

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

TABLE OF CONTENTS

1	PROLOGUE	2
2	INTRODUCTION	4
3	THE CONCEPTS OF <i>ULTRA VIRES</i> AND THE RULE OF LAW	5
4	THE COMMON LAW	15
5	INTERNATIONAL LAW	16
6	TREATIES AND CONVENTIONS	20
7	AL-KATEB V SECRETARY, DEPARTMENT OF IMMIGRATION	23
8	THE LEGISLATION	28
9	PRE TRIAL DETENTION	42
10	SEDITION	43
11	CONCLUSION	45

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A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

1 Prologue

There are certain assumptions that form the basis of our relationships in a civil society and these assumptions give rise to expectations on the part of individuals that the law will operate fairly and predictably to all people in the community. These assumptions have been long in their development as some of their corner stones are the product of dramatic moments in history such as the signing of the Magna Carta which reminded the Crown that it was still subject to the law.

Gradually, there developed principles such as the right to *habeas corpus*; the denial to the executive of the right to arbitrary arrest and the enduring concept that the imposition of punishment for breaches of the law was the exclusive right of the judiciary and that right was subject to observing critical protocols such as “due process” in which fairness, impartiality and consistency became defining characteristics.

With the merging of our society into global society, Australia became involved in establishing wider rules of behaviour that are intended to govern the manner in which governments throughout the world made, administered and executed the law. We became a signatory to the Universal Declaration of Human Rights which represented in a document to which Australia became a signatory along with many other governments throughout the world, the basic protections that were the rights of all citizens. Serious progress was made in codifying the expectations that citizens of any community should expect of their government.

Today, we talk about the Rule of Law as a dogma that embodies the various protections that have emerged and which define the characteristics of a free and civil society. We talk about it as though it is a permanent fixture in our society that will always be there to protect us from arbitrary government without recognising the fact that we live in a constantly changing environment. There have been many times in history where the Rule of Law has been ignored or abused. Sometimes it has been said to be necessary such as the imprisonment of so called “disaffected aliens” in the

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

First and Second World wars without charge or trial. The civil war in England in the seventeenth century and in America in the nineteenth century saw the abrogation of many of the protections that we expect in a civil and free society.

Historically, whenever there has been a call to arms, there has been a corresponding insistence by governments that the Rule of Law has to be suspended in many cases during the emergency. What is ironic is that the Rule of Law is all we have to protect us from tyranny and when we are threatened, we suspend the operation of the very instrument that has been developed to protect us.

With each insult to the concept, the Rule of Law tends to be diluted and modified with a real risk that its vital characteristics will be eroded. In Australia we were said to be faced with a threat of illegal immigration. At that stage, it was an offence to illegally enter Australia and a person who attempted to do so could be charged with that offence and have his or her case tried before a Court according to strict rules of procedure. The legislature changed the law to declare that certain persons were illegal immigrants. It was no longer necessary to charge people with an offence. If they were declared illegal, the executive branch of government could lock them up without any trial and that is the case in Australia today.

This principle of arbitrary detention has now crept into other areas of our laws and particularly those areas which relate to terrorism. People who are suspected of committing a crime can be detained by the executive without charge. People who commit what ordinarily would be a crime but who do so for religious, political or ideological motives can be charged with a terrorist act the consequences of which can be horrendous. Not only is the punishment severe including life imprisonment but they are denied access to the ordinary rules of procedure including the right to be present in Court when the evidence is given.

To those committed to the traditional concepts of the Rule of Law, these developments are alarming and it is legitimate for a body such as the International Commission of Jurists to question the necessity for such departures from traditional concepts. It is also worth asking where this journey might lead us.

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

Already, we have people imprisoned in Australia in the most objectionable circumstances who have not been convicted of any offence. We have an Australian who is incarcerated in Guantanamo Bay for five years in solitary confinement and has not even been charged with an offence.

The Rule of Law cannot be taken for granted and from time to time Governments, Courts and the Executive have to be reminded of the consequences of abandoning or suspending traditions that define civil society.

This paper on the anti terrorist legislation is intended more as a discussion of this wider concept of the balance between observing the protections enshrined in the concept of the Rule of Law and ensuring the protection of society at large. If authorities seek to achieve this balance by destroying traditional protections that characterise our society, then our society suffers. The traditions that have existed to secure our freedoms become casualties and that is a matter of great seriousness.

This is not to ignore the serious threats that have manifested themselves in disgraceful attacks on innocent victims. It is merely to give pause to people who assume that in order to address the issue, it is merely necessary to call a state of emergency which is an excuse to suspend the Rule of Law. Once we suspend the Rule of Law, we do have a state of emergency.

2 Introduction

In analysing the various Acts of the Federal Parliament that constitute what we call the “anti terrorist” legislation from the point of view of the Rule of Law, four criteria immediately occur as relevant. These are:

1. The extent to which the legislation exceeds the defence power of the Federal Parliament or, to use a Constitutional term is *ultra vires* ;

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

2. The extent to which it is offensive to concepts of the Rule of Law;
3. The extent to which some of its provisions are modified by principles of Common Law;
4. The extent to which some if not all of its provisions are to be interpreted in accordance with International Law;

As Constitutional theory if not judicial *dicta* has evolved, it is convenient to deal with the first and second criteria together.

This preliminary discussion is intended to stimulate a deeper and more penetrating analysis as the issues involved in this legislation have profound relevance to our future here in Australia as a free society where the Rule of Law should be its corner stone.

3 The concepts of *ultra vires* and the Rule of Law

Simply put, any laws passed by the Federal Parliament for which no power is conferred by the Constitution are said to be *ultra vires* or beyond power and therefore invalid. Conversely, any laws passed which are within power are valid laws, irrespective of their content. However, things are not always as simple as they seem and while some support can be found for this simple proposition in decisions such as that of the majority in *Al-Kateb*¹; observations, particularly by Dixon J in *The Communist Party case*² provide a cautionary warning about accepting such a simplistic approach, particularly if it offends traditional assumptions of the Constitution such as the requirement that legislation be in conformity with the Rule of Law.

In *Lloyd v Wallach*³ the War Precautions Act 1914 empowered the Governor General to make regulations for securing the public safety and defence of the

¹ (2004) HCA 37

² (1951) 83 CLR at pp 227-228

³ 1915 20 CLR 299

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

Commonwealth. Pursuant to that power the Governor General did in fact make War Precautions regulations and Regulation 55(1) was as follows:

“Where the Minister has reason to believe that any naturalised person is disaffected or disloyal, he may, by warrant under his hand, order him to be detained in military custody in such places as he thinks fit during the continuance of the present state of war”

Pursuant to this power, the Minister issued such a warrant but without giving any reason. The affected person swore an affidavit that he was not disloyal or disaffected and the Minister was called to give evidence but objected to provide reasons for his decision and maintained that he simply had to have a belief to justify his action.

The High Court accepted that the decision of the Minister merely required him to have a belief of disaffection or disloyalty and could not be challenged with the result that the affected person was imprisoned without knowing the reasons for the Minister’s belief. Broadly speaking, issues of national security carried the day.

While this decision seems to establish the plenary powers of the Federal Parliament to pass laws, even though they might not be consistent with traditional concepts of justice, the issue of *ultra vires* in relation to the Constitution was not raised. It was raised in the context of whether the regulations were *ultra vires* the Act (and were found that they were not) with the result that this serious issue as to their relationship with the defence power went unexamined by the High Court. The situation was revisited by the High Court in *The Communist Party Case*⁴.

The Communist Party Dissolution Act sought to dissolve the Communist party and put its assets in the hands of a receiver. The basis of the legislation was the Communist threat to the security of the Country in the immediate post war years. In this case, the issue of the extent to which the defence power enabled the Federal Parliament to make laws that inhibited the operation of individuals and organizations

⁴ 1951 83 CLR 1

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

that might be deemed to be a security risk to the Commonwealth was debated. Direct reference was made to *Lloyd v Wallach*⁵.

Before discussing the Court’s interpretation of *Lloyd v Wallach* it is relevant to refer to some observations made by Dixon J in relation to the broader concepts that impact upon the interpretation of the Constitution. In discussing the defence power Dixon J commented:

*“The power is ancillary and incidental to sustaining and carrying on good government. Moreover, it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as for example, in separating the judicial power from other functions of government, others of which are simply assumed .Among these I think it may fairly be said that the rule of law forms an assumption”*⁶ (The emphasis is mine).

I believe that it is not accidental that only two pages later in his judgement, Dixon J refers to *Lloyd v Wallach*. It is illuminating to quote at some length what he said.

“For example, I think that at this stage it is futile to deny that when the country is heavily engaged in an armed conflict with a powerful and dangerous enemy the defence power will sustain a law conferring upon a minister power to order the detention of a person whom he believes to be disaffected or of hostile associations and whom he believes that it is necessary to detain with a view to preventing them acting in a manner prejudicial to the public safety and the defence of the Commonwealth: see Lloyd v Wallach; Ex parte Walsh; and Little v the Commonwealth. The reason is because administrative control of the liberty of the individual in aspects considered material to the prosecution of a war is regarded as a necessary or proper incident of conducting a war. One man may be compelled to fight, another to perform directed work, a third may be suspected of treasonable propensities and restrained. But what the defence power will enable the Parliament to do at any given time depends upon what the exigencies of the time may be

⁵ Supra at page 2

⁶ 1951 83 CLR at page 193

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

considered to call for or warrant. The meaning of the power is of course fixed but as, according to that meaning, the fulfilment of the object of the power must depend on the ever changing course of events, the practical application of the power will vary accordingly. Hitherto a marked distinction has been observed between the use of the power in war and in peace. “But this Court has never subscribed to the view that the continued existence of a formal state of war is enough in itself, after the enemy has surrendered, to bring or retain within the legislative power over defence the same field of civil regulation and control as fell within it while the country was engaged in a conflict with powerful enemies” R v Foster⁷. Correspondingly, it is no doubt true that a mounting danger of hostilities before an actual outbreak of war will suffice to extend the operation of the defence power as circumstances may demand.. Throughout this case I have been impressed with the view that the validity of the Act must depend upon the possibility of bringing into application as at the date of the assent to the Act the conceptions as to the operation of the defence power which hitherto have been appropriate only in time of serious armed conflict”

The impact of this language is unmistakable. Intrusions into the rights of people in a civil society at a time when there is no state of serious armed conflict and which are said to be done pursuant to the defence power, will be seen as an invalid application of that power. When we are not in a state of armed conflict, the power of the legislature to intrude into areas of personal freedoms is constrained if not eliminated. In these circumstances, the defence power contracts.

The decision of *Lloyd v Wallach* attracted the attention of Williams J in the same case⁸. Williams J commented:

“Two cases which were much canvassed during the argument were Lloyd v Wallach and Ex parte Walsh. In my opinion, the legislation there upheld is legislation which could only be justified during such a

⁷ R v Foster 1949 79 CLR at pp 83 – 84.

⁸ 1951 83 CLR at pp 227-228

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

crisis.....It is impossible, in my opinion, to rely on any of the these cases when examining the scope of the defence power in peace..”

The unavoidable implication of these observations is that the legislation in *Lloyd v Wallach* while within the defence power of the Federal Parliament in the circumstances that existed in 1915 would not be a valid exercise of power in other circumstances, particularly those in which the country is not in armed conflict.

Presumably, the anti terrorist laws of the Federal Parliament are made pursuant to this “expanded” application of the powers of the Federal legislature referred to in *The Communist Party case*⁹ and this expansion of the defence power is justified by the current regime of terrorism that has perpetrated atrocities including the destruction of New York Trade Centre and the Bali bombing. The actual existence of a declared state of war in which Australia is involved clearly expands the power dramatically as was demonstrated in *Lloyd v Wallach*¹⁰ . However, as we have seen, that expanded power was brought about by the fact that Australia was at war and in serious armed conflict.

It is therefore at least an arguable proposition that in determining whether or not a Federal Act is within the defence power, it is not only necessary to examine its content but to examine its application in the context of current affairs of State. As a result, if the application of the laws results in intrusions to personal rights in a civil society, those intrusions can only be justified as a valid exercise of power, in the event of a serious threat to the Commonwealth. One example of a threat which so justifies this extension is when Australia is at war and in serious armed combat. Otherwise, an unfettered Parliament, in the absence of a Bill of Rights, could introduce legislation with provisions that are fundamentally offensive to our legal precepts. The constraints imposed by the democratic process are said by some to give us protection against arbitrary deprivation of rights.¹¹

⁹ Supra

¹⁰ Supra

¹¹ The line of reasoning is examined at pages 23 & 24 and one wonders whether it is flawed.

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

It is uncertain whether Australia is presently legally at war¹² with the result that a determination as to whether some of the anti terrorist legislation justifies an interpretation based upon the “expanded” defence power is an issue which perhaps justifies examination. To raise the issue of the validity of the legislation in a political context or in the context of the wider community’s perception of the terrorist threat would probably be akin to raising the issue of the legality and morality of the Vietnam war when the community believed that there was a communist under every bed just waiting for the Sam Pans to come across the Indian Ocean to retrieve Australia from its capitalist dementia. This is not a gratuitous comment in that the High Court has clearly indicated that it can take judicial notice of factors that indicate whether or not the threat to Australia justifies the expansion of the defence power and thus the intrusion on rights that otherwise would be unsustainable in a period where there is no real or perceived threat to peace¹³.

It would be absurd to describe the current perception of the terrorist threat as hysteria but it would be wrong to elevate it to a point where its existence is used as an argument to justify the abandonment of elements of our jurisprudence and of our political system that are corner stones of our freedoms in a civil society. History has been unkind to political systems that embark, no matter how timidly, on a path that is inconsistent with the Rule of Law. Evidence is that once a departure is made, it is followed by another and then another to the point where authoritarian Government loses touch with traditional jurisprudence and in fact looks upon it as an encumbrance. The legal fiasco in Guantanamo Bay is a frightening event that could be suggestive of this phenomenon. It is reassuring that the United States Legal system was sufficient to identify the faults in the Military Commission system set up for detainees in Guantanamo Bay¹⁴. The fact that our own Government not only condones what has been done at Guantanamo Bay but endorses it is perhaps an indication as to some of its thinking behind the anti terrorist legislation and of the political good will that can be generated by being “tough on terrorists”. That is not to suggest *mala fides* on the part of the Government. It clearly has a duty to take

¹² See footnote 17 at page 8

¹³ See Fullagar J in *Communist party Case* at page

¹⁴ See *Hamdan v Rumsfeld* 548 US 2006

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

prudent steps to protect our people and property from terrorist activity. It also has a duty to protect our Institutions and to the extent that the protection of life and property is at the expense of our Institutions that secure our free society, it is necessary to ensure that there is abundant justification for that sacrifice and a definition of the circumstances that will give rise to its termination.

It is an almost irresistible interpretation of the approach of the majority of the Court in *The Communist Party Case* that concepts of the rule of law operate to read down the defence power.

However, as recently as 1998 in *Kartinyeri v Commonwealth*¹⁵ Gummow and Hayne JJ commented “Thirdly, the occasion has yet to arise for consideration of all that may follow from Dixon J’s statement that the Constitution “is an instrument framed in accordance with many traditional conceptions.....Among these etc””. This observation almost suggests a misunderstanding of Dixon J’s judgement while at the same time ignoring the opinions of Williams and Fullagar JJ. It is surely too late in the day to argue that the defence power is not subject to the expansion and contraction interpretation based upon the extent of the threat to the security of the Commonwealth.

In *Marcus Clark & Co Ltd v The Commonwealth*¹⁶ Fullagar J revisited this theme with an apparent assumption that it was, to use a term that McHugh J has introduced into the lexicon of Constitutional interpretation “doctrinally sound”¹⁷ .

This is the point of intersection of the application of the Rule of Law and the issue of *ultra vires*.

In *The Communist Party Case* Fullagar J considered the circumstances that threatened at the time the legislation was passed being a state of concern but certainly not of war either declared or undeclared, against the circumstances that

¹⁵ 1998 195 CLR page 337 at page 381

¹⁶ 1952 87 CLR page 177 at page 253.

¹⁷ See *Al-Kateb* 2004 CLR 562 at page 589

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

gave rise to the decision in *Lloyd v Wallach*¹⁸ when Australia was heavily involved in World War I. These latter circumstances, according to Fullagar J, enable the Court to take an expansive view of the Defence power to the extent that the circumstances of the war protected the draconian legislation complained of by Wallach. This suggests that at least one consideration to be taken into account in evaluating whether or not a power is exceeded is the extent to which the legislation breaches traditional concepts (in the case of *Lloyd*, it required imprisonment without proof but merely the expression of a belief without disclosing the reasons for that belief on the part of the Attorney General). Another and integrated consideration is whether the circumstances are sufficient to justify an expanded interpretation of the defence power. The argument seems to be that the greater the threat to the security of Australia, the less expectation the Court will have of a requirement that the legislation provide traditional safeguards to the individual.

The difficulty about this argument in the context of the anti terrorist legislation is that in the case of *Lloyd*, Australia was at War and extensively so. Today, we are not at War. To the extent that the Afghanistan invasion was legal; some years ago it was said to be over. A democratically elected body is now in place in that country. The same can be said in relation to Iraq¹⁹.

The war that has attracted the current anti terrorist legislation is a “war” on “terror”. When did it start and when will it finish? It is an undeclared war on a diverse and unidentified group of people who presumably have some connection with a branch of Islamic religion that sets them in hostility to people in Western Society. They have attacked Australians in Bali, Americans in the USA and the English in the UK. There has been no attack in Australia and the number of deaths in all probability is less than the number of deaths of American military in Afghanistan and Iraq. Whether or not this threat is comparable to the threats that existed in the two world wars and the cold war period immediately following (the circumstances of which were not sufficient to persuade the High Court to expand the defence power) is

¹⁸ 1915 20 CLR page 299

¹⁹ Serious legal issues have been raised about the legality of the war in Iraq. See “*Lawless World*” by Philippe Sands QC, Particularly Chapter 8 at page 174

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

something about which we are unable to make an observation in that any such information is protected under the generic cover of “national security”. So, a threat, the dimensions of which we have no knowledge and are prevented from gaining such knowledge by the very laws that are said to protect us, is the basis of extending the defence power to deny basic rights traditionally extended to the worst of criminals.

In the *Communist Party case*²⁰ Fullagar J indicated that he could take judicial notice of the factors put to him by Counsel for the government (Barwick QC)²¹ that indicated the nature of the threat that justified an amplification of the defence powers but he decided that they were not sufficiently persuasive to so expand the defence powers in the manner attempted in the Communist Party dissolution Act.

In the present circumstances, what factors would or should a Court require to persuade it to adopt an expansionary interpretation of the defence powers? It is worthwhile observing here that before *The Communist Party Case* there had been prosecutions of two members of the communist party for sedition and in both cases²², the High Court upheld the convictions although in one case Latham CJ (who apparently did not hide the intensity of his anti communist feelings) was one of the Judges who upheld the conviction against Sharkey on the dubious ground that the sedition law under which Sharkey was prosecuted was made pursuant to the External Affairs power. The basis of convictions are a legal embarrassment today but the fact that Courts would convict communists for making statements as against their refusal to ban the communist party is indicative of the influence that political and public opinion can have on judicial performance. It is difficult not to conclude that judicial opinion was influenced by the wide spread belief that the communist party was plotting world wide domination and the destruction of our free society. Whether in fact this was the case has never been demonstrated and it obviously could not be demonstrated with sufficient clarity to the Court in *The Communist Party Case*. I will return to this phenomenon of the tendency of the judiciary to

²⁰ supra

²¹ They were enumerated extensively by Dixon J at page 197

²² See *Burns V Ransley* 79 1949 CLR 101 and *R V Sharkey* 1949 79 CLR 121

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

accept undertakings specific or implied by governments that issues of vital security are at stake, the revelation of which would be damaging.

This cursory discussion of the Constitutional issues raises the question of whether the anti terrorist legislation attracts the considerations in relation to the expansion of the defence power so extensively discussed in *The Communist Party Case*²³. If these considerations can be transported to a consideration of the current anti terrorist laws and particularly those provisions that challenge our concept of the Rule of Law there is a real dilemma that we are in a Catch 22 situation where we simply do not have sufficient material to make a judgement as to whether the defence power should be extended. If Courts can take judicial notice of the factors that are necessary to extend the defence power (see the reference to Fullagar J earlier) when we are not at war it is necessary that material is put before the Court to enable it to take judicial notice. Because of this undeclared war and the necessity to protect society by not disclosing the material that would normally be required to justify an expanded interpretation of the defence power for fear of threatening national security, we merely have to accept the word of the government that the threat is that real. It is probably not beyond the bounds of a legal observation to say that given the record of the government in relation to hopelessly inadequate intelligence that resulted in a conclusion that Iraq had weapons of mass destruction; its failure to either be aware of or acknowledge the frightful state of aspects of the administration of Immigration Policy and the current attempt to circumvent genuine asylum seekers from having their claims processed here in Australia, one would hope that any undertaking by the government that the terrorist threat is so real as to justify the current draconian legislation would have to be supported by some real evidence of which we should have some knowledge²⁴. Alternatively, in the administration of the legislation, the Courts should not be blinded by claims of privilege under the guise of “national security”. Compelling evidence should be available to enable the Court

²³ Supra

²⁴ The most recent release of documents concerning the involvement of the Executive Branch of Government in the AWB/Iraq scandal further damages the confidence of the individual in the transparency of government.

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

to make an informed decision as to the extent of the threat that gives rise so such an expansion of the defence power.

The unreliability of intelligence information that resulted in the invasion of Iraq is surely a matter of which the Courts should take judicial notice in considering intelligence material provided by Government upon which it relies for seeking an expanded interpretation of the defence power.

4 The Common Law

The third area that excites ones interest in analysing the legislation is whether or not; there are Common Law Rules that might tend to modify the effect of Commonwealth legislation.

In “*The judicial application of Human Rights law*”²⁵ the author examines five applications of the Common Law which, by themselves, provide protection in a free society but which have been progressively diluted by Parliament. His rationale of the freedom of the legislature in a free society to make laws that might be considered in conflict with traditional legal values is that they are made by a democratically elected government that “conducts its affairs in the light of day” and can be replaced in the electoral process. As events have developed, governments do not conduct their affairs in the “light of day” but are becoming increasingly protective of material of which they say they are aware and upon which they make their decisions and legislate²⁶. The discussion of the sedition legislation was truncated and the bill forced through Parliament without proper debate. The fact that the political and societal scene has now come to accept that there are terrorists underneath our beds just waiting for their friends to come from the Middle East on

²⁵ Nihal Jayawickrama; Cambridge University Press 2002 at pp 99-102

²⁶ The extent of government secrecy is becoming bizarre. In the Melbourne “Age” on the 8th July 2006 it is reported that the Victorian Government will not release documents relating the an abandoned wind farm on the basis that “it was not in the public interest and could provoke ill-informed speculation”

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

Camels to destroy us is all pervasive and to question it to the point of embarrassing a government is as likely to be successful as demonstrating against the war in Vietnam in the height of the belief of an imminent collapse of the dominoes in South East Asia. In those days, fighting the war against the infidels of Vietnam was a vote winner and those who were opposed to it were vilified as aiding the enemy.

5 International law

The fourth constraint, if it can be called such is that of International Law (both treaty and customary). Despite the persistence of Kirby J²⁷ there is little basis for challenging the anti terrorist legislation on the grounds that some of the provisions are inconsistent with if not diametrically opposed to provisions of the International Covenant on Civil and Political Rights and (e.g., Clause 14). Because of the supremacy of Parliament in exercising the powers conferred upon it by the Constitution, and because of a long line of decisions that establish that unless an international convention to which Australia is a signatory has been adopted in legislation, it will not constrain the legislature, even though the laws that it passes are in contravention of treaty. International law may be one of those assumptions envisaged by Dixon J in *The Communist Party Case*. However, at this stage, it would seem that its effect can only be interpretive so as to assist in establishing the true intent of Parliament when there is ambiguity²⁸. In *Kartinyeri* Kirby J continued his struggle to have canons of International law imported into the Constitution. At page 417 he said:

“Where the Constitution is ambiguous, this Court should adopt the meaning which conforms to the principles of universal and fundamental rights” He referred to the observations of Cooke P in the New Zealand case of Tanita v Minister of Immigration (1994) 2 NZLR 257 at 266 “It is the duty of the

²⁷ *Kartinyeri v Commonwealth* 1998 195 CLR 337 at page 417

²⁸ Even that is uncertain. See the discussion in *Katinyeri* and particularly the comments of Kirby J. and those of McHugh in *Al-Kateb v Godwin supra*. However see the reference to *Teoh* at page 13 in which McHugh J does seem to admit at least to the influence of International Treaty on the development of domestic law.

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

Judiciary to interpret national constitutions.....in the light of the universality of human rights”

McHugh J put an end to this line of argument in *Al-Kateb v Godwin* (see foot note 26) at page 589 when he made the following observation:

“The claim that the Constitution should be read consistently with the rules of International law has been decisively rejected by members of this Court on several occasions. As a matter of Constitutional doctrine, it must be regarded as heretical”

That observation was not only intended to put a stop now and forever to the concept but also to brand Kirby J as a Constitutional heretic. Having said that it was McHugh J who in *Minister for Immigration v Teoh*²⁹ made the following observation:

“Conventions entered into by the Federal Government do not form part of Australia’s domestic law unless they have been incorporated by way of Statute. They may of course affect the interpretation of development of the law of Australia. Thus, in interpreting statutory provisions that are ambiguous the Courts will favour a construction of a Commonwealth Statute which accords with the obligations of Australia under International Treaty”.

McHugh J was a dissenting Judge in *Teoh* in which the majority view was that the process adopted by the department in deciding to withdraw the residency visa of the respondent did not satisfy requirements of procedural fairness because it did not adhere to the International covenant relating to family and children which provides that the interests of children are paramount. It was said that an International covenant to which Australia was a signatory created an expectation of procedural fairness to which the Minister should adhere. This approach falls far short of insisting that Australian law should be construed in the light of International conventions. However, Mason and Deane JJ made an interesting observation in that

²⁹ *Minister for Immigration v Teoh* 183 (1995) CLR 273 at 315

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

case which surely can't be ignored and to which reference will be made later when considering extra judicial activities of the executive branch of Government and particularly decisions as to the treatment of detainees under the Act whether imprisoned awaiting trial, in preventative detention or subject to a control order. Their Honours stated

“Moreover, ratification by Australia of an International Convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by Courts and Administrative authorities in dealing with basic human rights affecting the family and children”³⁰

While recognising the limits of the application of International treaty to domestic law, there seems to be an unintended agreement between McHugh JJ on the one hand and Mason and Deane JJ on the other that one cannot ignore completely the existence of treaties to which Australia is a signatory and that such treaties cannot totally be ignored, otherwise their adoption by Australia would be simply “platitudinous”.

This also appears to be the view of Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration*³¹:

“We accept the proposition that the Courts should, in a case of ambiguity, favour a construction of a Commonwealth Statute which accords with the obligations of Australia under International Treaty”

A more recent reference to the influence of International law on domestic law (both Statute and Common Law) was made in the case of *Royal Women's Hospital v Medial Practitioner's Board of Victoria*³² by Maxwell J who identified three ways

³⁰ Teoh at page 296.

³¹ 176 CLR (1992) p 1 at page 38

³² (2006) VSCA 85 (20th April 2006). It is interesting that in this case, the bench actually invited submissions from the parties on the relevance of international law to the issues in dispute and seemed to suggest that in future, this is a practice that should be adopted.

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

in which international instruments can influence Australian domestic law and these are, according to Maxwell J:

First, the provisions of international treaties are relevant to statutory interpretation. In the absence of a clear statement of intention to the contrary, a statute (Commonwealth or State) should be interpreted and applied, as far as its language permits, so that it conforms with Australia’s obligations under a relevant treaty;

Secondly, the provisions of an international convention to which Australia is a party – especially one which declares universal fundamental rights – may be used by the courts as a legitimate guide in developing the common law. The High Court has cautioned that the courts should act with due circumspection in this area, given that (ex hypothesi) the Commonwealth Parliament itself has not seen fit to incorporate the provisions of the relevant convention into domestic law.

Thirdly, the provisions of an international human rights convention to which Australia is a party can also serve as an indication of the value placed by Australia on the rights provided for in the convention and, therefore, as indicative of contemporary values

While international law has limited impact upon judicial interpretation of Federal laws, it would completely negate the purpose of Australia entering into International Treaties if such treaties were consistently ignored. In between the proposition of Kirby J that legislation should be read down so that it accords with International Treaty and the suggestion that unless incorporated in Statute, International Treaty has no relevance to Australian domestic law, there must be an area of legal territory that at least acknowledges the existence of widely accepted principles of International Law to the point that they have some influence on domestic behaviour, otherwise there would be no point in entering into them or expecting other signatories to observe them.

Having said that, the increasing frequency with which arguments based upon International Law are finding their way into contemporary legal dialogue and

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

challenging the Judiciary in its approach to interpretation suggests that more and more, we will be challenged by concepts and standards of widely held international legal precepts. Nevertheless, there does appear to be a counter balance in the insistence that Commonwealth Statutes be strictly interpreted and that the Constitution authorises Parliament to confer powers on the executive branch of government that would seem to infringe some of these principles of international law. In addition, there seems to be reluctance on the part of the majority of the High Court to inhibit what others consider an intrusion by the executive into the realm of the Judiciary³³.

With this cursory background of some of the jurisprudential issues that impact upon the anti terrorist legislation we can examine the legislation itself.

6 Treaties and conventions

Reference has been made in the previous section to the extent to which International Law is incorporated into Australian domestic law. There is not the slightest suggestion that any treaty provisions have been incorporated into the anti terrorist legislation. Nevertheless, Australia is a party to treaties of some significance, none the least is the International Covenant on Political and Civil Rights. It is also adopted the Universal Declaration on Human Rights as a member of the United Nations in 1948.

Article 9 of the Covenant provides:

“No one shall be subjected to arbitrary arrest, detention or exile”

Article 10 and 11 of the Universal Declaration provide:

10. Everyone is entitled in full equality to a fair and public hearing by an independent and public tribunal in the determination of his rights and obligations and of any criminal charges against him.

³³ See *Al-Kateb v Department of Immigration* (2004) HCA 37

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

11. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to the law in a public trial in which he has all the guarantees necessary for his defence.

Article 14 of the Covenant requires the provision of the following rights:

- 1. to be informed promptly of the nature of the charges;*
- 2. to be given adequate time and facilities to prepare the defence*
- 3. trial without undue delay*
- 4. to be present at the trial and to be defended by Counsel of his own choice, or (if indigent) to have legal aid for Counsel where the interest of justice require it.*

Article 10 of the Covenant further provides:

- 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*
- 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;*

It is worth keeping these articles in mind when considering some of the provisions of the Terrorist legislation particularly in relation to preventative detention and control orders as well as procedural innovations such as preventing the person access to a lawyer of choice; being present when evidence is given having access to material upon which the prosecution bases its case. Whether or not the precise provisions have been incorporated into Australian domestic law, there can be no doubt that these articles embody fundamental principles of humanity which any civilised society should respect.

Another issue which Article 10 of the Covenant addresses is that of the treatment of a person detained before being charged or convicted. The stories that have emerged in relation to the treatment in prison of people charged with offences under the anti terrorist legislation suggest a closeness and oppressiveness that is the antithesis of the requirements of Article 10. One is not directly aware of the nature of this treatment but all the anecdotes indicate that it is severe and probably involves solitary confinement. It is relevant to observe that this indecent treatment is also

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

extended to inmates of immigration detention centres³⁴. It is clear from the covenant that this type of treatment was never intended and that a person charged but not convicted of a crime could not be treated in the same manner as a person who had been convicted. It is obvious that the implication of the article is that the treatment of such people had to be less severe or more lenient than might be the case with convicted criminals. In fact, there is evidence that the contrary is occurring.

The statement of Mason and Deane JJ in *Teoh*³⁵ to the effect that Australia’s ratification of a treaty has to be more than a platitude while perhaps not being a juristic direction must have some weight otherwise, there would be no point in entering into and ratifying treaties. Ratification must create some obligation under International law if only moral. Accordingly departure from standards expected of us according to treaty must have compelling reasons. The inhuman treatment of prisoners because of the nature of the charge gives rise to all natures of impropriety in that once we decided that charge X justifies treating a prisoner outside the standards required by convention, then there is little to prevent people charged with Y being so treated. After all, this treatment is a result of executive and not judicial direction.

It is frustrating that one area of executive conduct that is clearly governed by International treaty, being the detention before trial of a person accused of an anti terrorist act, seems to be excluded from judicial review. Presumably, there are clear rules for treatment of prisoners once they have been convicted. I imagine that short of some legal procedure, irregular treatment such as solitary confinement would not be open to prison authorities in relation to convicted criminals and yet there is nothing preventing this treatment of anti terrorist suspect prior to conviction despite the requirements of international law and treaty.

This is a serious weakness not only in relation to anti terrorist suspects but in relation to any detainees awaiting trial and who are subject to the unsupervised

³⁴ See the details of a talk given Burnside QC on SBS on the 16th October 2006. The events described by him are a discredit to our civility the conduct is what one would expect from a “rogue” state.

³⁵ 1995 183 CLR

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

conduct of prison officials. As indicated, once the treatment is considered appropriate for one class of detainee such as a suspected anti terrorist, then it becomes OK for another until the stage is reached where detention awaiting trial for any offence can be in itself a terrifying experience the intensity of which would inevitably be more severe for people who are ultimately acquitted. This concern also has ramifications in relation to people detained pursuant to provisions of the Migration Act. Evidence of wide spread mistreatment of some of these detainees is common knowledge and when one contemplates the possibility of prolonged and indefinite detention, it is clearly an area which calls for some form of judicial review to ensure that have the protections to which they are entitled under international law. If the view of Hayne J in *Al-Kateb*³⁶ that detention is not imprisonment, there is an even stronger argument that detainees should not be treated as prisoners but should have the protection of international law. The stories that emerge from Baxter and which, from time to time fill our television screens and the grape vine stories we receive about the treatment of anti terrorists suspect highlight Australia’s grotesque departure from fundamental principles of international law and yet, it seems, as the law currently stands, there is no remedy against inhuman treatment or treatment that equates to punishment.

7 Al-Kateb v Secretary, Department of Immigration

While this case was concerned with a detention under the Migration Act 1958 as amended, there are some propositions that emerge from *Al-Kateb*³⁷ which have relevance, not only to the anti terrorist legislation but to our developing jurisprudence. The discussion of this case should be seen in the context of this paper which has as its focus the concept of the Rule of Law and its relevance in statutory interpretation. To say that this concept was not prominent in the reasoning of the various Judges in *Al-Kateb* is far from an exaggeration. One would hope, that in the light of the observation of Dixon J in *The Communist Party*³⁸ case in relation to the

³⁶ *Al-Kateb* supra at page 91

³⁷ *Al-Kateb v Department of Immigration* (2004) HCA 37

³⁸ (1951) 85 CLR pp 227-228

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

Rule of Law, that any decision concerning the liberty of an individual particularly when that liberty is deprived executively, would attract the attention of the Judiciary.

The issue involved in *Al-Kateb* was the inability of the Australian government to find a country to which it could deport Mr Al-Kateb who had requested deportation when his application for a visa had been refused. The Migration Act required continued detention until a person had been removed from Australia or deported from Australia or until they had been granted a visa. As Mr Al-Kateb did not fall into any of these categories it was said that he should be detained indefinitely, given that there was no likelihood in the foreseeable future that he would be deported. The majority of the High Court dismissed his appeal which effectively was an appeal against indefinite or life detention.

The result was an executively imposed indefinite detention and one which was not subject to interference by the Judiciary. In one sense, it could be said that the result of the decision of the majority was for the High Court to accept that the executive branch of government could impose a life sentence without judicial review.

One line of reasoning behind this decision was that detention as an incident to the exercise of a power conferred by a placita of the Constitution was not a penalty but an incidental ancillary to the exercise of that power. Accordingly, the power to make laws in relation to aliens and unlawful citizens included the power to protect the wider community from their presence and to deport such people. Someone coming to Australia illegally had no entitlement to have a presence in Australia and therefore it is necessary to detain them until they do have a legal basis for entering Australia or until their departure. In this context it is said that their detention is not a penalty but a necessary ancillary to the exercise of a power in relation to immigration and aliens.

This line of reasoning has horrendous ramifications to the point where some of the departures from traditional jurisprudence contained in the anti terrorist legislation are merely overtures.

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

A minority view was that the legislation was based upon the assumption that in the event of a person failing to obtain the grant of a visa, it would be possible to deport that person with the result that indefinite detention was never conceived as a possibility by the legislature. In this ambiguous state, the legislation should be read down so to avoid the interpretation of indefinite detention for a number of reasons, none the least of which is that Parliament was conferring on the Executive a power that should rest with the Courts viz; the imposition of punishment.

McHugh J expressed the view that the intention of the legislature was clear and unmistakable and that it was intended in the circumstances that indefinite detention should follow the particular event in question. However, he made some observations which are ominous for the Rule of Law. He cited *Lloyd v Wallach*³⁹ and made the observation that the Chapter III defence was not raised in that case. The inference seemed to be that if such an argument was not raised in that case, then it has limited application in cases of executive detention. In fact, the respondent was not represented with the result that no arguments would have been mounted on his behalf. Quite apart from that His Honour made the further observation that the regulations which enabled an executive, armed with the authority of the Governor in Council to detain an individual merely on the basis of the unchallenged opinion of the Minister were found not to be *ultra vires*. This recounting was correct to a point but the decision of the Court in *Lloyd* was merely that the regulations were not beyond the power conferred by the Statute. The question of *ultra vires* the Constitution was never argued in that case. In any event, the regulations were made in war time when Australia was in armed combat with the enemy.

His Honour’s reliance on the unfortunate case of *Little v The Commonwealth*⁴⁰ to support the proposition of the protection of the executive against judicial inquiry in cases of detention by the executive is mysterious. All that was decided in that case was that if an official acts in a belief that his or her conduct is in accordance with

³⁹ (1915) 20 CLR at page 299

⁴⁰ (1947) 75 CLR p 94

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

the law, no matter how mistaken, a suit cannot lie against the official unless bad faith can be established.

The worrying thrust of all this is that McHugh J, who berates Kirby J for attempting to introduce concepts of international law into statutory interpretation of Commonwealth Statutes seems to be putting together a proposition that will underpin the belief by Parliament that it can extend detention powers to the executive so long as that power to detain is an incident to the power itself.

If we add to this the opinion of Hayne J that detention by the executive as an incident to a power is not a penalty but merely an administrative necessity to secure the power, the thrust of our jurisprudence in the context of the Rule of Law is disturbing if not alarming. All that has happened in the case of the Migration Act is a sleight of hand in drafting. Up until 1992 it was an offence to enter Australia illegally and a person could be charged with that offence and imprisoned. Suddenly, by granting to the executive the right to imprison, the act of entering Australia illegally is not an offence subject to the supervision of the Courts but an executive act of detention which is not a penalty and therefore beyond the supervision of the Courts.

In this event what would prevent the executive from exercising a power conferred by Parliament pursuant to the Taxation power to detain people who have not lodged Income Tax Returns or who have misstated their income instead of making it an offence to do so? What is to stop Parliament from authorising the executive to detain people who interfere or attempt to interfere with radio, television or internet transmission instead of making it an offence to do so? An extension of the argument of Hayne J is that if the detention is incidental to the power, then it is not a penalty and not reviewable by the Courts. The response would be “but these cases are different”. So, where do you draw the line? What would be the case if the Migration Act went on to say that in the event of the Minister being unable to deport an unlawful citizen or alien, the Minister shall detain that person indefinitely? If we accept that detention for a specific purpose and for a limited time is not punishment such as is the case of a person awaiting trial and who is not on bail, there must be a

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

point beyond this when the detention becomes punishment. For instance, the indefinite detention of a person without charge as is the case at Guantanamo Bay, clearly becomes punishment. If Hayne J is correct in saying that detention that does not amount to punishment is within the power of the executive, then surely the extension of this argument is that once it becomes punishment, it attracts the supervision of the Courts. This was the thrust of the comments of Brennan, Deane and Dawson JJ in *Kruger v the Commonwealth*⁴¹

This legalistic argument that distinguishes between detention as an incident to a power and punishment as the price one pays for an offence is a concept that does not sit comfortably with the Rule of Law. Hayne J resorts to the positivist jurist H.A.L Hart who even at the time he wrote had to defend himself against the arguments of the natural lawyers (such as Professor Radbruch) who had witnessed the worst consequence of positivism under Hitler, in order to seek out a definition of punishment that differentiates itself from the incarceration of unlawful citizens in immigration detention centres. He may not have been aware of the public knowledge of some of the less appealing aspects of such detention including solitary confinement, the unavailability of privacy by women such as M/s Rau etc. As Brennan, Deane, Toohey and Gaudron JJ observed in *Whitman v Holloway*⁴²:

“Nothing is achieved by describing some proceedings as punitive and others as remedial or coercive. Punishment is punishment, whether it is imposed in vindication or for remedial or coercive purposes. And there can be no doubt that imprisonment and the imposition of fines, the usual sanctions for contempt, constitute punishment”

If a doctrine such as detention as an ancillary to a power is not punishment and therefore does not attract the supervision of the Courts, then the chasm between the power of the legislature and the constraints of the Rule of Law becomes vast.

⁴¹ (1992) 176 CLR 1 at p 33

⁴² (1995) 183 CLR 525 at 534

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

The Court had little difficulty in accepting the injustice of the imprisonment of Mr Little in *Little v the Commonwealth*⁴³ without granting him relief although Dixon J gave the Commonwealth the opportunity not to apply for an order for costs. Sometimes, the law does have consequences that are perhaps inconsistent with community expectations such as denying a person wrongly imprisoned the right to damages or releasing a stateless person from detention. However, if the alternative is perpetual incarceration at the hands of the executive, it is difficult to ignore Dixon J’s assumption that the Rule of Law has a part to play in statutory interpretation.

This discussion of *Al-Kateb*, while ostensibly about the power of the executive branch of government to detain people without Court supervision, is intended to raise the broader jurisprudential issue of the application of the Rule of Law in our developing society where there is increasing pressure to surrender to the executive, powers that were traditionally the province of our Courts. With the development of principles of constraints evolving in law relating to terrorism both here and abroad it seems timely to ponder the wisdom of the direction of our jurisprudence as represented in decisions such as that of the High Court in *Al-Kateb*.

8 The legislation

Basically, the legislation consists of a number of Acts including the Criminal Code Amendment (Terrorism) Act 2003, the Anti Terrorist Act (No 2) 2005 and the National Security Information (Criminal and Civil Proceedings) Act 2004.

This suite of legislation defines terrorism and terrorist organizations including specific organization and creates offences for terrorist acts, assisting or financing terrorist activities or terrorist organization or recruiting members of terrorist organizations. It also defines what is meant by being a member of a terrorist organization. In addition, the legislation enables members of the Australian Police Force to seek and obtain orders known as “Control Orders” which have the effect of

⁴³ Supra

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

imposing strict control on the activities of individuals even though they have not committed any offence and also to seek Preventative Detention orders that result in a person, not charged with any offence to be detained in strict custody for up to forty eight hours, with power to apply for extensions of the order. People under a detention order and people with whom they communicate while under detention order are prohibited from telling other people that they are or were under detention. Communication between a person under a detention order and their lawyer is not privileged as a member of the AFP (Australian Federal Police) is entitled to be present during their conversations. The Anti-terrorist Act (No 2) of 2004 also creates the crime of Sedition.(See the ALRC Report #104 on Sedition which recommended its abolition. The recommendation has not yet been accepted by government).

The Criminal and Civil Proceedings Act provide certain procedures for the trial of people charged with the various offences created by the legislation. Some of the conduct that is said to be criminalized by the legislation is already criminal conduct. For instance, a terrorist act is one that causes serious harm that is physical harm to a person⁴⁴. However, it is elevated to a different status and therefore an entirely different penalty level by the qualification that “the action is done.....with the intention of advancing a political, religious or ideological cause; and the action is done or the threat is made with the intention of coercing or influencing by intimidation the government of the Commonwealth or a State”. This means of course that if a person does harm to another and it is possible to create a suggestion that there was some political, religious or ideological motive associated with the action, then a person could find themselves in a legal process quite different to that traditionally applicable to people charged with criminal activity. Not only are the procedural processes fraught with difficulties for the accused but the penalties are severe. A person who commits or engages in a terrorist act is subject to imprisonment for life. If a person at a political rally throws rotten tomatoes at the Prime Minister and criticises his political stance while insisting that he resign; that, according the legislation could be interpreted as a terrorist act and the person is

⁴⁴ Section; Schedule 1 101(1)(3) of the Criminal Code Amendment (Terrorism) Act 2003

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

exposed to imprisonment for life. This illustration would be met with the criticism that it trivialises the issue and that it would never happen. That is one of the vices of the legislation in that while such an event might not at the moment result in prosecution under the terrorist legislation, who knows what might happen as we descend the slippery slope of abnormal legal procedures? We are concerned as much if not more so about the future than the present.

Another irony of the definition of a terrorist act is that it apparently would not cover a situation where a person, for purely malevolent and vindictive reasons, takes action to blow up the Sydney Harbour Bridge. If some “political, religious or ideological” association cannot be made with this criminal act, then it seems to escape the terrorist definition. Tying the act to people with a political, religious or ideological axe to grind opens all sorts of doors as we get further and further away from the factors that initially gave rise to the legislation.

One of the uncertain aspects of the definition of a terrorist act is the emphasis to be given to the word “threat”. A terrorist action means “an action or threat of action... where the action causes serious harm that is physical harm to a person”. It is not clear how a threat can cause serious physical harm other than by creating fear that results in a person developing a psychotic or phobic condition. Events will presumably lend some indication as to the manner in which threats as distinct from actions give rise to liability but one fears that the inclusion of the word in a section that creates serious consequences for individuals might be used to avoid the necessity for actually proving that a person took some action that resulted in physical harm but that the person made a threat of such action. Such an interpretation would widen the scope of the definition and create much more sinister opportunities.

It is unnecessary for the purpose of this truncated survey to go into detail in relation to the variety of legal incongruities to which the legislation gives rise; the forgoing is only one example. Some more detail is necessary when we talk about sedition.

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

The forgoing example is used in order to highlight a specific aspect of the legislation that heightens the fear of the jurist that it might and almost certainly will result in serious abuses of traditional concepts of law with resultant disproportionate harm being suffered by individuals.

Section 29 of the National Security Information (Criminal and Civil Proceedings) Act 2004 provides for a closed hearing. The section goes on to provide that if the Court considers that the information concerned would disclose to:

1. the defendant; or
2. any legal representative of the defendant who has not been given a security clearance at the level considered appropriate by the Secretary in relation to the information concerned;
3. any court official who has not been given such a security clearance;

and that the disclosure would be likely to prejudice national security, the court may order that the defendant, the legal representative or the court official is not entitled to be present during any part of the hearing in which the prosecutor or any person mentioned in paragraph (2)(f); gives details of the information; or gives information in arguing why the information should not be disclosed or why the witness should not be called to give evidence in the proceeding. Once again, this flies in the face of the obligations that the Australian Government undertook when ratifying the International Covenant on Political and Civil Rights as discussed in section 5 of this paper.

Already this issue has arisen in the case of Thomas and also in the case of the Australian Federal Police project in relation to thirteen people charged in Victoria with anti terrorist activities. The regulations have been amended so as to include Counsel as well as Solicitors as people who need a security clearance. So far the argument has been avoided but it is likely that proceedings will be stayed at some point to enable the matter to go on appeal. In the meantime, the accused will remain confined in the most oppressive circumstances. Quite apart from the legal irregularities involved in denying an accused person access to Counsel of their own

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

choosing, in reality, what Counsel is discovering that the material sought to be protected is generally of little consequence with the result that there is a temptation to conclude that the section will be used extensively to deny the accused and his or her Counsel access to evidence.

Adding to the difficulties of defence Counsel is the disproportionate allocation of resources in these proceedings. The accused is generally legally aided and the defence team is extraordinarily limited in their resources. On the other hand, the prosecution team pervades the Court seen. There can be three Counsel together with a team of lawyers instructing and supported by an array of Federal Police sitting in the Court together with people from ASIO. The sense of being overwhelmed with the unlimited resources of the Government together with an atmosphere that terrorists are beyond criminality creates a feeling that the mere act of defending someone charged with a terrorist act is a crime. The experience is said to be unpleasant in the extreme and there is a real concern that it will certainly unfairly influence a Jury if not a Judge.

That is not to mention the concern about those associated with the prosecution being able to prevent an accused from Counsel of their choice by the simple device of denying a security clearance. While it might be said that the process would be transparent, there is unfortunately sufficient evidence that political attitudes can influence such issues⁴⁵.

Another consequence of the legislation is that an accused person can be convicted without him or her or their lawyer ever hearing the evidence upon which the conviction is based. The argument of national security will be sufficient to get the prosecution across the line. One of the factors that influenced Justice Stevens of the

⁴⁵ During the Bolte regime in Victoria, on a number of occasions, privileges were denied to lawyers on the basis of their political allegiance. One can imagine that in the event of a lawyer being actively opposed to the war say in Iraq, the executive deciding not to grant a security clearance.

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

US Supreme Court in upholding the *Hamdan* appeal was the ability of the Military Tribunal to hear evidence in the absence of the accused⁴⁶.

This then invites an examination of the provisions of the Anti-Terrorism Act (No 2) 2005. At first glance, one is tempted to conclude that the drafter of the legislation has gone to enormous efforts to build in protections whereas in fact, most of the so called protections are just window dressing to conceal the very novel structure of the Act and the manner in which it introduces processes to “provide the guarantees.....recognised as indispensable by civilised people”⁴⁷.

As we have seen, this Act provides for Control Orders without a person being charged with an offence and Preventative Detention Orders of people without being charged. Not only that, the circumstances of a Preventative Detention Order are Orwellian. Both concepts are echoes of Apartheid practices such as the Pass laws and preventative detention orders as well as the control orders used by the Russian Communists to remove Sakharov to a remote community⁴⁸.

If we look closely at the legislation we find that in order to obtain an Interim control order a member of the Australian Federal Police (AFP) has to make a request (pursuant to Section 104.2(3)(f)) of the Attorney General and part of that request has to contain (104.2(3)) (f) a summary of the grounds on which the order should be made. However, Section 104.2(3A) provides as follows:

“To avoid doubt, paragraph (3)(f) does not require any information to be included in the summary if disclosure of that information is likely to prejudice national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004)

⁴⁶ See *Hamdan v Rumsfeld* 548 US 2006 at page 72

⁴⁷ *Hamdan v Rumsfeld supra*

⁴⁸ See “The Solzhenitsyn Files” 1995 Edition; which is a collection of confidential documents obtained under Freedom of Information of the former Communist regime in Russia at page 257 which describes the politburo’s approach to isolating Sakharov.

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

Once the Attorney General’s consent to the Interim Control Order has been received the material used to obtain that consent is then presented to an issuing court which can be The Federal Court, the Family Court or a Federal Magistrate’s Court. The legislation makes it clear that if the AFP considers that the revelation of the grounds upon which the Order is sought is likely to prejudice national security, then these grounds will not be revealed to the Court. Section 104.4 (1)(b) provides that the Court can make an order only if it has received and considered such further information (if any) as the Court requires. Whether the Court can require information in relation to the summary that the AFP claims is protected by national security is an issue that is questionable. Even if it could, it is doubtful whether that material would be available to the person subject to the order or his or her lawyer. The fact that the AFP does not have to disclose that material to the Attorney General in order to obtain his or her consent suggests that there is no necessity to provide it to the Court. Bearing also in mind the decision of the Court in *Lloyds’ case*⁴⁹ it is not difficult to imagine that a Court can and will grant a control order without having the evidence supporting the application but only on the word of the AFP that to reveal the information would risk national security. The constraint on such a process taking place would be that it would be considered an excess of power. However, this rests once again on how the issue of national danger is determined.

In order to have an Interim Control Order confirmed, it is necessary to serve on the subject of the Order a copy of the Order. The Order is required to contain, *inter alia* “a summary of the grounds upon which the order is made”. However, Section 104.5 (2A) repeats the National Security avoidance clause:

“To avoid doubt, paragraph (1)(h)⁵⁰ does not require any information to be included in the summary if disclosure of that information is likely to prejudice national security (within the meaning of the National Security Information (Civil and Criminal Proceedings Act 2004))

⁴⁹ See *Lloyd v Wallach* (supra)

⁵⁰ Paragraphs(1)(h) requires the Order to contain a summary of the grounds upon which the order is made.

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

The Interim Order is returnable within forty eight hours and the subject of the Order has the right for a lawyer to attend. A lawyer for the subject of the Interim Control Order may request a copy of the Order but may not request or see any other document. (This suggests that if the Request for the Order does not contain a summary of the reasons for which the Order is sought, it is difficult to see how the information can be brought before the Court). While the Act enables people including the subject of the Order and his or her representatives as well as one or more members of the AFP to be present, it is quite specific that it only permits these people to give evidence; there is no mention of the right to cross examination although the right to make submissions is granted⁵¹. The Court can be one of any of the Federal Court, the Family Court or a Federal Magistrate’s Court.

We then come to Preventative Detention Orders and Prohibited Contact Orders, which are Orders that secure the detention of a person without charge in the most oppressive security. These Orders are issued *ex parte* by a person who may be a Judge, a retired Judge, a Federal Magistrate or an AAT member. The requirement to disclose a summary of the reasons for seeking the order is obviated by the National Security interest clause as is the case with a Control Order.

Peremptory detention by an unseen person on the representation of the Police who merely have to claim national security interests to avoid providing information as to the reasons for the Order is, I believe, an accurate description of how this particular segment of the legislation works. In association with such an Order, the police can by the same process, secure an order severely restricting, the right of the subject to contact other people.

Not only that, such people are offending if they notify anyone that they have been subject to such Orders.

⁵¹ If in fact it is intended to deny the right to cross examination, this would be another insult to the requirement of Article 14(3) (C) of the International Covenant on Political and Civil Rights

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

Before looking at the sedition clauses of the legislation, and without going into a detailed analysis of all of the various provisions, I think that it is fair to say that the legislation has created a new framework for addressing crimes and that this framework is inconsistent with the *traditional conceptions* to which Dixon J referred in *The Communist Party Case*⁵². As we have seen, in the absence of a Bill of Rights, the Courts have limited power to read down legislation to conform with traditional conceptions of jurisprudence. If the legislation is within power and unambiguous, then it stands, irrespective of how it plays out in relation to the individual. Three of many examples have already been given⁵³. Having said that, ample authority exists to stay the operation of legislation that offends basic protections in a free society if it goes beyond what is appropriate given the nature of the threat to our society. The conditions that need to exist have to be greater than those which existed at the date of the proclamation of the Communist Party Dissolution Act.

It may well be that another analysis would not paint such a picture of the legislation although it is difficult to avoid the conclusion that as it stands, the legislation has created a framework of laws that is identifiable more by the extent to which it falls outside the “traditional conceptions” than by its conformity. This framework of laws is also suggestive of the possibility of the executive branch of Government (responsible as it is to politically appointed Ministers) to act arbitrarily. The justification for this departure from “traditional conceptions” is “National Security” and the defence of the Commonwealth because of the threat of terrorism.

There is a facile argument that these laws are intended to preserve our free society but in essence, terrorism represents a threat to people’s lives and to property. What represents a threat to our free society are laws that tend to erode traditional legal values and processes that we take for granted in our free society. While the terrorist laws might be aimed at avoiding such atrocities directed to arbitrary damage to people and property such as those inflicted in Bali, they do at the same time give to the Executive, powers to withdraw freedoms or to seriously limit them. This is

⁵² Supra

⁵³ See *Lloyd v Wallach; Burns v Ranley and R v Sharkey* (references above)

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

particularly worrying when these powers are related to terrorist activities which, according to the legislation have political, religious or ideological intentions. In other words, terrorism is tied to political, religious or ideological motivations. So we have an Executive with enormous powers, answerable to politicians for the administration of the anti terrorist laws that have application to people with political, religious and ideological convictions.

In the sense of the immediate danger that is said to exist to our society as a result of terrorist activities world wide, there is wide acceptance of this departure from jurisprudential normality. People who question the desirability of such initiatives are immediately open to criticism as not recognising seriously the terrorist threat or even being “soft” on terrorists. When have we heard such exclamations before? Was it during the Vietnam War or during the McCarthy regime in the USA? However, even if we grant that the immediate danger is sufficient to justify abnormal legal processes, one has to ask “when will this terrorist threat disappear? When will we win the war on terrorism?” One is frightened to hear the answer; particularly when anti terrorist laws are linked to political, religious and ideological motivation. Is it unfair to be reminded of the undercurrent of Orwell’s 1984 when battles against the enemy were constantly being conducted? When did the war on terrorism start and when will it finish? In the context of an increasingly secret society in which the Executive is excused from disclosing information in relation to terrorists because of the threat to National Security it must become the responsibility of the Executive, that possesses all of the evidence that cannot be revealed, to finally declare when the war on terror has finished. The mere use of the word “war” is no justification for such extraordinary powers. In no sense can the so called “war” on “terror” be properly termed a war. It is a struggle and it certainly is a problem but it cannot be described as a war such as the armed conflict that *ex post facto* was said to justify the regulations in *Lloyd v Wallach*⁵⁴. War has always meant an armed conflict against an identifiable enemy. A war can never be against an unidentified class of people holding certain beliefs which are likely, if acted upon, to result in the execution of terrorist acts.

⁵⁴ *Lloyd v Wallach supra*

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

Even if we give the present government all the good will in the world and put our faith in it that the powers being created by this new legislative enterprise will be exercised in good faith, we cannot ignore the fact that we have put in place an instrument that has an enormous capacity to destroy our traditional institutions in the future.

Our political system is one which presupposes that we have a choice of political representation. In a society where we could be constantly told that the terrorist threat still exists and we have to be ever watchful, our choice may not be as great as we think. Political parties may decide that there is no voter mileage in criticising people who are tough on terrorists with the result that there could be political uniformity in accepting not only the draconian laws that are now in place but more obnoxious laws as the terrorist threat is said to intensify. Some people would call that a “one party state”. There is no doubt that Menzies played the communist card with supreme political skill and virtually eliminated political opposition. His one attempt to achieve legislative intervention through the Communist Party dissolution Act, failed and it failed for one reason. The High Court stood in the way.

However, the current legislation is much more extensive and subtle and the climate is such as to call in question whether the current High Court would see the legislation as an excess of power⁵⁵. Short of that, all things can be done on the say so of the Australian Federal Police if they decide that to reveal the reasons for their conduct would prejudice national security. Short of the High Court stepping in, the continuation of the war on terror will be determined by the information obtained by the police who are not obliged to reveal it if it is considered to prejudice national security. Juridical concerns that the legislation threatens civil society will be associated with those “intellectuals” who seem to be constantly rejected by the wider community and who will earn the epithet of “soft on terrorists”.

⁵⁵ See the discussion in this paper in the section headed *Al-Kateb v Secretary Department of Immigration* at page 21 et seq

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

It may not come to this and hopefully it won't. However, short of the intervention of the High Court, one cannot be but afraid that what we are doing in the name of anti terrorism is creating legal instruments that ensure the erosion of freedoms and that, despite our Constitution, we could end up in a one party state where the police force becomes the tool of politicians.

I have constantly tried to make the point that the new laws protect the Executive in the event that it can claim national security issues as the reason for excluding accused people and their lawyers from hearing the evidence upon which the accused might be convicted; of obtaining orders that dramatically curtail the freedoms of the individual and of legal processes that create enormous difficulties for people who might feel that they are fighting with one hand if not two hands behind their back. That is not to mention the possibility of acts which today would be of a lesser nature being converted into crimes where the penalties are extreme even to the point of life imprisonment. This represents a challenge to our legal system (although in some cases, even a truncated legal apparatus is removed, such as in the process of obtaining a preventative detention order) and to the Judiciary.

In the event that the legislation cannot be modified, the real test will come when the Judiciary will be under pressure to concede issues of national security on the undertaking of the Executive branch of government or to insist, despite the public pressure that will be at large and the insistence of a government that says it is doing its best to fight the war on terror, to require real hard evidence that what is asked of them is supported by robust evidence that stands the test of expert cross examination.

In this regard, one has to keep in mind the ability, once again on the part of the Executive, to exclude lawyers from representing suspects. Once again, even if we accept that security clearances will be dealt with in good faith, the perpetuation of this law and the risk of it being abused is great. Regrettably, as we have seen, there are examples here in Australia where lawyers have been denied access to privileges to which they had entitlement because of political considerations. While one can understand the concern of the legislature that some lawyers may end up being

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

conduits from a detained terrorist to the world of terrorism, one has to also recognise that there are reputable bodies that control practising lawyers. The risk of political abuse, if not today but some time in the future must be incredibly high, given past experience in our own country.

There is a real risk that in the event of Courts holding the Executive to the fire of proof, despite the defence of national security, there could be an attack on the Judiciary for being soft on terrorists resulting in tougher laws being introduced to overcome judicial intransigence. We see this happening all the time. The withdrawal of sentencing rights from Judges associated with the legislating of penalties that prevent Judges from using their judicial discretion is one example of the extent of the intrusion today by the legislative branch into the judicial branch. Another example is the most recent development in Victoria whereby it is suggested that Judges be sent for “retraining” so that they are more aware of community values. I do believe that this is a technique in common use in China. The appointment of temporary Judges, no matter that the policy has utilitarian justification, creates an opportunity in the context of our developing jurisprudence to render the Judiciary even more compliant.

The fact that important decisions impacting on individual rights can be made by Magistrates who do not have the experience of senior members of the Judiciary is not an observation made as a criticism of magistrates but one that is intended to create an awareness of increasing the possibility of mistake on the one hand and succumbing to political pressure in the guise of public concern on the other hand.

Many of the provisions of the anti terrorist legislation lack conformity with requirements of the International Covenant on Civil and Political Rights (to which Australia is a signatory) and in particular Article 9 (No one is to be subjected to arbitrary arrest or detention) and 14 (Due process clauses) and as the law presently stands, those protections cannot be invoked. In the disturbing words of McHugh J in *Al-Kateb v Godwin*⁵⁶

⁵⁶ 2004 219 CLR 562 at page 589

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

“The claim that the Constitution should be read consistently with the rules of International Law has been decisively rejected by members of this Court on several occasions. As a matter of constitutional doctrine, it must be regarded as heretical”

Despite this, Kirby J maintains his maverick promotion of an international compliance doctrine but even his suggestion that in the case of ambiguity, laws should be interpreted in the context of International Law would seem to be a voice in the wilderness, at least at this stage.

Nevertheless, the fact that there is disharmony between the anti terrorist legislation and International Law should be a matter of concern from a number of perspectives. Firstly, in reviewing the legislation, the legislature should be aware of this variation and of the possible consequences of it being ignored. Secondly, Courts, in the event that it is not possible to bring the legislation more into line with “traditional concepts” should be very aware of the necessity to interpret the legislation so as to ensure the highest level of accountability on the part of the Executive. For instance, in issues where closed hearings are called for, Courts will need to be studious to ensure that the most compelling circumstances exist to justify such a departure from our traditional process. Mere objection by the prosecution that issues of national security are at stake should not suffice. A thorough evaluation of the evidence upon which reliance is placed should be undertaken before conceding to requests for closed hearing.

The requirement that the accused and his or her lawyer be absent from hearing certain evidence should be ignored in the event that it is not possible to have it excised from the legislation.

The opportunity to have Orders made pursuant to the Anti-Terrorist Act (No 2) 2005 without adequate material should not be taken and Courts should insist upon a thorough presentation of the material that is said to justify the Order.

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

Where there is doubt as to the right to cross examination, Courts should take the view that cross examination is permitted. If it emerges on interpretation that cross examination in some cases is not permitted then the government should be asked to amend the legislation.

Regrettably, in the environment of fear that has been generated by the unprovoked and heinous activities of terrorists, the pressure will always be for Judges to acquiesce to the demands of the Executive and particularly to requests that they take evidentiary short cuts so as to avoid risking national security. There will always be the concern that if the request is not agreed to, blood might run in the streets, which will increase the pressure to concede, which in turn, will give more confidence to the Executive that they need not have compelling evidence to justify their request.

9 Pre trial detention

As pointed previously⁵⁷, pre trial detention of people charged with offences under the anti terrorist legislation are treated differently, not only to others who are awaiting trial but to people who have actually been convicted of an offence and are in detention for reasons of punishment. The circumstances of their detention are horrific and cannot be said to be justified on any grounds. Regrettably, this is an area of law for which no adequate provision has been made. While the International Covenant on Political and Civil Rights provide for the treatment of persons awaiting trial and who are not convicted, there is no domestic law which enshrines these protections. As a result, it seems that the executive is free to inflict regimes that amount to severe punishment without any statutory control.

If *Teoh*⁵⁸ means anything, it must at least indicate that executive action that results in the infliction of punishment of people who have not been convicted of a crime is a breach of international law. Furthermore, there must be an argument that it offends Chapter III protections against punishment without judicial edicts. It would appear that this argument has not been made in relation to these detainees. Even if one

⁵⁷ See Discussion of detention and international law at page 17

⁵⁸ *Supra* at page 17

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

applies the concepts of Hayne J in *Al-Kateb*⁵⁹ the test of an ancillary power must be abused because if it is an ancillary power pursuant to the Defence power to protect the public from suspected terrorists, it would merely be necessary to incarcerate them but not to inflict punishment.

10 Sedition

If all of this is not enough to worry those who are committed to the Rule of Law, we have the sedition provisions of the Anti-Terrorist Act (No 2) 2005. These provisions have been thoroughly reviewed by the Australian Law Reform Commission, which investigation involved taking into account the views of many interested parties. Suffice it to say that apart from the government and its relevant Executive branches, the attitude to the sedition laws was wholly negative. The Australian Law Reform Commission’s report (#104, July 2006) recommended abolition of the offence altogether. That recommendation has not been accepted by the government. Despite the “good faith” clauses that have been inserted into the legislation, one would now be very concerned to take a position on the war on terror as was taken in relation to the Vietnam War. Given the decisions of the High Court in *Burns and Sharkey*⁶⁰

There are basically five separate Sedition offences a summary of which is:

1. Urging another person to overthrow by force of violence
 - a. The Constitution;
 - b. The Government of a Commonwealth or State;
 - c. The lawful authority of the Government of the Commonwealth.
2. Urging another person to interfere by force of violence with the lawful processes of an election etc.,
3. Urging a group (whether distinguished by race, religion or political opinion) to use force of violence against another group or other groups.

⁵⁹ Supra at page 21

⁶⁰ Supra

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

4. Urging another person to engage in conduct intending the conduct to assist an organization or country with which the Commonwealth is at war either declared or undeclared.
5. Urging a person to assist an organization or country that is in armed conflict with the Australian Defence Force.

“Urging” is an interesting word, particularly when it is coupled with a concept of “recklessness”. It has many manifestations from invocations to footballers at the football to the passionate and zealous expression of political grievances in political rallies. When religion comes into play, the scenarios of “urging” with “recklessness” are manifold and the possibilities of some sort of force or violence, no matter how unintended or remote on the part of the “urger” results in the crime of sedition.

It is interesting to read some of the comments of Robert Garran in *Prosper the Commonwealth*⁶¹ about some of the activities that preceded the adoption of the Constitution and the passions that were aroused at the time. Doubtless there was a lot of hot headed debate that resulted on occasions in physical contact. Political debate does arouse passion. When we add to this the concept of recklessness as an element of the Seditious Crimes, it is not difficult to imagine scenarios where the most innocent observation can have sinister overtones. When this legislation creates crimes that are to be prosecuted according to the procedures provided in the *Civil and Criminal Proceedings Act (2004)* one has to be concerned that the most tenuous connection between recklessness of thought by the accused can be interpreted as having a motive of violence.

Quite apart from that, if one is conscientiously opposed to a military enterprise by its own government (which is not an unusual situation) Section 80.2 (7) would seem to expose such a person to risk if not conviction despite the exception provisions in 80.3.

⁶¹ “Prosper the Commonwealth” Angus & Robertson 1958 Sir Robert Garran QC

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

Sufficient has been said about the inappropriateness of the Sedition provisions. The Australian Law Reform Commission recommends their removal as do all organizations concerned with preservation of fundamental rights. There is ample provision in both the Federal and State Crimes Act to prosecute people who advocate violence. This can be done whether or not the advocacy is in relation to a political or religious issue. The simple fact that one advocates and promotes violence is sufficient to attract Criminal law. To go further and attach political, religious, racial or ideological motives to one’s activities politicises the offence and as is the case with the anti terrorist legislation, creates a tool for politicians and the Executive that can be seriously abused. This fault in the legislation is in addition to the faults already mentioned in that it exposes the most innocent conduct or the practice of a conscientious belief to punishment.

When we look at it in the overall context of the anti terrorist legislation it is fair to draw breath and wonder whether what we are now about is the invention of a new legal order that is subject more and more to political influence and less and less with “traditional concepts”.

One would have hoped, that with the persistent examples of abuse of the crime of Sedition and its poor reputation for politically motivated trials and given the ample armoury that exists in the Criminal law of the Commonwealth and the States, that we would have done with this archaic mechanism that has so often been associated with the suppression of political dissent.

11 Conclusion

This paper set out as an attempt to identify some central features of the anti terrorist legislation in order to gauge its conformity on the one hand with principles of the Rule of Law and the necessity on the other hand, given the existence today of what is known as the “terrorist threat” to depart from the constraints of the Rule of Law.

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

It is of course, never easy to balance the protections extended in a free society to real and evil threats to that society. History suggests that sometimes in doing so, some calamitous consequences flow. For instance, the internment of people with Japanese characteristics even though they were American citizens in the second World War is one such episode where the competing factors of national security on the one hand and individual freedoms on the other were totally out of balance. We did the same here in Australia see *Lloyd v Wallach* and in the second World War it is said that Dr Evatt, when he was Minister for External Affairs consigned thousands of innocent people to military detention on the grounds of ethnicity.

Sometimes, constraints are cultural rather than legal. The Vietnam War gave rise to a culture in Australia where people who were foremost in their dissent were attacked in a number of ways with impunity. Most of them were secretly observed and security files were maintained. They had a fear (and as events have transpired) with some reason that their phone calls were tapped. The degree of discomfort that was inflicted and the extent to which, on occasions, their business activities were damaged, was serious.

The McCarthy regime ended up as an exercise in extra judicial procedures, uncontrolled by the usual protections extended to people charged with crimes that resulted in the ruin of many innocent people despite the fact that they were never charged with any offence. The process resulted in a reign of terror for any who were identified as having the slightest left wing tendencies.

When one introduces to the cultural aspects of a society confronted with a threat or supposed threat of terror; legal processes that interfere with basic rights, particularly when those legal processes are attached to political, religious or ideological disposition, it seems appropriate for a body such as the International Commission of Jurists to ask for a pause in this process so that we can analyse and debate what we are doing in the context of how we see society now and in the future.

Do we want to introduce a regime that associates crime with political, religious and ideological convictions so that we can suspend in those cases the operation of the

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

Rule of Law? Does the war on terror amount to such a grave circumstance as to justify this departure? The answer of anyone concerned about the preservation of a civil society has to be an emphatic NO! If we do not have the facts to convince us that the danger is so acute as to attract an expansionist interpretation of the defence power, we have to rely on the assurance of the Executive. Once we institutionalise this process, we may never know if the war is won or still continuing. In the meantime, we can become used to restrictions that not only deprive people arbitrarily of freedoms but can usher in a culture where such processes are accepted as easily as owner onus (and we rarely complain about the horrific disasters this concept causes from time to time when errant cameras cause cancellation of licences and loss of jobs). By attaching these processes to political, religious and ideological convictions, it is fair to be fearful of where the consequences of such tools end up when they are in the hands of politicians.

When one contemplates the horrific and maniacal attacks on the World Trade Centre, the London Underground and the Bali tourist resort and when one is aware that these catastrophes represent a restless movement of people who do not share our values and therefore embark upon activities that cause dreadful harm to innocent people, the temptation to respond with legal processes that we would abhor if they became part of our traditional legal system, is understandable.

However, it is also important to identify the characteristics that define our society and there is no doubt that the freedoms guaranteed by the Rule of Law are essential elements of these characteristics. The fundamental elements of the Rule of Law are enshrined in International treaties such as the International Covenant on Civil and Political Rights and the Universal Declaration on Human Rights. To abandon them might assist in the fight against terrorism in the short term (although there is no evidence that this is so) but to commit ourselves to a new jurisprudence in a situation of undeclared war which has no origin and in relation to which there are no criteria by which we can determine when it ends gives rise to a fear that in the longer term we will contribute to the ongoing erosion of the very concepts that do characterise us as a free society. This is particularly worrying when the factors that are said to justify the erosion of rights cannot be in the public domain for reasons of

A short review of the various Acts of the Federal Parliament that constitute what might loosely be called the “anti terrorist” legislation

National Security. Where one finds the balance between these conflicting values is a difficult pursuit but it is one that is essential. At the moment, the anti terrorist laws have not found this balance and they put in jeopardy the values that are integral to a civil society. The tendency to arrogate to the executive, authority that was once the province of the Judiciary and to remove the conduct of the executive branch of government from judicial review is a deeply concerning phenomenon. The fact that the transfer of this authority from the judicial branch of Government to the executive branch seems to have the approval of a majority of the members of the High Court is even more disturbing. It is easy to use the threat of terrorism as the justification for this departure from jurisprudential normalcy but once the departure is made, it is difficult to visualise the end and the worry is that we will create a legal environment where departures from the Rule of Law become common place and accepted with frightful consequences.

On a more positive note, one cannot ignore the fact that these issues of the application of principles of the Rule of Law contained in international treaty are at least being aired. In the absence of a Bill of Rights, it is encouraging to see the traditional waters of statutory interpretation being stirred by jurisprudential concepts. However, when these concepts run counter to contemporary political and community assumptions, there is a great danger that the stirring of the currents will subside and gradually, a civil society such as ours will be overcome by concepts of *vi et armis* rather than those enshrined in the Rule of Law. In the end, the only sure protection against an authoritarian society is adherence to the Rule of Law.

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