CALL-OUT POWERS FOR THE AUSTRALIAN DEFENCE FORCE IN AN AGE OF TERRORISM: SOME LEGAL IMPLICATIONS

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The use of the Australian Defence Force (ADF)[1] by the government in situations that do not involve those specifically envisaged by the *Constitution*[2] can be a cause of tension between those who can see the logical benefit of using Commonwealth assets to their maximum advantage in adverse situations and those who are cautious about deploying the ADF internally within Australia. There are, of course, solid arguments which support both points of view,[3] and there is also an extra dimension in terms of ensuring that there is adequate legal protection for ADF members when they are deployed in circumstances where an expectation might arise that they may be required to use some level of force.

Until relatively recently, the legal framework which supports the internal deployment of the ADF was vague and uncertain and there was little fidelity surrounding the statutory procedure upon which the use of the ADF within Australia — the 'call-out' provisions — could be based. Rather, reliance on the 'executive power'[4] has been the historical basis upon which governments from across the political spectrum have used the ADF (including its people and equipment) in situations when it was considered that extraordinary measures were required.

This article will examine the manner in which the legal authority for the deployment of the ADF in Australia has been addressed. The first part of the article will distinguish between call-out and other ADF assistance before reviewing the main constitutional issues that affect the internal deployment of the ADF. This analysis will be followed by a brief review of some of the judicial decisions which have considered the extent of the defence power under the *Constitution* and/or the use of the ADF.

The second part of the article will examine the legislative amendments which were put in place in 2000 when the wide-scale deployment of the ADF in support of logistic and security arrangements for the Sydney Olympic Games occurred.[5] In 2006, as part of the preparation for the Melbourne Commonwealth Games, further legislative amendments specifically recognised that security threats could emanate from the maritime and air environments.[6] The key aspects of these amendments will be examined later in this article, as will some of the impacts and issues which arise from a legal and operational perspective.

Call-out distinguished from ADF assistance

At the outset it is important to distinguish between some of the different ways in which the ADF may be deployed internally in Australia. The most fundamental distinction involves an appreciation that situations can arise when it is expected that some of the ADF personnel

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involved may be required to use force against the population, whereas in other situations no such expectation arises.

Historically, this distinction had been marked by two different nomenclatures supported by relevant Defence Instructions: Defence Assistance to the Civil Community (DACC)[7] and Defence Force Aid to the Civil Power/Authority (DFACP/A).[8] The distinction is further clarified by describing DACC as primarily comprising the provision of support to the community by the ADF in circumstances where the civilian community does not have the necessary resources to undertake a specified task.[9] Disaster relief is included among the tasks which are covered by DACC.

On the other hand, DFACP/A consists primarily of providing ADF assistance to Commonwealth or state/territory law enforcement bodies in circumstances where their law enforcement capabilities are insufficient or inadequate for the task. Clearly, the latter circumstance is the one where the potential use of the ADF within Australia has the capacity to cause the most concern for both the civil community and those members of the ADF involved in the operation.

In terms of direct authorisation to a particular element of the ADF to provide either DACC or DFACP/A, the use of Defence Instructions[10] are one means by which the Secretary of the Department of Defence and the Chief of the Defence Force (CDF) may jointly issue instructions or orders which are of a permanent or standing nature unless/until there is subsequent amendment. The *Defence Act 1903* (Cth) allows the Secretary and the CDF to issue such instructions when their purpose is 'for the good governance and administration of the ADF':

> (1) Subject to section 8, the Secretary and the Chief of the Defence Force shall jointly have the administration of the Defence Force except with respect to:
>
> (a) matters falling within the command of the Defence Force by the Chief of the Defence Force or the command of an arm of the Defence Force by the service chief of that arm of the Defence Force; or
>
> (b) any other matter specified by the Minister.
>
> (2) Instructions issued by or with the authority of the Secretary and the Chief of the Defence Force in pursuance of the powers vested in them jointly by virtue of subsection (1) shall be known as Defence Instructions (General).[11]

The use of Defence Instructions to support and direct ADF activities is often buttressed by other administrative processes — but, arguably, these other mechanisms do not possess the same line of direct legislative authority.[12] Nevertheless, there is certainly an expectation that all military and civilian ADF personnel will adhere to the requirements of the *Defence Assistance to the Civil Community Manual* (DACC Manual). Additionally, it has been made clear in the *2016 Defence White Paper* that the provision of DACC and DFACP/A are both key functions of the ADF, and defence capability will be structured and procured with both of these tasks in mind.[13] Accordingly, it can be concluded that defence policy and some elements of legislation applicable to defence provide sufficient legal basis for at least initial consideration of the use of the ADF in internal security operations within Australia.

Constitutional issues

Turning now to the constitutional basis upon which the ADF might be deployed on such operations within Australia, the first observation to note is that the topic of when and how the *Constitution* supports the use of the ADF within Australia is one that has caused debate and difference in opinion among selected Australian legal, military and academic writers.[14]

Further, the issue is not one that has only been contemplated in relatively recent times;[15] nor has consideration of this topic been confined to Australian writers.[16]

Part of the answer to understanding the constitutional basis for using the ADF within Australia comes from consideration of the constitutional authority provided by 51(vi) of the *Constitution* (the 'defence power'), which states:

> The Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:
>
> …
>
> (vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth …

It is noted that there are two limbs to s 51(vi). The first limb provides the power to the Commonwealth Parliament to deal with, in general terms, the defence of Australia (both the Commonwealth and the states), while the second limb provides a different element of power insofar as it permits the Commonwealth to legislate to control the forces which will execute and maintain its laws.[17] It is further contended that the second limb of s 51(vi) can be construed as having two elements. The first element is that it permits the passage of legislation that deals with the ADF itself, such as the *Defence Act 1903* and associated amending legislation which is regularly enacted by the Parliament. The second element is that the proper reading of s 51(vi) supports the view that it permits the enactment of other laws (using the defence power as constitutional authority) which do not directly affect the control of the ADF but which do assist in executing and maintaining the laws of the Commonwealth.[18]

Clearly, it is contemplated that constitutional authority exists under s 51(vi) for the Commonwealth to take the necessary action to defend Australia, including making the necessary preparations for such defence, in circumstances where an attack is being contemplated, or has occurred against, Australia. While it may be hoped that Australia's military forces and capabilities are sufficient to prevent such action occurring in areas which are subject to Australian jurisdiction, the lessons of history do not support this view. Further, the nature of threats currently posed by non-state armed groups leads to a sense of inevitability of an attack which would be likely to necessitate ADF involvement in the response occurring in the near to medium term.[19]

Deployment of the ADF in Australia might also be supported by the executive power of the Commonwealth under s 61 of the *Constitution*:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor General as the Queen's representative, and extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth …

The extent of the executive power is a topic which has 'rarely been examined in the High Court',[20] with (on one account) fewer than 15 High Court cases directly considering the nature of this power.[21] However, one area involving Australian military deployments which has exclusively been the subject of the executive power has been the decision to commit Australian forces to combat operations overseas. It is true that, on most occasions, Parliament has been informed of the decision, but Parliament has never been specifically asked to approve or vote on a decision to deploy Australian forces overseas in a combat role. Instead, the government of the day has relied on the executive prerogative to provide the legal basis for such deployments.[22] Despite a number of attempts to alter this situation, most recently by the introduction of the Defence Legislation Amendment (Parliamentary Approval of Overseas Service) Bill 2015 into the Parliament by the Australian Greens party,

there seems little prospect of any changes being made to the current practice in the foreseeable future.[23]

Internally, the use of the executive power to provide the legal basis for the Commonwealth's use of Australian forces within Australia has been linked with a surviving prerogative which permits the Commonwealth to take action that (in very broad terms) 'protects its interests'. A detailed analysis of actions of this type which the Commonwealth has taken since Federation was undertaken by Elizabeth Ward for the Parliamentary Library in the 1990s.[24] The key conclusions were:

- there are legal difficulties inherent in nearly all uses of the defence forces for 'non-defence' purposes;
- successive Commonwealth governments have used the defence forces without prior consideration of the legal steps involved;
- the defence forces have often responded to requests without regard for their own operational instructions; and
- on a legal basis, the deployed troops are found to be largely unprotected.

In terms of the Commonwealth protecting its interests, much of the analysis contained in Ward's paper was centred on s 61, but it was noted that the power which the Commonwealth exercised under s 61 'may vary depending on the extent to which there is a relevant law to execute'.[25] The implication raised by this finding supports the contention that using s 61 alone to provide the legal basis for the use of the ADF within Australia is problematic from a legal perspective on a number of fronts.

There have been two interesting recent developments in terms of the extent to which s 61 can be relied upon to support the deployment of the ADF within Australia. The first development was the decision of the High Court in *Williams v Commonwealth*[26] (*Williams*), where the issue raised was whether Commonwealth expenditure was supported from the perspective of either a valid head of legislative power under the *Constitution* or the executive power of the Commonwealth. The High Court held that support was not provided by either power. The potential issue for the future deployment of the ADF within Australia is that *Williams* makes it clear that the allocation of funds to provide for the deployment of the ADF could be challenged if it was considered there was not a solid constitutional basis under either an explicit head of power (for example, s 51(vi) or s 119) or the executive power.

In relation to the second development, the decision in *CPCF v Minister for Immigration and Border Protection*[27] builds upon *Williams* in the sense that it perhaps foreshadows a line of reasoning which, if adopted in the future, could call into question the constitutional validity of authorising the use of the ADF in Australia relying on the executive power. Kiefel J raised this issue in the following terms:

> It can hardly be said that a statute such as the MP [Maritime Powers] Act, which authorises a decision that the relevant powers be exercised in a particular way and details the manner and conditions of their exercise, and in respect of which the role of the Commonwealth Executive is discernible, supports an intention that the Commonwealth Executive is to retain a complete discretion as to how such powers are to be exercised.[28]

There is potential that a combination of the two cases could adversely affect the deployment of the ADF within Australia, especially if the circumstances were considered to be controversial, as would be the case in the event of an allegation that such use of the ADF was 'politically motivated'. A constitutional challenge could be mounted on the basis used in *Williams* (in terms of the use of Commonwealth funds) and/or by seeking a ruling from the High Court that pt IIIAAA of the Defence Act already provides a comprehensive regime for the use of the ADF in Australia and this has therefore extinguished any residual s 61

executive power. Although these situations are untested, an element of caution should be adopted if there is any future desire to use s 61 as the basis for the deployment of the ADF.

The use of the command power under s 68 of the *Constitution* is included for completeness rather than because there is any reasonable expectation that the Governor-General might exercise actual command and authority over the deployment of the ADF within Australia. Section 68 provides: 'The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.'

It is not the purpose of this article to review the command power extensively other than to note that the existence of that power in anything other than a 'titular' sense has long been considered otiose.[29] In fact, when reflecting upon his command role, Sir Ninian Stephen noted that:

> [p]urely titular my title as Commander-in-Chief may be, but it does reflect the quite special relationship that I believe exists between the Governor-General and the armed forces of the Commonwealth. It is a close relationship of sentiment, based neither upon control nor command but which in our democratic society expresses on the one hand the nation's pride in and respect for its armed forces and, on the other, the willing subordination of members of those forces to the civil power.[30]

Finally, and for completeness, it is noted that s 119 of the *Constitution* stipulates that the Commonwealth has an obligation to protect the states (and territories) against invasion and, if requested, against domestic violence: 'The Commonwealth shall protect every State against invasion, and on the application of the Executive Government of the State, against domestic violence.'

The first limb of s 119 is uncontentious, as this function for the ADF is entirely consistent with other authorisations in the *Constitution* as well as a long line of legal reasoning. However, the second limb is an area where the potential for dispute can arise and, as will be shown below, is precisely the situation envisaged by the activation of the regime provided for in pt IIIAAA of the Defence Act. However, pt IIIAAA goes further than s 119, as it also permits the Commonwealth to protect its own interests without any request from a state. In the broadened understanding of national security that currently exists in Australia, it is quite conceivable that the Commonwealth could deploy the ADF without waiting for a state request.

The impact of judicial decisions

Since Federation, there have been numerous judicial decisions which have considered the extent of the defence power under the *Constitution* and/or the use of the ADF within Australia. A number of these cases have directly addressed the reach of the defence power under s 51(vi),[31] while others have had a more peripheral connection with the military.[32] Brief examination of a few selected cases thus repays attention.

In terms of cases which have had a direct impact on the constitutional validity of action purportedly supported by the defence power, in *Farey v Burvett*[33] the High Court found that the use of the defence power to support the fixing of the price of bread at a time when there was a global conflict occurring (the First World War) was permitted. Similarly, during the Second World War the High Court held that the defence power could legitimately be used as the basis for the constitutional validity of the *Income Tax (Wartime Arrangements) Act 1942* (Cth).[34] However, in *Australian Communist Party v Commonwealth*[35] the High Court did not consider that the reach of s 51(vi) was sufficient to provide a basis for upholding the constitutional validity of a law which sought to make the existence of the Communist Party in Australia illegal.

While it is beyond the immediate scope of this article, analysis of the meaning and extent of power provided by the two limbs of s 51(vi) was recently considered by the High Court in *Thomas v Mowbray*.[36] In that decision, the Court upheld the use of the defence power to underpin the control order regime which is contained in the Criminal Code (Commonwealth)[37] despite there being no involvement of ADF personnel in the particular circumstances of the case. In this sense, the second limb of s 51(vi) was found to extend to 'forces' other than those which are part of the ADF (for example, the Australian Federal Police).

Turning to cases which have affected the ADF and its operations, one of the most celebrated cases in recent times arose when the vessel *MV Tampa*, having rescued over 400 persons who were in distress at sea, sought to enter Australian waters at Christmas Island in August 2001. The government decided that it would not permit *MV Tampa* to offload the 'rescuees'[38] at Christmas Island, and proceedings were commenced in the Federal Court, in effect, to seek an injunction against the stated intention of the government to remove the rescuees from the *MV Tampa* and take them to Nauru as part of the 'Pacific solution'.[39] The injunction was successful at trial but was immediately and successfully appealed to the Full Court of the Federal Court by the government.[40] An application for special leave to appeal the Full Court's ruling in the High Court was discontinued, as by the time the application was heard on 27 November 2001 the circumstances had so altered that there was no basis for proceeding with the case.[41]

In *A v Hayden [No 2]*[42] the involvement of the ADF was limited to providing assistance to assess how a training activity being undertaken by the Australian Secret Intelligence Service was conducted. There was no suggestion that the ADF was deeply involved in the planning of or preparation for the activity itself and the one Army member present while the training activity occurred was nowhere near the main scene of action. The main learning point for all involved with this case, including the military, was that activities carried out in Australia must comply with relevant Australian law. Gibbs CJ stated:

> It is fundamental to our legal system that the executive has no power to authorize a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer.[43]

The overall theme which can be drawn from analysis of the cases mentioned above is that some latitude will be permitted by the courts when determining the width of the defence power at times when Australia is engaged in a conflict, but this latitude will not be extended in all circumstances. Further, the cases demonstrate that compliance with the law is, and remains, a fundamental requirement of any activity involving the military. It is in this context that we will now consider the specific legislative framework for the deployment of the ADF in Australia.

The legislative framework — *Defence Act 1903*

Immediately prior to the amendments put in place as a precursor to the 2000 Sydney Olympic Games, the *Defence Act 1903* contained four short and administratively focused sections relating to 'calling out the forces' by proclamation of the Governor-General (pt III, div 4). Section 50D dealt with the procedures for calling out the emergency forces for continuous full-time service in time of 'war or defence emergency'. Section 50E dealt with calling out the reserve forces for continuous full-time service in time of war and defence emergency and, in s 50F, in times other than war or defence emergency where, nevertheless, it was considered 'desirable' by the Governor-General for the 'defence of Australia'. Section 50G then set out the associated reporting requirements — essentially, that the 'reasons for the making of the Proclamation' were to be reported to both Houses of Parliament.[44]

The immediate precursor to pt IIIAAA was s 51, 'Protection of States from domestic violence':

> **51 Protection of States from domestic violence**
>
> Where the Governor of a State has proclaimed that domestic violence exists therein, the Governor General, upon the application of the Executive Government of the State, may, by proclamation, declare that domestic violence exists in that State, and may call out the Permanent Forces and in the event of their numbers being insufficient may also call out such of the Emergency Forces and the Reserve Forces as may be necessary for the protection of that State, and the services of the Forces so called out may be utilized accordingly for the protection of that State against domestic violence:
>
> Provided always that the Emergency Forces or the Reserve Forces shall not be called out or utilized in connexion with an industrial dispute.[45]

It is notable that the threshold requirements for a s 51 call-out were 'domestic violence' and, in line with s 119 of the *Constitution*, the request of the relevant state. There was no allowance for a Commonwealth interest to act as a trigger or for the Commonwealth to take action regardless of a state request. That such options still persisted within the broader executive power is of little doubt; however, the next set of changes specifically brought these two matters within a statutory scheme.

The 2000 Sydney Olympic Games amendments

The new pt IIIAAA regime for call-out replaced s 51 with 27 new sections (ss 51–51Y).[46] The focus of these amendments was clearly upon land-based counterterrorism and hostage recovery situations: As the Explanatory Memorandum noted:

> This Bill will add new provisions to the *Defence Act 1903* to enable the utilisation of the Defence Force in assisting the civilian authorities to protect Commonwealth interests and States and Territories against domestic violence …
>
> The Bill provides for the specific powers that the Defence Force has under the new scheme. There are powers relating to the recapture of premises and in connection therewith, freeing hostages, detaining persons, evacuating persons, searching and seizing any dangerous things. There are also the general security area powers and designated area powers.[47]

This purpose was clearly reinforced in the second reading speech:

> The Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000 proposes to amend the *Defence Act* 1903 to bring the framework for call-out of the Defence Force in law enforcement emergencies up to date. I believe the bill provides a sound basis for the use of the Defence Force as a last resort in resolving such emergencies …
>
> The existing legislation is not responsive to contemporary needs. Rather, it reflects its 18th century English origins, which focused on riot control — at a time before modern police services were developed …
>
> The present legislative framework does not provide sufficient accountability to parliament. Nor does the legislation provide members of the Defence Force with appropriate authority to perform the tasks they may be required to carry out, either in an assault upon terrorists or in a related public safety emergency. Furthermore, there needs to be provision both for safeguards in the exercise of such authority and for accountability for the actions of individuals as well as government …
>
> Call-out will occur only if the Prime Minister, Minister for Defence and Attorney-General agree that a state or territory is not, or is unlikely to be, able to protect the Commonwealth or itself against the domestic violence. In making or revoking an order, the Governor-General acts on the advice of Executive Council or, for reasons of urgency, he or she is to act with the advice of an authorising minister. The Chief of the Defence Force is to use the Defence Force for the purpose set out in the order. Subject to directions from the minister, the Chief of the Defence Force will determine the composition of the force to be deployed and will exercise command of it.[48]

This significant suite of amendments thus incorporated powers and authorisations in relation to recapturing buildings, recovering hostages and enforcing General Security Areas (GSAs) and Designated Areas (DAs) within GSAs. It also provided for associated matters such as use of reasonable and necessary force, seizure of dangerous objects, and reporting to Parliament. Section 51Y also purported to maintain the executive power in parallel with, or behind, the statutory pt IIIAAA scheme:

> **51Y Part additional to other Defence Force utilisation and powers**
>
> This Part does not affect any utilisation of the Defence Force that would be permitted or required, or any powers that the Defence Force would have, if this Part were disregarded.

Quite apart from the detail as to substantive powers and authorisations, this new statutory scheme included two vital and significant procedural innovations to the call-out regime. The first was to identify — in greater detail — the appropriate triggers for the scheme; the second was to delineate a clear procedure for enlivening the scheme.

The triggers for the scheme were identified in ss 51A, 51B and 51C. Each requires some explanation. Section 51A concerned 'utilising the Defence Force to protect Commonwealth interests against domestic violence' and provided (in part):

> *Conditions for making of order*
>
> (1) Subsection (2) applies if the authorising Ministers are satisfied that:
>
> (a) domestic violence is occurring or is likely to occur in Australia; and
>
> (b) if the domestic violence is occurring or is likely to occur in a State or self-governing Territory — the State or Territory is not, or is unlikely to be, able to protect Commonwealth interests against the domestic violence; and
>
> (c) the Defence Force should be called out and the Chief of the Defence Force should be directed to utilise the Defence Force to protect the Commonwealth interests against the domestic violence; and
>
> (d) either Division 2 or Division 3, or both, and Division 4 should apply in relation to the order.
>
> …
>
> *Involvement of State or Territory*
>
> (3) If paragraph (1)(b) applies:
>
> (a) the Governor-General may make the order whether or not the Government of the State or the self-governing Territory requests the making of the order; and
>
> (b) if the Government of the State or the self-governing Territory does not request the making of the order, an authorising Minister must, subject to subsection (3A), consult that Government about the making of the order before the Governor-General makes it.
>
> *Exception to paragraph (3)(b)*
>
> (3A) However, paragraph (3)(b) does not apply if the Governor-General is satisfied that, for reasons of urgency, it is impracticable to comply with the requirements of that paragraph.

The definition of 'domestic violence' in s 51 was and remains as follows: 'domestic violence has the same meaning as in section 119 of the *Constitution*'. There was no definition of 'Commonwealth interest'.

Sections 51B and 51C concerned utilising the Defence Force to protect, respectively, one or more of the states or the self-governing territories from domestic violence. Section 51B is indicative:

> *Conditions for making of order*
>
> (1) Subsection (2) applies if a State Government applies to the Commonwealth Government to protect the State against domestic violence that is occurring or is likely to occur in the State and the authorising Ministers are satisfied that:
>
> (a) the State is not, or is unlikely to be, able to protect itself against the domestic violence; and
>
> (b) the Defence Force should be called out and the Chief of the Defence Force should be directed to utilise the Defence Force to protect the State against the domestic violence; and
>
> (c) either Division 2 or Division 3, or both, and Division 4 should apply in relation to the order.
>
> …
>
> *Revocation of order*
>
> (5) If:
>
> (a) the State Government withdraws its application to the Commonwealth Government; or
>
> (b) the authorising Ministers cease to be satisfied as mentioned in subsection (1);
>
> the Governor-General must revoke the order.

Thus a multi-trigger scheme was brought into effect. The first trigger — s 51A — concerns domestic violence that affects a Commonwealth interest and provides the Commonwealth with the ability to act under pt IIIAAA without, if necessary, the consent or request of the state or territory in which the domestic violence threatening that Commonwealth interest is occurring. The second trigger — ss 51B and 51C — concerns domestic violence where there is no Commonwealth interest at play and thus requires the application of the state or self-governing territory prior to the authorising Ministers making the necessary decision to invoke pt IIIAAA. As will be noted below, the amendments brought into place just prior to the 2006 Melbourne Commonwealth Games have broadened the scope of these triggers but still rely upon these two seminal concepts — domestic violence and Commonwealth interests — as either the sole or the combined trigger for the expanded scheme.

The process for call-out implemented in 2000 is expressed primarily in the requirements for the call-out 'order' as anticipated for each of the ss 51A–51C call-outs. For example, for a s 51A call-out, the content of the order was statutorily set in s 51A(4) as follows:

> (4) The order:
>
> (a) must state that it is made under this section; and
>
> (b) must specify the State or Territory in which the domestic violence is occurring or likely to occur, the Commonwealth interests and the domestic violence; and
>
> (c) must state that Division 2 [power to recapture etc] or Division 3 [GSAs and DAs etc], or both, and Division 4 [provisions common to Divisions 2 and 3, such as reasonable and necessary use of force] apply in relation to the order; and
>
> (d) must state that the order comes into force when it is made and that, unless it is revoked earlier, it ceases to be in force after a specified period (which must not be more than 20 days).

However, the requirement to seek further ministerial authorisations for specific acts, once the call-out was underway, was also built into the scheme. For example, s 51I, dealing with

special powers to recapture premises, still required additional ministerial authorisation for certain actions:

> *Ministerial authorization*
>
> (2) However, the member must not recapture the subject premises etc., or do any of the things mentioned in paragraphs (1)(b) or (c) in connection with any recapture of the subject premises etc., unless an authorising Minister has in writing authorised the recapture.
>
> *Exception*
>
> (3) Subsection (2) does not apply if the member believes on reasonable grounds that there is insufficient time to obtain the authorisation because a sudden and extraordinary emergency exists.

Additionally, it was the role of an authorising Minister to declare a GSA (s 51K) and, if necessary, a DA (s 51Q) and for those declarations to be published appropriately. Requirements for publication of orders and reporting to Parliament were also specifically addressed.[49]

Further amendments — the 2006 Melbourne Commonwealth Games

As noted in the Explanatory Memorandum for the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005, 'the amendments give effect to Government initiatives to improve responsiveness of the Australian Defence Force (ADF) to domestic security incidents in the current threat environment'.[50] Indeed, as with the Sydney Olympics, the imminent presence in Australia of many heads of state, heads of government, VIPs, athletes, and others provided the impetus to update and radically broaden the scope of pt IIIAAA:

> The current legislative basis for ADF operations in support of domestic security does not reflect the evolving threat environment nor does it reflect recent initiatives such as the March 2005 establishment of the Joint Offshore Protection Command …
>
> The bill will amend current call-out provisions for the ADF in domestic security operations, replacing parts of the legislation which are rigid and complex and inhibit the flexibility and speed with which the ADF could respond should Australia face a terrorist incident in limited or no notice circumstances. Further, the amendments address the lack of statutory legal authority to use reasonable and necessary force in ADF operations involving aviation and maritime security and the protection of designated critical infrastructure. The amendments to Part IIIAAA will clarify accountabilities, facilitate the effective use of ADF capabilities and ensure that there are adequate legal protections for ADF personnel when conducting domestic security operations.[51]

This updated 2006 pt IIIAAA scheme thus addressed a range of shortfalls and problems identified in the 2000 scheme and implemented a series of fixes.[52] These fixes are broadly categorisable into three types of amendments: process; scope; and protections.

Procedurally, the amendments introduced new call-out initiation options on top of the 'standard' call-out process involving advice to, and then the issuing of the call-out order by, the Governor-General. The first of these new procedures was the 'expedited call-out' whereby, in an emergency situation (as would likely be the case in many call-out situations), a short-form, and even unwritten, call-out order can be initiated by the Prime Minister or by two relevant Ministers through direct contact with the CDF:

> The expedited call-out arrangements will enable the Prime Minister to make an order, that the Governor-General is usually empowered to make, in the event that a sudden and extraordinary emergency makes it impractical for a call-out order to be made under existing sections of the Part. In the event the Prime Minister cannot be contacted, call-out can be authorised by the two other authorising Ministers. Should either of the remaining authorising Ministers be non-contactable, an authorising Minister in consultation with the Deputy Prime Minister, the Minister for Foreign Affairs or the Treasurer can authorise call-out.[53]

This new call-out mechanism is provided for in s 51CA and covers all domains of call-out:

> **51CA Expedited call out**
>
> *Expedited call out by the Prime Minister*
>
> (1) The Prime Minister may make an order of a kind that the Governor-General is empowered to make under section 51A, 51AA, 51AB, 51B or 51C if the Prime Minister is satisfied that:
>
> (a) because a sudden and extraordinary emergency exists, it is not practicable for an order to be made under that section; and
>
> (b) the circumstances referred to in subsection 51A(1), 51AA(1), 51AB(1), 51B(1) or 51C(1) (as the case requires) exist …

Additionally, s 51CA(2) and (3) provide that, if the Prime Minister is 'unable to be contacted for the purposes of considering whether to make, and making, an order under subsection (1) of this section', the other two 'authorising Ministers' (that is, the Minister for Defence and the Attorney-General) may make the order; if either the Minister for Defence or the Attorney-General is unavailable then the order can be made by the remaining authorising Minister plus one of the Deputy Prime Minister, the Minister for Foreign Affairs or the Treasurer. Further, the order need not be in writing (s 51CA(4)) initially, but a signed and witnessed record of the order must be made by both the giver(s) (the Prime Minister or the two Ministers) and the receiver (CDF) and exchanged between them, with the Prime Minister or Ministers also providing a copy to the Governor-General.

The second new call-out procedure has come to be known in some quarters as a 'contingent call-out', but it is perhaps more accurately labelled a 'specified circumstances call-out'. Section 51AB provides for situations in which it is prudent to have a dormant call-out order in place, where the meeting of certain pre-specified criteria — effectively, triggering conditions or events — will automatically bring the call-out into effect:

> **51AB Order about utilising Defence Force to protect Commonwealth interests against violence if specified circumstances arise**
>
> *Conditions for making of order*
>
> (1) Subsection (2) applies if the authorising Ministers are satisfied that:
>
> (a) if specified circumstances were to arise:
>
> (i) domestic violence would occur or would be likely to occur in Australia that would, or would be likely to, affect Commonwealth interests; or
>
> (ii) there would be, or it is likely there would be, a threat in the Australian offshore area to Commonwealth interests (whether in that area or elsewhere);
>
> and, for reasons of urgency, it would be impracticable for the Governor-General to make an order under section 51A or 51AA (as the case requires); and
>
> (b) if subparagraph (a)(i) applies—the domestic violence would occur or would be likely to occur in a State or self-governing Territory that would not be, or is unlikely to be, able to protect the Commonwealth interests against the domestic violence; and
>
> (c) the Chief of the Defence Force should be directed to utilise the Defence Force to protect the Commonwealth interests against the violence, or the threat in the Australian offshore area, if the specified circumstances arise; and
>
> (d) Divisions 3B and 4 should apply in relation to the order.

Significantly, however, this form of contingent call-out is only available for div 3B threats (div 4 being matters common across all divisions) — that is, only in relation to 'powers relating to aircraft'. This scheme was thus designed to allow for the 11 September 2001 scenario of aircraft being used as a weapon through crashing — for example, crashing into a VIP-heavy location such as the Melbourne Cricket Ground during the Commonwealth Games opening or closing ceremonies or the meetings of significant international leader forums such as APEC Economic Leaders Week. Effectively, such a contingent call-out order is a signed but dormant call-out order which specifies a series or set of circumstances — indicia or trigger events — which, should they occur, automatically bring the call-out order into effect and thus, from that point forward, cover subsequent actions (which may include an aircraft shoot-down) under the aegis of pt IIIAAA.

The second category of amendments related to the scope of domain and threat types covered by the pt IIIAAA regime. Whereas the 2000 scheme was essentially focused upon land-based threats and hostage recovery operations, the 2006 scheme expanded coverage into three new areas of threat concern: the 'offshore area' (div 3A); the issue of aircraft threats noted above (div 3B); and 'designated critical infrastructure' (div 2A).

The 'offshore area' is defined in s 51:

> Australian offshore area means:
>
> (a) Australian waters [which is also specifically defined to exclude the internal waters of states and self-governing territories]; or
>
> (b) the exclusive economic zone of Australia (including its external Territories); or
>
> (c) the sea over the continental shelf of Australia (including its external Territories); or
>
> (d) an area prescribed by the regulations;
>
> and includes the airspace over an area covered by paragraph (a), (b), (c) or (d).

This is a significant expansion in terms of the geographic area in which pt IIIAAA may be used, but it allows for a new s 51AA 'Order about utilising Defence Force in the offshore area etc to protect Commonwealth interests' to be made in relation to (for example) structures and installations over which Australia may properly exercise jurisdiction in its exclusive economic zone and over its continental shelf and extended continental shelf in accordance with the *United Nations Convention on the Law of the Sea* 1982.[54] Importantly, this form of call-out relies solely upon a Commonwealth interest trigger, as there are no issues of domestic violence affecting a state which can, theoretically, arise in this area, which is subject to Commonwealth jurisdiction (although certain aspects of state legislation are extended into Australia's exclusive economic zone by virtue of the *Crimes at Sea Act 2000* (Cth)).[55]

In addition to parallel powers analogous to those available on land — such as to recover vessels and hostages, declare GSAs and DAs, conduct search and seizure etcetera — ss 51SO and 51SP provide additional offshore area-specific powers to require people to answer questions or produce documents (along with a waiver and protection as to the normal rule on self-incrimination) and to direct people to operate a 'facility, vessel or aircraft or machinery or equipment'. Importantly, however, s 51T, relating to reasonable and necessary use of force, specifically indicates that the normal rule — 'use such force against persons and things as is reasonable and necessary in the circumstances' (s 51T(1)) while not doing 'anything that is likely to cause the death of, or grievous bodily harm to, the person unless the member believes on reasonable grounds that doing that thing is necessary to protect the life of, or to prevent serious injury to, another person (including the member)'

(s 51T(2)(a)) — does not apply to these special powers (s 51T(1A)). That is, quite appropriately, force cannot be used to ensure that a person answers questions or produces documents, or operates machinery (and so on), under an offshore area call-out. However, conversely, s 51T(2B) also adjusts the standard rule in its application over two of the special s 51SE powers under an offshore area call-out, being:

> **51SE Special powers of members of the Defence Force**
>
> *Special powers*
>
> (1) Subject to this section, a member of the Defence Force who is being utilised in accordance with section 51D may, under the command of the Chief of the Defence Force, do any one or more of the following:
>
> (a) take any one or more of the following actions:
>
> (i) take measures (including the use of force) against a vessel or an aircraft, up to and including destroying the vessel or aircraft;
>
> (ii) give an order relating to the taking of such measures …

In relation to these two offshore powers, the applicable rule on use of reasonable and necessary force is expressed to include a defence against causing death or grievous bodily harm where this is necessary to give effect to either an order relating to s 51SE(1)(a)(i) or (ii) — as above — or to a measure against aircraft under div 3B:

> **51T Use of reasonable and necessary force**
>
> …
>
> (2B) Despite subsection (1), in exercising powers under subparagraph 51SE(1)(a)(i) or (ii) or Division 3B, a member of the Defence Force must not, in using force against a person or thing, do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the member believes on reasonable grounds that:
>
> (a) doing that thing is necessary to protect the life of, or to prevent serious injury to, another person (including the member); or
>
> (b) doing that thing is necessary to protect designated critical infrastructure against a threat of damage or disruption to its operation; or
>
> (c) doing that thing is necessary and reasonable to give effect to the order under which, or under the authority of which, the member is acting.

In relation to aircraft threats, the brief but powerful new div 3B permits, inter alia, the 'taking of measures' against aircraft, including shooting that aircraft down, along with specific protections such as an emphasised requirement for a ministerial authorisation, where possible, that has specifically considered the 'reasonableness and necessity' of the measure (s 51ST(4)–(8)) and provides a specifically tailored superior orders defence (s 51ST(2)–(3)) in addition to the s 51WB superior orders defence applicable across the entirety of pt IIIAAA. Further, as with a very narrow set of potential orders in the offshore area (s 51SE(1)(a)(i) and (ii), noted above), the manner in which the reasonableness and necessity of a use of force is assessed is slightly altered for measures taken under this division. As noted above, s 51T(2B) applies across all of div 3B, thus providing that reasonable and necessary force may in some circumstances include force that is likely to cause death or grievous bodily harm, even where there is no imminent risk to life, so long as 'doing that thing is necessary and reasonable to give effect to the order under which, or under the authority of which, the member is acting'. Arguably, however, the authorisations in s 51T(2B)(c) in relation to giving effect to these orders remain linked to the broader concept of self-defence and imminent harm (see below).

The third new domain brought within pt IIIAAA by the 2006 amendments is designated critical infrastructure (DCI). This regime only applies where a preliminary declaration that an object or facility is DCI has been appropriately made:

> **51CB Declaration of designated critical infrastructure**
>
> (1) The authorising Ministers may, in writing, declare that particular infrastructure, or a part of particular infrastructure, in Australia or in the Australian offshore area is designated critical infrastructure.
>
> (2) However, the authorising Ministers may do so only if they believe on reasonable grounds that:
>
> (a) there is a threat of damage or disruption to the operation of the infrastructure or the part of the infrastructure; and
>
> (b) the damage or disruption would directly or indirectly endanger the life of, or cause serious injury to, other persons …

If such a declaration has been made, the powers under div 2A may be authorised to protect that DCI. As per s 51IB, these powers relate to actions to 'prevent, or put an end to, damage or disruption to the operation of the designated critical infrastructure' and/or to 'prevent, or put an end to, acts of violence' in relation to that DCI as well as associated powers for detaining suspected perpetrators, control of movement, evacuation, search and so on. Section 51T(2A) and s 51T(2B)(c) then provide that a use of force likely to cause death or grievous bodily harm may still constitute reasonable and necessary force in two additional situations. The first is where it is necessary to 'protect, against the threat concerned, the designated critical infrastructure in respect of which the powers are being exercised'. The second additional authorisation applies where the relevant call-out order relates to measures against aircraft under div 3B or to the specific s 51SE(1)(a)(i) or (ii) powers available in the offshore area (to order or take measures including use of force against a vessel or aircraft), where 'doing that thing is necessary to protect designated critical infrastructure [if any such is so designated] against a threat of damage or disruption to its operation'.

The third category of 2006 amendments relates to protections afforded to ADF members who engage in conduct while under pt IIIAAA orders. The nature of these protections is not one that should raise concerns about immunity or impunity; indeed, these amendments are solely about clarifying the applicable law against which ADF conduct under pt IIIAAA orders is to be assessed. Division 4A, 'Applicable criminal law', comprises two sections. The first, s 51WA, provides inter alia that the relevant law to be applied when assessing ADF members' conduct under pt IIIAAA is the 'substantive criminal law of the Jervis Bay Territory, as in force from time to time' (a routine legal arrangement for the ADF, including within the *Defence Force Discipline Act 1982* (Cth)) and that it is the Commonwealth Director of Public Prosecutions who exercises these functions exclusive of state and territory Directors of Public Prosecutions. This does not, however, remove from state or territory police the jurisdiction to investigate possible offences: as the note to s 51WA makes clear, '[i]t is not intended that this section or Act restrict or limit the power of State or Territory police to investigate any criminal acts done, or purported to be done, by Defence Force members when operating under Part IIIAAA of this Act'. The second section in div 4A provides a clear statement as to the availability of an additional defence of 'superior orders' in circumstances where the following cumulative conditions are met:

> **51WB Defence of superior orders in certain circumstances**
>
> …
>
> (2) It is a defence to a criminal act done, or purported to be done, by a member of the Defence Force under this Part that:
>
> (a) the criminal act was done by the member under an order of a superior; and

(b) the member was under a legal obligation to obey the order; and

(c) the order was not manifestly unlawful; and

(d) the member had no reason to believe that circumstances had changed in a material respect since the order was given; and

(e) the member had no reason to believe that the order was based on a mistake as to a material fact; and

(f) the action taken was reasonable and necessary to give effect to the order.

Remaining challenges?

The pt IIIAAA call-out regime has yet to be activated, although 'contingent call-out' orders have been in place — but have remained dormant — on several occasions such as during the 2006 Melbourne Commonwealth Games and for a number of high-level international political leader events in Australia. Consequently, while the regime has been exercised, it has not yet been utilised.

However, there are a number of ambiguities or challenges that remain afoot in relation to this otherwise comprehensive statutory scheme. As noted previously, the first challenge is the degree to which the s 51Y preservation of the executive power both behind and in parallel with the statutory pt IIIAAA scheme remains extant. From an operational perspective, it would be useful if at least those components of the executive power which cover preliminary acts, or acts precedent, remained available. For example, a dormant contingent call-out in relation to an air threat is to a large extent preconditioned upon the presence of fighter aircraft already in the air and available to enforce the relevant authorisations as soon as the triggers are met. To some extent, the authority for that presence over a meeting venue in a major city will need to rely upon the executive power. Thus, whatever may ultimately be said about whether s 51Y is fully effective, it is vital that the executive power remains available on either side of a pt IIIAAA call-out in order to manage both preconditional requirements and, if necessary, post-call-out consequences.

The second continuing challenge is locating the authorisations for use of lethal force contained within pt IIIAAA within the broader legislative context of self-defence as the only defence that is otherwise available for use of lethal force in such situations.[56] The pt IIIAAA scheme for the most part reflects orthodoxy[57] — s 51T(2) asserts that force likely to cause death or grievous bodily harm is generally limited to situations of imminent threat of serious harm or death to the ADF member or others.[58] However, in relation to destroying certain vessels or aircraft in the offshore area, or certain aircraft under a div 3B measures against aircraft call-out, or to protecting DCI (either directly under div 2A or as an adjunct to an offshore (div 3A) or aircraft measures (div 3B) call-out), the grant of authority appears wider. That is to say, in the narrow circumstances anticipated in s 51T(2A) for DCI or s 51S(2B)(b) and (c) in relation to DCI, and giving effect to an offshore or aircraft measures call-out order, the usual overt link required between imminent threat of death or serious injury and the authority to use lethal force in response appears broken. However, it is also arguable that each of these situations is in fact actually a subspecies of self-defence in that each such event, if left unmitigated, inherently presages inevitable — if not always imminent — death or grievous bodily harm to others. The maintenance of this perhaps attenuated but nevertheless clear link between these authorisations and the defence of self-defence is perhaps most evident in the second reading speech for the 2006 amendments. In relation to the DCI scheme, for example, the Minister specifically observed that:

This measure acknowledges the increasingly close interrelationships between infrastructure, critical services and facilities; and that the destruction or disabling of a system or structure is likely to have

> significant flow-on effects that may result in loss of life. For example, the potential loss of power to a hospital, the disruption of communications or the interruption of vital utilities … The authorising Ministers must be satisfied that an attack on infrastructure will result in the loss of life before directing the CDF to utilise the ADF to protect infrastructure.
>
> The potential use of force by the ADF in such circumstances would be informed by a process that identifies the importance of the infrastructure, on its own and within a system, and whether disruption to its operation would endanger the life of a person. That process would be underpinned by a reasonable belief that there is a threat to specific infrastructure and the disruption of that infrastructure would result in potential loss of life.[59]

Similarly, in the Explanatory Memorandum:

> 77. A primary concern is the authority to use force to protect uninhabited infrastructure, where the loss of that infrastructure is likely to have cascade effects directly resulting in serious injury or the loss of life. Within the current Commonwealth, State and Territory criminal law frameworks, force can only be used if an attack against infrastructure is likely to cause immediate death or serious injury to persons (such as the inhabitants of infrastructure targeted for attack).
>
> 78. No provisions currently exist that allow the use [of] lethal force where this is necessary to protect uninhabited infrastructure from attack, even if the consequences of that attack would have secondary effects resulting in the death or serious injury to others. The increasingly close interrelationships between infrastructure, critical services and facilities means that the destruction or disabling of a system or structure could have significant flow-on effects that may result in loss of life or serious injury …
>
> 79. It is proposed that the Attorney-General, the Minister for Defence and the Prime Minister will be the authorising Ministers for the purposes of 51CB. The authorising Ministers must be satisfied that an attack on infrastructure will result in the loss of life or serious injury before directing the CDF to utilise the ADF to protect infrastructure. Once Ministers have directed CDF to utilise the ADF, the ADF will have specific powers to act to protect infrastructure.[60]

Consequently, the most problematic remaining issue is in relation to a use of lethal force under the aegis of s 51T(2B) as concerns an order to shoot at or into a vessel or to shoot down an aircraft under an offshore call-out; or to take lethal measures against an aircraft under a div 3B call-out. However, the Explanatory Memorandum for the 2006 Bill makes clear in relation to s 51SE that:

> The powers include the power to destroy an aircraft or vessel. This might be required where the vessel or aircraft was heading for a facility offshore or a city of facility onshore.[61]

Similarly, for an aircraft in a div 3B situation:

> 127. In essence, the terms of proposed 51ST are intended to ensure that where ADF members in good faith comply with their orders to take measures against aircraft, or to order other members of the ADF to take such measures, then there is significant statutory protection for those measures. Such statutory protection will only be withdrawn, in accordance with 51ST(2) and (3), where there are clear reasons that were or should have been known to the ADF member why measures should not be taken against an aircraft. For instance, should an ADF member who is specifically positioned to deal with a potential air threat, receive an order to engage an aircraft through the expected channels, that is consistent with the rules of engagement under which he or she is operating, and there are no clear reasons for the order to be questioned in the circumstances, then that ADF member will be able to comply with that order with confidence that they are acting with lawful authority. Likewise, should an ADF member who is positioned to give orders to other members to take measures against an aircraft, apply the facts known to them to a set of objective criteria defining an aerial threat and conclude on reasonable grounds that the criteria have been met, then that member will have confidence that they are acting within their lawful authority by giving an order to engage the aircraft.[62]

The nexus to threat of serious harm or death as a consequence of the vessel or aircraft achieving its objective is perhaps unstated but nevertheless clear — albeit this appears to be a decision for the relevant Minister upon which the 'shooter' is entitled to rely so long as 'the member has no reason to believe that circumstances have changed in a material way since

the superior order was given'.[63] However, it is equally clear that the justification of 'lawful authority'[64] also infuses the structure and logic of this particularised authorisation for use of lethal force as potentially 'reasonable and necessary' outside of the traditionally narrower parameters of immediate self-defence.

Finally, there are a number of areas where future clarification may be useful. For example, in the context of terrorist tactics that involve taking hostages for the purpose of killing rather than extracting concessions, closer consideration could perhaps be given to the need for an authorisation to use lethal force in self-defence of the hostages where, as a matter of terrorist tactics, the death of those hostages is considered inevitable even if not necessarily immediate. This would allow for a lethal response at an opportune time before the actual manifestation of an imminent — but seemingly inevitable — threat of death to the hostages. This issue was recently ventilated at the Inquest Into the Deaths Arising from the Lindt Cafe Siege, albeit in relation to a police sniper.[65] Similarly, the relationship between a possible act of terrorism and a 'Commonwealth interest' could perhaps be clarified, as the existence of such an interest does generate the possibility of a Commonwealth response under pt IIIAAA even if it is against the wishes of the relevant state.[66]

Conclusion

The comprehensive nature of the scheme for Commonwealth responses to domestic violence — whether via its implications for a Commonwealth interest or via the request of a state or self-governing territory — is clearly evident in the scope and detail of pt IIIAAA of the *Defence Act 1903*. The desire to place the types of activities traditionally available to the executive under the relatively opaque Crown prerogative for internal security upon a firmer and more transparent statutory basis is clearly a victory for the rule of law. However, this case study is equally indicative of a number of challenges that can arise when such endeavours are pursued.

First, the relationship between the statutory scheme and its parallel, subsisting, or foundational executive power — most particularly in terms of the preservation or extinguishment debate — is, to some extent, hostage to the vagaries of constitutional jurisprudence in unrelated fields. This is unavoidable, but the implications for the pt IIIAAA s 51Y preservation of the executive power should be vigilantly reassessed after each new High Court or Full Court of the Federal Court case in which this relationship is reviewed.

Secondly, the importance of coherence and consistency between the essential elements of the regime and correlative authorisations elsewhere in legislation — particularly in relation to such sensitive and fundamental authorisations as the use of force, especially lethal force, by state agents — can never be understated. In terms of pt IIIAAA, for example, this is perhaps best evidenced by lingering confusion as to the precise justification for use of lethal force outside situations of immediate self-defence. Perhaps a more robust approach to resolving the operational requirement for greater clarity around this issue might be, as we have suggested, to create a more precise statutory permission within pt IIIAAA for use of lethal force in self-defence when the requisite harm is not immediate but, rather, is downstream and inevitable. Indeed, this appears to be the reasoning evident in the example for DCI concerning the loss of power or such services to a hospital, which was given by the Minister in the second reading speech for the 2006 amendments.

Finally, because so much hangs upon it, it may be worthwhile for the Commonwealth and the states to agree on some broad parameters for when an incident of apparent terrorism might constitute a Commonwealth interest. All of these issues, however, are matters of refinement and progressive development rather than wholesale problems with the scheme. It is probable, of course, that further challenges to the scheme as currently enshrined in statute

may present if a call-out is ever activated and the subsequent report to Parliament is subject to debate. However, as it currently stands, the pt IIIAAA scheme demonstrates a well-balanced, workable and accountable approach to regulation of that most critical challenge for democratic governance — when to authorise the armed forces to use force in support of a civil authority faced with a manifest threat to internal security.

Endnotes

1 While the term 'Australian Defence Force' (ADF) has been in wide usage since at least the mid-1970s, the term is one that only achieved legislative authority in 2016 with the entry into force of the changes to the composition of the ADF that will occur from 1 July 2016 pursuant to the *Defence Legislation Amendment (First Principles) Act 2015* (Cth). These changes will, inter alia, result in the statutory creation of the Australian Defence Force, made up of three 'arms' — namely, the Royal Australian Navy, the Australian Army and the Royal Australian Air Force — under the *Defence Act 1903* (Cth). The *Naval Defence Act 1910* (Cth) and the *Air Force Act 1923* (Cth) will be repealed from 1 July 2016.

2 The *Commonwealth of Australia Constitution Act 1900* (the *Constitution*) is, in fact, an Act passed by the British Parliament in 1900 which entered into force on 1 January 1901 and provided the statutory basis for the creation of the Commonwealth of Australia. See *Australia's Constitution: With Overview and Notes by the Australian Government Solicitor* (Parliamentary Education Office and Australian Government Solicitor, 7th ed, 2010) vii–viii.

3 See generally Cameron Moore, 'The ADF and Internal Security — Some Old Issues with New Relevance' (2005) 28(2) *UNSW Law Journal* 523–537.

4 See the *Constitution* s 61.

5 Amendments were made to the *Defence Act 1903* by the insertion of pt IIIAAA via the *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* (Cth). Detailed examination of the provisions of pt IIIAAA will be provided later in this article.

6 See *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2006* (Cth), which will be discussed in detail later in this article.

7 *Defence Instruction (General) OPS 05–1 Defence Assistance to the Civil Community* was the relevant authority for DACC until it was replaced in December 2012 with the *Defence Assistance to the Civil Community Manual* (DACC Manual): see Auditor-General, *Emergency Defence Assistance to the Civil Community* (Audit Report No 24, Australian National Audit Office, 2014) 12 <https://www.anao.gov.au/sites/g/files/net616/f/AuditReport_2013-2014_24.pdf>.

8 *Defence Instruction (General) OPS 01–1 Defence Force Aid to the Civil Power — Policy and Procedures* was the relevant authority for DFACP until it was completely revised and renamed in June 2010 and issued as *Defence Instruction (General) OPS 01–1 Defence Force Aid to the Civil Authority*.

9 See Auditor-General, above n 7, 30–2.

10 The legal basis for issuing Defence Instructions is currently provided in the Defence Act, s 9A, which permits the issuing of Defence Instructions (General) (DI(G)s) by the Secretary and Chief of the Defence Force (CDF) jointly, as well as Defence Instructions (Navy/Army/Air Force) issued by each of the three Service Chiefs in relation to matters which impact upon their respective service. However, as a result of changes to the Defence Act which will occur pursuant to the *Defence Legislation Amendment (First Principles) Act 2015*, from 1 July 2016 there will only be provision for the issuing of Defence Instructions (replacing the current DI(G)s) jointly by the Secretary and the CDF. Service Chiefs will no longer have the authority to issue Defence Instructions relevant to their service.

11 Explanatory Memorandum, Defence Legislation Amendment (First Principles) Bill 2015 (Cth) 43.

12 For example, as noted above, DACC is no longer covered by a Defence Instruction, as the applicable policy and procedures are provided in the 2012 DACC Manual. Although it was issued under the authority of the Secretary and the CDF, the DACC Manual does not have authorisation currently provided for under s 9A of the Defence Act, which may therefore present difficulties if adverse administrative or discipline action is contemplated for any failure to adhere to the requirements stipulated in the DACC Manual.

13 See Department of Defence, Australian Government, *2016 Defence White Paper* (25 February 2016), 72–3 <http://www.defence.gov.au/WhitePaper/>.

14 See, for example, Garth Cartledge, *The Soldier's Dilemma: When to Use Force in Australia* (AGPS Press, 1992); Michael Head, 'The Military Call-Out Legislation — Some Legal and Constitutional Questions' (2001) 29 *Federal Law Review* 273; Moore, above n 3; Michael Head, 'Australia's Expanded Military Call-Out Powers: Causes for Concern' (2006) 3 *University of New England Law Journal* 125.

15 See Douglas I Menzies QC, 'The Defence Power', in R Else-Mitchell (ed), *Essays on the Australian Constitution*, (Law Book Company of Australasia Pty Ltd, 1952) 132.

16 See E C S Wade and G Godfrey Phillips, *Constitutional Law* (Longmans, Green and Co, 5th ed, 1955), especially chs VIII and IX, for an outline of how the use of the military internally in the United Kingdom raised significant constitutional issues in that jurisdiction.

17 See *Re Tracey; Ex parte Ryan* [1989] HCA 12 (Brennan and Toohey JJ) 22.

18 The nature of the defence power — and, in particular, its existence as a 'purpose' power (and not a 'subject-matter' power) that waxes and wanes as Australia's defence needs alter — has long been the subject of constitutional law textbook analysis. See, for example, George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory* (Federation Press, 6th ed, 2014) 845–7.

19 In response to the security situation which exists in the world today, Australia has instituted a National Terrorism Threat Advisory System which has a current threat level of 'Probable': Australian Government, *National Terrorism Threat Advisory System* <https://www.nationalsecurity.gov.au/Securityandyourcommunity/Pages/National-Terrorism-Threat-Advisory-System.aspx>.

20 Williams, Brennan and Lynch, above n 18, 366.

21 See Benjamin Tomasi, 'Variation on a Theme: CPCF v Minister for Immigration and Border Protection [2015] HCA 1' (2016) 39(2) *University of Western Australia Law Review* 426–33, especially 430–1.

22 See generally Deirdre McKeown and Roy Jordan, 'Parliamentary Involvement in Declaring War and Deploying Forces Overseas' (Background Note, Parliamentary Library, Parliament of Australia, 22 March 2010) <https://www.aph.gov.au/binaries/library/pubs/bn/pol/parliamentaryinvolvement.pdf>; note also the remarks regarding the historical use of Australia's military provided in *Re Tracey; Ex parte Ryan* [1989] HCA 12, where the High Court justices noted the external defence of Australia is the usual function of the armed forces.

23 The Defence Legislation Amendment (Parliamentary Approval of Overseas Service) Bill 2015 has since lapsed: Parliament of Australia, *Defence Legislation Amendment (Parliamentary Approval of Overseas Service) Bill 2015* <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s997>.

24 Elizabeth Ward, 'Call Out the Troops: An Examination of the Legal Basis for Australian Defence Force Involvement in "Non-defence" Matters' (Research Paper No 8 1997–98, Parliamentary Library, Parliament of Australia, 1997).

25 Ibid 7.

26 [2014] HCA 23. Two separate but related cases were initiated by Mr Williams against the Commonwealth. For analysis of the earlier case in 2012, see Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35 *Sydney Law Review* 253–81.

27 [2015] HCA 1.

28 Ibid 283.

29 For a comprehensive assessment of the nature and extent of the command power, see Sir Ninian Stephen, 'The Governor-General as Commander-in-Chief' (1984) 14 *Melbourne University Law Review* 563–71.

30 Ibid 571.

31 For example, *Farey v Burvett* [1916] HCA 36; *South Australia v Commonwealth* [1942] HCA 14; *Australian Communist Party v Commonwealth* [1951] HCA 5; *Re Tracey; Ex parte Ryan* [1989] HCA 12.

32 In this latter regard, examples can be found in numerous cases involving the use of the ADF in border protection operations where the central issue has not been the legality of the ADF deployment. See, for example, *A v Hayden [No 2]* [1984] HCA 67 and, as a recent example, *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1.

33 *Farey v Burvett* [1916] HCA 36.

34 See *South Australia v Commonwealth* [1942] HCA 14.

35 [1951] HCA 5.

36 *Thomas v Mowbray* [2007] HCA 33.

37 *Criminal Code Act 1995* (Cth) s 104.4.

38 The term 'rescuees' was used by North J in *Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297, 17, to describe the persons taken onboard *MV Tampa*.

39 *Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297.

40 *Ruddock v Vadarlis* [2001] FCA 1329.

41 *Vadarlis v Minister for Immigration and Multicultural Affairs M93/2001* [2001] HCATrans 625 (27 November 2001).

42 [1984] HCA 67.

43 Ibid 2 (Gibbs CJ).

44 *Defence Act 1903* as at 1 July 2000 (incorporating amendments up to Act No 179 of 1999): Australian Government, *Federal Register of Legislation* <https://www.legislation.gov.au/Details/C2004C03476>.

45 *Defence Act 1903* s 51.

46 *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* (Cth): Australian Government, *Federal Register of Legislation* <https://www.legislation.gov.au/Details/C2004A00711>.

47 Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000 (Cth) 2. Parliament of Australia, *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000* <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r1122>.

48 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2000, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000, Second Reading, 18409 (Dr Stone, Parliamentary Secretary to the Minister for the Environment and Heritage) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A"chamber%2Fhansardr%2F2000-06-28%2F0041%22>.

49 Section 51X.

50 Explanatory Memorandum, Defence Legislation Amendment (Aid To Civilian Authorities) Bill 2005 (Cth) 2. Parliament of Australia, *Defence Legislation Amendment (Aid To Civilian Authorities) Bill 2005 (Cth)* <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A"legislation%2Fems%2Fs493_ems_23cc6b1e-cbb4-4e8d-afee-c66e15dc54c2%22>.

51 Commonwealth, *Parliamentary Debates*, Senate, 7 December 2005, Defence Legislation Amendment (Aid To Civilian Authorities) Bill 2005, Second Reading, 25 (Senator Coonan, Minister for Communications, Information Technology and the Arts) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A"chamber%2Fhansards%2F2005-12-07%2F0053%22>.

52 *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2006* (Cth): Australian Government, *Federal Register of Legislation* <https://www.legislation.gov.au/Details/C2006A00003>.

53 Commonwealth, *Parliamentary Debates*, Senate, 7 December 2005, Defence Legislation Amendment (Aid To Civilian Authorities) Bill 2005, Second Reading, 26 (Senator Coonan, Minister for Communications, Information Technology and the Arts).

54 Opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

55 *Crimes at Sea Act 2000* (Cth), s 6 (application of Australian criminal law outside the adjacent area) and sch 1 (the 'Cooperative Scheme' for application of criminal law within the 'adjacent area', particularly ss 2–3): Australian Government, *Federal Register of Legislation* <https://www.legislation.gov.au/Details/C2014C00290>.

56 *Criminal Code Act 1995* (Cth): '10.4 Self-defence: (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:

(a) to defend himself or herself or another person; or

(b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or

(c) to protect property from unlawful appropriation, destruction, damage or interference; or

(d) to prevent criminal trespass to any land or premises; or

(e) to remove from any land or premises a person who is committing criminal trespass;

and the conduct is a reasonable response in the circumstances as he or she perceives them.

(3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury:

(a) to protect property; or

(b) to prevent criminal trespass; or

(c) to remove a person who is committing criminal trespass.

(4) This section does not apply if:

(a) the person is responding to lawful conduct; and

(b) he or she knew that the conduct was lawful.

However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.' Australian Government, *Federal Register of Legislation* <https://www.legislation.gov.au/Details/C2016C00544>.

57 For example, *Crimes Act 1914* (Cth): '3ZC Use of force in making arrest: (1) A person must not, in the course of arresting another person for an offence, use more force, or subject the other person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest.

(2) Without limiting the operation of subsection (1), a constable must not, in the course of arresting a person for an offence:

(a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable); or

(b) if the person is attempting to escape arrest by fleeing — do such a thing unless:

(i) the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable); and

(ii) the person has, if practicable, been called on to surrender and the constable believes on reasonable grounds that the person cannot be apprehended in any other manner.' Australian Government, *Federal Register of Legislation* <https://www.legislation.gov.au/Details/C2016C00484>.

58 See generally Rob McLaughlin, 'The Use of Lethal Force by Military Forces on Law Enforcement Operations — Is There a "Lawful Authority"?' (2009) 37(3) *Federal Law Review* 441.

59 Commonwealth, *Parliamentary Debates*, Senate, 7 December 2005, Defence Legislation Amendment (Aid To Civilian Authorities) Bill 2005, Second Reading, 26 (Senator Coonan, Minister for Communications, Information Technology and the Arts).

60 Explanatory Memorandum, Defence Legislation Amendment (Aid To Civilian Authorities) Bill 2005 (Cth) 77–9.

61 Ibid 31.

62 Ibid 137.

63 Section 51SE(3)(d) for s 51SE powers specifically; and s 51WB(2)(d) across pt IIIAAA generally.

64 *Criminal Code Act 1995* (Cth): '10.5 Lawful authority: A person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law.' It is uncertain, however,

whether there can be a 'lawful authority' to kill in situations outside of either the strict provisions of s 10.4 self-defence or the Crown prerogative to employ the ADF under the Law of Armed Conflict (LOAC) to engage with the designated enemy. The strong impression left from any close reading of *A v Hayden [No 2]* [1984] HCA 67, particularly Murphy J's 'death squads in Europe' observation, is that it would be difficult to argue that a provision in a status that indicated that it was permissible for state agents to kill people in certain situations outside of either self-defence or a LOAC-governed situation would be intensely problematic and contentious.

65 Louise Hall, 'Sniper had "potential shot" at Lindt cafe siege gunman Man Monis: inquest', *Sydney Morning Herald*, 9 June 2016: 'Under questioning from Counsel Assisting the Coroner Sophie Callan, the witness said in his opinion, the sniper did not have the "legal authority" to take the shot anyway. He said the sniper would have had to establish that someone was about to be killed or injured or that he himself would be seriously injured to have such authority.' <http://www.smh.com.au/nsw/sniper-had-potential-shot-at-lindt-cafe-siege-gunman-man-monis-inquest-20160609-gpfh52.html>.

66 See, for example, s 51A(3) and (3A).