ANTI-TERRORISM LEGISLATION: ISSUES FOR THE COURTS

Murray McInnis*

There can be little doubt that there are significant challenges facing governments when dealing with terrorism. A recent article[1] in the New York Review of Books revealed the United Nations Office on Drugs and Crime (UNODC) based in Vienna estimates the value of all opiates produced in Afghanistan last year at $US2.8 billion of which $US600 million will be returned to Afghanistan and distributed amongst the farmers. The farmers are controlled by various 'mafia type' criminal organisations who appear to have successfully provided technological advice to the farmers to enable them to maximise the crops. The criminal elements also have an arrangement with the Taliban who in turn forward funds to Al Qaeda to be used for terrorist activities.

The massive scale of this drug production which according to UNODC estimates accounts for 87% of the world's heroin distributed illegally is worth noting in the context of the challenge faced by countries seeking to dealing with terrorism. It is clearly significant as the amounts of money generated by the sale of heroin puts into some context the reference made later in the paper that the cost of the entire operation of the suicide bombings in London was less than £8,000.[2]

One would hope that there will be very few applications requiring the courts to exercise powers of any kind under the non anti-terrorism laws and instead there will be co-operation between Federal and State enforcement agencies using current powers combined with intelligence obtained by Australian Security Intelligence Organisation (ASIO).

In this paper, I shall deal with issues arising out of the *Anti-Terrorism Act (No. 2) 2005* (the Act). The Act is part of what is described as an anti-terrorism legislative package and came into effect in December 2005.

I shall provide a brief overview of the Act and then deal specifically with practical issues arising under the Act for the courts, and in particular the Federal Magistrates Court (the FMC). It will be evident that the legislation raises a wide range of procedural fairness and natural justice issues which are fundamental to both administrative and criminal law.

The Act comprises a number of schedules and claims to be 'an Act to amend the law relating to terrorist acts and for other purposes'. The Act amends other relevant Commonwealth legislation.[3]

The Act is the product of a review of existing federal legislation which in part already dealt with terrorist activity. The Act confers powers on law enforcement and intelligence agencies designed to prevent and investigate terrorism and to strengthen existing laws which target terrorist acts and terrorist organisations.

---

* *Federal Magistrate. Paper delivered to the Australian Institute of Administrative Law 2006 Administrative Law Forum, 23 June 2006.*

It is not possible in a paper of this kind to analyse in detail all the features of the legislation. The two key features of the new scheme which I regard as relevant when considering administrative law and natural justice issues are 'control orders' and provisions which permit police 'preventative detention'.

In the Attorney-General's second reading speech he states the following:

> Under the Control Order regime:
> - an 'interim' control order is made initially. The person the subject of the order may attend Court and make representations when the Court decides to confirm, void or revoke the order;
> - the control order does not come into effect until the person is notified;
> - the person can apply for the order to be revoked, varied or declared void as soon as the person is notified that an order has been confirmed.
> - the person and their lawyer may have a copy of the grounds for making or varying the order;

> Under the preventative detention regime:
> - the order, as well as the treatment of the person detained, would be subject to judicial review; There is also built in merits review including when the police seek a continued preventative detention order.
> - At that time the person detained or their legal representative can provide the police with additional information concerning the preventative detention order.
> - The issuing authority is required to consider afresh the merits of making the order to be satisfied, after taking into account relevant information, including information provided to the police by the person subject to the order, that the conditions for the order are met. This includes any information that has become available since the initial preventative detention order was made.
> - the person detained may contact a lawyer, a family member… their employer… and another person at the discretion of the police officer;
> - each year, the Attorney-General would report to Parliament on the operation of preventative detention orders
> - the regime will not apply to people under 16 and special rules will apply for people between the ages of 16 and 18 and people incapable of managing their own affairs." [4]

The new laws have attracted significant comment.

In a press release entitled, *Judges asked to do the work of police: law council*, the Law Council of Australia stated in part:

> Proposed anti-terrorism legislation would require Australian judges to perform the work of the police, compromising their independence ...

In the same press release the Council President, John North, stated:

> Requiring judges to make detention orders posed a grave risk of asking them to do tasks incompatible with their office.

Mr North further stated:

> Federal judicial officers would be asked to make continued preventative detention orders following an initial order made by an AFP officer.
>
> Judicial officers would be exercising what is obviously a police function, a function of the executive, and this will run the risk of prejudicing public confidence in the independence of the judiciary.[5]

In the Queensland Law Society publication 'Proctor', the President, Rob Davis, in the December 2005 issue stated:

> Make no mistake about it, the federal government's Anti-Terrorism Bill (No. 2) 2005 ("The Bill") is an unprecedented assault on our precious and hard-won civil rights, and it is impossible to understate the truly frightening and awesome provisions and wider implications of this proposed legislation.[6]

In a speech delivered in South Africa in November 2005, Kirby J of the High Court made the following comments:

> The great power of the idea of independent judicial examination of "control orders" and other decisions made under the ... legislation shows, once again, the potent metaphor that judicial review represents in modern democratic constitutional arrangements. It is as if many people recognise the need to counter-balance the swift, decisive, resolute and opinionated actions of officers of the Executive Government with the slower, more reflective, principled and independent scrutiny by the judicial branch, performed against timeless criteria of justice and due process.[7]

Control orders

In Sch 4 of the Act, a control order is defined to mean, 'an interim control order or a confirmed control order'.

An interim control order means an order made under ss 104.4, 104.7 or 104.9. Section 104.4 provides power to the issuing court to make an interim order. It is useful to refer to s 104.4 in the attachment.

Section 104.7 provides for the making of an urgent interim control order by electronic means, whilst s 104.9 provides for the making of those orders in person.

It is interesting to note that s 104.5 in the attachment sets out the terms of an interim control order.

A 'confirmed control order' means an order made pursuant to s 104.16. That section is set out in the attachment.

It will be noted that the control orders are made by an issuing court. An issuing court, pursuant to s 100.1(1) of the Criminal Code as amended by the Act, means:

(a) the Federal Court of Australia; or

(b) the Family Court of Australia; or

(c) the Federal Magistrates Court.

It will be readily apparent that significant information needs to be presented to the issuing court to enable it to be satisfied on the balance of probabilities that the making of the order would substantially assist in preventing a terrorist act or that the person has provided training to or received training from a listed terrorist organisation, and, further, that the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act (see s 104.4).

A number of observations may immediately be made in relation to the significance of a control order. The substantial observation, in my view, which is relevant, is that the standard of proof is only on 'the balance of probabilities' and the court, in being satisfied on the balance of probabilities in relation to the restrictions, need only consider that the order is 'reasonably necessary' and 'reasonably appropriate'.

The terms of an interim control order are significant. They provide a wide range of restrictions, though as noted earlier from the Minister's Second Reading Speech, the person who is the subject of such an order may apply for the order to be revoked, varied or declared void as soon as the person is notified that an order is being confirmed.

Preventative detention orders

Subdivision B of Sch 4 of the Act provides for preventative detention orders as described by the Minister in the Second Reading Speech earlier in this paper.

The object of the division is stated in s 105.1 to be 'to allow a person to be taken into custody and detained for a short period of time in order to prevent an imminent terrorist act occurring; or preserve evidence of, or relating to, a recent terrorist act.' (see attachment)

Of significance, when considering the role of the judiciary in relation to preventative detention orders are the persons who may be appointed as an issuing authority for the making of continued preventative detention orders. Pursuant to s 105.2 of the Act, the Minister may by writing appoint as an issuing authority for continued preventative detention orders the following:

105.2 Issuing authorities for continued preventative detention orders

(a) a person who is a judge of a State or Territory Supreme Court; or

(b) a person who is a Judge; or

(c) a person who is a Federal Magistrate; or

(d) a person who:
  (i) has served as a judge in one or more superior courts for a period of 5 years; and
  (ii) no longer holds a commission as a judge of a superior court; or

(e) a person who:
  (i) holds an appointment to the Administrative Appeals Tribunal as President or Deputy President; and
  (ii) is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory; and
  (iii) has been enrolled for at least 5 years.

The same section also provides, in subsection (2), that the Minister must not appoint a person unless the person has 'by writing consented to being appointed' and the consent is in force.

It should be observed that the categories of issuing authorities go beyond those currently holding judicial appointment in a state or territory or persons who may be a Judge or Federal Magistrate. They include persons who have served as a Judge in one or more superior courts for a period of five years and who no longer hold a commission as a Judge of a superior court or a person who holds an appointment to the Administrative Appeals Tribunal as a President or Deputy President and is enrolled as a legal practitioner of a Federal Court or of the Supreme Court of a State or Territory and has been enrolled for at least five years.

Judicial Presidents of the AAT are Federal Court judges. The Deputy Presidents, however, do not hold judicial office and not all the current appointments are tenured in the same manner as a Chapter III Justice or a Judge of a State or Territory Supreme Court.

A further observation may be made in relation to issuing authorities in that the Minister must not appoint a person to act as an issuing authority unless that person has consented to being appointed and that the consent is in force. Hence the legislation provides for what might be described as a self-nomination process.

The self-nomination process is one which operates under other legislation.[8]

The self-nomination process for issuing authorities, whilst on the one hand providing a degree of judicial supervision, may, if a small number of volunteers come forward, result in -

at least potentially - a narrow approach being adopted when considering orders which clearly have a significant impact upon the liberty of the subject.

It is significant to note that even where a Judge or Presidential Member of the AAT indicates in writing to the Attorney-General that he or she is prepared to accept an appointment as an issuing authority, there is a still a discretion in the Minister to decide whether to appoint that person. There is no guidance in the legislation as to the factors to be taken into account and the exercise of that discretion and it is not clear whether a decision of that kind would necessarily be reviewable. Hence, there is at least the potential for the government of the day to select certain persons to perform the task which may result in a small group of persons selected as issuing authorities for the purpose of preventative detention orders.

The other issue which will arise is the question of whether it would be preferable for all eligible persons to self-nominate or at least to be encouraged to nominate so that the number of persons dealing with applications will be greater and applications can then be allocated on a strict rotational basis.

Likewise the panel of Judges with appropriate expertise and knowledge established by the Courts to deal with applications under the legislation to the Court would need to ensure that those selected with appropriate knowledge and experience are all available on a strict rotational basis. This would avoid any suggestion of forum shopping or applicants seeking to obtain orders whether by persons acting in a persona designata role or in a Court role who are regarded as more likely to grant the order.

The basis for applying for and making preventative detention orders is set out in s 105.4 of the Act which I also include in the attachment.

Persona designata

It is further noted that the role performed by the issuing authority is properly described as a *persona designata* role. So much is clear from s 105.18 which provides:

> 105.18 Status of person making continued preventative detention order
>
> (1) An issuing authority who makes:
> (a) a continued preventative detention order; or
> (b) a prohibited contact order in relation to a person's detention under a continued preventative detention order;
> has, in the performance of his or her duties under this Subdivision, the same protection and immunity as a Justice of the High Court.
> (2) A function of:
> (a) making or revoking a continued preventative detention order; or
> (b) extending, or further extending, the period for which a continued preventative detention order is to be in force; or
> (c) making or revoking a prohibited contact order in relation to a person's detention under a continued preventative detention order;
> that is conferred on a judge, a Federal Magistrate or a member of the Administrative Appeals Tribunal is conferred on the judge, Federal Magistrate or member of the Administrative Appeals Tribunal in a personal capacity and not as a court or a member of a court.

The *persona designata* role raises a number of important issues, none the least of which concern the separation of powers. It is perhaps not surprising that as far as I know, very few Chapter III Justices in Australia have accepted a *persona designata* appointment as an issuing authority for preventative detention orders.

In an information paper on what was then the Anti-Terrorism Bill, Carmody J of the Family Court of Australia and Chair of the Family Court of Australia Law Reform Committee made

what I regard to be a helpful and appropriate comment in relation to the *persona designata* role of Judges when he stated:

> Individual judges have a right, and maybe even a duty, to act in their private capacities for the benefit of the community provided what they do and how they do it is not incompatible with their judicial role and functions. Whether an individual judge accepts a persona designata position is a matter entirely for their own conscience and decision except, perhaps, to the extent that their private action impairs community confidence in the court as a whole or somehow brings the judiciary into disrepute. The risk of being criticised for the manner in which they exercise their persona designata, ie. by issuing an invalid order, is an occupational hazard and not likely to cause public disquiet. However, if a judge was thought to be 'chosen' for his or her personal leanings, prejudices or predispositions, then there would be a real danger of a crisis of confidence in his or her capacity to act judiciously (as distinct from judicially) and even-handedly. This, arguably, could reduce the public standing of the court and adversely affects its integrity. [9]

There are significant security concerns in relation to the documentation and arrangements for the issuing of orders and the hearing of applications under the legislation. Security clearances, as I understand it, will need to be given to all persons handling the files and, what obviously will be on many occasions, sensitive security documents. This will involve the allocation of significant resources to ensure security of documents and all personnel dealing with these applications. I am not aware of the current arrangements in place to meet those requirements in the FMC, though no doubt arrangements will be made with the cooperation of all relevant courts.

Another practical matter of concern is the issue of security for both the judicial officers and staff when dealing with applications under the anti-terrorism legislation. Security concerns are valid and it is clear that all persons dealing with applications would need a security clearance and proper facilities need to be established throughout Australia to ensure that security needs can be met by the Courts. Security should also extend of course to personal security for those dealing with these sensitive cases which of their nature will obviously involve a higher risk than other applications which are dealt with by the Courts. No doubt the Court administrators are working hard to establish protocols and provide the appropriate resources and facilities to ensure that security clearances are obtained for the maximum number of staff which at the very least should include all associates to the Judges and appropriate registry staff. However, if security arrangements are only put in place for a selected small number of staff then that selection process itself may also result in effectively narrowing the field of judicial officers who may be approached to deal with these matters.

A further issue yet to be fully canvassed involves protocols and procedures to be adopted by issuing authorities. These include questions as to whether staff may be present during a hearing even though staff may not have a security clearance. Security clearances themselves are time consuming and presumably would need to be undertaken when there was a change in staffing arrangements. This is a common feature in the Federal Courts where associates are usually only appointed for a period of 12 months. The legislation does not appear to provide an obligation on applicants seeking orders from issuing authorities to disclose that earlier applications have been made and refused. No doubt individual Justices acting as issuing authorities may seek further information regarded as relevant. It would not be appropriate for an application to be refused by one issuing authority only to be repeated without additional information before another issuing authority.

In relation to control orders coming before the court, in my view the courts may need to put in place a system for the allocation of the cases which may require specialist panels. Panels will need to be constituted by a broad range of members of a court rather than a narrow group, and cases as a matter of fairness would need to be allocated on a strict rotational basis. Any alternative basis for allocating cases may lead to allegations that certain members of the court, whilst possessing appropriate skills and experience, may then become the favoured forum for those seeking orders under the new legislation.

Conclusion

Despite the absence of a 'Bill of Rights' in Australia, the civil liberties of Australiana have been traditionally protected in various ways by our common law and legislation.

Clearly the threat of terrorism has attracted attention from many governments throughout the world. Again, the problem may arise of a perception in these circumstances of apprehended bias which may be created simply by a failure to allocate the appropriate resources and arrange necessary security clearances for all relevant staff.

A brief comparative analysis of anti-terrorism legislation throughout the world reveals in my view that the Australian legislation seems to be more far reaching and significant in terms of the civil rights and natural justice concerns referred to earlier in this paper. Dealing with terrorism remains a significant challenge. In the United Kingdom the Parliament established the Intelligence and Security Committee by *the Intelligence Services Act 1994* (the ISC). The ISC was required to examine policy administration and expenditure of the Security Service, Secret Intelligence Service (SIS) and Government Communications Headquarters. The ISC examined intelligence and security matters which related to the London terrorist attacks which occurred on 7 July 2005. It produced a report to the Prime Minister dated 30 March 2006 entitled, *Report into the London Terrorist Attacks on 7 July 2005*. The Report was presented to the Parliament by the Prime Minister in May 2006. In its report the ISC makes the following observation in relation to the governments counter terrorism strategy,

> 11. Since 2002, Government work to counter Islamist terrorism has taken place under the Government's counter-terrorism strategy, known as CONTEST. This strategy has brought together the work of all departments (including that of the intelligence and security agencies) under one aim: 'to reduce the risk from international terrorism so that people can go about their business freely and with confidence'.

The ISC then proceeds to analyse the issue of counter-terrorist intelligence. When dealing with the attacks which occurred on 7 July the ISC noted that the security service 'had come across' two of the suicide bombers 'on the peripheries of other surveillance and investigative operations'. At the time the identities of the suicide bombers were not known to the security services and there was no appreciation of their subsequent significance. The ISC then states in its summary and conclusion the following:-

> 55 It is also clear that, prior to the 7 July attacks, the Security Service had come across Siddeque Khan and Shazad Tanweer on the peripheries of other surveillance and investigative operations. At that time their identities were unknown to the Security Service and there was no appreciation of their subsequent significance. As there were more pressing priorities at the time, including the need to disrupt known plans to attack the UK, it was decided not to investigate them further or seek to identify them. When resources became available, attempts were made to find out more about these two and other peripheral contacts, but these resources were soon diverted back to what were considered to be higher investigative priorities.
>
> 56 It is possible that the chances of identifying attack planning and of preventing the 7 July attacks night have been greater had different investigative decisions been taken in 2003-2005. Nonetheless, we conclude that, in light of the other priority investigations being conducted and the limitations on Security Service resources, the decisions not to give greater investigative priority to these two individuals were understandable.
>
> 57 In reaching this conclusion we have been struck by the sheer scale of the problem that our intelligence and security Agencies face and their comparatively small capacity to cover it. The Agencies had to reassess their capacity to cope as a result of the July attacks – an issue that we will consider in more detail in Sections 5 and 6.

As noted earlier the U.K. the Home Secretary estimates that the costs of the entire operation carried out by the four suicide bombers was less than £8,000.

I mention the report of the ISC and the U.K. experience simply to illustrate the significant and challenging problems confronting authorities when dealing with terrorism. It is not clear that strong anti-terrorism laws of the kind that we have in Australia, if introduced in the same form in the U.K. would have prevented the July 7 tragedy.

Administrative lawyers for many years have been acutely aware of the need to protect rights arising out of administrative decisions through due process. Decisions made under this new legislation, both in court and in the exercise of *persona designata* functions, raise what could only be described as decisions which to some extent may be described as administrative but clearly may be properly characterised as decisions which have wide implications for civil rights in this country.

I have raised practical concerns most of which have yet to be addressed in Australian Courts as they illustrate the need for extreme care and caution when dealing with this significant legislation. This legislation will have a dramatic impact upon the civil rights and freedoms which are so valued in our democratic society. Care should be taken to ensure that the administration of these laws is undertaken in a fair and impartial manner. To do otherwise would be to undermine the significant contribution that the judiciary may make in the administration of these laws both in a personal capacity and in their normal Court capacity.

Attachment to the anti-terrorism paper delivered to the AIAL 2006 Administrative Law Forum

104.4 Making an interim control order

(1) The issuing court may make an order under this section in relation to the person, but only if:

(a) the senior AFP member has requested it in accordance with section 104.3; and

(b) the court has received and considered such further information (if any) as the court requires; and

(c) the court is satisfied on the balance of probabilities:

(i) that making the order would substantially assist in preventing a terrorist act; or

(ii) that the person has provided training to, or received training from, a listed terrorist organisation; and

(d) the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

(2) In determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, the court must take into account the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances).

(3) The court need not include in the order an obligation, prohibition or restriction that was sought by the senior AFP member if the court is not satisfied as mentioned in paragraph (1)(d) in respect of that obligation, prohibition or restriction.

104.5 Terms of an interim control order

(1) If the issuing court makes the interim control order, the order must:

(a) state that the court is satisfied of the matters mentioned in paragraphs 104.4(1)(c) and (d); and

(b) specify the name of the person to whom the order relates; and

(c) specify all of the obligations, prohibitions and restrictions mentioned in subsection (3) that are to be imposed on the person by the order; and

(d) state that the order does not begin to be in force until it is served personally on the person; and

(e) specify a day on which the person may attend the court for the court to:

(i) confirm (with or without variation) the interim control order; or

(ii) declare the interim control order to be void; or

(iii) revoke the interim control order; and

(f) specify the period during which the confirmed control order is to be in force, which must not end more than 12 months after the day on which the interim control order is made; and

(g) state that the person's lawyer may attend a specified place in order to obtain a copy of the interim control order; and

(h) set out a summary of the grounds on which the order is made.

Note 1: An interim control order made in relation to a person must be served on the person at least 48 hours before the day specified as mentioned in paragraph (1)(e) (see section 104.12).

Note 2: A confirmed control order that is made in relation to a 16- to 18-year-old must not end more than 3 months after the day on which the interim control order is made (see section 104.28).

(1A) The day specified for the purposes of paragraph (1)(e) must be as soon as practicable, but at least 72 hours, after the order is made.

(2) Paragraph (1)(f) does not prevent the making of successive control orders in relation to the same person.

(2A) To avoid doubt, paragraph (1)(h) 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*).

Obligations, prohibitions and restrictions

(3) The obligations, prohibitions and restrictions that the court may impose on the person by the order are the following:

(a) a prohibition or restriction on the person being at specified areas or places;

(b) a prohibition or restriction on the person leaving Australia;

(c) a requirement that the person remain at specified premises between specified times each day, or on specified days;

(d) a requirement that the person wear a tracking device;

(e) a prohibition or restriction on the person communicating or associating with specified individuals;

(f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the Internet);

(g) a prohibition or restriction on the person possessing or using specified articles or substances;

(h) a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);

(i) a requirement that the person report to specified persons at specified times and places;

(j) a requirement that the person allow himself or herself to be photographed;

(k) a requirement that the person allow impressions of his or her fingerprints to be taken;

(l) a requirement that the person participate in specified counselling or education.

Note: Restrictions apply to the use of photographs or impressions of fingerprints taken as mentioned in paragraphs (3)(j) and (k) (see section 104.22).

Communicating and associating

(4) Subsection 102.8(4) applies to paragraph (3)(e) and the person's communication or association in the same way as that subsection applies to section 102.8 and a person's association.

(5) This section does not affect the person's right to contact, communicate or associate with the person's lawyer unless the person's lawyer is a specified individual as mentioned in paragraph (3)(e). If the person's lawyer is so specified, the person may contact, communicate or associate with any other lawyer who is not so specified.

Counselling and education

(6) A person is required to participate in specified counselling or education as mentioned in paragraph (3)(l) only if the person agrees, at the time of the counselling or education, to participate in the counselling or education.

104.16 Terms of a confirmed control order

(1) If the issuing court confirms the interim control order under section 104.14, the court must make a corresponding order that:

(a) states that the court is satisfied of the matters mentioned in paragraphs 104.4(1)(c) and (d); and

(b) specifies the name of the person to whom the order relates; and

(c) specifies all of the obligations, prohibitions and restrictions mentioned in subsection 104.5(3) that are to be imposed on the person by the order; and

(d) specifies the period during which the order is to be in force, which must not end more than 12 months after the day on which the interim control order was made; and

(e) states that the person's lawyer may attend a specified place in order to obtain a copy of the confirmed control order.

Note: A confirmed control order that is made in relation to a 16- to 18-year-old must not end more than 3 months after the day on which the interim control order was made (see section 104.28).

(2) Paragraph (1)(d) does not prevent the making of successive control orders in relation to the same person.

105.1 Object

The object of this Division is to allow a person to be taken into custody and detained for a short period of time in order to:

(a) prevent an imminent terrorist act occurring; or

(b) preserve evidence of, or relating to, a recent terrorist act.

Note: Section 105.42 provides that, while a person is being detained under a preventative detention order, the person may only be questioned for very limited purposes.

105.4 Basis for applying for, and making, preventative detention orders

(1) An AFP member may apply for a preventative detention order in relation to a person only if the AFP member meets the requirements of subsection (4) or (6).

(2) An issuing authority may make a preventative detention order in relation to a person only if the issuing authority meets the requirements of subsection (4) or (6).

Note: For the definition of ***issuing authority***, see subsection 100.1(1) and section 105.2.

(3) The person in relation to whom the preventative detention order is applied for, or made, is the ***subject*** for the purposes of this section.

(4) A person meets the requirements of this subsection if the person is satisfied that:

(a) there are reasonable grounds to suspect that the subject:

(i) will engage in a terrorist act; or

(ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or

(iii) has done an act in preparation for, or planning, a terrorist act; and

(b) making the order would substantially assist in preventing a terrorist act occurring; and

(c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

(5) A terrorist act referred to in subsection (4):

(a) must be one that is imminent; and

(b) must be one that is expected to occur, in any event, at some time in the next 14 days.

(6) A person meets the requirements of this subsection if the person is satisfied that:

(a) a terrorist act has occurred within the last 28 days; and

(b) it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act; and

(c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

(7) An issuing authority may refuse to make a preventative detention order unless the AFP member applying for the order gives the issuing authority any further information that the issuing authority requests concerning the grounds on which the order is sought.

Endnotes

1 The New York Review of Books June 22, 2006 p.26

2 According to Home Secretary John Reid ,*Guardian Weekly* May 19-25, 2006

3 *Criminal Code Act 1995*, the *Crimes (Foreign Incursions and Recruitment) Act 1978*, the *Financial Transactions Reports Act 1988*, the *Australian Security Intelligence Organisation Act 1979*, the *Surveillance Devices Act 2004*, the *Administrative Decisions (Judicial Review) Act 1977*, the *Crimes Act 1914*, the *Migration Act 1958*, the *Aviation Transport Security Act 2004,* the *Proceeds of Crime Act 2002*, the *Customs Act 1901* and the *Customs Administration Act 1985.*

4 Attorney-General Second Reading Speech Anti-Terrorism Bill (No.2) 2005 House of Representatives Hansard 3 November 2005 p.102

5 Law Council of Australia, press released dated 27 October 2005.

6 Proctor, December 2005, page 2.

7 The Honourable Michael Kirby J, 'Judicial Review in a Time of Terrorism - Business as Usual', an essay delivered on 25 November 2005 at the University of Witwatersrand, School of Law and South Africa Journal of Human Rights, Johannesburg, South Africa.

8 *Telecommunications (Interception) Act 1979, Australian Security Intelligence Organisation Act 1979, Surveillance Devices Act 2004.*

9 Justice Tim Carmody, 'The Anti-Terrorism Bill (No. 2) 2005,' Information Paper, 24 November 2005. Carmody J acknowledges in his paper that he has relied upon two articles namely, '*Wilson & Kable:* The Doctrine of Incompatibility – An Alternative to Separation of Powers?' Associate Professor Gerard Carney (1997) 13 QUTLJ 175 and Elizabeth Handsley 'Do Hard Laws make Bad Cases? – The High Court's Decision in *Kable v Director of Public Prosecutions (NSW)*' (1997) 25 FedL Rev.171.