

# A HISTORY OF THE DEFENCE POWER: ITS UNIQUENESS, ELASTICITY AND USE IN LIMITING RIGHTS

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*The s 51(vi) defence power in the Australian constitution is unlike any of the other constitutional heads of power. It is one of only a few purposive powers, and so when considering whether legislation is intra vires the defence power, the subject matter of the legislation is analysed to determine whether it is for defence purposes. It is also the only power which expands and contracts according to the extant political climate, so it has been interpreted broadly during times of war but more restrictively during other periods. This article provides a comprehensive analysis of the approach of the high court during the different stages of expansion and contraction, including during periods of ostensible peace, periods of increasing international tension, wartime and the aftermath of war. It places particular emphasis on cases where the defence power has been used to limit the rights of individuals. It considers the current climate post-september 11 and the extent to which the defence power has been used to pursue anti-terrorism measures.*

## I INTRODUCTION

It is the duty of any government to take reasonable steps to keep persons within their control secure from threats.<sup>1</sup> Indeed, 'exceptional times may be best governed by exceptional means and ... exceptional powers to make laws should be made available in these times'.<sup>2</sup> While the *Australian Constitution* does not contain explicit emergency powers, s 51(vi) confers on the Parliament the power to make laws for the peace, order, and good government of the Commonwealth with respect to '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'. This defence power is unique when compared to other constitutional heads of power, which has significant implications for human rights.

The defence power is one of only a limited number of purposive powers in the *Constitution*. When scrutinising the validity of legislation enacted pursuant to the defence power, one must analyse the subject matter of the legislation to determine whether it is *for* defence purposes. This can be contrasted to the analysis required for non-purposive powers, where the question is whether the legislation was enacted *upon*, or in relation to, the relevant head of power. There are a number of implications of this

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<sup>1</sup> Dame Mary Arden, 'Meeting the Challenge of Terrorism: The Experience of English and Other Courts' (2006) 80 *Australian Law Journal* 818, 819.

<sup>2</sup> H P Lee, *Emergency Powers* (Law Book Co., 1984) 1.

approach, including the availability of the proportionality test (or ‘appropriate and adapted’ test) when considering whether legislation is *intra vires*. Secondly, unlike any other constitutional head of power, the defence power is elastic in scope and so expands and contracts according to the extant political climate. The High Court has recognised three stages of expansion and contraction: those core aspects of the defence power which are obviously defence-related and therefore are available generally, including during peacetime; an intermediate power which is available during periods of increasing international tension and the aftermath of war; and an expanded power which is available during wartime.<sup>3</sup>

This article discusses these unique aspects of the defence power and undertakes a historical analysis of how the High Court has approached the power during these periods of expansion and contraction. In particular, it considers the approach of the High Court in cases where the Parliament has attempted to limit the human and economic rights of individuals.<sup>4</sup> This is highly relevant in the current post-September 11 era of the ‘War on Terror’, where Australia is not at war, but nor can the climate be described as one of ostensible peace.

## II INTERPRETING SECTION 51(VI)

While *prima facie* its scope may appear to be quite restricted, the defence power has generally been interpreted more broadly than its wording may suggest, even during peacetime. In *Farey v Burvett* it was held that the words ‘naval and military’ are not words of limitation,<sup>5</sup> and when read together with the s 61 executive power it includes the ‘power to protect the nation’.<sup>6</sup> There are also a number of other principles of interpretation and characterisation that apply to the defence power which make it unique.

In *Stenhouse v Coleman*, the High Court described the defence power as a purposive power, meaning that legislation enacted pursuant to it must have a particular purpose, the defence of the Commonwealth.<sup>7</sup> When scrutinising the validity of legislation enacted pursuant to the defence power, the High Court has adopted an approach whereby the steps taken or authorised by the legislation are analysed to determine whether they are *for* defence purposes, either directly or incidentally, according to the prevailing ‘needs’ or threat that existed at the time. This involves forming a view as to whether the legislation is *conducive* to a desired end, as opposed to whether the legislation is *designed* to attain a desired end.<sup>8</sup> For example, fixing the price of food was found capable of contributing to the war effort,<sup>9</sup> while seizing the property of organisations

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<sup>3</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 222-3 (Williams J).

<sup>4</sup> Noting that there is minimal constitutional protection of human rights in Australia, the broad references to human and economic rights in this article refers to those rights recognised under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, including the right to liberty of the person, the freedom from arbitrary detention, the right to due process, and the right to work.

<sup>5</sup> (1916) 21 CLR 433, 440 (Griffith CJ).

<sup>6</sup> *Thomas v Mowbray* (2007) 233 CLR 307, 388-9 (Kirby J).

<sup>7</sup> (1944) 69 CLR 457, 464 (Latham CJ), 466 (Starke J).

<sup>8</sup> Lee, above n 2, 14.

<sup>9</sup> *Farey v Burvett* (1916) 21 CLR 433, 441 (Griffith CJ).

deemed prejudicial to the war effort was not because there was no adequate connection between the defence power and the seizure of property.<sup>10</sup>

Legislation enacted for defence purposes may be in relation to ‘primary’ and ‘secondary’ aspects. The primary aspects include matters directly related to the raising, equipping and conduct of the armed forces.<sup>11</sup> The secondary aspects are what Sawyer describes as ‘conditions in the community which are in turn relevant to such “direct” activities, but only as the general background for them’.<sup>12</sup> For example, the retention of specially trained staff in a Commonwealth-run clothing factory may not be possible unless the factory is always fully engaged as it would be during wartime, and so sales to civilian organisations are merely incidental to the maintenance of the factory for war purposes.<sup>13</sup> The approach to the defence power is a wider test than the subject matter test for non-purposive powers, because legislation need not relate to matters that directly affect defence but may also include matters that, for example, indirectly contribute to a war effort.

In contrast with the Court’s approach to non-purposive powers, the proportionality test (or the ‘appropriate and adapted’ test) is available in the characterisation of the purposive defence power. The effect of this is that the judiciary is empowered to invalidate legislation where there is a lack of proportionality between the purpose of the measure and the legislative means for achieving that purpose. While the question of what is the appropriate method of achieving a desired result is a matter for the Parliament, the law must be capable of being reasonably considered to be appropriate and adapted to achieving what is said to impress it with the character of a law with respect to the relevant power.<sup>14</sup> Implicit in this requirement ‘is a need for there to be a reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it’.<sup>15</sup> This can be contrasted with the approach taken in the characterisation of non-purposive powers, where such matters are not relevant.

That being said, the availability of the proportionality test in relation to the defence power varies according to the immediate threat. This is because the scope of s 51(vi), unlike any of the other enumerated powers, expands and contracts according to the prevailing international and political climate.<sup>16</sup> During periods falling short of war, in applying the proportionality test the High Court has focused on the purpose of measures and their capacity to assist defence generally. Given that the threat is less than during times of war, the extent to which a measure will fall within the scope of the defence power is more limited. For example, in relation to legislation that limits rights, in *Polyukhovich v Commonwealth* Brennan J held that although the retrospective offence provisions of the *War Crimes Act 1945* (Cth) could be capable of having a relevant

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<sup>10</sup> *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 154 (Starke J).

<sup>11</sup> Geoffrey Sawyer, ‘Defence Power of the Commonwealth in Time of Peace’ (1953) 6 *Res Judicatae* 214, 217.

<sup>12</sup> *Ibid* 220.

<sup>13</sup> *Attorney-General (Vic) (At the Relation of the Victorian Chamber of Manufacturers) v Commonwealth* (1935) 52 CLR 533, 558 (Gavan Duffy CJ, Evatt and McTiernan JJ).

<sup>14</sup> *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1, 259. This case concerned the purposive treaty implementation aspect of the external affairs power, but it was held that the same approach may be taken in relation to the defence power.

<sup>15</sup> *Ibid* 260.

<sup>16</sup> *Farey v Burvett* (1916) 21 CLR 433, 441 (Griffith CJ).

deterrent effect and might, on that account, be said to be ‘appropriate and adapted’ to serve defence purposes,

the validity under s.51(vi) of a law enacted in a time of peace depends upon whether the Parliament might have reasonably considered the means which the law embodies for achieving or procuring the relevant defence purpose to be appropriate and adapted to that end, a question of reasonable proportionality ... In times of war, laws abridging the freedoms which the law assures to the Australian people are supported in order to ensure the survival of those freedoms in times of peace. In times of peace, an abridging of those freedoms ... cannot be supported unless the Court can perceive that the abridging of the freedom in question is proportionate to the defence interest to be served.<sup>17</sup>

During wartime the High Court focused on the nature of the hostilities and the threat faced in order to determine whether a measure was proportionate. In World War II, Dixon J explained that the existence and character of hostilities are facts which will determine the extent of the operation of the power.<sup>18</sup> The effect of this is that the proportionality test gives rise to a greater capacity of the judiciary to consider substantive issues than is possible in the case of non-purposive constitutional powers. Conversely, the elasticity of the defence power means that there is scope for a much broader range of topics to fall within power during periods falling short of ostensible peace. An analysis of the different stages of expansion and contraction of the defence power demonstrates the implications this has for human rights where measures seek to limit the rights of individuals.

### III THE DEFENCE POWER DURING PEACETIME

During periods of profound peace the High Court showed its reluctance to permit the Parliament to enact legislation pursuant to the defence power where a strong connection between that legislation and the defence of the Commonwealth was not demonstrable. During such periods there is no material threat to the security of the nation and so the defence power is at its narrowest, authorising only legislation which has, as its direct and immediate object, the naval and military defence of the Commonwealth and of the several States.<sup>19</sup> ‘While peace prevails, the normal facts of life take their respective places in the general alignment, and are subject to the normal action of constitutional powers.’<sup>20</sup> The focus is on the ‘primary aspects’ of the defence power, which includes measures such as the enlistment and training of military members, and the manufacture of weapons.<sup>21</sup> The effect of the defence power on human rights during such periods was minimal, given that during such periods there was no need for the Parliament to limit human rights in the interests of defence.

The early 1920s was considered to be a period of peace. In 1926 in *Commonwealth v Australian Commonwealth Shipping Board*,<sup>22</sup> the High Court was required to consider whether the Board transgressed the powers set out in its enabling legislation when it entered into a contract to supply, erect and maintain steam turbo-alternators. The Board

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<sup>17</sup> (1991) 172 CLR 501, 592-3.

<sup>18</sup> *Andrews v Howell* (1941) 65 CLR 255, 278.

<sup>19</sup> Lee, above n 2, 30.

<sup>20</sup> *Farey v Burvett* (1916) 21 CLR 433, 453 (Isaacs J).

<sup>21</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 254 (Fullagar J).

<sup>22</sup> (1926) 39 CLR 1.

argued that its dockyard and workshops were necessary for the defence of the Commonwealth, and that it was impracticable to maintain them efficiently for that purpose unless it could enter upon general manufacturing and engineering activities. While the High Court recognised that there might be practical difficulties in maintaining the works, such as costs and worker experience, it was satisfied that ‘the power of naval and military defence does not warrant these activities in the ordinary conditions of peace, whatever be the position in time of war’.<sup>23</sup>

This case can be contrasted with the 1935 decision of *Attorney-General (Vic) (At the Relation of the Victorian Chamber of Manufacturers) v Commonwealth*,<sup>24</sup> some ten years later. Rich J identified that the requirements of the Commonwealth-run clothing factory were of a fluctuating character, and given that ‘all things naval and military have the possibility of war in view’, the nature of the factory could not be determined in accordance with peacetime requirements.<sup>25</sup> The Court accepted that the retention of specially trained staff might not be possible unless the factory was fully engaged as it would be during wartime. It was therefore ‘necessary for the efficient defence of the Commonwealth to maintain intact the trained complement of the factory, so as to be prepared to meet the demands which would inevitably be made upon the factory in the event of war’.<sup>26</sup> The High Court distinguished this case from *Commonwealth v Australian Commonwealth Shipping Board*<sup>27</sup> on the grounds that in the earlier case it was required to have regard to the supply of electrical equipment as a trade ‘wholly unconnected with any purpose of naval or military defence’.<sup>28</sup>

In *Re Tracey; Ex parte Ryan*,<sup>29</sup> a more recent peacetime case, the High Court confirmed the validity of a separate judicial system for the enforcement of military discipline. Here, a defence force member charged with offences under the *Defence Force Discipline Act 1982* (Cth) objected to the jurisdiction of a Defence Force Magistrate to hear his case on the basis that the hearing and determination of the charges involved an unauthorised exercise of Chapter III judicial power. Mason CJ and Wilson and Dawson JJ conceded that ‘a service tribunal has practically all the characteristics of a court exercising judicial power’.<sup>30</sup> However, the unique nature of the defence force allowed the defence power to be used to impose a system of discipline which is administered judicially, not as part of the judiciary under Chapter III but as part of the defence force organisation itself.<sup>31</sup> To this end, ‘the power to make laws with respect to the defence of the Commonwealth contains within it the power to enact a disciplinary code standing outside Chapter III and to impose upon those administering that code the duty to act judicially’.<sup>32</sup> Although the *Constitution* did not expressly provide for the disciplining of the forces, it is necessarily comprehended by s 51(vi) because the military defence of the Commonwealth

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<sup>23</sup> Ibid 9-10 (Knox CJ, Gavan Duffy, Rich and Starke JJ).

<sup>24</sup> (1935) 52 CLR 533.

<sup>25</sup> Ibid 562.

<sup>26</sup> Ibid 558.

<sup>27</sup> (1926) 39 CLR 1.

<sup>28</sup> *A-G (Vic) (At the Relation of the Victorian Chamber of Manufacturers) v Commonwealth* (1935) 52 CLR 533, 559 (Knox CJ, Gavan Duffy, Rich and Starke JJ), quoting *Farey v Burvett* (1916) 21 CLR 433, 441 (Griffith CJ).

<sup>29</sup> (1989) 166 CLR 518.

<sup>30</sup> Ibid 537.

<sup>31</sup> Ibid 540-1.

<sup>32</sup> Ibid 541.

demands the provision of a disciplined force.<sup>33</sup> It is required 'no less at home in peacetime than upon overseas service or in war-time'.<sup>34</sup>

From the above, it is clear that the judiciary places a relatively high level of scrutiny on defence measures introduced during times of peace. This can be contrasted with wartime, where the High Court treated parliamentary opinion as conclusive and the consequential parliamentary and executive action as justified by the defence power.<sup>35</sup> This line becomes blurred during periods falling between war and peace, particularly when the Parliament is seeking to limit human rights for defence purposes.

#### IV THE DEFENCE POWER DURING PERIODS OF INCREASING INTERNATIONAL TENSION

In the lead up to both World Wars and during the Cold War, the climate was one in which war had not been declared, but nor could it be said that it was a time of peace. There was apprehended emergency, so that while Australia was not embroiled in a crisis, the crisis was obvious elsewhere and there was a fear that it might soon spread to Australia.<sup>36</sup> During these periods, the High Court was more liberal in its interpretation of the defence power, and accepted that a wider interpretation was necessary in order to prepare for war. Indeed, '[a]ny conduct which [was] reasonably capable of delaying or of otherwise being prejudicial to the Commonwealth preparing for war would be conduct which could be prevented or prohibited or regulated under the defence power'.<sup>37</sup> That said, the High Court still established limits: the connection between the legislation and the particular purpose of defence needed at least to be established 'with reasonable clearness'.<sup>38</sup> Nevertheless, the elasticity of the defence power has meant that, generally speaking, the greater the prevailing threat or tension, the greater the power and, therefore, the greater the potential for the infringement of rights.

After World War II, during the Cold War tensions, came one of the most significant cases addressing the defence power: *Australian Communist Party v Commonwealth*.<sup>39</sup> This case remains of enormous interest from a human rights perspective because if the majority had upheld the validity of the legislation, the defence power would have potentially been deemed limitless, and exercisable simply on the subjective opinion of the executive. In a 6:1 judgment (Latham CJ dissenting), it was held that the *Communist Party Dissolution Act 1950* (Cth), which declared the Australian Communist Party unlawful and confiscated its property, was ultra vires the defence power.

The preamble to the Act contained nine recitals which, inter alia, described the Australian Communist Party as a revolutionary party using violence, fraud, sabotage, espionage, and treasonable or subversive means for the purpose of bringing about the overthrow or dislocation of the Australian government. Key sections included section 4 which declared unlawful, dissolved and forfeited the property of the Australian

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<sup>33</sup> Ibid 543 (Brennan and Toohey JJ).

<sup>34</sup> Ibid.

<sup>35</sup> Sawer, above n 11, 218.

<sup>36</sup> David Clark and Gerard McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* (Oxford University Press, 2000) 86.

<sup>37</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 225 (Williams J).

<sup>38</sup> *R v Foster; Ex parte Rural Bank of NSW* (1949) 79 CLR 43, 84 (Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ).

<sup>39</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

Communist Party, and section 5 which granted the Governor-General the power to declare associated bodies unlawful if satisfied that their continued existence were prejudicial to defence – the exercise of which was not subject to judicial review. Ultimately, the majority of the High Court held that the legislation was invalid. Five of the justices (Dixon, McTiernan, Williams, Fullagar and Kitto JJ) held that in declaring whether a person or association threatened the Commonwealth, the Governor-General, as a member of the executive, was essentially making a declaration as to the application of the defence power, which is contrary to the doctrine of separation of powers.

Dixon J accepted that matters relating to defence are the responsibility of the executive, which has the benefit of accessing information that cannot be made public to inform its decisions.<sup>40</sup> '[T]he reasons why [the defence power] is exercised, the opinions, the view of facts and the policy upon which its exercise proceeds and the possibility of achieving the same ends by other measures are no concern of the Court.'<sup>41</sup> However, during times falling short of war, the defence power cannot be used to make a law attaching legal consequences to a legislative or executive opinion which itself supplies the only link between the power and the legal consequences thereby imposed.<sup>42</sup> Here, the effect of the legislation was that the Governor-General was left to judge the reach and application of the ideas expressed by phrases such as 'security and defence of the Commonwealth' and 'prejudicial to', and that declaration was conclusive.<sup>43</sup> McTiernan and Kitto JJ asserted that despite the views expressed in the preamble, the duty is cast upon the judiciary to determine whether laws are within the scope of the legislature's power.<sup>44</sup> The *Constitution* does not allow the Parliament to 'conclusively "recite itself" into power', which was what the Act purported to do.<sup>45</sup>

McTiernan and Kitto JJ considered that in order for the legislation to be valid, it must be proved that at the time it was enacted facts existed which made it reasonably necessary for the Australian Communist Party to be dissolved and its property forfeited.<sup>46</sup> Williams J accepted that there were notorious public facts during the war of which the Court could take judicial notice, and while this justified the *National Security Act 1939* (Cth) during actual hostilities, there were no relevant facts sufficient to bring the *Communist Party Dissolution Act 1950* (Cth) within the scope of the defence power on the day it was enacted.<sup>47</sup> Thus winding up bodies, disposing of their assets, and depriving individuals of their civil rights based on the executive's assertion that they were conducting themselves in a manner prejudicial to defence, was not authorised by the defence power in the prevailing climate.

Relevantly, McTiernan J commented on the extent to which the defence power could be used to limit civil liberties generally:

In a period of grave emergency the opinion of Parliament that any person or body of persons is a danger to the safety of the Commonwealth would be sufficient to bring his or their civil liberties under the control of the Commonwealth; but in time of peace or when there is no immediate or present danger of war, the

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<sup>40</sup> Ibid 198.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid 261.

<sup>43</sup> Ibid 179.

<sup>44</sup> Ibid 207, 271.

<sup>45</sup> Ibid 206, 221.

<sup>46</sup> Ibid 224.

<sup>47</sup> Ibid 226.

position is otherwise because the *Constitution* has not specifically given the Parliament power to make laws for the general control of civil liberties and it cannot be regarded as incidental to the purpose of defence to impose such a control in peace time.<sup>48</sup>

His Honour went on to note that ‘the general control of civil liberty which the Commonwealth may be entitled to exercise in war time under the defence power is among the first of war-time powers that would be denied to it when the transition from war to peace sets in’.<sup>49</sup>

Interestingly, the majority judges, with the exception of Kitto J, indicated that they would have accepted a general policy of judicial restraint with respect to the defence power in times of actual war. On this basis, Sawyer concludes that it is likely that had this case been decided during wartime, the High Court would have treated the parliamentary opinion as conclusive and therefore the legislative actions of the Parliament would have been within the scope of the defence power.<sup>50</sup> This is a reasonable conclusion in light of the wartime decisions discussed below. However, this approach was criticised in the post-September 11 decision of *Thomas v Mowbray*,<sup>51</sup> where the primary aspects of the defence power were held to be exercisable outside wartime in response to internal threats. The *Communist Party Dissolution Act 1950* (Cth) has since been described as ‘one of the most draconian and unfortunate pieces of legislation ever to be introduced into the Federal Parliament’.<sup>52</sup>

Concerns arose following the decision in *Australian Communist Party v Commonwealth*,<sup>53</sup> with some arguing that the High Court’s approach had the effect of inhibiting the efforts of the Commonwealth in preparing for war.<sup>54</sup> However, such concerns were dispelled in *Marcus Clark & Co Ltd v Commonwealth*,<sup>55</sup> in which the High Court demonstrated its support for defence measures introduced prior to any official declaration of war. Here, regulations stated that companies and individuals who borrowed above a set amount from certain entities had to obtain the Treasurer’s consent, which could not be refused ‘except for purposes of or in relation to defence preparations’.<sup>56</sup> The majority confirmed the validity of the legislation on the basis that restrictions regarding the raising of money amounted to a law with respect to defence. Unlike the legislation considered in *Australian Communist Party v Commonwealth*,<sup>57</sup> the enabling *Defence Preparations Act 1951* (Cth) contained a detailed account of the international situation, thus explaining why essential defence preparations needed to be undertaken with haste. Dixon CJ concluded that ‘measures that tend or might reasonably be thought to be conducive to such an end are within the power provided that the tendency to the end is not tenuous, speculative or remote’.<sup>58</sup> Webb J also adopted a broad approach, and argued (quoting from *Farey v Burvett*) that the regulations might

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<sup>48</sup> Ibid 207.

<sup>49</sup> Ibid.

<sup>50</sup> Sawyer, above n 11, 217.

<sup>51</sup> (2007) 233 CLR 307.

<sup>52</sup> G Williams, ‘Australian Values and the War against Terrorism’ (2003) 26(1) *University of New South Wales Law Journal* 191, 193.

<sup>53</sup> (1951) 83 CLR 1.

<sup>54</sup> See Lee, above n 2, 24.

<sup>55</sup> (1952) 87 CLR 177.

<sup>56</sup> *Defence Preparations (Capital Issues) Regulations 1951* (Cth) reg 17(i).

<sup>57</sup> (1951) 83 CLR 1.

<sup>58</sup> *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177, 219.



“conceivably, even incidentally, aid the effectuation of the powers of defence” by diverting some men or materials to war preparations, and so have the necessary real connection with defence’.<sup>59</sup> His Honour was satisfied that despite war having not yet been declared, the Act and the regulations were justified:

I am unable to hold that while the defence powers in their secondary aspect can be employed in times of peace, whether real or ostensible, to rebuild a city bombed during war ... they can never be employed to meet an international situation short of war, even when there is a distinct possibility of war with powerful enemies using weapons unprecedented in range and destructiveness.<sup>60</sup>

In finding a strong link between the defence power during war time and in the lead up to war when defence preparations were being made, McTiernan J considered that ‘[d]efence preparations, as the term implies, are necessarily relative to a possible war’ and described the power as carrying a wide discretion to authorise action by the Parliament to protect Australia against aggression.<sup>61</sup> The practical effect of this position is that if there is a real possibility of war, then any legislation conceivably or incidentally related to defence will be valid.

Lee argues that this case indicates that the Parliament ‘has ample legislative flexibility encompassing a wide range of subject-matters to put the nation on a war footing, provided the court will accept the need for preparation’.<sup>62</sup> In establishing whether such a need existed, and therefore in establishing a connection between the legislation and the defence power, Webb J took judicial notice of the notorious fact that, during this Cold War and Korean War period, there was considerable international tension and a distinct possibility of a third world war.<sup>63</sup> However, Sawyer is critical of the outcome on the basis that the legislation fell short of vesting in the judiciary the power to decide whether a sufficient connection existed between the refusal of capital and the expansion of the armed forces.<sup>64</sup> The most the legislation did was to allow the Court to satisfy itself that the Treasurer was of the bona fide opinion that the connection existed and had acted on relevant considerations.<sup>65</sup> As discussed in the following section, where the defence power is at its widest, this approach places a significant limit on the extent to which the judiciary is in fact able to undertake a subjective review of the appropriateness of a particular measure where that measure limits the rights of individuals.

## V THE DEFENCE POWER DURING WARTIME

The defence power has been given its broadest interpretation during times of war. During such periods, the Commonwealth has introduced extensive and detailed controls on the community of a kind that, in time of peace, would be thought to have nothing to do with the defence power.<sup>66</sup> The High Court has tended to defer to the Parliament on what measures it considered necessary for the successful prosecution of the war, although judicial control was not entirely absent during such periods. During World War

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<sup>59</sup> Ibid 248, quoting *Farey v Burvett* (1916) 21 CLR 433, 455 (Isaacs J).

<sup>60</sup> *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177, 246 (Webb J).

<sup>61</sup> Ibid 226-7.

<sup>62</sup> Lee, above n 2, 32.

<sup>63</sup> *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177, 246.

<sup>64</sup> Sawyer, above n 11, 223.

<sup>65</sup> Ibid.

<sup>66</sup> Lee, above n 2, 10.

I and World War II, the power was held to extend to legislation addressing not only defence necessities such as war service and supply, but also to industry in general, for instance price regulation and economic controls. The implications of this broad approach for individuals were significant, particularly where the legislative measures were dependent on the opinion of a member of the executive.

### A *The World War I Cases*

World War I was the first major war that Australia had been involved in since Federation. The conflict began when the United Kingdom and Germany went to war in August 1914, and Australia's involvement commenced shortly after Prime Minister Andrew Fisher had declared full support for the United Kingdom. It continued for a period of four years, during which time there were few elements of life which remained untouched by the war effort. At the outbreak, Australia enacted the broad-reaching *War Precautions Act 1914* (Cth). Sections 4 and 5, respectively, enabled the Governor-General to make regulations for securing the public safety and defence of the Commonwealth, and to issue an order which made provision 'for any matters which appear necessary or expedient with a view to the public safety and the defence of the Commonwealth'. As discussed below, the Act was used to introduce regulations on a broad range of subjects, many of which were challenged.

One of the most controversial measures during World War I was the internment provisions which permitted the detention of a person who was not charged with an offence, would not be entitled to a court hearing and might not be made aware of the grounds upon which they were detained. These provisions had significant consequences for the right to liberty of the person. In 1915 in *Lloyd v Wallach*,<sup>67</sup> the respondent was arrested and detained under a regulation enacted pursuant to the *War Precautions Act 1914* (Cth), which provided that where the Defence Minister had reason to believe that any naturalised person was disaffected or disloyal, he could order him to be detained in military custody during the continuance of a state of war. In considering the authority of the Court to review the Minister's actions, Griffith CJ made the following observation:

I think that his belief is the sole condition of his authority, and that he is the sole judge of the sufficiency of the materials on which he forms it. If this be so, the only inquiry which could possibly be made by the Court ... would be whether the Minister had in fact a belief arrived at in the manner I have indicated. That belief is a matter personal to himself, and must be formed on his personal and ministerial responsibility. It is quite immaterial whether another person would form the same belief on the same materials, and any inquiry as to the nature and sufficiency of those materials would be irrelevant. Further, having regard to the nature of the power and the circumstances under which it is to be exercised, it would, in my opinion, be contrary to public policy, and, indeed, inconsistent with the character of the power itself, to allow any judicial inquiry on the subject in these proceedings.<sup>68</sup>

Such an approach was confirmed by Isaacs J, who stated that the Minister 'is the sole judge of what circumstances are material and sufficient to base his mental conclusion upon, and no one can challenge their materiality or sufficiency or the reasonableness of

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<sup>67</sup> (1915) 20 CLR 299.

<sup>68</sup> *Ibid* 304-5.

the belief founded upon them'.<sup>69</sup> Griffith CJ narrowly accepted that if it could be proved that the Minister had not formed such a belief, then an aggrieved person might have a redress against him.<sup>70</sup> However, it would be difficult to establish such an argument, given that the Minister's opinion was subjective and he was not required to establish a basis for that opinion. A person's right to liberty could therefore be infringed without judicial involvement.

A similar approach was taken the following year in *Welsbach Light Company of Australasia v Commonwealth*,<sup>71</sup> in which the Governor-General proclaimed that any transaction with a company declared by the Attorney-General to be managed or controlled for the benefit of persons of enemy nationality, was trading with the enemy and was prohibited. Griffith CJ applied the rule that 'the intention of a legislative authority is to be ascertained, not by any technical rules applicable to proceedings in criminal cases, but by having regard to the subject matter, the evil to be remedied, and the nature of the remedy'.<sup>72</sup> His Honour determined that it was sufficient for the Attorney-General to declare that in his opinion a company fell within a prohibited category, and that he did not have to 'hold the Attorney-General's hand' in making such an investigation.<sup>73</sup> This limited the right of individuals to work and earn a living, with little scope for judicial review.

Financial restrictions impinging on economic freedoms were also addressed in *Farey v Burvett*<sup>74</sup> in the same year. Here, the Governor-General made a regulation under the *War Precautions Act 1914* (Cth) that declared that certain areas were 'proclaimed areas' in which he could set maximum prices for the sale of bread and flour. The appellant, who was convicted of selling bread above the maximum price, was unsuccessful in his challenge of the Act. Griffith CJ held that the scope of the defence power must be considered in light of the prevailing circumstances, and it could extend to any law 'which may tend to the conservation or development of the resources of the Commonwealth so far as they can be directed to success in war, or may tend to distress the enemy or diminish his resources'.<sup>75</sup> The test his Honour set out for determining whether legislation was for defence purposes was: 'Can the measure in question conduce to the efficiency of the forces of the Empire, or is the connection of cause and effect between the measure and the desired efficiency so remote that one cannot reasonably be regarded as affecting the other?'<sup>76</sup>

Barton J was careful to distinguish between the roles of the judiciary and the legislature, including the basis on which the judiciary is permitted to review defence measures objectively:

If the thing is capable, during war, of aiding our arms by land or sea, here or elsewhere, we are to say so, but we say no more ... If it is thus capable, then the

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<sup>69</sup> Ibid 308.

<sup>70</sup> Ibid 305.

<sup>71</sup> (1916) 22 CLR 268.

<sup>72</sup> Ibid 276.

<sup>73</sup> Ibid.

<sup>74</sup> (1916) 21 CLR 433.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

question of the necessity, or the wisdom or expediency, of invoking such aid, is for Parliament.<sup>77</sup>

In terms of the subject matter of defence legislation, Barton J accepted that almost any resource can be used to ensure a nation's success in war, regardless of whether the resource is mental or material.<sup>78</sup> The control of food supplies is a legitimate means of defence in time of war, and whether these means are necessary in the prevailing circumstances is a question for the Parliament, which has 'the best knowledge of the facts relating to the strategy of the War and the conditions under which the people can be victorious'.<sup>79</sup>

Isaacs J focused on the scope and construction of the defence power in the context of the *Constitution* itself, recognising that in exercising its duty to defend itself, the Commonwealth has the legislative power to do whatever is advisable in relation to defence.<sup>80</sup> While his Honour did accept that this power is one that 'is commensurate with the peril it is designed to encounter',<sup>81</sup> his Honour contended that the *Constitution* 'is not so impotent a document as to fail at the very moment when the whole existence of the nation it is designed to serve is imperilled'.<sup>82</sup> As compared to the test set out by Griffith CJ, which looked to the efficiency of the particular measure, Isaac J's test appears to be more deferential to the legislature in determining the most appropriate measures to be taken.

If the measure questioned may conceivably in such circumstances even incidentally aid the effectuation of the power of defence, the Court must hold its hand and leave the rest to the judgment and wisdom and discretion of the Parliament and the Executive it controls—for they alone have the information, the knowledge and the experience and also, by the Constitution, the authority to judge of the situation and lead the nation to the desired end ... As to the desirability or wisdom of the Regulation complained of, it is not my province to speak; but as a matter of law I have no hesitation in holding that such a Regulation is one which, as a defence Regulation, is within the competency of the Legislature in the condition of affairs that now exist.<sup>83</sup>

There is a question as to whether this broad approach can be maintained in light of *Australian Communist Party v Commonwealth*,<sup>84</sup> given that such a test would vest in the Parliament an almost unquestionable discretion, since it does not require the legislature to establish that the 'desired end' justifies the measure and its effect on individuals' rights. This appears to be the concern of the dissenting justices. Gavan Duffy and Rich JJ could not accept the proposition that the defence power enables the Parliament to make such laws as it chooses, provided they are, in its opinion, conducive to the defence of the Commonwealth.<sup>85</sup>

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<sup>77</sup> Ibid 449.

<sup>78</sup> Ibid 447.

<sup>79</sup> Ibid 448-9.

<sup>80</sup> Ibid 455.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid 451.

<sup>83</sup> Ibid 455-6.

<sup>84</sup> (1951) 83 CLR 1.

<sup>85</sup> *Farey v Burvett* (1916) 21 CLR 433, 462.

After the decision in *Farey v Burvett*,<sup>86</sup> the High Court upheld all defence measures that were challenged during World War I.<sup>87</sup> For example, in *Pankhurst v Kiernan*,<sup>88</sup> legislation provided that '[w]hoever advocates or encourages, or incites or instigates to the taking or endangering of human life, or the destruction or injury of property, shall be guilty of an offence'.<sup>89</sup> Barton J was satisfied that Parliament could pass legislation preventing any dislocation of the War effort.<sup>90</sup> Isaacs J went so far as to say that 'no one can ever say that anything is useless for war purposes, even in the narrowest sense'.<sup>91</sup> The legislation was upheld on the basis that it was designed for the preservation of Australian life and property (which are essentials for national defence), even though the Parliament did not have power to make laws with regard to the protection of property. This was also despite the effect it had on economic freedoms.

In August 1918, only months prior to the end of World War I, came the case of *Ferrando v Pearce and another*.<sup>92</sup> The Minister ordered the plaintiff's deportation under legislation which allowed the Defence Minister to order the deportation of any alien.<sup>93</sup> Barton J said of the validity of the order:

It is obvious that deportations must in many cases be expedient with a view to public safety and defence. That they are capable of being so is enough. Being thus capable, whether they are so in fact is a matter which legislative authority, or authority delegated by the Legislature, alone can determine.<sup>94</sup>

The plaintiff claimed that the purpose of the order was to compel him to return to Italy so that he could render compulsory military service. Gavan Duffy J concluded that such a motive does not in itself make the order invalid, because 'here the power is given to be exercised at the Minister's discretion, and the purpose which he hopes to attain by its exercise is immaterial'.<sup>95</sup> In light of this, the majority confirmed the validity of the order.

Within months of this decision came *Burkard v Oakley*,<sup>96</sup> and *Sickerdick Informant v Ashton*.<sup>97</sup> In the former, regulations empowered the Attorney-General to declare that certain shares were transferred to the Public Trustee. The High Court confirmed that this could be considered a reasonable precaution for public safety and the defence of the Commonwealth.<sup>98</sup> Similarly, in the latter case, the defendant was charged with having printed a publication in which statements were made which were likely to prejudice the recruiting of military forces. Again, the relevant regulation was accepted as a regulation for securing safety and defence. Despite the effect such restriction could have on the implied constitutional freedom of political communication, Barton J stated that the wisdom or otherwise of any regulation is a matter for the legislature and the Court is not

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<sup>86</sup> Ibid.

<sup>87</sup> Lee, above n 2, 28.

<sup>88</sup> (1917) 24 CLR 120.

<sup>89</sup> *Unlawful Associations Act 1916 (Cth)* s 4.

<sup>90</sup> *Pankhurst v Kiernan* (1917) 24 CLR 120, 129.

<sup>91</sup> Ibid 132.

<sup>92</sup> (1918) 25 CLR 241.

<sup>93</sup> *War Precautions Act 1914 (Cth)* s 5.

<sup>94</sup> *Ferrando v Pearce and another* (1918) 25 CLR 241, 253.

<sup>95</sup> Ibid.

<sup>96</sup> (1918) 25 CLR 422.

<sup>97</sup> (1918) 25 CLR 506.

<sup>98</sup> *Burkard v Oakley* (1918) 25 CLR 422, 524 (Knox CJ).

concerned with such matters.<sup>99</sup> Both cases confirmed the validity of the broad principles outlined in *Farey v Burvett*.<sup>100</sup>

## B *The World War II Cases*

Australia's involvement in World War II commenced in September 1939 with a radio announcement by the then Prime Minister Robert Gordon Menzies. Australia was better prepared for World War II, although specialist legislation, including the *National Security Act 1939 (Cth)*, was still widely litigated. Section 5 allowed the Governor-General to make regulations for securing public safety and the defence of the Commonwealth and for prescribing all matters which were necessary or convenient to be prescribed for the more effectual prosecution of any war in which the King was engaged. During the six year war, there were 17 major cases in which the High Court considered the scope of the defence power and legislation enacted pursuant to it.<sup>101</sup> However, the High Court did not repeat the same liberal approach it had adopted in World War I, where it had allowed a wide latitude to the Parliament. These cases had varying outcomes, with the High Court not convinced in some instances that certain regulations could be said to deal with matters associated with the prosecution of the war, particularly where the rights of individuals were affected without justification. In these decisions, the Court drew a distinction between matters which might relate to the general well-being of a community at war, and matters which have a specific connection with defence. In this context, Dixon J stated of the defence power:

Its meaning does not change, yet unlike some other powers its application depends upon facts, and as those facts change so may its actual operation as a power enabling the legislature to make a particular law ... Whether it will suffice to authorise a given measure will depend upon the nature and dimensions of the conflict that calls it forth, upon the actual and apprehended dangers, exigencies and course of the war, and upon the matters that are incident thereto.<sup>102</sup>

In 1943 in *Adelaide Company of Jehovah's Witnesses*,<sup>103</sup> the Governor-General declared a Jehovah's Witnesses organisation unlawful under regulations on the basis that, in his opinion, the organisation was prejudicial to the defence of the Commonwealth or the efficient prosecution of the war.<sup>104</sup> Following the declaration, the organisation was dissolved and its property confiscated. It challenged the validity of these laws on the basis that the regulations were not authorised by the *National Security Act 1939 (Cth)*, or alternatively that the Act was ultra vires the defence power. A key question was whether the s 116 constitutional freedom of religion prevented the Parliament from legislating to restrain the activities of a religious organisation which the Governor-General considered to be prejudicial.

In relation to the capacity of the legislature to interfere with personal freedoms during times of war, Starke J stated that laws are not within power if 'arbitrary or capricious':

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<sup>99</sup> *Sickerdick Informant v Ashton* (1918) 25 CLR 506, 512-3.

<sup>100</sup> (1916) 21 CLR 433.

<sup>101</sup> Sawer, above n 11, 295.

<sup>102</sup> *Andrews v Howell* (1941) 65 CLR 255, 278.

<sup>103</sup> (1943) 67 CLR 116.

<sup>104</sup> *National Security (Subversive Associations) Regulations 1940 (Cth)* reg 3.

In other words, if the regulation involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, then a court might well say: "Parliament never intended to give authority to make such rules." A regulation of that character would not be a law or regulation "with respect to defence" or for securing the public safety or defence of the Commonwealth.<sup>105</sup>

That being said, the majority accepted that a state of war justifies defence legislation which subjects personal freedoms to temporary restrictions which would otherwise not be legitimate during times of peace. On this basis, s 116 did not prevent the Commonwealth from making laws which prohibited the promotion of religious doctrines.<sup>106</sup> In justifying legislative interference with personal liberties during times of war, Latham CJ stated:

No organized State can continue to exist without a law directed against treason. There are, however, subversive activities which fall short of treason (according to the legal definition of that term) but which may be equally fatal to the safety of the people ... Such obstruction may be both punished and prevented. So also propaganda tending to induce members of the armed forces to refuse duty may not only be subject to control but may be suppressed.<sup>107</sup>

It is clear that in this case the High Court showed its willingness to accept that an infringement of human rights could be justified in times of war. Indeed, Starke J acknowledged that s 116 is subject to limitations and '[t]herefore there is no difficulty in affirming that laws or regulations may be lawfully made by the Commonwealth controlling the activities of religious bodies that are seditious, subversive or prejudicial'.<sup>108</sup> According to Rich J, the freedom of religion is not absolute, but is 'subject to powers and restrictions of government essential to the preservation of the community'.<sup>109</sup> Williams J offered the example of a person detained on mere suspicion, without trial, and for the duration of the war because the Minister is of the opinion that their liberty is prejudicial to safety. This, his Honour said, would be a valid exercise of plenary administrative power.<sup>110</sup> Such a position is consistent with World War I decisions such as *Lloyd v Wallach*.<sup>111</sup>

Nevertheless, ultimately it was held that the regulations did exceed the defence power. Starke J held that while the Parliament is responsible for national security and is the best judge of what national security requires, the regulations were arbitrary, capricious, and oppressive and had little, if any, real connection with the defence of the Commonwealth or the efficient prosecution of the war.<sup>112</sup> To this end, while the High Court accepted that the Commonwealth had the power to suppress subversion, in contrast to the earlier cases the regulations here were held to go beyond the defence power.

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<sup>105</sup> *Adelaide Company of Jehovah's Witnesses* (1943) 67 CLR 116, 151-2.

<sup>106</sup> *Ibid* 149 (Rich J).

<sup>107</sup> *Ibid* 132-3.

<sup>108</sup> *Ibid* 155.

<sup>109</sup> *Ibid* 149.

<sup>110</sup> *Ibid* 162.

<sup>111</sup> (1915) 20 CLR 299.

<sup>112</sup> *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 154.

The following year in *Reid v Sinderberry*,<sup>113</sup> the respondents were convicted under regulations which made it an offence to disobey a direction ‘to engage in employment under the direction and control of the employer specified in the direction’. The regulations were made under s 13A of the *National Security Act 1939* (Cth). The respondents argued that s 13A was invalid on the basis that it was unconstitutional for the Governor-General to make regulations simply because he holds the opinion that it is necessary for defence. Latham CJ and McTiernan J stated the question for the Court as— “Is the regulation really a law with respect to securing the public safety, the defence of the Commonwealth, or the efficient prosecution of the war?”<sup>114</sup> The Court held that s 13A was valid because steps to ensure that the production of food for civilians so that the population does not become starved and disorderly are sufficiently connected with defence.<sup>115</sup> The fact that the opinion of the Governor-General was an element of the conditions which had to be satisfied before a regulation could be made under the section was not an objection to the regulation’s validity.<sup>116</sup> Here, the test adopted by the High Court was whether the measure can reasonably be regarded as a means towards attaining an object which is connected with defence; the Court was not concerned with the actual wisdom or effectiveness of the measure.<sup>117</sup>

This decision was followed later that year in *Stenhouse v Coleman*.<sup>118</sup> Here, the plaintiff challenged an order made under regulation 59 of the *National Security (General) Regulations*, which provided, inter alia, that a Minister, ‘so far as appears to him to be necessary in the interests of defence or the efficient prosecution of the war ..., may by order provide ... for regulating, restricting or prohibiting the production... of essential articles’. The plaintiff argued that the production of goods for civilian use fell outside the scope of the defence power but, on the basis of *Farey v Burvett*,<sup>119</sup> this argument was rejected.<sup>120</sup> The maintenance of essential supplies and services was found to be ‘plainly and necessarily a matter having the most direct connection with the war’; it was said that ‘[i]f the life of the community cannot be maintained the armed forces cannot be maintained’.<sup>121</sup> On the issue of the application of reg 59 being dependent on the opinion of the Minister, Latham CJ referred to *Reid v Sinderberry*,<sup>122</sup> and confirmed that what reg 59 authorised was confined to the making of orders which had a real connection with the subject of defence.<sup>123</sup> To this end, in both cases the High Court limited its role of review to simply determining whether a connection between defence and the legislation exists, rather than reviewing the merits of the legislation or the implications the measure may have on human rights more broadly. This places great power in the hands of the Parliament.

A similar issue was addressed in 1947 in *Little v Commonwealth*.<sup>124</sup> Here the plaintiff sought to recover damages from the Commonwealth for false imprisonment after

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<sup>113</sup> (1944) 68 CLR 504.

<sup>114</sup> Ibid 512.

<sup>115</sup> Ibid 512-3 (Latham CJ and McTiernan J).

<sup>116</sup> Ibid 511.

<sup>117</sup> Leslie Zines, *The High Court and the Constitution* (Butterworths, 4th ed, 1997) 304.

<sup>118</sup> (1944) 69 CLR 457.

<sup>119</sup> (1916) 21 CLR 433.

<sup>120</sup> *Stenhouse v Coleman* (1944) 69 CLR 457, 462 (Latham CJ).

<sup>121</sup> Ibid.

<sup>122</sup> (1944) 68 CLR 504.

<sup>123</sup> *Stenhouse v Coleman* (1944) 69 CLR 457, 464.

<sup>124</sup> (1947) 75 CLR 94.



being detained for two separate periods of 10 days and four months in 1942. The orders were made under regulations 25-26 of the *National Security (General) Regulations*, which stated that the Minister could exercise the powers conferred if satisfied that to do so would prevent the person acting in any manner prejudicial to the public safety or the defence of the Commonwealth. Among other arguments, the plaintiff contended that the Minister was not, and could not have been, so satisfied in this case. Dixon J referred to the position in *Lloyd v Wallach*,<sup>125</sup> and reiterated that theoretically the existence of the Minister's opinion was examinable, but that as the Minister was the sole judge of the truth, reliability, relevance, and sufficiency of the information before him and of the reasonableness of his conclusion, no practical challenge to his opinion could be made.<sup>126</sup> In fact, Dixon J went so far as to say that 'an erroneous opinion is none the less an opinion'.<sup>127</sup> Thus, even though there was no evidence which justified any suggestion against the plaintiff's loyalty to the allied cause, there was no evidence that the Minister was mistaken in his opinion, and therefore the plaintiff's action was dismissed.

In instances involving an order or instrument made on the opinion of a member of the executive, the High Court is not empowered to examine de novo the factual findings and discretions of the administrator, but is limited to such matters as relevant considerations, proper purposes and errors of law.<sup>128</sup> This falls short of the degree of control that the Court has insisted on in cases involving other heads of constitutional power.<sup>129</sup> In relation to orders made on the basis of the opinion that such orders were necessary for the defence of the Commonwealth, '[t]here could be no more striking illustration of the exceptional status of the defence power'.<sup>130</sup> The powers of the executive during times of war have been interpreted very broadly.

## VI THE DEFENCE POWER IN THE AFTERMATH OF WAR

During the aftermath of war when the nation was in transition from war to peace, for example the periods immediately after World War I and World War II, the High Court accepted that the defence power still operates with an expanded scope. Extended powers during this period are based on the premise that an official declaration of the end of the war does not necessarily mean that the prevailing financial, economic and social conditions immediately revert back to that of peacetime. However, there is a question as to how long this transition period continues. Generally speaking, the extent to which defence measures are permitted during the aftermath of war depends on the nature of the measure. For example, petrol rationing or preferential employment of ex-servicemen may reach a point when they can no longer be considered incidental to a winding up process. These post-war measures had primarily economic implications for individuals.

There was a raft of decisions in the years following the end of World War I in which the High Court was supportive of the Parliament's post-war measures. In 1920 in *Attorney-General (Commonwealth) v Balding*,<sup>131</sup> legislation making continuing provision for the welfare of returned soldiers was held valid on the basis that it was 'a matter so intimately

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<sup>125</sup> (1915) 20 CLR 299.

<sup>126</sup> *Little v Commonwealth* (1947) 75 CLR 94, 103.

<sup>127</sup> *Ibid.*

<sup>128</sup> Zines, above n 117, 306.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 257 (Fullagar J).

<sup>131</sup> (1920) 27 CLR 395.

connected with the defence of the Commonwealth as manifestly to be included within the scope of the power'.<sup>132</sup> Also that year, the High Court confirmed the continuing validity of the *War Precautions Act 1914 (Cth)* and its associated regulations in *Jerger v Pearce*.<sup>133</sup> Here, the Minister for Defence had authorised the deportation of the plaintiff. The plaintiff argued that as the war had ended, the defence power could no longer support the legislation. The High Court determined that despite the hostilities ceasing, a state of war technically continued.<sup>134</sup>

In the aftermath of World War II, the High Court adopted a similar approach. In *Shrimpton v Commonwealth*,<sup>135</sup> a 1945 case, regulations prohibited the transfer of land unless the Treasurer's consent was provided.<sup>136</sup> After the Treasurer refused to give his consent unless certain conditions were satisfied, the plaintiff contended that the regulations were invalid on the basis that the power of the Treasurer to give or withhold consent 'in his absolute discretion' and 'subject to such conditions as he thinks fit' without any requirement of a connection with defence, was an excess of power. The majority (Latham CJ, Starke, Dixon and McTiernan JJ) held that the regulations were *intra vires* the defence power. Latham CJ confirmed that the *National Security Act 1939 (Cth)* authorised the making of regulations fixing the prices of goods and services, which could include regulations relating to the purchase of land.<sup>137</sup> Additionally, the Treasurer's discretion was not arbitrary and unlimited, despite being described as absolute, since it had to be exercised *bona fide* and for the purposes of the regulations.<sup>138</sup>

These regulations were again challenged in 1946 in *Dawson v Commonwealth*,<sup>139</sup> where the applicant argued that the *National Security Act 1939 (Cth)* was no longer valid given the surrender of the Japanese. The High Court was similarly divided and accordingly the view of Latham CJ, who followed the decision in *Shrimpton v Commonwealth*,<sup>140</sup> prevailed. His Honour accepted that it could not be said that overnight the Commonwealth turned from being engaged in war to not being engaged in war.<sup>141</sup> The allied forces were in occupation of enemy countries by virtue of conquest, and such a state of affairs could not be described as a state of peace. The defence power does not cease instantaneously with the termination of hostilities, and the defence power must extend to the wind-up after war and to the restoration of conditions of peace.<sup>142</sup>

There were similar outcomes in *Real Estate Institute of NSW v Blair*<sup>143</sup> and *Morgan v Commonwealth*.<sup>144</sup> The former case concerned preferential housing for service members. Latham CJ identified the difficulties brought about by the war, such as housing shortages, and considered that legislative provisions concerning the re-establishment in

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<sup>132</sup> *Ibid* 398 (Knox CJ, Isaacs, Gavan Duffy, Powers and Rich JJ).

<sup>133</sup> (1920) 28 CLR 588.

<sup>134</sup> *Ibid*, 592-4 (Starke J).

<sup>135</sup> (1945) 69 CLR 613.

<sup>136</sup> *National Security (Economic Organization) Regulations 1942 (Cth)* reg 6

<sup>137</sup> *Shrimpton v Commonwealth* (1945) 69 CLR 613, 622.

<sup>138</sup> *Ibid* 619-20. Ultimately, the majority held that while the regulations were valid, the conditions imposed by the Treasurer were not authorised by the regulations as they did not have a relation to the purchase or disposition of land.

<sup>139</sup> (1946) 73 CLR 157.

<sup>140</sup> (1945) 69 CLR 613.

<sup>141</sup> *Dawson v Commonwealth* (1946) 73 CLR 157, 174.

<sup>142</sup> *Ibid* 175.

<sup>143</sup> (1946) 73 CLR 213.

<sup>144</sup> (1947) 74 CLR 421.

civil life of persons who have served in the defence forces were still within power even though hostilities had ceased.<sup>145</sup> Rich J affirmed that ‘the function of the defence power does not, of course, begin when the first shot is fired nor end with the last’.<sup>146</sup> In the latter case, the High Court rejected the argument that the varying application of a food rationing order among different States infringed the s 99 constitutional prohibition on the Commonwealth giving preference to one State over another. It was said of the application of s 99 that

[i]t would, indeed, be a remarkable thing for a *Constitution* to provide that laws for the defence of a country, at a time possibly of the most critical threat to national existence, should be limited by a requirement that they should not have the effect of giving some commercial preference to parts of the country over other parts.<sup>147</sup>

Nevertheless, the High Court ultimately determined that 1949 was the cut-off point at which an expanded scope of the defence power could no longer be applied. This came about in *R v Foster; Ex parte Rural Bank of NSW*,<sup>148</sup> where four years after hostilities had ended the ‘aftermath of war’ argument was finally rejected, even though peace treaties had not been signed. The challenge was to the validity of certain regulations providing for the employment of women during the war, the rationing of liquid fuel, and housing for discharged servicemen and their dependants. The High Court accepted that in order to restore a community ravaged by war to conditions of peace, it might be necessary to continue some wartime controls for a certain period of time.<sup>149</sup> Repatriation and rehabilitation of soldiers, and the rebuilding of a city destroyed by bombing, were listed as obvious examples.<sup>150</sup> However, the High Court reiterated that the wide scope of the defence power does not continue indefinitely: ‘it does not place within Federal legislative authority every social, economic or other condition might not have arisen except for the war’, as this would allow legislation on virtually any subject matter, since that almost no aspects of life were untouched by the war:<sup>151</sup>

The effects of the past war will continue for centuries. The war has produced or contributed to changes in nearly every circumstance which affects the lives of civilized people. If it were held that the defence power would justify any legislation at any time which dealt with any matter the character of which had been changed by the war, or with any problem which had been created or aggravated by the war, then the result would be that the Commonwealth Parliament would have a general power of making laws for the peace, order and good government of Australia with respect to almost every subject. Nearly all the limitations imposed upon Commonwealth power by the carefully framed *Constitution* would disappear...<sup>152</sup>

Ultimately, the legislation was held invalid on the basis that the regulations were not obviously connected with the prosecution of the war, were not incidental to any winding-up process, and were not incidental to any endeavour to restore conditions which might

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<sup>145</sup> *Real Estate Institute of NSW v Blair* (1946) 73 CLR 213, 221.

<sup>146</sup> *Ibid* 225.

<sup>147</sup> *Morgan v Commonwealth* (1947) 74 CLR 42, 453-4 (Latham CJ and Dixon, McTiernan and Williams JJ).

<sup>148</sup> (1949) 79 CLR 43.

<sup>149</sup> *Ibid* 84 (Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ).

<sup>150</sup> *Ibid* 83.

<sup>151</sup> *Ibid* 85.

<sup>152</sup> *Ibid* 83.

be regarded as part of the peacetime organisation of industry.<sup>153</sup> Sawyer argued that the decision of the High Court in this final ‘unwinding’ case

amounted in substance to a policy decision that the Commonwealth had been given sufficient time for post-war reconstruction. It was not an arbitrary decision in the sense of having no support at all in reason, but it was arbitrary in the sense that the arguments for treating the Commonwealth’s transition power as ending in about December 1949 were no better than the arguments for ending them, say, in December 1948 or December 1950.<sup>154</sup>

There also appears to be an antinomy between the Court’s professed inability to query the opinion of a member of the executive in undertaking a particular course of action, and the apparent ease with which it concludes that an extended scope of the defence power no longer exists.

The post-World War II contraction of the defence power was confirmed in 1951 in *Queensland Newspapers Pty Ltd v McTavish*,<sup>155</sup> where regulations providing for the accommodation of returned servicemen did not, apart from their application to servicemen, ‘appear to have any present connection with the power to make laws with respect to defence.’<sup>156</sup> Fighting had ceased more than four years prior, and this should have been sufficient to overcome the shortage due to war conditions.<sup>157</sup> Although it was possible for the defence power to be used to make laws for the purpose of conferring certain benefits and privileges upon former servicemen, the regulations here went beyond this and attempted to prolong a regulation in ‘an attempt to exercise a power incidental to defence after the conditions to which the regulation was incident have passed’.<sup>158</sup> This was particularly so because the regulations affected the property rights of house owners who were required to provide housing to the returned servicemen.

## VII THE CURRENT CLIMATE POST-SEPTEMBER 11

In terms of the current climate, Australia is not currently engaged in war, but nor can the climate be described as one of peace — at least not since 11 September 2001. As such, while the defence power is not at its widest scope, it can be considered to be operating at an expanded scope which is most comparable to periods of increased international tension. This conclusion is supported by the approach of the High Court in 2007 in *Thomas v Mowbray*.<sup>159</sup> It is unlikely that the climate will revert back to peacetime in the near future, and this has implications in terms of the ability of the Parliament to use the defence power to enact legislation which impacts on the rights of individuals.

Following the United States terrorist attacks on 11 September 2001, the Australian Parliament introduced a raft of anti-terrorism legislation in support of the ‘War on Terror’ which created new terrorism offences and provided for the issue of control orders and preventive detention orders. This legislation sought to address the perceived inadequacies of the existing law to deal with the threat of terrorism, not only by

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<sup>153</sup> Ibid 88.

<sup>154</sup> Sawyer, above n 11, 214.

<sup>155</sup> (1951) 85 CLR 30.

<sup>156</sup> Ibid 45 (Dixon, McTiernan, Webb, Fullagar and Kitto JJ).

<sup>157</sup> Ibid 51.

<sup>158</sup> Ibid 48.

<sup>159</sup> (2007) 233 CLR 307.

punishing terrorists but also by providing mechanisms to prevent the commission of terrorist attacks. As explained by former Attorney-General Philip Ruddock, '[t]he law should operate as both a sword and a shield – the means by which offenders are punished but also the mechanism by which crime is prevented'.<sup>160</sup> However, the legislation has given rise to considerable controversy, with criticisms that Australia overreacted to the threat of terrorism. The control order regime in *Criminal Code* division 104 in particular, whereby persons can have their movements restrained or 'controlled', can potentially infringe an individual's right to liberty where they have not been found guilty or even charged with a criminal offence. While an order does not involve imprisonment, depending on the severity of the restrictions a control order can effectively amount to house arrest. According to McGarrity, Lynch and Williams, '[t]he sacrifices that these countries have been prepared to make to the liberty of their citizens in order to achieve, or, more accurately, pursue, security raises alarm bells about the health of the democratic project itself'.<sup>161</sup> Indeed, there is no apparent public emergency on a scale sufficient to justify laws which suspend fundamental human rights such as the right to personal liberty.

The High Court considered the validity of interim control orders in *Thomas v Mowbray*,<sup>162</sup> after Australia's first control order was issued. The case was significant in several respects, as the Court contemplated the constitutional validity of control orders with respect to the defence power, and also the wider implications of permitting the executive to impose restrictions on liberty in the absence of criminal charge. Although the interim control order regime was held to be valid, the High Court did note the human rights issues. As Justice von Doussa argues extra-judicially, an interesting question is whether the outcome in this case would have been different had the question been whether control orders are compatible with human rights standards.<sup>163</sup>

In this case, Thomas had originally been convicted of a terrorist act, but the conviction was overturned by the Victorian Court of Appeal on the basis that his confession was inadmissible because it was obtained under duress.<sup>164</sup> Within a week of his release from custody the defendant, a Federal Magistrate, placed an interim control order on the plaintiff at an ex parte hearing. The order was made on a number of grounds including that the plaintiff had admitted training with al-Qaeda and that there were good reasons to believe that he could be used to commit terrorist acts on behalf of al-Qaeda or related terrorist cells. The defendant also relied on the confession, which he deemed admissible at the ex parte hearing as it was an interlocutory civil case.<sup>165</sup> The restrictions and obligations contained in the order included, inter alia, a curfew confining the plaintiff to his home between midnight and 5am, a requirement that he report to police three times per week, and restrictions from using certain communication technology and communicating with a list of persons identified as terrorists. It was considered that the

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<sup>160</sup> Philip Ruddock, 'Legal Framework and Assistance to Regions' (Paper presented to the Regional Ministerial Counter-Terrorism Conference, Bali, February 2004) [49].

<sup>161</sup> Nicola McGarrity, Andrew Lynch and George Williams, 'The Emergence of a 'Culture of Control'' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Abingdon, Oxon Routledge, 2010) 3, 3.

<sup>162</sup> *Thomas v Mowbray* (2007) 233 CLR 307.

<sup>163</sup> Justice John von Doussa, 'Reconciling Human Rights and Counter-Terrorism - a Crucial Challenge' (2006) 13 *James Cook University Law Review* 104, 116.

<sup>164</sup> *R v Thomas* (2006) 14 VR 475.

<sup>165</sup> See *Jabbour v Thomas* (2006) 165 A Crim R 32, 34.

controls 'would protect the public and substantially assist in preventing a terrorist act'.<sup>166</sup> Prior to the Court confirming the order, the plaintiff commenced proceedings to have the interim order quashed on the basis that division 104 was wholly invalid. Key questions asked of the Court included whether division 104 was within the legislative power of the Commonwealth and whether it invalidly conferred on a federal court non-judicial power.

The Court ruled by a 5:2 majority comprising Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ (Kirby and Hayne JJ dissenting) that the regime was not unconstitutional. Among other issues, the majority accepted that the legislation was indeed supported by the primary aspect of the defence power.<sup>167</sup> In a joint judgment, Gummow and Crennan JJ described the scheme as 'directed to apprehended conditions of disturbance, by violent means within the definition of "terrorist act", of the bodies politic of the Commonwealth and the States', and determined that 'restrictions aimed at anticipating and avoiding the infliction of the suffering which comes in the train of such disturbances are within the scope of federal legislative power'.<sup>168</sup> Their Honours concluded that it is the definition of 'terrorist act' that necessarily engages the defence power, rather than whether a connection exists between the defence power and the interim control order system.<sup>169</sup> Additionally, their Honours held that the defence power was not confined to waging war in a conventional sense, or the protection of bodies politic as distinct from the public.

The proposition in *Australian Communist Party v Commonwealth* that the purpose of the power was to respond to 'external enemies' was rejected on the basis that the defence power is not limited to meeting the threat of foreign aggression.<sup>170</sup> Callinan J in particular was critical of the majority in that case for not paying sufficient attention to the threat from internal sources during periods falling short of war.<sup>171</sup> This is relevant in terms of the power of the Parliament to legislate to restrict the rights of citizens in Australia. According to Gleeson CJ the defence power

is not limited to defence against aggression from a foreign nation; it is not limited to external threats; it is not confined to waging war in a conventional sense of combat between forces of nations; and it is not limited to protection of bodies politic as distinct from the public, or sections of the public.<sup>172</sup>

There were also intimations that Australia is in a period of increased international tension (or at least a period falling short of ostensible peace) which has significant implications for the use of the defence power into the future and its effect on rights. Kirby J compared the current threat of violence faced by Australia to the types of activity that the defence of Australia has traditionally involved, and stated that '[a]ll of these elements represented potential dangers to Australia's constitutional system which, in given circumstances, this country would be entitled to protect and defend itself from'.<sup>173</sup> Similarly, Callinan J stated that '[t]here will always be tensions in times of danger, real

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<sup>166</sup> *Thomas v Mowbray* (2007) 233 CLR 307, 322-3.

<sup>167</sup> *Ibid* 324 (Gleeson CJ), 363 (Gummow and Crennan JJ), 503-4 (Callinan J), 525 (Heydon J).

<sup>168</sup> *Ibid* 362.

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

<sup>170</sup> *Ibid* 362, 511 (Callinan J), citing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 194 (Dixon J).

<sup>171</sup> *Thomas v Mowbray* (2007) 233 CLR 307, 503.

<sup>172</sup> *Ibid* 324.

<sup>173</sup> *Ibid* 397.

or imagined ... They will no doubt continue while terrorism of the kind proved here remains a threat'.<sup>174</sup>

On the issue of judicial power, the Court considered separation of powers matters arising from division 104. Gleeson CJ summarised the plaintiff's contention that division 104 conferred non-judicial power on a federal court because it conferred the power to deprive a person of liberty on the basis of what that person might do in the future, rather than on the basis of a judicial determination of what that person has done.<sup>175</sup> It was argued that the power exercised when control orders are made is distinctively legislative or executive, and therefore is not a power that may be conferred upon the judiciary.<sup>176</sup> His Honour rejected these arguments because the power to restrict or interfere with a person's liberty on the basis of what they might do in the future is a power that is exercised by the judiciary in a variety of circumstances such as bail applications or apprehended violence orders.<sup>177</sup> Similarly, Gummow and Crennan JJ determined that the jurisdiction to bind over does not depend on a conviction and it can be exercised in respect of a risk or threat of criminal conduct against the public at large.<sup>178</sup> In fact, Gleeson CJ stated 'the exercise of powers, independently, impartially and judicially, especially when such powers affect the liberty of the individual would ordinarily be regarded as a good thing, not something to be avoided'.<sup>179</sup> This is an interesting perspective which may indicate the willingness of the High Court to be involved in assessing human rights issues.

Kirby J dissented on the basis that division 104 lacked an established source in federal constitutional power and that it breached the requirements of Chapter III.<sup>180</sup> In relation to the latter, Kirby J expressed his concern with how the scheme may undermine the position of the federal courts which the doctrine of separation of powers serves to defend: 'If the courts are seen as effectively no more than the pliant agents of the other branches of government, they will have surrendered their most precious constitutional characteristic.'<sup>181</sup> Kirby J also discussed the human rights implications of restricting the liberty of an individual on the basis of what another individual has or might do.<sup>182</sup>

To uphold the validity of that type of control order for which Div 104 of the *Code* provides would be to erode the well-founded assumption that the judiciary in Australia under federal law may only deprive individuals of their liberty on the basis of evidence of their past conduct. It would seriously undermine public confidence in federal courts for judges to subject individuals to any number of "obligations, prohibitions and restrictions" for an indeterminate period on the basis of an estimate that some act, potentially committed by somebody else, may occur in the future. To do this is to deny persons their basic legal rights not for what they have been proved to have done (as established in a criminal trial) but for what an official suggests that they might do or that someone else might do. To allow judges to be involved in making such orders, and particularly in the one-sided procedure contemplated by Div 104, involves a serious and wholly

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<sup>174</sup> Ibid 506.

<sup>175</sup> Ibid 327.

<sup>176</sup> Ibid 327-8.

<sup>177</sup> Ibid 328.

<sup>178</sup> Ibid 357.

<sup>179</sup> Ibid 329.

<sup>180</sup> Ibid 366.

<sup>181</sup> Ibid 436.

<sup>182</sup> Ibid 425.

exceptional departure from basic constitutional doctrine unchallenged during the entire history of the Commonwealth. It goes far beyond the burdens on the civil liberties of alleged communists enacted, but struck down by this Court, in the Communist Party Case. Unless this Court calls a halt, as it did in that case, the damage to our constitutional arrangements could be profound.<sup>183</sup>

From this case it can be concluded that a broader operation of the defence power is currently available to the Parliament. This power is not limited to responding to overseas threats, but can also be used to respond to internal threats, which would likely include legislation designed to address the threat posed by 'home grown' terrorists. Applying the body of precedent discussed in this article, it would not be difficult for the Parliament to conclude that measures which restrict individual rights for such purposes are a proportionate response to the threat faced in today's climate. This would include measures as drastic as stripping citizenship from terrorist suspects or increasing the duration for which individuals can be held in detention without charge. The availability of the primary aspects of the defence power to respond to such internal threats poses great risk to the right to liberty of the person, and is reminiscent of some of the wartime cases above where liberty was restricted based on the opinion of the Minister.

## VIII CONCLUSION

As a purposive power which expands and contracts according to the extant political climate, the s 51(vi) defence power is clearly unlike any other constitutional head of power. During peacetime, the High Court has been restrictive in its interpretation, while during wartime it has historically adopted a broader approach, allowing governments a wide discretion to enact legislation thought necessary for the successful prosecution of the war. Because of the elasticity of the defence power and its status as a purposive power, its scope in periods falling short of ostensible peace is wide enough, in the absence of constitutionally protected rights, to lead to an acceptance of measures restrictive of individual rights. The above body of precedent demonstrates how the defence power can be used to limit rights.

Australia is currently in a period of increased international tension, and therefore the defence power operates at an expanded scope. This is particularly disconcerting in light of the current anti-terrorism legislation and the continuing rhetoric regarding how Australia should respond to the threat. The High Court must be careful, now and in the future, not to take a narrow view of the problems with which the government must deal 'when it is entrusted with the supreme responsibility of the defence of the country'.<sup>184</sup> However, it must ensure that the law strikes a correct balance between protection of the nation and protection of individual rights.

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<sup>183</sup> Ibid 432.

<sup>184</sup> *R v Foster; Ex parte Rural Bank of NSW* (1949) 79 CLR 43, 83 (Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ).