power ... The issue is rather when ... it is permissible to confer on courts functions of that nature."

325 So much was also acknowledged in another critical passage of this Court's reasons in *Precision Data*[407]:

> "The Parliament can, if it chooses, legislate with respect to rights and obligations by vesting jurisdiction in courts to make orders creating those rights or imposing those liabilities. ... This legislative technique and its consequences in terms of federal jurisdiction were discussed by Dixon J in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*[408]. Leaving aside problems that might arise *because of the subject-matter involved* or *because of some prescribed procedure not in keeping with the judicial process*, where a discretionary authority is conferred upon a court and the discretionary authority is to be exercised according to legal principle or by reference to an *objective standard or test prescribed by the legislature and not by reference to policy considerations or other matters not specified by the legislature*, it will be possible to conclude that the determination by the court gives effect to rights and obligations for which the statute provides and that the determination constitutes an exercise of judicial power."

326 *The absence of norms in Div 104*: The difficulty encountered when evaluating s 104.4 of the Code against the foregoing criteria is that it is not merely concerned with the prevention of "terrorist acts", in so far as they constitute criminal offences (including those offences arising under secondary forms of liability) of committing "terrorist acts" against the Code. The width of the term "terrorist act", as used in s 104.4, extends far beyond acts that would

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405 See *Tasmanian Breweries* (1970) 123 CLR 361 at 374 per Kitto J; reasons of Hayne J at [465].

406 Zines at 197, citing *Cominos v Cominos* (1972) 127 CLR 588 at 600 per Gibbs J; *Joske* (1976) 135 CLR 194 at 216 per Mason and Murphy JJ; *Boilermakers* (1956) 94 CLR 254; *Waterside Workers' Federation* (1918) 25 CLR 434.

407 (1991) 173 CLR 167 at 191 (emphasis added). See also *Tasmanian Breweries* (1970) 123 CLR 361 at 377; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 360.

408 (1945) 70 CLR 141 at 165 and following.

constitute existing criminal offences. It thus exceeds existing rights and obligations[409] under the Code. One cannot simply say that there is a legislative requirement that these rules be observed and that the court has jurisdiction to act on a complaint to enforce the rules[410]. Division 104 of the Code is thus not ancillary to a recognised or traditional judicial function.

327 Most critically, the "jurisdiction" of a federal court to issue an interim order arises only if "each of the obligations, prohibitions and restrictions to be imposed on the person … is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act". The "matter"[411] involved, and the "jurisdiction" conferred[412], are therefore intimately interconnected[413].

328 There are several difficulties in relying on *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*[414] to sustain the validity of the jurisdiction and power conferred by s 104.4 of the Code. First, to utilise the "trick" of drafting upheld in that case, the legislation must fall within "one of the subjects of the legislative power of the Federal Parliament"[415]. I have already explained my view that this requirement is not fulfilled in the present case. Yet even if that conclusion could be overcome, any conferral on a Ch III court of the power to "bring a new set of rights and obligations into existence" must be "'exercised according to legal principle or by reference to an objective standard or test prescribed by the legislature and not by reference to [unspecified] policy considerations'"[416].

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409 See *Peacock* (1943) 67 CLR 25 at 35, 54.

410 cf [2006] HCATrans 660 at 2983-2997.

411 Constitution, s 76(ii).

412 See Constitution, s 77(i); cf reasons of Hayne J at [473]-[474].

413 See *Barrett* (1945) 70 CLR 141 at 164-169 and esp at 167-169. Note also *Jacka v Lewis* (1944) 68 CLR 455.

414 (1945) 70 CLR 141.

415 *Barrett* (1945) 70 CLR 141 at 168. See also at 166.

416 *Dingjan* (1995) 183 CLR 323 at 360, quoting *Precision Data* (1991) 173 CLR 167 at 191, which referred to the discussion by Dixon J in *Barrett* (1945) 70 CLR 141 at 165 and following. See also reasons of Hayne J at [473]-[474].

329 Finally, the "subject matter and prescribed procedures" must be "consistent with the nature and functions of a court"[417]. The difficulties inherent in s 104.4, in so far as it fails to prescribe an ascertainable legal standard, have already been identified. The role of determining what is necessary for the protection of the public from a terrorist act, where that is the sole consideration, is atypical of the functions reposed in courts. There are also powerful reasons for rejecting the submission that the given powers are consistent with historical or contemporary judicial functions and procedures[418]. In this case it is therefore apparent that a combination of the subject-matter involved, together with the procedure employed, renders s 104.4 incompatible with the exercise of the judicial power of the Commonwealth[419].

Distinguishing analogies from history and other courts

330 *Historical considerations*: Much attention was directed during argument, and in the written submissions, to deciding whether functions analogous to those stated in Div 104 have historically been exercised by the courts so as to support their deployment here. In my opinion, all of the historical analogies cited by the Commonwealth and the intervening States to support Div 104 are distinguishable.

331 First, many of the examples nominated involve orders that are ancillary to other proceedings. That is, the orders are subsidiary to the determination of the existing rights and duties of parties in other litigation[420]. That is not this case.

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417 *Dingjan* (1995) 183 CLR 323 at 360, referring to *Precision Data* (1991) 173 CLR 167 at 191. See also *Davison* (1954) 90 CLR 353 at 369-370; *Harris v Caladine* (1991) 172 CLR 84 at 150.

418 See below at [330]-[338]. It is noted that the proceedings under s 58E of the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) with which *Barrett* was concerned were inter partes.

419 cf reasons of Hayne J at [503]-[512].

420 See, for example, *Family Law Act* 1975 (Cth), s 114 (which empowers federal courts to make orders or grant injunctions having regard to circumstances arising out of the marital relationship in proceedings between parties to a marriage: such orders or injunctions may be issued for the personal protection of a party to the marriage and may restrain a party to the marriage from entering or remaining in particular places or specified areas), s 90AE (which allows a court to make a variety of orders affecting the rights, liabilities and obligations of third parties in relation to the disposition of property of a party to the marriage); *Corporations Act* 2001 (Cth), s 1323 (which allows federal courts to make orders to protect the

(Footnote continues on next page)

Secondly, other orders said to be analogous are directly related to the past conduct of the person subject to the order[421], or are issued specifically to restrain a breach of the law[422]. Thirdly, other suggested examples concern orders that are directed at protecting a particular or identifiable person, rather than society at large[423]. Fourthly, where obligations are similarly created in some of the examples cited, they are imposed based on evidence of what the person who is to be subject to the order may do, and not on what the person subject to the order and/or other third parties not subject to the order might otherwise do[424]. These are not insignificant distinctions. They help to confirm what is, in any case, apparent of the face of Div 104 of the Code – its provisions are unique. They are exceptional. They involve an attempt to break new legislative ground.

332 *Binding over orders*: The Commonwealth next argued that, historically, the use of binding over orders bore strong similarities to control orders issued under Div 104. It was suggested that such orders were the "clearest analogy" or precedent for s 104.4(1)(d) of the Code.

333 The nature of binding over orders was described by Lord Parker CJ in *Sheldon v Bromfield Justices*[425]:

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interests of a person where an investigation is being carried out into alleged contraventions of that Act).

421 See, for example, *Bail Act* 1978 (NSW), s 6; *Bail Act* 1977 (Vic), s 4; *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q), s 3; *Restraining Orders Act* 1997 (WA), ss 11A, 34, 35. See also McDonald, "Involuntary Detention and the Separation of Judicial Power", (2007) 35 *Federal Law Review* 25 ("McDonald") at 70-71.

422 See, for example, *Trade Practices Act* 1974 (Cth), s 80, which empowers federal courts to make orders to restrain a breach of that Act.

423 See, for example, *Family Law Act* 1975 (Cth), ss 68B, 114, which allow federal courts to make orders in relation to the welfare of children, as well as orders protecting a party to a marriage. Such orders may restrain a person from entering or remaining in specified areas or places. See also Rose and Nestorovska (2007) 31 *Criminal Law Journal* 20 at 44.

424 See *Family Law Act* 1975 (Cth), ss 68B, 114; *Bail Act* 1978 (NSW), s 6; *Magistrates' Court Act* 1989 (Vic), s 126A; *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q), ss 3, 13; *Restraining Orders Act* 1997 (WA), s 34.

425 [1964] 2 QB 573 at 577.

> "It is well known that justices have power pursuant to their commission or pursuant to the Justices of the Peace Act, 1361, to bind over all persons brought before them. It is a very important jurisdiction and is in the nature of preventive justice. No offence need be proved at all."

A contemporary equivalent to such orders may be found in s 126A of the *Magistrates' Court Act* 1989 (Vic).

334 Leaving aside other distinctions arising from this "ancient power"[426], there are four important differences between binding over orders and orders issued under s 104.4 of the Code. First, binding over orders are related directly to what the person subject to the order has already done[427]. Secondly, binding over orders are only directed at the future conduct of the person who is the subject of the order. Thirdly, the person subject to the order has the right to be fully heard on the allegations propounded to justify the order before it is made. Fourthly, such historical orders did not support additional conditions in the form of specific obligations, prohibitions and restrictions imposed by an interim control order[428]. The differences from the control orders for which Div 104 provides are made plain by the observations of Lord Alverstone CJ in *R v Wilkins*[429]:

> "Justices have a general power under their commission to bind over any person if it appears that that person has been guilty of violent conduct tending to a breach of peace, even though there is no proof of a threat towards any particular person, provided, of course, that the person bound over has had a reasonable opportunity of knowing the nature of the charge brought against him and of making his answer to it."

335 Binding over orders are therefore of little assistance in providing the suggested historical analogy for the "judicial power" said to be exercised pursuant to Div 104 of the Code. In any event, not every order that has historically been made by courts in England or in the Australian colonies and State courts in Australia will necessarily pass muster under the requirements

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426 *R v Wright; Ex parte Klar* (1971) 1 SASR 103 at 112 per Bray CJ. See also McDonald (2007) 35 *Federal Law Review* 25 at 73.

427 See *Edwards v Raabe* (2000) 117 A Crim R 191 at 197 [23].

428 See *Wright* (1971) 1 SASR 103 at 112. See also *R v Ayu* [1958] 1 WLR 1264 at 1265; [1958] 3 All ER 636 at 637-638; *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241 at 247 [17].

429 [1907] 2 KB 380 at 383-384, cited with approval in *Sheldon* [1964] 2 QB 573 at 578.

established by the Constitution. In every case it is for the courts, ultimately this Court, to say whether the posited order is one that is compatible with the exercise of the judicial power of the Commonwealth provided for in the Constitution. In making that judgment in the present case, it is appropriate to note the defects of binding over orders and the misuse to which they have sometimes been subject. Such criticisms may be apt to a consideration of whether any like jurisdiction should be accepted in the case of Australian federal courts as part of the judicial power of the Commonwealth[430]:

> "Magistrates have ... bound over where there was no breach of law of any kind actual or threatened. They have bound over for transvestism, and for prostitution of a character that does not amount to a breach of law. It is extraordinary that the humblest judicial functionaries should thus be able to indulge their fancy by formulating their own standards of behaviour for those who come before them. True, the power may be employed in a beneficial way. It was used to meet the problem, experienced in both world wars, of young girls who haunted military camps for the purpose of promiscuous associations. ... Beneficent though the result was, it is a notable infringement of civil liberty that persons should be brought before a court for conduct that is not the breach of any legal rule."

336 In a belated response to such criticism, the Home Office in Britain has recently suggested a tightening up of the law on binding over orders in the United Kingdom[431]. A paper recommends that the standard of proof should become the criminal standard[432] and that the proposed subject of the order should be permitted to call evidence at all stages[433]. These developments suggest recognition of the need for considerable caution on the part of this Court in treating binding over orders as any guide for what is constitutionally accepted conduct on the part of Australian federal courts. As Callinan and Heydon JJ remarked in *Fardon v Attorney-General (Qld)*[434]:

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430 See Williams, "Preventive Justice and the Rule of Law", (1953) 16 *Modern Law Review* 417 at 420-421 (citations omitted).

431 United Kingdom, Home Office, *Bind Overs: A Power for the 21st Century*, Consultation Document, (2003) ("Home Office Paper").

432 Home Office Paper at 2 [2.5], 6 [7.6.7], 9 [9.8].

433 Home Office Paper at 5-6 [7.5.1]-[7.5.5].

434 (2004) 223 CLR 575 at 655-656 [219]. The constitutional separation of the judicial power within the States observes different legal rules. See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 67, 78, 92-94, 103-104, 109-111, 132.

> "Federal judicial power is not identical with State judicial power. ... Not everything by way of decision-making denied to a federal judge is denied to a judge of a State."

337 Two other forms of judicial order were nominated as analogous to the provision for "protecting the public" in Div 104 of the Code. Thus, it was suggested that courts take similar considerations into account in bail proceedings, undoubtedly a conventional judicial task. In addition, s 38 of the *Restraining Orders Act* 1997 (WA) was raised as a specific example permitting the making of an order for the protection of the public generally[435].

338 *Conclusion: analogies fail*: Each of the propounded analogies is distinguishable from the orders for which Div 104 provides. Each is decided on the basis of the past conduct of the person to be subject to the order and each is directed against what that particular person might do in the future[436]. They are not directed, as orders under Div 104 may be, at what third parties not subject to the order might do. In the case of bail proceedings[437], the court may consider the protection and welfare of the community. However, it will only do so having regard to the nature and seriousness of the offence with which the accused is charged with having committed and any other offences that may be taken into account[438]. The court may only consider possible future offences in defined circumstances[439]. The protection of the community is only one of a great number of otherwise strict and ascertainable criteria to be considered in bail proceedings. It is not the *only* factor. In *Fardon* I observed[440]:

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435 Namely, s 38(3), which provides: "If there is no particular person seeking to be protected an application for a misconduct restraining order may be made by a police officer on behalf of the public generally."

436 See *Restraining Orders Act* 1997 (WA), ss 34, 35. See also McDonald (2007) 35 *Federal Law Review* 25 at 70-73.

437 See, for example, *Bail Act* 1978 (NSW), s 32; *Bail Act* 1977 (Vic), s 4(2)(d), (3).

438 See, for example, *Bail Act* 1978 (NSW), s 32(1)(c)(i); *Bail Act* 1977 (Vic), s 4(2)(d), (3)(a).

439 See, for example, *Bail Act* 1978 (NSW), s 32(1)(c)(iv), (2); *Bail Act* 1977 (Vic), s 4(2)(d), (3).

440 (2004) 223 CLR 575 at 640 [171] (citation omitted, original emphasis); cf reasons of Gleeson CJ at [16]-[18].

> "The *Bail Act* expressly provides for consideration, in bail decisions, of whether there is an unacceptable risk that, whilst released, the accused *will* commit an offence, that is, a future offence. ... It is enough to point to the great difference between refusal of bail in respect of a pending charge of a *past offence* and refusal of liberty, potentially for very long intervals of time, in respect of estimations of *future* offending, based on predictions of propensity and submitted to proof otherwise than by reference to the criminal standard of proof."

The unconvincing invocation of the "chameleon doctrine"

339 *The chameleon doctrine*: The Commonwealth then relied, as it usually does in this connection, on the "chameleon doctrine" to sustain the validity of Div 104 of the Code. With this "doctrine" the Court has fashioned a rod for its own back. The "doctrine" has recently been the subject of re-examination[441]. Gaudron J expounded the conventional explanation in her reasons in *Re Dingjan; Ex parte Wagner*[442]:

> "[S]ome powers are essentially judicial so that they can be conferred by the Commonwealth only on courts named or designated in Ch III of the Constitution[443], while others take their character from the tribunal in which they are reposed and the way in which they are to be exercised and, thus, may be conferred on courts or other tribunals as the Parliament chooses[444]."

340 The Commonwealth submitted that Div 104 was a classic example of a "double aspect" or innominate power that acquires its constitutional character from the body in which it is vested[445]. Indeed, the Commonwealth submitted that

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441 See *Albarran* (2007) 81 ALJR 1155; 234 ALR 618; *Visnic v Australian Securities and Investments Commission* (2007) 81 ALJR 1175; 234 ALR 413.

442 (1995) 183 CLR 323 at 360.

443 *Waterside Workers' Federation* (1918) 25 CLR 434 at 467; *Boilermakers* (1956) 94 CLR 254 at 270, 296, 314, 338.

444 *Precision Data* (1991) 173 CLR 167 at 189. See also *Davison* (1954) 90 CLR 353 at 370; *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 628; *Re Ranger Uranium Mines* (1987) 163 CLR 656 at 665-666; *Harris v Caladine* (1991) 172 CLR 84 at 93, 147-148.

445 Relying on *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 6, 9-10; *Hegarty* (1981) 147 CLR 617 at 628, 631-632. See also *Re Ranger Uranium Mines* (1987) 163 CLR 656 at 665; *Harris v Caladine* (1991) 172 CLR

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the chameleon doctrine explained why it had not, in this or other cases, urged that *Boilermakers* be overruled. Putting it bluntly and with chilling candour, the Commonwealth submitted that *Boilermakers* "does not matter much any more"[446].

341 If this submission were to be accepted, there would be little point in the foregoing discussion or in any of the Court's careful analysis of the *Boilermakers* doctrine since it was expounded and upheld. The separation of the judicial power would be a chimera. But how could that be?

342 I accept that some functions are neither exclusively judicial nor exclusively non-judicial. I accept that the performance of some functions may be consistent with the exercise of judicial power as well as the exercise of executive or legislative power[447]. However, simply because a function is reposed in Ch III courts does not mean it becomes automatically cloaked with the attributes of the judicial power of the Commonwealth[448]. In *Pasini v United Mexican States*, I explained why this was so[449]:

> "[T]he assignment of a function to a court cannot, without more, finally determine, for constitutional purposes, the character of the function so assigned. Were it so, the identification by the Parliament of the repository of the function would conclusively determine its constitutional nature. That could not be. By the Constitution, the function of characterisation belongs, finally, to this Court[450]."

343 The foregoing is not to deny the established authority that the nature of the body in which a function is reposed may assist in determining the "judicial

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84 at 122, 147-148; *Precision Data* (1991) 173 CLR 167 at 189; *Brandy* (1995) 183 CLR 245 at 261-262.

446 [2007] HCATrans 076 at 11295.

447 See *Joske* (1974) 130 CLR 87 at 95; *Quinn* (1977) 138 CLR 1 at 6, 9-12; *Breckler* (1999) 197 CLR 83 at 126-127 [83]-[84].

448 See reasons of Hayne J at [462].

449 (2002) 209 CLR 246 at 268-269 [62]. See also *Visnic* (2007) 81 ALJR 1155 at 1164 [45]; 234 ALR 413 at 423, citing *Polyukhovich* (1991) 172 CLR 501 at 607 per Deane J.

450 *Spicer* (1957) 100 CLR 277 at 305.

character" of that function[451]. However, necessarily, this fact cannot eliminate the judicial duty to characterise the function. The most that the "chameleon doctrine" provides is one way of resolving a *doubt* about the essential nature of the function[452]. In *R v Spicer; Ex parte Australian Builders' Labourers' Federation*[453], Kitto J explained why this was the correct approach:

> "[S]ometimes a grant of power not insusceptible of a judicial exercise is to be understood as a grant of judicial power because the recipient of the grant is judicial. But it by no means follows that whenever a power which has some similarity to an acknowledged judicial power is given to a judicial person or body there is a grant of judicial power. The reason for concluding in some such cases that the judicial character of the repository imparts a judicial character to the power is simply that the former provides a ground for an inference, which in those cases there is nothing or not enough in other considerations to preclude, that the power is intended and required to be exercised in accordance with the methods and with a strict adherence to the standards which characterise judicial activities. That is not a necessary inference, however, in every case of this kind."

344 Although I accept that there may be instances involving functions in some ways similar to those envisaged by Div 104 of the Code and that, carefully prescribed, these might validly be performed by federal courts, the functions provided for in s 104.4 are not judicial[454]. The chameleon doctrine, whilst occasionally useful, must not be elevated so far that it overwhelms all other considerations referred to in this Court's decisions on the point. To permit this to happen would be to debase the Court's doctrine, to surrender its constitutional function to the choices made by other branches of government, and to ignore the important constitutional purposes that the separation of the judicial power upholds.

345 *Appropriateness of enacted function*: That useful constitutional principle reflects an overriding, and fundamental, concern – the "desirability or

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451 See *Sue v Hill* (1999) 199 CLR 462 at 516-517 [134]-[135], 518 [140] per Gaudron J (Gleeson CJ, Gummow and Hayne JJ agreeing at 484 [39]); *Pasini* (2002) 209 CLR 246 at 269 [63]. See also *Davison* (1954) 90 CLR 353 at 368-369.

452 *Albarran* (2007) 81 ALJR 1155 at 1168 [70]; 234 ALR 618 at 634; *Visnic* (2007) 81 ALJR 1175 at 1183-1184 [45]; 234 ALR 413 at 423.

453 (1957) 100 CLR 277 at 305. See also *Hegarty* (1981) 147 CLR 617 at 628.

454 See also reasons of Hayne J at [513].

appropriateness"[455] of federal courts performing functions of the kind purportedly conferred by s 104.4 of the Code.

346 This issue was helpfully explained by Jacobs J in *R v Quinn; Ex parte Consolidated Foods Corporation*[456]:

> "The historical approach to the question whether a power is exclusively a judicial power is based upon the recognition that we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom. The governance of a trial for the determination of criminal guilt is the classic example. But there are a multitude of such instances."

347 Control orders undoubtedly impinge upon the basic rights to liberty of those made subject to them. This Court's duty under the Constitution is to guard against unwarranted departures from fundamental rights and freedoms which the Constitution and applicable law defend[457]. Yet Div 104, in its present form, undermines the judicial power of the Commonwealth by attempting to deploy federal judges upon tasks that are non-normative and that are performed in accordance with procedures that seriously depart from the basic rights normal to judicial process[458]. Once again, I agree with, and would apply, the analysis of Professor Zines[459]:

> "From the point of view of the Australian Constitution, the issue is not, of course, whether in the opinion of the High Court it is desirable that judges deal with a particular matter, but whether it may reasonably be thought desirable, that is, whether it is appropriate for a court. A particular function will only be appropriate if its exercise is consistent

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455 See Zines at 198: "It is suggested that the questions whether such a function is ancillary to a clearly judicial function or is analogous to an historical function are really aids in resolving this more fundamental issue." See also *Joske* (1976) 135 CLR 194 at 216.

456 (1977) 138 CLR 1 at 11.

457 *Baker v The Queen* (2004) 223 CLR 513 at 539 [66].

458 See *Breckler* (1999) 197 CLR 83 at 125-126 [81].

459 Zines at 198. See also Green (1920) 29 *Yale Law Journal* 369 at 379.

> with the 'professional habits' and techniques practised by the judiciary. Judicial reasoning, of course, requires a high degree of consistency; it involves the formulation of principles, and decisions based on those principles. But above all it works best in concrete situations."

348 As is often the case, the point was also expressed succinctly and vividly by Windeyer J in *Tasmanian Breweries*[460]:

> "This Court has the duty of keeping the Parliament within its constitutional bounds. But it is equally its duty itself to keep within the province marked out for it as the judicial power of the Commonwealth. The Court, no less than the Parliament, must observe the separation of powers."

349 My decision on this issue should not be interpreted as indicating that I would uphold the validity of Div 104 if the powers therein were conferred on a Minister or other officer of the Commonwealth outside the Judicature. I agree with what Hayne J has said in that connection. It is unnecessary for me to elaborate it[461].

The special case of judicial deprivation of liberty

350 *Deprivation of liberty and criminal guilt*: There is one final consideration on this issue. It reinforces the conclusion just expressed. The hypothesis evident in Div 104 assumes a deprivation of liberty in consequence of a judicial order. In *Fardon*[462], this Court considered related questions, although within a State constitutional context[463]. There, and in other cases, the Court has noticed tangentially principles found in Ch III of the Constitution affecting the exercise of jurisdiction by federal courts. While it is unnecessary to revisit those cases in any detail in the present context, observations made in *Fardon* by members of the majority are pertinent to the resolution of the present proceedings.

351 In issue here is not solely what "obligations, prohibitions and restrictions" have been imposed on the plaintiff. Rather, this Court is concerned to examine the scope of measures that *may* be imposed under Div 104[464]. In determining the

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460 (1970) 123 CLR 361 at 403.

461 Reasons of Hayne J at [506].

462 (2004) 223 CLR 575. *Fardon* examined the validity of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Q), namely ss 5, 8 and 13.

463 See also *Kable* (1996) 189 CLR 51; *Baker* (2004) 223 CLR 513.

464 The Code, s 104.5(3).

validity of a challenged provision, the Court "is always obliged to test a novel law by what would occur if the novelty became common or repeated or is taken to its logical extent"[465].

352 In this case, as in *Fardon*, what is ultimately involved is "the loss of *liberty* of the individual" by a judicial order[466]. As stated by Gummow J in *Fardon*, citing some of my own remarks in an earlier case, "that loss of liberty is 'ordinarily one of the hallmarks reserved to criminal proceedings conducted in the courts, with the protections and assurances that criminal proceedings provide'"[467]. To similar effect, in *Fardon*, I reaffirmed that[468]:

> "Although the constitutional setting in the United States is different from that operating in Australia, our legal tradition shares a common vigilance to the dangers of civil commitment that deprives persons of their liberty."

353 In *Fardon*, Gummow J formulated a principle, derived ultimately from Ch III of the Constitution, which holds that, save for recognised exceptions, the involuntary detention of persons in custody is permitted conformably with that Chapter "only as a consequential step in the adjudication of criminal guilt of that citizen for past acts"[469]. In enunciating this principle, Gummow J avoided a discussion of whether the detention "is penal or punitive in character"[470]. By inference, this course was adopted so as to emphasise "that the concern is with the *deprivation of liberty* without adjudication of guilt rather than with the further [and different] question whether the deprivation is for a *punitive* purpose"[471]. Gummow J went on to say[472]:

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465 *Fardon* (2004) 223 CLR 575 at 638 [166].

466 *Fardon* (2004) 223 CLR 575 at 612 [79] (emphasis added).

467 (2004) 223 CLR 575 at 612 [79], citing my reasons in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 178-179 [56]; cf *Kansas v Hendricks* 521 US 346 at 361-363, 379-381 (1997).

468 (2004) 223 CLR 575 at 641 [174].

469 (2004) 223 CLR 575 at 612 [80]. See also at 631 [145].

470 See *Fardon* (2004) 223 CLR 575 at 612-613 [81]; cf my reasons in *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 66 [184].

471 *Fardon* (2004) 223 CLR 575 at 612-613 [81] (emphasis added), citing *Al-Kateb* (2004) 219 CLR 562 at 612-613 [137]-[139].

472 *Fardon* (2004) 223 CLR 575 at 613 [84] (emphasis added).

> "[D]etention by reason of *apprehended* conduct, even by judicial determination on a quia timet basis, is of a different character and is at odds with the central constitutional conception of detention as a consequence of judicial determination of engagement in *past* conduct."

354 *The uniqueness of Div 104*: In the plaintiff's case, Div 104 of the Code contemplates the possibility of the loss of liberty, potentially extending to virtual house arrest, not by reference to past conduct or even by reference to what that person himself might or might not do in the future. It is based entirely on a prediction of what is "reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act", a vague, obscure and indeterminate criterion if ever there was one. The judicial process, said to be enlivened by s 104.4, is not therefore refined. On its face, it is capable of arbitrary and capricious interpretation. This invites the question: if the community of nations, with all of its powers and resources, cannot agree on what precisely "terrorism" is (and how it can be prevented), how can one expect a federal magistrate or court in Australia to decide with consistency and in a principled (judicial) way what is reasonably necessary to protect the public from a terrorist act[473]? How can such a decision be regarded as one proper to a court limited, as such, to the application of a pre-existing norm and especially in decisions critical to the liberty of the person affected?

355 This Court has accepted that, in "strictly limited circumstances, the judiciary permits 'executive interference with the liberty of the individual' where 'the purpose of the imprisonment is to achieve some legitimate non-punitive object'"[474]. However, in Australia, judges in federal courts may not normally deprive individuals of liberty on the sole basis of a prediction of what might occur in the future. Without an applicable anterior conviction, they may not do so on the basis of acts that people may fear but which have not yet occurred. Much less may such judges deprive individuals of their liberty on the chance that such restrictions will prevent *others* from committing certain acts in the future[475].

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473 Note what was said by the Canadian Supreme Court in *Suresh* [2002] 1 SCR 3 at 53 [94]: "One searches in vain for an authoritative definition of 'terrorism'. ... The absence of an authoritative definition means that, at least at the margins, 'the term is open to politicized manipulation, conjecture, and polemical interpretation'". See also Nino, "International Terrorism: Definition", (2007) 71 *Journal of Criminal Law* 147 ("Nino").

474 See *Fardon* (2004) 223 CLR 575 at 623-624 [126], citing *Chu Kheng Lim* (1992) 176 CLR 1 at 56 per Gaudron J, 71 per McHugh J. See also *Re Woolley* (2004) 225 CLR 1 at 66 [184]; reasons of Hayne J at [443].

475 See reasons of Hayne J at [503]-[506].

Such provisions partake of features of the treatment of hostages which was such a shameful characteristic of the conduct of the oppressors in the Second World War and elsewhere. It is not a feature hitherto regarded as proper to the powers vested in the Australian judiciary. In Australia, we do not deprive individuals of their freedoms because doing so conduces to the desired control of others.

356 By its terms, Div 104 requires no attention to be directed towards the person subject to the order prior to determining that the conditions exist for a control order to be granted. If that is done it will only be done incidentally. It is not obligatory[476]. The satisfaction of the requirements of s 104.4(1)(c)(ii) of the Code, referring to the past conduct of the person to be subject to the order, is not a condition precedent to the issue of a control order. There are alternative limbs[477]. Ultimately, the federal court must merely be satisfied, on the civil standard of proof, that each aspect of the order is "reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act". Such an order is to be issued on the basis of evidence presented by the AFP, the nature of which a federal magistrate or federal judge would be most unlikely to contest[478]. I remain of the view that I expressed in *Fardon*[479]:

> "The focus of the exercise of judicial power upon past events is not accidental. It is an aspect of the essential character of the judicial function. Of its nature, judicial power involves the application of the law to *past* events or conduct[480]. Although, in discharging their functions, judges are often called upon to predict future happenings[481], an order imprisoning a person because of an estimate of some future offence is something new and different."

357 Even more novel and offensive to principle is the judicial order contemplated by Div 104 of the Code. It provides for the deprivation of liberty because of an estimate of some future act, not necessarily one to be committed by the person subject to the proposed order. To uphold the validity of that type of control order for which Div 104 of the Code provides would be to erode the

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476 cf reasons of Gleeson CJ at [28].

477 See reasons of Hayne J at [503].

478 See above at [257]-[258].

479 (2004) 223 CLR 575 at 637 [164] (original emphasis).

480 *Precision Data* (1991) 173 CLR 167 at 188. See also *Ha v New South Wales* (1997) 189 CLR 465 at 503-504.

481 The granting of quia timet injunctions constitutes an example.

well-founded assumption that the judiciary in Australia under federal law may only deprive individuals of their liberty on the basis of evidence of their past conduct. It would seriously undermine public confidence in federal courts for judges to subject individuals to any number of "obligations, prohibitions and restrictions" for an indeterminate period[482] on the basis of an estimate that some act, potentially committed by somebody else, may occur in the future[483]. To do this is to deny persons their basic legal rights not for what they have been proved to have done (as established in a criminal trial) but for what an official suggests that they might do or that someone else might do. To allow judges to be involved in making such orders, and particularly in the one-sided procedure contemplated by Div 104, involves a serious and wholly exceptional departure from basic constitutional doctrine unchallenged during the entire history of the Commonwealth. It goes far beyond the burdens on the civil liberties of alleged communists enacted, but struck down by this Court, in the *Communist Party Case*. Unless this Court calls a halt, as it did in that case, the damage to our constitutional arrangements could be profound.

358 Division 104 effectively enlists federal courts in making a choice as to which deprivations of liberty they consider to be necessary or appropriate for the future protection of the public, independent of any ancillary conduct or liability. The "thin veneer of legality" which s 104.4 of the Code seeks to create by vesting this power in federal courts "cannot disguise the reality" that it is not judicial power[484].

359 It is in cases such as the present that the Court is tested. When the test comes, it is not to be answered by endorsement of grave departures from long-standing constitutional history and judicial tradition. Least of all is it to be answered in terms of the emotional appeals by the Commonwealth and its supporters to notions of legal exceptionalism which this Court firmly rejected in its decision in the *Communist Party Case*.

Conclusion: Div 104 invalidly confers non-judicial powers

360 It follows from these reasons that the plaintiff has established his second constitutional attack on the validity of Div 104 under which the interim control order was made in his case.

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482 Successive control orders in relation to the same person are not prohibited. See the Code, s 104.5(2).

483 See *Fardon* (2004) 223 CLR 575 at 638 [166].

484 See *Secretary of State for the Home Department v MB* [2006] EWHC 1000 (Admin) at [103] per Sullivan J; cf reasons of Hayne J at [509].

361 Even if, contrary to my earlier conclusion, the provisions of Div 104 of the Code are otherwise sustained by the legislative power of the Federal Parliament, the attempt in that Division to vest federal courts with the power to make interim control orders, in the manner prescribed, amounts to a purported conferral of non-judicial power on such courts. This is contrary to Ch III of the Constitution. It is therefore invalid on this additional basis. The question in the special case should be answered accordingly.

JUDICIAL POWER: INVALID EXERCISE

Compatibility of Div 104 with Ch III of the Constitution

362 *The third issue*: If, contrary to the foregoing conclusion, Div 104 of the Code were to be characterised as conferring judicial power, there are several features of the legislation that are nonetheless incompatible with the way in which judicial power may be exercised under Ch III of the Constitution. In *Leeth v The Commonwealth*, Deane and Toohey JJ pointed out that the provisions of Ch III[485]:

> "not only identify the possible repositories of Commonwealth judicial power. They also dictate and control the manner of its exercise."

363 *Invalid exercise of judicial power*: The conclusions that I have already stated are sufficient, twice over, to entitle the plaintiff to succeed in these proceedings. To explore at any length the third issue is not therefore essential to the outcome of the special case. Nevertheless, on the assumption (contrary to my conclusion) that Div 104 validly confers judicial power on federal courts, there are several features of the Division that appear to depart from the requirements of the Constitution for the valid exercise of the judicial power of the Commonwealth.

364 *Offending features*: The offending features of Div 104 in this respect include, individually and cumulatively, the following:

(1) *Ex parte determinations*: Interim control orders are to be issued ex parte in all cases and not just in exceptional circumstances where that course is necessary or essential for particular reasons. Under

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485 (1992) 174 CLR 455 at 486-487, see also at 470, 502; *Chu Kheng Lim* (1992) 176 CLR 1 at 27; *Dietrich v The Queen* (1992) 177 CLR 292 at 326, 362; Winterton et al, *Australian Federal Constitutional Law: Commentary and Materials*, 2nd ed (2007) at 928; Mason, "A New Perspective on Separation of Powers", (1996) 82 *Canberra Bulletin of Public Administration* 1 at 7.

Div 104 it is routine for individuals to be subjected to "obligations, prohibitions and restrictions" without a hearing from the time the interim order is issued until it is confirmed[486]. Self-evidently, this is itself a very serious departure from the norm ordinarily, and desirably, observed by federal courts (and other courts) in Australia[487]. It institutionalises the exception of court decisions behind closed doors as the rule;

(2) *Uniform minimisation of rights*: The individual subject to the interim order is guaranteed no more than 48 hours notice of that order before a confirmation hearing[488]. Moreover, the individual is only entitled initially to receive a summary of the grounds on which the interim order is issued[489]. The full reasons are not provided, whatever the circumstances or need. Once again, these provisions constitute a serious and, so far as I am aware, unique departure from the way federal courts exercise the judicial power of the Commonwealth. The procedures are not left to the federal court concerned to adapt and vary according to the particular needs of the individual circumstances. Division 104 mandates a uniform procedure. It is one seriously at odds with the way federal courts in this country have hitherto performed their functions in accordance with the Constitution. The Constitution itself incorporates the basic features of openness and equality of arms that are such important features of our legal tradition; and

(3) *Withholding evidence*: Specifically, the individual subject to an application or order may not be informed of particular evidence raised in the case against them. Thus, s 104.12A of the Code relevantly provides:

"(1) At least 48 hours before the day specified in an interim control order [for a confirmation hearing], the senior AFP member who requested the order must:

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486 See the Code, ss 104.4, 104.5(1)(e), 104.5(1A), 104.12, 104.12A. See further Rose and Nestorovska (2007) 31 *Criminal Law Journal* 20 at 44-46.

487 *X v Australian Prudential Regulation Authority* (2007) 81 ALJR 611 at 629 [89]; 232 ALR 421 at 441.

488 The Code, s 104.12(1). Note s 104.12A(2)(a)(ii).

489 See the Code, ss 104.5(1)(h), 104.12A(3), 104.21. See also Rose and Nestorovska (2007) 31 *Criminal Law Journal* 20 at 46.

(a) elect whether to confirm the order on the specified day; and

(b) give a written notification to the issuing court that made the order of the member's election.

(2) If the senior AFP member elects to confirm the order, an AFP member must:

(a) serve personally on the person in relation to whom the order is made:

(i) a copy of the notification; and

(ii) a copy of the documents mentioned in paragraphs 104.2(3)(b) and (c); and

(iii) any other details required to enable the person to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order; and

...

(3) To avoid doubt, subsection (2) does not require any information to be served or given if disclosure of that information is likely:

(a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*); or

(b) to be protected by public interest immunity; or

(c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or

(d) to put at risk the safety of the community, law enforcement officers or intelligence officers.

The fact that information of a kind mentioned in this subsection is not required to be disclosed does not imply that such information is required to be disclosed in other provisions of this Part that relate to the disclosure of information."

365 *Alternative systems*: Other countries with legal systems generally similar to those of Australia have either legislated for, or required the availability of, special advocates in circumstances where accused persons are not entitled to access to the full case against them on grounds, asserted by the executive, of national security[490]. There is no similar facility in Div 104 of the Code for an independent person to have access to the executive's material or to controvert the veracity of the evidence relied upon. To expect a court to rely for its decisions solely upon the evidence supplied by the very officers seeking to secure or uphold the control order, is fundamentally inconsistent with the adversarial and accusatorial procedures, observed by the Australian judiciary until now in serious matters affecting individual liberty, as contemplated by Ch III of the Constitution[491].

Conclusion: Div 104 involves exercise of powers inconsistent with Ch III

366 It follows that Div 104 of the Code is at odds in important respects with the features of "independence, impartiality and integrity" that are implied or assumed characteristics of the federal courts for which Ch III of the Constitution provides. Requiring such courts, as of ordinary course, to issue orders ex parte, that deprive an individual of basic civil rights, on the application of officers of the executive branch of government and upon proof to the civil standard alone that the measures are reasonably necessary to protect the public from a future terrorist act, departs from the manner in which, for more than a century, the judicial power of the Commonwealth has been exercised under the Constitution.

367 What has hitherto been regarded as wholly exceptional, within the grant or refusal of a judge and adaptable to particular needs in very special circumstances, is rendered by Div 104 the universal norm. This change seriously alters the balance between the State and the individual whose liberties are potentially affected by the federal court's orders. It reduces, and in some cases destroys, the capacity of federal courts to be, and to appear to be, independent and impartial as between the executive and the individual. The resulting legislative scheme is therefore incompatible with the postulate upon which the federal Judicature is created by the Constitution.

368 In an attempt to deal with a particular problem the legislative scheme does so in a heavy handed, uniform and exceptional way. It risks squandering for all cases the precious reputational capital of federal courts which the separation of powers doctrine serves to defend. Legislatures and executive governments may

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490 See *Charkaoui* 2007 SCC 9 at [81]-[87]. See also *M v Secretary of State for the Home Department* [2004] 2 All ER 863 at 868 [13], 873 [34].

491 See also reasons of Hayne J at [515]-[516].

not always be as conscious as courts are of the difficulty, once lost, of regaining such reputations. If the courts are seen as effectively no more than the pliant agents of the other branches of government, they will have surrendered their most precious constitutional characteristic. This Court should not allow that to happen.

369 The foregoing is especially relevant because there is no legal requirement in Div 104 for the court concerned to consider the past conduct of the individual in question. There is no opportunity for an independent person to controvert the evidence relied upon. There are no countervailing procedures to ensure that the federal courts concerned can perform their functions neutrally and effectively. In effect, and in substance, the federal courts are rendered rubber stamps for the assertions of officers of the Executive Government. They, and those whose liberties are most affected, are deprived of any effective means to test and contradict the executive's assertions.

370 The exercise of serious powers affecting individual liberty by judges is indeed ordinarily a good thing and sometimes it is constitutionally obligatory[492]. But it becomes a bad thing if the powers are granted in vague and inappropriate terms, for that engages judges in the exercise of powers that are in truth unbridled discretions, governed by the most nebulous of criteria. And it is a very bad thing if the judge concerned is required to act in exceptional ways in private and subject to constraints not normal or proper to the judicial office. These are consequences against which the federal separation of powers doctrine stands guard in Australia.

371 It follows that the provisions of Div 104 of the Code contravene the postulates of the judiciary for which Ch III of the Constitution provides in this country. Terrorist acts are indeed, potentially, serious dangers to the Australian body politic. Effective laws to respond to such dangers are possible, consistent with the Constitution and specifically with Ch III. However, the lesson of the past responses of this Court to new challenges to the nation and its security is that fundamental features of the Constitution are preserved or compatibly adapted. They are not abandoned. Division 104 of the Code attempts an unbalanced and unequal departure from the Constitution's guarantee of equal justice to all who come before the independent federal courts of the nation. It is therefore invalid on this further ground.

Overseas legislation and precedents

372 *Canadian measures*: The foregoing conclusion on the third issue is strengthened by a consideration of the legislative approaches to analogous issues

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492 cf reasons of Gleeson CJ at [17].

in other jurisdictions with legal systems similar to Australia's and judicial responses to cases involving such legislation.

373 There are clear differences between Div 104 of the Code and the now expired provisions of the Canadian *Criminal Code*[493], whereby a court was empowered to order an individual to enter into a recognizance to keep the peace and be of good behaviour[494]. Such orders could only be made if a "peace officer"[495] believed on reasonable grounds that a terrorist activity *would* be carried out and suspected on reasonable grounds that the imposition of a recognizance (with conditions) was *necessary* to prevent the carrying out of the terrorist activity[496]. The issuing court needed to be "satisfied by the evidence adduced" that the peace officer had "reasonable grounds for the suspicion"[497]. A person to be subject to the order was generally entitled to be heard before the order was made[498]. The conditions capable of being imposed were also not as extensive[499]. Notably, the Canadian laws have now expired because of a statutory sunset clause[500].

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493 See *Criminal Code* (Can), s 83.3, inserted by *Anti-Terrorism Act*, SC 2001 C-41. The definition of "terrorist activity" is contained in s 83.01(1) and bears strong similarity to the definition of "terrorist act" in Div 104 of the Code. Note however that the aspect of the definition of "terrorist activity" in the Canadian Code requiring the activity to be done "in whole or in part for a political, religious or ideological purpose, objective or cause" was declared invalid by Rutherford J in the Superior Court of Justice in Ontario. See *Khawaja* (2006) 42 CR (6th) 348 at 387 [87]; cf Nino (2007) 71 *Journal of Criminal Law* 147.

494 See also reasons of Hayne J at [514].

495 The definition of "peace officer" is contained in s 2.

496 See *Criminal Code* (Can), s 83.3(2).

497 *Criminal Code* (Can), s 83.3(8); reasons of Hayne J at [514].

498 *Criminal Code* (Can), s 83.3(4)-(8).

499 See *Criminal Code* (Can), s 83.3(8).

500 The Canadian recognizance laws ceased to apply from 1 March 2007. They had been subject to a sunset clause. A motion to extend the laws for a further three years was defeated in the Canadian Parliament on 27 February 2007: see *Criminal Code* (Can), s 83.32.

374 *United Kingdom measures*: The *Prevention of Terrorism Act* 2005 (UK) ("the PTA")[501] allows the Home Secretary in the United Kingdom to issue non-derogating control orders against individuals if the Home Secretary has "reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity" and considers that "it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual"[502].

375 A derogating control order is made on application to a designated court by the Home Secretary[503]. Except in urgent cases[504], the Home Secretary must obtain the permission of the court to make a non-derogating order[505]. In the case of non-derogating orders, the court is asked to determine whether the Home Secretary's decision that there were grounds to make that order "was obviously flawed"[506], applying the principles applicable in applications for judicial review[507]. Control orders, whether derogating or non-derogating, may impose any obligations the Home Secretary or the court considers necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity[508].

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501 The PTA followed the decision of the House of Lords in *A v Secretary of State for the Home Department* [2005] 2 AC 68 concerning the preventative detention provisions in the *Anti-terrorism, Crime and Security Act* 2001 (UK) and the Human Rights Act 1998 (Designated Derogation) Order 2001. The House of Lords held that s 23 of the *Anti-terrorism, Crime and Security Act* was incompatible with the non-discrimination guarantee of the European Convention on Human Rights ("ECHR") as no objective justification existed for confining the preventative detention regime in that Act to foreign terrorist suspects.

502 PTA, s 2(1). "[T]errorism-related activity" is defined in s 1(9) of the PTA. "[T]errorism" is defined in s 1 of the *Terrorism Act* 2000 (UK) in similar terms to the definition of "terrorist act" in the Code.

503 PTA, s 4(1). These control orders impose "derogating obligations" inconsistent with the right to liberty under Art 5 of the ECHR, but are permissible in the United Kingdom because made under a "designated derogation" within the meaning of the *Human Rights Act* 1998 (UK), s 14. See PTA, s 4(3).

504 PTA, s 3(1)(b), (4).

505 PTA, s 3(1)(a).

506 PTA, s 3(2)(a), (3)(b). See also s 3(10).

507 PTA, s 3(11).

508 PTA, s 1(3). See the examples given in the PTA, s 1(4)-(7).

376 Critically however, both types of orders require specific consideration of whether the individual to be subject to the order has been involved in terrorism-related activity. This is not a mandatory feature of Div 104 of the Code in Australia. The Home Secretary is also required to consult the chief officer of the police force about whether there is evidence available that could realistically be used to prosecute the individual for an offence relating to terrorism before applying for or making a control order[509].

377 In the United Kingdom, a number of control orders issued by the Home Secretary have been successfully challenged. Leaving aside the role of the European Convention on Human Rights and the *Human Rights Act* 1998 (UK) in the context of these orders, such cases have raised a number of concerns about the nature of the control order regime in the United Kingdom that are apposite to Div 104[510]. Nevertheless, the role of the special advocate has proved instrumental in ensuring that the tribunals and courts established by law can discharge their functions at least with a minimum of informed scrutiny of executive allegations which have in this way sometimes been found unsustainable[511].

378 *United States measures*: Although the recent decision of the United States Supreme Court in *Hamdan v Rumsfeld*[512] did not concern "control orders", the reasons of the majority shed some light on the meaning attributed in that country to the phrase "regularly constituted court". Four of the Justices stated that Art 75 of Protocol I to the Geneva Conventions would be regarded by the United States "'as an articulation of safeguards to which all persons in the hands of an enemy

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509 PTA, s 8(2).

510 See *Secretary of State for the Home Department v MB* [2006] EWHC 1000 (Admin) at [103]-[104] per Sullivan J; *Secretary of State for the Home Department v JJ* [2006] EWHC 1623 (Admin) at [73]; [2006] 3 WLR 866 at 874 [23], 875 [27] per Lord Phillips of Worth Matravers CJ; cf *Secretary of State for the Home Department v MB* [2006] 3 WLR 839 at 852-853 [31], 865 [85]-[86]. Leave to appeal to the House of Lords was granted in both of these cases: [2007] 1 WLR 397. The appeals were heard together with an appeal from the decision in *Secretary of State for the Home Department v AF* [2007] EWHC 651 (Admin) (leave given on 17 May 2007) and the decisions are pending. See also Hardiman-McCartney, "Controlling Control Orders: Article 5 ECHR and the Prevention of Terrorism Act 2005", (2007) 66 *Cambridge Law Journal* 6.

511 See eg *M v Secretary of State for the Home Department* [2004] 2 All ER 863 at 868 [13], 873 [34].

512 165 L Ed 2d 723 (2006).

are entitled'"[513]. The detainees at Guantanamo Bay could expect therefore to enjoy the rights of an accused to be present at their trial and to be privy to all the evidence against them. Equivalent rights are not extended to those individuals in Australia like the plaintiff made subject to interim control orders under Div 104. Such orders may deprive those individuals of their liberty or seriously restrict it despite the absence of any proved or even alleged criminal wrongdoing and without any attention being directed to their past actions.

Confirmation by reference to the international law of human rights

379 One final aspect of these proceedings should be mentioned. International law, ratified by and binding on Australia, protects the rights of individuals to be free of arbitrary detention and the unlawful deprivation of liberty[514]. International law also safeguards individual rights to privacy and respect for family life[515]; to freedom of expression and association[516]; to freedom of movement[517]; and to a fair hearing in the determination of one's rights and obligations[518]. Clearly, the "obligations, prohibitions and restrictions" that might be imposed by an order made under s 104.4 of the Code will potentially infringe any, or all, of these rights.

380 The foregoing principles of international law have not been incorporated by municipal law into federal law in this country. However, that does not mean that the principles are irrelevant to the functions of the courts. An Australian statute must be interpreted and applied, as far as its language admits, so as not to

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513 *Hamdan v Rumsfeld* 165 L Ed 2d 723 at 779 (2006) per Stevens J (joined by Souter, Ginsburg and Breyer JJ), citing Taft, "The Law of Armed Conflict After 9/11: Some Salient Features", (2003) 28 *Yale Journal of International Law* 319 at 322.

514 See International Covenant on Civil and Political Rights ("the ICCPR"), Arts 9, 14(1). The ICCPR entered into force generally on 23 March 1976 in accordance with Art 49 and entered into force in Australia on 13 November 1980: [1980] ATS 23. Compare ECHR, Arts 5, 6; American Convention on Human Rights, Arts 7, 8; African (Banjul) Charter on Human and People's Rights, Arts 6, 7; Universal Declaration of Human Rights, Art 10; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at 89-92 [140]-[152].

515 ICCPR, Art 17.

516 ICCPR, Arts 19, 22.

517 ICCPR, Art 12.

518 ICCPR, Art 14.

be inconsistent with established rules of international law[519]. This Court will also refuse to uphold legislation that abrogates fundamental rights, recognised by civilised countries, unless the purpose of the legislature is clear, evidenced by unambiguous and unmistakable language[520]. These principles are not just aspirational statements. This was made clear by Gleeson CJ in *Al-Kateb v Godwin*[521]:

> "A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament."

Although dissenting as to the result in that case, what the Chief Justice said is settled doctrine in this Court.

381 Given its overall nature and context, Div 104 suggests a possible purpose to abrogate several of the foregoing rights and freedoms. However, this intention is neither clear nor explicit, particularly in light of s 104.4(2). That sub-section invites an issuing court to identify the extent of incursion of the "obligations, prohibitions and restrictions" into individual rights and freedoms. It then asks the court to determine whether this incursion is justified, that is, whether it is "reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act". Without further guidance, it is extremely difficult, to say the least, for a judge to discern the application, if any, of any statutory presumption of conformity to the rules of international law and fundamental rights and freedoms. Viewed against the range of "obligations, prohibitions and restrictions" that may be imposed by an interim order[522], s 104.4 provides little clarification of the practical role to be played by such basic rights in an actual case. Effectively, this is so because the coercive provisions of the Division as a whole, and the procedures for which it provides, necessitate serious departures from the fundamental rights of persons affected by an application for a

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519 See *Jumbunna* (1908) 6 CLR 309 at 363; *Zachariassen* (1917) 24 CLR 166 at 181; *Polites* (1945) 70 CLR 60 at 69, 74, 75, 77-78, 79. See also *Al-Kateb* (2004) 219 CLR 562 at 617-630 [152]-[193]; above at [208].

520 *Potter* (1908) 7 CLR 277 at 304; *Coco* (1994) 179 CLR 427 at 437, 446; *Daniels Corporation* (2002) 213 CLR 543 at 553 [11]; *Plaintiff S157/2002* (2003) 211 CLR 476 at 492 [30]; *Al-Kateb* (2004) 219 CLR 562 at 577 [19]-[20], 643 [241].

521 (2004) 219 CLR 562 at 577 [20].

522 See the Code, s 104.5(3).

control order. The specificities risk the drowning out of the functions of the general statements about rights and freedoms.

382 To the extent that, under the Constitution, there is ultimately any uncertainty about the ambit of the federal legislative power to sustain the validity of Div 104 of the Code, or any uncertainty about the requirements of Ch III of the Constitution governing the necessities of the exercise of judicial power in Australia's federal courts, such uncertainty should be resolved in favour of the plaintiff's arguments[523]. The Australian Constitution should be read, so far as the text allows, in a way that is harmonious with the universal principles of the international law of human rights and not destructive of them. Australia has ratified and accepted those principles. They are upheld by other civilised nations[524]. They are available to assist our understanding of the contemporary limits and requirements of the Australian Constitution. As such, they confirm the constitutional conclusions that I have already expressed.

CONCLUSIONS AND ORDERS

383 *General conclusions*: For the reasons I have expressed, Div 104 of the Code was made without any applicable federal legislative power. It is therefore invalid as lacking a valid constitutional source. Should this conclusion be wrong, the Division invalidly purports to vest non-judicial power in federal courts. And if this conclusion is wrong, the Division is invalid because any judicial power that it does vest in federal courts is to be exercised under the Code in ways that are incompatible with the fundamental requirements applicable to such courts as independent repositories of the judicial power of the Commonwealth.

384 Upon the fundamental requirements so stated, the Australian Constitution and the international law of human rights speak, in my view, with a consistent, clear voice and in identical terms. Courts must be independent and impartial[525].

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523 ICCPR, Art 14(1). See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 363-364 [83]-[84], 373 [116].

524 See *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 at 921 [68]; *Rasul v Bush* 542 US 466 (2004); *Hamdan v Rumsfeld* 165 L Ed 2d 723 (2006); *Beit Sourik Village Council v Government of Israel* 43 ILM 1009 at 1128 [86] (2004) per Barak P (Mazza VP and Cheshin J concurring); cf *Communist Party Case* (1951) 83 CLR 1 at 141; *Re Aird* (2004) 220 CLR 308 at 345-346 [115]-[117].

525 See *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-658; *Austin v Commonwealth* (2003) 215 CLR 185 at 291-293 [252]-[257]; *Al-Kateb* (2004) 219 CLR 562 at 617-630 [152]-[193].

They must treat with essential equality all parties who come before them. This Div 104 fails to do. The failure does not appear as a rare exception, capable of being judicially confined to very special and particular circumstances. It is stated as a systemic norm to be applied universally, whatever the facts of the given case. On these three bases, therefore, Div 104 is invalid when measured against the requirements of the Constitution. This Court should so declare.

385 *Constitutional values*: In the past, lawyers and citizens in Australia have looked back with appreciation and gratitude to this Court's enlightened majority decision in the *Communist Party Case*[526]. Truly, it was a judicial outcome worthy of a "free and confident society"[527] which does not bow the head at every law that diminishes liberty beyond the constitutional design.

386 I did not expect that, during my service, I would see the *Communist Party Case* sidelined[528], minimised, doubted and even criticised and denigrated[529] in this Court. Given the reasoning expressed by the majority in these proceedings, it appears likely that, had the Dissolution Act of 1950 been challenged today, its constitutional validity would have been upheld. This is further evidence of the unfortunate surrender of the present Court to demands for more and more governmental powers, federal and State, that exceed or offend the constitutional text and its abiding values. It is another instance of the constitutional era of laissez faire through which the Court is presently passing.

387 Whereas, until now, Australians, including in this Court, have generally accepted the foresight, prudence and wisdom of this Court, and of Dixon J in particular, in the *Communist Party Case* (and in other constitutional decisions of the same era[530]), they will look back with regret and embarrassment at this decision when similar qualities of constitutional wisdom were demanded but were not forthcoming.

388 In the face of contemporary dangers from terrorism, it is essential that this Court should insist on the steady observance of settled constitutional principles. It should demand adherence to the established rules governing the validity of

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526 Especially by way of contrast with *Dennis v United States* 341 US 494 (1951). See at 587-588 per Douglas J (diss).

527 Reasons of Gummow and Crennan JJ at [61].

528 See [2007] HCATrans 076 at 8484-8487, 10080-10088, 10799-10884; reasons of Gummow and Crennan JJ at [139]-[140].

529 Reasons of Callinan J at [530]-[533], [582]-[585], [589].

530 Including the *Bank Nationalisation Case* (1948) 76 CLR 1 at 185.

federal laws and the deployment of federal courts in applying such laws. It should reject legal and constitutional exceptionalism. Unless this Court does so, it abdicates the vital role assigned to it by the Constitution and expected of it by the people. That truly would deliver to terrorists successes that their own acts could never secure in Australia.

389 The wellspring of constitional wisdom lies in legal principle. Its source is found in the lessons of constitutional history. When these elements are forgotten or neglected by a court such as this, under the passing pressures of a given time, the result is serious error. The consequences for the constitutional design, as for individual liberty, can be grave. It must then be left to a future time to return to that wisdom and to rediscover its source when the mistakes of the present eventually send this Court back to the wise perceptions of the past.

390 *Orders*: It follows from these reasons that Div 104 of the Code is not a valid law of the Commonwealth. The questions stated in the special case should be answered as follows:

1. Yes;

2. Yes;

3. Yes; and

4. The Commonwealth.

The plaintiff's proceedings should be returned to a single Justice of this Court for determination, consistent with these answers.

391 HAYNE J. The central issue in the special case stated by the parties is the validity, in their application to the plaintiff, of certain provisions of the *Criminal Code* (Cth) ("the Code"). The particular provisions in issue were introduced into the Code by the *Anti-Terrorism Act (No 2)* 2005 (Cth) ("the 2005 Act").

392 Before the 2005 Act, the Code had contained various provisions dealing with the subject of terrorism. They had been made, first, by the *Security Legislation Amendment (Terrorism) Act* 2002 (Cth), and were subsequently amended by a number of Acts, including the *Criminal Code Amendment (Terrorism) Act* 2003 (Cth) ("the 2003 Act").

393 In 2003, the Parliament of the State of Victoria had enacted the *Terrorism (Commonwealth Powers) Act* 2003 (Vic) ("the Victorian Reference Act"). Other States enacted similar legislation. As s 1 of the Victorian Reference Act recorded, the purpose of that Act was "to refer certain matters relating to terrorist acts to the Parliament of the Commonwealth for the purposes of [s] 51(xxxvii) of the Constitution". The Victorian Reference Act set out, as a schedule to the Act, the text of what the federal Parliament was later to enact, by the 2003 Act, as Pt 5.3 of the Code.

394 The provisions of the Code at the centre of the controversy in the present matter are those provisions of Div 104 of the Code which were relied on when a Federal Magistrate (the first defendant) made an interim control order against the plaintiff. Those provisions would be engaged when considering whether that interim control order should be confirmed. The provisions now in issue were not contained in the text of the proposed legislation set out in the schedule to the Victorian Reference Act. There is an issue about whether those provisions are nonetheless supported in their operation in Victoria by the Victorian Reference Act.

395 Four provisions of the Code are of particular importance: s 100.1 (and in particular, the definition of "terrorist act"), s 104.4 (which is the central provision governing the making of an interim control order), s 104.5 (which regulates the terms of an interim control order) and s 104.14 (which regulates the confirmation of an interim control order). The text of the relevant provisions sufficiently appears in the reasons of other members of the Court.

The special case

396 Although the active parties in this litigation[531] joined in stating a special case for the opinion of the Court under r 27.08 of the High Court Rules 2004, the

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531 The first defendant, the Federal Magistrate, filed a submitting appearance and has taken no active part in the litigation.

questions which the parties stated as "arising in the proceeding"[532] were cast in very general terms.

397 The proceeding instituted by the plaintiff in the original jurisdiction of the Court is an application for an order to show cause why constitutional writs and associated relief should not issue to the first defendant, the Federal Magistrate who made the interim control order, and the second defendant, the Manager, Counter-Terrorism – Domestic, Australian Federal Police, on whose application that order was made and who, it is alleged, will, if not restrained, seek confirmation of the order. It is a proceeding that arises in particular circumstances, and the matter to which it gives rise in this Court does not extend beyond the particular factual foundations revealed in the controversy between *these* parties. The questions of validity that arise in that matter, particularly those relating to the engagement of identified heads of legislative power, are therefore questions about the validity of the relevant provisions in their application to the plaintiff.

398 Those questions are said to arise out of the facts agreed by the parties in their special case. The special case was amended in a number of respects while pending in this Court but it is not necessary to trace the history of those amendments. It will be necessary, however, to remark upon a number of features of the special case as it was ultimately agreed between the parties.

399 The special case referred to a large number of statements that were said to have been made by persons or bodies as diverse as the Australian Security Intelligence Organisation ("ASIO"), persons associated with Al Qa'ida, and persons holding public office in Australia. Al Qa'ida was said, in the special case, to be "an organization associated with [Usama] Bin Laden", and persons associated with Al Qa'ida were said to have made various statements between 1998 and 2005 threatening violence against the United States of America and its allies including, in particular, Australia. The special case recorded what were described as "[v]iews and conclusions expressed or reached by or on behalf of the Commonwealth about the threat of terrorism to Australia".

400 The special case also referred to, and included as annexures, a large number of documents, of many different kinds. They included statements and reports by ASIO, a Council of Australian Governments communiqué, and transcripts of interviews with, or statements by, Usama Bin Laden, "a person believed to be Ayman al-Zawahiri", and other persons who, on the face of the documents, appeared to be associated with Usama Bin Laden or Al Qa'ida, or associated with some other group having generally similar aims or attitudes. Policies pursued by the United States in the Middle East were said in one of

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532 r 27.08.1.

those statements to be "a clear proclamation of war against God, his Messenger, and the Muslims" and it was asserted that "[r]eligious scholars throughout Islamic history have agreed that *jihad* is an individual duty when an enemy attacks Muslim countries".

401 The special case further recorded that ASIO had stated that "responsibility or involvement has been claimed by, or reliably attributed to, al-Qa'ida" for a number of attacks that had caused death and injury, including the detonation of truck bombs at United States embassies in Africa, an attack upon a United States naval ship, the USS *Cole*, in the port of Aden, and the aeroplane hijackings and subsequent attacks upon the World Trade Centre in New York and the Pentagon in Washington on 11 September 2001.

402 The parties agreed that the statements recorded in the special case "were made or were likely to have been made as stated or alleged" but went on to say that "there is no agreement between the parties as to the truth of the matters stated". They agreed that the documents "were or were likely to have been published as stated or alleged" but again went on to say that "there is no agreement between the parties as to the truth of the matters contained in the documents". The caveats thus entered by the parties inevitably present difficulties in discerning the factual bases from which the relevant questions were said to arise. Not least is that because the relevance of the fact that some statements were made is not always readily apparent. It will be necessary in the course of these reasons to return to consider some more particular aspects of the difficulties presented by the way in which the special case is framed, but those aspects may be put aside for the moment.

403 Further, when the questions that are said to arise in the matter are cast at the level of generality in which they were framed in the special case, difficult questions may be presented about what exactly are the relevant constitutional facts that bear upon those questions. That, in turn, would require consideration of issues about judicial notice of the kind that were examined in *Australian Communist Party v The Commonwealth* ("the *Communist Party Case*")[533]. But when the questions of validity that arise in this matter are properly identified, as questions about the validity of the operation of the impugned provisions in the particular circumstances of the case, these reasons will show that it is not necessary to resolve any issue about relevant constitutional facts or to explore the limits of doctrines concerning judicial notice. No issue about what are the relevant constitutional facts need be resolved because the determinative question is whether the functions and powers given to federal courts by the impugned provisions constitute the exercise of the judicial power of the Commonwealth. And no issue about the limits of judicial notice need be resolved because the

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533 (1951) 83 CLR 1 at 196.

validity of the impugned provisions, in their application to the plaintiff, does not turn upon the Court's being satisfied of the existence of particular facts or circumstances.

A terrorist act

404 The Code's definition of a "terrorist act" is central to understanding the issues that must be considered. That definition, in s 100.1 of the Code, identifies not only "an action" but also a "threat of action" that has particular characteristics (essentially the causing of serious harm to persons or property, creating a serious risk to the health or safety of the public or a section of the public, or seriously interfering with electronic systems). The action, or threat of action, is not a terrorist act if it is advocacy, protest, dissent or industrial action and is not intended to cause serious harm to persons or to create a serious risk to the health or safety of the public or a section of it. But to be a terrorist act, the action must be done, or the threat made, with the intention of advancing a political, religious or ideological cause, and the action must be done, or the threat made, with the intention of coercing or influencing by intimidation "the government of the Commonwealth or a State, Territory or foreign country" (or a part of a State, Territory or foreign country) or with the intention of "intimidating the public or a section of the public".

The issues

405 The issues that arise in this Court can be grouped under two principal headings: questions about the legislative power to enact the provisions of the Code concerning control orders, and questions about whether the task that the Code assigns to the identified federal courts is the exercise of the judicial power of the Commonwealth. The questions about legislative power were argued with particular reference to the defence power (s 51(vi)[534]), the reference power

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534 "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:

...

(vi) 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".

(s 51(xxxvii)[535]), the external affairs power (s 51(xxix)[536]) and what was described as the "implied power to protect the nation". It will be necessary to consider whether any of the several heads of legislative power mentioned in argument is engaged. But because the discretionary authority to make control orders is given by the legislation to federal courts, it is also necessary to consider the content of the task that is thus assigned and decide whether "the determination by the court gives effect to rights and obligations for which the statute provides and that the determination constitutes an exercise of judicial power"[537].

406 It will be convenient to deal first with the questions about legislative power and then to deal with the questions about judicial power. The first questions should be resolved in favour of validity, but the legislation should be held to be invalid on the ground that the jurisdiction it purports to give to federal courts is not jurisdiction in a matter. The criterion of liability to suffer the making of a control order hinges about the protection of the public from a terrorist act. It does not depend upon the application of any norm or standard of conduct either to the person against whom the order is to be made, or to any past, present or future conduct of that person. The determinative question presented by the legislation to a court asked to make or confirm a control order is whether doing so will tend to protect the public from a terrorist act. The requisite tendency is to be determined[538] by application of the expression "is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public". The question that an issuing court is to address is not a question that is to be decided by the application of legal norms that are identified in the legislation.

Sources of legislative power

407 As noted earlier, four heads of power were relied on to support the impugned provisions of the Code: the defence power, the reference power, the external affairs power and the "implied power to protect the nation". It will be convenient to deal in any detail with only the first two of these heads of power – the defence power and the reference power. Whether, or to what extent, the

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535 Power with respect to "[m]atters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law".

536 Power with respect to "[e]xternal affairs".

537 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 191.

538 s 104.4(1)(d).

external affairs power or an "implied power to protect the nation" might support laws to the same general effect as the impugned provisions, in their operation in the circumstances of this case or in their operation in other, different circumstances, need not be considered. Nothing that is said in these reasons should be understood as deciding those questions. It is convenient to put those questions to one side because each of the defence power and the reference power supports the validity of the impugned provisions in their operation in the facts of this case.

Relevant facts

408 As the questions of validity as properly identified are confined to the validity of the impugned provisions in their application to the plaintiff, it is necessary to begin by identifying the relevant facts and circumstances more precisely.

409 The plaintiff challenges the validity of laws which permit the making of a control order in circumstances where it is agreed that he undertook paramilitary training overseas, for three months, including training in the use of firearms and explosives[539]. The relevant circumstances include the fact that, in seeking the interim control order, it was alleged that the training the plaintiff had received had been provided by Al Qa'ida[540], a group which, after the plaintiff had received the training he did undertake, was listed as a "listed terrorist organisation"[541]. The relevant circumstances also include the further fact that it is agreed that Al Qa'ida has made statements threatening acts in Australia, and against Australians, which, if committed, would constitute terrorist acts as that term is defined in the Code. The purpose of such acts has been said to be to have the United States of America, and its allies including Australia, end their "centuries-long war against Islam and its people" and have "their armies leave all the territory of Islam, defeated, broken, and unable to threaten any Muslim". That is, the acts threatened are acts of violence which, if committed, would be done with the intention of advancing a cause of a kind described in the definition ("political, religious or ideological"), and would be done with the intention of coercing or influencing by intimidation the government of the Commonwealth to change its foreign policies. This intention may usefully be characterised as an international political aim.

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539 Further Amended Special Case, par 6.

540 Further Amended Special Case, par 11(a).

541 Further Amended Special Case, pars 25, 26.

410 Is a law that permits the making of a control order in the circumstances just described, a law with respect to the naval and military defence of the Commonwealth and of the several States?

The defence power

411 Apart from the *Communist Party Case*[542] and *Marcus Clark & Co Ltd v The Commonwealth*[543], the decisions in this Court about the defence power have for the most part focused upon issues presented in the context of either the First or the Second World War. Each of those conflicts was a war between nation states. Each had an identifiable commencement and an identifiable cessation of hostilities. The armed forces of the warring nation states were directly engaged in battle. But so too were the civilian populations of those states engaged in the prosecution of the war. Ideas of "total war" that traced their origins to Napoleon were given full rein. Each of those wars can readily be analysed in the elemental terms of von Clausewitz, as "not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means"[544].

412 What is said in the decisions of the Court about issues presented in the context of the First and Second World Wars must be understood making due allowance for circumstances of the kind just mentioned. But it is no less important to recognise that the particular political and factual circumstances in which those cases were decided do not necessarily mark the boundaries of the legislative power with respect to the naval and miliary defence of the Commonwealth and of the several States.

413 Political events during and between the First and Second World Wars, and in particular the emergence of the Union of Soviet Socialist Republics, may have altered the way in which some nation states identified relevant international political aims and objectives, but the military power of the nation state remained the ultimate method for the effectuation of those aims and objectives. Neither before nor during the twentieth century was the application of military power in pursuit of political aims and objectives confined to declared wars between nation states. The United Kingdom had deployed its forces throughout the British Empire and had used those forces to achieve particular ends without there being any declared war between nation states.

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542 (1951) 83 CLR 1.

543 (1952) 87 CLR 177.

544 Carl von Clausewitz, *On War*, (1832) (J J Graham translation as revised and edited by F N Maude, 1908; Rapoport (ed) 1968) at 119.

414 It may be possible to identify some changes in the way in which the military forces of nation states were used after the Second World War. Whether that conclusion is justified would require consideration of a number of different forms of military engagement after 1945. First, there were various forms of military response to the independence movements in parts of the colonial empires of the United Kingdom, France, Belgium, The Netherlands and Portugal as well as former German and Italian colonies. Second, there was the engagement of forces deployed under the authority of Ch VII of the Charter of the United Nations as they were, for example, in Korea. Third, there were outbreaks of hostilities in the Middle East and in Indochina that were not preceded or accompanied by a formal declaration of war between nation states. Fourth, the military forces of nation states were used as international peacekeeping forces, sometimes with or instead of forces more closely resembling a police rather than a military force. Fifth, the military forces of nation states were used in response to great humanitarian crises that emerged from natural disasters or political action or inaction.

415 If these events do represent some change in the way in which military forces were employed in the latter half of the twentieth century they are changes of only indirect relevance to questions that must now be considered about the ambit of the legislative power with respect to defence. Events of the kind described have not stemmed from or led to the enactment of federal legislation that has been subject to challenge. Because Australian involvement in such events has related to the ways in which Australian defence forces have been deployed, new or different legislation has not been necessary, or, the subject-matter of any new legislation being directly concerned with the military forces of the Commonwealth, no separate question of validity has been agitated.

416 But it may be noted that these ways in which the military forces of nation states were used after the Second World War constituted the use of those forces in execution of the international political objectives of nation states. In all but the humanitarian missions, armed forces were used to achieve those political ends through the actual or threatened application of military power.

417 By contrast, "terrorism" may be seen as raising new and different issues about legislative power. In part, perhaps in large part, that is because terrorism is a tactic that, by its very nature, may not necessarily be seen as evoking a military response.

418 "Terrorism" and "terrorist" are words that may have been used more often in the political discourse of recent decades than they were in earlier times. But the words have a long history. *The Oxford English Dictionary* states, as the first meaning of "terrorism", "[g]overnment by intimidation as directed and carried

out by the party in power in France during the Revolution of 1789-94; the system of the 'Terror' (1793-4)"[545]. "Terrorist" is given a cognate meaning[546]. But more generally, the words are defined by that work as "the employment of methods of intimidation"[547] and "[a]ny one who attempts to further his views by a system of coercive intimidation"[548]. They are, therefore, words that have been used in connection with many different kinds of actions and events.

419 In the twentieth century, "terrorism" and "terrorist" were words that were often used in connection with actions taken for or against the prosecution of nationalist or independence movements. Sometimes they were used to refer to persons who acted for, or events that were to be explained by, revolutionary purposes. But often the words were used by one part of a society to refer to other, opposing, elements in that society and were used to refer to what may be called "internal" forces and events. Notions of what are "internal" forces and events, as opposed to "external" forces and events, have in the past often depended for their classification upon a priori conceptions of the state or society concerned as shaped by the very conceptions that were being directly challenged by those labelled as "terrorists". No bright line can be identified between some kinds of terrorism or terrorist that are "internal" and some that are "external". It is, nonetheless, important to recognise that the present case concerns threats made by persons and groups outside Australia that are made for the stated purpose of effecting a change in Australia's foreign policies. It is to that extent an "external" threat. This case does not concern any wholly "internal" threat and it is, therefore, neither necessary nor appropriate to examine the issues that might arise were it said that the defence power may be engaged to legislate with respect to such a threat.

420 Just as no bright line may be drawn between "internal" and "external" threats, so too there is difficulty in making any division between forms of terrorism according to the kind of measures used to meet the actions of, or threats of action by, those identified as terrorists. Sometimes the acts undertaken by those identified as terrorists have evoked a response that was not markedly different from the particular society's response to other forms of criminal activity. Acts of groups like the Red Army Faction in Germany (sometimes called the Baader-Meinhof Gang) were of that kind. By contrast, the acts of groups like the Shining Path (Sendero Luminoso) in Peru were met with steps undertaken by the military forces of that country.

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545 *The Oxford English Dictionary*, 2nd ed (1989), vol 17 at 820.

546 2nd ed (1989), vol 17 at 821.

547 2nd ed (1989), vol 17 at 821, "terrorism".

548 2nd ed (1989), vol 17 at 821, "terrorist".

421 What is important, for present purposes, is that critical to the ordinary meaning of "terrorism" and "terrorist" and to the Code's definition of a "terrorist act" is the idea of intimidation in its ordinary sense: "the use of threats or violence to force to or restrain from some action"[549]. And as may well implicitly be an essential element of the ordinary meaning of those words, but is in any event explicitly an essential element of the statutory definition, intimidation is employed for particular purposes: those that the Code identifies as "the intention of advancing a political, religious or ideological cause". Terrorism is therefore a means, a tactic, employed for particular ends.

422 At once it is evident that meanings given to "terrorism" and to "war" intersect. If, as von Clausewitz had it, war is the pursuit of a nation's political objectives by other means (namely, the concerted application of military force) and if, as the Code defines a "terrorist act", terrorism includes the pursuit of a political, religious or ideological cause by actual or threatened acts of intimidation directed at a polity (including by serious harm to persons and property) the intersection of the two ideas is revealed. They are both tactics used to achieve particular ends. But they do not overlap entirely. So much is apparent from the possibility that military forces are not used to meet a terrorist threat.

423 The question that now arises is whether a particular legislative response to the threat that persons, or groups of persons, will employ this tactic to intimidate the Commonwealth is, in the particular circumstances of this case, a law with respect to the naval and military defence of the Commonwealth.

424 The plaintiff's submission, that the impugned provisions of the Code are not supported by the defence power, depended primarily upon two related propositions. The plaintiff submitted, first, that actual or threatened aggression from a foreign nation is a circumstance that is essential to the proper application of the defence power. Secondly, the plaintiff submitted that the power is with respect to the defence of the Commonwealth and the several States as bodies politic, not the defence of citizens or inhabitants of the Commonwealth or the States in their "individual capacities as such, or their property". The plaintiff further submitted that, if the defence power were not understood in this way, and in particular, if a threat from what was described as "a private group or organization" were sufficient to engage the power, it is a power which should still be understood as extending only to defence of the polities that make up the Australian federation, not the protection of the public, property, or "infrastructure systems" from aggression or violence.

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549 *The Oxford English Dictionary*, 2nd ed (1989), vol 8 at 8.

425 It is not helpful to examine the ambit of the legislative power with respect to defence at the level of abstraction at which the plaintiff's submissions are cast. Moreover, to do that may well invite error. It is not helpful because questions of the engagement of the defence power, like any question about validity, are questions about the validity of particular legislative provisions. In the familiar words of Kitto J in *Fairfax v Federal Commissioner of Taxation*[550]:

> "the question is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes; it is a question as to the true nature and character of the legislation: is it in its real substance a law upon, 'with respect to', one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character?"

And because the defence power, unlike most other heads of power under s 51, "involves the notion of purpose or object"[551] it is essential not to divorce the legislation in question from the proper identification of the purpose that it is intended to serve. As Dixon J made plain in *Stenhouse v Coleman*[552], however, the "purpose" that is to be identified is not the subjective purposes of legislators. Rather, the "purpose" is to be collected from the legislation in question, "the facts to which it applies and the circumstances which called it forth"[553].

426 Questions about how to identify the relevant statutory purpose were central issues in the *Communist Party Case*. They are questions that must be considered in the present matter. It is, therefore, convenient to examine now what was decided in the *Communist Party Case*.

427 It will be recalled that the legislation in issue in the *Communist Party Case*, the *Communist Party Dissolution Act* 1950 (Cth) ("the Dissolution Act"), recited that:

> "it is necessary, for the security and defence of Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth, that the Australian Communist Party, and bodies of

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550 (1965) 114 CLR 1 at 7.

551 *Stenhouse v Coleman* (1944) 69 CLR 457 at 471 per Dixon J.

552 (1944) 69 CLR 457 at 471.

553 (1944) 69 CLR 457 at 471.

> persons affiliated with that party, should be dissolved and their property forfeited to the Commonwealth".

That recital was preceded by recitals referring to the legislative power with respect to defence and the incidental power, a recital referring to the vesting of the executive power of the Commonwealth in the King, exercisable by the Governor-General, and recitals about aims and activities said to be pursued by the Australian Communist Party.

428 The plaintiffs in the several proceedings that culminated in the decision in the *Communist Party Case* denied the statements of fact contained in the recitals and wished to adduce evidence to contradict the assertions contained in those recitals. Questions were reserved for the opinion of the Full Court including whether "the decision of the question of the validity or invalidity of the provisions of the [Dissolution Act] depend[ed] upon a judicial determination or ascertainment of the facts or any of them" stated in the recitals of the preamble to the Act[554]. That question was answered "No", and the Dissolution Act was held to be invalid. But it is important to recognise that the ultimate question of validity of the Dissolution Act, and the prior question about what facts bore upon validity, were distinct and separate questions.

429 It is further necessary to recognise that, as Dixon J said[555]:

> "to conclude that the question of the validity or invalidity of the Act does not depend on the correctness in fact of the preamble or that evidence to controvert the recitals cannot be offered, the inquiry must be pursued to the point of *excluding on the one hand the possibility of the Act being valid although the facts are not in truth as recited and on the other of its being invalid although they or some of them may be as recited*". (emphasis added)

That is, the Court's holding in the *Communist Party Case* that the Dissolution Act was invalid was a holding that, regardless of the truth or falsity of the recitals, the Act was not a law with respect to defence. And it was on that basis that the question about whether the facts recited in the Dissolution Act might be controverted was answered as it was.

430 What was said in the *Communist Party Case* about the relevance of the factual inquiries proposed by the plaintiffs, to a consideration of the applicability of the defence power, must be understood in this light. What it reveals is the critical importance attached to the Dissolution Act's effect on "the status,

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554 (1951) 83 CLR 1 at 9-10.

555 (1951) 83 CLR 1 at 191.

property and civil rights of persons *nominatim* or by other identification *without any external test of liability upon which the connection of the provisions with power will depend*"[556].

431 The recitals contained "a statement to the effect that persons or bodies of persons have been guilty of acts which might have been penalized in advance under the defence power and have a propensity to commit like acts"[557]. And this was recited "as affording a supposed connection between the defence power and the operative provisions enacted"[558]. Dixon J did not exclude the possibility that such "an extreme and exceptional extension of the operation or application of the defence power"[559] might result from the necessities of war, and support provisions "containing nothing in themselves disclosing a connection with Federal power and depending upon a recital of facts and opinions concerning the actions, aims and propensities of bodies and persons to be affected". But his Honour concluded[560] that "they are necessities that cannot exist in the same form in a period of ostensible peace" and the critical provisions of the Dissolution Act were held not to be supported by the defence power.

432 It is relevant to notice the steps in the argument in the *Communist Party Case* that Dixon J identified as advanced in support of the validity of the Dissolution Act. The recitation of the steps in that argument will provide a useful basis for considering the competing arguments in this matter. It is simplest to set out those steps by reproducing the relevant passage of the reasons of Dixon J, but identifying separate propositions by number. His Honour said[561]:

> "[1] *The central purpose of the legislative power in respect of defence is the protection of the Commonwealth from external enemies* and it necessarily receives its fullest application in time of war. It is a legislative power and therefore affords but the means of establishing all the legal machinery and making all the legal provisions considered necessary and appropriate for the purpose.

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556 (1951) 83 CLR 1 at 198 (emphasis added).

557 (1951) 83 CLR 1 at 201.

558 (1951) 83 CLR 1 at 201.

559 (1951) 83 CLR 1 at 202.

560 (1951) 83 CLR 1 at 202.

561 (1951) 83 CLR 1 at 194-195.

[2] *The responsibility for the practical measures taken in order to protect the country must belong to the Executive.* The prosecution of a war is of necessity an executive function and has always been so conceived. It is needless after our recent experiences of war to enlarge upon the extent to which it is necessary in modern war to transfer both power and responsibility to the Executive. The conduct of such a war carries with it the direction and control of men and their affairs in every aspect capable of affecting in any degree the prosecution of the war.

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[3] *I think that at this date it is futile to deny that when the country is heavily engaged in an armed conflict with a powerful and dangerous enemy the defence power will sustain a law conferring upon a minister power to order the detention of persons whom he believes to be disaffected or of hostile associations and whom he believes that it is necessary to detain with a view to preventing their acting in any manner prejudicial to the public safety and the defence of the Commonwealth*: see *Lloyd v Wallach*[562]; *Ex parte Walsh*[563]; and *Little v The Commonwealth*[564]. The reason is because administrative control of the liberty of the individual in aspects considered material to the prosecution of a war is regarded as a necessary or proper incident of conducting the war. One man may be compelled to fight, another to perform directed work, a third may be suspected of treasonable propensities and restrained.

[4] *But what the defence power will enable the Parliament to do at any given time depends upon what the exigencies of the time may be considered to call for or warrant.* The meaning of the power is of course fixed but as, according to that meaning, the fulfilment of the object of the power must depend on the ever-changing course of events, the practical application of the power will vary accordingly.

[5] *Hitherto a marked distinction has been observed between the use of the power in war and in peace.* 'But this Court has never subscribed to the view that the continued existence of a formal state of war is enough in itself, after the enemy has surrendered, to bring or retain within the legislative power over defence the same wide field of civil regulation and control as fell within it while the country was engaged in a conflict with

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562 (1915) 20 CLR 299; [1915] VLR 476.

563 [1942] ALR 359.

564 (1947) 75 CLR 94 at 102-104.

> powerful enemies' (*R v Foster*[565]). Correspondingly it is no doubt true that a mounting danger of hostilities before any actual outbreak of war will suffice to extend the actual operation of the defence power as circumstances may appear to demand." (emphasis added)

433 Argument in the *Communist Party Case* focused upon the application of the last two propositions, especially the fourth. Thus, because at the date of Royal Assent to the Dissolution Act, Australian forces were engaged in hostilities in Korea, it was suggested[566] that "under the influence of events the practical reach and operation of the defence power had grown to such a degree" as to cover the Dissolution Act. But although Dixon J accepted[567] that "the events of the time" had brought within the application of the defence power "measures which would not have been considered competent – for example, in the state of affairs prevailing when this Court held its first sittings" – the Dissolution Act was held not to be supported by s 51(vi).

434 In the present case, the plaintiff fastened upon the first proposition (that the central purpose of the legislative power in respect of defence is the protection of the Commonwealth from external enemies). The plaintiff submitted, in effect, that defence from external enemies was more than the *central* purpose of the power, it was a defining and necessary characteristic of the purpose of laws made in exercise of the power. Further, so the plaintiff submitted, the only relevant "external enemies" were those that are nation states, not what the plaintiff described as a "private group or organization".

435 These contentions should not be accepted. Neither is a proposition that is established by, or supported by what is said in, the *Communist Party Case* or any other decision of this Court. Each is a proposition that seeks to confine the ambit of s 51(vi). Neither the words of the provision, nor the history of its application, supports propositions cast in the absolute terms advanced by the plaintiff. Rather, it will suffice for present purposes to recognise that the impugned provisions of the Code, in their application in this case, 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. The relevant purpose of the impugned provisions is to respond to threats of that kind by authorising the making of control orders.

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565 (1949) 79 CLR 43 at 83, 84.

566 (1951) 83 CLR 1 at 196.

567 (1951) 83 CLR 1 at 197.

436 In support of his contentions, the plaintiff attached weight to the words "naval and military" in the expression "[t]he naval and military defence of the Commonwealth and of the several States". These words, so the plaintiff submitted, described "the kind of defence to which the power is ultimately directed": defence through the exercise of naval and military force. In *Farey v Burvett*, Griffith CJ said[568] that "naval" and "military" were words of extension, not limitation, "showing that the subject matter includes all kinds of warlike operations". And the many cases decided during the two world wars and upholding the validity of legislation regulating all manner of aspects of daily life are consistent only with the power not being limited to the raising, training and equipping of military forces and ancillary matters. Of course the words are not unimportant; they cannot be ignored. The power must be construed according to its terms. And as *Farey v Burvett* reveals, "naval and military" are to be seen, in at least some respects, as words of extension not limitation.

437 But contrary to the plaintiff's submissions, s 51(vi) is not to be read as a legislative power whose content is defined by one or more kinds of response to external threat. It may be accepted that "naval and military defence" does point to kinds of threat with which the power is concerned. In particular, the reference to "naval and military defence" reveals that, as Dixon J said in the *Communist Party Case*, the central purpose of the legislative power is protection of the Commonwealth from external enemies. It by no means follows from this observation, however, that the only permitted subject-matter of legislation made in reliance upon s 51(vi) is the provision for naval and military responses to such threats. The view that the power is confined in that way was rejected in *Farey v Burvett*. No less importantly, however, recognising that the central purpose of the power is protection of the Commonwealth from external enemies does not mean that those enemies are necessarily confined to nation states.

438 Even if it was once true that only nation states had the means of pursuing political aims by the application of concerted force, that is not so today. The means of applying lethal force have changed over time. Not only have weapons changed, the ways in which widespread harm may be inflicted have multiplied. During and after the Second World War, so-called "special forces" raised within regular military forces have been used, as small units, but with great military effect. During the same period, guerrilla tactics, using irregular and numerically small forces, have been used to great effect. So too, now, the events of 11 September 2001 show that "terrorist" tactics can be used by very small numbers of personnel but with large consequences. Power of a kind that was once the exclusive province of large military forces of nation states may now be exerted in pursuit of political aims by groups that do not constitute a nation state.

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568 (1916) 21 CLR 433 at 440.

439 Because that is so, it may be necessary to consider the continued utility of what Dixon J referred to in the fifth proposition from the *Communist Party Case* as a "marked distinction ... between the use of the power in war and in peace". The line between war and peace may once have been clear and defined by the declared state of relations between nations. But as the reference in the *Communist Party Case* to "a period of *ostensible* peace"[569] reveals, that line is now frequently blurred. The increasing capacity of small groups to carry out threats of widespread harm to persons and property may further obscure the distinction between war and peace if those terms are to be defined primarily by reference to dealings between nation states. If there is that blurring of the distinction between war and peace, it must not be permitted to obscure the essential similarity between the actual or threatened application of concerted force by one nation state on another, in pursuit of the first state's political objectives, and the actual or threatened application of such force by an organisation or group in pursuit of that organisation's international political objectives. The former may be described as "war", and the latter as "terrorism", but each is the pursuit of international political aims by the actual or threatened application of concerted force.

440 It may be accepted that, as the plaintiff submitted, the defence power is concerned centrally with the defence of the Commonwealth and the several States as bodies politic; the power does not focus upon the physical safety of individuals or their property. Nonetheless, it is important to recognise that in war, force is ultimately applied to persons and property. The aerial bombing campaigns of the Second World War show that force is applied in war in ways that directly affect civilian populations and their property.

441 The distinction drawn by the plaintiff between the defence of the Commonwealth and the several States as bodies politic, and the defence of citizens or inhabitants of the Commonwealth or the States in their "individual capacities as such, or their property", should, to that extent, be rejected as unhelpful.

442 There is, however, a related distinction that should be made. It may be drawn between the application of force by individuals whose motives for doing so are not to further any international political aim and the application of force in furtherance of international political objectives. The latter kind of case, in which there are international political objectives, may engage the defence power; the former would seem unlikely to do so. Of course, it must be recognised that the distinction just described may be more difficult to draw in some cases than others, especially if the aim pursued is evidently not capable of fulfilment. And religious and ideological motives may present their own particular difficulties in

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569 (1951) 83 CLR 1 at 202 (emphasis added).

that respect, especially if the aims being pursued were to be seen as utopian rather than practical. But these difficulties apart, it should be accepted that the defence power is concerned centrally with defence of the Australian bodies politic. It is therefore concerned centrally with defence against the imposition of political objectives on those polities by external force. It matters not whether that force is sought to be applied by other nation states or by groups that do not constitute a state.

443 "[W]hat the defence power will enable the Parliament to do" in response to the possibility of actions by groups that are not themselves (and are not the proxies of) nation states "depends upon what the exigencies of the time may be considered to call for or warrant"[570]. Whether and to what extent it is necessary, in the words of the second proposition identified in the *Communist Party Case*, "to transfer both power and responsibility to the Executive" to meet the possibility of such actions may present difficult questions. In particular, whether the point would come at which the defence power would "sustain a law conferring upon a minister power to order the detention of persons whom he believes ... that it is necessary to detain with a view to preventing their acting in any manner prejudicial to the public safety and the defence of the Commonwealth" need not be decided. It is sufficient to note that the reason given by Dixon J in the *Communist Party Case* for the validity of such legislation in wartime was that administrative control of the liberty of the individual in this respect was a necessary or proper incident of conducting the war in which the nation was then engaged.

444 These are not questions that arise in this matter. The impugned provisions do not provide for administrative detention. They provide for restraints on liberty to the extent that those restraints are "reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act"[571]. Subject to the judicial power issues that will be considered separately, the impugned provisions are explicitly directed to the prevention of terrorist acts. That is their evident purpose (understanding "purpose" in the sense described by Dixon J in *Stenhouse v Coleman*[572]). They are engaged in relation to the plaintiff in the circumstances earlier described. In that operation the impugned provisions are laws with respect to the naval and military defence of the Commonwealth. They are laws with respect to naval and military defence because, in their particular operation in this case, they provide measures directed to preventing the application of force to persons or property in Australia that is

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570 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 195.

571 s 104.4(1)(d).

572 (1944) 69 CLR 457 at 471.

sought to be applied for the purpose of changing the federal polity's foreign policies.

445 Although the conclusions just reached suffice to support holding that (judicial power questions apart) the impugned provisions are supported by a head of legislative power, it is as well to say something about the engagement of the reference power.

The reference power

446 Because the impugned provisions of the Code were not provisions that were part of the text set out in Sched 1 to the Victorian Reference Act, argument about the application of the reference power in the present matter focused upon the operation of s 4(1)(b) of that Act. The matter referred to the Parliament of the Commonwealth by s 4(1)(b) of the Victorian Reference Act was described in that provision as:

> "the matter of terrorist acts, and actions relating to terrorist acts, but only to the extent of the making of laws with respect to that matter by making express amendments of the terrorism legislation or the criminal responsibility legislation".

"[E]xpress amendment" of the terrorism legislation or the criminal responsibility legislation was defined in s 3 of the Victorian Reference Act as:

> "the direct amendment of the text of the legislation (whether by the insertion, omission, repeal, substitution or relocation of words or matter) by Commonwealth Acts, but does not include the enactment by a Commonwealth Act of a provision that has or will have substantive effect otherwise than as part of the text of the legislation".

447 The critical question in the present matter is whether the 2005 Act, in so far as it inserted the impugned provisions in the Code that provide for the making of control orders, is a law with respect to a matter referred by the Victorian Reference Act. The answer to that question depends immediately upon whether the 2005 Act is a species of the genus: "laws with respect to that matter [of terrorist acts, and actions relating to terrorist acts] by making express amendments of the terrorism legislation". If the impugned provisions are laws of that kind, there then is a further issue about the operation to be given to s 100.8 of the Code, as enacted in pursuance of the reference of power to enact provisions in the terms of the text set out in Sched 1 to the Victorian Reference Act. Section 100.8 provided that it applied to "an express amendment" of Pt 5.3 of the Code and that:

> "(2) An express amendment to which this section applies is not to be made unless the amendment is approved by:

(a) a majority of the group consisting of the States, the Australian Capital Territory and the Northern Territory; and

(b) at least 4 States."

448 The Commonwealth submitted that the subject-matter of the reference made by s 4(1)(b) of the Victorian Reference Act was "terrorist acts, and actions relating to terrorist acts". It further submitted that the succeeding words of the provision (introduced by "but only to the extent") indicated the way in which that reference should be implemented. That is, the Commonwealth submitted that there was a reference of power to make laws with respect to a defined subject-matter but that the reference was qualified by the requirement that the law had to be enacted in a particular form – as part of the original Act identified as the provisions whose text was set out in Sched 1 to the Victorian Reference Act.

449 The plaintiff contended that the matter referred by s 4(1)(b) of the Victorian Reference Act was not to be understood in this way. Rather, so the plaintiff argued, the amendments of the Code made by the 2005 Act's insertion of provisions relating to control orders constituted "the insertion of an entirely new regime, one that 'will have [substantive] effect otherwise than as part of the text of the legislation'[573] and is thus excluded from the matter referred by s 4(1)(b)". The plaintiff further submitted that there had not been consent to the amendments made by the 2005 Act that was of a kind required by s 100.8 of the Code as enacted pursuant to the reference.

450 For the reasons that follow, the plaintiff's construction of the Victorian Reference Act should be rejected and the Commonwealth submission accepted. The text of the Victorian Reference Act requires that conclusion.

451 First, it is important to recognise that the text and structure of that Act are consistent only with there being two distinct and different references of power: one made by s 4(1)(a) by reference to the scheduled text; the other made by s 4(1)(b). Section 4(3) of the Act provided expressly that the operation of each of pars (a) and (b) of s 4(1) "is not affected by the other paragraph". It follows that "the matter of terrorist acts, and actions relating to terrorist acts" referred to in s 4(1)(b) is not to be read as confined by reference to the particular provisions set out in the scheduled text: the "referred provisions".

452 Next, and separately, the provisions of the Victorian Reference Act dealing with "express amendment" are consistent only with the Commonwealth

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573 *Terrorism (Commonwealth Powers) Act* 2003 (Vic), s 3 definition of "express amendment".

submission about the way in which that Act operates. That appears most immediately from the definition of "express amendment". The definition has two parts. First, it is said that an express amendment means "the direct amendment of the text of the legislation" and various examples of the ways in which that may be done are spelled out: "whether by the insertion, omission, repeal, substitution or relocation of words or matter". Then there is a qualification: "but does not include the enactment ... of a provision that has or will have substantive effect otherwise than as part of the text of the legislation".

453 How do these two parts of the definition mesh? At first sight, the two parts appear to be contradictory. The first part contemplates direct amendment by insertion, omission, repeal, substitution or relocation of words or matter; the second part limits that by excluding enactment of a provision that has or will have "substantive effect otherwise than as part of the text of the legislation".

454 If, however, as the Commonwealth submits, the reference made by s 4(1)(b) permits amendment by insertion of new matter (in this case provisions for control orders) so long as that new matter falls within the description of a law with respect to the matter referred ("terrorist acts, and actions relating to terrorist acts") and that is done by express amendment to the law that was enacted in the form of the scheduled text, there is no contrariety between the two parts of the definition of "express amendment". By contrast, if the plaintiff is right to submit that no change may be made to legislation enacted in the form of the scheduled text if that change introduces a new provision having "substantive effect", the definition of express amendment cannot be given sensible meaning. On the hypothesis advanced by the plaintiff, the qualification to the definition of express amendment would swallow the body of the definition and, no less importantly, s 4(1)(b) would not constitute the reference of a second, and separate subject-matter.

455 For these reasons the provisions about control orders introduced into Pt 5.3 of the Code by the 2005 Act are supported by the reference of power made by s 4(1)(b) of the Victorian Reference Act.

456 The point then made by the plaintiff about the operation of s 100.8 may be dealt with briefly. In its terms, s 100.8 is a provision of federal law which purports to fetter the federal Parliament in its future action: certain amending laws may be made *only* if prior approval is given. That law is invalid. The federal Parliament may not fetter the future exercise of its legislative powers. It has no power to do so. It is therefore not necessary to consider how approvals of the kind for which s 100.8 provides may be signified or by what person or institution of a State or Territory such an approval would be given.

457 For these reasons the impugned provisions, in their operation in the facts and circumstances of this case, are provisions that meet the description of laws with respect to the heads of legislative power set out in s 51(vi) and s 51(xxxvii).

But those grants of legislative power are, of course, "subject to this Constitution". It is, therefore, necessary to consider the Ch III questions that are presented by the impugned provisions.

Judicial power

458 Examination of the judicial power questions that arise in this matter must begin from two well-established principles. First, *R v Kirby; Ex parte Boilermakers' Society of Australia*[574] decided that the express statement in ss 75 and 76 "of the matters in respect of which and the Courts by which the judicial power of the Commonwealth may be exercised is ... clearly intended as a delimitation of the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth, and as a necessary exclusion of any other exercise of original jurisdiction"[575].

459 Secondly, it is well established that a single legislative provision may perform the double function of dealing with substantive liabilities or substantive legal relations and giving jurisdiction with reference to them[576]. Even though the liability and the jurisdiction are created by the one provision, it is possible to identify the two separate conceptions and "fit them into the pattern of Chapter III of the Constitution"[577]. That is, it is possible to identify a law made under s 76(ii) conferring jurisdiction on a federal court in a matter arising under a law made by the Parliament.

460 It is, of course, clear that the legislation now in issue gives jurisdiction to federal courts. The determinative issue in the case is whether the authority given to federal courts to make control orders is authority to decide a *matter* arising under a law made by the Parliament.

461 That question must be answered by giving close attention to the relevant legislation. Before doing that, however, it is necessary to say something further about the first of the premises just identified as established by *Boilermakers*. In its oral submissions, the Commonwealth placed heavy emphasis upon the

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574 (1956) 94 CLR 254.

575 (1956) 94 CLR 254 at 273.

576 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 165 per Dixon J.

577 *Barrett* (1945) 70 CLR 141 at 167 per Dixon J.

"chameleon doctrine"[578] by which, so it was submitted, the nature of a power takes its character from the body to which it is given.

462 It may readily be accepted that, as Kitto J said in *R v Spicer; Ex parte Australian Builders' Labourers' Federation*[579]:

> "It is true ... that there is nothing necessarily foreign to the nature of judicial power in the fact that its exercise is conditional upon the formation of an opinion described in broad terms [and that it] is true also that sometimes a grant of a power not insusceptible of a judicial exercise is to be understood as a grant of judicial power because the recipient of the grant is judicial."

But the fact that the recipient of statutory power is a federal court does not conclude the question whether the power thus given to the court is the judicial power of the Commonwealth.

463 Nor is that question to be answered on an assumption that the doctrine of separation of powers is "a product of abstract reasoning alone [or is] based upon precise definitions of the terms employed"[580]. As Kitto J rightly pointed out in *R v Davison*[581], the doctrine, as developed in political philosophy, was based upon observation of the experience of democratic states. That is why, as Kitto J also remarked in *Davison*[582], the distribution by the Constitution of the functions of government amongst separate bodies, by requiring a distinction to be maintained between powers described as legislative, executive and judicial, "is using terms which refer, not to fundamental functional differences between powers, but to distinctions generally accepted at the time when the Constitution was framed between classes of powers requiring different 'skills and professional habits' in the authorities entrusted with their exercise".

464 The well-recognised difficulties in framing any comprehensive definition of what is the exercise of the judicial power of the Commonwealth[583] do not deny

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578 *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 18 per Aickin J.

579 (1957) 100 CLR 277 at 304-305.

580 *R v Davison* (1954) 90 CLR 353 at 381 per Kitto J.

581 (1954) 90 CLR 353 at 381.

582 (1954) 90 CLR 353 at 381-382.

583 Compare, for example, *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ; *Waterside Workers' Federation of Australia v*

(Footnote continues on next page)

the centrality of the concept of "matter" in ss 75 and 76 and the importance, in the understanding of that concept, of "arbitrament upon a question as to whether a right or obligation in law exists"[584].

465 When, in *Huddart, Parker & Co Pty Ltd v Moorehead*, Griffith CJ spoke[585] of judicial power as "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property", the notion of "arbitrament upon a question as to whether a right or obligation in law exists"[586] lay at the centre of the conception that was described. In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*, Kitto J elaborated the point when he said[587]:

> "a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, *a question as to the existence of a right or obligation*, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons". (emphasis added)

As Kitto J went on to say[588]:

> "a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified".

466 That does not mean that the exercise of judicial power will not often require the discretionary exercise of power. Conferring discretionary powers on

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J W Alexander Ltd (1918) 25 CLR 434 at 442 per Griffith CJ; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 281-282 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 267 per Deane, Dawson, Gaudron and McHugh JJ.

584 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 per Kitto J.

585 (1909) 8 CLR 330 at 357.

586 *Tasmanian Breweries* (1970) 123 CLR 361 at 374 per Kitto J.

587 (1970) 123 CLR 361 at 374.

588 (1970) 123 CLR 361 at 374-375.

a court is a frequent feature of conferring judicial power. But the conferral of discretionary power may, in some cases, present particular questions[589].

467 In *Queen Victoria Memorial Hospital v Thornton*[590], the task given to a court of summary jurisdiction (described by this Court[591] as "making an appointment in substitution for the appointment made by an employer") was so unconfined that the legislation was held not to confer judicial power. No issue of fact was submitted to the court for decision, no antecedent right existed which the court was called upon to ascertain, examine or enforce.

468 The legislation in issue in *Thornton* may be contrasted with s 37 of the *Stevedoring Industry Act* 1954 (Cth), considered by this Court in *R v Spicer; Ex parte Waterside Workers' Federation of Australia* ("the *Waterside Workers' Case*")[592]. Of that legislation, four members of the Court said[593]:

> "The validity of s 37 depends upon its real nature and meaning. If it is to be interpreted as conferring upon the Commonwealth Industrial Court jurisdiction to hear and determine a matter arising under a law made by the Parliament of the Commonwealth within the meaning of s 76(ii) of the Constitution, then there is nothing to be said against its constitutional validity. A matter of that description involves a claim of right depending on the ascertainment of facts and the application to the facts of some legal criterion provided by the legislature: see *Barrett v Opitz*[594]; *Hooper v Hooper*[595]. The existence of some judicial discretion to apply or withhold the appointed legal remedy is not necessarily inconsistent with the determination of such a matter in the exercise of the judicial power of the Commonwealth. But it is perhaps necessary to add that the discretion must not be of an arbitrary kind and *must be governed or bounded by some ascertainable tests or standards*." (emphasis added)

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589 Campbell, "The Choice between Judicial and Administrative Tribunals and the Separation of Powers", (1981) 12 *Federal Law Review* 24 at 30-31.

590 (1953) 87 CLR 144.

591 (1953) 87 CLR 144 at 150.

592 (1957) 100 CLR 312.

593 (1957) 100 CLR 312 at 317 per Dixon CJ, Williams, Kitto and Taylor JJ.

594 (1945) 70 CLR 141 at 166-169.

595 (1955) 91 CLR 529.

It is the need to identify an ascertainable test or standard which is to govern the grant or refusal of an interim control order which is critical in the present case. That will require close attention to the relevant provisions of the Code. Before undertaking that task it is necessary, however, to say more about discretion and judicial power.

469 It may be thought that what was said in the *Waterside Workers' Case* was qualified, even departed from, in *R v Joske; Ex parte Shop Distributive and Allied Employees' Association* ("the *Shop Distributive Employees' Case*")[596]. It was argued in the *Shop Distributive Employees' Case* that a provision of the *Conciliation and Arbitration Act* 1904 (Cth) that permitted the Industrial Court, upon finding that there was an invalidity in the affairs of an industrial organisation, to "make such order as it thinks fit to rectify or cause to be rectified the invalidity, or to negative, modify or cause to be modified the consequences in law of the invalidity"[597] did not confer judicial power. Before making such an order, the Industrial Court was required to satisfy itself that such an order "would not do substantial injustice to the organization" or to members or third parties having dealings with the organisation.

470 Of these provisions, Mason and Murphy JJ said[598]:

> "It involves, so the argument runs, the conferment on the Court of functions which differ markedly from the ascertainment and declaration of existing rights, involving as they do, the making of determinations by reference to criteria not enunciated and the making of orders creating new rights. In addition, it is urged that the concept of 'substantial injustice' is so vague as not to lend itself to an exercise of judicial power. These considerations, it seems to us, are not enough to bring us within reach of the conclusion which the prosecutors seek to attain. Many examples are to be found in the exercise of judicial power of orders which alter the rights of the parties or are the source of new rights. Likewise, *there are countless instances of judicial discretions with no specification of the criteria by reference to which they are to be exercised – nevertheless they have been accepted as involving the exercise of judicial power* (see *Cominos v Cominos*[599]). *It is no objection that the function entrusted to the Court is novel and that the Court cannot in exercising its discretion*

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596 (1976) 135 CLR 194.

597 *Conciliation and Arbitration Act* 1904 (Cth), s 171C(2), as inserted in the principal Act by the *Conciliation and Arbitration (Organizations) Act* 1974 (Cth).

598 (1976) 135 CLR 194 at 215-216.

599 (1972) 127 CLR 588.

> *call in aid standards elaborated and refined in past decision; it is for the Court to develop and elaborate criteria regulating the discretion*, having regard to the benefits which may be expected to flow from the making of an order under sub-s (2)(a) and the impact which such an order will have on the interests of persons who may be affected." (emphasis added)

471 Two observations may be made about this aspect of the reasons of Mason and Murphy JJ. First, their Honours did not suggest that the propositions they formulated were at odds with the earlier decision of four members of the Court in the *Waterside Workers' Case*. Secondly, and more fundamentally, what is said in the *Shop Distributive Employees' Case* must be understood in the light of some basic principles.

472 The *Boilermakers' Case*, and many other decisions of the Court both before and after *Boilermakers*, establish beyond argument that the Constitution provides a separation of powers. It follows inevitably that the bare fact that legislation gives power to a federal court does not mean that no Ch III question can arise. Whatever the ambit of the so-called chameleon doctrine, by which a power that may be exercised administratively or judicially may take its colour from the body to which it is given[600], the doctrine does not strip the concept of separation of powers of all meaning. Contrary to the submissions of the Commonwealth, the chameleon doctrine does not mean that *Boilermakers* "does not matter much any more"[601]. There remains a real and radical difference between the judicial power of the Commonwealth and executive and legislative power.

473 Although Mason and Murphy JJ concluded, in the *Shop Distributive Employees' Case*[602], that the exercise of the power given to the Industrial Court to grant or withhold relief according to the consideration of "substantial injustice" was itself an exercise of judicial power, it is important not to divorce that conclusion from the context in which it was reached. In particular, it is important to recognise that the power to grant relief was predicated upon the Court's finding that there was some invalidity in the affairs of the organisation. On any view, then, the issue about whether there was an "invalidity" in the affairs of the organisation constituted a "matter". There was a controversy between parties about whether past action or inaction accorded with identified legal standards. The notion of "substantial injustice" was to be engaged in considering what orders should be made if an "invalidity" were established.

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600 *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 18 per Aickin J.

601 [2007] HCATrans 076 at 11295.

602 (1976) 135 CLR 194 at 216.

474 Now it may be thought, from the manner in which the joint reasons in the *Waterside Workers' Case* were expressed, that it is useful to divide the problem into two questions: first, whether there is a claim of right depending upon the application to facts as ascertained of "some legal criterion provided by the legislature"[603] and second, whether the remedy is discretionary. The utility of such a segmented approach to the problem of whether a power given to a court is a judicial power may be doubted. The whole of the relevant legislative provisions must be considered. Observing that a discretion is given to a federal court does not, standing alone, require the conclusion that the power is not judicial power. The decisions in the *Waterside Workers' Case* and the *Shop Distributive Employees' Case* (and many other decisions of the Court[604]) show that to be so. But power cannot validly be given to a federal court if the decisions whether and when to exercise the power that is given are not governed or bounded by a "defined or definable, ascertained or ascertainable"[605] standard. Such power is not power to decide a matter. There may be "a legal proceeding"[606], but there is not that "arbitrament upon a question as to whether a right or obligation in law exists"[607].

475 It is with these principles in mind that the impugned provisions must be examined. That examination will show that the impugned provisions have a number of features common to many forms of the exercise of judicial power. There is the giving of the power to courts, the requirement to find facts, the specification of a standard of proof, the articulation of the connection that is to be drawn between premise and conclusion using terms familiar to judges and lawyers ("reasonably necessary" and "appropriate and adapted"). But what sets the impugned provisions apart from an exercise of judicial power is the indeterminacy of the criterion that the courts are required to apply – "for the purpose of protecting the public from a terrorist act".

476 That criterion is unlike any that hitherto has been engaged in the exercise of judicial power. It is a criterion that does not call for the judicial formulation of standards of conduct or behaviour. It is a criterion that does not require the application of any familiar judicial measure of a kind found in fields as diverse as

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603 (1957) 100 CLR 312 at 317.

604 For example, *Cominos v Cominos* (1972) 127 CLR 588 at 608.

605 *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 291 per Dixon CJ.

606 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

607 *Tasmanian Breweries* (1970) 123 CLR 361 at 374 per Kitto J.

the law of tort ("reasonable"[608]), matrimonial causes ("just and equitable" or "necessary ... to do justice"[609]), corporations law or related fields ("just and equitable"[610]), regulation of contractual relations ("inequitable or unduly onerous"[611]) or industrial relations ("oppressive, unreasonable or unjust"[612]). It is a criterion that does not direct attention to whether an identified person is likely to offend against the criminal law if released from prison[613]. It is a criterion that seeks to require federal courts to decide whether and how a particular order against a named person will achieve or tend to achieve a future consequence: by contributing to whatever may be the steps taken by the Executive, through police, security, and other agencies, to protect the public from a terrorist act. It is a criterion that would require a federal court to consider future consequences the occurrence of which depends upon work done by police and intelligence services that is not known and cannot be known or predicted by the court.

477 Standards expressed in general terms, like those that are referred to earlier, are susceptible of "strictly judicial application"[614]. The criterion that is fixed by the impugned provisions is not. To explain why that is so, it is necessary to say something more about the impugned provisions, and to do that by reference to the Commonwealth's submissions.

478 The Commonwealth submitted that in exercising the powers under Div 104 a court issuing an interim control order, or confirming such an order, gives effect to the rights created by the Division. The Commonwealth contended that the issuing court "is required to examine past facts relating to [the person concerned], and to assess those facts against the standards specified in the Division". Those standards were identified as specified in ss 104.3, 104.4 and 104.12A of the Code and were said to be "sufficiently precise to engage the

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608 *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

609 *Cominos v Cominos* (1972) 127 CLR 588.

610 *Insurance Commissioner v Associated Dominions Assurance Society Pty Ltd* (1953) 89 CLR 78 at 90 per Fullagar J.

611 *Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25 at 54-56 per Williams J.

612 *R v Commonwealth Industrial Court; Ex parte The Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 368 at 383 per Kitto J.

613 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

614 *R v Commonwealth Industrial Court; Ex parte The Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 368 at 383 per Kitto J.

exercise of ... judicial power"[615]. Yet at the same time, the Commonwealth acknowledged that "[t]he area of operation of Division 104 adjusts with the level of threat", that is, threat to the public constituted by the possibility of commission of a terrorist act. What then are the standards specified in ss 104.3, 104.4 and 104.12A?

479 Section 104.3 is directed to the manner in which an interim control order is requested. It says nothing about the criteria to be applied in deciding whether an interim control order should be granted. Section 104.12A regulates procedures for confirming an interim control order, but again says nothing about what criteria are to be applied by the issuing court in deciding whether to confirm the interim order. Whether to confirm an interim control order is a subject dealt with by s 104.14 which provides[616] that the court may revoke the interim control order if "not satisfied as mentioned in paragraph 104.4(1)(c)".

480 In the end, it is s 104.4(1) which states the only criteria that an issuing court is to apply in deciding whether to grant an interim control order or confirm such an order. Two conditions must be met. First, the court must be satisfied on the balance of probabilities that either (i) "making the order would substantially assist in preventing a terrorist act" or (ii) "the person has provided training to, or received training from, a listed terrorist organisation"[617]. The second condition is that "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"[618].

481 Several features of this second condition should be noted. Each of the obligations, prohibitions and restrictions to be imposed by the order must have two characteristics: (a) that it is "reasonably necessary" for the purpose of protecting the public from a terrorist act, and (b) that it is "reasonably appropriate and adapted" for that purpose. In a case where it is not contended that the person concerned has provided training to or received training from a listed terrorist organisation, there is an evident overlap between the requirement of the alternative element of the first condition, that the court be satisfied that making the order would substantially assist in preventing a terrorist act, and the requirement that the particular obligations imposed are both reasonably

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615 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 597 [34] per McHugh J.

616 s 104.14(7)(a).

617 s 104.4(1)(c).

618 s 104.4(1)(d).

necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

482 In the present case, it was alleged that Mr Thomas was a person who had received training from a listed terrorist organisation. That is, the second element of the first condition was said to be engaged. This element, provided by s 104.4(1)(c)(ii), that a person has provided training to or received training from a listed terrorist organisation would, on its face, appear to extend to any and every form of training. So much would appear to follow from the distinction drawn in s 101.2 between a person providing or receiving training, and the training being "connected with preparation for, the engagement of a person in, or assistance in a terrorist act". But the significance of the apparent reach of the provision need not be explored.

483 The facts explicitly agreed in the special case included only that:

> "In March 2001, [Mr Thomas] left Australia and travelled to Pakistan, and then to Afghanistan. Whilst in Afghanistan, he undertook paramilitary training at the Al Farooq training camp for a period of three months. This training included training in the use of firearms and explosives."

Who provided that training was not recorded as a fact agreed for the purposes of the special case.

484 The special case included both the Federal Magistrate's reasons for granting the interim control order against Mr Thomas and the order itself. Schedule 2 to the order set out a "Summary of the grounds on which this order is made". Paragraph 1 of that schedule recorded that Mr Thomas had "admitted that he trained with Al Qa'ida in 2001" and that "Al Qa'ida is a listed terrorist organisation under section 4A of the Criminal Code Regulations 2002, made under the [Code]". It went on to record that Mr Thomas also admitted that "while at the Al Qa'ida training camp he undertook weapons training, including the use of explosives and learned how to assemble and shoot various automatic weapons".

485 As noted earlier in these reasons, the special case is drawn in such a way that it is by no means clear whether the findings made by the Federal Magistrate, and recorded in the summary of grounds on which the interim control order was made, are to be taken to be established facts for the purposes of the special case. The better view may well be that they are not agreed facts. It is, however, not necessary to go beyond the point of noticing that one asserted basis for the grant of the interim control order was that Mr Thomas received training of the kind described with Al Qa'ida.

486 Now as counsel for Mr Thomas pointed out, in reply, the assertion was that Mr Thomas trained with Al Qa'ida in 2001, *before* Al Qa'ida was listed as a

terrorist organisation in 2002. That temporal observation may or may not be relevant to the application of the first condition of s 104.4(1). That is, there may be a question whether, on its true construction, s 104.4(1)(c)(ii) requires that the training be given to or received from an organisation that is a listed organisation at the time of the training. That question need not be decided. But the facts agreed do not assert, and the parties did not assert in argument, that it is relevant to consider whether, at the time of Mr Thomas undertaking training, he was acting in breach of federal law, whether as stated in the Code or elsewhere.

487 Assuming, without deciding, that the way in which the two conditions specified in s 104.4(1)(c) are framed presents no separate question about the sufficiency of the statute's specification of the rights and obligations to be determined by a court in exercise of the judicial power of the Commonwealth, particular attention must be directed to the requirements that the court is satisfied, to the requisite standard, that the obligations, prohibitions and restrictions to be imposed are both reasonably necessary for the purpose of protecting the public from a terrorist act and reasonably appropriate and adapted for that purpose.

488 Again, some questions of construction of the provision arise. In particular, what is meant by the cumulative requirement that the court be satisfied that each of the obligations, prohibitions and restrictions to be imposed is reasonably necessary *and* reasonably appropriate and adapted for the stated purpose?

489 The expression "reasonably necessary" would make no sense if "necessary" were to be understood as "indispensable"[619]. The better view may therefore be that "reasonably necessary" is used to convey some less intense connection.

490 In oral argument it was suggested that it should be understood as having substantially the same meaning as the word "necessarily" has been construed to have in income tax law allowing deductions for expenditure "necessarily incurred" in the carrying on of a business[620]. In that context "necessarily" has been understood to mean "clearly appropriate or adapted for", not "unavoidably". As Gleeson CJ pointed out in *Mulholland v Australian Electoral Commission*[621], there is, in Australia, "a long history of judicial and legislative use of the term 'necessary', not as meaning essential or indispensable, but as meaning reasonably

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619 cf *In re Naylor Benzon Mining Co Ltd* [1950] Ch 567 at 575.

620 *Ronpibon Tin NL and Tongkah Compound NL v Federal Commissioner of Taxation* (1949) 78 CLR 47 at 56.

621 (2004) 220 CLR 181 at 199-200 [39].

appropriate and adapted". And the latter expression, "reasonably appropriate and adapted", can be traced to *McCulloch v Maryland*[622].

491 If "reasonably necessary", when used in s 104.4(1)(d) and s 104.4(2) of the Code, were to be understood in this way, the further reference in those provisions to the orders being "reasonably appropriate and adapted" for the purpose of protecting the public would be superfluous. That may be a strong reason to think that "reasonably necessary" should be understood in some other way but no other construction of the expression was offered in the course of argument.

492 In the end, it is not necessary to resolve these issues of construction. For present purposes, it is sufficient to notice that the statutory question presented to a court asked to make an interim control order requires the court to draw a connection between the order and "the purpose of protecting the public from a terrorist act" (s 104.4(1)(d)) and then, under s 104.4(2), to take into account "the impact" of each element of the order that is to be made "on the person's circumstances (including the person's financial and personal circumstances)". The nature or intensity of the connection between the order and that purpose which is to be understood as being conveyed by the expressions "reasonably necessary" and "reasonably appropriate and adapted" need not be decided.

493 What is of critical importance is that the focus of the statutory question for a court asked to make an interim control order is upon protecting the public from a terrorist act. What is the standard which is thus engaged?

494 A court deciding whether to grant an interim control order, and deciding how that order would be framed, would usually, perhaps inevitably, give close attention to what the evidence adduced reveals about what the person who is to be the subject of the order would do, or would be likely to do, if the order were not made. The Code does not require, however, that the court decide, or even consider, whether the conduct to be restrained would otherwise be lawful or not. The Code offers no legal standard of that kind as a standard against which threatened or intended conduct on the part of the person who is to be the subject of the order is to be measured. No question of antecedent right or liability is to be determined. Rather, the focus of the relevant provisions of the Code falls exclusively upon a future consequence: the order's achieving, or tending to the achievement of, "the purpose of protecting the public from a terrorist act".

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622 17 US 159 (1819). See *The Commonwealth and the Postmaster-General v The Progress Advertising and Press Agency Co Pty Ltd* (1910) 10 CLR 457 at 469.

495 The indeterminacy of the inquiry requires the conclusion that the task assigned to a federal court by s 104.4 is not the authority to decide a "matter". The task assigned is not to exercise the judicial power of the Commonwealth.

496 As noted earlier, the impugned provisions have a number of features common to many forms of the exercise of judicial power. Further, courts exercising the powers and functions given by the impugned provisions would inevitably approach the task according to the "skills and professional habits"[623] of the judicial branch of government. In particular, courts would look to past decisions, especially past decisions made under s 104.4 of the Code, for any guidance that the reasons given in those cases may provide for the disposition of issues presented in the instant case. But to say that the courts might thus "develop and elaborate criteria regulating the discretion"[624], does not conclude the questions about Ch III of the Constitution that are presented by the impugned provisions. There are several points to make about the significance that may properly be attached to the observation that courts given the powers and functions that are now in issue will seek to do so in accordance with established judicial method.

497 The fact that the legislature reposes power in a court does not conclude any question about the nature of that power. It would be contrary to the fundamental basis for all that this Court has decided about Ch III to hold otherwise. Likewise, to observe that courts called upon to decide questions of the kind presented by s 104.4 would do so by the application of judicial method does not conclude the question that must be decided.

498 To say that the courts will develop criteria regulating the exercise of the powers given by the Code is a proposition that, at best, assumes rather than demonstrates that there is a basis to be found *in the impugned provisions* for the development of those criteria. If it does not make that assumption, it asserts no more than that courts given the relevant powers will seek to employ judicial method when considering whether to exercise those powers. That is an assertion that does not advance the argument.

499 The impugned provisions offer no legal standard against which an application for a control order is to be judged. Because that is so, a court which is asked to make an order under the impugned provisions is necessarily left to decide the case according to nothing more definite than its prognostication about

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623 *Davison* (1954) 90 CLR 353 at 381, 382 per Kitto J, citing *Chambers's Encyclopaedia*, new ed (1950), vol 11 at 153-155.

624 *R v Joske; Ex parte Shop Distributive and Allied Employees' Association* (1976) 135 CLR 194 at 216.

the order's achieving, or tending to the achievement of, "the purpose of protecting the public from a terrorist act". The repeated exercise of that power would yield a succession of factually specific predictions made by individual judicial officers, each necessarily based on its own particular evidentiary foundation. Judicial method may very well have been used in undertaking the evaluation of the evidence that is tendered in connection with what, in the end, would be a particular species of fact-finding. But it is far from clear how a course of such decisions would yield any rule or standard of law that subsequent courts could identify and apply. If, however, a discernible pattern did emerge from a series of cases, and it was thought possible to distil some legal principle governing the making of the relevant prediction, the principle discerned would not come from the Code. The courts, not the legislature, would have created the legal standard that governs the application of the legislation.

500 All of these considerations point only to the conclusion that the task given to federal courts by the impugned provisions is not the exercise of the judicial power of the Commonwealth.

501 It is necessary to return to and amplify the proposition that the impugned provisions offer no legal standard against which an application for a control order is to be judged.

502 To decide what will (tend to) protect the public from a terrorist act it is necessary to know more than the fact that there is a threat to commit such an act. Even assuming that a particular threat is well defined (and much more often than not in the case of threats of terrorist acts, it will not) the utility of making an order to restrain a person in one or more of the ways specified in s 104.5(3), and in particular the tendency of such an order to secure public protection, cannot be assessed without knowing what other measures are being taken to guard against the threat. Knowing what other measures are being taken to guard against the threat may be seen as a matter for evidence that would prove the measures that have, or have not, been taken to thwart the threat that is under consideration. But it is the evaluative judgment that the criterion requires to be made by the court asked to make a control order that is a judgment ill-fitted to judicial determination. Several considerations point to the conclusion that it is not a question that is to be resolved by application of a criterion or criteria which would suffice to govern or bound the decision "by some ascertainable tests or standards"[625].

503 First, the statute says nothing about how a court is to decide whether or when its orders will (tend to) protect the public from a terrorist act. It may be

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625 *R v Spicer; Ex parte Waterside Workers' Federation of Australia* (1957) 100 CLR 312 at 317.

accepted that the conditions stated in s 104.4(1)(c) are jurisdictional facts to be established before the power given by s 104.4 may be exercised. But taken as a whole, the section is not to be read as requiring a court, on establishment of the jurisdictional facts specified in s 104.4(1)(c), to make an order containing one or more of the obligations, prohibitions or restrictions specified in s 104.5(3). Section 104.4(1) is cast in a form that is radically different from provisions of the kind considered in cases like *Finance Facilities Pty Ltd v Federal Commissioner of Taxation*[626]. The several conditions identified in pars (a) to (d) of s 104.4(1) are stated as qualifying what otherwise is a general discretion given to the court ("[t]he issuing court *may* make an order ... but only if" the conditions are met). Further, no party to the present proceedings contended that satisfaction of the conditions stated in pars (a) to (d) of s 104.4(1) required the court to make an order. All accepted that the court could nonetheless refuse to make an order if, for example, there had been undue delay in making the application or there were some other disqualifying reason.

504 Secondly, whether or not the impugned provisions of the Code are supported in every aspect of their possible operation by the defence power, they are provisions which, at least in part, are to be understood as being directed to the protection of the public from threats which include threats of a kind that engage the defence power. As Kitto J pointed out in the *Communist Party Case*[627]:

> "This Court has always recognized that the Parliament and the Executive are equipped, *as judges cannot be*, to decide whether a measure will in practical result contribute to the defence of the country, and that such a question must of necessity be left to those organs of government to decide." (emphasis added)

The subject-matter of the particular power given to federal courts by s 104.4 (the power to make orders for the purpose of protecting the public from a terrorist act) is public protection. That is a subject which is quintessentially for the Parliament and the Executive to consider and it is for those branches of government to decide what steps are to be taken to achieve that purpose. It is not for the judicature to establish criteria that will decide those questions. It is for the judicature to decide whether the steps taken by the legislative and the executive branches are lawful. That role of the judicature is fundamental to the system of government for which the Constitution provides and is as important in times of

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626 (1971) 127 CLR 106 at 134-135 per Windeyer J. See also *Leach v The Queen* (2007) 81 ALJR 598; 232 ALR 325.

627 (1951) 83 CLR 1 at 272.

threat as it is in other, more peaceful times. It is a role that must not be abdicated[628].

505 Subject to this important qualification, the defence of the nation is peculiarly the concern of the Executive[629]. The wartime cases like *Lloyd v Wallach*[630], *Ex parte Walsh*[631], *Little v The Commonwealth*[632] and *Wishart v Fraser*[633] recognise that "in war the exigencies are so many, so varied and so urgent that width and generality are a characteristic of the powers which [the Executive] must exercise"[634].

506 But that does not mean that if, as I would hold to be the case, the present legislation is invalid for contravention of Ch III, it could validly be re-enacted in a form that confers powers on the Minister like those that the impugned provisions give to federal courts. As noted earlier in these reasons, there is a real question (that need not be decided in this matter) whether the point would come in a time of "ostensible peace" where the defence power would sustain a law conferring upon a Minister power to order either the detention of persons or their subjection to restraints like those which the impugned provisions of the Code allow a court to make as part of a control order, if the Minister believes it is necessary to detain or restrain those persons. It is not to be supposed that such extraordinary measures would be supported by the defence power except in extraordinary circumstances. And again, although the point does not arise here, the *Communist Party Case* reveals that there are limits to the capacity of the Parliament (or, I would add, the Executive) to recite those arms of government into a valid exercise of the defence power. The ultimate limit is provided by the duty of this Court to pronounce on the validity of legislative or executive action when challenged on the ground that it exceeds constitutional power: "It is, emphatically, the province and duty of the judicial department, to say what the law is."[635]

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628 cf Ewing and Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain 1914-1945*, (2000) at 87.

629 *Wishart v Fraser* (1941) 64 CLR 470 at 484.

630 (1915) 20 CLR 299.

631 [1942] ALR 359.

632 (1947) 75 CLR 94.

633 (1941) 64 CLR 470.

634 *Wishart v Fraser* (1941) 64 CLR 470 at 484-485.

635 *Marbury v Madison* 5 US 87 at 111 (1803).

507 The fact that the defence of the nation is particularly the concern of the Executive has two relevant consequences that must be considered. First, there are some consequences for what questions can validly be submitted to federal courts for their determination.

508 The Executive's decisions about what steps can or should be taken to protect the public from a terrorist act will often be affected by intelligence and other material of a kind not readily made available in courts which, at least as a general rule, transact their business in public on the basis that the parties to the litigation know what evidence is led and what arguments are advanced.

509 Difficulties that are presented for courts by reference to intelligence material are well illustrated by the decision of the House of Lords in *A v Secretary of State for the Home Department*[636]. The majority of the House formed its conclusions about whether "there was an emergency threatening the life of the nation"[637] upon its examination of only some of the material that had been placed before the relevant administrative decision-maker: by reference to only the "public" as distinct from the "closed" material. Thus, although the question was one in which it was

> "open to the judiciary to examine the nature of the situation that has been identified by government as constituting the emergency, and to scrutinise the submission by the Attorney General that for the appellants to be deprived of their fundamental right to liberty does not exceed what is 'strictly required' by the situation which it has identified"[638]

that task was undertaken by reference to only so much of the available material as the Executive chose to make public.

510 The desirability of keeping intelligence material secret is self-evident. Often it will be essential. But the problem presented by the use of intelligence material is more deep-rooted than any question of preserving secrecy. Even if taking steps to secure the continuing secrecy of intelligence material is, or can be made, consistent with the generally open and adversarial nature of litigation in the courts, it is the nature of the material to be considered that presents issues of a kind not suited to judicial determination. In particular, by its very nature, intelligence material will often require evaluative judgments to be made about the weight to be given to diffuse, fragmentary and even conflicting pieces of

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636 [2005] 2 AC 68.

637 [2005] 2 AC 68 at 137 [118] per Lord Hope of Craighead.

638 [2005] 2 AC 68 at 137 [116] per Lord Hope of Craighead.

intelligence. Those are judgments of a kind very different from those ordinarily made by courts.

511 For the most part courts are concerned to decide between conflicting accounts of past events. When courts are required to predict the future, as they are in some cases, the prediction will usually be assisted by, and determined having regard to, expert evidence of a kind that the competing parties to the litigation can be expected to adduce if the point in issue is challenged. Intelligence information, gathered by government agencies, presents radically different problems. Rarely, if ever, would it be information about which expert evidence, independent of the relevant government agency, could be adduced. In cases where it could not be tested in that way (and such cases would be the norm rather than the exception) the court, and any party against whose interests the information was to be provided, would be left with little practical choice except to act upon the view that was proffered by the relevant agency.

512 These difficulties are important, but not just because any solutions to them may not sit easily with common forms of curial procedure. They are important because, to the extent that federal courts are left with no practical choice except to act upon a view proffered by the Executive, the appearance of institutional impartiality and the maintenance of public confidence in the courts are both damaged[639]. To that extent, "[t]he judiciary is apt to be seen as but an arm of the executive which implements the will of the legislature"[640]. These are signs or symptoms of a more deep-seated problem. The difficulties that have been mentioned both emerge from and reveal a fundamental feature of the impugned provisions: that a decision about what is necessary or desirable for public protection is confided to the judicial branch of government.

513 There is a second consequence that follows from the observation that the defence of the nation is particularly the concern of the Executive. It is for that arm of government to decide what is necessary for public protection. To achieve that end the Executive may well wish to intercept and prevent certain conduct before it occurs. But absent specific statutory authority, the Executive may not lawfully detain or restrain persons. If the conduct that is to be intercepted or restrained would, if undertaken, be contrary to law, legislation empowering a court to grant orders restraining a person from undertaking that conduct would be an orthodox and unremarkable conferral of jurisdiction. What sets the present legislation apart is that it seeks to give to the courts the decision of what is necessary to protect the public and, for the reasons earlier given, offers the courts no standard by which to decide that question.

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639 cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 133.

640 *Kable* (1996) 189 CLR 51 at 134.

514 An important and revealing contrast may be drawn between the provisions now under consideration and certain provisions of the Canadian *Criminal Code*[641] (particularly s 83.3 of that Code) which are directed to the same general end. The Canadian provisions hinge about conclusions reached by a "peace officer". If that officer "*believes* on reasonable grounds that a terrorist activity *will* be carried out" and "*suspects* on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is *necessary* to prevent the carrying out of the terrorist activity" the officer may, with the consent of the Attorney General of Canada, lay an information before a judge[642]. The issue that is then presented for judicial determination is whether the judge is "satisfied by the evidence adduced that the peace officer has reasonable grounds for the suspicion"[643]. That is an issue of a kind that courts deal with frequently. It requires consideration and evaluation of what the relevant official puts forward as the grounds upon which the impugned decision has been made. It does not require, as the provisions now in issue do, the court to decide for itself what is necessary or desirable for protection of the public.

Conclusions and orders

515 Many rules applied by the courts are expressed in abstract terms of great generality. Phrases like "just and equitable" and words like "reasonable" require difficult judgments to be made in particular cases. Those judgments are to be made, however, in the context of deciding the rights and duties of identified parties. They are judgments that depend upon applying recognised, if imprecise, measures of what is "just and equitable" or "reasonable". By contrast, the provisions now in issue require an assessment of how to protect the public from the conduct of persons who may have no direct connection with the person to whom the order is directed. By hypothesis the persons whose terrorist acts are to be impeded by the making of the order are themselves unwilling to obey Australian law. The federal courts are asked to make orders that will (help to) impede their conduct but are given no standard by which to decide when such an order should be made except the tendency of the order to protect the public.

516 In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[644], a majority of the Court concluded that a statutory power for a State Supreme

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641 RSC 1985, c C-46. The application of the relevant provisions has not been extended beyond a sunset date in 2007 fixed by the legislation.

642 *Criminal Code* (Can), s 83.3(1) and (2) (emphasis added).

643 *Criminal Code* (Can), s 83.3(8).

644 (2001) 208 CLR 199.

Court to grant an injunction "in all cases in which it shall appear to the Court or judge to be just and convenient" required that Court, when asked to grant an interlocutory injunction, to identify the legal or equitable rights which are to be determined at trial and in respect of which final relief is sought. The provision was held not to expand the jurisdiction of the Supreme Court to permit the grant of an interlocutory injunction where no legal or equitable rights were to be determined. Gaudron J identified[645] the root of that conclusion as being found in a proposition "beyond controversy[,] that the role of Australian courts is to do justice according to law – not to do justice according to idiosyncratic notions as to what is just in the circumstances". To require a Ch III court to decide whether to impose upon a person obligations, prohibitions or restrictions of the kind specified in s 104.5(3), by reference only to the relationship between those orders and the protection of the public from a terrorist act, would require the court to apply its own idiosyncratic notion as to what is just. That is not to require the exercise of the judicial power of the Commonwealth.

517 For these reasons I would answer the first question stated in the Further Amended Special Case filed on 15 February 2007:

> "Is Division 104 of the Criminal Code invalid because it confers on a federal court non-judicial power contrary to Chapter III of the Commonwealth Constitution?"

as follows:

> "In so far as Div 104 purports to confer on a federal court the power to make an interim control order or to confirm an interim control order it is not a valid law of the Commonwealth."

518 It would not then be necessary to answer questions 2 or 3. Question 4 should be answered: "The Commonwealth".

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645 (2001) 208 CLR 199 at 231 [59].

519 CALLINAN J. The plaintiff's liberty is restricted by an Interim Control Order ("ICO") made by a Federal Magistrate pursuant to s 104.4 of the *Criminal Code* (Cth) ("the Code"), enacted in the *Criminal Code Act* 1995 (Cth). The question which this case raises is whether the Code in its application to the facts of the case is constitutionally valid.

The nature of the challenged order

520 There has as yet been no trial. The ICO, by reason of its temporary but urgent nature, may be compared to an interim or interlocutory injunction in civil proceedings, or a grant of bail on conditions in pending criminal proceedings. Legislation or Rules of Court usually provide a lower threshold of proof to ground orders of those kinds[646]. The counterweight to this, in the case of the former, is the requirement that the applicant give an undertaking to pay damages in the event that it turn out that the relief ought not to have been granted. An accused person however, receives no recompense in respect of restrictions imposed upon him, or indeed even incarceration pending trial, in the event of subsequent acquittal. The point, for present purposes is, if a person chooses to challenge a temporary or interlocutory order, usually by appeal, but here, by proceedings in the original jurisdiction of this Court, seeking prerogative and related relief pursuant to s 75(v) of the Constitution[647], this Court (or any other whose jurisdiction is invoked) may only proceed upon the basis of the facts credibly alleged and proved according to a lower standard, compelled by the exigencies of the case, and accepted therefore only provisionally by the court making, and for the purposes only of, the interlocutory order.

521 Section 104.28A of the Code is headed "Interlocutory proceedings" and expressly provides that on a request for an ICO, s 75 of the *Evidence Act* 1995 (Cth) is to apply. The latter permits the reception of hearsay evidence in interlocutory proceedings provided that the source be stated. I refer to other interlocutory proceedings because they are, in many respects, analogous to what

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646 eg *Bail Act* 1977 (Vic), s 8; *Supreme Court Act* 1986 (Vic), s 37(1); see also *Evidence Act* 1995 (Cth), s 75.

647 Section 75(v) of the Constitution provides:

> "In all matters:
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> ...
>
> (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
>
> the High Court shall have original jurisdiction."

has occurred here, and because, although this plaintiff has joined in the statement of the special case to this Court in the form that it bears, he does not unqualifiedly accept the truth of various of the facts stated, even perhaps for the limited purpose of the constitutional challenge. Indeed, the equivocal stance that the plaintiff adopts in relation to the facts alleged, requires that attention be directed to the evidentiary value and significance of them.

522 It is on the basis of the evidence, uncontradicted by other evidence, much of which appears to have been before the Federal Magistrate, and therefore this Court, set out in the special case which incorporates the Magistrate's findings, notorious facts of which judicial notice may be taken, and constitutional facts to which I will refer, that I intend to proceed. Accordingly I do not need to resolve the tension between the plaintiff's participation in the stating of the special case to enable a timely disposition of the constitutional issues which it raises, and the ambiguous reservations[648] that he makes about the facts in it.

Establishment of constitutional facts

523 It is necessary to examine and to characterize the relevant facts in general, and some in particular. At the outset this point must be made: however constitutional facts are to be established, each party must be accorded natural justice in relation to any proposed finding of, or inferentially from, them. Inevitably, in some cases, both historical and current affairs will be relevant. Judges need to be careful to ensure that they are not influenced by any preconceived, personal, or idiosyncratic views about these[649], and that it is made

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648 Paragraph 2 of the Special Case is as follows:

> "In this Special Case, unless otherwise expressly stated it is agreed by the parties that:
>
> (a) any statements stated in paragraphs 3 to 47 to have been made were made or were likely to have been made as stated or alleged but there is no agreement between the parties as to the truth of the matters stated; and
>
> (b) any documents referred to in paragraphs 3 to 47 were or were likely to have been published as stated or alleged but there is no agreement between the parties as to the truth of the matters contained in the documents."

649 See the discussion by Latham CJ in the *Communist Party Case* of the possibility of different judicial perspectives on the Australian Communist Party and its connexion with branches of the Party elsewhere: *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 147-148.

clear to the parties, in any case of doubt, which of them may be of relevance. What I have just said applies with equal force to judicial notice: facts of which it may be taken do truly need to be notorious. Judges should keep in mind that distortion, bias, sensationalism, emotion and self-interest are at times common currency in ordinary social intercourse, and in the media. That does not mean that judges should disregard reliable reports and the genuine photographic depiction of, for example, relevantly here, the circumstances preceding, and after, the destruction of the Twin Towers in New York, the bombing of trains in Madrid, and of people and buildings in Bali, and the like.

524 There is a modern tendency, of which I take judicial notice, to disparage the work of most, if not all historians, on the asserted ground that no-one, not even the most rigorous of scholars, can research and write without the intrusion of an inevitable, unintentional, personal bias. Whether this is categorically so, I cannot say. That it may be, however, provides reason for judges to be cautious, and to be especially diligent to ensure natural justice in cases in which recourse to historical writings is to be made.

525 The internal content of statutes, including preambles, may themselves be useful, not simply by identifying the mischief to be corrected, but also, by providing an insight into the circumstances in which the mischief has occurred. Again, however, they require caution in their use as factual material. The utility of preambles, in particular, for factual purposes, is at best slight, as will plainly appear when I refer to the *Communist Party Case*. Explanatory memoranda and second reading speeches can have some utility. Provision for their use is expressly made by s 15AB of the *Acts Interpretation Act* 1901 (Cth)[650]. Nothing

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650 Section 15AB:

"**Use of extrinsic material in the interpretation of an Act**

(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when:

(i) the provision is ambiguous or obscure; or

(Footnote continues on next page)

can however compel this Court to act upon material that it does not think reliable, valid, relevant and useful when it comes to the interpretation and application of the Constitution.

526 A comprehensive and satisfactory definition of constitutional facts is not easy to state. In my view, constitutional facts in cases of contested constitutional powers should be taken to be facts justifying, or calling for, the exercise of the relevant power, and as to which its exercise is reasonably capable of applying. They are, if in controversy, no less required to be established, than any other facts in issue. This means they must be proved in the same way as other facts are proved, or be sufficiently notorious to be within judicial notice, or ascertainable

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(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:

…

(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;

(f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;

…

(3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage."

by reference to indisputably reputable and broadly accepted historical writings, or within a special category which I would describe as "official facts", being, for example, official published statistics[651], scrupulously collected and compiled, information contained in parliamentary reports, explanatory memoranda, second reading speeches, reports and findings of Commissions of Inquiry, and, in exceptional circumstances, materials generated by organs of the Executive. A deal of care needs to be taken with respect to "official facts" which of course the Court will not be bound to accept in any or all cases.

527 I have thought it appropriate to draw particular attention to these matters because, in the past, the use of materials not proved in evidence, or the subject of informed submissions on both sides has been controversial. An instance of this is the reliance by this Court in *Clark King & Co Pty Ltd v Australian Wheat Board*[652] upon general information on the wheat industry neither asserted in the pleadings nor proved in evidence[653]. Reliance upon that information was said to be justified by a passage in the joint judgment of Dixon, McTiernan and Fullagar JJ in *Wilcox Mofflin Ltd v State of New South Wales*[654], even though the passage cited also deplored the failure of the parties to enter into "formal or full proof" of matters relevant to constitutional interpretation[655]:

> "Unfortunately the parties did not enter into formal or full proof of these and other matters which would have enabled us, at all events, to obtain an understanding which we felt more adequate of the real significance, effect and operation of the statutes, information of a kind that we have come to think almost indispensable to a satisfactory solution of many of the constitutional problems brought to this Court for decision; though we are

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651 See *Evidence Act* 1995 (Cth), s 159, which provides:

> "A document that purports:
>
> (a) to be published by the Australian Statistician; and
>
> (b) to contain statistics or abstracts compiled and analysed by the Australian Statistician under the *Census and Statistics Act* 1905;
>
> is evidence that those statistics or abstracts were compiled and analysed by the Australian Statistician under that Act."

652 (1978) 140 CLR 120.

653 (1978) 140 CLR 120 at 189. For an example of the general information, see at 184.

654 (1952) 85 CLR 488.

655 (1952) 85 CLR 488 at 507 per Dixon, McTiernan and Fullagar JJ.

> bound to say that it is not an opinion commanding much respect among the parties to issues of constitutional validity, not even those interested to support legislation, who, strange as it seems to us, usually prefer to submit such an issue in the abstract without providing any background of information in aid of the presumption of validity and to confine their cases to dialectical arguments and considerations appearing on the face of the legislation. But from what appears in evidence, from the inferences to be drawn from the regulations and statutes themselves, from the statements made at the bar and from general knowledge and experience of Australian affairs, some picture of the industry can be constructed."

528 In *Uebergang v Australian Wheat Board*[656], Barwick CJ expressed his views[657] about the absence of cogent evidence of constitutional facts in *Clark King*, and the need for it to have been adduced and proved in both of those cases. In *Uebergang*, Gibbs and Wilson JJ also referred to the need for proof of that kind[658].

529 In *Woods v Multi-Sport Holdings Pty Ltd*[659], although it was not a constitutional case, I expressed my concern[660] that the statistics relied upon by McHugh J[661] were by no means probative of the state of affairs said to justify the conclusions of fact and law reached by his Honour, and the risk of unfairness to which their use gave rise. In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[662] I expressed a similar concern, this time as to the completeness of the facts assumed by the Court in *Bryan v Maloney*[663] as a basis for the statement of a rule of law about liability for defects in a residential building[664]. Problems of reliance are no less acute in constitutional cases.

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656 (1980) 145 CLR 266.

657 (1980) 145 CLR 266 at 293.

658 (1980) 145 CLR 266 at 296-298.

659 (2002) 208 CLR 460.

660 (2002) 208 CLR 460 at 513-514 [168]-[169].

661 (2002) 208 CLR 460 at 478 [63], 481 [69].

662 (2004) 216 CLR 515.

663 (1995) 182 CLR 609.

664 (2004) 216 CLR 515 at 590 [217].

The *Communist Party Case*

530 The *Communist Party Case*[665] is instructive here for several reasons. First, it was concerned with legislation enacted, as here, to enhance national security. Secondly, reliance for its validity was placed in substance upon the defence power. Thirdly, it was enacted at a time when there was a perception that a particular ideology presented a current and future risk to the Australian polity and people. Fourthly, the legislation sought to make a factual connexion with the foregoing. Fifthly, it came to the Court by way of a form of stated case. Something more needs to be said about each of these.

531 The Act there, the *Communist Party Dissolution Act* 1950 (Cth) ("the CPA"), was enacted with a preamble of nine paragraphs which indicate its objectives. They were summarized by Latham CJ[666]:

> "The first three paragraphs recite the terms of the Constitution, s 51(vi), s 61 and s 51(xxxix), to which reference has already been made. The other recitals are as follows: 4. 'And whereas the Australian Communist Party, in accordance with the basic theory of communism, as expounded by Marx and Lenin, engages in activities or operations designed to assist or accelerate the coming of a revolutionary situation, in which the Australian Communist Party, acting as a revolutionary minority, would be able to seize power and establish a dictatorship of the proletariat:' 5. '*And whereas the Australian Communist Party also engages in activities or operations designed to bring about the overthrow or dislocation of the established system of government of Australia* and the attainment of economic industrial or political ends by force, violence, intimidation or fraudulent practices:' 6. 'And *whereas the Australian Communist Party is an integral part of the world communist revolutionary movement, which, in the King's dominions and elsewhere, engages in espionage and sabotage and in activities or operations of a treasonable or subversive nature* and also engages in activities or operations similar to those, or having an object similar to the object of those, referred to in the last two preceding paragraphs of this preamble:' 7. 'And whereas certain industries are vital to the security and defence of Australia (including the coal-mining industry, the iron and steel industry, the engineering industry, the building industry, the transport industry and the power industry):' 8. 'And whereas activities or operations of, or encouraged by, the Australian Communist Party, and activities or operations of, or encouraged by, members or officers of that party and other persons who

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665 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

666 (1951) 83 CLR 1 at 133-134.

> are communists, are designed to cause, by means of strikes or stoppages of work, and have, by those means, caused, dislocation, disruption or retardation of production or work in those vital industries:' 9. 'And whereas it is necessary, for the security and defence of Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth, that the Australian Communist Party, and bodies of persons affiliated with that Party, should be dissolved and their property forfeited to the Commonwealth, and that members and officers of that Party or of any of those bodies and other persons who are communists should be disqualified from employment by the Commonwealth and from holding office in an industrial organization a substantial number of whose members are engaged in a vital industry:' It will be observed that these recitals refer not only to the Australian Communist Party as a party operating in Australia, but also to the basic theories of communism, in accordance with which it is alleged that that Party engages in activities in order to bring about a revolutionary situation (par 4). The Party is stated to be an integral part of the world communist revolutionary movement (par 6). Persons who are communists are said to be engaged in activities designed to cause dislocation, disruption or retardation of work in vital industries (par 8). Thus the recitals are not limited to allegations with respect to the Australian Communist Party. They contain allegations with respect to communism generally and with respect to the association of the Party with communism, and with respect to persons who are communists. Paragraphs 4 to 8 consist of allegations of fact. Paragraph 9 expresses the opinion of the Commonwealth Parliament that it is necessary for reasons of defence and the maintenance of the Constitution to enact the provisions of the Act." (emphasis added)

532 It is apparent from the preamble, as Latham CJ observed, that the Parliament regarded the Australian Communist Party, and its ideologies as seriously threatening the common weal in many ways. The ideology was political, and not, as is implicit here, both political and religious, but nothing turns on that.

533 The timing of the enactment of the CPA is a point of departure from the timing of the legislation here. The Communist Party was part of an international political movement, but one which was not merely dominated, but almost entirely controlled by the Communist Party of the Soviet Union. Only five years before, the Soviet Union had been an important ally of Australia, and the other western democracies. There had certainly been manifestations of Soviet communist imperialism[667], but it is probably right to say that it was only after the

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667 For example, the sealing off of Berlin in 1948 necessitating the Berlin airlift and the continuing occupation of Eastern Europe.

collapse of the Iron Curtain nearly forty years later, that all of the designs of the communist state upon the rest of the world, and the ruthlessness with which it was prepared to pursue them, were fully realized and acknowledged[668]. In short, much of what is now known and undoubted was not apparent in 1951, such that judicial notice would universally be taken of it. It may also be that some residual tenderness for a recent ally, and a naïveté about Soviet grand imperial designs affected the thinking of the Court in the *Communist Party Case*. But whether that is so of that case, it is certainly not here because in this one there is an abundance of uncontradicted, cogent, factual and notorious matter, having the character of constitutional and other facts upon which this Court may and should act. This marks another important point of distinction between this case and the *Communist Party Case*. In the latter, the Commonwealth sought to rely, for the establishment of the constitutional facts justifying the invocation of the defence power, factually solely on the allegations made in the preamble to the CPA. It is one thing for a court to accord some respect to preambles[669], but another entirely to regard them as conclusive or binding upon the court as the Commonwealth sought to do there[670], especially when the Australian Communist Party, the plaintiff, joined issue on all of them by filing affidavits in contradiction of them. Those important issues had not been resolved by the time that the matter came before the High Court. By contrast, here, not only are the relevant facts proved and uncontradicted, but they are also the subject of provisional findings by the Court whose decision is sought to be challenged. It is a matter of speculation whether, had either of those circumstances obtained in the *Communist Party Case*, the result would have been different. Furthermore, for the purpose of testing of the constitutional validity of the legislation here, the plaintiff has actually joined in the stating of the special case which narrates the necessary constitutional facts. In the *Communist Party Case*, the stated case descended to much less particularity of fact: it did little more than recite the procedural history of the case and raise questions of the validity of the CPA, and of the admissibility of the plaintiff's evidence[671]. Indeed, it was essentially on the basis that the Commonwealth failed to provide the necessary evidentiary linkage between the

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668 Some examples include the horrors of the Gulags, the scale of the political murders during the reign of Stalin and the 1940 Katyn massacre of Polish military officers. The extent of Soviet penetration of western agencies, including, for example, by the "Cambridge Spy Ring" consisting of Kim Philby, Donald Duart Maclean, Guy Burgess and Anthony Blunt, did not become apparent until well after the Iron Curtain had fallen.

669 (1951) 83 CLR 1 at 26-28 (*arguendo*).

670 See *South Australia v The Commonwealth* ("the *Uniform Tax Case No 1*") (1942) 65 CLR 373 at 432 per Latham CJ, 453 per McTiernan J.

671 (1951) 83 CLR 1 at 6-10.

CPA, and s 4 of it in particular, and the defence power, that Webb J held the Act to be invalid[672]. Dixon J thought it unnecessary to determine the facts because, in his opinion, the Commonwealth there had only argued that the preamble was conclusive as to the legislative opinions that it expressed. Even so, his Honour remarked upon the absence of any proposal by the Commonwealth to establish facts that might make a sufficient connexion between the defence power and the CPA[673]. And despite his Honour's disavowal of the need for factual proof to decide the case, he himself made repeated reference to facts and events not mentioned in the preamble[674]: for example, the Korean War then being fought; the principles of Communism, the Berlin blockade, and the "problem of Formosa". In short, his Honour did not consider the issues in a constitutional factual vacuum.

The relevant constitutional and other facts

534 On 25 August 2006, when the plaintiff was not subject to a conviction of any kind, the second defendant, an authorized federal police officer, with the consent of the Attorney-General, applied *ex parte* for the issue of the ICO. The second defendant has alleged, and caused to be set out in, or as annexures to, the special case many facts, some only of which will need reference. When I do refer to them, I will indicate their source and the basis for their reception and reliance upon them, although this is not strictly necessary in view of the plaintiff's participation in the stating of the special case, albeit with an ambiguous reservation. That does not mean of course that the plaintiff may not contest the facts, to the extent that they may be contestable, in other proceedings.

535 The plaintiff is an Australian citizen. In March 2001 he travelled to Pakistan and to Afghanistan. There he undertook paramilitary training, which included training for three months in the use of firearms and explosives, at the Al Farooq training camp. He was subsequently arrested in Pakistan, in transit to Australia. In this country, in November 2004, he was arrested and charged with offences under Pt 5.3 of the Code and the *Passports Act* 1938 (Cth). (Not in issue for the purposes of this special case.)

536 In February 2006, the plaintiff was tried in the Supreme Court of Victoria by a judge and jury. He was acquitted of two of the offences with which he was charged[675]. They related to the provision of resources to a terrorist organization.

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672 (1951) 83 CLR 1 at 244-245, cf at 265-266 per Fullagar J.

673 (1951) 83 CLR 1 at 191. See also at 278 per Kitto J.

674 (1951) 83 CLR 1 at 196-197. See also at 208 per McTiernan J.

675 s 102.7(1) of the Code.

He was convicted however of intentionally receiving funds from a terrorist organization (Al Qa'ida), contrary to s 102.6(1) of the Code, and of having in his possession an Australian passport that had been falsified, contrary to s 9A(1)(e) of the *Passports Act*. (Not in issue for the purposes of this special case.)

537 The plaintiff appealed against the convictions to the Court of Appeal of Victoria. On 18 August 2006 that Court set aside the convictions[676], and on 20 December 2006 ordered that there be a new trial. The plaintiff has been admitted to bail pending the retrial, on less restrictive conditions than those imposed by the Federal Magistrate by the ICO. (Not in issue for the purposes of this special case.)

538 Among the allegations made by the second defendant were these. The plaintiff was training at the Al Farooq training camp where he saw and heard Osama Bin Laden on several occasions, as well as other senior Al Qa'ida figures. It is an irresistible inference that the training was provided at Al Farooq by Al Qa'ida to equip him to undertake terrorist activities. After terrorist attacks by Al Qa'ida in New York and Washington on 11 September 2001, the plaintiff attempted to join the Taliban forces fighting the military forces of the United States of America in Afghanistan. I am prepared to take judicial notice of the fact that Bin Laden is the, or a principal, leader of Al Qa'ida, that Al Qa'ida is a terrorist organization and that it has either carried out, inspired or at least approbated vicious attacks on military targets, civilians and property in various countries, including those to which I have specifically referred. These are notorious matters. There has been video footage shown on many reputable television channels in many countries of Bin Laden advocating and claiming responsibility for terrorist activities.

539 The Australian Security Intelligence Organisation ("ASIO") has prepared annual reports relating to the threat posed by terrorists to the people and property of Australia. One states this[677]:

> "The threat to Australian interests overseas has increased, particularly in the Middle East and parts of South and Southeast Asia. At home, we face a sustained high level of threat to US, UK and some other foreign interests, and overall threat levels have been raised in respect of civil aviation, national symbols and attacks involving Chemical, Biological, Radiological and Nuclear weapons."

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676 *R v Thomas* (2006) 163 A Crim R 567; *R v Thomas (No 2)* [2006] VSCA 166.

677 ASIO, *Report to Parliament 2001-2002* at 15.

540 Other statements made were: "[n]ew intelligence obtained in 2002-03 confirmed that Australia was viewed by al-Qa'ida as a target prior to 11 September 2001 and continues to be viewed as a legitimate target"[678]; and, "[i]t is clear attacks on Australian interests here and abroad have been part of al-Qa'ida's strategic vision for some years"[679]. The Federal Magistrate was right to have regard to the material put before him. Even though it was hearsay, to the extent, if any, that it was not admissible as opinion evidence, coming as it does, from a reputable source and being uncontradicted by other evidence, it should be accepted.

541 What already emerges from the matters so far stated is that Al Qa'ida poses a threat to the nation, and that the plaintiff has aligned himself and had been trained with Al Qa'ida or an associated organization to undertake terrorism.

542 In *Shaw Savill and Albion Co Ltd v The Commonwealth*[680], Dixon J was concerned with proof in final proceedings[681]. He pointed out, even then, that "[t]he extent to which the Court should receive the statement of an officer of State as conclusive ... is not well defined". There the Commonwealth had denied liability in tort for damage arising out of a collision in which one of its warships was involved. An officer of the Commonwealth deposed that the warship was engaged in active naval operations, and that no liability for improper navigation should, or could attach to them. Dixon J was prepared to accept the first, but not the second of those claims[682]. His Honour thought irrelevant there, but did not discountenance for all purposes, the existence of an "exceptional rule giving conclusive effect to official statements"[683]. Some of the statements to which I have referred which have been made under oath by officers of the Executive here are analogous to the first category of statements referred to, and accepted by Dixon J in *Shaw Savill*: they pertain to a state of affairs which may readily be accepted to exist, for example, the indiscriminate bombings, and the international co-operation that has occurred to apprehend the attackers and prevent further like events. In any event, the Federal Magistrate was entitled to take judicial notice of the notorious circumstances of international terrorism and the threats posed by them, and Al Qa'ida's claims of responsibility for them.

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678 ASIO, *Report to Parliament 2002-2003* at 16.

679 ASIO, *Report to Parliament 2004-2005* at 15.

680 (1940) 66 CLR 344 at 363.

681 The proceedings here are final as to prerogative relief but the ICO remains open for confirmation or otherwise.

682 (1940) 66 CLR 344 at 363-364.

683 (1940) 66 CLR 344 at 364.

543 Those circumstances include the activities of groups of zealots forming part of, or associated with Al Qa'ida, in many countries throughout the world, making common cause of hatred, against communities posing no threat to them, in which sometimes they reside, and by which they and their families have been given residence, naturalization, comfort and education, have been granted religious and ideological tolerance, and social security and other support. They have conspired with others, and independently planned, to undertake violent, literally suicidal attacks upon even the institutions and peoples of those communities. In order to effectuate those attacks they have shown a willingness and capacity to use whatever weapons they can obtain, and to inflict casualties upon many innocent persons and property, both private and public. (These are notorious facts.)

544 Populations today are both more numerous and more concentrated. They, and property both personal and public, are more vulnerable. Modern weapons, and not just such horrific ones as nuclear bombs, germs and chemicals, are more efficient and destructive than ever before. The means of international travel and communication are more readily open to exploitation by terrorists than in the past. These matters too are blindingly obvious[684]. In argument, the plaintiff was asked to identify any historical precedent for this frightening combination of circumstances. It is not surprising that he was unable to do so[685]. The scale and almost inestimable capacity of accessible, modern, destructive technology to cause harm, render attempts to draw analogies with historical atrocities, as grave and frightening to their contemporary targets as they may have been, unconvincing.

545 Among published statements by persons associated with Al Qa'ida were these. On 23 February 1998, Bin Laden, Ayman al-Zawahiri and three other terrorist leaders issued a declaration under the banner of "The World Islamic Front". This formed part of the declaration:

> "On this basis, and in accordance with God's will, we pronounce to all Muslims the following judgment:
>
> To kill the American and their allies – civilians and military – is an individual duty incumbent upon every Muslim in all countries, in order to liberate the al-Aqsa Mosque and the Holy Mosque from their grip, so that their armies leave all the territory of Islam, defeated, broken, and unable

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684 cf *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 196-197 per Dixon J.

685 [2006] HCATrans 661 at 4925-4950; [2007] HCATrans 078 at 16130-16134.

> to threaten any Muslim. This is in accordance with the words of God Almighty: 'Fight the idolators at any time, if they first fight you'; 'Fight them until there is no more persecution and until worship is devoted to God'; 'Why should you not fight in God's cause and for those oppressed men, women, and children who cry out: "Lord, rescue us from this town whose people are oppressors! By Your grace, give us a protector and a helper!"?'
>
> With God's permission we call on everyone who believes in God and wants reward to comply with His will to kill the Americans and seize their money wherever and whenever they find them. We also call on the religious scholars, their leaders, their youth, and their soldiers, to launch the raid on the soldiers of Satan, the Americans, and whichever devil's supporters are allied with them, to rout those behind them so that they will not forget it."

546 There is no contradiction of this statement and its source. It is consistent with events that have elsewhere occurred. It is set out in an annexure to the special case.

547 On 11 January 1999, *Time Magazine* published an interview of Bin Laden by a journalist, Rahimullah Yusufzai. When asked about the use of chemical and nuclear weapons he said this[686]:

> "Acquiring weapons for the defense of Muslims is a religious duty. If I have indeed acquired these weapons, then I thank God for enabling me to do so. And if I seek to acquire these weapons, I am carrying out a duty. It would be a sin for Muslims not to try to possess the weapons that would prevent the infidels from inflicting harm on Muslims."

548 Although this is hearsay material, it is uncontradicted and consistent with other statements attributed to this person, is also consistent with events that have happened, and therefore admissible for the purposes of, and to support the jurisdiction for the making of an ICO. It in any event forms part of the special case.

549 Al Qa'ida has been identified as a terrorist organization by a Committee established by United Nations Security Council Resolution 1267 and by the governments of the United States, Canada, the United Kingdom and New Zealand. It is also listed by the European Union as an object of its anti-terrorism measures. In Australia, Al Qa'ida was first listed for the purposes of the definition of "listed terrorist organisation" in s 100.1(1) of the Code by regulations that were notified in the *Gazette* on 21 October 2002, and on

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686 "Interview With Bin Ladin", *Time Magazine*, 11 January 1999.

23 October 2002 were deemed by Sched 1, item 3 of the *Criminal Code Amendment (Terrorist Organisations) Act* 2002 (Cth) to have commenced on 21 October 2002. Al Qa'ida was re-listed as a "listed terrorist organisation" on 31 August 2004, and again on 24 August 2006. Before each listing, ASIO prepared a statement relating to Al Qa'ida, to which the Attorney-General of the Commonwealth had regard in determining his satisfaction for the purposes of s 102.1(2) of the Code. These are indisputable and notorious facts: they also form part of the special case.

550 The evidence here linked an organization based in Indonesia, Jemaah Islamiyah ("JI") with Al Qa'ida and demonstrated that the aims of both were similar. Evidence was also produced that terrorist attacks in Bali, Madrid, Nairobi, Dar es Salaam, Aden, Mumbai and London, as well as New York and Washington, some directly resulting in loss of life to Australians, had been made in recent times by Al Qa'ida or other organizations linked to, or incited by, it. These again are notorious facts of which judicial notice may be taken: they also form part of the special case.

551 In addition, in December 2001, state authorities in Singapore uncovered a plot to attack western targets in Singapore, including the Australian High Commission, by or on behalf of JI[687]. In June 2003 the police forces of Thailand uncovered a plan by JI to bomb the Australian Embassy in Bangkok, as well as the embassies of the United States and the United Kingdom[688]. This is hearsay, arguably admissible at this stage, but in any event uncontradicted and forming part of the special case.

552 Already in Australia there have been persons convicted or charged of conspiring or planning to undertake terrorist activities in this country. Much of this is a matter of public record.

553 There was other material in the special case which expressly made it clear, if it were not already obvious, that terrorism of the kind which gave birth to the attacks has engaged the attention of many nations and has moved them, including Australia, to co-operate with one another to combat it: in short that the relevant terrorism is a matter of international concern, that is to say, worry and fear. (These are both notorious and conventionally proved facts.)

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687 ASIO, *Report to Parliament 2002-2003* at 13.

688 Australia, Department of Foreign Affairs and Trade, *Transnational Terrorism: The Threat to Australia*, (2004) at 71.

The Interim Control Order

554 The ICO made by the Federal Magistrate (Mowbray FM) and annexed to the special case, imposed these restrictions and obligations upon the plaintiff:

"**OBLIGATIONS**

The following obligations form part of the interim control order and are imposed on you by virtue of sub-section 104.5(3) of the *Criminal Code*:

Upon personal service of the interim control order and thereafter for the duration of this interim control order:–

1. You are required to remain at your current place of residence in Williamstown, Victoria, between midnight and 5.00am each day, unless you notify the Coordinator of the Australian Federal Police Counter Terrorist Team, Melbourne Office, 383 Latrobe Street, Melbourne (the AFP CT Coordinator) in writing of another address that you will be residing at between these times.

and

2. You are required to report to the following specified persons at the following specified times and places:

   (a) a member of Victoria Police;

   (b) every Monday, Wednesday and Saturday, at any time between the hours of 9am and 9pm;

   (c) at any of the following Victoria Police premises (the 'specified premises'):

      (i) Werribee Police Station;

      (ii) Footscray Police Station; or

      (iii) Sunshine Police Station

   (d) or any other person, time and/or place agreed in writing by the AFP CT Coordinator.

and

3. You are required to allow impressions of your fingerprints to be taken by the Victoria Police via the 'Fingerprint Live Scan' unit for the purposes of ensuring compliance with paragraph 2 of this interim control order:

(a) within 24 hours following the issuing of this interim control order; and

(b) where required by a member of Victoria Police, on any occasion you report at the specified premises.

and

4. You are prohibited from leaving Australia except with the prior written permission of the AFP CT Coordinator.

and

5. You are prohibited from carrying out the following specified activities:

(a) acquiring, taking possession of, producing, accessing or supplying documentation (including in electronic form) regarding:

– the manufacture or detonation of explosives;

– weapons; and/or

– combat skills;

(b) manufacturing, acquiring, taking possession of or using or attempting to manufacture, acquire, possess or use any commercial, military or home made and/or improvised explosives or explosive accessories, initiation systems or firing devices;

(c) subject to section 104.5(5) of the *Criminal Code*, communicating to any person, whether directly or indirectly (including via internet chat rooms, websites, media interviews, publications and group gatherings) in relation to:

– methodology, tactics and other knowledge connected with, or likely to facilitate, terrorist acts, including explosives, weapons and/or combat skills

– names or contact details of persons you know to be associated with a listed terrorist organisation (see Schedule 3).

and

6. You are prohibited from communicating or associating with:

(a) up to 50 individuals listed by the Department of Foreign Affairs and Trade pursuant to Part 4 of the *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth), as notified to you in writing by the AFP CT Coordinator, with such prohibition to take effect from notification; and

(b) any individual that you know to be a member of a listed / specified terrorist organisation (see Schedule 3).

and

7. Following the expiration of 48 hours after this control order is served upon you, you are prohibited from accessing or using the following specified forms of telecommunications or other technology:

(a) any mobile telephone service that has not been approved in writing by the AFP CT Coordinator with such approval to be given provided only one mobile telephone service is nominated in total and sufficient details to identify the service to be used are provided;

(b) a telephone service card, SIM card or account, incorporating a credit or 'top up' facility that has not been approved in writing by the AFP CT Coordinator with such approval to be given provided only one telephone service card, SIM card or account, incorporating a credit or 'top up' facility is nominated in total and sufficient details to identify the service to be used are provided;

(c) any fixed or landline telephone service that has not been approved in writing by the AFP CT Coordinator with such approval to be given provided only one fixed or landline telephone service is nominated in total and sufficient details to identify the service to be used are provided or is required in the case of an emergency;

(d) any public telephone except in the case of an emergency;

(e) any satellite telephone service;

(f) any Voice Over Internet Protocol (VOIP) service including any software or hardware that will facilitate a VOIP service that has not been approved in writing by the AFP CT Coordinator with such approval to be given provided only one Voice Over Internet Protocol (VOIP) service including

any software or hardware that will facilitate a VOIP service is nominated in total and sufficient details to identify the service to be used are provided;

(g) any internet service provider account that has not been approved in writing by the AFP CT Coordinator with such approval to be given provided only one internet service provider account is nominated in total and sufficient details to identify the account to be used are provided;

(h) any electronic mail (e-mail) account that has not been approved in writing by the AFP CT Coordinator with such approval to be given provided only one electronic mail (e-mail) account is nominated in total and sufficient details to identify the account to be used are provided.

and

8. You are prohibited from having in your possession, custody or control or using any firearm or ammunition except during the 48 hours after this control order is served upon you during which you must arrange for the surrender to police of any firearm or ammunition in your possession, custody or control."

555 Pursuant to the Act, in a schedule to the ICO the Magistrate summarized the grounds for it:

"**SUMMARY OF THE GROUNDS ON WHICH THIS ORDER IS MADE**

1. Mr Thomas has admitted that he trained with Al Qa'ida in 2001. Al Qa'ida is a listed terrorist organisation under section 4A of the *Criminal Code Regulations* 2002, made under the *Criminal Code Act 1995*. Mr Thomas also admitted that while at the Al Qa'ida training camp he undertook weapons training, including the use of explosives and learned how to assemble and shoot various automatic weapons.

2. There are good reasons to believe that given Mr Thomas has received training with Al Qa'ida he is now an available resource that can be tapped into to commit terrorist acts on behalf of Al Qa'ida or related terrorist cells. Training has provided Mr Thomas with the capability to execute or assist with the execution directly or indirectly of any terrorist acts.

3. Mr Thomas is vulnerable. Mr Thomas may be susceptible to the views and beliefs of persons who will nurture him during his

reintegration into the community. Mr Thomas's links with extremists such as Abu Bakir Bashir, some of which are through his wife, may expose and exploit Mr Thomas's vulnerabilities.

4. Furthermore, the mere fact that Mr Thomas has trained in Al Qa'ida training camps, and associated with senior Al Qa'ida figures, in Afghanistan is attractive to aspirant extremists who will seek out his skills and experiences to guide them in achieving their potentially extremist objectives.

5. The controls set out in this interim control order statement will protect the public and substantially assist in preventing a terrorist act. Without these controls, Mr Thomas's knowledge and skills could provide a potential resource for the planning or preparation of a terrorist act."

Procedural history

556 On 28 August 2006, the ICO was served on the plaintiff.

557 On 29 August 2006, the second defendant, acting pursuant to s 104.12A of the Code, elected to confirm the ICO and gave written notification of that election to the Federal Magistrates Court.

558 On 30 August 2006, an Australian Federal Police ("AFP") officer served the plaintiff personally with the material specified in s 104.12A(2)(a) of the Code. Identifying information in relation to some persons was omitted in reliance upon s 104.12A(3) of the Code.

559 The hearing before the Federal Magistrates Court under s 104.14 of the Code to determine whether the ICO should be confirmed was originally listed for 1 September 2006. Following resolution of various interlocutory issues, the confirmation hearing was subsequently adjourned at the plaintiff's request until 29 June 2007, with the parties being given liberty to apply, to await the outcome of the proceedings in this Court.

560 On 30 September 2006, the Attorney-General of the Commonwealth gave notice in writing to the parties, and the Federal Magistrates Court under s 6A of the *National Security Information (Criminal and Civil Proceedings) Act* 2004 (Cth), that it applied in relation to the confirmation hearing.

The plaintiff's case in outline

561 The plaintiff advances these propositions. Division 104 of the Code is invalid because it confers on a court non-judicial power contrary to Ch III of the Constitution or, alternatively, it purports to confer judicial power on a federal

court exercisable in a manner contrary to Ch III of the Constitution. Division 104 is invalid also because it is not supported by one or more express or implied heads of legislative power under the Commonwealth Constitution. The last of these propositions involves claims that neither the defence power[689], the external affairs power[690], the reference power[691], the incidental power[692], nor the implied nationhood power[693], is sufficient to support Div 104.

562 In developing his first argument, the plaintiff made the submission that Div 104 impermissibly conferred a power upon a federal court to create future legal rights and obligations, rather than a power, truly judicial, to determine a dispute about existing rights and obligations. The former, relevantly here, is a power to deprive a person of liberty on the basis of a prediction, essentially a prediction by the Executive, about a person's future behaviour rather than his conduct in the past. Further indications that what is involved is not an exercise of judicial power are: that an ICO may be made *ex parte*; that the power may extend to the deprivation of, or restriction upon personal liberties; that the order may be made on proof of relevant matters on the balance of probabilities only; and the absence of a power of enforcement by the issuing court.

The legislation

563 I go now to the Code.

564 Chapter 5 of the Code is concerned with the security of the Commonwealth, and Pt 5.3 in particular with terrorism. Division 101 creates offences in connexion with terrorist acts, Div 102 offences in connexion with terrorist organizations, and Div 103 offences in connexion with the financing of terrorism.

565 Section 100.1 is the definition section for Pt 5.3, which is headed "Terrorism". A "listed terrorist organisation" is defined as "an organisation that is specified by the regulations for the purposes of paragraph (b) of the definition of *terrorist organisation* in section 102.1".

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689 s 51(vi).

690 s 51(xxix).

691 s 51(xxxvii).

692 s 51(xxxix).

693 *Davis v The Commonwealth* (1988) 166 CLR 79.

566 The Code defines[694] "terrorist act" very broadly:

"*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-section (2) of s 100.1 provides:

"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

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694 s 100.1(1).

(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."

567 The conduct excepted by sub-s (3) is as follows:

"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."

568 Sections 100.4(4) and (5) contemplate the possibility that the Code might, in some circumstances, be read down:

"(4) Notwithstanding any other provision in this Part, this Part applies to the conduct only to the extent to which the Parliament has power to legislate in relation to:

(a) if the conduct is itself a terrorist act – the action or threat of action that constitutes the terrorist act; or

(b) if the conduct is a preliminary act – the action or threat of action that constitutes the terrorist act to which the preliminary act relates.

(5) Without limiting the generality of subsection (4), this Part applies to the action or threat of action if:

(a) the action affects, or if carried out would affect, the interests of:

(i) the Commonwealth; or

(ii) an authority of the Commonwealth; or

(iii) a constitutional corporation; or

(b) the threat is made to:

(i) the Commonwealth; or

(ii) an authority of the Commonwealth; or

(iii) a constitutional corporation; or

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

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

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

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

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

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

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

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

(i) between Australia and places outside Australia; or

(ii) among the States; or

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

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

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

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

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

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

569 Providing or receiving training connected with terrorist acts is an offence, as is possessing things connected with terrorist acts, and other acts done in preparation for, or planning terrorist acts[695]. Section 102.1 defines a "terrorist organisation":

"*terrorist organisation* means:

(a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs); or

(b) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (2), (3) and (4))."

570 A specification of a "terrorist organisation" may only be made after various preliminary steps are taken[696]:

"*Terrorist organisation regulations*

(2) Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section, the Minister must be satisfied on reasonable grounds that the organisation:

(a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or

(b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

(2A) Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section, the Minister must arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed regulation.

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695 Div 101.

696 s 102.1. See also s 102.1A, which provides for review by a Parliamentary Joint Committee of security sections of the Commonwealth Executive.

(3) Regulations for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section cease to have effect on the second anniversary of the day on which they take effect. To avoid doubt, this subsection does not prevent:

(a) the repeal of those regulations; or

(b) the cessation of effect of those regulations under subsection (4); or

(c) the making of new regulations the same in substance as those regulations (whether the new regulations are made or take effect before or after those regulations cease to have effect because of this subsection)."

571 Section 102.3 makes it an offence knowingly to be a member of a terrorist organization. Similar provision is made in respect of directing a terrorist organization[697], recruiting or training, or being trained by one[698], being funded by or providing funds for one[699], supporting such an organization[700], associating with one[701], and, financing terrorism or a terrorist[702].

572 A person in the position of the second defendant may only apply for an ICO upon satisfaction of several conditions. Section 104.4 which is of central importance here provides as follows:

"**Making an interim control order**

(1) The issuing court may make an order under this section in relation to the person, but only if:

(a) the senior AFP member has requested it in accordance with section 104.3; and

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697 s 102.2.

698 ss 102.4, 102.5.

699 s 102.6.

700 s 102.7.

701 s 102.8.

702 Div 103.

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

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

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

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

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

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

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

573 Section 104.5(1) requires an issuing court to state a number of matters:

"(1) If the issuing court makes the interim control order, the order must:

(a) state that the court is satisfied of the matters mentioned in paragraphs 104.4(1)(c) and (d); and

(b) specify the name of the person to whom the order relates; and

(c) specify all of the obligations, prohibitions and restrictions mentioned in subsection (3) that are to be imposed on the person by the order; and

(d) state that the order does not begin to be in force until it is served personally on the person; and

(e) specify a day on which the person may attend the court for the court to:

(i) confirm (with or without variation) the interim control order; or

(ii) declare the interim control order to be void; or

(iii) revoke the interim control order; and

(f) specify the period during which the confirmed control order is to be in force, which must not end more than 12 months after the day on which the interim control order is made; and

(g) state that the person's lawyer may attend a specified place in order to obtain a copy of the interim control order; and

(h) set out a summary of the grounds on which the order is made."

574 It is not suggested that the order here is defective for want of any relevant formal or statutory requirements. So too, it is not argued that the restrictions imposed upon the plaintiff by the ICO fall outside the expansive language of s 104.5(3)[703].

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703 Section 104.5(3) provides:

"The obligations, prohibitions and restrictions that the court may impose on the person by the order are the following:

(a) a prohibition or restriction on the person being at specified areas or places;

(b) a prohibition or restriction on the person leaving Australia;

(c) a requirement that the person remain at specified premises between specified times each day, or on specified days;

(d) a requirement that the person wear a tracking device;

(e) a prohibition or restriction on the person communicating or associating with specified individuals;

(f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the Internet);

(g) a prohibition or restriction on the person possessing or using specified articles or substances;

(Footnote continues on next page)

575 After an ICO is made several steps are obligatory under s 104.12. They are intended to acquaint the subject of an order with its nature, and an understanding of it. In Queensland, the public interest monitor of the State must be given a copy of an ICO. Before an ICO expires, the applicant for it must elect whether to confirm it, and if he or she does, serve prescribed materials on the person bound by it, but not materials the disclosure of which would be likely to prejudice national security, risk compromising operations by law enforcement or intelligence interests, or the safety of persons.

576 Under s 104.14, a person in the plaintiff's position may contest the confirmation of an ICO by cross-examining, adducing evidence and making submissions. An applicant may, at any time, apply to the issuing court for the revocation or variation of the order[704].

577 Section 104.27 makes it an offence to contravene a control order. By s 104.32, an order ceases to have effect ten years after its making. The Code also sets up[705] a statutory regime for temporary detention to prevent an imminent terrorist act, or to preserve evidence relating to a recent terrorist act.

578 If an ICO is confirmed, an application may be made, by either the person affected[706] or the AFP Commissioner[707], for revocation or variation of that

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(h) a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);

(i) a requirement that the person report to specified persons at specified times and places;

(j) a requirement that the person allow himself or herself to be photographed;

(k) a requirement that the person allow impressions of his or her fingerprints to be taken;

(l) a requirement that the person participate in specified counselling or education."

704 So too may a person the subject of an order: see ss 104.18-104.26.

705 Div 105.

706 s 104.18.

707 ss 104.19, 104.23.

(confirmed) control order. The court may revoke or vary the order, or dismiss the application for its revocation or variation[708]:

"**104.20 Revocation or variation of a control order**

(1) If an application is made under section 104.18 or 104.19 in respect of a confirmed control order, the court may:

(a) revoke the order if, at the time of considering the application, the court is not satisfied as mentioned in paragraph 104.4(1)(c); or

(b) vary the order by removing one or more obligations, prohibitions or restrictions if, at the time of considering the application, the court is satisfied as mentioned in paragraph 104.4(1)(c) but is not satisfied as mentioned in paragraph 104.4(1)(d); or

(c) dismiss the application if, at the time of considering the application, the court is satisfied as mentioned in paragraphs 104.4(1)(c) and (d).

(2) A revocation or variation begins to be in force when the court revokes or varies the order.

(3) An AFP member must serve the revocation or variation personally on the person as soon as practicable after a confirmed control order is revoked or varied."

579 Thus, an issuing court may revoke a confirmed control order if the court is not satisfied, on the balance of probabilities, that the order would substantially assist in preventing a terrorist act, or is not satisfied that the person has provided training to or received training from a terrorist organization[709].

580 An issuing court may *vary* a confirmed control order if it is not 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[710]. A control order must accordingly have a degree of

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708 See also s 104.24.

709 s 104.4(1)(c).

710 s 104.4(1)(d).

proportionality for its making or variation, but proportionality is irrelevant for its revocation.

581 Proceedings for the confirmation of an ICO, or for the revocation or variation of a confirmed control order, may be the subject of an appeal[711] as with any other decision of the relevant issuing court[712].

Constitutional power

582 The first of the powers said by the Commonwealth to support the Division is the defence power. And, as I have foreshadowed, the submission to that effect is correct. That being so, no other head of power needs detailed consideration.

583 Defence is not something of concern to a nation only in times of a declared war. Nations necessarily maintain standing armies in times even of apparent tranquillity. Threats to people and property against which the Commonwealth may, and must defend itself, can be internal as well as external. With respect, insufficient critical attention to these matters was given by the majority in the *Communist Party Case*. The references by Dixon J to "ostensible peace"[713] and protection against external enemies as the "central purpose"[714] of the defence power evince both a preoccupation with the events of the recent past, of a declared war, uniformed, readily distinguishable external enemies, generally culturally, ethnically, ideologically and religiously homogenous states, and an incomplete appreciation, despite Hiroshima and Nagasaki, of the potential of weaponry for massive harm.

584 In saying that, I do not question the result in the *Communist Party Case* or the particular principle, properly identified and understood, for which it stands, and its importance which Fullagar J emphasized[715], that it is for the courts, and not the Parliament to have the final say on whether legislation is within constitutional power or not. That does not mean that any of the separate judgments in the *Communist Party Case* should be uniquely immune to critical examination and analysis. Nor does it mean that subsequent events which might

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711 s 104.28A(2). This includes for the purpose of s 75 of the *Evidence Act* 1995 (Cth).

712 See relevantly *Federal Court of Australia Act* 1976 (Cth), s 14(2), s 24(1)(a), s 24(1)(d) and s 25(1).

713 (1951) 83 CLR 1 at 202.

714 (1951) 83 CLR 1 at 194-195.

715 (1951) 83 CLR 1 at 262-263.

tend to falsify some of the factual assumptions upon which parts of the reasoning were based, should be ignored. In that respect it is revelatory history itself, which gives rise to questions about aspects of the case.

585 The facts established here, are, in my view facts in respect of which the Commonwealth may legislate under s 51(vi) of the Constitution. That conclusion is so right and obvious that reference to authority is really unnecessary. Even in the *Communist Party Case* itself there are statements which lend some support to the conclusion that I reach. McTiernan J[716] contemplated that had the activities of the Australian Communist Party been more substantially threatening, either in peace, or time of declared war, members of, and the Party, might have been amenable to the legislation there. Although Williams J was of the view that the defence power could be invoked if the proved facts made it "reasonably necessary in order to prepare for the defence of Australia"[717], later his Honour was to say[718]:

> "The defence power in peace time authorizes any legislation which is reasonably necessary to prepare for war … Any conduct which is reasonably capable of delaying or of otherwise being prejudicial to the Commonwealth preparing for war would be conduct which could be prevented or prohibited or regulated under the defence power."

586 His Honour did not however define "war". We cannot know how he would have regarded the facts with which the Court is confronted here.

587 Fullagar J was in no doubt that the defence power was not confined in its exercise to times of war[719].

588 The language of s 51(vi) of the Constitution is itself expansive. Under it, the Parliament may enact laws for the control of the forces to execute and maintain the laws of the Commonwealth. The 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 the State and other federal agencies, may better respond, than State police and agencies alone. If the answer to that is affirmative then the only further questions will be, are the enacted measures demonstrably excessive, or reasonably within the purview of the power, or, to

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716 (1951) 83 CLR 1 at 210.

717 (1951) 83 CLR 1 at 223.

718 (1951) 83 CLR 1 at 225.

719 (1951) 83 CLR 1 at 253.

use the language of s 104.4(1)(d) itself, "reasonably necessary" or "reasonably appropriate and adapted" to protection against terrorism. With respect to the meaning and application of that language, and the relevance of the time of listing of relevant terrorist organizations, it is unnecessary to add to what has been stated by Gummow and Crennan JJ[720].

589 I have commented on aspects of the judgment of Dixon J in the *Communist Party Case* which time, to say the least, as well as the facts proved here, make questionable: the drawing by his Honour of a distinction, as if there were a clear line between them for constitutional and all practical purposes, between times of peace and serious armed conflict, and internal and external threats[721]. Perhaps it was the country's recent emergence from a prolonged and costly declared war during which liberties had been curtailed and rights suspended, that influenced his Honour's responses to the CPA. Latham CJ, although in dissent, was in a sense more perceptive and alive to the gravity of direct and indirect internal threats inspired externally, and the different manifestations of war and warfare in an unsettled and dangerous world. To regard war as a declared war only, to assume that a nation's foes would all identify themselves, and rarely act covertly, that they would act logically, and that they would not be people drawn from the Australian community was even then however to be somewhat naïve. As Latham CJ, well informed no doubt by his far reaching and diverse experience as head of Naval Intelligence during the First World War, member of the Australian delegation to the Versailles Peace Conference after it, busy counsel, parliamentarian, attorney-general, leader of the opposition, first minister to Japan, and Chief Justice[722], said[723]:

> "Any Government which acts or asks Parliament to act against treason or sedition has to meet the criticism that it is seeking not to protect government, but to protect *the Government*, and to keep itself in power. Whether such a criticism is justified or not is, in our system of government, a matter upon which, in my opinion, Parliament and the people, and not the courts, should pass judgment. The contention that such an argument affects the validity of a law reminds me of the decision of a court in another country, when I was there, in a case of alleged treasonable conspiracy. The Court held that the accused did not intend to

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720 Reasons of Gummow and Crennan JJ at [99]-[103].

721 (1951) 83 CLR 1 at 194-196 per Dixon J.

722 Chisholm (ed), *Who's Who In Australia*, 13th ed (1947) at 505-506. No other judge of the Court until then, or subsequently had or has held such a broad and intimate knowledge and experience of public affairs, intelligence and geopolitics.

723 (1951) 83 CLR 1 at 142, 155-156.

> destroy government, but only to bomb public offices and assassinate ministers and generals and others. As they intended to take over the task of governing the country themselves, they were not guilty. I did not then, and do not now, agree with such a decision.
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> …
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> Actual fighting in the Second World War ended in 1945, but only few peace treaties have been made. The Court may, I think, allow itself to be sufficiently informed of affairs to be aware that any peace which now exists is uneasy and is considered by many informed people to be very precarious, and that many of the nations of the world (whether rightly or wrongly) are highly apprehensive. To say that the present condition of the world is one of 'peace' may not unfairly be described as an unreal application of what has become an outmoded category. The phrases now used are 'incidents', 'affairs', 'police action', 'cold war'. The Government and Parliament do not regard the present position as one of perfect peace and settled security, and they know more about it than the courts can possibly know as the result of considering legally admissible evidence. I have already referred to the authorities which show that neither the technical existence of war nor actual fighting is a condition of the exercise of the defence power. At the present time the Government of Australia is entitled, in my opinion, under the defence power to make preparations against the risk of war and to prepare the community for war by suppressing, in accordance with a law made by Parliament, bodies believed by Parliament to exist for the purpose (*inter alia*) of prejudicing the defence of the community and imperilling its safety. It is immaterial whether the courts agree with Parliament or not." (emphasis in original)

590 It could not be sensibly suggested however that too ready and ill-considered an invocation of the defence power, does not have the capacity to inflict serious damage upon a democracy. It is for this reason also that courts must scrutinize very carefully the uses to which the power is sought to be put. There will always be tensions in times of danger, real or imagined. They were present throughout the serious armed conflict of the Second World War as the numerous challenges to the National Security Regulations which were decided by this Court in those years and afterwards, show. They will no doubt continue while terrorism of the kind proved here remains a threat. The courts will simply have to do the best they can to ensure the proportionality that the Code itself admits must be applied in each and every case. The Commonwealth has however demonstrated that Div 104 of the Code, in its application to the plaintiff, is within the defence power.

Judicial power and its exercise

591 Justiciability and the exercise of judicial power are closely related and overlapping topics.

592 The plaintiff attacks the whole of Div 104 of the Code on the basis that it requires federal courts impermissibly to exercise non-judicial power. He does not present any argument in the alternative singling out any particular provision of it. Accordingly, there is no occasion for this Court to embark on any exercise of severance. He does, however, argue that even if the power in question might be regarded as judicial power, the Division, on its proper reading would compel its exercise non-judicially. In one sense these are curious submissions. If, as I have held, the Division is within the defence power in its application to this case, the submission might, if made out, have the consequence, subject to the application of s 75(v) of the Constitution, that the executive power rather than judicial power might be exercisable in respect of the plaintiff, thereby denying him access to the normal judicial process, including to appellate courts. It could also conceivably produce the consequence that a person in the plaintiff's position might be subjected to a form of administrative detention.

593 I have already set out the key provisions specifying the matters for proof on the making of an application, essentially, and relevantly here, that the person has received training from a listed terrorist organization, and that the order is reasonably necessary, appropriate and adapted to the purpose of protecting the public from a terrorist act.

594 In their judgment Gummow and Crennan JJ make five points with respect to the jurisdiction conferred by the Code upon the federal courts to issue ICOs[724]. I agree with each of those points.

595 The plaintiff argues that the issues raised by s 104.4 are political issues unsuited for judicial determination. I disagree. The making of orders by courts to intercept, or prevent conduct of certain kinds is a familiar judicial exercise. Every injunction granted by a court is to that end. And every application for an interlocutory injunction requires the court to undertake a balancing exercise, that is to say of the convenience of the competing interests, and the efficacy and necessity of the orders sought. Injunctions to restrain public nuisances require the same approach. Orders to prevent apprehended violence, to bind people over to keep the peace, and, more recently, as in *Fardon v Attorney-General (Qld)*[725], to approve curially continued detention as a preventative purpose to protect the

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724 Reasons of Gummow and Crennan JJ at [52]-[59].

725 (2004) 223 CLR 575.

public, are exercises undertaken, and, in my view, as here, better so undertaken by the courts. Protection of the public is frequently an important, sometimes the most important of the considerations in the selection of an appropriate sentence of a criminal. That too is necessarily both a balancing and a predictive exercise. It is one that necessarily takes account of the role of the police and other officials in preventing crime, and even of further criminal conduct on the part of the offender to be sentenced, as well as his personal circumstances.

596 I do not doubt that s 104.4 is concerned with justiciable controversies. It raises for trial issues on which evidence may be led and contested, the prospect of a terrorist act or otherwise, and whether an order would substantially assist in preventing it. Other familiar issues affecting the crafting of the order are similarly justiciable, these being as to its duration and other necessary, appropriate and reasonable components of it. The words of s 104.4 do state sufficient criteria for the resolution in a judicial way of the questions they raise. Whether an applicant for equitable relief comes to the court with clean hands, whether it would be just and equitable to make an order sought, whether conduct has been and might in the future be unconscionable, indeed a great deal of the jurisdiction of the courts, particularly in equity and much of it in common law, as well as under statute, is concerned with the balancing of interests and the assessment of past, current and future behaviour and circumstances. Examples of many of these are given in the joint judgment of Gummow and Crennan JJ and need no repetition by me. All legislation is, in a sense a "response" by Parliament to events and circumstances. The legislative response will frequently provide, as one of the criteria for the exercise of any judicial power conferred, the possibility or likelihood of an occurrence or its recurrence.

597 The court, in applying the Code looks to, and makes a determination about past conduct, for example, relevant training, and, in moulding the order has regard to both the prospective conduct of the subject of it in relation to future terrorist activities, and also possibly of others. Past and prospective conduct, well capable of being the subject of evidence, provide norms or standards for the making of orders of the kind made here. In this connexion, that the defence power is a purposive power is relevant: for its effective exercise it is not surprising that it is employable against a person or persons to serve its purpose.

598 The Code does not seek to impose upon the courts an obligation to exercise power contrary to Ch III of the Constitution. Urgent applications necessarily made *ex parte* are often made by courts. A requirement of proof beyond reasonable doubt might be preferable, but substitution of the balance of probabilities does not convert the judicial into the non-judicial.

599 Chapter III of the Constitution is not infringed by s 104.4. Division 104 makes and implies the usual indicia of the exercise of judicial power: evidence, the right to legal representation, cross-examination, a generally open hearing (subject to a qualification with respect to some sensitive intelligence material),

addresses, evaluation of the evidence, the ascertainment and application of the law to the found facts, and in all other respects as well, the application of orthodox judicial technique to the making of a decision which may be the subject of an appeal on either or both fact and law. This is not the way that any arm of the Executive conventionally operates. Risks to democracy and to the freedoms of citizens are matters of which courts are likely to have a higher consciousness. That the material upon which the courts may be forced by the exigencies to rely, may be incomplete, fragmentary and conflicting does not deprive the process which the Code requires them to undertake of its judicial character, or mean that the issues are not justiciable. If courts could only decide cases in which the materials were complete and the facts not in conflict, there would be little work for them to do and many controversies left unquelled. The necessity and obligation to decide on what is available is well settled. Recently this Court reaffirmed the "best evidence rule"[726]. It and the principle restated in *Vetter v Lake Macquarie City Council*[727], that courts must evaluate the evidence having regard to the capacities of the respective parties to adduce it, reflect the necessary pragmatism and experience of the common law with respect to human affairs and evidence about them.

600 Subject only to what I have said in relation to justiciability and Ch III, I also agree generally with the reasoning and conclusions of Gummow and Crennan JJ on those matters. The arguments of the plaintiff as to them should be rejected.

Other matters

601 What I have said makes it strictly unnecessary for me to consider suggested heads of constitutional power, other than the defence power, and any other issues raised by the parties. I would however make these reservations about the referral power.

602 These reservations are as to the constitutional validity of the provisions in the Code for the making of changes to Pt 5.3 of it, that is, their supportability under the referral power[728]. For example, s 100.8 provides for the

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726 *Golden Eagle International Trading Pty Ltd v Zhang* (2007) 81 ALJR 919 at 921 [4] per Gummow, Callinan and Crennan JJ; 234 ALR 131 at 132-133.

727 (2001) 202 CLR 439 at 454-455 [36]-[37] per Gleeson CJ, Gummow and Callinan JJ.

728 The reference of power to the Commonwealth by the Victorian Parliament was made by s 4 of the *Terrorism (Commonwealth Powers) Act* 2003 (Vic).

implementation of amendments to Pt 5.3 in circumstances in which a majority of the States and Territories approve the changes. Section 100.8 provides:

> "**Approval for changes to or affecting this Part**
>
> (1) This section applies to:
>
> (a) an express amendment of this Part (including this section); and
>
> (b) an express amendment of Chapter 2 that applies only to this Part (whether or not it is expressed to apply only to this Part).
>
> (2) An express amendment to which this section applies is not to be made unless the amendment is approved by:
>
> (a) a majority of the group consisting of the States, the Australian Capital Territory and the Northern Territory; and
>
> (b) at least 4 states."

603 Section 100.8 might arguably therefore purport to bind a State that did not agree with an amendment, to accept it simply because a majority of States approves it. The referral power is as follows[729]:

> "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:
>
> …
>
> (xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law".

604 This provision contemplates a class of subjects that remained within the power of each of the States at Federation, but which in the future it might, from time to time, and by no means necessarily permanently, be considered best to be delegated to the Commonwealth.

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729 s 51(xxxvii) of the Commonwealth Constitution.

605 Nowhere in the Convention Debates[730], nor in commentary upon the Constitution, is there any basis for a proposition that s 51(xxxvii) could validly be used to establish a regime in which a State might renounce or forgo its power in the future over a subject to a majority decision of the other States, and indeed also the Territories. The Constitution specifically states that the referral may be to the Commonwealth: it does not say that referral may be to the decision of a majority of States and Territories. Nor does it suggest that one State may refer its power to legislate on a particular matter to another State or Territory. Such an outcome was not within the intention, or even the contemplation, of the drafters of the Constitution. To construe s 51(xxxvii) as operating in this sense would be to effect a change to the plain meaning of the words of the Constitution. It is not to be used as a means of amending the Constitution without the approval of the people under s 128, a possibility against which Dr Quick spoke during the Convention Debates[731]:

> "My principal objection to the provision [as it is proposed] is that it affords a free and easy method of amending the Federal Constitution without such amendments being carried into effect in the manner provided by this Constitution."

606 Nor, as Mr Symon said, may the States relieve themselves of their constitutional powers and obligations[732]:

> "But here we are giving to any state the power of sending on to the Federal Parliament, for debate and legislation, some matter which it is purely for themselves to deal with, and I do not think we ought to put it in the power of states to relieve themselves from their own responsibilities in

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730 See *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 27 January 1898 at 215-225.

731 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 27 January 1898 at 218.

732 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 27 January 1898 at 219. In a similar vein, Mr Glynn said at 225:

> "But we are still in this dilemma: That the state might, by referring the matter to the state Parliament, deprive itself of the right of repeal, and thus take away the general power of legislation from the state Parliament. As I understand, a state Parliament cannot at present abrogate its own powers. It might pass a particular Act or it might repeal an Act, but here the Parliament of the state is giving away some power without the consent of the people of the state. We are giving power to the state Parliament to give away their sovereign powers without the consent of their people."

> legislation or administration by any such easy contrivance as this might turn out to be."

607 In my tentative view, to construe s 51(xxxvii) to support the mechanism in s 100.8 of the Code could well be erroneous.

608 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.

609 I agree with the answer and orders proposed by Gummow and Crennan JJ.

610 HEYDON J. The terms of s 104.4(1)(c) and (d) of the *Criminal Code* (Cth) meant that the first defendant was not empowered to make the Interim Control Order he made against the plaintiff unless he was satisfied on the balance of probabilities of, inter alia, two conclusions. The first was either that making the order would substantially assist in preventing a terrorist act (s 104.4(1)(c)(i)) or that the plaintiff had provided training to, or received training from, a listed terrorist organisation (s 104.4(1)(c)(ii)). The second was that each of the obligations, prohibitions and restrictions to be imposed on the plaintiff by the order was reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act (s 104.4(1)(d)). The first defendant expressed himself to be satisfied on the balance of probabilities in relation to both elements of the first conclusion, and the second conclusion. The soundness of the first defendant's conclusions is not under examination in this case. Rather, the issue for decision is an issue not before the first defendant, namely whether s 104.4 is constitutionally valid – an issue far narrower than those raised by the questions asked in the Further Amended Special Case.

Defence power

611 *Breadth of the defence power.* I agree with Gleeson CJ[733], and Gummow and Crennan JJ[734], that the defence power is not limited to defence against external threats to the Commonwealth and the States from nation states, for the reasons they give. It is not necessary to consider whether the criticisms advanced by Callinan J of *Australian Communist Party v The Commonwealth*[735] are sound[736], although, subject to hearing contrary argument, there does not seem to be any significant difference between what Gleeson CJ, and Gummow and Crennan JJ have written about the defence power and what Callinan J has written about it.

612 Do the circumstances attract the defence power? This raises an issue as to how the facts relevant to constitutional validity are to be established. I agree that the facts listed by Callinan J may legitimately be taken into account[737]. That conclusion is reached by the following route, which differs a little from his.

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733 At [6]-[9].

734 At [139]-[148].

735 (1951) 83 CLR 1.

736 At [583]-[590].

737 At [534]-[553].

613 *Five categories of facts.* By way of background it is convenient to divide the facts which may have to be established in litigation into five categories[738].

614 The first group comprises facts which are facts in issue, or relevant to facts in issue. Dixon CJ described them as "ordinary questions of fact which arise between the parties because one asserts and the other denies that events have occurred bringing one of them within some criterion of liability or excuse set up by the law"[739]. The second group concerns facts going to the constitutional validity of statutes, other enactments, or executive acts done under those statutes or enactments[740]. Dixon CJ sharply distinguished these facts from those in the first group in a respect set out below[741]. The third concerns facts going to the construction of non-constitutional statutes. The fourth concerns facts going to the construction of constitutional statutes. The fifth concerns facts which relate to the content and development of the common law.

615 The present case concerns the second group. It is desirable to make two preliminary points.

616 The first preliminary point is that a given factual controversy can arise under more than one head. An example may be taken from the present case. When the first defendant was considering whether making an order against the plaintiff "would substantially assist in preventing a terrorist act" within the meaning of s 104.4(1)(c)(i), it was relevant for him to reach the conclusion that in 2001: "The Al Farouk camp was run by Al Qa'ida." That fact, taken with the plaintiff's admission in par 6 of the Further Amended Special Case, that he attended the camp, tends to support the first defendant's conclusion that an order against the plaintiff would assist in preventing a terrorist act. But, although the constitutionality of s 104.4(1)(c)(i) was not in issue before the first defendant, the fact that the "Al Farouk camp was run by Al Qa'ida" also tends to support constitutional validity, because the running of such a camp, with its provision for training those attending in the use of weapons and explosives, is material to the

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738 This is a modification of the division suggested by Selway, "The Use of History and Other Facts in the Reasoning of the High Court of Australia", (2001) 20 *University of Tasmania Law Review* 129 at 131-132. See also Davis, "An Approach to Problems of Evidence in the Administrative Process", (1942) 55 *Harvard Law Review* 364 at 402-403 and Davis, "Judicial Notice", (1955) 55 *Columbia Law Review* 945 at 952.

739 *Breen v Sneddon* (1961) 106 CLR 406 at 411.

740 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 222 per Williams J.

741 *Breen v Sneddon* (1961) 106 CLR 406 at 411. See [632].

existence of a threat to Australia. Hence the same fact may be within both the first and the second category. So far as it is within the first category, it must be proved by evidence complying with the rules which govern the admissibility of evidence in conventional litigation. Whether that is the case so far as it is within the second category is discussed below[742].

617 The second preliminary point is that in each category it is desirable to bear in mind that there are potentially three issues which arise. One is whether it is permissible to take the fact in question into account, and for what purpose. The second is whether any evidentiary rules affect admissibility, and how they can be satisfied. The third is the extent to which the court can consider the facts in question without giving the parties notice that they are doing so.

618 As to the last matter, I would agree with Callinan J that the parties must be given notice that there may be a finding against them of the particular fact[743]. They should also be given notice, at least in broad terms, of why the finding should be made. These propositions apply, surely, for all five categories. Save perhaps for the operation of specialised tribunals such as ecclesiastical courts[744], it is not open to courts to conduct their own factual researches without notice to the parties[745]. In a case within the first category, the parties will usually be on notice because of the pleadings or whatever other method of defining the issues has been adopted. In cases in that category where the parties are not on notice, and in the other four categories, it is difficult to understand how any view could be maintained other than that a party should not lose on a crucial point without being warned in advance that the point may arise, and invited to deal with it.

619 *Rules of evidence apply to the first category.* Subject to special statutory provisions and any contrary agreement of the parties, there is no doubt that where it is desired to prove a fact within the first category, the rules of evidence must be

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742 It should be noted that while various matters of fact have been agreed by the parties in the Further Amended Special Case, supported by a substantial quantity of documents, it is far from clear how much of that material was before the first defendant.

743 At [523]. See also *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 511 [164]. The proposition was there enunciated with regard to facts in the fifth category.

744 For example, *Read v Bishop of Lincoln* [1892] AC 644 at 653.

745 In this respect *Ward v State of Western Australia* (1998) 159 ALR 483 at 498, per Lee J, is too wide. An instance of behaviour not to be followed is *R v Bartleman* (1984) 12 DLR (4th) 73 at 77; see Ogilvie (1986) 64 *Canadian Bar Review* 183 at 194-200.

complied with. These rules can be restrictive. In particular, the general law doctrine of judicial notice is narrow. Where judicial notice is taken without inquiry, the fact noticed must be "open and notorious". Where judicial notice is taken after inquiry, the inquiry must be into the "common knowledge of educated men" as revealed in "accepted writings", "standard works" and "serious studies and inquiries"[746]. The words of Dixon J just quoted were used about historical events, but they apply equally to other facts. In short, matters judicially noticed at common law must be indisputable. Yet the contents of many works, particularly those dealing with historical or contemporary events, are far from being indisputable and are highly controversial.

620 *Position in second category.* But must the rules of evidence be complied with in relation to the second category? It appears often to be thought that only evidence admissible according to the rules applicable to the first category can be received. That view has developed partly because in *Australian Communist Party v The Commonwealth*[747] Dixon J's classical statement of the judicial notice rules, based on authorities within the first category, was enunciated in a second category case as though judicial notice could only be taken of facts in that category if those rules were complied with. It has also sprung up because of the caution of this Court, when considering the second category, in going beyond the rules of admissibility for the first category. Thus in 1944, in *Stenhouse v Coleman*, Dixon J said, speaking of constitutional facts[748]:

> "[T]he existence of [the] 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. It may be that in this respect the field open to the court is wider than has been commonly supposed".

On the one hand, that hinted at a wider and different kind of judicial notice than appears in category one. On the other hand, it revealed a considerable suspicion of anything in the nature of a Brandeis brief, and it implied that not only was it the case that the existence of constitutional facts "may" be proved by evidence in the ordinary way, but also that it must be proved pursuant to the admissibility rules applicable to the first category. Similarly, in 1951 Williams J in *Australian Communist Party v The Commonwealth* said[749]:

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746 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 196.

747 (1951) 83 CLR 1 at 196.

748 (1944) 69 CLR 457 at 469. See also *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 256 per Fullagar J.

749 (1951) 83 CLR 1 at 225.

> "But it does not seem to me that the Court should be confined to notorious public facts of which it can take judicial notice. All the facts which are relevant to the decision of the constitutional issue must be admissible in evidence and the fact that the Court can take judicial notice of some facts merely expedites the manner of their proof. The facts which are not capable of proof in this way must be proved in such other ways as the laws of evidence allow."

This insistence that the ordinary rules of evidence apply to the proof of constitutional facts has other support[750].

621 However, the more modern authorities deny that constitutional facts can only be proved by material admissible under the rules of evidence. The starting point in that denial is, in Brennan J's words, the proposition that the "validity and scope of a law cannot be made to depend on the course of private litigation"[751].

622 Why is this so? The courts do not strike down legislation of their own motion, without one party taking the initiative. Statutes and subordinate legislation are ordinarily presumed to be valid[752]. But "to the extent that validity depends on some matter of fact, there is no onus on a challenging party which, being undischarged, will necessarily result in a declaration of validity"[753]. Why is the task of factual proof not left in the hands of the party alleging invalidity? Why, if the party which alleges invalidity fails to prove the facts on which invalidity depends, does the Court not simply treat the statute as valid and reserve the question of its potential invalidity for resolution in a battle to be conducted on another occasion, in another field and by a better-prepared litigant?

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750 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 144-145, 149, 151 per Latham CJ and 256 per Fullagar J; *Wilcox Mofflin Ltd v State of New South Wales* (1952) 85 CLR 488 at 507 per Dixon, McTiernan and Fullagar JJ; *Hughes and Vale Pty Ltd v The State of New South Wales (No 1)* (1954) 93 CLR 1 at 34 per Lord Morton of Henryton; [1955] AC 241 at 308; *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 293 per Barwick CJ, 302 per Gibbs and Wilson JJ.

751 *Gerhardy v Brown* (1985) 159 CLR 70 at 142. The expression "validity and scope" encompasses the constitutional validity of a statutory law (category two), the scope (i.e. the construction) of a statutory law (category three) and the scope (i.e. the construction) of a constitutional statutory law (category four).

752 *McEldowney v Forde* [1971] AC 632 at 661 per Lord Diplock; *South Australia v Tanner* (1989) 166 CLR 161 at 179 per Brennan J. Cf *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 261 per Fullagar J.

753 *South Australia v Tanner* (1989) 166 CLR 161 at 179 per Brennan J.

623 Brennan J justified a liberal approach to constitutional facts thus: "validity is a question of law and questions of law do not depend upon a party's discharge of an onus of proof of facts"[754]. But that is not generally true: for many an important question of law is posed in ordinary litigation, contingent upon proof of a particular factual state of affairs, and yet the courts do not embark upon the legal question if the necessary factual basis is not laid.

624 A better explanation is that sometimes a failure to deal with a constitutional question, feeble though the factual foundation laid by the parties may be, will create worse evils. It is repugnant for a court to convict and punish an accused person for breach of a statutory provision alleged to be constitutionally invalid without deciding on the soundness of that allegation. It is more repugnant than an inquiry into validity based on a factual examination conducted by the court without effective assistance from the parties and unconstrained by the rules applying to facts in issue[755]. That will not, however, explain every application of the doctrine, for often no question of criminal punishment is involved.

625 Another explanation is that the Court has an overriding duty to enforce the Constitution for all citizens or residents which it must fulfil even if the limited class of citizens or residents who comprise the parties before it will not adequately assist it to do so. From the earliest times this Court has seen itself as having, in general, a duty to determine the validity, one way or the other, of legislation alleged to be unconstitutional[756]. It is a duty which not even statute can interfere with, "because under the rigid federal Constitution of the Commonwealth a provision is not valid if it would operate to withdraw from the courts of law, and so ultimately from this Court, the decision of any question as to the consistency of a statute or an executive act with the Constitution"[757]. Putting to one side the political consequences of a legislature embarking on the enactment of unconstitutional legislation, there is no body other than the judiciary capable of preventing an abuse of legislative power. These factors are seen as outweighing the difficulty of finding the facts relevant to validity.

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754 *South Australia v Tanner* (1989) 166 CLR 161 at 179.

755 *Sportodds Systems Pty Ltd v New South Wales* (2003) 133 FCR 63 at 81-82 [47]-[48] per Branson, Hely and Selway JJ.

756 *D'Emden v Pedder* (1904) 1 CLR 91 at 117 per Griffith CJ.

757 *Hughes and Vale Pty Ltd v The State of New South Wales (No 2)* (1955) 93 CLR 127 at 165 per Dixon CJ, McTiernan and Webb JJ.

626 Since this Court has ultimate responsibility for the enforcement of the Constitution, it 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. That determination "is a central concern of the exercise of the judicial power of the Commonwealth"[758].

627 This principle of necessity – that constitutional facts must be investigated by this Court if it is to fulfil its duty to conduct judicial review of the constitutional validity of legislation – also accounts for the width of the principles pursuant to which it finds constitutional facts.

628 That width is also to be explained by the fact that questions in relation to constitutional facts "cannot and do not form issues between parties to be tried like" ordinary facts in issue[759]. Over the centuries common law rules and legislative enactments have grown up to regulate the proof of facts in issue in category one. But the rules were never directed to constitutional facts and it is wrong to import them from their proper sphere into a quite different one.

629 Hence the Court can receive evidence of constitutional facts which complies with the rules of admissibility applying to category one[760]. But it is not limited to that material. Thus, for example, the Court may take judicial notice on conventional principles[761]. However, many constitutional facts (and facts falling within categories three, four and five) are incapable of being judicially noticed by recourse either to common law principles or to statutory principles applying to facts in category one because they are controversial rather than beyond

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758 *Sue v Hill* (1999) 199 CLR 462 at 484 [38] per Gleeson CJ, Gummow and Hayne JJ.

759 *Breen v Sneddon* (1961) 106 CLR 406 at 411 per Dixon CJ.

760 In *Levy v Victoria* (1997) 189 CLR 579 at 598 Brennan CJ spoke about this only as "possibly" being the case.

761 *Gerhardy v Brown* (1985) 159 CLR 70 at 88 per Gibbs CJ. See also *Wilcox Mofflin Ltd v State of New South Wales* (1952) 85 CLR 488 at 507 per Dixon, McTiernan and Fullagar JJ ("general knowledge and experience of Australian affairs"). And for Canada, see *Attorney-General for Alberta v Attorney-General for Canada* [1939] AC 117 at 130 per Lord Maugham LC ("the Court must take into account any public general knowledge of which the Court would take judicial notice").

dispute[762]. The Court may seek to draw inferences from the challenged legislation[763]. It may, of course, rely on agreed facts, whether the agreement stems from admissions on the pleadings, or is reflected in a stated case, or arises from a formal admission, or has some other source. It may rely on the accuracy of allegations of fact made in a statement of claim to which the defendant has demurred. It has been said that it may require the parties to provide further factual material[764]. But beyond these possibilities, all relevant material may be brought to the Court's attention, independently of any of the general law rules as to admissibility in relation to facts in issue[765].

630 Thus in 1952 McTiernan J said in relation to whether a law was supported by the defence power[766]:

> "The Court may decide that the law is within the legislative power, if upon facts which the Court may judicially notice, or facts proved to the Court's satisfaction, or upon any rational considerations, the Court is of the opinion that the law may conduce to making the country ready for war, if it should come."

That is, "any rational considerations" may be taken into account even if they are not factual considerations which are being judicially noticed or established by evidence.

631 In 1959, Dixon CJ, with the agreement of McTiernan and Fullagar JJ[767], said[768]:

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762 As Callinan J pointed out in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 511-512 [165].

763 *Wilcox Mofflin Ltd v State of New South Wales* (1952) 85 CLR 488 at 507 per Dixon, McTiernan and Fullagar JJ.

764 *Sportsodds Systems Pty Ltd v New South Wales* (2003) 133 FCR 63 at 81 [48] per Branson, Hely and Selway JJ.

765 This proposition, and some of the authorities discussed in this judgment, were relied on by the Solicitor-General. The plaintiff did not respond to the Solicitor-General's submission on this point.

766 *Marcus Clark & Co Ltd v The Commonwealth* (1952) 87 CLR 177 at 227.

767 *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 296.

768 *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292, quoted with approval by Brennan J in *Gerhardy v Brown* (1985) 159 CLR 70 at 141-142.

> "Highly inconvenient as it may be, it is true of some legislative powers limited by definition, whether according to subject matter, to purpose or otherwise, that the validity of the exercise of the power must sometimes depend on facts, facts which somehow must be ascertained by the court responsible for deciding the validity of the law. In *Griffin v Constantine*[769], in order to decide the validity of the law there impugned some knowledge was necessary of the nature and history of methylated spirits but it was considered proper to look at books to obtain it. In *Sloan v Pollard*[770] facts were shown about arrangements between this country and the United Kingdom which gave constitutional validity to an order. In *Jenkins v The Commonwealth*[771] the validity of the statutory instruments was upheld on evidence as to the place of the mineral mica in electronic devices used in naval and military defence. There is no need to multiply examples. All that is necessary is to make the point that if a criterion of constitutional validity consists in matter of fact, the fact must be ascertained by the court as best it can, when the court is called upon to pronounce upon validity."

In the first of the three cases Dixon CJ referred to, judicial notice was taken after inquiry into some facts about the history of methylated spirits to be found in *Encyclopaedia Britannica* and *Chambers's Encyclopaedia*[772]. In the second[773] and third[774] the relevant facts were proved by evidence. Thus none of the three cases affords an example of a constitutional fact being proved without compliance with the rules of evidence. However, Dixon CJ then continued by referring to some evidence adduced by a party, and said that it was "not necessary to consider now" whether the course of adducing that evidence had been essential[775]. The expressions "facts which somehow must be ascertained by the court" and "as best it can", coupled with the leaving open of the possibility that the evidence was not necessary, not only raise a doubt about whether the rules of evidence need to be complied with, but tend to go further.

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769 (1954) 91 CLR 136.

770 (1947) 75 CLR 445 at 468, 469.

771 (1947) 74 CLR 400.

772 *Griffin v Constantine* (1954) 91 CLR 136 at 140 and 142 per Kitto J.

773 *Sloan v Pollard* (1947) 75 CLR 445 at 450; see also at 469 per Dixon J.

774 *Jenkins v The Commonwealth* (1947) 74 CLR 400 at 402 per Williams J.

775 *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292.

632 In 1961, in *Breen v Sneddon*, Dixon CJ drew a distinction between facts in category one and facts in category two. He said[776]:

> "It is the distinction between, on the one hand, ordinary questions of fact which arise between the parties because one asserts and the other denies that events have occurred bringing one of them within some criterion of liability or excuse set up by the law and, on the other hand, matters of fact upon which under our peculiar federal system the constitutional validity of some general law may depend. Matters of the latter description cannot and do not form issues between parties to be tried like the former questions. They simply involve information which the Court should have in order to judge properly of the validity of this or that statute or of this or that application by the Executive Government of State or Commonwealth of some power or authority it asserts."

The primary rules which govern how category one "issues between parties [are] tried" are the rules of evidence. Dixon CJ's statement that issues about constitutional facts are "not ... to be tried" in the same way as issues about facts in category one is thus excluding the application of those rules to category two facts.

633 In 1975, Jacobs J said of constitutional facts[777]:

> "The court reaches the necessary conclusions of fact largely on the basis of its knowledge of the society of which it is a part. The supplementing of that knowledge is a process which does not readily lend itself to the normal procedures for the reception of evidence. ... I only wish to state my view that parties should not feel bound to channel the information which they or any of them desire to have before the court into a pleading or statement of agreed facts or stated case (as was done in the instant cases). All material relevant (in a general, not a technical, sense) to the matter under consideration may be brought to the court's attention, though it is obviously desirable that it should be previously exchanged between the parties."

That is, the Court can take into account its knowledge of society (apparently whether the information it knows is noticed in compliance with the rules of judicial notice or not), and while it can take into account evidence and agreed

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776 *Breen v Sneddon* (1961) 106 CLR 406 at 411.

777 *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 622.

facts, all other relevant material may be considered whether or not it is technically admissible.

634 In 1985, Brennan J said in *Gerhardy v Brown*[778]:

> "There is a distinction between a judicial finding of a fact in issue between parties upon which a law operates to establish or deny a right or liability and a judicial determination of the validity or scope of a law when its validity or scope turns on a matter of fact. When a court, in ascertaining the validity or scope of a law, considers matters of fact, it is not bound to reach its decision in the same way as it does when it tries an issue of fact between the parties. The validity and scope of a law cannot be made to depend on the course of private litigation. The legislative will is not surrendered into the hands of the litigants. When the validity of a State law is attacked under s 109 of the Constitution and the scope of the Commonwealth law with which it is thought to be inconsistent depends on matters of fact (which I shall call the statutory facts) the function of a court is analogous to its function in determining the constitutional validity of a law whose validity depends on matters of fact."

Since his central concern was the "scope" – the construction – of a Commonwealth law, his remarks were directed to category three facts[779]. But he treated the applicable rules for category three as being the same as those for category two ("validity ... of a law") and category four ("scope of a [constitutional] law"). That is revealed by the fact that he then quoted the passage from Dixon CJ's judgment in *Breen v Sneddon*[780], which has just been set out[781], and also quoted from Dixon CJ's judgment in *Commonwealth Freighters Pty Ltd v Sneddon*[782]:

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778 (1985) 159 CLR 70 at 141-142. In *Levy v Victoria* (1997) 189 CLR 579 at 598 Brennan CJ spoke more tentatively: "[C]onstitutional facts could ... be ascertained by the stating of a case, by resort to information publicly available or, possibly, by the tendering of evidence."

779 This is supported by his reference to the "legislative will" not being surrendered to the litigants.

780 (1961) 106 CLR 406 at 411.

781 At [632].

782 (1959) 102 CLR 280 at 292.

> "[I]f a criterion of constitutional validity consists in matter of fact, the fact must be ascertained by the court as best it can, when the court is called upon to pronounce upon validity."

Brennan J concluded[783]:

> "The court may, of course, invite and receive assistance from the parties to ascertain the statutory facts, but it is free also to inform itself from other sources. Perhaps those sources should be public or authoritative, and perhaps the parties should be at liberty to supplement or controvert any factual material on which the court may propose to rely, but these matters of procedure can await consideration on another day. The court must ascertain the statutory facts 'as best it can' and it is difficult and undesirable to impose an a priori restraint on the performance of that duty."

635 The correctness of the approach to which McTiernan J, Dixon CJ, Fullagar J, Jacobs J and Brennan J appeared to adhere – that in category two the Court can rely on matters of fact even though they have not been proved by evidence admissible under the rules of evidence – is suggested by authorities holding that that approach is to be adopted in relation to matters of fact in category three[784], category four[785] and category five[786].

636 Thus the rules of evidence do not restrict the material which the Court can consider in deciding on facts falling within category two. However, as Jacobs J said, "it is obviously desirable that it should be previously exchanged between the parties"[787]. And even if this were not done – because, for example, the matter is not raised by either party but is seen as important by the Court – it would be

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783 *Gerhardy v Brown* (1985) 159 CLR 70 at 142.

784 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 479 [65] per McHugh J; *Gerhardy v Brown* (1985) 159 CLR 70 at 141-142. As just indicated, *Gerhardy v Brown* was itself a category three case.

785 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 479 [65] per McHugh J.

786 *Prentis v Atlantic Coast Line Co* 211 US 210 at 227 (1908) per Holmes J; *Chastleton Corp v Sinclair* 264 US 543 at 548 (1924) per Holmes J. See also *Lewis v Rucker* (1761) 2 Burr 1167 at 1172 [97 ER 769 at 772] per Lord Mansfield CJ.

787 *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 622.

astonishing if there were not a duty on the Court to advise the parties both of any constitutional fact it may find and of any material not tendered or referred to in open court upon which it proposes to rely in reaching a conclusion that that fact exists. It is scarcely satisfactory for a party to learn of some supposed fact by reason of which that party lost the litigation only on reading the Court's reasons for judgment, without having any opportunity to dispute the materiality of the fact, or its accuracy, or the trustworthiness of the sources from which it was taken, or the validity of the reasoning from those sources. In *Woods v Multi-Sport Holdings Pty Ltd*[788] Callinan J said that he did not take Brennan J's remarks in *Gerhardy v Brown*[789]:

> "to be a warrant for the reception and use of material that has not been properly introduced, received, and made the subject of submission by the parties. What his Honour said cannot mean that the interests of the litigants before the court can be put aside. They retain their right to an adjudication according to law even if other, conceivably higher or wider, interests may ultimately be affected."

This is entirely correct, with respect, save that if the words "introduced" and "received" call for compliance with the rules of evidence applying to facts in issue, they are out of line with other authority.

637 Underlying these processes of notification, whether inter partes or curial, is perhaps a theory that "the nature and importance of constitutional facts" is such that, even if they are not "utterly indisputable", they may "be regarded as presumptively correct unless the other party, through an assured fair process, takes the opportunity to demonstrate that [they] are incorrect, partial, or misused"[790]. In that respect, while Brennan J left open the question whether the parties should be at liberty to supplement or controvert any factual material on which the Court may propose to rely[791], it would be strange if they were not.

638 Whether or not a category one fact of which a court proposes to take judicial notice can be the subject of contrary evidence, the circumstance that this Court proposes to take judicial notice of a constitutional fact, or ascertain it

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788 (2002) 208 CLR 460 at 511 [164].

789 (1985) 159 CLR 70 at 141-142.

790 Strayer, *The Canadian Constitution and the Courts*, 3rd ed (1988) at 292, quoted in *R v Bonin* (1989) 47 CCC (3d) 230 at 248.

791 *Gerhardy v Brown* (1985) 159 CLR 70 at 142.

without recourse to admissible evidence, ought not to deprive a party of the right to present evidence on the point[792].

639 Important questions remain. If the rules of evidence need not be complied with, what limits are there on the capacity of the Court to take constitutional facts into account? The material ought to be sufficiently convincing to justify the conclusion that it supports a material constitutional fact, but does any more restrictive rule exist? Is it sufficient to rely on a natural inhibition against finding constitutional facts in a manner open to later public and professional criticism, and on the capacity of the parties, once advised of what possible constitutional facts may be found, and how, to protest, to argue for a contrary position, to call contrary evidence, and to point to other material not receivable under the rules of evidence[793]? In *Gerhardy v Brown* Brennan J left open the question whether the sources to which the Court may have resort "should be public or authoritative"[794]. Just as it is difficult to see how the legislature can "recite" its legislation into validity, so it is difficult to see how spokesmen can "pronounce" legislation proposed by the executive into validity. But it may be that, as Callinan J suggests, "official facts", or at least those evidenced by materials not prepared with an eye to litigation about the constitutional validity of the relevant statute, will come to play a central role in determining constitutional facts[795]. Issues of constitutional validity – not only in relation to the defence power, but also in relation to any other aspect of the Constitution – can be of vital significance. If judicial power to find constitutional facts were wholly untrammelled, there would be risks of great abuse. The questions just posed are thus important ones, and it is necessary to reserve them for resolution in future cases. In the present case there was ample material, of which the plaintiff had notice, and which he did not contradict, otherwise than by occasional bald assertions, to justify inferring the necessary constitutional facts. In part that material is to be found in what was

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792 Kenny, "Constitutional Fact Ascertainment", (1990) 1 *Public Law Review* 134 at 159.

793 It is relevant to bear in mind the cautious approach advocated by Callinan J in relation to category five facts: *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 510-513 [162]-[167].

794 (1985) 159 CLR 70 at 142. In *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, a case concerning facts within the fifth category, Callinan J at 512 [165] said of the general facts of history ascertainable from the accepted writings of serious historians that it "would only be if a very large measure of agreement could be obtained and, I would suggest, from the parties themselves, as to what are *accepted* writings and who are *serious historians* that the court would be entitled to resort to them". (emphasis in original)

795 At [526].

agreed between the parties in the Further Amended Special Case. In part it comes from other sources.

640 *The factual material in this case.* In this case the factual material relevant to the question whether the defence power supports the legislation which is available to the Court from the Further Amended Special Case falls within the following groups.

641 First, there is the material in the agreed part of the Further Amended Special Case. Rule 27.08.5 of the High Court Rules 2004 permits inferences and conclusions to be drawn from that material. However, there is a substantial limitation on the agreement arising from the fact that it is, unless otherwise expressly stated, subject to the following conditions:

> "(a) any statements stated ... to have been made were made or were likely to have been made as stated or alleged but there is no agreement between the parties as to the truth of the matters stated; and
>
> (b) any documents referred to ... were or were likely to have been published as stated or alleged but there is no agreement between the parties as to the truth of the matters contained in the documents."

If these conditions bound the Court, they would prevent the statements made in various reports of the Australian Security Intelligence Organisation and other governmental and intergovernmental agencies from being evidence of the truth of what is said. They would also exclude inferences from statements made by Osama Bin Laden and others associated with Al Qa'ida that representations made were true, and perhaps that threats made reflected the truth of important matters of underlying fact (namely that the states of mind of the makers were sincere). A further limitation arises from the cautious terms of some of the agreed facts. Thus par 19 states:

> "Terrorist groups or organisations ... and terrorists exist whose objectives and capabilities are such that terrorist acts ... *could* occur outside or within Australia and such acts *may* involve the infliction of significant harm and damage ...". (emphasis added)

642 Secondly, there is material in the findings of the first defendant – both a one-page summary forming Sched 2 to the Interim Control Order, and the eight pages forming the transcript of the first defendant's orally delivered reasons for decision. In order to be used against the plaintiff in the hearing before the first defendant, the evidence underlying those findings had to comply with the rules of evidence, because in that hearing the facts being considered were facts within the first category. The first defendant did not have to concern himself with

constitutional facts, but before this Court the findings can be used to establish constitutional facts whether or not their reception, or the evidence apparently underlying them, complies with the rules of evidence. That conclusion is not disturbed by the circumstance that the plaintiff stated that he disagreed with the correctness of the findings. The plaintiff submitted that the one-page summary is "not relevant" to questions of constitutional validity. That is not wholly true, but it is partly true. Many of the findings are of limited use for the purpose of establishing constitutional facts, because they are directed only to the personal position of the plaintiff as distinct from any wider threat to Australia. The plaintiff also submitted that the one-page summary "cannot be given effect without ascribing validity to the law which conferred jurisdiction on" the first defendant. That proposition is a non-sequitur and it was erroneous for the Commonwealth to have agreed with it. The materiality of the one-page summary to the ascertainment of constitutional facts depends on the inherent probability of its contents, and that remains the same whether or not the first defendant had jurisdiction. The plaintiff's submission reveals a confusion between category one facts (in relation to which the submission could have validity) and category two facts (in relation to which it has no validity).

643 However, in view of the Commonwealth's agreement with the plaintiff's submission, it is desirable to leave the findings of the first defendant out of account.

644 There are other relevant categories of material.

645 In the first place, contrary to one of the plaintiff's submissions, in determining what constitutional facts exist, the Court is not limited to the facts set out in the Further Amended Special Case for reasons given below[796]. Nor is it bound by the conditions agreed by the parties in relation to the facts set out in the Further Amended Special Case. The plaintiff's submission that the Court could not go beyond the Further Amended Special Case, repeated in other contexts, is without warrant. It is completely inconsistent with the statement of Jacobs J quoted above[797]. The plaintiff had notice of the statements and documents referred to. He did not attempt to challenge them by evidence (whether or not admissible pursuant to the rules of evidence), or by reasoning directed to show their unreliability. Provided the Court thinks they are reliable enough to be taken into account, there is no error in doing so. Examples include statements in the Australian Security Intelligence Organisation annual reports: they were made

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796 At [645]-[646].

797 *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 622: see [633].

under a statutory duty[798], they have been available for public perusal and criticism for years, they have not been contradicted by more convincing material, and they have not been placed in doubt by other material of sufficient reliability.

646 Secondly, whether or not items of information learned by members of the Court over past years from news broadcasts, the print media and public discussion are sufficiently open, notorious and within the common knowledge of educated persons[799] to justify judicial notice being taken of them under the law of evidence applicable to category one cases, they may be employed in determining constitutional facts.

647 The utilisation of these processes of reasoning entitles this Court to reach factual conclusions stronger than the sometimes guarded and limited ones stated in the Further Amended Special Case. They also enable this Court to concur in the following propositions advanced by the Solicitor-General in order to demonstrate the particular vulnerability of Australia:

> "The first is the ready availability today of explosive substances, highly toxic poisons, germs and other weapons or things which can be used as weapons ... The second matter is that [Australia] contains cities with very large localised populations and of necessity many people are frequently concentrated in a small area. The third factor is the very high value our society places on human life. A society which had no regard for human life including that of its own members would not suffer from the vulnerability that our society does suffer from. The fourth matter is the dependency of modern society on a variety of types of infrastructure. The fifth is the high value placed by our society on a number of iconic structures ... The sixth is that infrastructure and iconic structures can easily be destroyed by explosives. Water supplies can be poisoned and in other ways great damage can be done to infrastructure and human life by individuals.
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> The seventh matter is the particular vulnerability of aviation and, to a lesser degree, ships, buses and trains. The eighth is the growth of fanatical ideological movements which compass the destruction of western civilisation and, in particular, of Australia, or elements of it. The archetypical examples of the combination of factors I have referred to, or some of them, are the events of 11 September 2001, the events of Bali, Madrid, London, Nairobi and Dar es Salaam, Jakarta."

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798 See s 94(1) of the *Australian Security Intelligence Organisation Act* 1979 (Cth).

799 See Dixon J's tests in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 196, quoted above at [619].

648 The plaintiff submitted that these facts could not be relied on so far as they went beyond the facts agreed in the Further Amended Special Case. There is no warrant for that submission[800]. The plaintiff also submitted that these facts could not be judicially noticed: he said that they were not "commonly known" and were in part simply "assertions ... as to possible future occurrences". The latter proposition is incorrect and even if the facts are not all commonly known, which is questionable, that is not a condition for reception of them as a basis for inferring a constitutional fact.

649 On the bases outlined above it is to be inferred that there are constitutional facts favouring the conclusion that Australia faced a threat sufficient to support a characterisation of the impugned legislation as falling within the defence power.

Other heads of legislative power

650 It is not necessary to consider whether the legislation is supported by the powers conferred by s 51(xxix), s 51(xxxvii), s 51(xxxix) or the implied nationhood power.

Chapter III

651 The plaintiff's arguments in relation to Ch III are to be rejected for certain of the reasons given by Gummow and Crennan JJ[801] and Callinan J[802]. I also agree with what Gleeson CJ has said on the subject[803].

Orders

652 I agree with the answer and order proposed by Gummow and Crennan JJ.

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800 See [645]-[646] above.

801 At [71]-[79] and [94]-[126].

802 At [595]-[600].

803 At [10]-[31].