

# PREVENTATIVE DETENTION AND CONTROL ORDERS UNDER FEDERAL LAW: THE CASE FOR A BILL OF RIGHTS

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*[Federal laws passed since the 11 September 2001 attacks in the United States represent an extraordinary challenge for human rights protection in Australia. The legislative erosion of rights traditionally assumed as being fundamental within common law countries lies at the heart of this challenge. This article focuses on extraordinary measures recently added to the package of anti-terrorism laws: preventative detention orders; prohibited contact orders; and control orders. These measures were added to Part 5.3 of the Schedule to the Criminal Code Act 1995 (Cth) by the Anti-Terrorism Act [No 2] 2005 (Cth), and directly and explicitly remove or interfere with a number of individual rights. In this article we argue that the threat to human rights posed by such measures derives not only from their legislative enactment and form. The threat is heightened by the dominance of a positivistic legalism in the approach of the High Court of Australia — an approach that treats the constitutional text as the foundation of the rule of law in Australia, as opposed to the supreme manifestation of the rule of law that rests on a broader, but less explicit, foundation of constitutionalism. In this respect, the presence of a written Constitution has hindered the protection of rights to the extent that the principle of legality operates within a textual straitjacket. Until such time as Australia adopts a bill of rights at the national level, or there occurs an unlikely shift in the jurisprudential approach of the High Court, the Court will have little room to manoeuvre out of its positivistic corner when faced with other extraordinary legislative measures.]*

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## I INTRODUCTION

The sensitive balance between civil rights and national security has shifted since the 11 September 2001 terrorist attacks. In Australia, the adjustment is readily visible in the proliferation of anti-terrorism laws. The scope of such laws

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is very extensive<sup>1</sup> and constitutes a major challenge for traditional thinking about civil rights.<sup>2</sup> This article considers the challenges for federal courts in dealing with such legislation<sup>3</sup> through an examination of the decision in *Thomas v Mowbray*<sup>4</sup> and key counter-terrorism measures adopted in 2002, including preventative detention orders ('PDOs') and control orders. In *Thomas v Mowbray*, the control order regime established under Division 104 of the *Criminal Code Act 1995* (Cth) sch ('*Criminal Code*') survived a constitutional challenge. This important decision of the High Court of Australia has wide ramifications for human rights protection (or the lack thereof) in Australia. The control order is one of a series of extraordinary devices introduced by the *Anti-Terrorism Act [No 2] 2005* (Cth)<sup>5</sup> — part of an extensive package of anti-terror laws, the likes of which would have been unthinkable a decade ago. The upholding of legislation providing for the deprivation of liberty of a person not convicted or charged with any criminal offence marks an unfortunate turn in the spiralling descent of civil rights protection in Australia. It graphically illustrates the inability of judges to protect the community from the erosion of fundamental civil rights.

*Thomas v Mowbray* offers a telling example of the inadequacy of judicial review in protecting individual liberty in the face of extraordinary legislative measures — at least when jurisprudential approaches are dominated by 'a virulent strain of legal positivism',<sup>6</sup> and where human rights issues tend to remain at the margins of judicial analyses. In this article, we argue that the combined effect of two trends in Australia — the dominance of legal positivism and the political resistance to the statutory implementation of human rights norms at the federal level — has placed High Court judges in a difficult position. The politics surrounding the implementation (or non-implementation) of a federal bill of rights, and human rights generally, are well-known. They have been characterised by a number of tensions including federal–state rivalries,<sup>7</sup> concerns with sovereignty (and the so-called 'democratic deficit'),<sup>8</sup> executive

<sup>1</sup> For a comprehensive overview of the government's response to terrorism: see Parliamentary Library, *Terrorism Law* (2007) Parliament of Australia <<http://www.aph.gov.au/library/intguide/law/terrorism.htm#court>>.

<sup>2</sup> The Law Council of Australia has been especially critical of much of the anti-terrorism legislation: see Tim Bugg, 'President's Address: The State of the Profession' (Speech delivered at the 35<sup>th</sup> Australian Legal Convention, Sydney, 25 March 2007).

<sup>3</sup> Andrew Lynch and Alexander Reilly, 'The Constitutional Validity of Terrorism Orders of Control and Preventative Detention' (2007) 10 *Flinders Journal of Law Reform* 105.

<sup>4</sup> (2007) 237 ALR 194.

<sup>5</sup> Amending div 104 of the *Criminal Code*. Other similar measures include PDOs and prohibited contact orders ('PCOs'): at div 105.

<sup>6</sup> A phrase used by the late Justice John Perry of the Supreme Court of South Australia: Justice J W Perry, 'The Use and Application of International Law in Australia and in Decision Making' (Paper presented to the Law Society of South Australia, Adelaide, 29 October 2003) 18.

<sup>7</sup> See, eg, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

<sup>8</sup> For example, the response to the decision in *Toonen v Australia*, United Nations Human Rights Commission, UN Doc CCPR/C/50/D/488/1992 (1994): Sarah Joseph, 'Gay Rights under the ICCPR: Commentary on *Toonen v Australia*' (1994) 13 *University of Tasmania Law Review* 392; Wayne Morgan, 'Identifying Evil for What It Is: Tasmania, Sexual Perversity and the United Nations' (1994) 19 *Melbourne University Law Review* 740.

accountability<sup>9</sup> and, with regard to the judiciary, the constitutional and policy implications of so-called ‘judicial activism’. When faced with legislation that erodes fundamental rights, judges have lacked a positive instrument against which the proportionality of the statute may be measured. Any engagement with human rights issues in the absence of a positive instrument designed to implement such rights carries with it the risk of being perceived as ‘activist’. As a consequence, judges (for the most part) tend to approach human rights issues with caution, if they treat them as relevant at all. Whilst largely avoiding the political debate, Australia’s judges have frequently been placed at its centre and are far from impervious to its wider implications for judicial decision-making. That is particularly so given the presence of a written *Constitution* with an entrenched commitment to parliamentary supremacy and the separation of powers. Faced with this reality, we conclude by advocating for the adoption of a bill of rights at the federal level.

## II BACKGROUND TO THE *ANTI-TERRORISM ACT [NO 2] 2005* (CTH)

Within days of the destruction of the World Trade Center in New York, the United Nations Security Council passed Resolution 1373,<sup>10</sup> calling upon member states to take specific anti-terrorism measures, including the prevention and suppression of the finance of terrorism and the criminalisation of terrorist acts. Australia’s initial response was that it already had a highly coordinated domestic counter-terrorism response strategy incorporating law enforcement, security and defence agencies, and that it had an extensive network of law enforcement liaison officers and bilateral treaties on extradition and mutual legal assistance to facilitate the cooperation with other countries in the prevention, investigation and prosecution of terrorist acts.<sup>11</sup> In February 2002, shortly after the passage of Resolution 1373, the United Nations High Commissioner for Human Rights, Mary Robinson, undoubtedly concerned about the possibility of overreaction by member states to September 11, urged caution in the implementation of anti-terrorism measures and proposed a series of criteria which emphasised respect for human rights.<sup>12</sup> In June 2002, the Australian government introduced a wide range of new counter-terrorism measures,<sup>13</sup> with the reassurance that:

<sup>9</sup> For example, the political and legal fallout from the High Court decision in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273: see Wendy Lacey, ‘In the Wake of *Teoh*: Finding an Appropriate Government Response’ (2001) 29 *Federal Law Review* 219.

<sup>10</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, UN Doc S/RES/1373 (2001).

<sup>11</sup> See Nathan Hancock, ‘Terrorism and the Law in Australia: Legislation, Commentary and Constraints’ (Research Paper No 12, Parliamentary Library, Parliament of Australia, 2002); Submission to Senate Legal and Constitutional Legislation Committee, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills Report*, 20 November 2002, Submission No 251, [3.6] (Law Council of Australia).

<sup>12</sup> United Nations High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights*, 3, UN Doc E/CN.4/2002/18 (2002).

<sup>13</sup> The counter-terrorism package included: Security Legislation Amendment (Terrorism) Bill 2002 (Cth); Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 (Cth); Suppression of the Financing of Terrorism Bill 2002 (Cth); Border Security Legislation Amendment Bill 2002 (Cth); Telecommunications Interception Legislation Amendment Bill 2002 (Cth).

In developing this legislation, the Government has been conscious of the need to protect our community from the threat of terrorism without unfairly or unnecessarily encroaching on the individual rights and liberties that are fundamental to our democratic system. We think the legislation does just that.<sup>14</sup>

The anti-terrorism laws have been progressively supplemented. In 2005, following a Council of Australian Governments ('COAG') meeting held on 27 September 2005, the decision was made to 'strengthen' Australia's anti-terrorism laws even further, both at the state<sup>15</sup> and federal level. The *Criminal Code* amendments contained in the *Anti-Terrorism Act [No 2] 2005* (Cth) were extensive and controversial.

The control order legislation forms part of a huge package of anti-terrorism laws that would have been unimaginable a decade ago. New laws provide special rules for trials involving security issues,<sup>16</sup> contemplate the effective 'licensing' of lawyers by requiring security clearances in sensitive trials,<sup>17</sup> and sanction gross departures from principles of natural justice ordinarily applicable to administrative processes and criminal trials, for example, the right to see the evidence against oneself.<sup>18</sup> In terms of substantive law, there has been a significant extension of inchoate liability to include a variety of preparatory offences;<sup>19</sup> an expanded definition of terrorism that relies heavily upon motive as a defining factor;<sup>20</sup> and the expansion of extraterritorial reach.<sup>21</sup> The definition of a 'terrorist organisation' has been extended and the offence of sedition revitalised.<sup>22</sup> New offences relating to the financing of terrorism have been introduced and greater powers of criminal investigation conferred. Importantly, for present purposes, the *Anti-Terrorism Act [No 2] 2005* (Cth) amendments to the *Criminal Code* inserted three measures that present particular challenges for civil liberties: control orders, PCOs and PDOs.

<sup>14</sup> Daryl Williams, Attorney-General of Australia, 'Counter-Terrorism Package' (Press Release, 4 June 2002).

<sup>15</sup> See *Terrorism (Police Powers) Act 2002* (NSW); *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Community Protection) Act 2003* (Vic); *Terrorism (Preventative Detention) Act 2006* (WA); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Terrorism (Emergency Powers) Act 2003* (NT).

<sup>16</sup> Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (2004).

<sup>17</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 39, 46. See also *Criminal Code* s 105.37(4).

<sup>18</sup> For example, the rules of discovery have been adjusted and special provisions relating to bail in terrorism cases have been provided: *Crimes Act 1914* (Cth) s 15AA; *Vinayagamoorthy v DPP (Cth)* [2007] VSC 265 (Unreported, Bongiorno J, 17 July 2007). See also Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of Anti-Terrorism Bill [No 2] 2005* (2005).

<sup>19</sup> *Criminal Code* s 100.4.

<sup>20</sup> *Criminal Code* s 100.1. See also *Thomas v Mowbray* (2007) 237 ALR 194, 213 (Gummow and Crennan JJ).

<sup>21</sup> *XYZ v Commonwealth* (2006) 227 CLR 532.

<sup>22</sup> See, eg, Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006); Simon Bronitt and James Stellios, 'Sedition, Security and Human Rights: "Unbalanced" Law Reform in the "War on Terror"' (2006) 30 *Melbourne University Law Review* 923.

The PDO regime established by Division 105 of the *Criminal Code* has yet to be judicially considered. PDOs constitute a latent threat to civil liberties and have been used in the past (although thankfully never in Australia) as a means of stifling political dissent. Administrative detention is anathema to liberal democracy; that an individual should be deprived of liberty by executive order in the absence of any allegation of criminal wrongdoing is so axiomatically wrongful as to require no argument. Save extraordinary threats to public health, in cases of clear mental illness, or in times of declared war, it is unheard of for people to be detained for long periods of time outside the criminal justice system. John North, President of the Law Council of Australia, reminded the Senate Legal and Constitutional Legislation Committee reviewing the proposed legislation, that:

Australia's formal criminal justice system embraces critically important guarantees and safeguards, including the right of an accused to a fair trial, rules of evidence which are fair, the presumption of innocence and the requirement that guilt be established beyond reasonable doubt. These safeguards and minimum guarantees have been in place for centuries to try and punish those who can be convicted beyond reasonable doubt. It is unheard of in Australian law to have people held or detained for long periods under very strict conditions unless we follow these legal safeguards.<sup>23</sup>

Against this, the Howard Coalition government's position was that such measures were necessary given the nature of the terrorist threat. The safety of the people was the highest law. The logic of this argument can be applied equally in other areas of unlawfulness: drugs, racketeering, juvenile delinquency, gang behaviour, economic crimes, white-collar and especially environmentally damaging crime causing misery to millions. Whether the anti-terrorism measures will lead to other draconian measures remains to be seen, but the early signs are ominous.<sup>24</sup>

### III PREVENTATIVE DETENTION ORDERS

The preventative detention scheme is designed to detain persons suspected of some degree of involvement with terrorism where there is insufficient evidence to justify a formal charge.<sup>25</sup> Detention can be for up to 48 hours under federal law, or 14 days under state law.<sup>26</sup> The law has protective and forensic functions — to prevent terrorist attacks and to apprehend offenders. If a terrorist threat is imminent, or expected to occur within 14 days, and there are reasonable grounds to suspect that a person is involved either by way of planning or participation, so

<sup>23</sup> See Senate Legal and Constitutional Legislation Committee, above n 18, [3.33].

<sup>24</sup> There have been public calls in both Australia and New Zealand for motorcycle gangs to be proscribed under the model used to outlaw terrorist organisations: Nick Henderson, 'Crackdown on Gangs in the Pipeline', *The Advertiser* (Adelaide), 11 June 2007, 4; 'Governments Join to Tackle Biker Gangs', *The Australian* (Sydney), 28 June 2007 <<http://www.theaustralian.news.com.au/story/0,20867,21983925-1702,00.html>>.

<sup>25</sup> See above n 15.

<sup>26</sup> *Criminal Code* s 105.9; *Terrorism (Police Powers) Act 2002* (NSW) s 11(3)(a); *Terrorism (Preventative Detention) Act 2005* (Qld) s 12(2); *Terrorism (Preventative Detention) Act 2005* (SA) s 10(5)(b); *Terrorism (Preventative Detention) Act 2005* (Tas) s 9(2); *Terrorism (Community Protection) Act 2003* (Vic) s 13G(1); *Terrorism (Preventative Detention) Act 2006* (WA) s 13(3); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 8.

that making the order would substantially assist in preventing the act (indeed, is ‘reasonably necessary’ for that purpose), then the person may be detained for up to 48 hours.<sup>27</sup> If a terrorist act has occurred within the last 28 days and it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act, then the subject may be detained for a period considered reasonably necessary for that purpose.<sup>28</sup>

The PDO scheme contains many troubling features,<sup>29</sup> but for the sake of brevity we mention only a few:

- initial detention is facilitated entirely by the police: a senior member of the Australian Federal Police is an ‘issuing authority’<sup>30</sup> for the purpose of the initial detention order made on application by a member of the police;<sup>31</sup>
- children over 16 may be detained:<sup>32</sup> this constitutes a violation of Australia’s international obligations under the *Convention on the Rights of the Child* (‘CRC’),<sup>33</sup>
- rigorous non-disclosure provisions calculated where expedient to facilitate detention behind a shroud of secrecy:
  - a detainee is not entitled to disclose the fact that a PDO has been made, or the fact or period of detention,<sup>34</sup> and anyone who passes on such information commits an offence;<sup>35</sup>
  - a child detainee is entitled to contact both parents or guardians,<sup>36</sup> unless prohibited from doing so,<sup>37</sup> but a parent or guardian commits an offence punishable by five years imprisonment by disclosing the fact of detention to a third party or to another parent or guardian with whom the child is not entitled to have contact;<sup>38</sup>

<sup>27</sup> *Criminal Code* s 105.4(5).

<sup>28</sup> *Criminal Code* s 105.4(6).

<sup>29</sup> See Patrick Keyzer and Sam Blay, ‘Double Punishment? Preventive Detention Schemes under Australian Legislation and Their Consistency with International Law: The *Fardon* Communication’ (2006) 7 *Melbourne Journal of International Law* 407; Bernadette McSherry, ‘Indefinite and Preventive Detention Legislation: From Caution to an Open Door’ (2005) 29 *Criminal Law Journal* 94. For critical comments: see, eg, Susan Harris-Rimmer and Nigel Brew, *Proposals to Further Strengthen Australia’s Counter-Terrorism Laws — 2005* (25 November 2005) Parliamentary Library <<http://www.aph.gov.au/library/intguide/LAW/TerrorismLaws.htm>>; Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, in advice to the ACT government, as reported by Michelle Grattan, ‘Fraser Slams Anti-Terror Measures’, *The Age* (Melbourne), 20 October 2005, 1.

<sup>30</sup> *Criminal Code* s 100.1(1).

<sup>31</sup> In relation to continued PDOs, judges, federal magistrates, Administrative Appeals Tribunal (‘AAT’) members and retired judges acting *persona designata* may be appointed as the issuing authority: *Criminal Code* s 105.2.

<sup>32</sup> Children under 16 cannot be detained with a PDO: *Criminal Code* s 105.5.

<sup>33</sup> Opened for signature 20 November 1989, 1577 UNTS 44, art 37 (entered into force 2 September 1990).

<sup>34</sup> *Criminal Code* s 105.41(1).

<sup>35</sup> *Criminal Code* s 105.41(6).

<sup>36</sup> *Criminal Code* s 105.39(3).

<sup>37</sup> *Criminal Code* s 105.40.

<sup>38</sup> *Criminal Code* s 105.41(3)(c), (4A), (4B).

- a detainee is entitled to contact certain specified persons, for example, a member of their family, a flatmate, a colleague or coworker, but solely for the purposes of saying that they are safe but not able to be contacted for the time being;
- similar provisions apply to interpreters<sup>39</sup> and to monitors<sup>40</sup> responsible for supervising the contact the subject has with their lawyer;
- a detainee is entitled to contact the Ombudsman<sup>41</sup> or a lawyer<sup>42</sup> and there are special contact rules for persons under 18 or persons incapable of managing their own affairs;<sup>43</sup>
- a lawyer commits an offence punishable by imprisonment for five years if a person being detained under a PDO contacts the lawyer and the lawyer discloses to another person certain facts relating to the detention;<sup>44</sup>
- proceedings may not be brought in a court for a remedy in relation to a PDO, or the treatment of a person in connection with the person's detention under a PDO while the order is in force;<sup>45</sup>
- lawyers can only disclose information for the purpose of federal court proceedings, complaints to the Ombudsman, the giving of information or communications to the federal police, or state or territory officials about the detainee's treatment during detention;<sup>46</sup>
- if the order is in force, a court of a state or territory does not have jurisdiction;<sup>47</sup>
- this provision is said to apply 'despite any other law of the Commonwealth (whether passed or made before or after the commencement of this section)',<sup>48</sup>
- an application for review may be sought from the AAT, but not while the order is in force;<sup>49</sup> and

<sup>39</sup> *Criminal Code* s 105.41(5).

<sup>40</sup> *Criminal Code* s 105.41(7).

<sup>41</sup> *Criminal Code* s 105.36.

<sup>42</sup> *Criminal Code* s 105.37.

<sup>43</sup> *Criminal Code* s 105.39.

<sup>44</sup> *Criminal Code* s 105.41(2).

<sup>45</sup> *Criminal Code* s 105.51(1).

<sup>46</sup> *Criminal Code* s 105.41(2)(d).

<sup>47</sup> *Criminal Code* s 105.51(2).

<sup>48</sup> No application lies to the AAT for review of the PDO decision or an extension order made by the issuing authority while the order is in force. The AAT may subsequently declare a PDO decision to be void if the AAT would have set the decision aside if an application for review of the decision had been able to be made to the AAT while the order was in force. The AAT may also determine that the Commonwealth should compensate the person in relation to the person's detention under the order if the AAT declares the decision to be void: see *criminal Code* s 105.51(5), (7)–(8).

<sup>49</sup> *Criminal Code* s 105.51(5).

- no application can be made (at any time) under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).<sup>50</sup>

#### IV PROHIBITED CONTACT ORDERS

PCOs were introduced into Australian law by the *Anti-Terrorism Act [No 2] 2005* (Cth).<sup>51</sup> The grounds for making a PCO reflect the protective and forensic purposes underlying these measures. A member of the Australian Federal Police may apply for a PCO if he or she is satisfied that the order is reasonably necessary to:

- 1 avoid a risk to action being taken to prevent a terrorist act occurring;
- 2 prevent serious harm to a person;
- 3 preserve evidence relating to a terrorist act; or
- 4 prevent interference with the gathering of information.<sup>52</sup>

An order can also be made to facilitate the arrest of a suspected terrorist, a person subject to a PDO, or a person in relation to whom such an order is likely to be made, or to facilitate the service of a control order on a person.<sup>53</sup> A PCO can apparently exist independently of a PDO, although a member of the Australian Federal Police may apply for a PCO when applying for a PDO, or indeed where a PDO has already been made.<sup>54</sup> The issuing authority may order that the detainee is not, while in detention, to contact the person specified in the PCO.<sup>55</sup> The *Criminal Code* sets out the information that must be provided to the issuing authority. It must be in writing<sup>56</sup> and the Commonwealth Ombudsman must be notified in writing of the making of the PCO and receive a copy of the PCO.<sup>57</sup>

#### V CONTROL ORDERS

Division 104 grants a federal court the power to make control orders for periods of up to 12 months. In making a control order, the court must be satisfied, on the balance of probabilities, that making the order would substantially assist in preventing a terrorist act, or that the person has provided training to, or received training from, a listed terrorist organisation.<sup>58</sup> Control orders can be used to impose drastic restrictions on movement, association and communication. A person may be required to stay at, or away from, certain premises; wear a

<sup>50</sup> *Criminal Code* s 105.51(4).

<sup>51</sup> These measures were not part of the Anti-Terrorism Bill 2005 (Cth) submitted to the House of Representatives and were inserted by House amendments. As a result, state legislation modelled on and passed before the Anti-Terrorism Bill [No 2] 2005 (Cth) required subsequent amendment: see, eg, Terrorism (Preventative Detention) (Miscellaneous) Amendment Bill 2007 (SA).

<sup>52</sup> *Criminal Code* s 105.14A(4).

<sup>53</sup> *Criminal Code* s 105.14A.

<sup>54</sup> *Criminal Code* s 105.16.

<sup>55</sup> *Criminal Code* s 105.15(4).

<sup>56</sup> *Criminal Code* s 105.15(5).

<sup>57</sup> *Criminal Code* s 105.15(6).

<sup>58</sup> *Criminal Code* s 104.4(1)(c).

tracking device; refrain from some forms of communication; report to specified persons; and be photographed or fingerprinted.<sup>59</sup> A person may be ‘invited’ to participate in specified counselling or education, for which the detainee’s agreement is (thankfully) required.<sup>60</sup> The court must be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions imposed is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.<sup>61</sup> The *Criminal Code* permits applications for urgent interim orders to be made to a court by telephone, fax or email, and without the Attorney-General’s approval, although this must be obtained within four hours of the urgent application.<sup>62</sup> Like PDOs, control orders cannot be made for children under 16,<sup>63</sup> but children under 18 may be subject to orders of up to three months, with provision for successive orders.<sup>64</sup>

#### VI *THOMAS V MOWBRAY*: THE CONSTITUTIONAL VALIDITY OF CONTROL ORDERS

In *Thomas v Mowbray*,<sup>65</sup> the High Court, by majority decision, upheld the constitutional validity of Division 104, stating that it was amply supported by the defence power<sup>66</sup> and did not breach Chapter III of the *Constitution*. Three members of the seven bench Court also found sufficient legislative power in the external affairs power.<sup>67</sup> The principal issue in the case, as noted by Gleeson CJ, involved the separation of powers doctrine,<sup>68</sup> and specifically, whether control orders were distinctively executive or legislative in nature and therefore intrinsically offensive to judicial power.<sup>69</sup> Speaking in dissent, Kirby J described Division 104 as follows:

Div 104 of the Code contemplates the possibility of the loss of liberty, potentially extending to virtual house arrest, not by reference to past conduct or even by reference to what that person himself might or might not do in the future. It is based entirely on a prediction of what is ‘reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act’, a vague, obscure and indeterminate criterion if ever there was one. The judicial process, said to be enlivened by s 104.4, is not therefore refined. On its face, it is capable of arbitrary and capricious interpretation.<sup>70</sup>

<sup>59</sup> *Criminal Code* s 104.5(3).

<sup>60</sup> *Criminal Code* s 104.5(6).

<sup>61</sup> *Criminal Code* s 104.4(1)(d).

<sup>62</sup> *Criminal Code* s 104.6.

<sup>63</sup> *Criminal Code* s 104.28(1).

<sup>64</sup> *Criminal Code* s 104.28(2).

<sup>65</sup> (2007) 237 ALR 194. Our analysis only deals with the Ch III issues in the case. The question of characterisation is, therefore, not examined here.

<sup>66</sup> *Ibid* 203 (Gleeson CJ), 236 (Gummow and Crennan JJ), 316 (Hayne J), 352 (Callinan J), 371 (Heydon J).

<sup>67</sup> *Ibid* 203 (Gleeson CJ), 237 (Gummow and Crennan JJ). Callinan, Heydon and Hayne JJ did not decide this issue. Kirby J dissented: at 275–6. See also David Bennett, ‘*Thomas v Mowbray*: The Constitutionality of Control Orders’ (Speech delivered at the 35<sup>th</sup> Australian Legal Convention, Sydney, 24 March 2007).

<sup>68</sup> *Thomas v Mowbray* (2007) 237 ALR 194, 202.

<sup>69</sup> *Ibid* 204–5.

<sup>70</sup> *Ibid* 291–2.

## VII CONTROL ORDERS AS AN EXERCISE OF JUDICIAL POWER

The judicial power of the Commonwealth is vested in courts established under Chapter III of the *Constitution*. It is a basic if non-obvious principle underlying the separation of powers doctrine as articulated in the *Constitution* that *only* Chapter III courts can exercise the judicial power of the Commonwealth and, conversely, Chapter III courts can *only* exercise judicial power.<sup>71</sup> The latter aspect is perhaps the less obvious and was undiscovered until 1956.

Post-*Boilermakers' Case* jurisprudence suggests a clear cleavage<sup>72</sup> between judicial and non-judicial power. The precise expression of judicial power is however elusive and continues to trouble the High Court.<sup>73</sup> It is perhaps too easy to state simply that the power to apply *pre-existing* law in order to resolve a dispute between the parties is an expression of judicial power; whilst the power to determine the content of rights and obligations governing particular circumstances *in futuro* is a legislative function. As *Thomas v Mowbray* demonstrates, this formulation does not logically determine whether the power to determine the extent of a control order regime based on an assessment of future risk is a judicial or executive or indeed legislative function.

The plaintiff argued that because Division 104 conferred upon the court the power to determine what legal rights and obligations should be created, it conferred non-judicial power on a federal court.<sup>74</sup> Accordingly, the process of making a control order lacked the essential criterion for the exercise of judicial power, namely the application of existing rights and obligations to particular factual circumstances.<sup>75</sup> The plaintiff argued that the power to deprive a person of liberty, not as an incident of past unlawful behaviour, but on the basis of future conduct, was inherently non-judicial.<sup>76</sup> The plaintiff also argued that restraints upon liberty of the kind envisaged in Division 104 could only be imposed by a court as an incident of deciding or punishing criminal guilt, and that in any event the criteria for the making of a control order were too vague.<sup>77</sup>

Gleeson CJ was not persuaded by these arguments. His Honour noted that the legislative, executive and judicial powers were not mutually exclusive and did not operate in completely separate spheres.<sup>78</sup> Gleeson CJ rejected both the notion that the power to make control orders was exclusively non-judicial and the

<sup>71</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 296 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) ('*Boilermakers' Case*'); 'Chap III does not allow a combination with judicial power of functions which are not ancillary or incidental to its exercise but are foreign to it'.

<sup>72</sup> W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2<sup>nd</sup> ed, 1910) 101, quoted in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 117 (Evatt J). See also *Thomas v Mowbray* (2007) 237 ALR 194, 218–19 (Gummow and Crennan JJ).

<sup>73</sup> See *R v Elliott* (2006) 68 NSWLR 1 as to whether legislation giving effect to a recommendation that the defendants be never released was a violation of Ch III.

<sup>74</sup> *Thomas v Mowbray* (2007) 237 ALR 194, 201 (Gleeson CJ).

<sup>75</sup> *Ibid* 205 (Gleeson CJ).

<sup>76</sup> *Ibid*.

<sup>77</sup> *Ibid* 206 (Gleeson CJ).

<sup>78</sup> *Ibid* 204; see also *Boilermakers' Case* (1956) 94 CLR 254, 278 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

contention that an assessment as to future dangerousness was outside the scope of the judicial power:

The power to restrict or interfere with a person's liberty on the basis of what that person might do in the future, rather than on the basis of a judicial determination of what the person has done, which involves interfering with legal rights, and creating new legal obligations, rather than resolving a dispute about existing rights and obligations, is in truth a power that has been, and is, exercised by courts in a variety of circumstances. It is not intrinsically a power that may be exercised only legislatively, or only administratively.<sup>79</sup>

To hold otherwise, according to the Chief Justice, would be to consign such determinations to the executive branch of government.<sup>80</sup> His Honour did not think this would advance the cause of protecting human rights.<sup>81</sup> Gleeson CJ also rejected a submission that restraints on liberty could only be imposed by courts as an incident of deciding or punishing criminal guilt, or that the criteria for the making of a control order were too vague.<sup>82</sup>

His Honour referred to *Fardon v Attorney-General (Qld)* ('*Fardon*')<sup>83</sup> where the High Court upheld state legislation which conferred on the Supreme Court of Queensland a power to detain in custody certain prisoners who had served their sentences on the basis that the order was necessary to ensure adequate protection of the community. Continuing detention orders would be made on the basis that there was an unacceptable risk that the prisoner was likely to commit a serious sexual offence. The Chief Justice cited with approval McHugh J's comment that 'the exercise of judicial power often involves the making of orders upon determining that a particular fact or status exists.'<sup>84</sup> There were cases where the judicial exercise of power was used to create new rights and obligations restrictive of a person's liberty, such as bail and apprehended violence orders, the latter deriving from the ancient power of justices and judges to bind persons over to keep the peace.<sup>85</sup>

Nor did the Chief Justice think that there was something intrinsic about the threat of terrorism that rendered it inherently unsuited to the subject of judicial decision:

predictions as to danger to the public, which are commonly made against a background of the work of police, prison officers, public health authorities, welfare authorities, and providers of health care, are regularly part of the business of courts ... I am unable to accept that there is a qualitative difference between deciding whether an angry person poses an unacceptable risk to his or her family, or to the community or some section of the community, or whether a sexually dysfunctional man poses an unacceptable risk to women, and deciding whether someone who has been trained by terrorists poses an unacceptable risk to the public. The possibility that the person will do what he or she has

<sup>79</sup> *Thomas v Mowbray* (2007) 237 ALR 194, 205.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid* 206 (Gleeson CJ).

<sup>82</sup> *Ibid* 207–8.

<sup>83</sup> (2004) 223 CLR 575.

<sup>84</sup> *Thomas v Mowbray* (2007) 237 ALR 194, 205, citing *Fardon* (2004) 223 CLR 575, 596–7.

<sup>85</sup> *Thomas v Mowbray* (2007) 237 ALR 194, 205 (Gleeson CJ).

been trained to do, or will be used as a ‘resource’ by others who have been so trained, is capable of judicial evaluation. I do not accept that these issues are insusceptible of strictly judicial decision-making.<sup>86</sup>

Gummow and Crennan JJ took a similar approach to the question of judicial power. Their joint judgment commences with the observation that ‘Ch III gives practical effect to the assumption of the rule of law upon which the *Constitution* depends for its efficacy. But what does the rule of law require?’<sup>87</sup> Their Honours considered and rejected the argument that Division 104 conferred on the courts non-judicial power, or judicial power exercisable in violation of Chapter III.<sup>88</sup> The plaintiff’s submission that the exercise of judicial power required a ‘justiciable controversy’, which in turn required ‘legal criteria’ was not sustained in the context of Division 104.<sup>89</sup> The prescribed judicial procedure and the nature of the orders which could be made were a familiar part of judicial power to make orders restraining the liberty of the subject, for the purposes of keeping the peace or preserving property:

Orders which are not orders for punishment following conviction, but which involve restraints upon the person to whom they are directed, can be made after a judicial assessment of a future risk. Such orders are familiar in the context of binding over orders discussed later in these reasons, and in the context of statutory protection orders made for the prevention of future violence. In addition to the injunctive relief available under ss 68B and 114 of the *Family Law Act 1975* (Cth), every state and territory has enacted legislation with powers to make and tailor orders for the protection of targets of violence against those who have either perpetrated or threatened it.<sup>90</sup>

Moreover, terms such as ‘reasonably necessary’, ‘sufficient connection’ and ‘reasonably appropriate and adapted’ were familiar tools in constitutional law and not foreign to the exercise of judicial power.<sup>91</sup> On the general question of whether Division 104 conferred judicial power, Gummow and Crennan JJ concluded as follows:

The question of what is requisite for the purpose of protecting the public from a terrorist act may found a political assessment and lead to the enactment of legislation. That legislation may confer jurisdiction upon a federal court and stipulate as a criterion for the making of an order the satisfaction of the issuing court, on the balance of probabilities — a distinctively judicial activity — that each proposed obligation, prohibition and restriction would be reasonably necessary and appropriate and adapted — other familiar terms of judicial discourse — for that purpose of public protection.<sup>92</sup>

Gummow J had previously promoted the view that involuntary detention of a citizen in custody by the state is permissible ‘only as a consequential step in the

<sup>86</sup> Ibid 210.

<sup>87</sup> Ibid 216.

<sup>88</sup> Ibid 225.

<sup>89</sup> Ibid 219 (Gummow and Crennan JJ).

<sup>90</sup> Ibid 222 (Gummow and Crennan JJ).

<sup>91</sup> Ibid 226–7 (Gummow and Crennan JJ).

<sup>92</sup> Ibid 228. Contrast the approach of the United States Supreme Court in *Kansas v Hendricks*, 521 US 358 (1997).

adjudication of criminal guilt of that citizen for past acts',<sup>93</sup> but this did not mean that any deprivation of liberty such as that entailed by a PCO was beyond the judicial power of the Commonwealth. The learned justices noted that detention in the custody of the state 'differs significantly in degree and quality from what may be entailed by observance of an interim control order.'<sup>94</sup>

Callinan and Heydon JJ agreed in separate judgments. Callinan J held that Chapter III was not infringed by Division 104.<sup>95</sup> His Honour rejected the claim that Division 104 raised issues that were essentially non-justiciable and properly left to the executive to determine. Heydon J agreed with everything said by the other judges in the majority on the matter of judicial power.<sup>96</sup>

In dissent, Kirby J noted that the control order regime was 'novel and offensive to principle':

It provides for the deprivation of liberty because of an estimate of some future act, not necessarily one to be committed by the person subject to the proposed order. To uphold the validity of that type of control order for which Div 104 of the Code provides would be to erode the well-founded assumption that the judiciary in Australia under federal law may only deprive individuals of their liberty on the basis of evidence of their past conduct ... To do this is to deny persons their basic legal rights not for what they have been proved to have done (as established in a criminal trial) but for what an official suggests that they might do or that someone else might do. To allow judges to be involved in making such orders, and particularly in the one-sided procedure contemplated by Div 104, involves a serious and wholly exceptional departure from basic constitutional doctrine unchallenged during the entire history of the Commonwealth. It goes far beyond the burdens on the civil liberties of alleged communists enacted, but struck down by this court, in the *Communist Party Case*. Unless this court calls a halt, as it did in that case, the damage to our constitutional arrangements could be profound.<sup>97</sup>

Hayne J also concluded that Division 104 was beyond the judicial power of the Commonwealth. A major problem was that the relevant provision offered 'no legal standard against which an application for a control order is to be judged'.<sup>98</sup> Part of the problem was that the process of making a succession of 'factually specific predictions' was unlikely to yield 'any rule or standard of law that subsequent courts could identify and apply'.<sup>99</sup> Hayne J emphasised that the defence of the nation was 'particularly the concern of the Executive'.<sup>100</sup> This did not extend to detaining or restraining persons with specific lawful authority.<sup>101</sup> Granting to a federal court the power to restrain unlawful behaviour would be 'an orthodox and unremarkable conferral of jurisdiction'.<sup>102</sup> The present legisla-

<sup>93</sup> *Fardon* (2004) 223 CLR 575, 612.

<sup>94</sup> *Thomas v Mowbray* (2007) 237 ALR 194, 229 (Gummow and Crennan JJ).

<sup>95</sup> *Ibid* 357.

<sup>96</sup> *Ibid* 371.

<sup>97</sup> *Ibid* 293.

<sup>98</sup> *Ibid* 328 (Hayne J).

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

<sup>100</sup> *Ibid* 330.

<sup>101</sup> *Ibid* 331 (Hayne J).

<sup>102</sup> *Ibid*.

tion was defective in seeking to give to the courts ‘the decision of what is necessary to protect the public and, for the reasons earlier given, offers the courts no standard by which to decide that question.’<sup>103</sup> His Honour contrasted Division 104 with the equivalent provision contained in s 83.3 of the Canadian *Criminal Code*.<sup>104</sup> The structure of that provision was such that the role of the provincial court was to determine whether the conclusions reached by a ‘peace officer’ were based on reasonable grounds that a terrorist activity *would* be carried out or whether the peace officer ‘suspects on reasonable grounds that the imposition of a recognisance with conditions on a person, or the arrest of a person, is *necessary* to prevent the carrying out of the terrorist activity’.<sup>105</sup> Hayne J offered the following comments on this issue:

The issue that is then presented for judicial determination is whether the judge is ‘satisfied by the evidence adduced that the peace officer has reasonable grounds for the suspicion’. That is an issue of a kind that courts deal with frequently. It requires consideration and evaluation of what the relevant official puts forward as the grounds upon which the impugned decision has been made. It does not require, as the provisions now in issue do, the court to decide for itself what is necessary or desirable for protection of the public.<sup>106</sup>

It is interesting to compare the judgments of Hayne J and Gleeson CJ on the question of judicial power. Hayne J eschews a policymaking role for judges — which his Honour considers would necessarily be involved in making a control order in a particular case — considering it to lie beyond the proper scope of the judicial power.<sup>107</sup> In contrast, Gleeson CJ is content to bring such activities under the umbrella of judicial power, hoping that by reason of judicial involvement, the subject will have greater protection.<sup>108</sup> This raises a question whether any short-term gain from judicial involvement is worth the cost of potential damage in the longer term to judicial independence (perceived or otherwise). Hayne J fears the danger of being too close to the executive, for fear of undermining judicial independence and autonomy. The judges in the majority apparently have no such qualms. It is a deep irony that conservative judges, so reluctant to assume responsibility for filling in the gaps left by language and bad law-making, should be so willing to extend judicial power into areas of practical law enforcement. This form of judicial activism, in which judges readily assume an executive function, is to our minds far more controversial than the old-fashioned kind, which Heydon J decried prior to his elevation to the High Court bench in his extrajudicial article in *Quadrant*.<sup>109</sup> That judges make law from time to time can hardly be seriously doubted. Whether judges should be

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> *Criminal Code*, RSC 1985, c 46, s 83.3.

<sup>106</sup> *Thomas v Mowbray* (2007) 237 ALR 194, 307–8.

<sup>107</sup> *Ibid* 327–8.

<sup>108</sup> *Ibid* 204.

<sup>109</sup> Justice Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2003) 47(2) *Quadrant* 9.

involved in making practical decisions about risk minimisation in relation to terrorism is another matter altogether.<sup>110</sup>

#### VIII THE CONSTITUTIONAL VALIDITY OF PREVENTATIVE DETENTION ORDERS

Following *Thomas v Mowbray*, it is improbable that the PDO regime established by Division 105 would be seen as offending the separation of powers. This would require a finding that the power to make federal PDOs is intrinsically an aspect of judicial power and can therefore only be exercised by judicial officers acting as Chapter III judges.<sup>111</sup> This would call into question longstanding arrangements under which primary responsibility for the detection and prosecution of criminal wrongdoing is vested in the executive, subject to judicial oversight through processes of judicial review. In the context of migration law, this High Court has accepted the possibility of indefinite detention without end,<sup>112</sup> and it is hard to see the Court baulking at detention for a maximum of 48 hours, even in relation to citizens and others entitled to be at large.<sup>113</sup> It is not clear how one might extract from the *Constitution* any impediment to indefinite detention without temporal limitation based on a finding of future dangerousness.<sup>114</sup>

A second constitutional issue is whether federal judicial officers can be involved, albeit in a personal capacity, in the making of PDOs. The *Criminal Code* explicitly states that the function of making a PDO is conferred on a federal magistrate in a personal capacity and not as a court or a member of a court.<sup>115</sup> Any such order has effect 'only by virtue of this Act and is not to be taken by implication to be made by a court.' A federal magistrate performing a function of, or connected with, making an order under s 105.43 of the *Criminal Code* has the same protection and immunity as if they were performing that function as, or as a member of, the Federal Magistrates Court.<sup>116</sup> The granting of non-judicial functions to judicial officers acting in a personal capacity, subject to an overarching test of 'compatibility of function', has been the subject of differing views in the High Court, although a majority of judges appear to have settled for pragmatism over principle. In *Grollo v Palmer*,<sup>117</sup> the majority endorsed the practice in relation to the granting of telecommunication interception warrants, over the strong dissent of McHugh J.

<sup>110</sup> It is worth noting, however, that Gleeson CJ did not discount the possibility of challenge to particular control orders on grounds of procedural fairness, given the example of a case where particular information is not made available to the subject of a control order: *Thomas v Mowbray* (2007) 237 ALR 194, 211.

<sup>111</sup> See the very useful discussion by Lynch and Reilly, above n 3, 130 fn 140.

<sup>112</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.

<sup>113</sup> See Lynch and Reilly, above n 3, 136 fn 175.

<sup>114</sup> Although this may be explored in: *Blessington v The Queen* [2007] HCATrans 152 (Gummow and Heydon JJ, 24 April 2007).

<sup>115</sup> *Criminal Code* s 105.46.

<sup>116</sup> *Criminal Code* s 105.46(3).

<sup>117</sup> (1995) 184 CLR 348.

PDOs are also hard to reconcile with a bundle of rights recognised by the international community, many of which are enshrined in the *International Covenant on Civil and Political Rights* ('ICCPR'),<sup>118</sup> including the rights to personal liberty and security,<sup>119</sup> freedom of movement,<sup>120</sup> privacy,<sup>121</sup> freedom of assembly<sup>122</sup> and association.<sup>123</sup>

#### IX DIVERGENT APPROACHES TO HUMAN RIGHTS PROTECTION

*Thomas v Mowbray*<sup>124</sup> is a stark indication of the significant power of the legislature in addressing threats to security. Chapter III of the *Constitution* is unlikely to constitute much of an obstacle to the exercise of that power. The separation of judicial power was once described by the Privy Council as follows:

in a federal system the absolute independence of the judiciary is the bulwark of the *Constitution* against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard.<sup>125</sup>

That same sentiment could be used to characterise the jurisprudence of the Mason and Brennan High Courts. Yet, what has occurred under the Gleeson Court is an increase in the scope of judicial power, and at the same time, a relaxation of the Chapter III restrictions set out by the Mason and Brennan Courts. In essence, what has occurred is the rejection, or marginalisation, of 'incompatibility' as an overriding approach to Chapter III jurisprudence — whether at the state<sup>126</sup> or federal level.<sup>127</sup> Though it remains a dominant theme in the dissenting opinions of the High Court, it has unquestionably become a dangerous point upon which to base an appeal.

Each of the judgments in *Thomas v Mowbray*<sup>128</sup> is informed by a concern for human rights. Yet, for the most part, there is a conspicuous unwillingness on the part of the majority judges to adopt an overt human rights discourse in considering such measures. The case concerned the right to personal liberty which, as Gleeson CJ has previously demonstrated, represents a fundamental and long-accepted right at common law.<sup>129</sup> The question centres upon what Andrew Lynch and Alexander Reilly have described as the 'conundrum at the heart of the incompatibility doctrine' in Chapter III jurisprudence:

<sup>118</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>119</sup> *Ibid* art 9.

<sup>120</sup> *Ibid* art 12.

<sup>121</sup> *Ibid* art 17.

<sup>122</sup> *Ibid*.

<sup>123</sup> *Ibid* art 22.

<sup>124</sup> (2007) 237 ALR 194.

<sup>125</sup> *A-G (Cth) v The Queen* (1957) 95 CLR 529, 540–1 (Viscount Kilmuir LC, Viscount Simonds, Lords Morton, Tucker, Cohen, Keith and Somervell).

<sup>126</sup> *Fardon* (2004) 223 CLR 575.

<sup>127</sup> *Thomas v Mowbray* (2007) 237 ALR 194.

<sup>128</sup> *Ibid*.

<sup>129</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562, 577.

It is the perceived independence of judges that makes them particularly appropriate persons to administer clandestine and secretive executive orders. The more clandestine and secretive the executive action is, the more important it would appear to be to have the judiciary involved in its implementation as a check on the executive. And yet, courts are only independent of the other branches of government as a result of the separation of their functions, and as a result of the particular judicial methods they adopt in the exercise of judicial power. When the judiciary is employed to exercise non-judicial power, its independence is necessarily compromised. The very fact of acting for the executive means the judiciary is not acting independently, though a reputation for independence provides a cloak of legitimacy for the executive action. Clearly, the more often the executive uses judicial independence to bolster the legitimacy of its actions, and the more often the judiciary participate in processes that are not judicial in nature, the weaker judicial independence is for the future.<sup>130</sup>

Though Lynch and Reilly adopted a different position from the majority in *Thomas v Mowbray* on the validity of the control order regime, the ‘conundrum’ that they speak of assists in highlighting the human rights concerns of the majority judges. The concern of those judges, which is clearly evident in Gleeson CJ’s decision, rests with the desire to ensure a central role for courts (that are both independent of government and impartial) in relation to orders that may significantly restrict the personal liberty of individuals. That the High Court concerned itself with the technicalities of what is, or is not, ‘judicial power’ and whether Chapter III courts could validly make control orders, belies the human rights concerns (and, if not concerns, then certainly an awareness of the implications) of invalidating the regime under Division 104.

What is important to highlight is that, even aside from the Chapter III issue of complying with the *Boilermakers’ Case*, international human rights instruments clearly envisage different methods for the protection of human rights. Specifically, human rights conventions to which Australia is bound do not envisage a uniform role for the courts in their protection. Although the remedies for breaches of human rights are intended to be administered by the courts, different human rights require different roles for national courts in their practical operation (and thereby protection). For example, some human rights merely require the judicial oversight (that is, judicial review) of certain executive decisions. Examples under the *ICCPR* include arrest and detention<sup>131</sup> and, potentially, the deportation of aliens.<sup>132</sup> The *CRC* requires the judicial review of decisions by

<sup>130</sup> See Lynch and Reilly, above n 3, 138 fn 187.

<sup>131</sup> Opened for signature 16 December 1966, 999 UNTS 171, art 9.4 (entered into force 23 March 1976): ‘Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.’

<sup>132</sup> *Ibid* art 13:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

competent authorities to separate children from parents against their will,<sup>133</sup> and judicial involvement, where appropriate, in cases where protective measures are taken to prevent violence, harm and abuse to children.<sup>134</sup> Children deprived of their liberty are also entitled under the *CRC* to challenge the legality of that detention ‘before a court or other competent, independent and impartial authority’.<sup>135</sup> In some circumstances, national courts are the only institutions with competence to authorise or carry out certain actions (such as sentencing an offender to the death penalty under art 6 of the *ICCPR* and declaring the lawfulness or otherwise of an arrest or detention under art 9), whereas in other instances, courts must simply retain a role in reviewing the decisions made by other competent authorities (such as decisions to separate children from their parents against their will).

The protection of human rights, therefore, does not always fall within the sole domain of ‘judicial power’ — at least from an international law perspective. What is lacking, perhaps in both the decisions of *Thomas v Mowbray* and in academic analyses, is an engagement with international law in this respect. A more detailed examination of international human rights law reveals not just the right(s) to be protected, but the manner in which they should be protected — bearing in mind that international instruments tend to lay down the essential minimum requirements in this regard. What needs to occur if a more substantive approach is to be taken to the rule of law in Australian constitutional jurisprudence, is a more rigorous and transparent examination of the universally accepted human rights that are supposed to be ‘fundamental’ in common law jurisdictions and most Western liberal democracies. What is currently occurring in the High Court of Australia is a deliberate avoidance of the ‘human rights

<sup>133</sup> Opened for signature 20 November 1989, 1577 UNTS 44, art 9.1 (entered into force 2 September 1990):

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.

<sup>134</sup> *Ibid* art 19:

- 1 States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child.
- 2 Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

<sup>135</sup> *Ibid* art 37:

States Parties shall ensure that:

- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

issue' by most judges — a hangover from the conservatism of judges and driven by the politicisation of the human rights debate in Australia.

It is time that the Chapter III considerations were informed by an examination of how international human rights law envisages the role of national courts in the protection of specific rights. Whilst a quick examination of art 9 of the *ICCPR*<sup>136</sup> might seem to favour the approach of Kirby and Hayne JJ in *Thomas v Mowbray*, in some respects the majority approach might also be read consistently with that article — perhaps even going further than it requires by ensuring a role for the judiciary from the outset.<sup>137</sup> Whatever the answer to that question, the constitutional issues should not be used to obscure the underlying human rights issues. The issue is too fundamental to ignore and a positivistic legalism should not be used to evade the question.

#### X JUDGES AS CHAMPIONS OF HUMAN RIGHTS PROTECTION?

For many years the history of the protection of civil rights and freedoms, at least in the old common law world, did not depend upon constitutional protections contained in a rights document. The judges, as an extension of governmental power, were seen as providing institutional protections for civil rights. Thus, in the famous World War II case of *Liversidge v Anderson*<sup>138</sup> the House of Lords held that a person detained under reg 18B of the *Defence (General) Regulations 1939* had no right to compel particulars upon which the detention was justified; production of the order of detention by the Home Secretary being of itself sufficient justification. But the case is remembered for Lord Atkin's searing dissent, which subsequently became law: 'It has always been one of the pillars of freedom ... that the judges ... stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.'<sup>139</sup> This assumption of the common law is commonly referred to as 'the principle of legality' — an assumption that derives from the rule of law. An important manifestation of the broader principle is commonly referred to in Australia as the fundamental rights principle<sup>140</sup> and was articulated by Gleeson CJ in *Plaintiff S157/2002 v Commonwealth* as follows:<sup>141</sup>

<sup>136</sup> Opened for signature 20 November 1989, 1577 UNTS 44, art 37 (entered into force 2 September 1990).

<sup>137</sup> *Thomas v Mowbray* (2007) 237 ALR 194, 211 (Gummow and Crennan JJ).

<sup>138</sup> [1942] AC 206.

<sup>139</sup> *Ibid* 244, cited by Nicholas Cowdery, 'Terrorism and the Rule of Law' (Paper presented at the Criminal Lawyers Association of the Northern Territory Conference, 28 June 2003) 14.

<sup>140</sup> See, eg, Margaret Allars, 'International Law and Administrative Discretion' in Brian R Opeskin and Donald R Rothwell (eds), *International Law and Australian Federalism* (1997) 242–3. Margaret Allars describes the principle as the 'fundamental common law rights principle': at 242. The principle has been endorsed in the following cases: *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Bropho v Western Australia* (1990) 171 CLR 1, 17–18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239, 252 (Deane, Dawson, Toohey and Gaudron JJ); *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J); *Ex parte Walsh; Re Yates* (1925) 37 CLR 36, 93 (Isaacs J); *Sorby v Commonwealth* (1983) 152 CLR 281, 289–90 (Gibbs CJ), 309–11 (Mason, Wilson and Dawson JJ); *Re Bolton; Ex parte Bean* (1987) 162 CLR 514, 523 (Brennan J); *Balog v Independent Commission against Corruption* (1990) 169 CLR 625, 635–6 (Mason CJ, Dawson, Deane, Gaudron and Toohey JJ); *Corporate Affairs Commis-*

courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights and freedoms in question, and has consciously decided upon abrogation or curtailment. As Lord Hoffmann recently pointed out in the United Kingdom, for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be 'subject to the basic rights of the individual'.

Gleeson CJ was referring to the judgment of Lord Hoffmann in *R v Secretary of State for the Home Department; Ex parte Simms*, where his Lordship had offered the following comments on the principle of legality:<sup>142</sup>

the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

Whether or not a society chooses to enshrine fundamental rights in a constitutional document, a strong judiciary anchored firmly in the rule of law has a vital role to play in preserving fundamental rights. This may require hard decisions. Arguably the 6:1 decision by the High Court to strike down the *Communist Party Dissolution Act 1950* (Cth) was a hard decision at a time of perceived national threat from communism.<sup>143</sup> Kirby J referred to this case towards the end of his judgment in *Thomas v Mowbray*, with obvious sadness:<sup>144</sup>

I did not expect that, during my service, I would see the *Communist Party Case* sidelined, minimised, doubted and even criticised and denigrated in this court. Given the reasoning expressed by the majority in these proceedings, it appears likely that, had the *Dissolution Act* of 1950 been challenged today, its constitutional validity would have been upheld. This is further evidence of the unfortunate surrender of the present court to demands for more and more government-

*sion (NSW) v Yuill* (1991) 172 CLR 319, 322 (Brennan J), 331 (Dawson J), 338 (Gaudron J), 348 (McHugh J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 12 (Mason CJ); *Kruger v Commonwealth* (1997) 190 CLR 1, 107 (Gaudron J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417–18 (Kirby J); *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 414 (Kirby J); *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553 (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 197 ALR 241, 268 (Black CJ, Sundberg and Weinberg JJ).

<sup>141</sup> (2003) 211 CLR 476, 492 (citations omitted).

<sup>142</sup> [2000] 2 AC 115, 131.

<sup>143</sup> *Australian Communist Party v Commonwealth* (1950) 83 CLR 1 ('*Communist Party Case*').

<sup>144</sup> (2007) 237 ALR 194, 301–2 (citations omitted).

tal powers, federal and state, that exceed or offend the constitutional text and its abiding values. It is another instance of the constitutional era of *laissez faire* through which the court is presently passing.

Whereas, until now, Australians, including in this court, have generally accepted the foresight, prudence and wisdom of this court, and of Dixon J in particular, in the *Communist Party Case* (and in other constitutional decisions of the same era), they will look back with regret and embarrassment at this decision when similar qualities of constitutional wisdom were demanded but were not forthcoming.

In *Thomas v Mowbray*, Kirby J reiterated the views he expressed in the immediate aftermath of 11 September 2001. In a paper delivered a year and a day before the bombings in Bali, his Honour spoke of the need for perspective<sup>145</sup> and cautioned: 'The countries that have done best against terrorism are those that have kept their cool, retained a sense of proportion, questioned and addressed the causes, and adhered steadfastly to constitutionalism.'<sup>146</sup>

But constitutionalism in Australia is too often understood within the confines of positivism. For the majority of the High Court, the written text of the *Constitution* is all too readily divorced from the non-express assumptions upon which it rests — the assumptions to which Dixon J referred in the *Communist Party Case*.<sup>147</sup> Illustrative of the dominance of positivism in Australia is the tendency for lawyers to view cases such as *Mabo v Queensland [No 2]*,<sup>148</sup> *Dietrich v The Queen*<sup>149</sup> and the dissenting opinion of Gleeson CJ in *Al-Kateb v Godwin*<sup>150</sup> as common law cases only — not as constitutional cases in their own right. The principle of legality — the notion that judges have an integral role to play in demanding the legality of any executive or legislative action and in minimising the effect of laws which are designed to remove or erode fundamental rights and freedoms — has been reduced to its minimum in Australia. Beyond the express constitutional limits on executive and legislative action, the principle of legality is applied in an ad hoc and almost discretionary fashion and a shift in the approach of the High Court would appear remote, given the tradition of cautious conservatism on the part of judges in human rights matters.

## XI THE POLITICISATION OF HUMAN RIGHTS PROTECTION

The legal debate surrounding human rights implementation in Australia has been significantly affected by the vagaries of domestic politics.<sup>151</sup> The climate of

<sup>145</sup> Justice Michael Kirby, 'Australian Law — After September 11, 2001' (Speech delivered at the 32<sup>nd</sup> Australian Legal Convention, Canberra, 11 October 2001).

<sup>146</sup> *Ibid.*

<sup>147</sup> (1951) 83 CLR 1, 193.

<sup>148</sup> (1992) 175 CLR 1.

<sup>149</sup> (1992) 177 CLR 292.

<sup>150</sup> (2004) 219 CLR 562.

<sup>151</sup> See the writings of Hilary Charlesworth on this issue: Hilary Charlesworth, 'Australia's Split Personality: Implementation of Human Rights Treaty Obligations in Australia' in Philip Alston and Madeleine Chiam (eds), *Treaty-Making and Australia: Globalisation Versus Sovereignty?* (1995) 129–40; Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31 *Osgoode Hall Law Journal* 195; Hilary Charlesworth, 'International Law and Australian Federalism' in Brian R Opeskin and Donald R Rothwell (eds), *International Law and Australian Feder-*

political debate is a significant impediment to the emergence of a more expansive interpretive role for courts in seeking to restrain legislative or administrative excess. The trenchant criticism of Brennan J's judgment in *Mabo v Queensland [No 2]*<sup>152</sup> by conservative elements within Australian society, sometimes but not always connected to the mining industry, is a case in point. *Mabo v Queensland [No 2]* is sometimes seen as proof positive that the judiciary should steer clear of dangerous social engineering. It is ironic that the slaying of one myth (terra nullius) should be the occasion for erecting another (the radical judicial activist). Brennan J's assertion that the law could be 'modified to bring it into conformity with contemporary notions of justice and human rights'<sup>153</sup> was seen by some as subversive rather than evolutionary.<sup>154</sup>

There is indeed a chasm between those who advocate a strong role for the High Court based on the rule of law and those who favour 'strict legalism' based on the text of the *Constitution* and an unwavering commitment to the doctrine of parliamentary supremacy. In understanding this chasm, however, it is not enough to simply consider the High Court's jurisprudence in terms of legal doctrine. The politics of human rights protection in Australia has also had a significant influence on the High Court's jurisprudence. In recent years, increasing pressure has been placed on Australia's courts, but particularly the High Court, in light of the failure by successive federal governments to fully implement the majority of Australia's international human rights obligations.<sup>155</sup> The cautious approach of the Australian judiciary in response to this situation is, in many respects, understandable. The legitimacy of the courts, and particularly the High Court as the ultimate court of appeal in Australia and the effective guardian of the

alism (1997) 280–305; Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (2002) 35–9.

<sup>152</sup> (1992) 175 CLR 1.

<sup>153</sup> *Ibid* 30:

The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed. It is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.

<sup>154</sup> Frank Brennan, 'Countering the Terrorist Threat to Human Rights and the Australian Identity' (Speech delivered at James Cook University, Sydney, 25 May 2004).

<sup>155</sup> See Justice Michael Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' (1988) 62 *Australian Law Journal* 514, 526; P N Bhagwati, 'The Role of the Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint' (1992) 18 *Commonwealth Law Bulletin* 1262, 1263; Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2<sup>nd</sup> ed, 2004) 47. George Williams, *A Bill of Rights for Australia* (2000) 11, has stated that:

Since 1988, Australian courts, and not parliaments, have taken the lead in protecting human rights under Australian law. But this cannot be sustained indefinitely, lest undue stress be placed upon the structure of government. The separation of powers created by the *Constitution* between the judicial and legislative branches allows limited scope for the courts to make new law.

*Constitution*, rests on the extent to which courts perform their judicial function without venturing into fields constitutionally conferred upon the legislative and executive arms of government. However, in the human rights context, it would be surprising if Australian judges had not been influenced by the prevailing political climate relating to mechanisms for human rights enforcement.

A seemingly entrenched commitment (at least in some powerful political circles) to two outmoded and somewhat misleading views has characterised this situation: first, that representative democracy, responsible government, the common law, the separation of powers and the rule of law are sufficient to effectively protect the rights and freedoms of Australians;<sup>156</sup> and secondly, that engagement with the international human rights system undermines or erodes Australia's sovereignty.<sup>157</sup> As a consequence, Australia has failed to fully implement by way of legislation many, if not most, of its international legal obligations accepted under various human rights conventions.<sup>158</sup> When faced with extraordinary legislative measures that significantly erode rights traditionally viewed as fundamental, the present High Court has tended to give full effect to the words of s 51 of the *Constitution* which confers broad legislative powers on the Parliament. The protective ambit of Chapter III and the rule of law, which is supposed to form an assumption upon which the *Constitution* rests,<sup>159</sup> are all too often invoked only as effective limits on legislative power in dissenting opinions — most frequently, but not always solely, in those of Kirby J. The decision of Gleeson CJ in *Al-Kateb v Godwin*<sup>160</sup> — a decision that Professor David Dyzenhaus suggested was the high water mark for the rule of law in Australian jurisprudence<sup>161</sup> — is a strong example.

<sup>156</sup> O'Neill, Rice and Douglas, above n 155, 27–8, 46; Brian Galligan, 'Parliamentary Responsible Government and the Protection of Rights' (1993) 4 *Public Law Review* 100–12; Penelope Mathew, 'International Law and the Protection of Human Rights in Australia: Recent Trends' (1995) 17 *Sydney Law Review* 177, 180–1. George Williams, in calling for an Australian bill of rights, offered the following comments: 'The lack of an Australian Bill of Rights reflects the views of the framers of the *Australian Constitution* expressed in the 1890s that Australia did not need a Bill of Rights because basic freedoms were adequately protected by the common law and by our elected representatives': Williams, *A Bill of Rights for Australia*, above 155, 12. See also Charlesworth, *Writing in Rights*, above n 151, 20–5.

<sup>157</sup> See Mathew, above n 156, 177–8; Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 424; Hilary Charlesworth, 'Dangerous Liaisons: Globalisation and Australian Public Law' (1998) 20 *Adelaide Law Review* 57, 69; Henry Burmester, 'National Sovereignty, Independence and the Impact of Treaties and International Standards' (1995) 17 *Sydney Law Review* 127; Rod Kemp, 'Australian Disputes, Foreign Judgments' (1993) 46(2) *Institute of Public Affairs Review* 46; Craig Durham, 'International Human Rights Law: A Legitimate Influence or Constraint on Sovereign Jurisdiction?' [1997] *Australian International Law Journal* 56.

<sup>158</sup> As Robert McCorquodale, 'Implementing Human Rights in Australia' (1999) 5(2) *Australian Journal of Human Rights* 1, 3 has observed:

it is evident ... that there is a considerable distance to travel before international human rights can be considered to be implemented in Australia. Successive Australian governments have allowed a wide gap to develop between their international statements on human rights and the domestic implementation of those rights.

<sup>159</sup> *Communist Party Case* (1951) 83 CLR 1, 193 (Dixon J).

<sup>160</sup> (2004) 219 CLR 562.

<sup>161</sup> David Dyzenhaus, 'Legality and Emergency: The Judiciary in a Time of Terror' (Paper presented at the Symposium on Law and Liberty in the War on Terror Programme, University of New South Wales, Sydney, 6 July 2007).

## XII CONCLUSION

Australia stands alone in having no written bill of rights, entrenched or otherwise, for the protection of civil rights. It prefers instead to rely on informal (albeit critically important) mechanisms such as trust in the basic decency of government, an independent and incorruptible judiciary, the transparency of judicial and administrative processes and trial by jury. The assumption that informal mechanisms provide sufficient human rights protection has a respectable lineage in Australia. In the past decade it has come under renewed scrutiny.<sup>162</sup> Recent decisions of the High Court in areas of migration law, mental health law,<sup>163</sup> criminal law and especially security law<sup>164</sup> have caused even bill of rights sceptics to reconsider. Cases such as *Thomas v Mowbray*,<sup>165</sup> *Al-Kateb v Godwin*<sup>166</sup> and *Fardon*<sup>167</sup> have ‘unfortunately highlighted the inability of Australian judges to prevent unjust human rights outcomes in the face of federal legislation that is unambiguous in its intent and that falls within a constitutional head of power’.<sup>168</sup> This will come as no surprise to close observers of the High Court, especially since the departure of Sir Anthony Mason, because legal positivism is firmly entrenched as the dominant paradigm in Australian law. What is surprising is that the comments were made by former Justice Michael McHugh after his retirement from the High Court, and that he has since called for the enactment of a bill of rights.<sup>169</sup> Since 2001, the political climate has changed, as certainly as the weather. In uncertain times, judges may be less inclined to obstruct the will of Parliament as expressed in the written word of legislation, but this serves to underline the need for a formalised compact between the government and the people. Indeed, the task assumes a pressing urgency.

It is a given that Australia has a robust press culture, an impartial and professional public service and, perhaps above all, a long tradition of good governance based on shared values.<sup>170</sup> Power-sharing between different tiers of government coupled with a relatively short election cycle avoids concentration of power. These are the pillars which underpin the triumph of liberal democracy in Australia. But are these pillars strong enough to protect human rights in the 21<sup>st</sup>

<sup>162</sup> George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (2004) 64.

<sup>163</sup> High profile cases such as those of Cornelia Rau and Vivian Alvarez have focused attention on the deficiencies of deportation processes: see, eg, Joseph Kerr ‘The Women Australia Abandoned Force PM to Say Sorry’, *The Sydney Morning Herald* (Sydney), 15 July 2005, 1.

<sup>164</sup> See Leigh Sales, *Detainee 002: The Case of David Hicks* (2007).

<sup>165</sup> (2007) 237 ALR 194, upholding anti-terrorism legislation providing for control orders highly restrictive of personal freedom.

<sup>166</sup> (2004) 219 CLR 562, upholding legislation which apparently provided for administrative detention of an unlawful non-citizen pending deportation, without any temporal restriction.

<sup>167</sup> (2004) 223 CLR 575, upholding legislation allowing persons convicted of serious sexual offences to be subject to continuing detention after serving the original sentence in full.

<sup>168</sup> Michael McHugh, ‘Does Australia Need a Bill of Rights?’ (Speech delivered at the New South Wales Bar Association, Sydney, 8 August 2007) 44.

<sup>169</sup> *Ibid* 9.

<sup>170</sup> Australia has been largely spared the bracing impact of corruption in high political office. The United States has by contrast suffered two near misses in a single generation: Watergate and the Lewinsky scandal.

century in the face of a parliamentary juggernaut and a populace anxious about the threat of terrorism? And why think that a bill of rights would make a difference, given that many countries with appalling human rights records have glorious documents setting out the rights of citizens? The situation in Australia is currently such that basic and fundamental freedoms are being eroded by a Parliament with increased legislative powers and an all-powerful executive government with the political will to use them. Politicians have an agenda, and are frequently willing to trade hard-won privileges and freedoms for short-term advantage. Recent legislative measures have highlighted, to an unprecedented degree, the threat to human rights.

The need for a national bill of rights, but not necessarily a constitutionally entrenched one that would enable the High Court to invalidate legislation, has come. A bill of rights is not an absolute guarantee that human rights will be respected, but it provides a structured framework and agreed criteria against which particular measures impacting upon human rights can be assessed. The assessment of legislative measures by reference to underlying general principles is a task well-suited to the federal judiciary. It is a task regularly performed in the interpretation of the *Constitution* and the determination of the validity of legislation by reference to the ambit of constitutional powers conferred on the Parliament. The process of examining legislation by reference to a bill of rights would involve the same logical process. A bill of rights would not guarantee the observance of human rights in all situations, as human rights are never absolute, but must be balanced against other imperatives faced within society. What a bill of rights would achieve, however, is to move human rights issues from the margins of Australian jurisprudence and make human rights a significant, relevant and tangible factor used in measuring the exercise of power — whether executive, legislative or judicial. In essence, a bill of rights would introduce a significant measure of accountability, whereby all arms of government would be forced to justify any incursions upon basic liberties as proportionate measures necessary for the attainment of other legitimate aims. It represents a positive legal instrument and perhaps perpetuates the ‘virulent strain of legal positivism’.<sup>171</sup> However, it represents a pragmatic approach in light of the present reality in Australian law and jurisprudence. Without a statutory bill of rights, human rights issues will continue to predominantly inform only the opinions of dissenting judges.

There is a chorus now supporting the case for a bill of rights, including many highly respected jurists. It is time to move the debate forward. Until we do so, and given the constitutional reality, the threat to human rights by extraordinary legislative measures can only be met with the dissenting opinions of Kirby J and the occasional fellow traveller — increasingly rare these days. But Kirby J is certainly not alone in asserting the case for a broader protection of human rights. The dangers posed by the absence of an effective legal instrument for the

<sup>171</sup> See above n 6 and accompanying text.

protection of human rights were described thus by the former Chief Justice, Sir Gerard Brennan:<sup>172</sup>

Two factors have combined to expose human rights and fundamental freedoms to danger from an exercise of power by the political branches of government. First, our society has become more diverse in its ethnic, cultural, religious, and economic composition. ... The control of the political process by political parties favours the creation of poll-driven policies which will appeal to the majority of the electorate whether or not they unjustifiably discriminate against minority groups or against the weak. ...

A further danger to human rights and fundamental freedoms is posed by the dominance of the executive government, supported by its bureaucracy, over the Parliament. This dominance has undermined the theory that the Westminster model of responsible government effectively guarantees democratic control of executive power. Indeed, the influence of Cabinet, itself substantially under the influence of the Prime Minister of the day, over the Parliament substantially justifies Lord Hailsham's comment that '[w]e live under an elective dictatorship, absolute in theory if hitherto thought tolerable in practice'.

In defining the framework for federalism, the constitutional founders were more concerned with the collections that make up the federal compact, on the theory that the best form of protection for the individual arises from the distribution of power between governmental entities. It is therefore not surprising that, under the *Constitution*, there is no due process clause,<sup>173</sup> no statement about equality before the law, no freedom of assembly or freedom from arbitrary arrest. The *Constitution* contains few substantive rights for individuals and no explicit constitutional protection of human rights. Apart from freedom of religion,<sup>174</sup> a limited right to trial by jury,<sup>175</sup> a right to vote,<sup>176</sup> and freedom from discrimination based on residence,<sup>177</sup> the *Constitution* is a barren wasteland of individual rights. The judiciary has shown little if any willingness to develop a common law doctrine of judicial review based upon inherent limits on the scope of legislative power.<sup>178</sup> Efforts to extract implied rights of substance from the constitutional text or the nature of the constitutional compact have yielded more slurry than gold.<sup>179</sup> As Michael McHugh noted in a speech delivered after retiring from the High Court:

<sup>172</sup> Sir Gerard Brennan, 'Principle and Independence: The Guardians of Freedom' (2000) 74 *Australian Law Journal* 749, 755–6.

<sup>173</sup> *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 411 (Gummow J).

<sup>174</sup> *Constitution* s 116.

<sup>175</sup> *Constitution* s 80 (applicable only to offences charged 'on indictment').

<sup>176</sup> *Constitution* s 41.

<sup>177</sup> *Constitution* s 117.

<sup>178</sup> The opportunity for such development was offered by the formula used regularly in Parliaments deriving from Westminster. The power given to colonial legislatures to legislate for 'peace, order and good government' has never provoked a finding that a law was invalid on the basis that it was not for peace, order or good government. In Australia, subject matter review has arisen almost exclusively as a constitutional question relating to the scope of particular heads of power conferred upon the Commonwealth Parliament under the *Constitution*.

<sup>179</sup> One important implied right arising from *Constitution* ss 7, 24, 64, 128 concerns the implied freedom of political communication: see *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Austr-*

While the drawing of implications from the *Constitution* may be one way of bolstering rights protection in Australia, it provides, at best, a constrained form of protection and is in no way a substitute for a comprehensive and express Bill of Rights.<sup>180</sup>

In a sense, the *Constitution* is merely:

a shell, a husk of meaning  
From which the purpose breaks only when it is fulfilled  
If at all.<sup>181</sup>

One might ask, what purpose? What fulfillment? To which we say, a free and confident society.<sup>182</sup> A society ordered by the rule of law. The positivist tendencies of the High Court would be well-suited to the process of assessing measures by reference to the standards provided in a foundational rights document.

In the aftermath of 11 September 2001, free citizens privileged to live in the great liberal democracies produced by the Enlightenment, and apparently so loathed by al-Qaeda, may have more to fear from the erosion of rights by their own governments than the bomber's blast.<sup>183</sup> What should be obvious to most Australians trained in law is that the judiciary — just as much as Mohammed Haneef<sup>184</sup> or any other person within Australia — needs a bill of rights to temper the barren landscape of the *Constitution*. In the absence of a bill of rights, the system has proven itself incapable of responding to the threat of terrorism without relinquishing many of the fundamental freedoms that Australians have for so long taken for granted. The balance between security needs and civil rights is a complex one. According to the political situation, either may be ascendant, but neither is absolute. The liberty of the subject is a liberty confined or controlled by law, a regulated — rather than an abstract or absolute — freedom.<sup>185</sup> However, the limitations of the positivist approach to the protection of civil rights are now blindingly obvious. It is time for a change.

*lian Broadcasting Corporation* (1997) 189 CLR 520, 559 (Brennan CJ, Dawson, Gaudron, Gummow, Kirby, McHugh and Toohey JJ).

<sup>180</sup> McHugh, above n 168, 9.

<sup>181</sup> T S Eliot, 'Little Gidding' in *The Complete Poems and Plays* (first published 1942, 2004 ed) 191.

<sup>182</sup> *Thomas v Mowbray* (2007) 237 ALR 194, 217 (Gummow and Crennan JJ).

<sup>183</sup> See Laura K Donohue, 'In the Name of National Security: Counterterrorist Measures, 1960–2000' (Discussion Paper 2001–6, John F Kennedy School of Government, Harvard University, 2001) 29.

<sup>184</sup> See *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40.

<sup>185</sup> *Liversidge v Anderson* [1942] AC 206, 261 (Lord Wright).