

TERRORISM AND THE CONSTITUTION¹

Five years ago we had no State or federal laws dealing specifically with terrorism. An offence that fell under the rubric “terrorism” had to be dealt with by the ordinary criminal law. That was not surprising. Apart from the 1978 bombing at the Sydney Hilton Hotel probably aimed at the Commonwealth Heads of Government Regional Meeting, terrorist attacks were virtually unknown in this country although some race based attacks had occurred which might arguably fall within the concept of terrorism. But the attacks in the United States of 11 September 2001 and the subsequent attacks in Bali, Madrid and London, together with Australia’s involvement in Iraq and Afghanistan, have shown that the possibility of a terrorist attack in Australia is not remote.

To protect Australia against the possibility of a terrorist attack, the federal Parliament has enacted 36 laws since September, 2001 and further amendments are likely to be made in the near future. Since July 2002, 27 people have been charged with various terrorism offences under Part 5.3 of the Commonwealth *Criminal Code*, which is the principal law dealing with terrorism offences. Most these charges still await a hearing.

¹ Many of the points made in this paper are also made in the forthcoming “What Price Security? Taking Stock of Australia’s Anti-Terror Laws” by Andrew Lynch and George Williams, a draft of which I have had the advantage of reading.

So much legislation concerned with national security and preventing or dealing with terrorist attacks in Australia has been passed since 11 September 2001 that it is not practicable in a session such as this to discuss the constitutional implications of the whole body of this legislation. Indeed, it is only possible to give a broad outline of the constitutional implications in respect of those parts of the legislation with which I propose to deal.

It can, I think, be fairly said that so far as the terrorist legislation creates criminal offences, very little, if any, of the legislation is open to serious constitutional challenge. It is true that the *Commonwealth of Australia Constitution Act* 1900 does not confer any specific heads of legislative power on the federal Parliament to deal with national security or terrorism or, for that matter, crime. Nevertheless, the Constitution confers on the Parliament a number of powers which alone or in combination appear sufficient to authorise much of the legislation. Specific heads of power that support the legislation include the powers with respect to the naval and military defence of the Commonwealth, the control of the forces to execute and maintain the laws of the Commonwealth, external affairs, trade and commerce with other countries and among the States and the power with respect to postal, telegraphic, telephonic and other like services. Another source of federal power is the vesting of the executive power of the Commonwealth in the Queen, a power which extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. Those various heads of power and the so-called implied nationhood power combined with the

power to make laws with respect to matters incidental to the execution of any power vested by the Constitution in the Parliament or in the government of the Commonwealth appear sufficient to support the creation of most offences created by the legislation. However, the matter was put beyond doubt by the States² transferring some of their constitutional powers to the Commonwealth for its use and passing their own legislation to supplement federal legislation dealing with terrorism concerns. The *Terrorism (Commonwealth Powers) Act 2002* (NSW) and its counterparts in other States, for example, refer to the Commonwealth State legislative powers to make laws with respect to the matters referred to in Part 5.3 of the *Commonwealth Criminal Code*. The referral of these powers by the States and Territories effectively gives the Commonwealth power to deal with terrorist acts in the same way as if the Parliament of the Commonwealth had constitutional power to make laws with respect to terrorist acts for the whole of Australia.

However, laws of the Commonwealth – from whatever source derived - must not be inconsistent with the separation of powers enshrined in the Constitution and cannot infringe the provisions of Chapter III of the Constitution which vests the judicial power of the Commonwealth in the High Court of Australia, in such other federal courts as the Parliament creates and in such courts as the Parliament vests with federal jurisdiction. Chapter III also contains s.75(v) of the Constitution which gives the High Court a constitutional jurisdiction in all matters where a writ of mandamus, prohibition or injunction is sought against an

² C.f. *Terrorism (Commonwealth Powers) Act 2002* (NSW)

officer of the Commonwealth. It is the doctrine of the separation of powers and the provisions of Ch III that pose the greatest constitutional challenge to the validity of some provisions of the terrorist legislation. Associated with the Ch III problems is the extent to which the federal Parliament can enact laws requiring interrogation and detention as being incidental to one of the heads of power that support enacting terrorism offences. But given the references of State powers to the Commonwealth, I think it is unlikely that legislation concerning detention and interrogation will be held invalid because it is not incidental to a head of federal power. In addition, some provisions of the terrorist legislation are arguably in conflict with the constitutional right of the people to communicate with each other or political and government matters. And an argument is available - although it was rejected by Whealy J in one of the many *Lodhi*³ cases - that Part 3 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* unconstitutionally changes the structure of State courts.

Before turning to the legislation, it is convenient to refer to the constitutional principles derived from Ch III against which the validity of the terrorist legislation may be tested. I propose to deal in particular with whether and to what extent the federal Parliament has power to make laws concerning the detention of citizens, absent a court order imprisoning a person who has been convicted of an offence.

³ *Reg v Lodhi* [2006] NSWSC 571

Chapter III of the Constitution contains 10 sections, ss71-80. Among other things, those sections create the federal judiciary, delineate the appellate and original jurisdiction of the federal judiciary, and provide for trial by jury in indictable matters. Of these ten sections, the most fundamental is s 71. It declares that the judicial power of the Commonwealth is vested in the High Court "and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction." The High Court has often said that it is practicably impossible to give an exhaustive definition of judicial power. But a "widely-accepted statement" is that of Griffith CJ in *Huddart, Parke & Co Pty Ltd v Moorehead*⁴ where he said that judicial power means:

"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."

In *R v Quinn; Ex parte Consolidated Food Corporation*⁵, Jacobs J saw judicial power as being concerned with the "basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom."

On its face, Ch III is merely a blue-print for the judicial arm of government. However, interpretation of Ch III has revealed a number of

⁴ (1909) 8 CLR 330 at 357.

⁵ (1977) 138 CLR 1 at 11 per Jacobs J.

procedural and substantive rights within its provisions⁶. At an early stage of federation, the High Court declared that s 71 exhaustively defines the bodies that can exercise the judicial power of the Commonwealth. Whatever in substance is an exercise of judicial power can be exercised only by the courts referred to in s.71 of the Constitution. And the *Boilermakers' Case*⁷ decides that non-judicial powers and functions that are not incidental to the exercise of federal judicial power cannot be conferred on federal courts.

Procedural rights

Few would now doubt that Ch III protects some procedural rights in cases in federal jurisdiction, and all the terrorist law cases are in federal jurisdiction. A procedural right may be defined as a person's right of access to a method of enforcing substantive rights and duties⁸. A number of such procedural rights are evident in Ch III.

The Parliament has no power to fetter the s.75(v) right to obtain constitutional prerogative relief against Commonwealth officers, but other procedural rights may be fettered by legislation. Even so, legislative fettering these rights cannot constitutionally go so far as to direct the manner in which a court exercises the judicial power of the Commonwealth.

⁶ Moens *The Constitution of the Commonwealth of Australia*, 6th Edition (2001), p 7.

⁷ *Attorney General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529.

⁸ Nygh, *Butterworths Australian Legal Dictionary* (1997) at 1129.

Gradual Acceptance that Chapter III Protects Due Process Rights

Indeed, there are some procedural rights in Chap III that probably cannot be fettered. An analysis of the case law shows that it is now accepted that Ch III affords the individual at least some basic procedural rights. Those rights may fairly be described as those which courts have traditionally regarded as fundamental to the effective functioning of judicial power. It is after all a "short step"⁹ from the constitutional requirement that judicial power can only be vested in the courts identified in s.71 to the conclusion that Chap III guarantees the procedural rights necessary for the exercise of that power. Deane J has referred to s 71 as "the Constitution's only general guarantee of procedural due process."¹⁰ The weight of judicial opinion, especially in the last 20 years, supports the opinion of Deane J in *Re Tracey; Ex parte Ryan*¹¹ that:

"To ignore the significance of the doctrine [of the separation of powers] or to discount the importance of safeguarding the true independence of the judicature upon which the doctrine is predicated is to run the risk of undermining, or even subverting, the Constitution's only general guarantee of due process For its part, the Parliament cannot legislate either to destroy the entrenched safeguards of Ch III or to itself assume the exercise of judicial power."

Implied Right to Legal Representation

⁹ Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Sydney Law Review* 166 at 168.

¹⁰ *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580.

¹¹ (1988) 166 CLR 518 at 580.

Perhaps the most pertinent example of the implication of due process by the High Court can be seen in *Dietrich v The Queen*¹². There it was held that the power of a court to grant a stay of proceedings where an unfair trial would result, extends to a case where an indigent accused is charged with a serious offence and, through no personal fault, is unable to obtain legal representation. Deane J said that the principle of a "fair trial" was, in relation to the judicial power of the Commonwealth

"entrenched by the Constitution's requirement of the observance of judicial process and fairness that is implicit in the vesting of the judicial power of the Commonwealth exclusively in the courts which Ch III of the Constitution designates."¹³

However, somewhat surprisingly, the privilege against self incrimination, although seen as a fundamental common law principle, has not so far been regarded as beyond federal legislative power to impair or abolish¹⁴.

¹² (1992) 177 CLR 292.

¹³ (1992) 177 CLR 292 at 326. See also Gaudron J at 362.

¹⁴ In *Hammond v The Commonwealth* (1982) 152 CLR 188 at 203, Brennan J expressly left open the question whether the Commonwealth Parliament could deprive a person charged with a Commonwealth offence of immunity from self-incrimination. However, the High Court has now recognised such power: *Sorby v The Commonwealth* (1983) 152 CLR 281 at 298-299, 308, 314; see also *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

Uncertainty still remains, however, as to exactly what rights due process will entail. Nevertheless, it is still possible to conclude with confidence, as Professor Zines has said, that:

"At least one test for determining the limits on legislative power arising from Chapter III is surely whether the statutory provision impairs the due administration of justice."¹⁵

More Controversial – Whether Substantive Rights are Protected by Chapter III

Throughout the last century, there has been a great divergence in opinion as to whether Ch III of the Constitution protects substantive as well as procedural rights. There are those who see Ch III, and in particular the concept of judicial power in s 71, as being a "great reservoir of rights"¹⁶. Justice Deane, in particular, has expounded the view that the Constitution "contains a significant number of express or implec guarantees of rights and immunities".

In any event, Chapter III of the Constitution has been interpreted to reveal some fundamental substantive rights. Thus, the term "judicial power" in Ch III has been interpreted to encapsulate the "jealously

¹⁵ Zines, *The High Court and the Constitution* (1997) at 204.

¹⁶ Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Sydney Law Review* 166 at 167. This is despite the fact, which Zines concedes at 167, that "even on the broadest construction [of Chapter III], it refers only to federal judicial power."

guarded"¹⁷ notions of separation of powers (which operate in "ful vigour"¹⁸) and the absolute independence of the judiciary¹⁹. The chapter also provides for protection of substantive rights by ensuring through the judicial review mechanism of s.75(v) of the Constitution that officers of the Commonwealth are performing their tasks lawfully²⁰.

I will consider two particular substantive rights which have been addressed by the High Court as being potentially enshrined by Ch III and which are relevant to a discussion of the terrorist legislation.

1. Protection from Legislative "Usurpation of Judicial Power" and "Legislative Judgment"

In addition to due process rights that individuals have when they are brought before the courts exercising federal jurisdiction, individuals also have the right for access to the courts freed from the "usurpation o

¹⁷ Moens *The Constitution of the Commonwealth of Australia. 6th Edition* (2001), p 230.

¹⁸ Moens *The Constitution of the Commonwealth of Australia. 6th Edition* (2001), p 230.

¹⁹ *Attorney-General (Commonwealth) v R; Ex parte Boilermakers Society of Australia* (1957) 95 CLR 529 at 540.

²⁰ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CR 1 per Brennan CJ, Dawson, Toohey, McHugh Gummow JJ at 11; See also *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 684-5. See also Kennett, 'Individual Rights, the High Court and the Constitution.' (1994) 19 *Melbourne University Law Review* 581 at 581.

judicial power" and "legislative judgment" by the Parliament. In *Nicholas v The Queen*²¹, Brennan CJ said:

"A law that purports to direct the manner in which the judicial power should be exercised is constitutionally invalid. However, a law which merely prescribes a Court's practice or procedure does not direct the exercise of the judicial power in finding facts, applying law or exercising an available discretion.

This right of protection from usurpation of judicial power and legislative judgment was famously applied by the Privy Council in *Liyanage v The Queen*²². There special legislation redefined the relevant offences and penalties applicable to a group of defendants, modified the laws of evidence, provided for trial by three judges sitting without a jury and retrospectively validated their arrest without warrant and their detention before trial. In a celebrated decision, the law was held invalid as a usurpation of judicial power which violated the separation of powers in the Constitution of Ceylon. The High Court has referred to the decision with implicit approval in the *Builders Labourers' Case* in 1986²³.

In reaching its decision that the legislation should be struck down the Privy Council noted the difficulty in "tracing where the line is to be drawn between what will and what will not constitute such an interference²⁴" by the legislature on the judicial power. Importantly,

²¹ (1998) 193 CLR 173 at 188.

²² [1967] 1 AC 259.

²³ *Australian Building Construction Employees' and Builders Labourers Federation v The Commonwealth* (1986) 161 CLR 88 at 96.

²⁴ [1967] 1 AC 259 at 289-290.

"Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings."²⁵

There is no doubt that *Liyanage* is consistent with Australian doctrine on judicial power and is authoritative in Australia. The principle preventing improper interference with a judicial process has long been accepted in this country²⁶. It is evidenced by the High Court's decision in *Actors & Announcers Equity Association v Fontana Films Pty Ltd*²⁷. The case concerned the validity of s 451(5) of the *Trade Practices Act 1974* which provided that where two or more officers of a union engaged in concerted conduct, the union itself was *deemed* to engage in the conduct, unless it could show "that it took all reasonable steps" to prevent the officers doing so. By 5 -2, this provision was held to be invalid.

2. Freedom From Detention

²⁵ [1967] 1 AC 259 at 289-290.

²⁶ *Huddart Parker v Moorehead* (1909) 8 CLR 330; *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 346; *Hammond v Commonwealth* (1982) 152 CLR 188; *Sorby v Commonwealth* (1983) 152 CLR 281; *Australian Building Construction Employees' and the Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 at 96.

²⁷ (1982) 150 CLR 169.

A second related substantive right to protection from legislative judgment in Ch III and one highly relevant to the present discussion is the individual's right to freedom from detention except pursuant to a judgment by a court. This constitutional right was recognised in the joint judgment of Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration*²⁸ which concerned the detention of boat people. The Honours said that there existed "a constitutional immunity from being imprisoned ... except pursuant to an order by a court"²⁹ – since, apart from certain "exceptional cases":

"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 to the exclusively judicial function of adjudging and punishing criminal guilt."³⁰

If such a right exists, then, in the absence of a finding of guilt, federal legislation purporting to authorise detention outside the excepted categories would be invalid as an attempted exercise of the judicial power of the Commonwealth.

However, some constitutional lawyers think that the trend towards liberal interpretation of the constitutional guarantee against detention without a court order, began to slow with the High Court's decision in *Kruger v The Commonwealth*³¹ and accelerated with the decisions in *Al*

²⁸ (1992) 176 CLR 1.

²⁹ (1992) 176 CLR 1 at 28-29.

³⁰ (1992) 176 CLR 1 at 27.

³¹ (1997) 190 CLR 1.

*Khateb v Goodwin*³² and *Re Woolley*³³. In *Kruger* the High Court upheld legislation authorising the forced removal of Aboriginal children from their families and communities on the ground that the legislative purpose was protective of their welfare.

Indeed, some constitutional lawyers would see the later decisions in *Al-Khateb*³⁴ and *Re Woolley*³⁵ as making the constitutional guarantee against detention virtually non-existent. In *Al-Khateb*, a majority of the Justices of the High Court held that the detention of a non-citizen by the Executive in accordance with the *Migration Act* 1958 did not contravene Ch III of the Constitution even if the removal of the non-citizen from Australia was not reasonably practicable in the foreseeable future. The majority held that the purpose of the detention was not punitive because detention was required for the purpose of removal of non-citizens from Australia and their separation from the Australian community until that occurred. I was one of the majority Justices in *Al-Khateb*. I said:

"Ch III is always infringed by the detention of a person other than by a curial order -- whatever the purpose of detention - which is authorised by a law of the Commonwealth and imposes punishment. However a law authorising detention will not be characterised as imposing punishment if its object is purely protective. *Ex hypothesi*, a law whose object is purely protective will not have a punitive purpose."

³² (2004) 219 CLR 562.

³³ (2004) 210 ALR 369.

³⁴ (2004) 219 CLR 562.

³⁵ (2004) 210 ALR 369.

Hayne J³⁶, Callinan J³⁷ and Heydon J expressed similar opinions.

In *Woolley*, the High Court upheld a federal law that required the detention of the children of claimants for refugee status, as well as the parents.

These decisions throw up the question whether the statement of Brennan, Deane and Dawson JJ in *Lim* in fact represents constitutional doctrine.

As I pointed out in *Re Woolley*³⁸, if no more appears, a law which authorises the Executive to detain a person should be classified as "penal or punitive in character" and a breach of the separation of powers doctrine. But it is going too far to say that, subject to specified exceptions, detention by the Executive is always penal or punitive and can only be achieved as the result of the exercise of judicial power. Accordingly, the conclusion of Brennan, Deane and Dawson JJ that, in times of peace, citizens enjoy constitutional immunity from being imprisoned by Commonwealth authorities except under an order by a court in the exercise of the judicial power of the Commonwealth is open to serious doubt.

Whether detention is penal or punitive must depend on all the circumstances of the case. Logically, the fact that courts punish persons

³⁶ At 650-651.

³⁷ At 657.

³⁸ (2004) 210 ALR 369.

by making orders for detention by the Executive cannot lead to the conclusion – subject to exceptions or otherwise – that detention by the Executive is necessarily penal or punitive. There is now *dicta* from four High Court Justices that accepts that this is so.

In *Kruger v The Commonwealth*³⁹, Gaudron J said⁴⁰ that "it is not possible to say that, subject to clear exceptions, the power to authorise detention in custody is necessarily and exclusively judicial power." In *Al-Kateb v Godwin*⁴¹, Hayne J, with whose judgment Heydon J agreed on this point, referred to the judgment of Gaudron J in *Kruger* and was clearly of the same opinion as her Honour. In *Woolley*, I expressed the opinion that the statement of her Honour in *Kruger* was correct and the *dictum* of Brennan, Deane and Dawson JJ in *Lim* to the contrary should not be followed. In *Woolley*, I said:

If no more appears than that the law authorises or requires detention, the correct inference to be drawn from its enactment is likely to be that, for some unidentified reason, the legislature wishes to punish or penalise those liable to detention without the safeguards of a judicial hearing. It would nevertheless be a rare case where nothing more appears to throw light on whether the law is punitive or penal in nature. The terms of the law, the surrounding circumstances, the mischief at which the law is aimed and sometimes the parliamentary debates preceding its enactment will indicate the purpose or purposes of the law... [T]he issue of whether the law is punitive or non-punitive in nature must ultimately be determined by the law's purpose, not an *priori* proposition that detention by the Executive other than by judicial order is, subject to recognised or clear exceptions, always punitive or penal in nature. Indeed, leaving aside the cases of punishment for contempt of Parliament or

³⁹ (1997) 190 CLR 1.

⁴⁰ *Kruger* (1997) 190 CLR 1 at 110.

⁴¹ (2004) 78 ALJR 1099 at 1146-1149 [257]-[269] per Hayne J, 1155 [303] per Heydon J; 208 ALR 124 at 188-191, 200.

breach of military law, the so-called exceptions to the "constitution immunity" rule can be explained only by the fact that the *purpose* of the detention in those "exceptional" cases is not punitive or penal in nature.

Despite the decisions in *Kruger*, *Al-Khateb* and *Woolley*, however, I think that there can be little doubt that a right against detention without a finding of guilt by the judiciary exists in many situations but further case law will be needed to define how limited this right is. The terrorism legislation provides a fertile ground for helping to define it.

THE LEGISLATION

Let me now turn to those parts of the terrorism legislation which may have to withstand a constitutional challenge. But first it is convenient to refer briefly to the provisions that create the principal offences and which appear beyond constitutional challenge.

The Criminal Code defines the key term a "terrorist act" as an action or threat of action done with the intention of "advancing a political, religious or ideological cause" and "coercing, or influencing by intimidation" an Australian or foreign government or intimidating the public.

"Action" includes physical harm to or death of a person, serious damage to property, endangering the lives of others, creating a serious risk to the health or safety of the public, or seriously interfering with electronic systems of finance, communications, services and transport.

The principal offence in Division 101 is found in section 101.1: the offence of engaging in a terrorist act which includes a threat to commit such an act. No one has yet been charged with this offence. Division 101 also creates ancillary offences in respect of conduct that is connected to a terrorist act.

By an amendment made in 2005, the Code now declares that an offence is committed even if a terrorist act does not occur.

Division 102 creates offences with respect to a person's relationship with a terrorist organisation. The Criminal Code provides two ways in which a group of people can be classified as a "terrorist organisation". First, they will be a terrorist organisation for the purpose of the definition of that term if they are "directly or indirectly engaged in, preparing, planning, assisting in or fostering" a terrorist act. Second, a group of persons will be a terrorist organisation if the federal Attorney General declares that it is such an organisation. Nineteen organisations have so far been declared to be a terrorist organisation in this way. The Attorney may proscribe a group on either of two grounds. First, if the Attorney is satisfied that the group is directly or indirectly engaged in terrorist acts, he may proscribe it. Second, if he is satisfied that the group advocates terrorist activity, he may proscribe it. Advocacy is widely defined and includes directly praising terrorism in circumstances where there is a risk that it might lead a person to engage in a terrorist act. Once a group is proscribed as a terrorist organisation, its members may be liable in respect of various consequential provisions, as may those who associate with members of the organisation.

Section 103.1 of the *Code* makes it an offence for a person provide or collect funds and that person is “reckless as to whether they w be used to facilitate or engage in a terrorist act”. The section does not require that the funds be provided or collected for any particular person group or entity. Section 103.2 makes it an offence for a person intentionally make “funds available to” or to collect “funds for, or on behalf of, another person (whether directly or indirectly)” if “the first-mentioned person is reckless as to whether the other person will use the funds facilitate or engage in a terrorist act.”

THE AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION

The Australian Security Intelligence Organisation Legislative Amendment (Terrorism) Bill 2002 granted extensive powers to the Australian Security Intelligence Organisation (ASIO). It was introduced in the federal Parliament in March 2002 and, after extensive debate in and out of the Parliament, finally enacted in June 2003. It has been amended on several occasions.

The law now allows ASIO to seek two special warrants. The first authorises the questioning of persons. The second authorises both questioning and detention. However, the Director-General of ASIO can obtain these warrants only with the Attorney-General's consent. If the Attorney gives consent, the Director-General can apply to an “issuing authority” who is a Federal Magistrate or Judge to issue the warrant. Before the Attorney consents and before the issuing authority issues the warrant each must be satisfied that reasonable grounds exist for believing that the warrant will “substantially assist the collection of intelligence that

important in relation to a terrorism offence". In addition, the Attorney must be satisfied that "relying on other methods of collecting that intelligence would be ineffective". A person may be the subject of these warrants even though that person is not suspected of a terrorism offence.

A warrant enables ASIO to bring the person named in the warrant before a "prescribed authority" for questioning. The prescribed authority is a person appointed by the Attorney-General, such as a retired judge with five or more years experience on a superior court. A questioning warrant enables ASIO to ask the person questions and to require him or her to provide records or other things. The warrant may issue for as long as 28 days; questioning can take place for as long as 24 hours but no period of questioning can be longer than eight hours. If an interpreter has to be used, questioning can last for 48 hours. It is an offence, punishable with imprisonment for up to five years, if the person refuses to answer questions put to him or her or to give answers that are false or misleading. The Act abolishes the common law privilege of refusing to answer a question on the ground that the answer is self-incriminating but provides that the answer cannot be used in criminal proceedings against the person. However, this exception does not prevent ASIO using an answer to find other evidence against the person.

As its name indicates, a question and detention warrant authorises a police officer to take a person into custody for questioning before a prescribed authority. Before consenting to this type of warrant, the Attorney-General must be satisfied that "if the person is not immediately taken into custody and detained, the person: (i) may alert a person involved in a terrorist offence that the offence is being investigated; or (ii) may not appear before the prescribed authority for questioning; or (iii) may

destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce". However, the warrant must allow the person to contact a family member or another person or lawyer at specified times while in detention.

A questioning and detention warrant authorises the detention in custody of a person for as long as seven days but the periods of questioning under such a warrant are the same as under a questioning warrant. Although the person must be released at the end of the specified period, ASIO can obtain a further warrant if the Attorney and the issuing authority are satisfied that a further warrant is justified by reason of "information that is additional to or materially different from that known to the Director-General" when he or she sought the Attorney's consent to the previous warrant request.

While the warrant is in force, a person cannot give any other person any information about the warrant, not even that it has been issued. Furthermore, with limited exceptions, for two years after a warrant has expired, a person cannot inform any other person of "operation information" that was obtained under the warrant.

ASIO's power to detain persons for questioning appears to be greater than that of similar intelligence agencies in the United States and the United Kingdom because only ASIO has the power to obtain a warrant for the purpose of detaining a person in custody under conditions of extreme secrecy when that person is *not suspected* of a terrorism offence. Worse still, a person not suspected of any terrorism offence can be detained for longer than a person suspected of a terrorism offence or for that matter any federal offence. The *Crimes Act 1914* (Cth) permits

persons arrested for various offences to be held in custody for the purpose of investigating those offences. However, a person arrested for a terrorism offence cannot be detained for more than 24 hours. And a person arrested for serious but non-terrorist offences cannot be detained for longer than 14 hours. Thus, a questioning and detention warrant authorises the detention of persons, not suspected of a terrorism offence, for seven times as long as a person suspected of a terrorism offence and 14 times as long as a person suspected of non-terrorist offence.

So far however, the available evidence indicates that ASIO has not abused these questioning and detention powers. Until November 2005 ASIO had obtained 14 questioning warrants. The longest period for which a person was questioned was 42 hours 26 minutes. That was a case where an interpreter was used. The longest period of questioning without an interpreter was 15 hours and 57 minutes⁴².

There must be doubt as to the constitutional validity of these powers in so far as they apply to citizens who are not suspected of offences. If the view of Brennan, Deane and Dawson JJ in *Lim* is applied by the High Court, the validity of the legislation in its application to non-suspects would seem very doubtful. Even if the view I adopted in *Woolley* is applied, there must be a question as to whether the legislation in its application to non-suspect citizens is in substance punitive. One would

⁴² Parliamentary Joint Committee on ASIO, ASIS and DSD, Commonwealth of Australia, *ASIO's Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979*, November 2005) at pp.5-6.

think that ordinarily a person would be detained for interrogation only because that person had refused to co-operate with the authorities. In that context, detention is arguably punitive in nature.

CONTROL ORDERS AND PREVENTATIVE DETENTION ORDERS

In 2005, Part 5.3 of the *Criminal Code* was amended by adding Divisions 104 and 105. These Divisions authorise orders for the control or the preventative detention of a person. The making of these orders does not depend on a person having been convicted of a terrorist or other offence, as is the case in State jurisdictions where preventative detention orders can be made in the case of persons found guilty of sex crimes. For that matter, the making of these orders does not even require a finding that the person concerned is suspected of committing a crime. Both orders are made for the express purpose of protecting the public from a terrorist act, but differ in their effect. Preventative detention orders authorise the Australian Federal Police to take a person into custody and detain that person for a maximum period of 48 hours. They are aimed at either preventing an imminent terrorist attack from occurring or a preserving evidence relating to a terrorist act that has recently taken place. Control orders are also designed to prevent terrorist attacks, but their issue does not depend on an imminent risk of terrorist attack. They can operate for as long as a year. Moreover, they can be renewed. So far no preventative detention order appears to have been issued, and no control order was issued until the order made against Jack Thomas on or about 28 August 2006.

Control Orders

Control orders are issued for the purpose of monitoring, restricting and directing the activities of persons who may engage in acts of terrorism. The terms of a control order can vary from minor restrictions on, to far reaching interferences with, a person's freedom. For example an order can prohibit a person from being at specified areas or places from communicating or associating with a particular person or from using certain forms of telecommunication or technology. It can require a person to do things such as wear a tracking device or remain at a specified place for certain periods or to report at specified times and places. Breach of a control order is an offence punishable with up to five years imprisonment.

Only senior members of the Australian Federal Police can seek the issue of a control order. If the officer obtains the written consent of the Attorney-General, the officer can request the Federal Court, the Family Court or the Federal Magistrates Court to issue an interim order. Before making an order, 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 subject to the order has provided training to, or received training from, a listed terrorist organisation". The legislation provides for a further hearing in which the court may declare the order to be void if it is satisfied that when it was made there were no grounds for making the order. Alternatively, it may confirm the order or vary or remove some of its restrictions or obligations

As I have indicated, an order may operate for up to one year and a further order may be made when the confirmed order has expired.

Given the reference of State legislative powers to the Commonwealth and the recent High Court decision in *Fardon v Attorney-General (Qld)*⁴³ which upheld the validity of continuing or preventative detention regimes in relation to the persons already convicted of offence it may be that the High Court would uphold the validity of the provision providing for control orders. However, the making of such an order against a person without a prior conviction for an offence is not easily justified as an exercise of federal judicial power. As Justice Gummow said in *Fardon v Attorney-General (Qld)*, 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”⁴⁴. *Fardon* had already been convicted and the order extending his detention was premised on the fact that it was probable that he would offend again if released. The legislation there was very different to the present legislation. Hence, *Fardon* provides no guarantee that the issue of control orders before federal courts are valid. On the contrary, they seem invalid as an attempt to vest federal courts with a power that is non-judicial, contrary to the doctrine of the separation of powers, expounded in the *Boilermakers’ Case*.

Preventative Detentions Orders

A preventative detention order authorizes the Australian Federal Police to take a person into custody and detain that person for 24 hours.

⁴³ (2004) 210 *Australian Law Reports* 50.

⁴⁴ (2004) 210 *Australian Law Reports* 50, 74.

with the right to have the order extended for another 24 hours. This 48 hour period may then be further extended by reference to the provisions of State law which operate in conjunction with the *Criminal Code*. Thus, the New South Wales *Terrorism (Police Powers) Act 2002* enables detention for a maximum of 14 days.

A member of the Australian Federal Police may apply to an “issuing authority” for the issue of a preventative detention order. The issuing authority is a member of the Australian Federal Police who holds the rank of superintendent or higher. The initial order may permit detention for up to 24 hours. However, a preventative detention order can be continued after the grant of the initial order. The order, as continued, may authorise a further period of detention, not exceeding a total of 48 hours from the time that the individual was first taken into custody under that order.

The “issuing authority” for a continued preventative detention order must be a present or retired judge or a federal Magistrate. The President or Deputy President of the federal Administrative Appeals Tribunal may also be eligible for appointment as an “issuing authority”.

The *Criminal Code* declares that, in exercising the power to make, extend or revoke the preventative detention orders, a judicial officer is acting in his or her personal capacity and not as a member of the judicial court. The *Boilermakers Case*⁴⁵ held that the Parliament of the Commonwealth cannot invest federal courts with non-judicial powers or

⁴⁵ (1956) 94 CLR 254.

functions except in respect of matters that are incidental to the exercise of judicial powers or functions. The *Criminal Code* assumes or accepts that the issuing of a preventative detention orders is not a judicial function and the federal judges in their capacity as federal judges cannot issue them. This rule does not apply to State and Territory judges, but, as *Kable's Case* shows, functions conferred on Supreme Court judges must not be 'incompatible' with investing federal judicial power in State courts.

Over my lone dissent in *Grollo v Palmer*⁴⁶ and the dissent of Masor and Deane JJ in *Hilton v Wells*⁴⁷, the High Court has upheld legislation conferring power upon judges as private persons to issue telephone interception warrants sought by police officers. The legislation assumed that a judge has two separate *persona*, one as a judge and the other as a private citizen and that power could be conferred on the private person to the exclusion of the judicial *persona* even though the legislation used the judicial *persona* to identify the private person who was being invested with the power to issue the warrant.

This device of *persona designata* is a fiction. It uses judicial office to identify potential issuing authorities but in the same enactment asserts the power is conferred upon them as private individuals and not judges. Since the subsequent decision of the High Court in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*⁴⁸, however, there must be

⁴⁶ (1995) 184 CLR 348.

⁴⁷ (1985) 157 CLR 57.

⁴⁸ (1996) 189 CLR 1.

doubt as to whether the High Court will continue to endorse this fiction. Moreover, non-judicial power of the kind invested in an “issuing authority” is different from the power to issue search warrants that was constitutionally approved by the High Court in *Hilton* and *Grollo*. Accordingly, investing federal judges in their capacity as private citizens with these powers must be constitutionally suspect.

No doubt it was awareness of this problem that caused the Parliament to provide for retired judges to be eligible persons for appointment as issuing authorities.

A preventative detention order can be made when the issuing authority is satisfied that the making of a preventative order would “substantially assist in preventing a terrorist act from occurring” and that detaining the person for the requisite period is “reasonably necessary” to achieve this purpose. However, the authority must be satisfied that the “terrorist act” in question is “imminent” and “expected to occur, in any event, at some time in the next 14 days”. Further a preventative detention order can be made if the issuing authority is satisfied that it is necessary to detain the person in question for the purpose of preserving evidence relating to a terrorist act which has occurred within the last 28 days and that the period of detention is reasonably necessary for that purpose.

Disclosing the existence of a preventative detention order is an offence punishable with imprisonment for up to five years.

A person detained under a preventative detention order is entitled to contact only a limited number of persons such as one family member or employer. However, the only information which may be conveyed to these people is that the person being detained is “safe but is not able to be contacted for the time being”, a message that would not be out of place in the later stages of George Orwell’s *Animal Farm*. The detainee is also entitled to contact a lawyer to obtain advice about his or her rights under the preventative detention order or to arrange for the lawyer to act for the detained person in proceedings concerning the order. But these communications are monitored by police officers, as are those family members and others.

The object of these restrictions on communication with the outside world is to ensure that others – particularly the other members of terrorist organisations do not learn that the individual is being detained under a preventative detention order. However, the sudden and unexpected disappearance of a terrorist will almost certainly warn other members of the group as to what has happened. But if the sudden and unexpected disappearance of the terrorist or terrorist suspect does not tip off the other members of the group as to what has happened, the message that the person is “safe but is not able to be contacted for the time being” surely will.

In empowering the judges of federal courts to make preventative detention orders, the Commonwealth has run the risk of a constitutional challenge to that scheme. It is a curious feature of the legislation that both control orders and preventative detention orders may be made or

grounds that would support charging the person concerned with offences under Divs 101, 102 and 103 of Part 5.3 of the Criminal Code.

THE NATIONAL SECURITY INFORMATION ACT

In 2004, the Parliament enacted the *National Security Information (Criminal and Civil Proceedings) Act 2004* for the purpose of protecting information that if presented in open court might prejudice “national security” which was defined to mean Australia’s “defence, security international relations or law enforcement interests”. That Act imposes extraordinary obligations on lawyers engaged in federal proceedings. Defence lawyers must obtain security clearances to have access to information concerning national security. Furthermore, if, before or during a hearing, either the prosecutor or the defendant knows or believes that information which relates to or may affect national security will be disclosed, each is required to notify the Attorney-General as soon as possible. Each must also notify the Attorney if that person thinks that a witness intended to be called will disclose such information either “in giving evidence or by his or her mere presence”. If a witness is asked a question and the prosecutor or defendant thinks that the answer will disclose information concerning national security, they are required to inform the court. The court must then close the court and the question must be answered in writing and shown to the prosecutor. If the prosecutor thinks that the answer might relate to or affect national security, he or she is required to notify the Attorney-General.

Failing to comply with these requirements exposes the person concerned to imprisonment for up to two years.

When the Attorney is notified, the court must adjourn the hearing until the Attorney either issues a certificate to the prosecutor or defendant or advises the court of his or her decision not to do so. Pre-trial hearings in the *Lodhi* case before Whealy J were frequently slowed down by reason of these procedures.

The Attorney may respond to the notification in various ways. If the Attorney thinks that disclosure would prejudice national security he or she may issue a certificate directing the witness not to reveal the information. Or the Attorney may permit part of the information to be used. If the information was to be tendered in a document, the Attorney may supply the witness or lawyer with a copy from which certain or all information has been deleted accompanied by a summary of the information it contained. If the information was to have been given orally or in some other form, the Attorney may provide a written summary of the information or a written statement of the facts and it is this summary or statement which must be used as evidence. Where "the mere presence" of the witness risks the disclosure of information, the Attorney may issue a certificate which prohibits the witness being called to give evidence. The Attorney General's certificate is conclusive evidence "that disclosure of the information is likely to prejudice national security." (s.27(1))

Again, disclosing the information after notification, but before the Attorney issues a certificate, or disclosing it in breach of the conditions o

the certificate is punishable by imprisonment for up to two years

Upon resumption of the hearing, the court must consider the Attorney's certificate at a closed hearing where the only persons permitted to be present are the judicial officer, the court officials, the prosecutor, the defendant and his or her legal representative, the Attorney's legal representative and any witness whom the court allows to be present.

If the court decides that the defendant may be exposed to sensitive information, it may exclude the defendant from the hearing. Moreover even the defendant's legal representative may be excluded if they have not been given a security clearance and it is likely that national security would be prejudiced if they were to hear the information. Court officials may be excluded for the same reason. However, if either the prosecutor or the Attorney-General argues for the non-disclosure of the information the defendant and his or her legal representative must be given the opportunity to make submissions regarding this argument.

Finally, the court must make an order as to whether the evidence may be disclosed or disclosed in a restricted manner. The court must also decide whether to allow a witness to be called in cases where the appearance of the witness is claimed to be a threat to national security. In making its order, the court must consider whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security if the information was disclosed or the witness called and whether the order would have a substantial adverse effect on the defendant's right to receive a fair hearing.

The Act specifically states that, in considering its order, the court must give the “greatest weight” to the Attorney’s certificate. And s.27 makes the Attorney’s certificate conclusive as to the risk of prejudice to national security. It is no doubt true that in theory the *National Security Information (Criminal and Civil Proceedings) Act 2004* does not direct the court to make the order which the Attorney wants. But it goes as close to it as it thinks it can. It weights the exercise of the discretion in favour of the Attorney- General and in a practical sense directs the outcome of the closed hearing. How can a court realistically say I am going to make an order in favour of a fair trial even though, in exercising my discretion, I give the issue of fair trial less weight than the Attorney-General’s certificate. Imagine the appellate fate of a custody order where the trial judge has said I give custody to the father although his claim has less weight than that of the mother.

The effect of this legislation is that, at the Attorney-General’s discretion, information which he conclusively declares is likely to prejudice national security cannot be given orally and in practice cannot be the subject of cross-examination. A trial in which cross-examination was permitted would become a catalogue of adjourned hearings. These powers conferred on the Attorney-General are such an interference with a criminal trial in federal jurisdiction that it is difficult to see how they can be valid. Making the Attorney’s certificate conclusive as to the effect of the information on national security is a legislative attempt to reverse the

decisions in *Sankey v Whitlam*⁴⁹ and *Alister v The Queen*⁵⁰ that it is for the courts of justice and not the executive government to determine whether a claim for public interest immunity is made out. It is strongly arguable that s.27 (1) is invalid as a legislative attempt to usurp the judicial power of the Commonwealth.

The purported conclusiveness of the certificate coupled with the other restrictions in including those requiring the judge to give greatest weight to the Attorney's certificate under s.31 of *National Security Information (Criminal and Civil Proceedings) Act 2004* and the declaration in s.19 – although expressed in negative form - that the power of the Court with respect to abuse of process is affected expressly or impliedly by *National Security Information (Criminal and Civil Proceedings) Act 2004* combine to make a strong case that the legislation is an attempt by Parliament to usurp the judicial power of the Commonwealth. It is true that, in *Nicholas v The Queen*⁵¹ over the dissent of Kirby J and myself, the High Court upheld the validity of a federal law that directed a court exercising federal jurisdiction, to disregard the fact that an Australian Federal Police officer had committed an offence in importing prohibited goods, provided certain conditions were fulfilled. Brennan CJ, Toohey and Hayne JJ held that it was simply a law regulating the discretionary exclusion of evidence. Gaudron J held that it did not prevent independent determination as to whether the evidence should be excluded. Gummow

⁴⁹ (1978) 142 CLR 1.

⁵⁰ (1984) 154 CLR 404.

⁵¹ (1998) 193 CLR 173.

J held that the law did not deem any ultimate fact to be true or change the elements of the offence or the standard of proof. However, the *National Security Information (Criminal and Civil Proceedings) Act 2004* interferes with the conduct of a terrorist trial to a far greater extent than was the case in *Nicholas*, and that case is not directly in point; nor does the decision in *Nicholas* provide a persuasive analogy. In *Reg v Lodhi*⁵² however, Whealy J rejected a constitutional challenge to the *National Security Information (Criminal and Civil Proceedings) Act 2004*. However the argument that was put to him varied in significant respects from the considerations to which I have referred. The Court of Criminal Appeal dismissed an appeal from his Honour's decision but the constitutional issues were not involved in the appeal.

⁵² [2006] NSW 571.

FREEDOM OF SPEECH

There must be also be serious doubts as to whether certain provisions of Australia's terrorism laws are invalid as being inconsistent with the constitutional right of Australians to communicate with each other on political and government matters. Most provisions of those laws, in so far as they regulate freedom of speech, have only an incidental impact upon that freedom. Other provisions directly penalise the content of speech, such as the law of sedition, but are easily defended as compatible with freedom of speech because they are compatible with the protection of representative government which is the plank upon which freedom of speech under the Australian Constitution depends. But other provisions of the *Criminal Code* are not so easily defended.

Section 102.1(1A)(c), for example, declares that an organisation advocates the doing of a terrorist act if the organisation "directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person...to engage in a terrorist act." If this offence had been in operation during the existence of apartheid, it would probably have been an offence to praise the actions of Nelson Mandela that led to his imprisonment or to praise the actions of the PLO. Worse still, an organisation may be proscribed as a terrorist organisation if one of its executive members praised such an act with the result that other persons in the organisation may be guilty of various offences against the terrorism laws because of their membership of the organisation. There must be serious doubt as to whether s.102.1(1A)(c) is

consistent with the Constitution's guarantee of freedom from laws that prohibit freedom of communication on political and government matters.

There are other provisions of the terrorism laws that also seem open to challenge on the ground that they unduly interfere with the Constitutional guarantee. However, it is not appropriate in this paper - which is already lengthy - to explore these matters in detail.

Balancing freedom and security

Terrorism is not a phenomenon of the 21st century or even the 20th century. Terrorists and terrorism have existed since at least the invention of gunpowder. The attempt by Guy Fawkes to blow up the Houses of Parliament in the 17th century is an early example. Undoubtedly, the invention of dynamite in the 19th century assisted terrorist groups such as the Fenians in Ireland to increase the level of fear that accompanied their activities, and many would argue that the weapons and instruments of modern technology have assisted in raising the level of fear in the present century beyond that of earlier times.

However, I doubt whether the fear of terrorism that arises today from the activities of Al Qaeda is any greater than the fear instilled in communities in Europe, Russia and the United States and to a lesser extent in the United Kingdom by the Anarchist movement during the last half of the 19th century and the early part of the 20th century. Few now know or remember that, in the 18 years between 1894 and 1912, the Anarchists were responsible for the assassination of six heads of state as well as hundreds of bombings. Based on the writings of the Russian

Prince Peter Kropotkin, anarchism attracted many followers in many countries. Its key message was that a single deed was better propaganda than a thousand pamphlets. And anarchists applied that message with vigour. Anarchists killed President Carnot of France in 1894, Premier Canovas of Spain in 1897, Empress Elizabeth of Austria in 1898, King Humbert of Italy in 1900, President McKinley of the United States in 1901 and Premier Canalejas of Spain in 1912. An attempt to assassinate King Alfonso of Spain in 1906 failed but the bomb thrown at him killed 20 bystanders. Indiscriminate bomb attacks in public places were common particularly in France, Spain and Russia. Rebuked by a judge for endangering the lives of innocent people, the Anarchist, Emile Henry, replied, "There are no innocent bourgeoisie", words that with suitable modification echo the beliefs of modern terrorists. Even the United States did not escape bomb attacks. Eight Anarchists were executed in 1886 for the murder in Chicago of seven policemen who were killed by a bomb thrown at them⁵³. And it is now widely accepted that fear of and prejudice against anarchists was largely responsible for the miscarriage of justice that occurred in the trial of the anarchists, Sacco and Vanzetti.

Terrorism did not die with the fading of Anarchism only to be revived by the activities of Al Qaeda. Terrorism and terrorist groups have flourished since the end of the Second World War. It is enough to remember the activities of:

- ? The Stern Gang or Lehi (Fighters for Freedom in Israel)
- ? EOKA (The National Organisation of Cypriot Fighters)
- ? The Mau Mau in Kenya

⁵³ See generally, Barbara Tuchman, *The Proud Tower* (1966) Ch 2, "The Idea and the Deed."

- ? The Red Brigades in Italy
- ? The Bader -Meinhoff gang in West Germany
- ? The North African terrorist groups in Algeria and Morocco
- ? The ETA, the Basque terrorist group in Spain
- ? The IRA in England and Ireland
- ? The PLO in Palestine.

What makes Al Qaeda different from these groups - even the Anarchists - is a global objective apparently secured by a network of linked groups. The global objective is the destruction of the West, not only because of its support for Israel and non-Islamic governments in various Muslim countries and its invasion of Iraq but because Al Qaeda sees the Muslim religion and its customs as threatened by Western culture. The network appears to consist of autonomous groups or cells within countries or regions which share common beliefs and objectives and whose members are trained and funded by Al Qaeda and inspired by Osama Bin Laden. In this respect, the structure of Al Qaeda as a terrorist organisation differs from the hierarchical structure of traditional terrorist groups. There appears to be no chain of command as such, although the evidence indicates that Al Qaeda operatives have played major roles in formulating and planning terrorist attacks by the members of cells already existing in specific regions.

If this analysis of the structure of Al Qaeda is correct, the principal danger that that organisation has for Australia is the development in this country of so called "sleeper cells" whose members can be called on by

experienced Al Qaeda operatives to inflict terror on the populace. Despite the unity of the objectives of these cells throughout large parts of the globe, the threats to which they expose Australia is no different in principle from that posed by other terrorist organisations in other times and other countries. In a real sense, the enemy is within, not outside.

I mention these matters not to downplay the threat that Al Qaeda poses to this country but to emphasise that terrorism has been part of the Western world for a long time and that the Anglo-Australian-American world has survived its presence without changing the fundamental values that have been the hall marks of its legal systems. True it is that hitherto terrorism or its threat has not previously touched Australia. But the United Kingdom has lived with terrorism for generations. If the United Kingdom could survive the terrorism of the IRA without changing the fundamental nature of its legal system, the question must be asked what is there about the Al Qaeda that now requires some of the fundamental values of our democracy to be overturned?

A well constructed national security law must strike a balance between the demands of freedom and the need for protection from terrorist attacks. No one should underestimate the dangers to the body politic as well as to the safety of members of the public that terrorism brings. But the need to take drastic measures to thwart terrorist activity can justify laws that overthrow traditional freedoms only to the extent that it is demonstrably necessary to do so. The object of terrorism laws is the protection of our traditional freedoms. It would be ironic if we disregarded those freedoms in our attempt to protect them. At times we must be prepared to pay a high price to ensure our national security. But national

security at any cost is too high a price to pay. Whatever the dangers of terrorist activity, few Australians would wish to have national security laws that in effect turn Australia into a totalitarian state, worthy of Russia under the KGB or Nazi Germany under the Gestapo.

Whenever the Parliament enacts national security laws, it should remember some well-known words of Prime Minister Menzies when he introduced the National Security Bill 1939 into Parliament a few days after the outbreak of World War II:

Whatever may be the extent of the power that may be taken to govern, to direct and to control by regulation, there must be as little interference with individual rights as is consistent with concerted national effort ... the greatest tragedy that could overcome a country would be for it to fight a successful war in defence of liberty and to lose its own liberty in the process.⁵⁴

⁵⁴ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 7 September 1939, 164 (Robert Menzies, Prime Minister), cited in the forthcoming "What Price Security? Taking Stock of Australia's Anti-Terror Laws" by Andrew Lynch and George Williams.