

## CASE NOTE

### THOMAS v MOWBRAY\*

#### AUSTRALIA'S 'WAR ON TERROR' REACHES THE HIGH COURT

ANDREW LYNCH†

*[The High Court of Australia's decision in Thomas v Mowbray is important in two distinct senses. First, the case concerned constitutional powers and limitations which are either infrequently considered (in particular, the Commonwealth's legislative power with respect to defence) or subject to regular uncertainty (crucially, the abstractions which have accumulated around the constitutionally implied separation of judicial power). Secondly, the case presented yet another opportunity for the Court to reflect upon the deeper ramifications of preventative justice, but the first occasion on which this squarely intersected with the pure judicial power of the federal court system. Not only is this a matter of constitutional significance, but it also poses challenging policy questions as to the role which the judicial arm is best positioned to play under a substantial body of law based upon the pre-emptive restriction of individual liberty and developed since the terrorist attacks of 11 September 2001.]*

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#### I INTRODUCTION

Constitutional decisions of the High Court of Australia regularly present multiple starting points for analysis. Nonetheless, even against usual standards, the 2007 case of *Thomas v Mowbray* ('*Thomas*')<sup>1</sup> is striking in this regard. While the importance of the decision to uphold the validity of control orders against

\* (2007) 233 CLR 307 ('*Thomas*').

† LLB (Hons), LLM (QUT), PhD (UNSW); Associate Professor and Director, Gilbert + Tobin Centre of Public Law, Faculty of Law, The University of New South Wales.

<sup>1</sup> (2007) 233 CLR 307.

individuals who may have links to terrorism is indisputable, any attempt to encapsulate the several reasons for this in a single characterisation would be most unwise. The judgments in *Thomas* cast new light on infrequently considered yet important sources of Commonwealth power — those of defence<sup>2</sup> and referrals of state law-making capacity<sup>3</sup> — while also touching upon the ramifications of a global ‘war on terror’ for the power to legislate with respect to external affairs.<sup>4</sup> At the same time, the case provided the Court with a significant occasion on which to add to the fertile, yet ever perplexing, area of constitutional jurisprudence arising from the implied separation of judicial power in the *Constitution*. In the course of deciding these issues, the standing of the Court’s landmark decision in *Australian Communist Party v Commonwealth* (‘*Communist Party Case*’)<sup>5</sup> was directly questioned by some justices while staunchly defended by another.

In addition to these arresting features, *Thomas* is also clearly of major importance for Australia’s anti-terrorism laws more generally, including the scope of ‘terrorist act’ in s 100.1 of the *Criminal Code Act 1995* (Cth) sch 1 (‘*Criminal Code*’), which underpins the vast legal national security framework constructed by the Commonwealth since the events of 11 September 2001. At the same time, the case directly addresses the policy arguments over the best way for the judiciary to moderate excess in the responses made by the political arms of government to the threat of terrorism. Should courts be defending liberty through a traditional review function, or should they play a more active role in the development of viable processes of preventative justice? If the latter, can this be accommodated within the prevailing orthodoxy of federal judicial power under the *Constitution*?

## II CONTROL ORDERS IN AUSTRALIA

Division 104, which provides a scheme for the making of control orders against individuals, was inserted into the *Criminal Code* by the *Anti-Terrorism Act [No 2] 2005* (Cth). That Act was devised as a response to the London bombings of July 2005 and was passed after a controversial and expedited parliamentary process.<sup>6</sup> The Act contained several very substantial new measures against terrorist activity, including preventative detention orders, the use of ‘advocacy’ of terrorism as a basis for the proscription of organisations, and a revamped and modernised law of sedition. Despite the government’s insistence that all parts of the law, including sedition, were immediately necessary for

<sup>2</sup> *Constitution* s 51(vi).

<sup>3</sup> *Constitution* s 51(xxxvii).

<sup>4</sup> *Constitution* s 51(xxix).

<sup>5</sup> (1951) 83 CLR 1.

<sup>6</sup> For a thorough discussion of this process, including the relevant Senate Committee inquiry, see Greg Carne, ‘Prevent, Detain, Control and Order?: Legislative Process and Executive Outcomes in Enacting the *Anti-Terrorism Act (No 2) 2005* (Cth)’ (2007) 10 *Flinders Journal of Law Reform* 17, 26–32, 43–64. Additionally, the parliamentary debate and Senate Committee inquiry must be understood against the backdrop of parts of the original Bill having been broken away and separately enacted as an urgent response to an ‘imminent terrorist threat’: see Andrew Lynch, ‘Legislating with Urgency — The Enactment of the *Anti-Terrorism Act [No 1] 2005*’ (2006) 30 *Melbourne University Law Review* 747.

Australia's national security, only control orders have been used to date, and those in respect of just two individuals.<sup>7</sup>

Division 104 draws substantially (but not entirely) upon the control order scheme enacted by the United Kingdom in March 2005.<sup>8</sup> The *Prevention of Terrorism Act 2005* (UK) c 2 replaced Part IV of the *Anti-Terrorism, Crime and Security Act 2001* (UK) c 24, which had provided for the indefinite detention of any alien reasonably believed by the Home Secretary to be a 'risk to national security' and 'a terrorist'.<sup>9</sup> At the end of 2004, the House of Lords had found Part IV incompatible with the rights to both liberty and freedom from discrimination, which are guaranteed in the *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*European Convention on Human Rights*'),<sup>10</sup> and had issued a declaration to this effect under s 4 of the *Human Rights Act 1998* (UK) c 2.<sup>11</sup> Although persisting with the scheme of indefinite detention was theoretically possible,<sup>12</sup> this was not a viable option for several reasons, such as the prospect of future litigation.<sup>13</sup> Control orders were thus created to enable something which was both less than the total detention of persons and not limited to non-citizens in its application. It is worth stressing that the strongest justification given for the continued existence of control orders in the UK is the inadmissibility of intercept evidence in criminal prosecutions in that jurisdiction.<sup>14</sup> Such a restriction does not affect the prosecution of terrorists in Australia.

Under Division 104, the Commonwealth's control orders allow obligations, prohibitions and restrictions to be imposed 'for the purpose of protecting the public from a terrorist act'.<sup>15</sup> The list of conditions available in s 104.5(3) for inclusion in control orders bears strong similarities to that operating in the UK<sup>16</sup> and ranges from very minimal intrusion on an individual's freedom to an extreme deprivation of their liberty. The order can include prohibitions or restrictions on the individual:

<sup>7</sup> Other than Jack Thomas, only David Hicks has been issued with a control order: *Jabbour v Hicks* (2007) 215 FLR 454; *Jabbour v Hicks* [2008] FMCA 178 (Unreported, Donald FM, 19 February 2008).

<sup>8</sup> One important distinction is that the Australian law has nothing equivalent to s 8 of the United Kingdom's *Prevention of Terrorism Act 2005* (UK) c 2, which requires that when deciding to make the order the Secretary of State must consider, and a Control Order Review Group must subsequently monitor, whether the subject of an order could be criminally prosecuted instead.

<sup>9</sup> *Anti-Terrorism, Crime and Security Act 2001* (UK) c 24, ss 21(1), 23.

<sup>10</sup> Opened for signature 4 November 1950, 213 UNTS 222, arts 5, 14 (entered into force 3 September 1953).

<sup>11</sup> *A v Secretary of State for the Home Department* [2005] 2 AC 68 ('*Belmarsh Case*').

<sup>12</sup> Under s 4(6) of the *Human Rights Act 1998* (UK) c 2, legislation remains in force notwithstanding a declaration of incompatibility, though so far every declaration has been responded to by the government by remedying the defect so as to ensure compatibility with the Convention rights: Helen Fenwick, *Civil Liberties and Human Rights* (4<sup>th</sup> ed, 2007) 201–2.

<sup>13</sup> See Clive Walker, 'Keeping Control of Terrorists without Losing Control of Constitutionalism' (2007) 59 *Stanford Law Review* 1395, 1407.

<sup>14</sup> See further Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: 28 Days, Intercept and Post-Charge Questioning*, House of Lords Paper No 157, House of Commons Paper No 394, Session 2006–07 (2007) 31–45. See also *ibid* 1430–2.

<sup>15</sup> *Criminal Code* s 104.1. The expression 'terrorist act' is given a lengthy, multi-partite definition in s 100.1 of the *Criminal Code*.

<sup>16</sup> *Prevention of Terrorism Act 2005* (UK) c 2, s 1(4).

- being at specified areas or places;
- leaving Australia;
- communicating or associating with certain people;
- accessing or using certain forms of telecommunication or technology (including the internet);
- possessing or using certain things or substances; and
- carrying out specific activities (including activities related to the person's work or occupation).<sup>17</sup>

The order can also include the requirement that the person:

- remain at a specified place between certain times each day, or on specified days;
- wear a tracking device;
- report to specified people at specified times and places;
- allow photographs or fingerprints to be taken (for the purpose of ensuring compliance with the order); and
- if the person consents — participate in specified counselling or education.<sup>18</sup>

Unlike preventative detention orders in Division 105 of the *Criminal Code*, control orders stop short of imprisoning the subject in a state facility. Nevertheless, it is clear that an order incorporating either a prohibition or restriction on the person being at specified areas or places, or a requirement that they remain at specified premises between specified times each day or on specified days, may well amount to 'detention' in all but name.<sup>19</sup> A person who contravenes any of the terms of a control order to which they are subject commits an offence with a maximum penalty of five years' jail.<sup>20</sup>

Control orders may be sought only by senior members of the Australian Federal Police ('AFP') after obtaining the written consent of the Attorney-General to request an interim order from an issuing court, unless the order is urgently required, in which case consent may be sought retrospectively.<sup>21</sup> Once consent has been granted, the AFP member can request the interim control order from an 'issuing court' (the Federal Court of Australia, the Family Court of Australia or the Federal Magistrates Court of Australia). The court must receive the request in the same form as it was presented to the Attorney-General, except for any changes required by the latter, plus a copy of the Attorney-General's consent. Under s 104.4 of the *Criminal Code*, the court can only make the order if it is satisfied of the grounds upon which the AFP has made the request. The threshold

<sup>17</sup> *Criminal Code* s 104.5(3).

<sup>18</sup> *Criminal Code* s 104.5(3).

<sup>19</sup> Conor Gearty has noted the aversion by legislatures to the employment of the term 'house arrest' in relation to provisions which clearly enable this. As he infers, this must be to soften the unease surrounding the introduction of 'a form of coercion that ... was surely thought incapable of being used in a modern democratic state': Conor Gearty, *Can Human Rights Survive?* (2006) 103.

<sup>20</sup> *Criminal Code* s 104.27.

<sup>21</sup> *Criminal Code* s 104.2(1).

criteria is found in s 104.4(1)(c), which enables the court to issue the order if satisfied that, on the balance of probabilities:

- (i) 'making the order would substantially assist in preventing a terrorist act'; or
- (ii) 'that the person [subject to the order] has provided training to, or received training from, a listed terrorist organisation'.<sup>22</sup>

Additionally, under sub-s (d), the court must be satisfied that each of the obligations, prohibitions and restrictions to be imposed are 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act'.<sup>23</sup> In determining these matters, the court must take into account the impact of the obligations, prohibitions and restrictions on the person's circumstances — including financial and personal.<sup>24</sup>

If the court issues an interim control order, it is of no effect until served personally upon its subject. Amongst other matters, the order must set out a summary of the grounds upon which it has been made,<sup>25</sup> and also inform the person as to when — as soon as practicable, but at least 72 hours *after* the order is made — they may attend a court hearing for the order to be confirmed, revoked or declared void.<sup>26</sup> However, by arrangement between the parties, the interim control order made in respect of Jack Thomas was given an extended life so that his constitutional challenge to Division 104 could be resolved before any confirmation hearing.<sup>27</sup> Despite the Commonwealth's victory before the High Court, the AFP subsequently chose not to seek confirmation of the order but instead obtained from Thomas undertakings about conditions he was to observe pending his retrial for terrorism offences in the Supreme Court of Victoria.<sup>28</sup> For this reason, further consideration of the confirmation process is not required,<sup>29</sup> though it essentially utilises the same tests as those for interim control orders. Hence, although the majority in *Thomas* declined to confirm the validity of Division 104 as a whole,<sup>30</sup> it seems safe to say that their approval of interim control orders in Subdivision B serves to secure the entire scheme.<sup>31</sup>

<sup>22</sup> The Commonwealth Attorney-General maintains a list of proscribed terrorist organisations (of which there are currently 18) from which various criminal offences arise, such as membership, support or association with such organisations: *Criminal Code* div 102.

<sup>23</sup> *Criminal Code* s 104.4(1)(d).

<sup>24</sup> *Criminal Code* s 104.4(2).

<sup>25</sup> *Criminal Code* s 104.5(1)(h).

<sup>26</sup> *Criminal Code* ss 104.5(1)(e), (1A).

<sup>27</sup> *Thomas* (2007) 233 CLR 307, 336 (Gummow and Crennan JJ).

<sup>28</sup> Julia Medew, 'Federal Court Lifts "Terror" Restrictions on Jack Thomas', *The Age* (Melbourne), 24 August 2007, 5.

<sup>29</sup> See further Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terrorism Laws* (2006) 45–6.

<sup>30</sup> *Thomas* (2007) 233 CLR 307, 335 (Gleeson CJ), 366 (Gummow and Crennan JJ), 511 (Callinan J), 526 (Heydon J).

<sup>31</sup> Cf *ibid* 342 (Gummow and Crennan JJ).

## III 'JIHAD JACK' THOMAS AND THE COURTS

In *Jabbour v Thomas*, Australia's first interim control order was granted by the Federal Magistrates Court against Jack Thomas, frequently referred to by the Australian media as 'Jihad Jack'.<sup>32</sup> The order was made after Thomas had been acquitted by a Victorian Supreme Court jury of two counts of providing support to a terrorist organisation,<sup>33</sup> and then after having two lesser charges of which he was convicted<sup>34</sup> quashed by the Victorian Court of Appeal.<sup>35</sup>

The Federal Magistrate, Graham Mowbray, granted the order after an *ex parte* hearing at which he found, on the balance of probabilities, that *both* of the available grounds in s 104.4(1)(c) were made out — that making the order would 'substantially assist' in preventing the occurrence of a terrorist attack and also that Thomas had received training from a proscribed organisation (namely, Al Qa'ida during time spent in Afghanistan in 2001).

Two comments may be made on this. First, the evidence of Thomas's training with Al Qa'ida sustained the order not only on the second training-related ground, but was also used to show that, consequently, controlling him would 'substantially assist in preventing a terrorist act'. No evidence was submitted to establish that Thomas had engaged in any activities or associations since returning to Australia — including in the almost 18 months he was a free man before criminal charges were laid — which might point to planned or likely future terrorist activity on his part. The AFP overcame this difficulty by asserting that Thomas was in effect a 'sleeper' agent for the organisation — 'an Al Qa'ida resource to facilitate or carry out a terrorist attack at any time in the future.'<sup>36</sup> It seems far from ideal to accept claims of this sort as a sufficient basis to obtain a control order against an individual on the first ground of s 104.4(1)(c) without some more definite indication that they are *presently* engaged in behaviour which must be curtailed if a terrorist act is to be prevented. Apart from anything else, it ignores the accepted wisdom that terrorist organisations 'prefer to use for operational purposes "clean skins", persons who are not known ever to have been arrested'<sup>37</sup> — if Thomas had ever been a 'sleeper' agent, the likelihood of his posing such a threat after a highly publicised criminal trial must have been very low.

Secondly, and more closely attuned to the constitutional objections to the scheme as a whole,<sup>38</sup> a broader observation may be made about the evidence

<sup>32</sup> (2006) 165 A Crim R 32.

<sup>33</sup> *Criminal Code* s 102.7(1).

<sup>34</sup> Thomas was originally convicted under *Criminal Code* s 102.6(1) (intentionally receiving funds from a terrorist organisation) and *Passports Act 1938* (Cth) s 9A(1)(e) (possession of a falsified passport): *DPP (Cth) v Thomas* [2006] VSC 120 (Unreported, Cummins J, 31 March 2006).

<sup>35</sup> *R v Thomas* (2006) 14 VR 475. This decision and the various public reactions to it are considered in Andrew Lynch, 'Maximising the Drama: "Jihad Jack"', the Court of Appeal and the Australian Media' (2006) 27 *Adelaide Law Review* 311.

<sup>36</sup> *Jabbour v Thomas* (2006) 165 A Crim R 32, 38 (Mowbray FM).

<sup>37</sup> Lord Carlile of Berriew, *Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, Cm 7367 (2008) 17.

<sup>38</sup> See Andrew Lynch and Alexander Reilly, 'The Constitutional Validity of Terrorism Orders of Control and Preventative Detention' (2007) 10 *Flinders Journal of Law Reform* 105; Michael

substantially relied upon to satisfy the Magistrate. This consisted primarily of a record of interview conducted with Thomas by the AFP in Pakistan in early 2003, which was found by the Victorian Court of Appeal not to have been voluntarily made, leading to his conviction on some charges being quashed.<sup>39</sup> While this was acknowledged by Mowbray FM, he went on to say that the material was, nevertheless, admissible at the *ex parte* hearing for the interim control order as it was an interlocutory civil case.<sup>40</sup> Thomas's reversal of fortune from released prisoner to subject of a control order hinges on this shift — a clear instance, one might argue, of 'jurisprudential context-shopping ... [so as to avoid] the procedural requirements of the criminal law'.<sup>41</sup> Additionally, it should be noted that even with access to the tainted record of interview, the jury in Thomas's criminal trial had acquitted him of the most serious charge: namely, that he 'supported' a terrorist organisation under s 102.7 of the *Criminal Code* by having agreed to act as a 'human resource' to it at some future point in time.<sup>42</sup> This was the very allegation made by the AFP, using the same evidence, to obtain real restrictions on his liberty in this civil proceeding.

Amongst the conditions placed on Thomas by the order, and thus 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act',<sup>43</sup> was a curfew prohibiting him from leaving his house between midnight and 5am, a requirement that he report to police three days a week, a prohibition on acquiring or making explosives, a restriction on his use of various telecommunications devices without prior approval, and a prohibition on contacting up to 50 individuals listed by the Department of Foreign Affairs and Trade or any other individuals whom Thomas knew to be a member of a listed terrorist organisation.<sup>44</sup> The last of these was less than the AFP had originally sought, as the Magistrate had refused to grant the initial request to ban communication with a list of individuals which ran to over 300 pages.<sup>45</sup> Even so, this condition still attracted public ridicule (notably the prohibition on Thomas contacting the world's most wanted man, Osama bin Laden), and led to the issuing Magistrate later stating that he thought some of the conditions sought by the AFP were 'silly'.<sup>46</sup>

McHugh, 'Constitutional Implications of Terrorism Legislation' (2007) 8 *Judicial Review* 189, 203–4.

<sup>39</sup> Lynch, 'Maximising the Drama', above n 35, 318–21.

<sup>40</sup> *Jabbour v Thomas* (2006) 165 A Crim R 32, 34.

<sup>41</sup> Lucia Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (2007) 257, 265. See also Fenwick, above n 12, 1340–2.

<sup>42</sup> *DPP (Cth) v Thomas* [2006] VSC 120 (Unreported, Cummins J, 31 March 2006) [5].

<sup>43</sup> *Criminal Code* s 104.4(1)(d).

<sup>44</sup> *Jabbour v Thomas* (2006) 165 A Crim R 32, 43–6 (Mowbray FM).

<sup>45</sup> *Ibid* 39.

<sup>46</sup> Ian Munro and Mark Forbes, 'Magistrate Slams "Farcical" Ban on Bin Laden', *The Age* (Melbourne), 1 September 2006, 5; Natasha Robinson, 'Ban on Bin Laden Contacts Just "Silly"', *The Australian* (Sydney), 1 September 2006, 6.

IV THE CONSTITUTIONAL CHALLENGE: *THOMAS V MOWBRAY* IN  
THE HIGH COURT

As stated above, the confirmation of the control order over Thomas was deferred so as to enable the High Court to hear his challenge to the constitutional validity of Division 104. The case for invalidity of the Division was made on three grounds:

- conferral on a federal court of non-judicial power is contrary to Chapter III of the *Constitution*;
- in so far as the Division confers judicial power on a federal court, it authorises the exercise of that power in a manner contrary to Chapter III; and
- an absence of express or implied legislative power.

A majority of 5:2 ruled that Subdivision B of Division 104 — providing for the issuing of interim control orders — was valid. The majority consisted of Gleeson CJ and Gummow, Callinan, Heydon and Crennan JJ (with Gummow and Crennan JJ issuing a joint judgment). Kirby and Hayne JJ dissented, though the latter concurred with the majority on the third issue of the legislative competence of the Commonwealth.

In discussing the issues in the case it seems preferable, and also mirrors the approach of some of the judgments, to address the matter of legislative power before turning to the operation of the limitations arising from the implied separation of judicial power in Chapter III of the *Constitution*.

A *The Source of Legislative Power*

1 *Defence Power and the Terrorist Threat*

The essential question discussed in relation to whether the scheme for control orders could be supported by the Commonwealth's defence power under s 51(vi) of the *Constitution* was whether this extends to measures guarding against internal threats.<sup>47</sup> The Court unanimously found that it did, although Kirby J expressed a significant qualification (discussed below), leading his Honour alone to find that Division 104 could not be supported by s 51(vi).

In his approach to this issue, Hayne J offered perhaps the most theoretical consideration of the relationship between terrorism and war as violent means utilised in the service of political objectives. His Honour drew on the significance of Carl von Clausewitz's theory of war<sup>48</sup> — a matter he had raised on the first morning of hearings rather to the surprise of counsel for the plaintiff.<sup>49</sup> Although most directly discussed by Hayne J,<sup>50</sup> the common underpinning of political violence regardless of scale, origin or form was clearly central to the

<sup>47</sup> The power is granted 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': *Constitution* s 51(vi).

<sup>48</sup> Carl von Clausewitz, *On War* (J J Graham trans, first published 1832, 1873 ed) 1–13 [trans of: *Vom Kriege*].

<sup>49</sup> *Thomas v Mowbray* [2006] HCATrans 660 (Hayne J, 5 December 2006).

<sup>50</sup> *Thomas* (2007) 233 CLR 307, 452.

majority's view of the Commonwealth's purposive power of defence and the measures which it could sustain.

In the *Communist Party Case*, several members of the Court stressed that the purpose of the power was directed towards 'external enemies'<sup>51</sup> or 'war with an extra-Australian nation or organism.'<sup>52</sup> The members of the *Thomas* majority responded to these remarks in different ways. Gummow and Crennan JJ tempered this limited portrayal of the power with evidence from American and English history to confirm the capacity of the national government to protect against violent unrest.<sup>53</sup> Hayne J sought to place the earlier comments in context as not constituting an outright rejection of defence from other forms of threat.<sup>54</sup> For his part, Callinan J stated simply that 'insufficient critical attention'<sup>55</sup> was given by the majority in the *Communist Party Case* to the notion that the scope of the power might encompass responses to internal dangers posed by non-state actors and, further, that aspects of Dixon J's opinion in particular were 'questionable'.<sup>56</sup> On this issue, Callinan J stated a clear preference for the 'more perceptive' approach of the dissenting judge in the earlier case, Latham CJ.<sup>57</sup> Heydon J demurred from sharing in these criticisms of the *Communist Party Case* but suggested they were not discordant with the view of the power advanced by the other members of the majority with whom he also agreed.<sup>58</sup> If so, then that gives cause for some concern as Callinan J's comments, made with the benefit of hindsight,<sup>59</sup> did not sufficiently address the alarming particulars of the *Communist Party Dissolution Act 1950* (Cth). His Honour's attempt to rehabilitate the standing of Latham CJ's dissent in the earlier case has been described as supporting 'the corrosion of constitutionalism in the name of national security'.<sup>60</sup>

With the exception of Kirby J, all justices rejected the suggestion that the extent of any ability to legislate with respect to internal threats was limited to the defence of only those 'bodies politic' referred to in the placitum — 'the Commonwealth and ... the several States'.<sup>61</sup> While that distinction might initially seem highly artificial, strangely unconcerned as it is with 'the infliction of the suffering which comes in the train of such disturbances',<sup>62</sup> the majority was perhaps too swift in their dismissal of it. In particular, there seemed little willingness to consider the role which the states and their agencies might also

<sup>51</sup> (1951) 83 CLR 1, 194 (Dixon J).

<sup>52</sup> *Ibid* 259 (Fullagar J).

<sup>53</sup> *Thomas* (2007) 233 CLR 307, 360–2.

<sup>54</sup> *Ibid* 457–9.

<sup>55</sup> *Ibid* 503.

<sup>56</sup> *Ibid* 504.

<sup>57</sup> *Ibid* 505, cf 393, 442–3 (Kirby J). This part of Callinan J's opinion echoes many of the comments he made in his delivery of the Sir John Latham Memorial Lecture on 3 May 2005: I D F Callinan, 'International Law and Australian Sovereignty' (2005) 49(7) *Quadrant* 9, 9–11.

<sup>58</sup> *Thomas* (2007) 233 CLR 307, 511.

<sup>59</sup> See Geoffrey Lindell, 'The Scope of the Defence and Other Powers in the Light of *Thomas v Mowbray*' (2008) 10 *Constitutional Law and Policy Review* 42, 46.

<sup>60</sup> David Dyzenhaus and Raynor Thwaites, 'Legality and Emergency — The Judiciary in a Time of Terror' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 9, 23.

<sup>61</sup> *Constitution* s 51(vi).

<sup>62</sup> *Thomas* (2007) 233 CLR 307, 363 (Gummow and Crennan JJ).

play in protecting the public from harm generally. Gummow and Crennan JJ discussed the ‘bodies politic’ restriction upon the federal defence power almost as if its acceptance would leave the Australian public unshielded from terrorist attack,<sup>63</sup> while Callinan J acknowledged the role the state police might fill but was unwilling to admit that this could be (seemingly to any extent) independent of Commonwealth involvement.<sup>64</sup> Hayne J’s position on this question was perhaps the most interesting since his Honour actually accepted the core of the argument that defending bodies politic was the primary concern of s 51(vi). Nonetheless, his Honour ultimately dismissed the distinction as ‘unhelpful’ because it failed to recognise that terror is all too often unleashed on civilian populations as the most effective means of attacking the state. As a result, his Honour concluded that defence of the latter requires defence of the whole.<sup>65</sup>

Kirby J was the only member of the Court to approach the defence power via its two limbs. Use of this traditional framework was oddly constrictive, as evidenced by his claim that ‘the concern of the first aspect of s 51(vi) is defence, not security’<sup>66</sup> — a comment that might deservedly attract the label offered during oral hearings by the Solicitor-General as an example of ‘September 10 thinking’.<sup>67</sup> As already stated, Kirby J did concede that ‘there need not always be an external threat to enliven the power’ but insisted that, whatever the source, it must be directed toward the bodies politic.<sup>68</sup> Otherwise, why should the threat be lifted ‘to a level beyond that of particular dangers to specific individuals or groups or interests found *within* the bodies politic’?<sup>69</sup> Although somewhat over-calibrated by his Honour’s separate consideration of the two limbs of s 51(vi), essentially this was the basis for his objection to supporting the control order scheme using that power. Very significantly, his difficulty extended far beyond the immediate context of Division 104 itself to the cornerstone upon which the Commonwealth’s entire anti-terrorism framework rests — the definition of ‘terrorist act’ in s 100.1.

It is surprising how little concern was expressed by the majority as to the breadth of the term ‘terrorist act’ and the effect of this upon the validity of the control order regime. The prevention of a ‘terrorist act’ is the central purpose of Division 104,<sup>70</sup> and indeed the term is the key element in the power to issue a control order, which is conferred upon federal courts by s 104.4. Yet the majority effectively insulated this from review, with Gummow and Crennan JJ stating at the outset that the litigation did ‘not turn upon the validity of the definition of “terrorist act”, as supported, for example, by s 51(vi) of the *Constitution*’.<sup>71</sup> Even so, their Honours concluded the relevant part of their joint judgment with an emphatic endorsement that ‘[w]hat is proscribed by that definition falls within a

<sup>63</sup> Ibid 361–3.

<sup>64</sup> Ibid 504.

<sup>65</sup> Ibid 458.

<sup>66</sup> Ibid 396.

<sup>67</sup> *Thomas v Mowbray* [2007] HCATrans 76 (David Bennett QC, 20 February 2007).

<sup>68</sup> *Thomas* (2007) 233 CLR 307, 395.

<sup>69</sup> Ibid.

<sup>70</sup> *Criminal Code* s 104.1.

<sup>71</sup> *Thomas* (2007) 233 CLR 307, 338.

central conception of the defence power'.<sup>72</sup> Hayne J discussed the definition at greater length, but essentially focused upon the coercive purpose of political violence with a view to establishing the aforementioned connection between terrorism and war as 'politics by other means'.<sup>73</sup>

Only Kirby J gave substantial consideration to the operation of Division 104 as potentially enabled by the definition of 'terrorist act'. In contrast to his colleagues, his Honour concluded that the breadth of s 100.1 was destructive of the Division's legitimacy under s 51(vi):

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.<sup>74</sup>

This passage effectively highlights the failure of the other justices to give sufficient regard to the particular *means* of achieving security under consideration in this case. While drawing a distinction between defence generally and the protection of just the constituent parts of the Australian polity seems impossible to sustain in relation to the employment of military action, this limited reading of the power appears rather more appropriate when the measures in question take the form of expansions to the criminal law. This is not to say that the latter are completely off limits under s 51(vi) (the Court was surely correct in its rejection of the plaintiff's attempt to confine the Commonwealth's defence power exclusively to engagement of the navy or military), but suggests that in a situation falling well short of 'total war' the scope of the power to support non-martial responses to internal threats might justifiably be confined to protecting the basic apparatus of government.<sup>75</sup> The undoubted capacity of the states to criminalise actions and threats of violent disturbance and physical harm would ensure that the larger community does not go unprotected. To the extent that limiting the scope of the Commonwealth defence power in this way might be said to give rise to overlap and necessitate communication and cooperation between federal agencies and their state counterparts, it needs to be recognised

<sup>72</sup> Ibid 363. Gleeson CJ and Callinan J did no more than lay out the definition in s 100.1.

<sup>73</sup> Ibid 449–52. See also von Clausewitz, above n 48, 12.

<sup>74</sup> *Thomas* (2007) 233 CLR 307, 401–2.

<sup>75</sup> This seems a preferable distinction to that proposed by Ben Saul (with whose analysis of the Court's discussion of the defence power I am otherwise in general agreement) based instead upon 'the scale, gravity, severity or quantum of harm or anticipated harm': Ben Saul, 'Terrorism as Crime or War: Militarising Crime and Disrupting the Constitutional Settlement? Comment on *Thomas v Mowbray*' (2008) 19 *Public Law Review* 20, 27. Those criteria seem unhelpfully vague — both inherently so, but also particularly as a yardstick for the validity of legislation aimed at preventing future and unknowable acts of terrorist violence.

that not only is this an inevitable feature of effective counterterrorism in any federal system but also that it already occurs to a high degree in Australia.

An examination of the transcripts of the Court's hearing of oral argument in *Thomas* is revealing in this regard. Members of the bench, particularly Callinan J, seemed caught in a cataclysmic mindset which ramped up the need for military action and against which the efforts of police were viewed as plainly inadequate. For example, during the Commonwealth's submissions, the following exchange took place:

GLEESON CJ: If there were a specific threat to blow up the atomic installation at Lucas Heights, could the army be sent in to deal with that?

MR BENNETT: Yes, your Honour, for a number of reasons it could.

CALLINAN J: I would not want the New South Wales Police Force doing it.

KIRBY J: I do not think we should disparage the police forces of the States.

MR BENNETT: Your Honour, I do not do that.

CALLINAN J: I am just expressing a preference.<sup>76</sup>

The next day, Callinan J put it to counsel for Thomas that the circumstances of the modern terrorist threat meant it was 'difficult to imagine how a police force rather than a military force ... could possibly handle' this combination of risks.<sup>77</sup> When Mr Merkel responded by pointing out that the *Criminal Code* itself 'treats these issues as policing issues and there is no involvement of defence forces',<sup>78</sup> Callinan J brushed this off:

It may be that this is a very early stage and that the police can deal with this stage of it, but as it develops, it would obviously call for a response by a military force, and the exercise of all sorts of special powers, I would have thought, or an urgent power — the undertaking of all sorts of urgent things by the Federal Executive.<sup>79</sup>

Exchanges of this sort suggest that the majority was in thrall to the view of terrorism as war. How else to explain so little judicial hesitancy on the majority's part in ceding such substantial legislative powers to the Commonwealth under the rubric of 'defence'? Significant in getting to this point was the apparent acceptance by the majority of the nine factors which the Commonwealth Solicitor-General claimed as demonstrating the emergence of something 'new and evil' against which the nation needed to defend itself:

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

<sup>76</sup> *Thomas v Mowbray* [2007] HCATrans 76 (20 February 2007).

<sup>77</sup> *Thomas v Mowbray* [2007] HCATrans 78 (Callinan J, 21 February 2007).

<sup>78</sup> *Ibid* (Ron Merkel QC, 21 February 2007).

<sup>79</sup> *Ibid* (Callinan J, 21 February 2007).

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.

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 archetypal 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.<sup>80</sup>

Heydon J explained at length why the Court was entitled to accept these ‘as a basis for inferring a constitutional fact’,<sup>81</sup> while Callinan J clearly endorsed most of them as either ‘notorious’ or ‘blindingly obvious’.<sup>82</sup> Heydon J devoted his reasons to a particularly detailed exposition of the principles governing the Court’s establishment of facts in constitutional litigation.<sup>83</sup> The remaining members of the majority apparently shared Hayne J’s view that exploring these issues was unnecessary since ‘the validity of the impugned provisions, in their application to the plaintiff, [did] not turn upon the Court’s being satisfied of the existence of particular facts or circumstances.’<sup>84</sup> Gummow and Crennan JJ did, however, take note of the recent history of terrorism commencing from 11 September 2001 so as to appreciate the ‘mischief to which the legislation is directed’.<sup>85</sup>

Despite the pervasive rhetoric of the ‘war on terror’ in the immediate aftermath of the September 11 attacks, it has been steadily discredited in recent years — and not just for its logical shortcomings.<sup>86</sup> The martial response to September 11 was used to support not only the invasion of Iraq but also the erosion by governments of civil liberties as necessary sacrifices in the conflict. The extent to which both those strategies have failed to enhance our security is only now becoming fully understood.<sup>87</sup> The more sober approach is that regardless of its motivations, terrorist activity is fundamentally criminal in character and is most effectively combated as such.<sup>88</sup> That message may not come through as clearly as it might from political figures, but it is certainly the way in which more

<sup>80</sup> *Thomas v Mowbray* [2007] HCATrans 76 (David Bennett QC, 20 February 2007).

<sup>81</sup> *Thomas* (2007) 233 CLR 307, 525, cf 398–9 (Kirby J).

<sup>82</sup> *Ibid* 487–92.

<sup>83</sup> *Ibid* 511–25.

<sup>84</sup> *Ibid* 446.

<sup>85</sup> *Ibid* 350.

<sup>86</sup> ‘[T]he idea that the way to deal with the challenges to the West sharpened by the events of 9/11 is by waging a “war on terror” was from the beginning, and is ever more, preposterous’: Dyzenhaus and Thwaites, above n 60, 9.

<sup>87</sup> For a recent analysis of the foreign and domestic costs in the context of the United States, which has led the charge on both these fronts, see David Cole and Jules Lobel, *Less Safe, Less Free: Why America Is Losing the War on Terror* (2007); Stephen Holmes, *The Matador’s Cape: America’s Reckless Response to Terror* (2007).

<sup>88</sup> For a recent local discussion of competing ways in which the debate on terrorism may be framed, see Martin Krygier, ‘War on Terror’ in Robert Manne (ed), *Dear Mr Rudd: Ideas for a Better Australia* (2008) 127, 131–4.

impartial actors are now prone to frame the debate about terrorist violence. By way of example, contrast the general tone of the discussion in the High Court in *Thomas* with this assessment from the UK's Director of Public Prosecutions:

London is not a battlefield. The innocents who were murdered on 7 July 2005 were not victims of war. And the men who killed them were not, as in their vanity they claimed on their ludicrous videos, 'soldiers'. They were criminals. They were fantasists. We need to be very clear about this. On the streets of London, there is no such thing as a 'war on terror' ... The fight against terrorism on the streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws and the winning of justice for those damaged by their infringement.<sup>89</sup>

It is striking that this corrective has emanated most strongly from the jurisdiction in the English-speaking world with the longest experience of terrorist threats to its national security — the UK.<sup>90</sup> In part this is due not only to lessons learnt from the suspension of traditional criminal justice processes to enable executive responses to past 'emergencies', but also the discernible impact of the *Human Rights Act 1998* (UK) c 2 in empowering the judiciary to preserve the due process rights of individuals who may be vulnerable to the state at such times. After considering this recent development against the history of British responses to political violence over the 20<sup>th</sup> century, David Bonner has concluded that subjecting security measures to the limitations of a 'civilized society founded on the rule of law' (as opposed to viewing them as necessarily exempt due to the exigencies of an emergency or war-time) is of crucial importance in achieving victory over those who might seek to destroy us.<sup>91</sup> The context of this observation is, of course, different from that existing in Australia due to our lack of a formal instrument of rights protection at the national level. But the essential idea holds: absent a state of 'total war', fidelity to clear constitutional constraints, including federal ones, should not simply be dispensed with whenever governments claim new powers in the name of national security. This was, indeed, the traditional understanding of the 'elastic' nature of the power in s 51(vi).<sup>92</sup> By contrast, the result in *Thomas* suggests that the defence power, having expanded to meet the exigencies of the post-September 11 world, is now very unlikely to ever contract.

That terrorism is a crime is self-evident, even if only because the Commonwealth has legislated to that effect. However, the fact that the Australian community is protected from political violence primarily by their police rather than the military was not reflected in remarks by members of the High Court during the

<sup>89</sup> Ken Macdonald, 'Foreword' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (2007) v, vi.

<sup>90</sup> See Clive Walker, 'Clamping Down on Terrorism in the United Kingdom' (2006) 4 *Journal of International Criminal Justice* 1137, 1137–8. The UK's criminal justice approach towards terrorism can be compared with the war approach taken by the US: at 1145–6; Conor Gearty, 'The Superpatriotic Fervour of the Moment' (2008) 28 *Oxford Journal of Legal Studies* 183. See also Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32 *Journal of Law and Society* 507.

<sup>91</sup> David Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (2007) 352.

<sup>92</sup> *Stenhouse v Coleman* (1944) 69 CLR 457, 472 (Dixon J).

*Thomas* hearings, nor in the reasons given for judgment. Yet the police forces of the various states have been very active in many of the arrests of alleged terrorists to date. Callinan J is free to express ‘a preference’ that the army, rather than the New South Wales Police, ‘deal with’ threats to the Lucas Heights reactor, but this is not what Division 104, or indeed the remainder of Part 5.3 of the *Criminal Code*, provides.

In providing a legal scheme of civil orders which may be used to restrain persons and thus frustrate terrorism-related activity, Division 104 presents a ‘pendulum shift’ in criminal justice policy ‘from risk management to risk control.’<sup>93</sup> This is very far from being unproblematic,<sup>94</sup> but the challenges posed by control orders are squarely in this field. They are not a form of military action which is beyond the capacity of police — they are, in fact, a new form of ‘policing issues’.<sup>95</sup> Given the wide range of behaviour which may potentially be caught by the definition of ‘terrorist act’ and thus expose an individual to the operation of Division 104, it fell to the majority in *Thomas* to articulate much more clearly than it managed to do so, why this is within the Commonwealth’s power of defence rather than the power of the states to maintain and execute the criminal law.

## 2 *The External Affairs Power*

Having so clearly found support for Division 104 in the Commonwealth’s power with respect to defence, the majority gave varying degrees of attention to other possible sources of legislative validity. Hayne, Callinan and Heydon JJ all declined to consider any role for the external affairs power in supporting the law, while Gleeson CJ expressed agreement with Gummow and Crennan JJ that the Commonwealth’s power with respect to ‘external affairs’ in s 51(xxix) of the *Constitution* supplemented any ‘limits to the defence power which are crossed by the inclusion of governments of foreign states and expanded notions of “the public”’ in the definition of ‘terrorist act’.<sup>96</sup> Interestingly, the joint judgment did not engage at all with legal argument over whether Subdivision B was supported pursuant to treaty obligations upon the Commonwealth. Instead, their Honours relied upon the capacity of terrorism to affect Australia’s relations with other countries and also, to the extent the law had an extraterritorial operation, the power under s 51(xxix) to legislate for any ‘matter or thing’ geographically external to the country.<sup>97</sup>

By contrast, Kirby J, having found the law wanting under s 51(vi), was obliged to give full consideration to the external affairs power. His Honour accepted that the power could support so much of Division 104 which fell within ‘the geographic externality principle, to the extent that it exists’, but argued that this

<sup>93</sup> Gabe Mythen and Sandra Walklate, ‘Criminology and Terrorism: Which Thesis? Risk Society or Governmentality?’ (2006) 46 *British Journal of Criminology* 379, 389.

<sup>94</sup> See Lucia Zedner, ‘Preventative Justice or Pre-Punishment? The Case of Control Orders’ (2007) 60 *Current Legal Problems* 174. See generally Clive Walker, ‘Terrorism and Criminal Justice — Past, Present and Future’ [2004] *Criminal Law Review* 311, 327.

<sup>95</sup> *Thomas v Mowbray* [2007] HCATrans 78 (Ron Merkel QC, 21 February 2007).

<sup>96</sup> *Thomas* (2007) 233 CLR 307, 324–6 (Gleeson CJ), 364 (Gummow and Crennan JJ).

<sup>97</sup> *Ibid* 364–5. On the last point, their Honours were drawing essentially on *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 632 (Dawson J).

could not be effectively relied upon in isolation and that another aspect of the power was needed to ‘sustain the whole (or most) of the Act’.<sup>98</sup> His Honour rejected that this was provided by the contribution which the Division made to Australia’s relations with other nations since its invalidation by the Court would have no relevant impact upon these.<sup>99</sup> While that can hardly be a suitable test for this aspect of the power,<sup>100</sup> Kirby J makes a valid point in suggesting that the effect of domestic laws upon our standing in the international community is a flimsy hook on which to hang the validity of a law such as this. There is no clear consensus across that community as to the way in which terrorism should be rendered unlawful at the national level or even how it should be defined.<sup>101</sup> It is difficult to see why such an amorphous test as the impact upon our foreign relations can be invoked, without more, to provide a constitutional basis for those aspects of a law which have a domestic operation. In that sense, this aspect of s 51(xxix) suffers from the same shortcomings as any reliance on the power on the basis that the law in question immediately addresses a matter of ‘international concern’ — a test set down by Stephen J in *Koowarta v Bjelke-Petersen*<sup>102</sup> which has since been applied sporadically, albeit never determinatively.<sup>103</sup>

By far the most substantial part of Kirby J’s discussion of the external affairs power deals with whether Division 104 is supported as a law made implementing an international obligation. The opaqueness of the concept of terrorism in international instruments and the range of diverse strategies by which nation-states might respond to the call of the United Nations Security Council Resolution that they take ‘the necessary steps to prevent the commission of terrorist acts’<sup>104</sup> led his Honour to conclude that Division 104 failed the requirement of ‘sufficient specificity’,<sup>105</sup> which had earlier been established by the Court in *Victoria v Commonwealth* (*Industrial Relations Act Case*).<sup>106</sup> Given that many nations have not moved even to create specific terrorism offences in response to Security Council Resolution 1373, any suggestion that this instrument *obliges* Australia to establish a scheme of control orders for persons suspected of having some kind of connection to terrorism can hardly be correct. As discussed earlier, the inspiration for the Howard government’s introduction of control orders was their use in the UK, but they are certainly not a standard

<sup>98</sup> *Thomas* (2007) 233 CLR 307, 410.

<sup>99</sup> *Ibid.*

<sup>100</sup> Under s 104.32 of the *Criminal Code*, the Division is subject to a 10 year sunset clause, supporting an inference that its continued operation seems of dubious vitality to Australia’s international relations.

<sup>101</sup> See *Thomas* (2007) 233 CLR 307, 405–6 (Kirby J).

<sup>102</sup> (1982) 153 CLR 168, 216–21.

<sup>103</sup> A majority of four justices applied the test in *Tasmania v Commonwealth* (1983) 158 CLR 1 (*Tasmanian Dam Case*), but only one of them (Murphy J) was in the majority on the result reached. Most recently, the test of international concern was considered but not applied by the Court in *XYZ v Commonwealth* (2006) 227 CLR 532. In *Thomas* (2007) 233 CLR 307, 410, Kirby J effectively said that his earlier comments on the power rendered consideration of the ‘international concern’ test unnecessary.

<sup>104</sup> *Resolution on Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1373, UN SCOR, 56<sup>th</sup> sess, 4385<sup>th</sup> mtg, [2(b)], UN Doc S/Res/1373 (2001).

<sup>105</sup> *Thomas* (2007) 233 CLR 307, 409.

<sup>106</sup> (1996) 187 CLR 416, 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

measure in global efforts by states to curb politically motivated violence. It is revealing that no other member of the Court, including the three justices who were prepared to find support for Subdivision B in s 51(xxix), embarked on a discussion of this aspect of the power.

### 3 *The References Power*

When the first tranche of anti-terrorism laws was introduced in 2002, the Commonwealth Attorney-General, Daryl Williams, identified a range of legislative powers which might support the legislation<sup>107</sup> before saying that, having

agreed on the importance of comprehensive, national coverage of terrorism offences ... the states would remove any lingering constitutional uncertainty by means of constitutional ‘references’ to the Commonwealth Parliament in accordance with s 51(xxxvii) of the *Commonwealth Constitution*.<sup>108</sup>

These references were made in substantially the same terms by all states. In Victoria (Thomas’s home state), the reference is found in the *Terrorism (Commonwealth Powers) Act 2003* (Vic) (*‘Referring Act’*). Section 4(1)(a) refers to the Commonwealth the text of sch 1, which mirrors Part 5.3 of the *Criminal Code* as then enacted federally. That Part of the *Criminal Code* has certainly not been static in the intervening years, with Division 104 being just one of the more substantial additions made to it. But to what extent are these subsequent changes to Part 5.3 supported by the referral from the states?

Section 4(1)(b) of the *Referring Act* provides ambiguous guidance on this point by stating that the referral also includes

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.

Whether Division 104 is adequately supported hinges then on whether it is within the qualification — is it an ‘express amendment’ of the terrorism legislation referred via sch 1? This term is defined by s 3 of the *Referring Act* to mean

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 ...

Only Kirby and Hayne JJ considered the role of the states’ referral of legislative power under s 51(xxxvii) in supporting the Division, and their Honours

<sup>107</sup> Daryl Williams, ‘The War against Terrorism: National Security and the *Constitution*’ (Summer 2002–03) *Bar News* 42, 43. These powers included:

powers relating directly to criminals (s 51(xxviii), s 119); to Commonwealth places (s 52(i)) and territories (s 122); other express powers (including those dealing with foreign, trading or financial corporations — s 51(xx), electronic, postal and other like services — s 51(v), and external affairs — s 51(xxix)), in addition to the implied power to protect the Commonwealth and its authorities.

<sup>108</sup> *Ibid.* See also *Criminal Code* s 100.3.

reached opposing conclusions. Hayne J observed that the s 3 definition of express amendment appeared to be ‘contradictory’.<sup>109</sup> Indeed, it is difficult to imagine how changes to the legislation would not produce a ‘substantive effect’ of some sort. Because s 3 cannot be interpreted as effectively negating any operation which s 4(1)(b) might have as a separate and additional referral from the state to the Commonwealth beyond the text in the Schedule, his Honour accepted the Commonwealth’s argument that the reference would allow the insertion of any new matter concerning ‘terrorist acts, and actions relating to terrorist acts’ so long as this was ‘done by express amendment to the law that was enacted in the form of the scheduled text’.<sup>110</sup>

The logic of this is clear but the result is oddly formalistic. On this reading, the *Referring Act* first provides a set text of provisions which the referred power is to support as a Commonwealth enactment, before proceeding to grant an unlimited discretion to otherwise legislate on the ‘matter of terrorist acts’ accompanied by a requirement that this occur ‘as part of the text’ specifically referred. Hayne J supported his interpretation by the injunction of s 4(3) of the *Referring Act* to read the two referrals in the subsections of s 4 separately,<sup>111</sup> but it is arguable that the text of those provisions denies this possibility.

The problems of interpreting the *Referring Act* are undoubtedly compounded by the use of the phrase ‘substantive effect’. It is tempting to think that what was really meant was that the ‘express amendment’ was not to have a *substantial* effect beyond that of the text as referred by s 4(1)(a) and the Schedule. It was not open to the Court to read the *Referring Act* in this way, but that suspicion is reinforced by Kirby J’s contrasting of the terrorism referral with that supporting the *Corporations Act 2001* (Cth).<sup>112</sup> In the case of that law, not only was the relevant text simply tabled in the state legislature rather than included as a Schedule in the referring statutes, but the latter was expressed to support the Commonwealth law ‘in the terms, or substantially in the terms, of the tabled text’.<sup>113</sup> Additionally, Kirby J quoted the Victorian Attorney-General’s second reading speech in support of the law effecting the reference of power for Part 5.3, wherein the Minister indicated his understanding that the referral was ‘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.’<sup>114</sup>

The referral of state power in this case should serve as an example of drafting to be avoided on future occasions. Hayne J’s decision that the referral was effective to support Division 104 does not diminish his comments about the lack of clarity blighting the relevant provisions of the *Referring Act*, while Kirby J’s analysis in reaching the opposite conclusion is just as convincing and has the

<sup>109</sup> *Thomas* (2007) 233 CLR 307, 462.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid* 461–2.

<sup>112</sup> *Ibid* 375–9.

<sup>113</sup> See, eg, *Corporations (Commonwealth Powers) Act 2001* (Vic) s 3(1).

<sup>114</sup> *Thomas* (2007) 233 CLR 307, 378, quoting Victoria, *Parliamentary Debates*, Legislative Assembly, 25 March 2003, 525 (Rob Hulls, Attorney-General).

added attraction of giving the conditions attached to the referral a more understandable purpose.

Finally, Kirby, Hayne and Callinan JJ were all of the view that s 100.8 of the *Criminal Code* was invalid. That section requires the approval of both ‘a majority of the group consisting of the states, the Australian Capital Territory and the Northern Territory’, and of at least four of the states, to any amendment of Part 5.3. Kirby J objected to the provision’s apparent attempt to substitute the approval of the executive members of state and territory governments for the power of the state legislatures to refer matters under s 51(xxxvii) of the *Constitution*.<sup>115</sup> Hayne J thought s 100.8 was invalid as a fetter on the future actions of the Commonwealth Parliament,<sup>116</sup> while Callinan J focused on the section’s purported subjugation of a state parliament’s powers to the decision of a majority of other states and also the territories.<sup>117</sup> All three approaches indicate the difficulty of attempting to give a legislative basis to intergovernmental cooperation of this kind.

### B Compliance with Chapter III

As indicated by the order of the questions for the Court in the Special Case,<sup>118</sup> Thomas’s challenge to Division 104 rested primarily upon its alleged breach of the strict separation of judicial power implied from Chapter III of the *Constitution*. In *R v Kirby; Ex parte Boilermakers’ Society of Australia* (‘*Boilermakers*’), a majority of the Court had insisted that the *Constitution* forbade the conferral of both judicial and non-judicial functions upon the one body.<sup>119</sup> The effect of the decision, as confirmed by the Privy Council, was not only to require that federal judicial power be exclusively vested in courts but, correspondingly, that non-judicial power could not be conferred on the same.<sup>120</sup> Professor Leslie Zines has commented that while the first proposition is easy enough to accept, the second is much less so.<sup>121</sup> It is this second aspect of *Boilermakers* which was relevant in *Thomas* — essentially, was Division 104 invalid either as conferring upon Chapter III courts a power which was non-judicial in nature or, at least in so far as the power was judicial, was its exercise to occur in a non-judicial manner?

Despite some earlier judicial suggestions that the *Boilermakers* doctrine should be reviewed or overruled,<sup>122</sup> and the amount of litigation to which it has given

<sup>115</sup> *Thomas* (2007) 233 CLR 307, 381–3.

<sup>116</sup> *Ibid* 462.

<sup>117</sup> *Ibid* 509.

<sup>118</sup> *Ibid* 310–15. For the procedural requirements relating to a Special Case, see *High Court Rules 2004* (Cth) r 27.08.

<sup>119</sup> (1956) 94 CLR 254.

<sup>120</sup> *A-G (Cth) v The Queen; Ex parte Boilermakers’ Society of Australia* (1957) 95 CLR 529. See also *Thomas* (2007) 233 CLR 307, 412 (Kirby J).

<sup>121</sup> Leslie Zines, *The High Court and the Constitution* (5<sup>th</sup> ed, 2008) 215.

<sup>122</sup> See, eg, *R v Joske; Ex parte Australian Building Construction Employees and Builders’ Labourers’ Federation* (1974) 130 CLR 87, 90 (Barwick CJ); *A-G (Cth) v Breckler* (1999) 197 CLR 83, 113 (Kirby J).

rise in recent years, it is basically regarded as settled.<sup>123</sup> So it was surprising to hear the Commonwealth Solicitor-General submit in *Thomas* that the principle ‘does not matter much any more.’<sup>124</sup> Although the majority certainly did not confirm this explicitly, it is difficult not to view the outcome of the case as effectively endorsing the demise of the second (but not, it should be stressed, the first) aspect of *Boilermakers*, given the extent to which this can be said to remain a meaningful constraint upon those functions which may be validly vested in federal courts by the legislature.

### 1 *The Courts, Deprivation of Liberty and an Absence of Guilt*

The question in *Thomas* needs to be understood in the context of recent decisions concerning the constitutional permissibility of either the executive to detain aliens or state courts to order preventative detention of criminals (generally sex offenders) nearing the completion of their custodial sentence for an earlier offence. These controversies have been teased out under the rubric of *Boilermakers* insistence upon the strict purity of Chapter III’s judicial power. However, none of the earlier decisions offered direct guidance on the problem in *Thomas* — whether a federal court (as opposed to a state court or the Commonwealth executive) could deprive a citizen (as opposed to an alien) of their liberty, stopping short of full detention, absent any earlier finding of criminal guilt whatsoever.

Of the recent jurisprudence in the area, the 2004 case of *Fardon v Attorney-General (Qld)* (*‘Fardon’*)<sup>125</sup> had, despite several vital differences from the facts in *Thomas*, the most obvious relation to the matter at hand. In that case, the High Court considered the validity of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), which granted the Supreme Court of Queensland the power to make interim and continuing detention orders against a prisoner currently serving time for a serious sexual offence.<sup>126</sup> A 6:1 majority of the Court found the law to be valid, assisted by the many features which distinguished it from the NSW Act which had been struck down in *Kable v Director of Public Prosecutions (NSW)* (*‘Kable’*),<sup>127</sup> not the least being that the Queensland legislation was of general application rather than targeted to a sole individual.<sup>128</sup>

However, *Fardon* gave no clear answer to the broader question of whether the ability to detain on the basis of what a person *might* do rather than what they *have* done is judicial in nature.<sup>129</sup> Most members of the majority were able to avoid this issue since all that was required for the state Act to survive a challenge

<sup>123</sup> See, eg, *Thomas* (2007) 233 CLR 307, 413 (Kirby J).

<sup>124</sup> *Thomas v Mowbray* [2007] HCATrans 76 (David Bennett QC, 20 February 2007).

<sup>125</sup> (2004) 223 CLR 575.

<sup>126</sup> See, eg, *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 8(2)(b)(ii), 13(5)(a).

<sup>127</sup> (1996) 189 CLR 51.

<sup>128</sup> *Fardon* (2004) 223 CLR 575, 591–2 (Gleeson CJ), 595–7, 601–2 (McHugh J), 619–21 (Gummow J), 647–8 (Hayne J), 652–8 (Callinan and Heydon JJ).

<sup>129</sup> The Court’s avoidance of this issue by focusing instead upon the procedural features of the Queensland legislation has been criticised: Patrick Keyzer, ‘Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth’ (2008) 30 *Sydney Law Review* 100, 105–12; Dan Meagher, ‘The Status of the *Kable* Principle in Australian Constitutional Law’ (2005) 16 *Public Law Review* 182, 185.

under the *Kable* principle was that it did ‘not confer functions which are incompatible with the proper discharge of judicial responsibilities’.<sup>130</sup> Only McHugh J was prepared to say that ‘when determining an application under the Act, the Supreme Court is exercising judicial power.’<sup>131</sup> In contrast, Gummow and Kirby JJ (the latter in dissent) suggested that had the Act been passed by the Commonwealth it would have offended Chapter III.<sup>132</sup> While accepting the existence of exceptional cases, Gummow J insisted that Chapter III ensured that ‘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.’<sup>133</sup> His Honour preferred this particular formulation over attempts to characterise detention as either ‘penal or punitive’ in accordance with the joint judgment of Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.<sup>134</sup>

Unlike in *Fardon*, the question of what power was conferred upon the federal courts by Division 104 of the *Criminal Code* required a precise answer in *Thomas*. On the basis of a variety of considerations, the majority found that in issuing control orders, the courts were exercising judicial power. The Chief Justice, after acknowledging that some powers are not distinctly judicial but may take their character as such by virtue of their exercise by judicial bodies,<sup>135</sup> adopted the observations of McHugh J in *Fardon* and said:

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.<sup>136</sup>

His Honour then proceeded to give examples, such as bail and apprehended violence orders, though conceded that these ‘analogies are not exact’;<sup>137</sup> and indeed, they are not. While there is undoubtedly both a predictive and protective dimension to much judicial work,<sup>138</sup> two fundamental characteristics of control orders render attempts at analogy with any other preventative orders currently existing in Australia unsatisfactory. These are: (i) that they are issued by federal

<sup>130</sup> *Fardon* (2004) 223 CLR 575, 592 (Gleeson CJ), 648 (Hayne J), 655–6 (Callinan and Heydon JJ).

<sup>131</sup> *Ibid* 596, though his Honour did not ultimately base his conclusion on that finding.

<sup>132</sup> *Ibid* 608–14 (Gummow J), 631 (Kirby J).

<sup>133</sup> *Ibid* 612.

<sup>134</sup> (1992) 176 CLR 1, 27, where their Honours famously declared:

putting to one side the exceptional cases to which reference is made below, 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.

<sup>135</sup> *Thomas* (2007) 233 CLR 307, 326–7 (Gleeson CJ). See further *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188–92 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

<sup>136</sup> *Thomas* (2007) 233 CLR 307, 328.

<sup>137</sup> *Ibid* 329.

<sup>138</sup> *Ibid* 333–4.

courts observing the strict separation between judicial and non-judicial power required by *Boilermakers*; and (ii) that they are not limited to individuals who have already been found guilty of a crime<sup>139</sup> or who are involved in court proceedings currently on foot.<sup>140</sup> In highlighting elements of commonality between control orders and other protective orders which courts might issue, Gleeson CJ downplayed the more obvious distinctions to be drawn.

His Honour was hardly alone in doing so. Gummow, Crennan and Callinan JJ also drew connections between control orders and the other orders which Gleeson CJ had discussed.<sup>141</sup> Additionally, Gummow and Crennan JJ, while denying any ‘immediate analogy’,<sup>142</sup> discussed the old power of justices of the peace to bind over individuals to be of good behaviour and keep the peace.<sup>143</sup> Their Honours said it was ‘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’.<sup>144</sup> This is, as they say, significant, but perhaps some accompanying recognition might have been given to the very real distinction between a court having the power to require a person to enter into a recognisance of good behaviour and the ability to make an order prohibiting an individual from leaving their house, using a telephone, undertaking work in a particular industry or otherwise engaging in what for others would be perfectly law-abiding activities.<sup>145</sup>

In addition to portraying control orders as in keeping with long legal traditions, the majority distinguished their effect from ‘involuntary detention ... in custody by the State’.<sup>146</sup> Consequently, the need for ‘criminal guilt of that citizen for past acts’,<sup>147</sup> previously insisted upon by members of the Court, did not apply.<sup>148</sup> Gleeson CJ said that it is incorrect to extend that principle on the same footing to apply to ‘restraints on liberty, whether or not involving detention in custody’.<sup>149</sup> Gummow J (with Crennan J) reaffirmed his earlier statement from *Fardon*, but also distinguished it from applying to ‘any deprivation of liberty’ before saying

<sup>139</sup> This is a feature of all community protection orders developed by Australian states in respect of sex offenders: see, eg, *Community Protection Act 1994* (NSW) s 5.

<sup>140</sup> To the extent that federal courts do make protective orders which impose restrictions on individuals, these are more properly understood as a form of anticipatory injunctive relief sought by another party for the protection of a specific legal right in relation to proceedings over which the court already has jurisdiction. The example which the Attorney-General’s Department produced for the Senate inquiry into the Bill, and which several of the majority justices in *Thomas* discussed (see *Thomas* (2007) 233 CLR 307, 348, 357 (Gummow and Crennan JJ)), was the power of the Family Court under s 114 of the *Family Law Act 1975* (Cth). Bail orders are also quite inapt as an analogy since the individual is clearly subjected to the jurisdiction of the court which has been enlivened on the basis that they are facing prosecution for a past criminal act.

<sup>141</sup> *Thomas* (2007) 233 CLR 307, 347–8 (Gummow and Crennan JJ), 507 (Callinan J).

<sup>142</sup> *Ibid* 357.

<sup>143</sup> *Ibid* 356.

<sup>144</sup> *Ibid* 357.

<sup>145</sup> See *ibid* 433–7, where Kirby J, in dissent, systematically listed the grounds upon which distinctions could relevantly be made between the ‘unique’ scheme for control orders and all attempts at analogy.

<sup>146</sup> *Fardon* (2004) 223 CLR 575, 612 (Gummow J).

<sup>147</sup> *Ibid*.

<sup>148</sup> See, eg, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

<sup>149</sup> *Thomas* (2007) 233 CLR 307, 330.

that '[d]etention in the custody of the State differs significantly in degree and quality from what may be entailed by observance of an interim control order.'<sup>150</sup> This was certainly true in regard to the terms of the interim control order issued over Jack Thomas, but the distinction as stated by their Honours is far too stark to silence constitutional objection to the control order scheme more generally.

Their Honours' position may be contrasted with that of the House of Lords on essentially the same point. In October 2007, a majority of their Lordships rejected an appeal by the UK government against a ruling that a control order imposing 18 hours a day home detention was in breach of the individual's right to liberty under art 5 of the *European Convention on Human Rights*.<sup>151</sup> The decision was split 3:2 with the third member of the majority, Lord Brown, indicating he would regard a 16 hour curfew as falling short of a deprivation of liberty in the relevant sense. Despite this rather equivocal outcome,<sup>152</sup> all opinions in the case make only too clear the benefit (and also, it must be said, the challenge) which the English courts have of approaching control orders with the aid of jurisprudence from the European Court of Human Rights, which has recognised that '[t]he difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance'.<sup>153</sup> So whether the deprivation occurs 'in the custody of the State' is, with respect to Gummow and Crennan JJ, not the exclusive determinant. It is not inconceivable that the conditions available for inclusion in a control order in s 104.5(3) may be used to achieve such a significant restriction upon liberty so as to amount to a deprivation akin to imprisonment in a state facility.<sup>154</sup> Indeed, in some respects, as Lord Bingham pointed out in *Secretary of State for the Home Department v JJ*, control orders can be unfavourably compared with formal incarceration, given the inability of the subject to associate with others and the lack of access to entertainment, which inmates of an open prison might enjoy.<sup>155</sup> Any assertion that bright lines exist between the unconstitutional detention of an individual and reasonable restrictions upon them risks promoting a formalism potentially destructive of liberty in real terms.

## 2 Standards and Criteria Capable of Judicial Application

The split between the majority and both dissenting justices in *Thomas* is ultimately over whether the matters of which federal courts are obliged to be

<sup>150</sup> Ibid 356.

<sup>151</sup> *Secretary of State for the Home Department v JJ* [2008] 1 AC 385.

<sup>152</sup> The UK Parliament's Joint Committee on Human Rights has noted that as a consequence, and despite the government's loss in the litigation, the Home Secretary has interpreted the decision as permitting 16 hour detention and has increased the curfew under a number of non-derogating control orders accordingly: Joint Committee on Human Rights, House of Lords and House of Commons, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008*, House of Lords Paper No 57, House of Commons Paper No 356, Session 2007–08 (2008) 13–14.

<sup>153</sup> *Guzzardi v Italy* (1980) 39 Eur Court HR (ser A) 33, quoted in *Secretary of State for the Home Department v JJ* [2008] 1 AC 385, 411 (Lord Bingham).

<sup>154</sup> *Thomas* (2007) 233 CLR 307, 429–30 (Kirby J). See also Gearty, *Can Human Rights Survive?*, above n 19, 103; Fenwick, above n 12, 1340.

<sup>155</sup> [2008] 1 AC 385, 415.

satisfied in deciding to issue a control order under Division 104 are capable of judicial determination.

The majority rejected the argument that ss 104.4(1)(c) and (d) required a Chapter III judge to apply standards which were impermissibly vague or uncertain. Gleeson CJ drew upon clear evidence as to the acceptability and wide usage of tests requiring determination of what is 'reasonably necessary' or 'reasonably appropriate and adapted',<sup>156</sup> while the joint judgment of Gummow and Crennan JJ described reasonableness as 'the great workhorse of the common law.'<sup>157</sup> Their Honours argued that law regularly utilises 'broadly expressed standards'<sup>158</sup> such as 'oppressive' and 'just and equitable'<sup>159</sup> and pointed to Kitto J's view in *R v Commonwealth Industrial Court; Ex parte Amalgamated Engineering Union, Australian Section*<sup>160</sup> that terms such as these were 'not so indefinite as to be insusceptible of strictly judicial application'.<sup>161</sup> While that must be so, the complaint might be made that the many statutory examples given by both Gleeson CJ and in the joint judgment of Gummow and Crennan JJ do not carry the potential to affect individual liberty anywhere near as keenly as the provisions of Division 104. This does not mean these standards are unworkable, but it should be recognised that their acceptability must be determined by context.

The minority justices objected not to the use of standards of 'reasonable necessity' *per se*, but rather to the statute's coupling of them to the 'purpose of protecting the public from a terrorist act' in s 104.4(1)(d). The majority was of the opinion that courts regularly engage in determinations of what is reasonably required to achieve this particular end and pointed to the kind of orders which they had earlier used in analogising control orders as an exercise of judicial power, namely those for binding over, bail and apprehended violence.<sup>162</sup> However, Kirby J disagreed that this was a court's 'normal function'<sup>163</sup> before going on to distinguish all attempts at analogy.<sup>164</sup> Hayne J agreed with Kirby J that the question was not one governed by ascertainable tests or standards<sup>165</sup> and, like Kirby J, also drew directly upon Kitto J's statement in the *Communist Party Case* 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'.<sup>166</sup> In a passage worth quoting at some length, Hayne J then went on to explain precisely the difficulties likely to be encountered by courts in making decisions of this sort and the damage potentially inflicted upon them:

<sup>156</sup> *Thomas* (2007) 233 CLR 307, 330–3.

<sup>157</sup> *Ibid* 352.

<sup>158</sup> *Ibid* 345.

<sup>159</sup> *Ibid* 344–8.

<sup>160</sup> (1960) 103 CLR 368, 383.

<sup>161</sup> *Thomas* (2007) 233 CLR 307, 345.

<sup>162</sup> *Ibid* 334 (Gleeson CJ), 347–8 (Gummow and Crennan JJ), 507 (Callinan J).

<sup>163</sup> *Ibid* 417.

<sup>164</sup> *Ibid* 417–25.

<sup>165</sup> *Ibid* 468–9.

<sup>166</sup> *Communist Party Case* (1951) 83 CLR 1, 272, quoted in *Thomas* (2007) 233 CLR 307, 417 (Kirby J), 475 (Hayne J).

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.

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.<sup>167</sup>

The practical challenges identified by Hayne J led him to reject the possibility that the broadly expressed powers conferred by the Division on the federal judiciary were capable of ‘strictly judicial application’ in their exercise, and thus did not offend the separation of judicial power. By contrast, Gummow and Crennan JJ viewed this as one of those occasions on which an ambiguous power may take on the character of the arm of government which wields it, and cited Zines to suggest that any vagueness or policy component of the power will be given appropriate content or operation through the application of judicial technique on a case-by-case basis.<sup>168</sup> Kirby J shared Hayne J’s opinion that there were limits to the so-called ‘chameleon doctrine’ and that it could not overcome the courts’ fundamental duty to characterise the function in question.<sup>169</sup> He focused on the need to determine the appropriateness of reposing the function in the judiciary and quoted Zines back to the authors of the joint judgment.<sup>170</sup>

A particular function will only be appropriate if its exercise is consistent 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.<sup>171</sup>

If the issue of appropriateness is approached broadly, then it is perhaps reasonable to conclude, as the majority did, that making orders for the purpose of protecting the community is not inimical to judicial power. Many examples of

<sup>167</sup> *Thomas* (2007) 233 CLR 307, 477–8. In so saying, Hayne J appeared wary of the danger warned against by David Dyzenhaus of allowing the legislature ‘to create a hole that is grey rather than black [that is, distinct from absolute exceptionalism in the manner (initially) of detention at Guantánamo Bay], one in which there is the façade or form of the rule of law rather than any substantive protections’: David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (2006) 3.

<sup>168</sup> *Thomas* (2007) 233 CLR 307, 351.

<sup>169</sup> *Ibid* 413.

<sup>170</sup> *Ibid* 428–9.

<sup>171</sup> Leslie Zines, *The High Court and the Constitution* (4<sup>th</sup> ed, 1997) 198.

protective orders are canvassed in the judgments in *Thomas* demonstrating as much.<sup>172</sup> However, when this purpose is placed in the context of national security then, as discussed in the quote from Hayne J above, the capacity of the courts to examine the issues in the way indicated by Zines is open to serious doubt.

Further, when one connects that purpose to the breadth of the threshold test in s 104.4(1)(c)(i) — ‘that making the order would substantially assist in preventing a terrorist act’ — then arguably it becomes irredeemably inappropriate for a court to perform such a function, no matter what technique may develop around its exercise. Denise Meyerson has deftly argued that, in enabling the making of an order over individuals not personally suspected of any terrorism-related activity, the Division ‘opens the door to using membership of a social group as a predictor of risk in [an] invidious way’.<sup>173</sup> It is extraordinary to empower a court to impose restrictions upon an individual’s liberty under such circumstances.<sup>174</sup> That this presents a major point of distinction between control orders and every other kind of preventative order cited by the majority justices by way of analogy was not adequately acknowledged. The joint judgment weakly insisted that the making of an order against ‘someone other than the prospective perpetrator of a terrorist act ... nevertheless may be of substantial assistance in preventing that act’,<sup>175</sup> but made no attempt to explain why such bald consequentialism was not offensive to judicial power.<sup>176</sup>

### 3 Policy

The question of where the power to issue control orders should ideally be placed was discussed more generally than in relation to identifying its essential character. Indeed, Gleeson CJ was particularly explicit in his use of policy considerations to explain the result he reached:

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. ... 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*, 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. ... To decide that such

<sup>172</sup> See, eg, *Domestic and Family Violence Protection Act 1989* (Qld) s 13; *Domestic Violence Act 1994* (SA) s 4.

<sup>173</sup> Denise Meyerson, ‘Using Judges to Manage Risk: The Case of *Thomas v Mowbray*’ (2008) 36 *Federal Law Review* 209, 223.

<sup>174</sup> By contrast, div 105 of the *Criminal Code* enables judicial officers acting in their personal capacity to issue preventative detention orders over individuals who may not be suspected of terrorism-related activity (but whose detention is deemed necessary for the preservation of evidence of, or relating to, a terrorist act): s 105.4(6).

<sup>175</sup> *Thomas* (2007) 233 CLR 307, 352 (Gummow and Crennan JJ).

<sup>176</sup> Cf *ibid* 479 (Hayne J). It is also worth noting that this consideration did not suggest to the majority that the law was not ‘reasonably appropriate and adapted’ to the purpose of defence when characterising div 104 under s 51(vi). This diminished the attempt by Gummow and Crennan JJ (at 363) to distinguish the legislation from the ‘vice’ of the *Communist Party Dissolution Act 1950* (Cth) as identified by Dixon J — a failure to focus on conduct with objective standards or tests of liability: *Communist Party Case* (1951) 83 CLR 1, 192.

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.<sup>177</sup>

Gleeson CJ delivered these comments having already noted that no party argued that it was beyond the capacity of any Australian legislature to create a scheme for control orders. But his assumption, that if the use by federal courts of the powers in Division 104 was impermissible then such powers might instead be conferred upon the executive, was rejected by the dissenting justices, both of whom dismissed the suggestion that a law infringing Chapter III had any significance for the possible expansion of executive power.<sup>178</sup> Hayne J pointed out that a law empowering the executive in this way would, at least for him, be difficult to justify under s 51(vi) in a situation short of total war.<sup>179</sup>

The question of whether, as a matter of pure policy, the power to issue control orders is best conferred upon the judiciary is one which has attracted much attention. Gleeson CJ was certainly justified, in dismissing the second basis of Thomas's challenge (that even if the power in question was judicial in character, then Division 104 required its exercise in a non-judicial manner), to draw attention to the various safeguards of judicial process which were expressly or impliedly brought to bear on the making of such orders and which might not pertain to an executive-dominated system.<sup>180</sup> Many detractors of the UK's control order regime would agree with these remarks and view them favourably against the ability of the Home Secretary to personally issue non-derogating orders in that jurisdiction.<sup>181</sup> Even so, Conor Gearty, while lamenting the extent of administrative discretion under anti-terrorism law generally in the UK and the thinness of judicial oversight, has nevertheless concluded that even the limited 'use of judges and lawyers from the historically independent legal professions' may gradually curb the law's more worrying excesses.<sup>182</sup> This hope has certainly been borne out by the role played by the courts in reviewing the non-derogating control orders issued by the UK Home Secretary.<sup>183</sup>

But in what mode should the courts ameliorate the potential vices of the security measures of the post-September 11 world? As a decision-maker, for the reasons given by Gleeson CJ? Or, as apparently favoured by Hayne J, through the exercise of a more traditional role of review?<sup>184</sup> David Dyzenhaus and

<sup>177</sup> *Thomas* (2007) 233 CLR 307, 329 (citations omitted). See also at 507–9 (Callinan J).

<sup>178</sup> *Ibid* 429 (Kirby J), 476 (Hayne J).

<sup>179</sup> *Ibid* 476.

<sup>180</sup> *Ibid* 335.

<sup>181</sup> Courts are only called upon to issue control orders when the conditions sought would require a derogation from the UK's obligations under the *European Convention of Human Rights: Prevention of Terrorism Act 2005* (UK) c 2, s 4. To date, no such order has been sought by the Home Secretary, who has preferred instead to adjust the conditions attached to non-derogating orders to accord with judicial decisions as to what will not offend against the guarantees of the Convention: see Carlile, above n 37, 19.

<sup>182</sup> Gearty, *Can Human Rights Survive?*, above n 19, 126.

<sup>183</sup> See Bonner, above n 91, 309–12; *Secretary of State for the Home Department v JJ* [2008] 1 AC 385; *Secretary of State for the Home Department v MB* [2008] 1 AC 440. For a far less favourable appraisal, see K D Ewing and Joo-Cheong Tham, 'The Continuing Futility of the *Human Rights Act*' [2008] *Public Law* 668.

<sup>184</sup> *Thomas* (2007) 233 CLR 307, 475, 479.

Raynor Thwaites, in their discussion of *Thomas*, suggest that the majority's willingness to allow federal courts to exercise the powers conferred by Division 104 manifests

an attitude to the administrative state which is not only appropriate for a modern constitutional democracy but necessary if judges are going to play a meaningful role in ensuring that the so-called 'war on terror' is conducted in accordance with the rule of law.<sup>185</sup>

If we accept that there is a clear need for the generation of 'appropriate principles, values, and goals with which to frame the continuing development of preventive measures'<sup>186</sup> such as control orders, then it would seem difficult to deny that courts are the optimal forum in which this is to take place. Any squeamishness over the extent to which this causes courts to be dependent upon 'intelligence' rather than more traditional forms of evidence may, arguably, be misplaced.<sup>187</sup>

There is much that is appealing in this argument — it certainly acknowledges the rapid developments in preventative justice which look likely to continue irrespective of the courts' compliance or resistance. However, two responses might be made to it.<sup>188</sup> First, there is no compelling evidence that an effective role of review is not the best means of promoting security while safeguarding liberty nor that building courts into the process by which things such as control orders are issued will not seriously tarnish them. The prevailing assumption — that the greater the involvement of the judiciary at first instance, then the greater the compliance with the rule of law of the particular measure or scheme — appears worryingly one-sided. Advocates seem far too dismissive of the possibility that the courts might come off second best — and yet that risk, once realised, is extremely difficult to reverse. In contrast, there is good support, as Bonner has shown, for the belief that the judicial arm can positively affect otherwise suspect processes exclusively through an oversight role.<sup>189</sup> Lucia Zedner may be right in pointing to the limitations of human rights as a basis for such interventions,<sup>190</sup> but nothing in her call for a better justice model, which guides the use of legal instruments concerned with risk and futurity, suggests that courts cannot adequately influence these via review.

Secondly, and in the more immediate context, if the High Court is of the opinion that, given what is at stake in terms of individual liberty, it is preferable for the judicial arm to accept a primary role in considering what steps are necessary for the 'protection of the public', then it would be far better for it to decide as much directly. The attempt by the majority to reach this result while claiming

<sup>185</sup> Dyzenhaus and Thwaites, above n 60, 24.

<sup>186</sup> Zedner, 'Preventative Justice or Pre-Punishment?', above n 94, 203.

<sup>187</sup> Clive Walker, 'Intelligence and Anti-Terrorism Legislation in the United Kingdom' (2005) 44 *Crime, Law and Social Change* 387, 409–13.

<sup>188</sup> Though others are certainly possible: see Paul Fairall and Wendy Lacey, 'Preventative Detention and Control Orders under Federal Law: The Case for a Bill of Rights' (2007) 31 *Melbourne University Law Review* 1072, 1085–6.

<sup>189</sup> See generally Bonner, above n 91, 265–342.

<sup>190</sup> Zedner, 'Preventative Justice or Pre-Punishment?', above n 94, 183–7. See also Kent Roach, *September 11: Consequences for Canada* (2003) 75–9 (on the limits of 'Charter-proofing').

continued adherence to the dictates of the *Boilermakers* doctrine is distinctly uncomfortable and ultimately unconvincing. The ability to impose a range of conditions severely restricting the freedom of an individual on the basis that this is 'reasonably necessary' to protect the public from terrorist violence, not limited to a requirement to establish that individual's direct link to such activities, does not easily comport with any orthodox understanding of pure judicial power. There may indeed be sound policy reasons why courts should possess such a power but these are diminished by the attempt to mask the novelty of what is enabled by Division 104.

## V CONCLUSION

It is evident that the decision in *Thomas* is a profoundly important one which will be carefully studied and debated for many years to come. Ultimately, this is for two reasons, both of which are strongly connected to the Commonwealth's preventative response to the modern terrorist threat. The first of these is the significance of the case for the interpretation of the Commonwealth's defence power in s 51(vi) of the *Constitution*. Terrorism clearly seeks to destroy security and it seems strange to deny the federal government the legislative capacity to meet this threat head-on. However, the elusive and shifting nature of political violence means that there must be limits on the scope of the power in this regard. Terrorism regularly claims space in the civilian, rather than the purely military, sphere but the defence capabilities of the state should not be given complete licence to follow it there. Apart from the undesirable consequences which history shows this may produce for citizens and the health of the liberal democracy in which they live, to allow such an extension in its crudest sense would ignore the very effective role which policing can play in working with local communities to build positive relationships and infiltrate networks of individuals who may pose a threat. That Part 5.3 of the *Criminal Code* operates to bring responses to terrorist activities within a criminal justice model undermines the suggestion that laws on this topic are sustained simply by the power with respect to defence. This is made apparent when one examines the potential operation of the Part's provisions in light of the definition of 'terrorist act' in s 100.1, which may include all manner of domestic disturbances traditionally within the responsibility of state police forces. That a majority of the High Court declined to discuss the validity of the essential definition under s 51(vi) means that this question remains for another day — though it is in fact unlikely to ever require determination since s 51(xxxvii) must effectively support that and other provisions which were included in the textual matter referred by the state parliaments.

The second aspect of *Thomas*, which is more likely to resonate in practical ways, is the Court's decision regarding the scope of judicial power. The majority's embrace of a role for the judiciary in the making of control orders under the conditions set down by Division 104 must be appreciated as the culmination of a sequence of cases which have steadily reduced the importance of the second aspect of the strict separation of judicial power enunciated in *Boilermakers*. It is difficult to know what point of principle is served by further lip service to that doctrine. *Thomas* indicates its insignificance on a very real question of individ-

ual liberty, leaving us with just those many other cases where it proves an unpredictable obstacle to creative institutional design in the federal jurisdiction. Until the Court cleanly disposes of *Boilermakers* it cannot properly fashion a new theory of preventative justice in which the influence of the judicial arm is paramount, which would seem crucial if, for the reasons offered by Gleeson CJ, it is committed to taking on such an active role.

Whether the best way for judges to ‘engage in the experiment of trying to devise preventive regimes that live up to the aspirations of the rule of law’<sup>191</sup> is through direct decision-making or through insulating themselves from such a role in order to preserve the integrity of their review function is, of course, the critical question — and one which needs much more consideration and debate beyond that which occurred in this case.

<sup>191</sup> Dyzenhaus and Thwaites, above n 60, 24.