Reviewing a decision to call out the troops

*Samuel C Duckett White and Andrew Butler**

> *Emergencies present significant challenges to legal systems committed to the rule of law. While providing considerable latitude for State action to respond as deemed necessary, the legal system nonetheless seeks to limit and render accountable (to some degree) the exercise of extraordinary powers in an attempt to minimise the risk of misuse or over-reaction.*[1]

On 15 December 2014, Man Haron Monis held 18 people hostage in the Lindt Café, Sydney. One hostage, at the direction of Monis, alerted the authorities that 'an Islamic State operative armed with a gun and explosives … had stationed collaborators with bombs in other locations in the city'.[2] While the NSW Police officers acted as first responders, members of the Australian Defence Force (ADF) counter-terrorism unit, Tactical Assault Group (East) (TAG(E)), were concurrently rehearsing methods by which to resolve the hostage situation.[3] After a 16-hour siege, Monis executed a hostage, which triggered the NSW Police to enter the premises, resulting in the death of Monis and a second hostage.[4] The subsequent Coroner's report canvassed, inter alia, the role of the ADF in the siege[5] and concluded that the 'challenge global terrorism poses for State Police Forces calls into question the adequacy of existing arrangements for the transfer of responsibility for terrorist incidents to the ADF'.[6]

In Australia, with the exception of the Australian Federal Police and specialised federal agencies, general law enforcement is the constitutional responsibility of the states and territories, within their respective jurisdictions.[7] There are instances, however, where state and territory law enforcement agencies may 'lack the highly sophisticated military hardware to cope with extremely dangerous emergencies'.[8] As such, it may fall upon ADF members to aid the civil authority.[9]

* Samuel Duckett White (LLM (Hons I) (Melb), BA /LLB (Hons) (UQ)) is a Captain of the Australian Army Legal Corps currently posted to the Directorate of Operations and Security Law. All opinions and errors herein are those of the author and do not represent that of the Australian Defence Force or the Department of Defence. Andrew Butler did a BA/LLB (Hons II) at Queensland University of Technology.

1 S Bronitt and D Stephens, 'Flying Under the Radar — The Use Lethal Force Against Hijacked Aircraft' (2007) 7(2) *Oxford University Commonwealth Law Journal 265, 266.*

2 Coroners Court of New South Wales, *Inquest into the Deaths Arising from the Lindt Café Siege: Findings and Recommendations*, Glebe, May 2017, 3 (Lindt Café Coronial).

3 Ibid 201.

4 Ibid 3.

5 Ibid 383–92.

6 Ibid 385.

7 By operation and inference of s 119 of the *Australian Constitution*; see further Peta Stephenson, 'Fertile Grounds for Federalism — Internal Security, the States and Section 119 of the Constitution' (2015) 43 *Federal Law Review* 289, 291.

8 Hoong Phun Lee, 'Military Aid to the Civil Power' in Michael Adams and Colin Campbell (eds), *Emergency Powers in Australia* (Monash University Press, 2018) 223.

9 See Australia and New Zealand Counter-Terrorism Committee, *National Counter-Terrorism Plan* (4th ed, 2017) 35.

International and domestic terrorism,[10] with indiscriminate attacks on civilians and property, has influenced the way the Australian Government has approached constitutional and legal parameters of counterterrorism.[11] On 27 November 2018, the *Defence Amendment (Call Out of the Australian Defence Force) Act 2018* (Cth) (2018 Amendments) was passed with bipartisan support. The 2018 Amendments to Pt IIIAAA of the *Defence Act 1903* (Cth) aimed to 'streamline the legal procedures for call out of the ADF and to enhance the ability of the ADF to protect states, self-governing territories, and Commonwealth interests, onshore and offshore, against domestic violence, including terrorism'.[12]

This article is concerned with the ability of civilian courts to review a decision to call out the ADF to aid the civil authority — arguably the most important, yet least clarified aspect of Pt IIIAAA and one that would not appear to be covered in any academic literature in the field.[13]

It is clear that a decision of the Governor-General (to make a call-out order) is not subject to judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act).[14] A decision by an Authorising Minister, or alternate Authorising Minister, to make an order or declaration under Pt IIIAAA would be viewed as a decision by an officer of the Commonwealth.[15]

Review of a decision to call out the ADF to aid the civil authority could occur by way of the constitutional writs referred to in s 75(v) of the Constitution. Section 75(v) provides that 'in all matters … in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth' the High Court shall have original jurisdiction. Similar

10 Insofar as there is a single definition; see Bruce Hoffman, Inside Terrorism (Columbia University Press, 1998); see further Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge University Press, 2015).

11 Robert Hill (Minister for Defence), 'Australia's National Security: A Defence Update 2003', media release, 26 February 2003, 5. The current National Terrorism Threat Level is PROBABLE.

12 Explanatory Memorandum to Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth) 2 (Explanatory Memorandum 2018); as corroborated in the second reading speech for the Bill: Commonwealth, *Parliamentary Debates,* House of Representatives, 28 June 2018, 674 (Charles Christian Porter, Attorney-General).

13 See Samuel C Duckett White, 'A Soldier By Any Other Name: A Reappraisal of the "Citizen in Uniform" Doctrine in Light of Part IIIAAA' (2020) 57(2) *Military Law and Law of War Review;* David Letts and Rob McLaughlin, 'Military Aid to the Civil Power' in Robin Creyke, Dale Stephens and Peter Sutherland (eds), *Military Law in Australia* (The Federation Press, 2019) 112; John Sutton, 'The Increasing Convergence of the Role and Functions of the ADF and Civil Police' (2017) 202 *Australian Defence Force Journal 38*; David Letts and Rob McLaughlin, 'Call-Out Powers for the Australian Defence Force in an Age of Terrorism: Some Legal Implications' (2016) 85 *AIAL Forum 63*; Michael Head, *Calling Out the Troops* (The Federation Press, 2009); Cameron Moore, 'The ADF and Internal Security: Some Old Issues with New Relevance' (2005) 28(2) *UNSW Law Journal*, 523; Margaret White, 'The Executive and the Military' (2005) 28(2) *UNSW Law Journal* 438; Norman Charles Laing, 'Call-Out the Guards: Why Australia Should No Longer Fear the Deployment of Australian Troops on Home Soil' (2005) 28(2) UNSW Law Journal 508; Michael Head, 'The Military Call-Out Legislation: Some Legal and Constitutional Questions' (2001) 29 *Federal Law Review* 271; 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); Lee, above n 8; Andrew Hiller, *Public Order and the Law* (Sweet & Maxwell Ltd, 1983).

14 See para (c) of the definition of 'decision to which this Act applies' in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) s 3.

15 See Janina Boughey and Greg Weeks, '"Officers of the Commonwealth" in the Private Sector' (2013) 36(1) *UNSW Law Journal* 316.

jurisdiction is conferred on the Federal Court of Australia by s 39B(1) of the Judiciary Act 1903 (Cth). Although the courts' powers include granting other administrative law remedies such as certiorari and a declaration, it is not necessary for present purposes to discuss these remedies in any detail. It is sufficient to note that it is possible that one or more of these remedies would be available in relation to a decision of the Authorising Ministers under the proposed threshold if an applicant could demonstrate a legal defect in the reasoning of the Authorising Ministers, such as a failure to consider the mandatory factors.

Any application for judicial review would have to overcome the hurdle of standing, which this article does not engage with but assumes would be possessed by a necessary applicant.[16] It further assumes that reasons will be given for the call-out order, which would address the mandatory considerations. This article will cover the legislative framework of Pt IIIAAA, focusing specifically on the mandatory and discretionary considerations of the Authorising Ministers when making a call-out decision or declaration. It will then address the decision itself before looking at practical barriers to judicial review, such as the presumption of regularity, whether a decision to call out the troops is non-justiciable, and sensitivities surrounding national security evidence. While some might consider this an academic exercise, it is likely that, in a scenario where the ADF was called out under Pt IIIAAA, there would be extreme scrutiny of the decision-making process.

Legislative framework: Pt IIIAAA

Part IIIAAA is predicated on the need to resolve domestic violence incidents, or a threat thereof, as quickly and efficiently as possible. It merits noting from the outset that:

> The threshold (for calling out the troops) … recognises that calling out the ADF to respond to an incident is a significant and exceptional act, and ensures that it is not to be done in relation to incidents that are within the ordinary capability of police.[17]

This threshold will be explored in more detail below. A call-out order is generally made by the Governor-General, on the satisfaction of the Authorising Ministers. The Authorising Ministers are the Prime Minister, the Attorney-General and the Minister for Defence.[18]

An order by the Governor-General requires the Chief of the Defence Force (CDF) to utilise the ADF in 'such a manner as is reasonable and necessary, for the purpose specified in the order'.[19] With the exception of an offshore area, when utilising the ADF under Pt IIIAAA, the CDF must, as far as is reasonably practicable, ensure that ADF members, inter alia,

16 Under the ADJR Act, s 5, a person aggrieved by a 'decision to which this Act applies' may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the grounds specified in the section — eg failing to take a relevant consideration into account in the exercise of a power. The phrase 'decision to which this Act applies' is relevantly defined in s 3 of the ADJR Act to mean 'a decision of administrative character' made under an Act. The term 'decision' is broadly defined in the ADJR Act, s 3(2), and has been interpreted as meaning a determination, for which provision is made by statute, that is 'final or operative and determinative', at least in a practical sense, of the issue of fact calling for consideration: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337.

17 Addendum to the Explanatory Memorandum to the Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth), 3 (Addendum to the Explanatory Memorandum 2018).

18 *Defence Act 1903* (Cth) s 31.

19 Ibid s 39(2).

cooperate with the police force of the relevant state or territory.[20] This does not transfer operational command or control of ADF members to constabulary forces.[21]

It merits first to look at potential call-out situations that may occur under the amended Pt IIIAAA, as outlined in Table 1.

Section	Call-out type
33	Commonwealth interest
34	Commonwealth interest — contingent call-out
35	Protection of states and territories
36	Protection of states and territories — contingent call-out

Call-out orders under ss 33 and 35 are effective for up to 20 days unless revoked earlier.[22] If the Authorising Ministers are still satisfied, the order may be extended for up to another 20 days, without restriction on the number of times an order may be varied.[23] Contingent call-out orders cease to be in force at the end of the time frame specified in the order unless revoked earlier.[24] A call-out order must also specify which Division, as per Table 2 below, it authorises, dictating the powers that might be utilised by ADF members.[25] More than one Division may be in effect at one time.

Table 2: Part IIIAAA Divisions

Number	Division
3	Special powers generally authorised by the Minister
4	Powers exercised in specified areas
5	Powers to protect declared infrastructure

The above framework notes which Divisions are to be authorised to apply in relation to the order. Although not central to the topic of this article, from a holistic perspective it is important that it be understood.

Generally speaking, Div 3 powers may only be exercised when authorised by an Authorising Minister.[26] The powers under Div 3 are focused primarily on 'preventing, ending, and protecting

20 Ibid s 40(1)(ii)
21 Ibid s 40(3).
22 Ibid ss 33(5)(d)(ii), 35(5)(d)(ii).
23 Ibid s 37(2).
24 Ibid ss 34(5)(d)(ii), 36(50(d)(ii).
25 Ibid ss 33(5)(c), 34(5)(c), 35(5)(c), 36(5)(c).
26 Ibid s 41.

people from, acts of violence and threats'.[27] While there is no limitation on the corps or service categorisation of the ADF members to be used (Regular or Reserve), realistically any land-based call-out of the ADF under Div 3 will utilise Australian Special Forces, which include TAG(E) or Tactical Assault Group (West) (TAG(W)). TAG(E) is constituted by members of the 2nd Commando Regiment (2CDO) and is responsible for assisting Australia's eastern seaboard.[28] TAG(W) is constituted by members of the Special Air Service Regiment (SASR) and is responsible for Australia's western seaboard.[29]

Personnel in TAG(E) and TAG(W) are members of Special Operations Command (SOCOMD). The effect of this is that qualified members of SOCOMD are highly trained and experienced in urban combat and are considered the apex of combat soldiers. They are, even within the isolated institution of the ADF, removed both geographically and culturally,[30] their identities, and the tenure of their posting in SOCOMD, are protected (in policy) from both the public and their peers (protected identity herein referred to as PID). Accordingly, there is no requirement for soldiers to wear uniform or have any form of identification while operating under Div 3. While lengthy, the justification merits replication:

> The requirement to wear uniforms and identification applies to proposed Division 4, but not to proposed Division 3. This is because the tasks that the ADF will be required to perform under Division 3 are higher end military actions and may involve the Special Forces. These tasks may require the ADF to operate in a covert manner where uniforms would be detrimental. ADF Special Forces soldiers have protected identity status because they are associated with sensitive capabilities. Protected identity status is required to maintain operational security and the safety of the individual and their family. By virtue of their protected identity status, ADF Special Forces soldiers are able to exercise powers under proposed Division 3 without being required to produce identification or wear uniforms. Tasks under Division 4 are more likely to be related to securing an area with, or in assistance to, the police. When carrying out Division 4 tasks, the ADF is more likely to need to display a visible presence and therefore uniforms will assist the conduct of these tasks.[31]

Division 3 evidently envisages situations which require extreme, deliberate and potentially lethal force to be used. It allows a wide discretion to ADF members on the ground, in the air or on the water to prevent or put an end to violence.

Under Div 4, the Authorising Ministers may declare a 'specified area'.[32] The intent of such a declaration by the Authorising Ministers is to empower an ADF member to search premises in the specified area and also means of transport and persons in the specified area.[33] The search powers under the specified area are accordingly divided into two subdivisions:

27 Explanatory Memorandum 2018, above n 12, 59.
28 Michael Brissenden, 'Sydney Siege: Counter-terrorism Specialist Questions Weapons' *Australian Broadcasting Corporation* (online) 25 January 2015 <https://www.abc.net.au/news/2015-01-29/counter-terrorism-specialist-questions-sydney-siege-weapons/6053706>.
29 Ibid
30 The effect of this isolation on the culture of SOCOMD was addressed in an internal review by sociologist Dr Samantha Crompvoets — see Dan Oakes, 'Claims of Illegal Violence, Drugs and Alcohol Abuse in Leaked Australian Defence Report' *Australian Broadcasting Corporation* (online) 9 June 2018 <https://www.abc.net.au/news/2018-06-08/allegations-of-australian-soldier-misconduct-detailed-in-report/9815182>.
31 Explanatory Memorandum 2018, above n 12, 60.
32 *Defence Act 1903* (Cth) s 51.
33 Explanatory Memorandum 2018, above n 12, 16.

one relating to premises (Subdiv C)[34] and the other to means of transport and people (Subdiv D).[35] The authorisation process for these subdivision search powers differs subtly.

Division 5 develops further on the powers of the ADF when protecting 'declared infrastructure' and is focused primarily on 'preventing and ending damage or disruption to the operation of declared infrastructure, and on preventing, ending and protecting people from acts of violence and threats'.[36] Under Pt IIIAAA the Authorising Ministers may, in writing, declare particular infrastructure, or part thereof, as 'declared infrastructure'.[37] Separately, an expedited infrastructure declaration can be made under Div 7.[38] The criteria by which the Authorising Ministers may declare infrastructure requires belief, on reasonable grounds, that:

> (a) Either:
>
> (i) There is a threat of damage or disruption to the operation of the infrastructure or the part of the infrastructure; or
>
> (ii) If a contingent call out order is in force — if the circumstances specified in the order were to arise, there would be a threat of damage or disruption to the operation of the infrastructure or part of the infrastructure; and
>
> (b) The damage or disruption would directly or indirectly endanger the life of, or cause serious injury to, any person.[39]

The Explanatory Memorandum makes clear that:

> [It is not intended to cover or] … protect nationally significant buildings such as the Opera House in the absence of any concomitant risk to life. The type of infrastructure intended to be declared includes, for example, power stations, water treatment plants, nuclear power stations and hospitals.[40]

However:

> [It is equally linked to] physical facilities, supply chains, information technologies, and communication networks which if destroyed, degraded or rendered unavailable for an extended period, would significantly impact on the social or economic wellbeing of Australia, or affect Australia's ability to conduct national defence and ensure national security.[41]

The question of whether infrastructure such as the Sydney Harbour Bridge — which, if destroyed, would impact on the economic wellbeing of Sydney through significant disruption to its flow of trade and transport — could be deemed declared infrastructure remains open. Declared infrastructure may be either within Australia or the offshore area; and whether a call-out is in force or not.[42] Pertinently, it may relate to infrastructure in a state or territory,

34 *Defence Act 1903* (Cth) s 51A.
35 Ibid s 51B.
36 Explanatory Memorandum 2018, above n 12, 72.
37 *Defence Act 1903* (Cth) s 51H.
38 Ibid s 51F.
39 Ibid s 51H(2).
40 Explanatory Memorandum 2018, above n 12, 71
41 Ibid 32.
42 *Defence Act 1903* (Cth) s 51H.

regardless of whether the relevant state or territory government has requested it.[43] It may only operate while the call-out order is on foot.[44]

When making an order to call out the ADF, the Governor-General must also specify the exact nature of the domestic violence or threat, the specific interest affected in each jurisdiction, and the date on which the call-out ends.[45]

Call-outs

For a Commonwealth interest call-out, the Governor-General may make an order to call out the ADF, on the satisfaction of the Authorising Ministers, that:

(a) any of the following applies:

(i) domestic violence that would, or would be likely to, affect Commonwealth interests is occurring or is likely to occur in Australia;

(ii) there is a threat in the Australian offshore area to Commonwealth interests (whether those interests are in that area or elsewhere);

(iii) domestic violence that would, or would be likely to, affect Commonwealth interests is occurring or is likely to occur in Australia, and there is a threat in the Australian offshore area to those or any other Commonwealth interests; 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 Commonwealth interests against the domestic violence or threat, or both; and

(c) one or more of Divisions 3, 4 and 5 should apply in relation to the order.[46]

While there is nothing to prevent a state or territory from requesting a Commonwealth interests order, the Commonwealth can also make one on its own initiative to protect Commonwealth interests within a state or territory. Where a Commonwealth interests call-out order is made that a state or territory has not requested, there is a requirement for Authorising Ministers to consult with the state or territory before the order is made (unless, for reasons of urgency, it is not practicable to do so).[47]

The ADF may be used without state or territory request when domestic violence would, or would be likely to, affect a Commonwealth interest.[48] Part IIIAAA fails to provide any definition for the phrase 'Commonwealth interest'. Some interpretive help is found in the Addendum to the Explanatory Memorandum to the Act, where the term is to be read as including 'The protection of: Commonwealth property or facilities; Commonwealth public officials; visiting foreign dignities of heads of state; and major national events, including the Commonwealth Games or G20'.[49]

43 Ibid 51H(6)(7).
44 Ibid 51H(5)(ii).
45 Ibid ss 33(5), 34(5), 35(5) s36(5).
47 Ibid ss 38(2), 51V(6)
48 Ibid s 33(1).
48 Addendum to the Explanatory Memorandum 2018, above n 17, 3.

Indeed, bearing in mind that there has been no judicial consideration of the phrase or any statutorily binding definition, one academic has suggested that where Commonwealth laws or property are affected then, ipso facto, a Commonwealth interest has been affected.[50] Although such a position was posited prior to the 2006 and 2018 Amendments, it is submitted that this assessment may remain valid.

For a state or territory protection call-out, the Governor-General may make an order to call out the ADF if:

> (a) a State Government or Government of a self governing Territory applies to the Commonwealth Government to protect the State or Territory against domestic violence that is occurring, or is likely to occur, in the State or Territory; and
>
> (b) the authorising Ministers are satisfied that:
>
> (i) 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 or Territory against the domestic violence; and
>
> (ii) one or more of Divisions 3, 4 and 5 should apply in relation to the order.[51]

For both Commonwealth interest and state or territory protection call-outs, Pt IIIAAA allows for a mechanism by which the Governor-General may essentially pre-authorise an order for a call-out, triggered by specified circumstances, where for reasons of urgency a normal call-out is impracticable.[52] These are known as contingent call-outs.

Expedited call-outs

Additional to the above, in sudden and extraordinary emergencies, an order may be made by Authorising Ministers, or alternative Authorising Ministers, in lieu of the Governor-General, to call out the ADF.[53] Such an order may simply be made verbally[54] or be an electronically signed email.[55] What constitutes a sudden or extraordinary set of circumstances is undefined, necessarily so due to the flexibility afforded.

There are three different methods by which this can occur. The process may only progress if the preceding option cannot be satisfied. In the first instance, the Prime Minister may unilaterally make an order or declaration.[56] Where the Prime Minister is unavailable to be contacted for the purpose of considering or making such an order or declaration then the two remaining Authorising Ministers may make an order or declaration.[57] In the event that one of the aforementioned Authorising Ministers is unavailable, the remaining Authorising

50 Commonwealth, *Protective Security Review — Report of Mr Justice Hope* (unclassified version), Parliamentary Paper No 397 (1979) (Hope Report), Annex 9; see Michael Head, 'Calling Out the Troops — Disturbing Trends and Unanswered Questions' (2005) 28(2) *UNSW Law Journal 528.*
51 *Defence Act 1903* (Cth) s 35(1).
52 Ibid ss 34(1), 36(1).
53 *Defence Act 1903* (Cth) s 51U
54 Ibid s 51U(3). If this is the case then a written record of its particularity must be made and signed by the decision-maker(s) and the CDF as per s 51U(3). Failure to comply with this requirement will affect the validity of the order or declaration, by implication of *Defence Act 1903* (Cth) s 51U(3).
55 Ibid ss 51(U)(3)(a)(b). This could allow, theoretically, for an expedited call-out in under five minutes.
56 *Defence Act 1903* (Cth) s 51U(2)(a).
57 Ibid s 51U(2)(b).

Minister, jointly with an alternative Minister, may make an order or declaration.[58] An alternate Authorising Minister is any one of the following Ministers: the Deputy Prime Minister; the Foreign Affairs Minister; the Treasurer; or the Minister for Home Affairs.[59] An expedited call-out can only last up to five days.[60] A decision to call out the ADF in these circumstances would involve a decision that would further be subject to judicial review under the ADJR Act.

The decision: mandatory and discretionary factors

The central role of Authorising Ministers under Pt IIIAAA is the logical starting point when assessing the reviewability of a decision to call out the ADF. The Authorising Ministers are required to make a number of assessments, which differ between a Commonwealth interest call-out and a state or territory protection, or expedited, call-out. For a Commonwealth interest call-out, or Commonwealth interest contingent call-out, the Authorising Ministers:

i. must consider the nature of the domestic violence; and

ii. must consider whether the utilisation of the Defence Force would be likely to enhance the ability of each of those States and Territories to protect the Commonwealth interests against the domestic violence; and

iii. may consider any other matter that the authorising Ministers consider relevant.[61]

This is compared with the test for a state or territory protection call-out, which requires that the Authorising Ministers:

i. must consider the nature of the domestic violence; and

ii. must consider whether the utilisation of the Defence Force would be likely to enhance the ability of the State or Territory to protect the State or Territory against the domestic violence; and

iii. may consider any other matter that the authorising Ministers consider relevant.[62]

Further, when making a call-out order or declaration with respect to Divs 3 and 5, the Authorising Ministers must have regard to Australia's international obligations.[63]

What can be seen, however, is that both require, in essence, a mandatory consideration of the nature of the domestic violence and the ability of the ADF to enhance state or territory constabulary forces' ability to protect the relevant interest against the domestic violence.

Domestic violence

The language used in Pt IIIAAA aims to reflect s 119 of the *Constitution* — the 'wallflower of

58 Ibid s 51U(2)(c).
59 Ibid s 51U(2)(c). In an era of rapidly changing political portfolios, the Minister for Home Affairs is defined as the Minister who administers the *Australian Federal Police Act 1979* (Cth) as per s 31.
60 *Defence Act 1903* (Cth) s 51V(4)(b).
61 Ibid ss 33(2)(a)(b), 34(2)(a)(b).
62 Ibid ss 35(2)(a)(b), 36(2)(a)(b).
63 Ibid ss 45, 51G.

the *Constitution*'.[64] Viewed through the prism of a continual cycle of industrial struggles in the 1890s,[65] Sir Samuel Griffiths, as Premier of Queensland, is thought to have inserted the original provision on or around March 1891[66] in light of his deployment, two months earlier, of 1442 troops to break the Shearer's Strike.[67] The provision of the Constitution reads:

> The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

The term 'domestic violence' finds no definition in the Constitution or the Defence Act, nor has it received any jurisprudential commentary. The Addendum to the Explanatory Memorandum to the Act notes that:

> 'domestic violence' … refers to *conduct that is marked by great physical force, and would include a terrorist attack, hostage situation, and widespread or significant violence*. Part IIIAAA uses the term 'domestic violence' as this is the term used in section 119 of the *Constitution*, which deals with state requests for assistance in responding to domestic violence. Peaceful protests, industrial action or civil disobedience would not fall within the definition of 'domestic violence.'[68]

When considering the nature of the domestic violence:

> [Consideration could include] matters such as *the type of violence, the types of weapons used, the number of perpetrators* involved, as well as the scale of domestic violence (or anticipated domestic violence) where such information is available. For example, the ADF could be called out in response to unique types of violence, such as chemical, biological, radiological or nuclear attack … The ADF could also be called out where the type of violence is not unique — for example an active shooter — but *where the violence is so widespread, or there are so many shooters involved*, that law enforcement resources are in danger of being exhausted. [69]

This direction, however, is merely advisory. There is thus a large ambit of discretion granted to Authorising Ministers to be satisfied in making their recommendation to the Governor-General. A possible ground of review would be that the situation that resulted in the ADF being called out did not meet the threshold for amounting to 'domestic violence' — potentially such as the Lindt Café hostage situation, which, although involving a hostage situation, did not involve widespread violence.

ADF's involvement enhances

The second mandatory consideration requires an assessment of the differing capabilities and capacity of the various states or territories.[70] The constabulary forces of New South Wales, for example, require less assistance than those of Tasmania. This is ostensibly aimed at ensuring that:

64 Peta Stephenson, 'Fertile Grounds for Federalism — Internal Security, the States and Section 119 of the Constitution' (2015) 43 *Federal Law Review* 289, 291.
65 Head, above n 13, 45.
66 See John A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972).
67 Which the Queensland Government viewed as amounting to an insurrection and troops were called in to suppress it. See Commonwealth, above n 50, 330.
68 Explanatory Memorandum 2018, above n 12, 6 (emphasis added).
69 Ibid 36 (emphasis added).
70 Anthony Blackshield, 'The Siege of Bowral — The Legal Issues' (1978) 4(9) *Pacific Defence Reporter* 36.

> [The ADF is called out in situations] where the ADF has relevant specialist capabilities that could be brought to bear … (allowing for) greater flexibility for the ADF to be used to provide the most rapid, effective or appropriate specialist support to the states and territories, while respecting the states' and territories' position as first responders.[71]

Arguably, one ADF member equipped with a service rifle could enhance the capabilities of a state or territory constabulary force; equally, a lack of training and communication systems could hinder the effectiveness of coordinated responses.[72] Although it is a balancing act, the use of the ADF is a significant and exceptional act not intended to respond to 'incidents ordinarily and easily dealt with by police'.[73] Reviewing an assessment by a decision-maker as to what level of enhancement might be achieved by utilising the ADF is thus a more difficult consideration to challenge than what constitutes domestic violence.[74]

Contingent call-outs

The same follows for contingent call-outs. As noted above, contingent call-outs may occur for any call-out situations[75] and are triggered by 'specified circumstances'.[76] Under s 34:

> [Contingent call-out orders will typically be] used as part of a request for ADF security support for major international events hosted within Australia, where there is a foreseeable or anticipated threat against Commonwealth interests. Such orders have been regularly made as part of security measures to protect major Commonwealth events including the 2014 G20 Leaders' Summit in Brisbane, the 2018 Gold Coast Commonwealth Games and the 2018 ASEAN–Australia Summit, from circumstances involving air threats.[77]

This is shared for contingent call-outs under s 36, in relation to state or territory protection orders.[78] Specifically, a contingent call-out under s 36 may occur where 'the relevant state or territory may have limited, or no, capability to respond to such an attack'.[79]

These specified circumstances must be 'sufficiently particular to allow Authorising Ministers to make the assessment required'[80] and are not intended to be made 'on the basis of vague or indefinite specified circumstances'.[81] But what exactly 'specified circumstances' constitute, and the level and reliability of the intelligence required for offshore and land contingencies,

71 Explanatory Memorandum 2018, above n 12, 25.
72 'Working with Police' (2019) 56 *Smart Soldier* 29–32.
73 Explanatory Memorandum 2018, above n 12, 6.
74 The Lindt Café Coronial found that the preconditions for a call-out, under the relevant legislation at the time, were not met because NSW Police considered it had the capacity to respond effectively to Monis' actions and did not advise the NSW Government otherwise. See Lindt Café Coronial, above n 2, 384.
75 The Lindt Café Coronial found that the preconditions for a call-out, under the relevant legislation at the time, were not met because NSW Police considered it had the capacity to respond effectively to Monis' actions and did not advise the NSW Government otherwise. See Lindt Café Coronial, above n 2, 384. The Lindt Café Coronial found that the preconditions for a call-out, under the relevant legislation at the time, were not met because NSW Police considered it had the capacity to respond effectively to Monis' actions and did not advise the NSW Government otherwise. See Lindt Café Coronial, above n 2, 384.
76 *Defence Act 1903* (Cth) ss 34(1), 36(1).
77 Addendum to the Explanatory Memorandum 2018, above n 17, 3.
78 Ibid 5.
79 Ibid 4
80 Ibid 4
81 Ibid 3

was a significant issue in the drafting stages.[82] The Explanatory Memorandum notes that there 'are a range of circumstances that could give rise to a contingent call out order. What constitutes specified circumstances will depend on the situation in question'.[83] The effectiveness and viability of contingent call-outs have been raised elsewhere and will not be covered in this article.[84]

A contingent call-out order could be made, for example, to protect Commonwealth interests during a major international summit where there is a foreseeable risk based on intelligence of a chemical, biological, radiological or nuclear (CBRN) attack at a summit venue. It would be appropriate for a contingent call-out order to be in place to deal with this foreseeable risk, empowering the ADF to use its specialist capabilities should the specified circumstances of an imminent or actual CBRN attack at the summit arise without having to use the normal or expedited call-out process when the specified circumstances actually arise. Moreover, this applies to possible aviation or maritime threats. It would appear then unlikely that any possible challenge or review could be conducted on the decision to call out troops under a contingency.

International obligations

Divisions 3 and 5 of Pt IIIAAA require Authorising Ministers to have regard to Australia's international obligations.[85] Failure to do so would constitute a jurisdictional error under a judicial review application. Some examples include the application of Art *3bis* to the *Convention on International Civil Aviation* [86] (Chicago Convention), with respect to use of force against a civil aircraft; as well as the *Freedom of Association and Protection of the Right to Organise Convention 1948* (No 87),[87] the *Right to Organise and Collective Bargaining Convention 1949* (No 98)[88] and Art 8(1)(d) of the *International Covenant on Economic, Social and Cultural Rights*[89] (ICESCR) with respect to use of the ADF in industrial actions.

82 See Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Defence Legislation Amendment (Aid to the Civilian Authorities) Bill 2005* (2006) 44.

83 Addendum to the Explanatory Memorandum 2018, above n 17, 5.

84 Justice Robert Hope, in his seminal Hope Report (Commonwealth, above n 50, 161) commented that the past has established in many parts of the world a great variety of emergent circumstances, some of which would have fallen within a predictable pattern but some of which would not. The last two decades have shown how quickly different situations can develop, thereby creating entirely new challenges to law enforcement authorities. The prescription of the circumstances in which the Defence Force can be used, or of the criteria to be applied in deciding whether that use should be approved, is impracticable and would impose too great an inflexibility upon a situation, which although unusual, of its very nature requires flexibility.

85 *Defence Act 1903* (Cth) ss 45, 51G.

86 Opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947).

87 Opened for signature 9 July 1948, 68 UNTS 17 (entered into force 4 July 1950), ratified by Australia 28 February 1974.

88 Opened for signature 1 July 19489, 96 UNTS 257 (entered into force 18 July 1951), ratified by Australia 28 February 1974

89 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), ratified by Australia 10 March 1976.

Barriers affecting review

Presumption of regularity and mala fides

A key practical difficulty is the 'presumption of regularity', which would also be applicable in relation to a call-out order. In *Minister for Natural Resources v New South Wales Aboriginal Land Council*,[90] McHugh JA stated that 'where a public official or authority purports to exercise a power or to do an act in the course of his or its duties, a presumption arises that all conditions necessary to the exercise of that power or the doing of that act have been fulfilled'.

The presumption of regularity can be rebutted, and one such rebuttal would be that the decision was *mala fides*. One specific example may be where a call-out order was made by a sole alternate Authorising Minister; such an action would not be unviable but may lead to questions.

A plea of *mala fides* would be difficult to establish, no less so than a less than consistent usage of the term.[91] Within the United Kingdom, Lord Somerville in 1956 noted that the term had 'never been precisely defined or its effects have happily remained in the region of hypothetical cases'.[92] In modern parlance, it can be submitted that mala fides relates to a concept of dishonesty which would require particularisation;[93] and thus would require proof of a subjective mental element of the Governor-General, Authorising Ministers or alternate Authorising Ministers. It is, however, unlikely to succeed.

A *mala fides* plea in the context of a call-out thus, from the outset, is difficult. Lee, in his seminal work, *Emergency Powers*, summarised the position as such (noting that, in this context, a call-out of the ADF would fall under the notion of an emergency power):

> Viewed from one angle a political crisis if unresolved through emergency rule may threaten the national security. Viewed from the angle of those who are directly affected by the emergency rule a proclamation of emergency is merely a colourable device to enable to government to achieve indirectly what it cannot constitutionally do directly … the insistence on a heavy burden of proof on those who seek to impugn it makes it extremely difficult for a successful invocation of the mala fides argument.[94]

Arising from the paucity of precedent, it follows that foreign authorities should be sought. Common law cases on the use of military in assisting law enforcement 'date from the period of empire when places such as Palestine, Australia, New Zealand, South Africa and India shared a greater formal legal affinity'.[95] As such, *obiter* and *ratio* from these cases are acknowledged to not be binding. It is unlikely, however, that in a scenario relating to the use of force by an ADF member under Pt IIIAAA that 'the UK experience would not feature strongly in the search for jurisprudential guidance — at least, as a minimum, with respect to the broader philosophical–legal issues at play'.[96]

90 (1987) 9 NSWLR 154, 164.
91 Hoong Phun Lee, *Emergency Powers* (Sweet & Maxwell Ltd, 1984) 270.
92 *Smith v East Elloe RDC* [1956] AC 736.
93 *Cannock Chase District Council v Kelly* [1978] 1 All ER 152.
94 Lee, above n 91, 271.
95 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, 446.
96 Ibid 447.

Accordingly, the Privy Court decision in *Stephen Kalong Ningkan v Government of Malaysia*[97] provide an interesting case study. The facts, although long, merit repeating to demonstrate a nearly successful argument of mala fides and the pitfalls for an application.

On 22 July 1963, Stephen Kalong Ningkan was appointed Chief Minister of Sarawak, one of the Malaysian states. He equally was leader of the majority party in the State Legislature of Sarawak (also known as the Council Negri). On 16 June 1966, the Governor of Sarawak, acting on representations made to him, requested Ningkan to resign due to a loss of confidence. Instead of complying with the request, Ningkan convened the Council Negri to request a formal no-confidence vote; consequentially, the Governor sacked Ningkan for noncompliance and appointed a new Chief Minister. Ningkan filed a suit, successfully claiming a formal no-confidence vote was required and that his dismissal was void, and was reinstated as Chief Minister.

This reappointment led to the passing of the *Emergency (Federal Constitution and Constitution of Sarawak) Act 1966*. Under this legislation, a signed statutory declaration containing 25 signatures of no confidence was delivered to the Governor, which created a constitutional impasse when the Governor invoked his discretion to refuse Ningkan's request for elections rather than dismissal. A state of emergency was declared after deteriorating public confidence to allow for emergency legislation enabling the Governor to dismiss a Chief Minister on a statutory declaration. This legislation was passed and Ningkan was sacked; the Privy Council upheld the validity of the emergency legislation.

In *Stephen Kalong Ningkan v Government of Malaysia* — the culminating litigation for Ningkan's reinstallation as Chief Minister — counsel for the applicant effectively argued that there was no emergency within the meaning of Art 150(1) of the Malaysian Constitution (being a grave emergency to the security or economic life of the Federation), as there had been no signs or symptoms of a grave emergency: 'no disturbances, riots or strikes had occurred; no extra troops or police had been placed on duty; no curfew or other restrictions on movement had been found necessary; and the hostile activities of Indonesia had already ended'.[98] The Privy Council thus found, in dealing with the *mala fides* argument arising from an improper use of emergency legislation, that, although the proclamation was justiciable, Ningkan had failed to discharge the heavy onus of proof placed on him.[99]

The Privy Council's broad interpretation of a state of emergency, which was purely constitutional in nature and failed to have any semblance of domestic violence, would suggest it well-nigh impossible to challenge a decision, even an expedited decision by a sole alternate Authorising Minister.

Potential non-justiciable nature of decision

It was traditionally an underlying principle of the common law that prerogative powers are non-justiciable, albeit that the notion of justiciability is not one with 'which the average lawyer

97 [1968] 1 MLJ 119.
98 Lee, above n 91, 272.
99 [1970] AC 369, 390.

is conversant'.[100] Although not binding, the House of Lords decision in *Council of Civil Service Unions v Minister for the Civil Service*[101] *(CCSU)* provides authority for the position that the exercise of prerogative power is not immune from judicial review for that reason alone. The subject matter, and not the source of the prerogative power, is the determining factor in determining justiciability.[102]

The House of Lords' approach in CCSU was followed by the Full Federal Court in *Minister for Arts, Heritage and Environment v Peko-Wallsend*[103] *(Peko-Wallsend)*, rejecting the principle that review was impossible purely because a prerogative power was involved and suggesting that justiciability instead turned on the nature and effect of the power exercised.[104] This was supported by the High Court in *R v Toohey; Ex parte Northern Land Council*[105] *(Toohey),* where Mason J considered reviewability of exercise of prerogative and executive powers, noting that:

> There is much to be said for the view … that the exercise of discretionary prerogative power can be examined by the courts just as any other discretionary power which is vested in the executive. The question would remain whether the exercise of a particular prerogative power is susceptible of review and on what grounds.[106]

Perhaps in order to check the alleged growing impunity of executive power, the law of justiciability has become increasingly fluid when considering this 'forbidden area'.[107] Justice Tamberlin, in considering the case of the incarcerated Australian David Hicks seeking a writ of habeas corpus, rejected the Commonwealth's application for a summary dismissal on the grounds that 'the concept of a "forbidden area" arguably states the position far too generally to be applied at face value'.[108]

But these developments relate to foreign policy. A more appropriate analogy is the judiciary's approach to review of national security matters. In this, the position is best summarised by the following quote:

> security is a concept with a fluctuating content, depending very much on circumstances as they exist from time to time; it is similar to the constitutional concept of defence.[109]

While the majority of the Court held in that instance that there was no area of the Commonwealth's exercise of power that could be outside potential review, in practice there were insurmountable difficulties in doing so for the litigant. In dissent, Brennan J still acknowledged the formidable task of seeking review of a national security matter, going as far as to comment that 'the public interest in national security will seldom yield to the public

100 Hersch Lauterpacht, 'The Doctrine of Non-Justicable Disputes in International Law' (1928) 23 *Economica* 277.
101 [1984] UKHL 9.
102 [1985] AC 374, 407. See Fiona Wheeler, 'Judicial Review of Prerogative Power in Australia: Issues and Prospects' (1992) 14(4) *Sydney Law Review* 432, 449–50.
103 (1987) 75 ALR 218, 224, 253.
104 *Minister for Arts, Heritage and Environment v Peko-Wallsend* (1987) 75 ALR 218, 223–5 (Bowen CJ).
105 (1981) 151 CLR 170.
106 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 220–1 (Mason J).
107 *Abbasi v Secretary of State* [2002] EWCA Civ 1598.
108 *Hicks v Ruddock* (2007) 156 FCR 574.
109 *Church of Scientology v Woodward* (1982) 154 CLR 25, 60 (Mason J).

interest in the administration of civil justice'.[110] This would seem to confirm the position of the Privy Council as up to date. It declared in *The Zamora*:

> Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.[111]

The American experience of federal injunctive relief against state governor decisions to utilise the National Guard as a law enforcement agency is somewhat analogous. In particular, the United States Supreme Court found that, while a governor's decision to call out the National Guard was unreviewable, the decision to use the National Guard for a certain purpose was subject to review.[112] This distinction is narrow but important, for the decision was grounded upon the absolute need in a system of government dedicated to the rule of law for an ability to review such a decision.[113] Pertinently, that Court held that 'what are the allowable limits of military discretion, and whether they have been overstepped in a particular case, are judicial questions'.[114]

Yet, despite the weakening of the traditional prerogative immunity in Australia, it has been suggested that there is no scope for reviewing prerogative powers, such as the 'appointment and dismissal of Prime Ministers, decisions relating to foreign policy, declarations of war, national security, and matters such as royal honours'.[115] If such a position were adopted, it would appear to immunise, from review, a decision made by the Governor-General to call out the ADF.[116] Despite this, it is the submission of this article that each of the Authorising Ministers would be found to be an 'officer of the Commonwealth' for the purpose of s 75(v) of the *Constitution* and s 39B(1) of the *Judiciary Act 1903*. It is therefore highly likely that the matter would be justiciable.

However, assuming justiciability could be established, it would be necessary, as noted above, for a person seeking to challenge a decision under s 75(v) of the *Constitution* or s 39B of the Judiciary Act to have grounds for challenge. In the absence of any statement of reasons of the Authorising Ministers, this is likely to be difficult in practice. Grounds of challenge could not simply be asserted without any factual basis, and the presumption of regularity would need to be rebutted by the available facts including reasonable inferences. It is possible that the call-out order may be of some assistance in this regard, although it would not be required to be made public until it has ceased to be in force. In this instance, review of a decision to make the call-out order would be a largely academic endeavour.

Sensitivity of evidence

Were a decision by an Authorising Minister or alternate Authorising Minister be found reviewable by a relevant jurisdiction, there would be additional barriers in accessing and

110 Ibid 76.
111 *The Zamora* [1916] 2 AC 77, 107 (Lord Parker).
112 *Sterling v Constatin* 287 US 378, 399 (1932) citing with approval *Martin v Mott* 25 US (12 Wheat) 19 (1827).
113 Ibid
114 Ibid 196.
115 Head, above n 50, 178.
116 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1); see further *Dean v Attorney-General of Queensland* [1971] Qd R 391, 404–5 (Sable J).

considering the national security, police and ADF intelligence relied upon in making that decision. The friction between national security and public interest is neither novel nor unique.[117] This was made clear in the case of *Leghaei v Director General of Security*[118] *(Leghaei)* before Madgwick J in the Federal Court.

This matter concerned an application for review under s 39B of the Judiciary Act 1903 (Cth) of an adverse security assessment furnished by Australian Security Intelligence Organisation (ASIO) pursuant to s 37 of the *Australian Security Intelligence Organisation Act 1979* (Cth), which determined that the applicant was 'directly or indirectly a risk to Australian national security'.[119] The furnishing of that assessment obliged the Minister for Immigration to cancel the applicant's bridging visa.[120] The applicant disputed the assessment on two primary grounds. First, the applicant claimed that the assessment was void for jurisdictional error due to a denial of procedural fairness, on the basis that the Director-General had failed to provide to the applicant:

> (i) any notice of particular grounds on which the first respondent proposed to make the assessment;
>
> (ii) any specific issues to address as to why the applicant is believed to be a risk to Australian national security; or
>
> (iii) any response to the applicants request for 'specific issues' to which the applicant might respond.[121]

Secondly, the applicant claimed that the assessment was void for jurisdictional error 'in that the Director-General of Security failed to consider and form an opinion on, or provide advice about, the essential question on which the assessment depended', namely whether:

> the applicant's alleged acts and conduct that were the subject of the Assessment (i) meant that it was consistent with the requirements of security for prescribed administrative action to be taken in respect of the applicant, and (ii) supported the making of an adverse security assessment in respect of the applicant.[122]

This raises interesting considerations, when viewed through the prism of Pt IIIAAA, and the ability to utilise evidence, because any consideration of such matters by a court would be largely reliant on the Governor-General's and the Authorising Ministers' subjective assessments as to whether the two broad criteria under the Defence Act are satisfied in the circumstances. It is a matter for judicial consideration.[123]

In considering first whether ASIO had a duty to afford procedural fairness to the applicant, Madgwick J rejected the respondent's submission that the *Australian Security Intelligence Act 1979* (Cth) or considerations of confidentiality and national security necessarily implied that procedural fairness should be excluded, noting that the *Migration Act 1958* (Cth) required

117 Caroline Bush, 'National Security and Natural Justice' (2007) 57 AIAL *Forum* 78, 84–6.
118 *Leghaei v Director-General of Security* [2005] FCA 1576 (*Leghaei*).
119 Ibid [6].
120 Ibid [9].
121 Ibid [26].
122 Ibid [27]
123 This tension of subjective or objective interpretation is also found with respect to the possible defence of superior orders, applicable to ADF members while called out under Pt IIIAAA (s 51Z). See Samuel C Duckett White, 'A Soldier By Any Other Name: A Reappraisal of the Citizen in Uniform Doctrine in Light of Part IIIAA' (2020) (2020) 57(2) *Military Law and Law of War Review*.

a person to be notified when their visa would be cancelled.[124] Accordingly, Madgwick J held that:

> It is my view that an obligation to positively consider what concerns and how much detail might be disclosed to the subject visa holder to permit him/her to respond, without unduly detracting from Australia's national security interests, is minimally necessary to ensure a fair decision-making process.
>
> Thus, in relation to a lawful non-citizen etc, such as the applicant, whose visa would be directly threatened by an adverse security assessment, there was, in my view, a duty to afford such degree of procedural fairness as the circumstances could bear, consistent with a lack of prejudice to national security …[125]

After determining that ASIO had a duty to afford procedural fairness to the applicant, Madgwick J considered whether this duty had been discharged. Ultimately, Madgwick J was satisfied on the confidential evidence before him that the Director-General had genuinely considered disclosure and had afforded procedural fairness to the applicant, noting, however, that the potential prejudice to the interests of national security involved in such disclosure reduced the content of procedural fairness, in practical terms, to nothingness.[126] In coming to this conclusion, his Honour reflected the positions maintained in *Peko-Wallsend*[127] and *Toohey*[128] in further stating that, without the benefit of countervailing expert evidence in the present case, he was not in a position to form an opinion contrary to those expressed in the confidential affidavit evidence in relation to disclosure as 'the Courts are ill equipped to evaluate intelligence'.[129]

It is significant that, while the applicant in *Leghaei* was unable to access information relied upon in making the negative security assessment, classified information and materials were made available to the Court, as well as counsel for the applicant and the applicants' instructing solicitor, after they had undergone the requisite security clearances and had given appropriate undertakings as to confidentiality.[130] In the event of a call-out under Pt IIIAAA, it may indeed be possible to disclose sufficient materials to the court to allow for a determination as to whether it was valid or invalid.[131]

Such a level of disclosure was enough for Madgwick J to consider the unchallenged materials before the Director-General, and determine that procedural fairness had been afforded to the extent possible in light of national security interests and that the adverse assessment decision was not affected by jurisdictional error.[132] But, as Madgwick J states, the amount of comfort that the applicant and interested members of the public can take from this process is 'regrettably limited'.[133]

124 *Leghaei* [2005] FCA 1576 [73].
125 Ibid [82]–[83].
126 Ibid [88].
127 (1987) 75 ALR 218, 224, 253
128 (1981) 151 CLR 170, 220–221 (Mason J).
129 *Leghaei* [2005] FCA 1576 [84].
130 Bush, above n 117, 85–86
131 This might include security situational report or redacted intelligence updates. Equally, it might include text messages — see *Thomas; Secretary, Department of Defence* [2018] AATA 604.
132 *Leghaei* [2005] FCA 1576 [88] and [97].
133 Ibid [90].

As noted above, it is foreseeable that members of TAG(E) or TAG(W) will be utilised for a call out order authorising Div 3. Their use increases the sensitivities around document release, especially with respect to their PID status and tactics, techniques, and procedures (TTPs). As a general proposition, there would be substantial scope for the Commonwealth to rely on a claim of public interest immunity to limit or prevent disclosure of information relied on by the Authorising Ministers to a coroner or tribunal that has required the information for the purposes of its inquiry.

Conclusion

It is the submission of this article that, with the exception of martial law, all public law areas are subject to some level of reviewability.[134] Practically speaking, however, it would appear that a decision by the Authorising Ministers or alternate Authorising Ministers to make an order or declaration with respect to the ADF under Pt IIIAAA is largely unreviewable, even in situations where a *mala fides* decision may have occurred.

Yet this article submits that a decision to call out the ADF is a decision that, from a public policy perspective, will not go without questions.[135] It is highly likely that, if a call-out order was made and the ADF utilised lethal force against a threat, a coroner or other tribunal (such as a royal commission) could occur. This was the case with the Lindt Café Siege, and ADF decisions on operations have been historically subject to detailed scrutiny.[136] In particular, it is possible that the Authorising Ministers' or alternate Authorising Ministers' consideration of the mandatory factors could be the subject of scrutiny and subsequent adverse comment or criticism by a coroner or tribunal. The involvement of a coroner or tribunal is likely, especially in situations where a death occurs. Nonetheless, consideration would be required of the particularities of state or territory coronials, a number of legal and constitutional issues, including the proper interpretation of the relevant state legislation,[137] and whether there is any Commonwealth legislation that would operate to override aspects of the relevant state legislation.[138] Should such issues be surmounted, the recommendations and comments arising out of a coronial or tribunal assessment of a call-out could be significant. Yet whether coronials and tribunals can be practical alternative methods of reviewing call-out decisions remains to be seen.

134 This is a position taken from the Hope Report: Commonwealth, above n 50, 174.

135 As occurred after the Bowral call-out — see, for example, Blackshield, above n 70, 36.

136 See the Queensland State Coroner, 'Inquest into the Deaths of James Thomas Martin, Robert Hugh Frederick Poate, Stjepan Rick Milosevic' (22 September 2015).

137 For example, there is a presumption that an Act does not bind the Crown or its servants or agents — see *Bropho v Western Australia* (1990) 173 CLR 426; *Commonwealth v Western Australia* (1999) 196 CLR 392.

138 Section 109 of the Constitution provides that '[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.