

BOOK REVIEW

***Calling Out the Troops — The Australian Military and Civil Unrest: The Legal and Constitutional Issues* by Michael Head (Sydney: Federation Press, 2009) pages i–viii, 1–248. Price \$49.95 (softcover). ISBN 978-1-86287-709-2.**

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[As of 2006, part IIIAAA of the Defence Act 1903 (Cth) permits Australian military aircraft and warships to fire missiles into civilian aircraft or shipping where they present a threat to 'Commonwealth interests'. There is no need for a declaration of war nor any actual armed conflict to be taking place. This is not to say that there are no checks and balances. There are, and they include the concurrence in most circumstances of the Prime Minister, Attorney-General, Defence Minister and Governor-General. However, such powers were too much for the German Constitutional Court, which struck down comparable German legislation. This was essentially on the grounds that a government Minister could not decide to take potentially hundreds of innocent lives to prevent another incident like that of 11 September 2001 in the United States. The challenge for the reader of Calling Out the Troops is to make their own decision about whether such powers are justified and, if they are, whether they should be prescribed in legislation. This writer does not agree with the conclusion of the author of Calling Out the Troops that such powers are part of a bourgeois conspiracy but does agree that such powers should be subject to much debate and scrutiny in order for Australians to make informed decisions as to whether the Parliament has got the balance right. This is the great strength of Calling Out the Troops, in that it does subject the new powers to considerable critical analysis.]

CONTENTS

I	Introduction	1023
II	Description	1023
III	Maritime Law Enforcement	1025
IV	Overseas Operations	1025
V	Military Justice	1026
VI	The ADF and the Police	1027
VII	Statutory versus Executive Power	1027
VIII	A Conspiracy?	1028
IX	Critical Infrastructure and Executive Discretion	1029
X	Conclusion	1031

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I INTRODUCTION

The thought of a civilian passenger jet full of ordinary people flying over Australia being hijacked and then shot down is quite horrific. The shock and horror would most likely amplify if the missile that struck the aircraft launched from an Australian fighter jet or warship. So too, armed troops using lethal force to defend infrastructure such as a power station would be an alien experience for Australia. Amendments to part IIIAAA of the *Defence Act 1903* (Cth) in 2006 provided these powers to the Australian Defence Force ('ADF').¹ There has been some academic debate about this, but not much.² Furthermore, there is little to suggest any general public awareness that the Commonwealth Parliament has legislated for the significant destructive power now available to the ADF to be directed at non-military threats.³ This is the great value of Michael Head's book, *Calling Out the Troops — The Australian Military and Civil Unrest: The Legal and Constitutional Issues* ('*Calling Out the Troops*'). Restraining the use of force by the state within its own borders has been a legal issue since the *Magna Carta*,⁴ and any development of the legal power for the state to use force should be the subject of debate and scrutiny. It is therefore timely and important that *Calling Out the Troops* subjects the new statutory powers to critical scrutiny and opens the debate to a potentially wider audience than a journal article might reach. A particularly welcome aspect of *Calling Out the Troops* is that public debate on military legal issues in Australia is quite limited and many, though not all, of the contributors to this debate have a background in the ADF.⁵ This institutional perspective does not appear at all in Head's work and this can only strengthen and deepen debate in this area. While the conclusions that Head draws do not entirely convince this author, the observations that he makes and the questions that he asks in response to them are compelling.

This book review will first give a general description of *Calling Out the Troops* and deal with some of the book's perceived limitations before addressing its conclusion and its main strengths.

II DESCRIPTION

The central premise of *Calling Out the Troops* is that there should be serious cause for concern over the developments in part IIIAAA of the *Defence Act 1903* (Cth) and the military's role in internal security generally. The conclusion in the book is that:

¹ See generally *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2006* (Cth), amending *Defence Act 1903* (Cth) pt IIIAAA.

² See, eg, Simon Bronitt and Dale Stephens, "'Flying under the Radar' — The Use of Lethal Force against Hijacked Aircraft: Recent Australian Developments' (2007) 7 *Oxford University Commonwealth Law Journal* 265.

³ See, eg, *Defence Act 1903* (Cth) s 511.

⁴ Michael Head, *Calling Out the Troops* (2009) 68–9.

⁵ See, eg, 'Symposium: Australian Military Law' (2005) 28 *University of New South Wales Law Journal* 327.

the legislation has been advanced amid a broader, creeping militarisation of official policy, designed to accustom ordinary people to the sight of troops on the streets. The global dimensions of this trend further suggests [sic] that preparations are being made to deal with domestic unrest as social and international tensions rise. It is hoped this book will contribute to the development of an informed and vigilant opposition to these tendencies.⁶

More on the conclusion later⁷ — at this point, it is sufficient to note that this author endorses the final sentence from the extract. *Calling Out the Troops* draws upon and substantially develops some earlier journal articles written by Head.⁸ It also makes considerable use of the 2005 thematic edition on military law in the *University of New South Wales Law Journal*.⁹ *Calling Out the Troops* carefully and thoroughly sets the context in Part One with chapters on the concept of ‘domestic violence’ and calling out the troops;¹⁰ the historical background in England and Australia, including the Bowral call-out of 1978;¹¹ the constitutional subordination of the military to the civil government;¹² and the contemporary expansion of Australia’s military deployments.¹³ There is a wealth of historical research and legal detail which should be of great benefit to researchers in this field. Part Two then moves into the details of part IIIAAA of the *Defence Act 1903* (Cth) and related regulations;¹⁴ the executive power and the role of the Governor-General;¹⁵ distinctions and overlap between the military and the police;¹⁶ constitutional¹⁷ and legal¹⁸ uncertainties; and the issue of military justice.¹⁹ In Part Three of *Calling Out the Troops*, Head concludes with an emphasis on global trends and the implications for other industrialised countries.²⁰ Head’s writing is a pleasure to read. He is lucid and it did not feel like an effort to read the book at all. While the research is of a very high standard, in referring to an alarming suggestion of military participation with civilian police in breaking up a crowd of community radio supporters, there is only a reference to a book on policing by Jude McCulloch.²¹ Given the serious

⁶ Head, *Calling Out the Troops*, above n 4, 221.

⁷ See below Part VIII.

⁸ Michael Head, ‘Australia’s Expanded Military Call-Out Powers: Causes for Concern’ (2006) 3 *University of New England Law Journal* 125; Michael Head, ‘Calling Out the Troops — Disturbing Trends and Unanswered Questions’ (2005) 28 *University of New South Wales Law Journal* 479.

⁹ See ‘Symposium: Australian Military Law’, above n 5.

¹⁰ Head, *Calling Out the Troops*, above n 4, ch 1.

¹¹ *Ibid* ch 2.

¹² *Ibid* ch 3.

¹³ *Ibid* ch 4.

¹⁴ *Ibid* ch 5.

¹⁵ *Ibid* ch 6.

¹⁶ *Ibid* ch 7.

¹⁷ *Ibid* ch 8.

¹⁸ *Ibid* ch 9.

¹⁹ *Ibid* ch 10.

²⁰ *Ibid* ch 11.

²¹ Jude McCulloch, *Blue Army: Paramilitary Policing in Australia* (2001) 185, cited in *ibid* 142.

nature of this incident, it would have been very useful to have had more detail, particularly as the incident is not well known.

III MARITIME LAW ENFORCEMENT

An apparent gap in *Calling Out the Troops* is the issue of law enforcement by the ADF in a maritime context. This has been occurring since at least 1968 on a wide scale, primarily for fisheries and immigration.²² There is reference to *Li Chia Hsing v Rankin*²³ and some discussion of the *Tampa* incident,²⁴ but that is all. The book could have conceptually distinguished these operations as external to Australia and concerned with enforcement against foreigners. Alternatively, it could have addressed the issues of the ADF's involvement in law enforcement at sea as part of the overall argument. As it is, to raise concern about the increased militarisation of policing without addressing or distinguishing the ADF's largest policing activity does leave some uncertainty as to how this activity should sit within the overall concern of the book.

IV OVERSEAS OPERATIONS

Calling Out the Troops makes some observations about ADF operations in East Timor, the Solomon Islands, Iraq and Afghanistan.²⁵ Some observations concerning the lack of scrutiny given to incidents involving civilian deaths are well made.²⁶ When the ADF kills civilians in the service of the Australian nation, it is reasonable to expect Australians to seek some accountability for these actions. (The appropriate degree of scrutiny, when balanced against the need for operational security, is another question however.) Where the book could have done more is by making the legal distinction between these operations and operations by the ADF within Australia clearer. There are different legal considerations that apply to these two categories of operations, particularly where the law of armed conflict applies. The law of armed conflict contemplates the targeting of enemy combatants and military objectives, quite beyond what the law of self-defence would ordinarily permit.²⁷ In doing so, it permits a proportional loss of civilian life in targeting military objectives.²⁸ As harsh as

²² See Cameron Moore, *ADF on the Beat: A Legal Analysis of Offshore Enforcement by the Australian Defence Force* (2004) 6–12.

²³ (1978) 141 CLR 182, cited in Head, *Calling Out the Troops*, above n 4, 38–9.

²⁴ Head, *Calling Out the Troops*, above n 4, 73–4, 78–82, 126–8, 154. See generally *Rud-dock v Vadarlis* (2001) 110 FCR 491; Transcript of Proceedings, *Vadarlis v Minister for Immigration and Multicultural Affairs* (High Court of Australia, Gaudron, Gummow and Hayne JJ, 27 November 2001).

²⁵ Head, *Calling Out the Troops*, above n 4, 89–93.

²⁶ See *ibid.*

²⁷ See *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3, arts 43, 49, 52 (entered into force 7 December 1978) (*'Additional Protocol I'*). The provisions of *Additional Protocol I* were implemented by Australian legislation on 21 December 1991: see *Geneva Conventions Act 1957* (Cth) sch 5, inserted by *Geneva Conventions Amendment Act 1991* (Cth) s 9, sch 1.

²⁸ See *Additional Protocol I* art 57.

this may seem, such incidental killing is lawful and arises under a legal regime that does not ordinarily apply to ADF operations within Australia. The book does not really draw this legal distinction out. So too, its criticism of the ADF not affording prisoner of war status to militia members captured in East Timor in 1999–2000 does not draw out issues relating to the law of armed conflict.²⁹ Australia did not apply the law of armed conflict and so these ‘prisoners’ were not prisoners of war but effectively remandees for the future East Timorese justice system. If Australia had applied the law of armed conflict, it could have targeted these militia members and killed them without regard to the law of self-defence.³⁰

V MILITARY JUSTICE

Calling Out the Troops devotes a chapter to the limitations of the military justice system, which have been the subject of intense parliamentary scrutiny and a number of challenges in the High Court of Australia.³¹ It points out that since the High Court’s decisions in *Re Tracey; Ex parte Ryan*³² and *Re Nolan; Ex parte Young*³³ it is no longer possible for a person to plead *autrefois acquit* or *autrefois convict* in a civilian court after that person has been dealt with by a military court.³⁴ In other words, the civilian justice system prevails over the military justice system and military law imposes additional, rather than different, legal obligations on members of the ADF. The book makes much of the possibility that a member of the ADF may only be dealt with under the military justice system and not face the scrutiny of the civilian courts. Given the poor performance of the military system, this may mean that members of the ADF will not properly be held to account for their actions. The new Australian Military Court may have exacerbated this, as it was set up as a court of record with a number of features more like that of a civilian court than a court martial.³⁵ Civilian prosecutors may therefore more readily defer to decisions of this Court.³⁶ This point in the book seems somewhat tangential. It is appropriate that civilian prosecutors assess whether it is in the interests of justice to prosecute a person already dealt with by the military justice system. It will not always be the case that a further civilian prosecution is warranted.

The book also makes the point that a military discipline system is essential for maintaining the subordination of the military to civil government.³⁷ As such, there are likely to be some cases where military prosecution alone will be appropriate, although the fact that constitutionally it cannot be exclusive means

²⁹ Head, *Calling Out the Troops*, above n 4, 92.

³⁰ *Additional Protocol I* arts 43, 49, 52.

³¹ See Head, *Calling Out the Troops*, above n 4, ch 10; see especially at 189–96.

³² (1989) 166 CLR 578.

³³ (1991) 172 CLR 460, 493–4, 499 (Gaudron J).

³⁴ Head, *Calling Out the Troops*, above n 4, 193–4.

³⁵ *Ibid* 196–7. See also *Defence Force Discipline Act 1982* (Cth) s 114.

³⁶ See Head, *Calling Out the Troops*, above n 4, 194–7.

³⁷ *Ibid* 37–8.

that there is scope for civilian scrutiny. In any event, the decision of the High Court to strike down the legislation establishing the Australian Military Court in *Lane v Morrison* on 26 August 2009,³⁸ after the publication of *Calling Out the Troops*, may mean that some of the concerns in the book have been overtaken by events. This is particularly so given the introduction of the Military Court of Australia Bill 2010 (Cth) which seeks to place jurisdiction for service offences, other than summary matters, under a new Chapter III court with civilian judges.³⁹

VI THE ADF AND THE POLICE

Calling Out the Troops raises concerns about an increased role for the ADF in the realm of policing. It also raises concerns about the increase in paramilitary elements of the various Australian police services, such as tactical response groups.⁴⁰ The book draws attention to the increasing operational activity of the ADF in the years since the East Timor intervention of 1999 and the terrorist attacks of 11 September 2001.⁴¹ It is right to question what this means and raise concerns that military options are becoming more attractive to governments, and to remind us that history has many examples of the dangers this poses.⁴² However, the book could have gone further in offering an alternative. Not only does *Calling Out the Troops* raise concerns about the militarisation of policing functions, it raises concerns that part IIIAAA of the *Defence Act 1903* (Cth) goes too far,⁴³ while also cautioning against any reliance on the uncertainties of prerogative and other executive powers as an alternative source of legal authority.⁴⁴ If all of these points are a cause for concern then what is the alternative? The book does not state this but, by not being concerned with the traditional model of policing by lightly armed constables and an ADF solely focused on external war-fighting, it suggests that this is perhaps the preferable status quo. It may well be, but what of threats where the attackers have a military level of capability or situations where the police have no effective ability to respond, such as offshore or in the air?

VII STATUTORY VERSUS EXECUTIVE POWER

The political imperative in Australia, Canada, the United States and the United Kingdom, at least, has been for governments not to appear impotent against terrorist attacks.⁴⁵ Governments have sought to appear strong in the face of the threat. This has been borne out in Australia with involvement of the ADF in

³⁸ (2009) 239 CLR 230.

³⁹ Military Court of Australia Bill 2010 (Cth) pts 2, 4–6.

⁴⁰ Head, *Calling Out the Troops*, above n 4, ch 7.

⁴¹ *Ibid* ch 4.

⁴² *Ibid* ch 2.

⁴³ *Ibid* ch 5.

⁴⁴ *Ibid* 134–5.

⁴⁵ *Ibid* 9–10, 206–10.

internal security operations since 2001, mentioned in the book as being part of the Commonwealth Heads of Government Meeting ('CHOGM') in 2002, the US Presidential visit in 2003, the Commonwealth Games in 2006 and the Asia-Pacific Economic Cooperation ('APEC') Leaders' Meeting in 2007.⁴⁶ Interestingly, all of these operations saw the provision of combat air patrols by Royal Australian Air Force fighters.⁴⁷ The first two operations in 2002 and 2003 were under the executive power. The second two, in 2006 and 2007, followed the 2006 amendments to part IIIAAA of the *Defence Act 1903* (Cth). The conclusion is that the government was willing to commit the ADF to such operations whether there was legislation authorising them or not.⁴⁸ The ADF might have refused to conduct such operations without clear legal authority to conduct them. That the ADF would have refused to act in spite of a centuries-old culture of obedience to the civil government is almost inconceivable, and there is much in *Calling Out the Troops* to underline the significance of military subordination to the civil government.⁴⁹ The question then becomes: is it preferable for Parliament to authorise in statute the extent of the ADF's authority to act in internal security operations or for such operations to rely on the executive power alone? *Calling Out the Troops* addresses this question only indirectly. If it is accepted that it is better to have such powers clarified in legislation, the debate should be over the extent of such powers. If it is not accepted that such legislation should exist at all, then the debate might focus upon how the ADF and police should respond to terrorist threats when the government and public demands a response.

VIII A CONSPIRACY?

Calling Out the Troops makes a persuasive argument that when militaries have put down internal disturbances in Australia and the UK it has often been to suppress one part of the population in favour of the interests of the establishment. There is a parallel between the slaughter of protesters in England or Ireland and of Aborigines or miners in Australia.⁵⁰ Military action has been excessive and brutal and has alienated parts of society rather than having been in the interests of society as a whole. The examples given of shootings by soldiers in Northern Ireland and at Kent State University in the US also suggest that, historically, accountability for these actions is patchy at best.⁵¹ This is the warning contained in *Calling Out the Troops* and it is a salutary one. It is diminished somewhat by the overall conclusion of the book: that there has been a process 'designed to accustom ordinary people to the sight of troops on the streets.'⁵² This has been happening in industrialised democracies around the

⁴⁶ Ibid 77–8.

⁴⁷ Ibid 82–5.

⁴⁸ See ibid 78.

⁴⁹ See, eg, ibid 37–8.

⁵⁰ See, eg, ibid ch 2, 209.

⁵¹ Ibid 197–9.

⁵² Ibid 221 (emphasis added).

world from the US and Canada to Japan, Italy, Germany and the UK.⁵³ The judiciary has been acquiescing in this expansion of executive power.⁵⁴

Calling Out the Troops convincingly argues that there has been increasing militarisation and a certain degree of judicial deference to the executive. It does not, however, illustrate where the *design* for this comes from. The suggestion is of some sort of conspiracy between militaries, governments and judiciaries around the world. There is no evidence given of this. The conclusion also states that the observations of Karl Marx and Friedrich Engels on class antagonisms⁵⁵ and international tensions⁵⁶ are ‘increasingly apt’.⁵⁷ It is not really clear why these observations would be more apt now, particularly given the world’s history of wars, revolutions and oppression since Marx and Engels wrote those words. The book could have persuasively concluded simply with the idea that increased militarisation and too much judicial deference to the executive have been occurring and that there are dangers in this. Rather than allowing this to occur inadvertently, there would be much to gain from debating the lessons of history in order to guard against these dangers.

IX CRITICAL INFRASTRUCTURE AND EXECUTIVE DISCRETION

One of the main strengths of *Calling Out the Troops* lies in its analysis of the legislation. Two points in particular stand out. The first is the discussion of the use of lethal force to defend critical infrastructure. The second concerns the high degree of discretion given to the executive in making decisions under part IIIAAA of the *Defence Act 1903* (Cth).

The use of lethal force to defend critical infrastructure where there is no direct threat to life is perhaps the most significant departure from established legal principle.⁵⁸ Even the destruction of aircraft in the air and vessels at sea could possibly find some authority in the prerogative to defend the realm, without legislative authority.⁵⁹ However, there is no other legal authority that would support the use of lethal force to defend property, whether critical infrastructure or not, outside of the law of armed conflict.⁶⁰ The use of lethal force in Australia in peace, prior to the 2006 amendments to the *Defence Act 1903* (Cth), invariably required a direct threat to life.⁶¹ While the amended use of lethal force to defend designated critical infrastructure requires an indirect threat to life, it is still a significant departure from the earlier principle. Is it justified? There may well be situations where the use of lethal force to defend critical infrastructure could save many more lives than are taken. However, such a calculation is immensely

⁵³ Ibid ch 11.

⁵⁴ Ibid 14–15, 156–9.

⁵⁵ Ibid 220.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid 105–6, 171.

⁵⁹ Ibid 181–2. See *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75.

⁶⁰ See above nn 27–8 and accompanying text.

⁶¹ For a discussion of the relevant law prior to the 2006 amendments, see Moore, above n 22, 104–5.

difficult to make in advance of the incident. This is the difficulty that the German Federal Constitutional Court had when it decided that a German law authorising the destruction of aircraft in the air⁶² was a violation of the right not to be arbitrarily deprived of one's life.⁶³ The use of lethal force to defend critical infrastructure is an issue that requires much more public debate than has occurred until now. It might only occur when authorising Ministers make a designation of critical infrastructure. As *Calling Out the Troops* makes clear, the opportunities for Parliament or the courts to review such a decision are limited. Moreover, the discretion available to the authorising Ministers to make such a decision is quite broad, as the criteria for designating critical infrastructure are reasonably open.⁶⁴ This flexibility could be invaluable in enabling government to respond lawfully to an unanticipated threat. Conversely, however, the greater the discretion, the greater potential there is for abuse or arbitrariness.

This leads to one of the other particular strengths of the analysis in *Calling Out the Troops*. The book sets out in some detail the width of discretion available to Ministers and ADF officers in part IIIAAA call-out situations. Head also points out the limited or uncertain quality of the mechanisms for parliamentary or judicial review of their decisions⁶⁵ as well as the ill-defined nature of terms such as 'Commonwealth interests' or 'domestic violence'.⁶⁶ Times of great peril to society are the times when the executive is often given the greatest scope of action and *Calling Out the Troops* quotes the Privy Council in *The Zamora* in 1916, which stated that:

Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public.⁶⁷

As stated above, strong executive action may be the only thing that can save many lives in a situation of high threat. Equally, *Calling Out the Troops* reminds the reader that strong executive powers can be the source of greatest threat to democratic government itself. As Dixon J stated, in 1951, in *Australian Communist Party v Commonwealth*:

History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need

⁶² *Luftsicherheitsgesetz* [Air Transport Security Law] (Germany) 11 January 2005, BGBl I, 78, 2005, § 14(3).

⁶³ Bundesverfassungsgericht [German Constitutional Court], 1 BvR 357/05, 15 February 2006 reported in (2006) 115 BVerfGE 118, cited in Oliver Lepsius, 'Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New *Air-Transport Security Act*' (2006) 7 *German Law Journal* 761, 763.

⁶⁴ *Defence Act 1903* (Cth) s 51CB. See Head, *Calling Out the Troops*, above n 4, 106, 177–84.

⁶⁵ Head, *Calling Out the Troops*, above n 4, 177–84.

⁶⁶ *Ibid* 105–8. See also at 106 for discussion of the meaning of 'threat to "Commonwealth interests"'.⁶⁷

⁶⁷ [1916] 2 AC 77, 107 (Lord Parker for the Lords Parker, Sumner, Parmoor, Wrenbury and Sir Arthur Channell), quoted in *ibid* 182.

protection from dangers likely to arise from within the institutions to be protected.⁶⁸

Calling Out the Troops importantly points out how much discretion has been granted to the executive under part IIIAAA of the *Defence Act 1903* (Cth). It is only by being aware of this that Australians can draw conclusions about whether it is appropriate and whether accountability mechanisms need to be strengthened or, indeed, whether these executive powers need to be curtailed.

X CONCLUSION

Calling Out the Troops raises many more issues and questions than this book review can address. It could have given more attention to issues of maritime law enforcement and the law of armed conflict in order to give a fuller picture of the various roles of the ADF in policing civilians. It made perhaps too much of the possibility that a civilian prosecutor may not pursue ADF personnel, although at the time of writing the book, before *Lane v Morrison*, this was a most uncertain area of the law. *Calling Out the Troops* does not really address the question it fundamentally raises of what is the alternative to a military role in internal security. Nonetheless, while this author does not necessarily accept that the bourgeoisie is making preparations to deal with social unrest by design, *Calling Out the Troops* is a valuable critical reflection on the rise of executive power and the increasing role of the ADF in internal security. Its real strengths lie in its thorough analysis of the history of the use of the military to suppress internal disturbances and its analysis of the issues raised by part IIIAAA of the *Defence Act 1903* (Cth). It makes very important points on the dangers of excessive executive power to democracy and the dangers of excessive responses to internal disturbances potentially fuelling its causes. This makes *Calling Out the Troops* a very significant — perhaps critical — contribution to debate on the role of the military in internal security.

⁶⁸ (1951) 83 CLR 1, 187, quoted in Head, *Calling Out the Troops*, above n 4, 150.