

Thomas v Mowbray
[2006] HCA 33

In response to the London bombings of 7 July 2005, Division 104 was added to Part 5.3 of the *Criminal Code* (Cth). It enables a control order to be imposed on a person to protect the public from a terrorist act. Such orders may last up to a year, with the possibility of renewal.

The potential scope of a control order ranges from a very minimal intrusion on an individual's freedom to an extreme deprivation of his or her liberty. The order can include prohibitions or restrictions on an individual:

- being at specified areas or places;
- communicating or associating with certain people;
- accessing or using certain forms of telecommunication or technology;
- possessing or using certain things or substances; and
- carrying out specific activities (including activities related to the person's work).

The order can also require the person to, for example:

- remain at a specified place between certain times each day, or on specified days;
- wear a tracking device; and
- report to people at specified times and places.

A person who contravenes the terms of a control order commits an offence with a maximum penalty of five years' jail.

Only senior members of the AFP may seek control orders. The first step is to obtain the written consent of the Attorney-General to request an interim order from an issuing court. Before seeking consent, the AFP member must have reasonable grounds for either believing that the order would "substantially assist in preventing a terrorist act" or suspecting that the individual over whom the order is sought has provided training to or received training from a proscribed organisation. The AFP member must also inform the Attorney-General of any known facts that might go *against* imposing the order.

Once the Attorney-General has granted consent, the AFP member can request the interim control order from an issuing Court (the Federal Court, the Family Court or the Federal Magistrates Court). Sections 104.4 and 104.5 provide:

Criminal Code (Cth)

- (1) The issuing court may make an order under this section in relation to the person, but only if:
 - (a) the senior AFP member has requested it in accordance with section 104.3; and
 - (b) the court has received and considered such further information (if any) as the court requires; and
 - (c) the court is satisfied on the balance of probabilities:
 - (i) that making the order would substantially assist in preventing a terrorist act; or
 - (ii) that the person has provided training to, or received training from, a listed terrorist organisation; and
 - (d) the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.
- (2) In determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, the court must take into account the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances).

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

If the court issues an interim control order it is of no effect until served personally on its subject. The interim order must also inform the person as to when – as soon as practicable but at least 72 hours after the order is made – he or she may attend a court for it to confirm, revoke or declare void the interim control order.

After the interim control order is granted and 48 hours before the nominated hearing date, the AFP member must advise the issuing court whether he or she wishes to seek confirmation of the order. The individual affected must also receive this notification along with the documents given to the Attorney-General in order to obtain consent. This is subject to an important caveat: any information that is likely to prejudice national security or put at risk the operations or safety of police, intelligence agencies or the community is exempt from the obligation.

If the AFP has elected to confirm the order, the court will make a decision after a hearing at which both parties can provide evidence and make submissions. The court may declare the order to be void if satisfied that at the time it was made there were no grounds for making it.

Two people have been the subject of a control order, Jack Thomas and David Hicks. Jack Thomas was convicted for receiving funds from a terrorist organisation while in Pakistan. Although his conviction was quashed on the grounds that his key admissions were not voluntary (a retrial has since been ordered), he became the subject of an interim control order issued by Federal Magistrate Mowbray on 26 August 2006. After an ex parte hearing, Mowbray FM noted that Thomas “has admitted that he trained with Al Qa’ida in 2001” and held that he was “satisfied on the balance of probabilities in the terms of s 104.4(1)(c)(i) of [the Code] that a making of an interim control order would substantially assist in preventing a terrorist act”.

Upon being issued with the interim control order, Thomas questioned the validity of Division 104 in the High Court on the basis that it was not supported by any head of federal legislative power and that it conferred non-judicial power on a federal court contrary to Chapter III of the Constitution. His challenge was rejected by Gleeson, Gummow, Callinan, Crennan and Heydon JJ, with Hayne and Kirby JJ in dissent. Turning first to Chapter III of the Constitution, Gummow and Crennan JJ found:

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Gummow and Crennan JJ: The submissions by the plaintiff ... require close attention to the terms of s 104.4(1), in particular to satisfaction on the balance of probabilities respecting the matters mentioned in pars (c) and (d) thereof. An interim control order must state that the issuing court is satisfied of the matters in pars (c) and (d) (s 104.5(1)(a)). Section 104.4(2) requires the issuing court to take into account the impact of the obligations, prohibitions and restrictions on the personal circumstances of the individual concerned. This was described in submissions as involving a “balancing exercise” by the issuing court. At the forefront of the plaintiff’s case are arguments challenging the sufficiency of the matters mentioned in pars (c) and (d) of s 104.4(1) and the requirements of s 104.4(2) to provide adequate or permissible criteria for the exercise of the judicial power of the Commonwealth.

In *White v Director of Military Prosecutions* [[2007] HCA 29 at [45]-[47]] reference was made by Gummow, Hayne and Crennan JJ to the importance which has been attached in the decisions respecting Ch III to the presence or absence of an understanding at the time of the adoption of the Constitution of the treatment of a particular class or type of function as apt for exercise by a court. The Commonwealth supports its case for validity by reference to what it contends is the long history of what are at least analogous functions to the making of interim control orders and to their exercise by

English and colonial courts. Consideration of these particular submissions may be put to one side for the present.

Reference also was made in *White* to the development of various theories or descriptions of judicial power which are expressed in general and ahistorical terms. An example was given of the distinction drawn between arbitral and judicial power, with emphasis upon the power of enforcement attending the latter but not the former.

The particular issues respecting the alleged attempt to confer upon the issuing courts power other than the judicial power of the Commonwealth which were pressed by the plaintiff may be approached by taking as a starting point the following passage in the joint judgment of Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* [(1996) 189 CLR 1 at 11]:

“Harrison Moore wrote that under the Australian Constitution there was, between legislative and executive power on the one hand and judicial power on the other, ‘a great cleavage’. The function of the federal judicial branch is the quelling of *justiciable controversies*, whether between citizens (individual or corporate), between citizens and executive government (in civil and criminal matters) and between the various polities in the federation. This is discharged by ascertainment of facts, *application of legal criteria* and the exercise, where appropriate, of judicial discretion. The result is promulgated in public and implemented by binding orders. The institutional separation of the judicial power assists the public perception, central to the system of government as a whole, that these controversies have been quelled by judges acting independently of either of the other branches of government.” (emphasis added)

The plaintiff’s submissions emphasise in particular the absence of at least two of the characteristics identified in that passage in *Wilson*. These are the requirements of a “*justiciable controversy*” and of the provision by the legislation in question of “*legal criteria*” to be applied by the court.

The plaintiff submits that (a) critical criteria in s 104.4 are concerned with subjective and political questions best suited for determination by the executive and unsuited for determination by the judiciary and (b) the task required by s 104.4 of balancing the need to protect the public with the circumstances of the individual is not governed by objective standards or criteria. We turn to consider submission (b), then submission (a) and will then consider the remaining submissions respecting Ch III.

Absence of legal criteria?

Is there in s 104.4 an absence of legal standards or criteria governing the exercise of the jurisdiction conferred upon the issuing courts, something, as remarked in *Wilson*, which is necessary for the functioning of the federal judicial branch? The issue thus raised was treated in argument as if the existence of such standards is an essential requirement of legislation for it to attract the exercise of the judicial power of the Commonwealth spoken of particularly in s 71 of the Constitution. The issue may be expressed somewhat differently, as being whether s 104.4 (read with s 15C of the Interpretation Act) is a law which is adequate to “define” what is “the jurisdiction” of the issuing courts, within the sense of s 77(i) of the Constitution, or whether it fails to do so because it is an attempt to delegate to the issuing courts the essentially legislative task of determining “the content of a law as a rule of conduct or a declaration as to power, right or duty” [*The Commonwealth v Grunseit* (1943) 67 CLR 58 at 82].

In what follows, it will be assumed that no relevant distinction is presented between these two expressions of the issue. What is critical is the presence in s 104.4 of what may be said to be adequate legal standards or criteria. It should be said at once that the case law shows acceptance of broadly expressed standards.

In its form when considered in the *Builders’ Labourers’ Case* [*Builders’ Labourers’ Case* (1957) 100 CLR 277 at 289-290], s 140 of the *Conciliation and Arbitration Act* 1904 (Cth) included among criteria for the curial disallowance of the rules of registered organisations the terms “oppressive” and “tyrannical”. This, as Dixon CJ put it, was one of the “considerations”, no one of them apparently being “necessarily decisive”, which supported the holding of invalidity. When the section was recast in terms which survived challenge in *R v Commonwealth Industrial Court; Ex parte The Amalgamated Engineering Union, Australian Section* (“the *Amalgamated Engineering Union Case*”) [(1960) 103 CLR 368] there was a prohibition of rules which were “oppressive, unreasonable or unjust”. However, Kitto J (with whom Dixon CJ agreed) said of the new s 140 [103 CLR at 383]:

“It must be conceded that the words ‘oppressive’, ‘unreasonable’ and ‘unjust’, in relation to conditions, obligations or restrictions imposed by a rule upon applicants for membership or upon members, describe attributes which are not demonstrable with mathematical precision, and are to be recognized only by means of moral judgments according to generally acknowledged standards. There is a degree of vagueness about them which, in the context of the former section, assisted the conclusion that the intention was to confer on the Court a general administrative discretion for the amelioration of rules. But the notions which the words convey, more readily to be associated with administrative than with judicial decisions though they be, *must be conceded, having regard to the nature of criteria with which courts are familiar in other fields, to be not so indefinite as to be insusceptible of strictly judicial application; and their employment in the present context is not sufficient to show, against the strong indications which there are to the contrary, that the Court is intended to exercise its power under the section otherwise than judicially.*” (emphasis added)

Similar conclusions should be reached respecting the presence is 104.4(1) of the phrases “would substantially assist in preventing a terrorist act” and “protecting the public from a terrorist act”.

The entry by the Parliament into the field of business regulation (by legislation including the Life Insurance Act and the *Trade Practices Act* 1965 (Cth)) and the field of matrimonial causes (by the *Matrimonial Causes Act* 1959 (Cth) (“the Matrimonial Causes Act”)) was attended by the creation of new heads of federal jurisdiction the exercise of which was governed by broadly expressed standards. Indeed, in the *Associated Dominions Assurance Case* [(1953) 89 CLR 78 at 90], Fullagar J said of the absence from s 59 of the Life Insurance Act of criteria to guide the exercise of curial discretion to make a winding-up order:

“I cannot say that I have felt any serious difficulty as to the general principles which should guide the Court in exercising its discretion under s 59. With regard to the ultimate discretion, I think the general conception to be applied is that which is inherent in the words ‘just and equitable’ in the Companies Acts. Those words are wide and vague, but they have become very familiar, and they have been judicially considered on many occasions.”

In *Mikasa (NSW) Pty Ltd v Festival Stores* [(1972) 127 CLR 617] the Court rejected an argument that the absence of specified criteria by which the court was to decide whether or not to enjoin engagement in retail price maintenance was fatal to validity of the relevant provision.

In *Cominos v Cominos* [(1972) 127 CLR 588] the Court upheld the validity of provisions of the Matrimonial Causes Act which provided in wide terms for the making of maintenance orders (s 84), “just and equitable” property settlements (s 86), and ancillary orders “necessary to make to do justice” (s 87). When considering s 86 Mason J remarked [127 CLR at 608]:

To authorize a court to make an order where it is just and equitable to do so creates a judicial discretion exercisable after a consideration of all the circumstances relevant to the making of the order and in accordance with principle. The conferment of such an authority is not inconsistent with the exercise of judicial power.”

There is apparent in these cases an appreciation that in the course of the 20th century State legislation had established regimes to regulate and modify property and contractual rights and obligations by reference to broadly expressed criteria and to provide for the exercise by State courts of jurisdiction to implement the legislation ...

It should be added that criteria for judicial decision-making may involve the prevention or occurrence of future consequences by steps taken by the executive branch of government in the exercise of its powers. Mandatory court orders may stipulate, for their full effectiveness, the exercise of such powers. A well-known example is the form of specific performance decree set out in the report of *Butts v O'Dwyer* [(1952) 87 CLR 267]. The defendants were obliged to seek the approval of the Minister administering the *Crown Lands Consolidation Act* 1913 (NSW) to the transfer of lease and, if that was forthcoming, to complete the transfer to the plaintiff.

In assessing whether the courts have adequate legal standards or criteria “for the purpose of protecting the public from a terrorist act” it is relevant to note, not only that a judicial procedure has been laid down, but also that the orders which may be made are a familiar part of judicial power to make orders restraining the liberty of the subject, for the purposes of keeping the peace or preserving property. Orders, which are not orders for punishment following conviction, but which involve restraints upon the person to whom they are directed, can be made after a judicial assessment of a future risk. Such orders are familiar in the context of binding over orders discussed later in these reasons, and in the context of statutory protection orders made for the prevention of future violence. In

addition to the injunctive relief available under ss 68B and 114 of the *Family Law Act 1975* (Cth) (“the Family Law Act”), every State and Territory has enacted legislation with powers to make and tailor orders for the protection of targets of violence against those who have either perpetrated or threatened it.

“Policy” considerations

Something should be said here of the significance of criteria for curial determination which fix upon considerations of “policy”. What is meant by the use of that word? In its general sense, a policy is a principle or course of action which is adopted or proposed, particularly by the legislature and by the executive in its administration of legislation. But in the case law there also appears, for example, in the restraint of trade doctrine and the principles respecting relief against penalties and forfeitures, the policy of the law upon various aspects of the conduct of commerce. *Magill v Magill* [(2006) 231 ALR 277] concerned the policy of the law respecting the application of the law of tort to intimate personal relationships.

In *Australian Communist Party v The Commonwealth* [(1951) 83 CLR 1 at 277] Kitto J declared that “[t]he courts have nothing to do with policy”, but spoke too broadly. Where legislation is designed to effect a policy, and the courts then are called upon to interpret and apply that law, inevitably consideration of that policy cannot be excluded from the curial interpretative process. No principle of the separation of the judicial power from that of the other branches of government should foreclose that activity, for it is apt to lead to the just determination of controversies by the courts.

Statutes implement particular legislative choices as to what conduct should be forbidden, encouraged, or otherwise regulated. It is a commonplace that statutes are to be construed having regard to their subject, scope and purpose. Much attention now is given by the courts, when engaged on that task, to placing the law in question in its context and to interpreting even apparently plain words in the light of the apprehended mischief sought to be overcome and the objects of the legislation.

The context in which the Parliament enacted Pt 5.3 of the Code includes matters of “general public knowledge” [*Stenhouse v Coleman* (1944) 69 CLR 457 at 469] set out in the Special Case. Paragraph 32 of the Special Case lists recent terrorist attacks including the attacks in the United States of America on 11 September 2001, described in par 32(c) as follows:

“On 11 September 2001, four planes were hijacked. Two of the planes were flown into the towers of the World Trade Centre in New York, resulting in the eventual collapse of both towers and the death of 2752 people. A third plane was flown into the Pentagon in Washington, the headquarters of the US military, killing 189 people. A fourth plane crashed south of Pittsburgh when the passengers attempted to overpower the hijackers, killing 40 people. The fourth plane had been heading towards Washington, not its scheduled destination of San Francisco.”

Paragraph 35 of the Special Case lists major terrorist attacks occurring after 11 September 2001 which have resulted in significant numbers of civilian deaths. These include the simultaneous bombing of two locations in Bali on 12 October 2002 and the separate bombings in Bali on 1 October 2005, which together killed at least 222 civilians and injured many others; attacks on the transport network in Madrid on 11 March 2004, during which 10 bombs were exploded on four trains in three stations during the morning rush hour, in which 191 people were killed and at least 1,800 others injured; a car bomb detonated by a suicide bomber outside the Australian Embassy in Jakarta on 9 September 2004, which resulted in the killing of 11 people and injuring more than 160 others; attacks on the London transport system on 7 July 2005, in which three bombs were detonated by suicide bombers on underground trains, while a fourth later exploded on a double-decker bus, which killed 52 people and injured more than 770 others; and an attack in Mumbai in India on 11 July 2006 in which over 200 people were killed and at least 700 people injured.

It is also a matter of general public knowledge that many of these attacks on major urban targets were carried out by persons with some training and skills in handling explosives and a willingness to die in the course of the attack. Many such attacks have been explained, by those claiming responsibility for them, by reference to jihad, a term encompassing bellicosity, based at least in part on religious considerations, the use of which is not confined to a single nation state.

Shortly after the attacks in the United States of America, on 28 September 2001 the Security Council of the United Nations unanimously adopted Resolution 1373, par 2(b) of which requires all States to “[t]ake the necessary steps to prevent the commission of terrorist acts”.

The mischief to which the legislation is directed has been apprehended both within, and beyond, the Commonwealth of Australia and has been dealt with by legislatures of other nation states.

Courts are now inevitably involved on a day-to-day basis in the consideration of what might be called “policy”, to a degree which was never seen when earlier habits of thought respecting Ch III were formed. Care is needed in considering the authorities in this field. The vantage point from which the issues were presented is significant. The issue may be whether a power reposed by statute in an administrative or regulatory body is invalid because there is an attempted conferral of the judicial power of the Commonwealth. Here, the presence of criteria which give a prominent part to considerations of policy points against an attempted conferral of judicial power, and so in favour of validity. An example is the importance attached by the Corporations and Securities Panel, whose functions and powers were upheld in *Precision Data Holdings Ltd v Wills* [(1991) 173 CLR 167], to the maintenance of an efficient competitive and informed share market. This appeared to this Court to be a manifestation of commercial policy and a matter which supported the validity of the legislation and the authority of the Panel.

Earlier, in the *Tasmanian Breweries Case* [*R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361] it had been argued, unsuccessfully, that the Trade Practices Tribunal was attempting to exercise judicial power because its functions were analogous to the development and implementation by the courts of public policy in the restraint of trade doctrine. It was in the course of rejecting that submission and upholding the validity of the powers of the Tribunal that Windeyer J said [123 CLR at 401]:

“I do not doubt that in considering the public interest the Trade Practices Tribunal should have regard, among other things, to the same general considerations of reasonableness in reference to the public interest as a court would if asked by a party to an agreement to declare it unenforceable because in unreasonable restraint of trade. Nevertheless, in applying the idea of public interest, as adumbrated by the [*Trade Practices Act 1965* (Cth)], the Tribunal is more at large than is a court exercising the judicial power and asking what are the limits of reasonableness.”

Of the *Builders’ Labourers’ Case* Mason and Murphy JJ later (and with respect correctly) observed [*R v Joske; Ex parte Shop Distributive and Allied Employees’ Association* (1976) 135 CLR 194 at 21]:

“True, it was said in that case that the discretion given by s 140 was not a judicial discretion but was based ‘wholly on industrial or administrative considerations’ (per Dixon CJ) and involved ‘considerations of industrial policy’ (per Taylor J). We do not regard these observations as indicating that the mere requirement that a court take into account considerations of industrial policy in exercising a discretion is of itself enough to stamp that discretion with the character of a non-judicial function. The observations were made in a context in which there were other grounds supporting the conclusion reached by the Court.” ...

The federal judges exercising the jurisdiction conferred by the interim control order provisions will bring to their consideration of whether “making the order would substantially assist in preventing a terrorist act” (s 104.4(1)(c)(i)) and of the particular form of an order, both matters of common knowledge, some of which we have referred to above, and the facts and circumstances disclosed in the evidence on the particular application for an order. From consideration of the legislation on a case by case basis it may be expected that guiding principles will emerge, a commonly encountered phenomenon in judicial decision-making.

It is true that an interim control order may depend for its effectiveness upon activities of the police and intelligence services. However, the presence of these considerations in a predictive assessment which founds relief of a *quia timet* nature is not repugnant to the exercise of federal judicial power.

Conclusions respecting alleged inadequate criteria

The plaintiff’s argument sought, in effect, to sidestep the general significance of these remarks by stigmatising the exercise of the curial function under s 104.4 of the Code. The making of interim control orders was said to be so dominated, if not controlled, by the implementation of the legislative policy respecting the “response” by the Parliament to terrorist acts and apprehended acts of terrorism, that it limited to a constitutionally impermissible degree any judicial power to apply objectively determinable criteria. That view of the legislation should not be accepted.

Section 104.4 is not so expressed as to be insusceptible of strictly judicial application. The context, discussed earlier in these reasons under the heading “The jurisdiction of issuing courts”, indicates that issuing courts are intended to exercise judicially and not otherwise these powers with respect to

interim control orders. The importance of these considerations in favouring validity appears in the passage from the judgment of Kitto J in the *Amalgamated Engineering Union Case* which has been set out above.

There are two matters identified in par (c) of s 104.4(1) as to at least one of which the issuing court must be satisfied on the balance of probabilities. The second matter, the receipt by the person in question of training from or the provision of training to “a listed terrorist organisation”, presents issues of fact to be considered on the evidence presented. There is also a question of construction. This is whether the involvement with what is now a listed organisation must have occurred whilst it was so listed, or whether, as the Commonwealth submits, involvement at a time before the listing may suffice. The latter is the better view, given the subject, scope and purpose of Div 104. What is of immediate importance from a vantage point in Ch III of the Constitution is that the resolution of such issues of construction undoubtedly may be entrusted to a Ch III court.

The first matter in par (c) of s 104.4(1) is that “making the order would substantially assist in preventing a terrorist act”. It is true, as the plaintiff stressed in his submissions, that the person subjected to the order may be someone other than the prospective perpetrator of a terrorist act. The making of an order nevertheless may be of substantial assistance in preventing that act.

It is true also that the definition of “terrorist act” is detailed and contains terms which may give an area of choice and discretion in evaluating the weight of the evidence tendered on the application of the interim control order. But, as explained in these reasons, that does not foreclose the exercise of strictly judicial techniques of decision-making.

Judicial techniques must then be applied to each proposed obligation, prohibition and restriction. Section 104.4(1) requires in par (d) that each of these be measured against what is “reasonably necessary” and also against what is “reasonably appropriate and adapted” for attainment of the purpose of public protection from a terrorist act. This is weighed with the impact upon the circumstances of the person in question as a “balancing exercise” (s 104.4(2)).

The term “reasonable” which thus is a significant integer in s 104.4 is one with which courts are well familiar. This term has provided what is the great workhorse of the common law. One commentator has remarked, with some cogency, that this general concept, which draws its determinative force from the circumstances of each action on the case, yet has perhaps the most significant determinative role of all the general concepts which underpin common law doctrines.

In *McCulloch v Maryland* [4 Wheat 316 at 413-414 [17 US 159 at 203] (1819)]. the Supreme Court of the United States said of the term “necessary”:

“Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. ... [The word ‘necessary’] has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports.”

In par (d) of s 104.4(1) the phrase is “reasonably necessary” and is well apt for application as a legal criterion. That paragraph also uses the phrase “reasonably appropriate and adapted” to achieve the designated purpose. That phrase has its provenance in another well-known passage in *McCulloch* [4 Wheat at 357 [17 US at 177]]:

“The court, in inquiring whether congress had made a selection of constitutional means, is to compare the law in question with the powers it is intended to carry into execution; not in order to ascertain whether other or better means might have been selected, for that is the legislative province, but to see whether those which have been chosen have a natural connection with any specific power; whether they are adapted to give it effect; whether they are appropriate means to an end.”

This notion of sufficient connection between the desired end and the means proposed for its attainment may have its origins in constitutional law, but it is capable of judicial application elsewhere. Section 104.4(1) is an example. So also is the use made of notions of reasonable necessity and “reasonably appropriate and adapted” in the balancing exercise required of the issuing court by s 104.4(2).

Non-justiciable?

In the end, the plaintiff's case respecting the failure to confer upon the issuing courts the exercise of the judicial power of the Commonwealth must come down to a proposition that s 104.4 seeks to draw the issuing court into adjudication of non-justiciable matters.

"Non-justiciable" is a slippery term of indeterminate reference. It may be used with respect to Ch III of the Constitution in identifying the absence of the constitutional competence of this Court to restrain or otherwise intervene in some of the activities entrusted to the Parliament by Ch I and the Executive by Ch II. The special position accorded in *R v Richards; Ex parte Fitzpatrick and Browne* [(1955) 92 CLR 157] to the privileges of the Senate and the House of Representatives established by s 49 of the Constitution is one example. Another is the holding in *R v Governor of South Australia* [(1907) 4 CLR (Pt 2) 1497] that mandamus cannot lie to compel exercise by State Governors of powers conferred by the Constitution, specifically with respect to Senate elections.

The term "non-justiciable" may be applied in a more particular sense. Even if the plaintiff has standing in respect of the controversy sought to be agitated in a Ch III court, nevertheless there will be no "matter" if determination of the controversy would require adjudication of obligations and undertakings which depend entirely on political sanctions and understandings. Examples are agreements and understandings between governments in the Australian federation and between Australia and foreign governments.

It is not for an issuing court to enter upon any dispute as to the assessment made by the executive and legislative branches of government of the "terrorist threat" to the safety of the public before the enactment of the 2002 Act, the 2003 Act and the 2005 Act. But to the extent that this assessment is reflected in the terms of legislation, here Div 104 of the Code, and questions of the interpretation and application of that law arise in the exercise of jurisdiction by an issuing court, no violence is done to Ch III of the Constitution. The issuing court is concerned with a "matter" arising under a law which was preceded by a political assessment, but is not itself making or challenging that assessment.

The question of what is requisite for the purpose of protecting the public from a terrorist act may found a political assessment and lead to the enactment of legislation. That legislation may confer jurisdiction upon a federal court and stipulate as a criterion for the making of an order the satisfaction of the issuing court, on the balance of probabilities – a distinctively judicial activity – that each proposed obligation, prohibition and restriction would be reasonably necessary and appropriate and adapted – other familiar terms of judicial discourse – for that purpose of public protection.

The protection of the public as a purpose of decision-making is not alien to the adjudicative process. For example, it looms large in sentencing after the determination of criminal guilt. In *Veen v The Queen [No 2]* [(1988) 164 CLR 465 at 476] Mason CJ, Brennan, Dawson and Toohey JJ observed:

"However, sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform."

The objection by the plaintiff to the engagement of issuing courts in the assessment of risk to the public is a restatement of the objection to conferral of jurisdiction in terms said to be too broad to found the exercise of the judicial power of the Commonwealth. That submission should not be accepted.

Exercise of power in a manner contrary to Ch III

The plaintiff sought to extract from remarks of Gaudron J in *Nicholas v The Queen* [(1998) 193 CLR 173 at 208-209] support for something like a "due process" requirement from the text and structure of Ch III. The decisions of the Court have not gone so far. But it may be accepted for present purposes that legislation which requires a court exercising federal jurisdiction to depart to a significant degree from the methods and standards which have characterised judicial activities in the past may be repugnant to Ch III. Do the provisions of the Code concerning interim control orders oblige issuing courts to act in a manner inconsistent with the essential character of a court or with the nature of judicial power? It then becomes necessary in the present case to consider the complaints which the plaintiff makes respecting the processes and outcome of applications for interim control orders.

First, the plaintiff points to the *ex parte* nature of such applications. But *ex parte* applications are no novelty, and the scheme of the legislation, as already noted, is to provide in the very short term for a contested confirmation hearing if the person in question wishes to proceed in that way.

Secondly, the plaintiff complains that the standard of proof stipulated in s 104.4(1) is no more than satisfaction on the balance of probabilities. The Commonwealth, correctly, accepts that this does require application of the principles in *Briginshaw v Briginshaw* [(1938) 60 CLR 336]. Further, the choice of the standard or burden of proof may be fixed by the Parliament without it being repugnant to Ch III.

Thirdly, complaint is made of the restrictions imposed upon personal liberty *quia timet* and without adjudication of criminal guilt. In *Fardon v Attorney-General (Qld)* [(2004) 223 CLR 575] Gummow J rejected a submission by the Commonwealth and accepted the proposition that, “exceptional cases” aside, “the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts” [223 CLR at 612]; Gummow J distinguished from committal to custody to await trial (one of the “exceptional cases”) detention by reason of apprehended conduct and upon a *quia timet* judicial determination as being equally offensive to Ch III [223 CLR at 613].

The plaintiff sought to transmute what was said in *Fardon* (to which we adhere) into the broader proposition that any deprivation of liberty entailed by the terms of an interim control order could not be imposed by a court exercising the judicial power of the Commonwealth.

Detention in the custody of the State differs significantly in degree and quality from what may be entailed by observance of an interim control order. Moreover, as the Commonwealth and several of the interveners emphasised, some analogy is provided by examples in the English legal tradition of the imposition by curial order of preventative restraints. One such was the power of justices of the peace, on the application of the person threatened to bind over to keep the peace those whose activities threatened to break it, and on the justices’ own motion to bind over generally to be of good behaviour

...

The plaintiff emphasised that the breaches of the peace apprehended under the old law were breaches by the person subjected to the order. That is true also of the injunctive remedy for the personal protection of a party to a marriage now provided by s 114(1)(a) of the Family Law Act, but not necessarily of the power to grant an injunction “in relation to the property of a party to the marriage” (s 114(1)(e)).

The assistance provided by historical considerations may not, and does not here, furnish any immediate analogy to the modern legislative regime which is now under challenge. However, it is worth noting that the jurisdiction to bind over did not depend on a conviction and it could be exercised in respect of a risk or threat of criminal conduct against the public at large. In asking a court to exercise the preventative jurisdiction it was necessary to place before the court material which enabled it to conclude that in the absence of an order there was a risk of a breach of the peace.

The matters of legal history relied upon do support a notion of protection of public peace by preventative measures imposed by court order, but falling short of detention in the custody of the State. The plaintiff’s submission that such legislation is repugnant to Ch III should be rejected.

The fourth submission by the plaintiff on this branch of his case is that Div 104 authorises issuing courts to disregard the requirements of procedural fairness. Subdivision D of Div 104 provides for confirmation of interim control orders. Section 104.12A imposes a requirement upon an AFP member to disclose to the person in question details required for that person to understand and respond to the case to be put for confirmation of the order (s 104.12A(2)(a)(iii)). However, s 104.12A(3) excludes from that requirement any information the disclosure of which “is likely ... to prejudice national security” within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (“the Security Information Act”). That expression is so defined in that statute as to require a real and likely, not merely a remote, possibility of prejudice by the disclosure to the defence, security, international relations or law enforcement interests of Australia; the latter three expressions are then further defined.

The plaintiff submits that the exclusion made by s 104.12A(3) of the Code is invalid as repugnant to the exercise of federal jurisdiction.

To meet that submission the Commonwealth refers to authorities, in particular the passage in the joint judgment of Gibbs CJ, Wilson, Brennan and Dawson JJ in *Alister v The Queen* [(1984) 154 CLR 404 at 469] as follows:

“The disposal of any point in litigation, without the fullest argument on behalf of the parties, is a course to which every court reacts adversely, however untenable the point in issue may first appear, and however unlikely it is that argument will assist it. The present case evokes the same reaction. But it is the inevitable result when privilege is rightly claimed on grounds of national security.”

Nevertheless, there may remain a question whether in the terms used in the Security Information Act the Parliament has sought to over-reach the bounds of the understanding of “national security” in passages such as that from *Alister*.

There is no challenge in this proceeding to the validity of the provisions of the Code which pick up the definitions in the Security Information Act just mentioned. To rule now upon the validity of s 104.12A(3) of the Code could embarrass the operation of the Security Information Act. Further, s 104.12A(3) (and the other provisions of subdiv D) is yet to be engaged in respect of the plaintiff and no concrete case respecting the operation of the “national security” provision in that sub-section is presented. In these circumstances, no relief of a declaratory nature respecting the validity of subdiv D of Div 104 should be made. The preferable course is to limit any such relief to the validity of the provisions which have been immediately engaged, those in subdiv B, respecting interim orders.

Subject to these qualifications, the attack on validity based upon Ch III of the Constitution should be rejected.

Gummow and Crennan JJ also held that the regime was supported by the defence and external affairs powers.

Gummow and Crennan JJ: *The defence power ...*

In the decisions of this Court concerning s 51(vi), it has been said from time to time that the power is purposive in nature and that a notion of proportionality is involved in relating ends to means. This is because par (vi) of s 51 is considered to be one of the few instances, referred to by Dawson J in *Leask v The Commonwealth* [(1996) 187 CLR 579 at 600], where power is conferred by s 51 not “by reference to subject matter” but by reference to “aims or objectives”. In that regard, what has been said in this Court respecting the defence power was foreshadowed, with respect to the Constitution of the United States, by Alexander Hamilton. In No 23 of *The Federalist*, Hamilton wrote:

“This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms as simple as they are universal; the *means* ought to be proportioned to the *end*; the persons, from whose agency the attainment of any *end* is expected, ought to possess the *means* by which it is to be attained.” (original emphasis)

In the same issue of *The Federalist* Hamilton also made sapient observations respecting what was involved in the notion of defence; these should be set out because they provide a backdrop for consideration of the limitations upon the reach of the defence power in the Australian Constitution for which the plaintiff contends. Hamilton wrote that one of the principal purposes to be answered by the Union was “the common defence of the members; the preservation of the public peace, as well against internal convulsions as external attacks” and went on:

“The authorities essential to the common defence are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defence.” (original emphasis)

In a not dissimilar vein, during World War I Griffith CJ said in *Farey v Burvett* [(1916) 21 CLR 433 at 440]:

“As to the suggested limitation by the context, the words ‘naval’ and ‘military’ are not words of limitation, but rather of extension, showing that the subject matter includes all kinds of warlike operations. The concluding words cannot have any restrictive effect, unless they are read as an exhaustive definition of all that may be done, which is an impossible construction. In my opinion the word ‘defence’ of itself includes all acts of such a kind as may be done in the United Kingdom,

either under the authority of Parliament or under the Royal Prerogative, for the purpose of the defence of the realm, except so far as they are prohibited by other provisions of the Constitution.”

The plaintiff prefers the statement by Gavan Duffy and Rich JJ in their dissenting judgment in *Farey* [21 CLR at 466]:

“The words ‘the public safety and the defence of the realm’ are very different from the words ‘the naval and military defence of the Commonwealth’: the one phrase clearly suggests defence by means of naval and military operations, while the other is as broad and general as could be devised for the purpose of embracing all means for securing the safety of the community.”

But that view of s 51(vi) should not be accepted.

In the *Communist Party Case*, Dixon J said that the “central purpose” of the power is “the protection of the Commonwealth from external enemies” [(1951) 83 CLR 1 at 194], and Fullagar J said of the defence power [83 CLR 259]: “[I]t is concerned with war and the possibility of war with an extra-Australian nation or organism.” Is the defence of the Commonwealth and the several States of which s 51(vi) of the Constitution speaks concerned exclusively with defence against external threats to those bodies politic, typically by the waging of war by nation states, as occurred in 1914 and 1939?

Such a limited view of the power is not reflected in the recent discussion in the joint judgment in *New South Wales v Commonwealth* [(2006) 231 ALR 1 at 63-64]. Further, there was a long history in English law before the adoption of the Constitution which concerned defence of the realm against threats posed internally as well as by invasion from abroad by force of arms. Thus, the law of treason fixed among other things upon the “levying of war” against the sovereign in his or her realm. In this context, the levying of war in the realm required an insurrection accompanied by force, for an object of a public or general nature. In the report in Douglas of the trial at Bar in the Court of King’s Bench of Lord George Gordon, after the Gordon Riots, the following appears:

“The case, on the part of the prosecution, was; that the prisoner, by assembling a great multitude of people, and encouraging them to surround the two Houses of Parliament, and commit different acts of violence, particularly burning the Roman Catholic Chapels, had endeavoured to compel the repeal of an Act of Parliament.

Lord Mansfield, when he began to sum up the evidence, stated to the jury, that it was the unanimous opinion of the Court, that an attempt, by intimidation and violence, to force the repeal of a law, was a levying war against the King; and high treason.”

The analogy with the essential elements of the definition of “terrorist act” in s 100.1 of the Code will be apparent.

It is against this background that the plaintiff (with some support from New South Wales on this branch of the case) nevertheless makes the following submissions respecting the defence power. The first, that s 51(vi) is concerned only to meet the threat of aggression from a foreign nation, should not be accepted, for the reasons given above.

Next, the plaintiff points to the words “the Commonwealth and the several States” as indicative of that which is being defended. This is said to be those “collective” bodies politic rather than the citizens or inhabitants of the Commonwealth or the States and their property. That submission should not be accepted. The notion of a “body politic” cannot sensibly be treated apart from those who are bound together by that body politic. That has been so in English law for centuries. For example, the preamble to *The Ecclesiastical Appeals Act* of 1532 stated that the realm of England was: “governed by one supreme head and King ... unto whom a body politic compact of all sorts and degrees of people ... be bound and owe to bear, next to God, a natural and humble obedience”. The obverse of that obedience and allegiance was the sovereign’s obligation of protection. This notion of a compact sustaining the body politic cannot be weakened and must be strengthened by the system of representative government for which the Constitution provides.

The terms of the preamble to the *Commonwealth of Australia Constitution Act* 1900 (Imp) supply a link between Tudor conceptions of the State and those of the modern system of representative government. The preamble states that what is to be established will be “under” the Crown and the Constitution, but identifies this as coming about upon agreement of the people of the Australian colonies “to unite in one indissoluble Federal Commonwealth”. That is to say, the creation of this new body politic implemented, by Imperial statute, popular agreement. This emphasised, as Harrison Moore wrote, that: “[T]he Commonwealth of Australia, being a union of the people and not of their governments, is no mere confederacy.”

One consequence of a restrictive view of the scope of the defence power, exemplified by statements that it is concerned with wars waged by external enemies, has been the assertion of a power, stemming from s 61 and the incidental power in s 51(xxxix), to legislate “for the protection of [the Parliament] and the Constitution against domestic attack”. This was how Fullagar J put it in the *Communist Party Case*.

The interim control order system may be said to be 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 rather than to violent conditions which presently apply. But three things should be said here. First, 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. Secondly, in that regard the defence power itself is sufficient legislative support without recourse to any implication of a further power of the kind identified by Fullagar J in the *Communist Party Case*. (It is unnecessary to consider the scope of the “nationhood” power discussed by Mason CJ, Deane and Gaudron JJ in *Davis v The Commonwealth* [(1988) 166 CLR 79 at 92-95].)

Thirdly, much attention has been given in various decisions, concerned particularly with the waging in World War I and World War II of “total war” and the “mobilisation” of economic resources, to the fluid nature of the defence power. The plaintiff emphasises the concentration in such decisions upon the judicial assessment, as matters of constitutional fact, of facts said to be sufficient to connect the legislation in question with the head of power in s 51(vi). This approach to validity is readily understood in considering laws fixing the price of bread in 1916, regulating in 1945 the manufacture of fly-spray and protecting tenancies for residential accommodation in 1951. But this concentration upon sufficiency of connection is not called for when dealing with the interim control order system. This turns upon the operation of the definition of “terrorist act”. What is proscribed by that definition falls within a central conception of the defence power, as explained in these reasons. Protection from a “terrorist act” as defined necessarily engages the defence power.

The vice of the *Communist Party Dissolution Act 1950* (Cth), that it was, as Dixon J put it, “not addressed to suppressing violence or disorder” and did not “take the course of forbidding descriptions of conduct” with “objective standards or tests of liability upon the subject” [83 CLR at 192], does not appear in the interim control order regime.

The plaintiff’s submissions respecting the defence power should be rejected.

The external affairs power

What has been said above respecting the application of the interim control order system for the purpose of protection from a terrorist act requires qualification. As remarked earlier, when describing the definition in s 100.1 of the Code of “terrorist act”, the object of coercion or intimidation may be the government of a foreign country or of a part thereof and “the public” includes reference to the public of a country other than Australia.

There may be limits to the defence power which are crossed by the inclusion of governments of foreign states and expanded notions of “the public”. However that may be, here the external affairs power (s 51(xxix)) comes into play.

The pursuit and advancement of comity with foreign governments and the preservation of the integrity of foreign states may be a subject matter of a law with respect to external affairs. In *XYZ v Commonwealth* [(2006) 227 ALR 495 at 502-503], Gleeson CJ noted (with evident approval) that it was accepted that the external affairs power at least includes power to make laws in respect to matters affecting Australia’s relations with other countries. The commission of “terrorist acts” in the sense defined in s 100.1 of the Code is now, even if it has not been in the past, one of these matters.

In *Suresh v Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada said [[2002] 1 SCR 3 at 50]: “It may once have made sense to suggest that terrorism in one country did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid.” The Court added:

“First, the global transport and money networks that feed terrorism abroad have the potential to touch all countries, including Canada, and to thus implicate them in the terrorist activity. Second, terrorism itself is a worldwide phenomenon. The terrorist cause may focus on a distant locale, but the violent acts that support it may be close at hand. Third, preventive or precautionary state action may be justified; not only an immediate threat but also possible future risks must be considered.

Fourth, Canada's national security may be promoted by reciprocal cooperation between Canada and other states in combating international terrorism."

Further, in *XYZ*, Gummow, Hayne and Crennan JJ referred to the important statement by five members of the Court in the *Industrial Relations Act Case* [*Victoria v The Commonwealth* (1996) 187 CLR 416 at 485]:

"Of course the scope of the legislative power is not confined to the implementation of treaties. The modern doctrine as to the scope of the power conferred by s 51(xxix) was adopted in *Polyukhovich v The Commonwealth* [(1991) 172 CLR 501]. Dawson J expressed the doctrine in these terms [172 CLR at 632]:

'[T]he power extends to places, persons, matters or things physically external to Australia. The word "affairs" is imprecise, but is wide enough to cover places, persons, matters or things. The word "external" is precise and is unqualified. If a place, person, matter or thing lies outside the geographical limits of the country, then it is external to it and falls within the meaning of the phrase "external affairs".'

Similar statements of the doctrine are to be found in the reasons for judgment of other Justices: Mason CJ; Deane J; Gaudron J; and McHugh J. They must now be taken as representing the view of the Court."

The legislative scheme in Div 104 of the Code for prevention through the interim control order system of "terrorist acts" done or threatened with the intention of coercing or influencing by intimidation the government of a foreign country or part thereof or intimidating the public or a section of the public of a foreign country is a law with respect to a "matter or thing" which lies outside the geographical limits of Australia. The "matter or thing" is the apprehended intimidation or injury to the government or public of a foreign country.

Callinan J reached the same outcome, and in regard to the defence power analysed the significance of the *Communist Party Case*:

Callinan J: The *Communist Party Case* is instructive here for several reasons. First, it was concerned with legislation enacted, as here, to enhance national security. Secondly, reliance for its validity was placed in substance upon the defence power. Thirdly, it was enacted at a time when there was a perception that a particular ideology presented a current and future risk to the Australian polity and people. Fourthly, the legislation sought to make a factual connexion with the foregoing. Fifthly, it came to the Court by way of a form of stated case. Something more needs to be said about each of these.

The Act there, the *Communist Party Dissolution Act 1950* (Cth) ("the CPA"), was enacted with a preamble of nine paragraphs which indicate its objectives ...

It is apparent from the preamble, as Latham CJ observed, that the Parliament regarded the Australian Communist Party, and its ideologies as seriously threatening the common weal in many ways. The ideology was political, and not, as is implicit here, both political and religious, but nothing turns on that.

The timing of the enactment of the CPA is a point of departure from the timing of the legislation here. The Communist Party was part of an international political movement, but one which was not merely dominated, but almost entirely controlled by the Communist Party of the Soviet Union. Only five years before, the Soviet Union had been an important ally of Australia, and the other western democracies. There had certainly been manifestations of Soviet communist imperialism, but it is probably right to say that it was only after the collapse of the Iron Curtain nearly forty years later, that all of the designs of the communist state upon the rest of the world, and the ruthlessness with which it was prepared to pursue them, were fully realized and acknowledged. In short, much of what is now known and undoubted was not apparent in 1951, such that judicial notice would universally be taken of it. It may also be that some residual tenderness for a recent ally, and a naïveté about Soviet grand imperial designs affected the thinking of the Court in the *Communist Party Case*. But whether that is so of that case, it is certainly not here because in this one there is an abundance of uncontradicted, cogent, factual and notorious matter, having the character of constitutional and other facts upon which this Court may and should act. This marks another important point of distinction between this case and the *Communist Party Case*. In the latter, the Commonwealth sought to rely, for the establishment of the constitutional facts justifying the invocation of the defence power, factually solely on the allegations made in the preamble to the CPA. It is one thing for a court to accord some respect to

preambles, but another entirely to regard them as conclusive or binding upon the court as the Commonwealth sought to do there, especially when the Australian Communist Party, the plaintiff, joined issue on all of them by filing affidavits in contradiction of them. Those important issues had not been resolved by the time that the matter came before the High Court. By contrast, here, not only are the relevant facts proved and uncontradicted, but they are also the subject of provisional findings by the Court whose decision is sought to be challenged. It is a matter of speculation whether, had either of those circumstances obtained in the *Communist Party Case*, the result would have been different. Furthermore, for the purpose of testing of the constitutional validity of the legislation here, the plaintiff has actually joined in the stating of the special case which narrates the necessary constitutional facts. In the *Communist Party Case*, the stated case descended to much less particularity of fact: it did little more than recite the procedural history of the case and raise questions of the validity of the CPA, and of the admissibility of the plaintiff's evidence. Indeed, it was essentially on the basis that the Commonwealth failed to provide the necessary evidentiary linkage between the CPA, and s 4 of it in particular, and the defence power, that Webb J held the Act to be invalid. Dixon J thought it unnecessary to determine the facts because, in his opinion, the Commonwealth there had only argued that the preamble was conclusive as to the legislative opinions that it expressed. Even so, his Honour remarked upon the absence of any proposal by the Commonwealth to establish facts that might make a sufficient connexion between the defence power and the CPA. And despite his Honour's disavowal of the need for factual proof to decide the case, he himself made repeated reference to facts and events not mentioned in the preamble: for example, the Korean War then being fought; the principles of Communism, the Berlin blockade, and the "problem of Formosa". In short, his Honour did not consider the issues in a constitutional factual vacuum ...

The first of the powers said by the Commonwealth to support the Division is the defence power. And, as I have foreshadowed, the submission to that effect is correct. That being so, no other head of power needs detailed consideration.

Defence is not something of concern to a nation only in times of a declared war. Nations necessarily maintain standing armies in times even of apparent tranquillity. Threats to people and property against which the Commonwealth may, and must defend itself, can be internal as well as external. With respect, insufficient critical attention to these matters was given by the majority in the *Communist Party Case*. The references by Dixon J to "ostensible peace" [83 CLR at 202] and protection against external enemies as the "central purpose" [83 CLR at 262-3] of the defence power evince both a preoccupation with the events of the recent past, of a declared war, uniformed, readily distinguishable external enemies, generally culturally, ethnically, ideologically and religiously homogenous states, and an incomplete appreciation, despite Hiroshima and Nagasaki, of the potential of weaponry for massive harm.

In saying that, I do not question the result in the *Communist Party Case* or the particular principle, properly identified and understood, for which it stands, and its importance which Fullagar J emphasized, that it is for the courts, and not the Parliament to have the final say on whether legislation is within constitutional power or not. That does not mean that any of the separate judgments in the *Communist Party Case* should be uniquely immune to critical examination and analysis. Nor does it mean that subsequent events which might tend to falsify some of the factual assumptions upon which parts of the reasoning were based, should be ignored. In that respect it is revelatory history itself, which gives rise to questions about aspects of the case.

The facts established here, are, in my view facts in respect of which the Commonwealth may legislate under s 51(vi) of the Constitution. That conclusion is so right and obvious that reference to authority is really unnecessary. Even in the *Communist Party Case* itself there are statements which lend some support to the conclusion that I reach. McTiernan J contemplated that had the activities of the Australian Communist Party been more substantially threatening, either in peace, or time of declared war, members of, and the Party, might have been amenable to the legislation there. Although Williams J was of the view that the defence power could be invoked if the proved facts made it "reasonably necessary in order to prepare for the defence of Australia" [83 CLR at 223], later his Honour was to say [83 CLR at 253]:

"The defence power in peace time authorizes any legislation which is reasonably necessary to prepare for war ... Any conduct which is 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."

His Honour did not however define “war”. We cannot know how he would have regarded the facts with which the Court is confronted here.

Fullagar J was in no doubt that the defence power was not confined in its exercise to times of war.

The language of s 51(vi) of the Constitution is itself expansive. Under it, the Parliament may enact laws for the control of the forces to execute and maintain the laws of the Commonwealth. The real question in every case will be, is the Commonwealth or its people in danger, or at risk of danger by the application of force, and as to which the Commonwealth military and naval forces, either alone or in conjunction with the State and other federal agencies, may better respond, than State police and agencies alone. If the answer to that is affirmative then the only further questions will be, are the enacted measures demonstrably excessive, or reasonably within the purview of the power, or, to use the language of s 104.4(1)(d) itself, “reasonably necessary” or “reasonably appropriate and adapted” to protection against terrorism. With respect to the meaning and application of that language, and the relevance of the time of listing of relevant terrorist organizations, it is unnecessary to add to what has been stated by Gummow and Crennan JJ.

I have commented on aspects of the judgment of Dixon J in the *Communist Party Case* which time, to say the least, as well as the facts proved here, make questionable: the drawing by his Honour of a distinction, as if there were a clear line between them for constitutional and all practical purposes, between times of peace and serious armed conflict, and internal and external threats. Perhaps it was the country’s recent emergence from a prolonged and costly declared war during which liberties had been curtailed and rights suspended, that influenced his Honour’s responses to the CPA. Latham CJ, although in dissent, was in a sense more perceptive and alive to the gravity of direct and indirect internal threats inspired externally, and the different manifestations of war and warfare in an unsettled and dangerous world. To regard war as a declared war only, to assume that a nation’s foes would all identify themselves, and rarely act covertly, that they would act logically, and that they would not be people drawn from the Australian community was even then however to be somewhat naïve. As Latham CJ, well informed no doubt by his far reaching and diverse experience as head of Naval Intelligence during the First World War, member of the Australian delegation to the Versailles Peace Conference after it, busy counsel, parliamentarian, attorney-general, leader of the opposition, first minister to Japan, and Chief Justice, said [83 CLR at 155-6]:

“Any Government which acts or asks Parliament to act against treason or sedition has to meet the criticism that it is seeking not to protect government, but to protect *the Government*, and to keep itself in power. Whether such a criticism is justified or not is, in our system of government, a matter upon which, in my opinion, Parliament and the people, and not the courts, should pass judgment. The contention that such an argument affects the validity of a law reminds me of the decision of a court in another country, when I was there, in a case of alleged treasonable conspiracy. The Court held that the accused did not intend to destroy government, but only to bomb public offices and assassinate ministers and generals and others. As they intended to take over the task of governing the country themselves, they were not guilty. I did not then, and do not now, agree with such a decision ...

Actual fighting in the Second World War ended in 1945, but only few peace treaties have been made. The Court may, I think, allow itself to be sufficiently informed of affairs to be aware that any peace which now exists is uneasy and is considered by many informed people to be very precarious, and that many of the nations of the world (whether rightly or wrongly) are highly apprehensive. To say that the present condition of the world is one of ‘peace’ may not unfairly be described as an unreal application of what has become an outmoded category. The phrases now used are ‘incidents’, ‘affairs’, ‘police action’, ‘cold war’. The Government and Parliament do not regard the present position as one of perfect peace and settled security, and they know more about it than the courts can possibly know as the result of considering legally admissible evidence. I have already referred to the authorities which show that neither the technical existence of war nor actual fighting is a condition of the exercise of the defence power. At the present time the Government of Australia is entitled, in my opinion, under the defence power to make preparations against the risk of war and to prepare the community for war by suppressing, in accordance with a law made by Parliament, bodies believed by Parliament to exist for the purpose (*inter alia*) of prejudicing the defence of the community and imperilling its safety. It is immaterial whether the courts agree with Parliament or not.” (emphasis in original)

It could not be sensibly suggested however that too ready and ill-considered an invocation of the defence power, does not have the capacity to inflict serious damage upon a democracy. It is for this reason also that courts must scrutinize very carefully the uses to which the power is sought to be put. There will always be tensions in times of danger, real or imagined. They were present throughout the serious armed conflict of the Second World War as the numerous challenges to the National Security Regulations which were decided by this Court in those years and afterwards, show. They will no doubt continue while terrorism of the kind proved here remains a threat. The courts will simply have to do the best they can to ensure the proportionality that the Code itself admits must be applied in each and every case. The Commonwealth has however demonstrated that Div 104 of the Code, in its application to the plaintiff, is within the defence power.

In dissent, Kirby J found that Div 104 was not supported by any head of legislative power and breached the requirements of Ch III. He concluded with a passionate statement on constitutional values.

Kirby J: In the past, lawyers and citizens in Australia have looked back with appreciation and gratitude to this Court's enlightened majority decision in the *Communist Party Case*. Truly, it was a judicial outcome worthy of a "free and confident society" which does not bow the head at every law that diminishes liberty beyond the constitutional design.

I did not expect that, during my service, I would see the *Communist Party Case* sidelined, minimised, doubted and even criticised and denigrated in this Court. Given the reasoning expressed by the majority in these proceedings, it appears likely that, had the Dissolution Act of 1950 been challenged today, its constitutional validity would have been upheld. This is further evidence of the unfortunate surrender of the present Court to demands for more and more governmental powers, federal and State, that exceed or offend the constitutional text and its abiding values. It is another instance of the constitutional era of laissez faire through which the Court is presently passing.

Whereas, until now, Australians, including in this Court, have generally accepted the foresight, prudence and wisdom of this Court, and of Dixon J in particular, in the *Communist Party Case* (and in other constitutional decisions of the same era), they will look back with regret and embarrassment at this decision when similar qualities of constitutional wisdom were demanded but were not forthcoming.

In the face of contemporary dangers from terrorism, it is essential that this Court should insist on the steady observance of settled constitutional principles. It should demand adherence to the established rules governing the validity of federal laws and the deployment of federal courts in applying such laws. It should reject legal and constitutional exceptionalism. Unless this Court does so, it abdicates the vital role assigned to it by the Constitution and expected of it by the people. That truly would deliver to terrorists successes that their own acts could never secure in Australia.

The wellspring of constitutional wisdom lies in legal principle. Its source is found in the lessons of constitutional history. When these elements are forgotten or neglected by a court such as this, under the passing pressures of a given time, the result is serious error. The consequences for the constitutional design, as for individual liberty, can be grave. It must then be left to a future time to return to that wisdom and to rediscover its source when the mistakes of the present eventually send this Court back to the wise perceptions of the past.

While Hayne J found that the control order regime was supported by the defence power, he dissented in finding that it infringed Ch III of the Constitution.

Hayne J: Examination of the judicial power questions that arise in this matter must begin from two well-established principles. First, *R v Kirby; Ex parte Boilermakers' Society of Australia* [(1956) 94 CLR 254 at 273] decided that the express statement in ss 75 and 76 "of the matters in respect of which and the Courts by which the judicial power of the Commonwealth may be exercised is ... clearly intended as a delimitation of the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth, and as a necessary exclusion of any other exercise of original jurisdiction".

Secondly, it is well established that a single legislative provision may perform the double function of dealing with substantive liabilities or substantive legal relations and giving jurisdiction with reference to them. Even though the liability and the jurisdiction are created by the one provision, it is

possible to identify the two separate conceptions and “fit them into the pattern of Chapter III of the Constitution” [*Barrett* (1945) 70 CLR 141 at 167]. That is, it is possible to identify a law made under s 76(ii) conferring jurisdiction on a federal court in a matter arising under a law made by the Parliament.

It is, of course, clear that the legislation now in issue gives jurisdiction to federal courts. The determinative issue in the case is whether the authority given to federal courts to make control orders is authority to decide a *matter* arising under a law made by the Parliament.

That question must be answered by giving close attention to the relevant legislation. Before doing that, however, it is necessary to say something further about the first of the premises just identified as established by *Boilermakers*. In its oral submissions, the Commonwealth placed heavy emphasis upon the “chameleon doctrine” [*R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 18] by which, so it was submitted, the nature of a power takes its character from the body to which it is given.

It may readily be accepted that, as Kitto J said in *R v Spicer; Ex parte Australian Builders’ Labourers’ Federation* [(1957) 100 CLR 277 at 304-305]:

“It is true ... that there is nothing necessarily foreign to the nature of judicial power in the fact that its exercise is conditional upon the formation of an opinion described in broad terms [and that it] is true also that sometimes a grant of a power not insusceptible of a judicial exercise is to be understood as a grant of judicial power because the recipient of the grant is judicial.”

But the fact that the recipient of statutory power is a federal court does not conclude the question whether the power thus given to the court is the judicial power of the Commonwealth.

Nor is that question to be answered on an assumption that the doctrine of separation of powers is “a product of abstract reasoning alone [or is] based upon precise definitions of the terms employed” [*R v Davison* (1954) 90 CLR 353 at 381]. As Kitto J rightly pointed out in *R v Davison*, the doctrine, as developed in political philosophy, was based upon observation of the experience of democratic states. That is why, as Kitto J also remarked in *Davison* [90 CLR at 381-2], the distribution by the Constitution of the functions of government amongst separate bodies, by requiring a distinction to be maintained between powers described as legislative, executive and judicial, “is using terms which refer, not to fundamental functional differences between powers, but to distinctions generally accepted at the time when the Constitution was framed between classes of powers requiring different ‘skills and professional habits’ in the authorities entrusted with their exercise”.

The well-recognised difficulties in framing any comprehensive definition of what is the exercise of the judicial power of the Commonwealth do not deny the centrality of the concept of “matter” in ss 75 and 76 and the importance, in the understanding of that concept, of “arbitrament upon a question as to whether a right or obligation in law exists”.

When, in *Huddart, Parker & Co Pty Ltd v Moorehead* [(1909) 8 CLR 330 at 357], Griffith CJ spoke of judicial power as “the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property”, the notion of “arbitrament upon a question as to whether a right or obligation in law exists” [*Tasmanian Breweries* (1970) 123 CLR 361 at 374] lay at the centre of the conception that was described. In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*, Kitto J elaborated the point when he said [123 CLR at 374]:

“a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons”. (emphasis added)

As Kitto J went on to say [123 CLR at 374-5]: “a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified”.

That does not mean that the exercise of judicial power will not often require the discretionary exercise of power. Conferring discretionary powers on a court is a frequent feature of conferring judicial power. But the conferral of discretionary power may, in some cases, present particular questions.

In *Queen Victoria Memorial Hospital v Thornton* [(1953) 87 CLR 144 at 150], the task given to a court of summary jurisdiction (described by this Court as “making an appointment in substitution for the appointment made by an employer”) was so unconfined that the legislation was held not to confer

judicial power. No issue of fact was submitted to the court for decision, no antecedent right existed which the court was called upon to ascertain, examine or enforce.

The legislation in issue in *Thornton* may be contrasted with s 37 of the *Stevedoring Industry Act 1954* (Cth), considered by this Court in *R v Spicer; Ex parte Waterside Workers' Federation of Australia* ("the *Waterside Workers' Case*") [(1957) 100 CLR 312 at 317]. Of that legislation, four members of the Court said:

"The validity of s 37 depends upon its real nature and meaning. If it is to be interpreted as conferring upon the Commonwealth Industrial Court jurisdiction to hear and determine a matter arising under a law made by the Parliament of the Commonwealth within the meaning of s 76(ii) of the Constitution, then there is nothing to be said against its constitutional validity. A matter of that description involves a claim of right depending on the ascertainment of facts and the application to the facts of some legal criterion provided by the legislature The existence of some judicial discretion to apply or withhold the appointed legal remedy is not necessarily inconsistent with the determination of such a matter in the exercise of the judicial power of the Commonwealth. But it is perhaps necessary to add that the discretion must not be of an arbitrary kind and *must be governed or bounded by some ascertainable tests or standards.*" (emphasis added)

It is the need to identify an ascertainable test or standard which is to govern the grant or refusal of an interim control order which is critical in the present case. That will require close attention to the relevant provisions of the Code. Before undertaking that task it is necessary, however, to say more about discretion and judicial power.

It may be thought that what was said in the *Waterside Workers' Case* was qualified, even departed from, in *R v Joske; Ex parte Shop Distributive and Allied Employees' Association* ("the *Shop Distributive Employees' Case*"). It was argued in the *Shop Distributive Employees' Case* that a provision of the *Conciliation and Arbitration Act 1904* (Cth) that permitted the Industrial Court, upon finding that there was an invalidity in the affairs of an industrial organisation, to "make such order as it thinks fit to rectify or cause to be rectified the invalidity, or to negative, modify or cause to be modified the consequences in law of the invalidity" did not confer judicial power. Before making such an order, the Industrial Court was required to satisfy itself that such an order "would not do substantial injustice to the organization" or to members or third parties having dealings with the organisation.

Of these provisions, Mason and Murphy JJ said [135 CLR at 215-6]:

"It involves, so the argument runs, the conferment on the Court of functions which differ markedly from the ascertainment and declaration of existing rights, involving as they do, the making of determinations by reference to criteria not enunciated and the making of orders creating new rights. In addition, it is urged that the concept of 'substantial injustice' is so vague as not to lend itself to an exercise of judicial power. These considerations, it seems to us, are not enough to bring us within reach of the conclusion which the prosecutors seek to attain. Many examples are to be found in the exercise of judicial power of orders which alter the rights of the parties or are the source of new rights. Likewise, *there are countless instances of judicial discretions with no specification of the criteria by reference to which they are to be exercised – nevertheless they have been accepted as involving the exercise of judicial power It is no objection that the function entrusted to the Court is novel and that the Court cannot in exercising its discretion call in aid standards elaborated and refined in past decision; it is for the Court to develop and elaborate criteria regulating the discretion*, having regard to the benefits which may be expected to flow from the making of an order under sub-s (2)(a) and the impact which such an order will have on the interests of persons who may be affected." (emphasis added)

Two observations may be made about this aspect of the reasons of Mason and Murphy JJ. First, their Honours did not suggest that the propositions they formulated were at odds with the earlier decision of four members of the Court in the *Waterside Workers' Case*. Secondly, and more fundamentally, what is said in the *Shop Distributive Employees' Case* must be understood in the light of some basic principles.

The *Boilermakers' Case*, and many other decisions of the Court both before and after *Boilermakers*, establish beyond argument that the Constitution provides a separation of powers. It follows inevitably that the bare fact that legislation gives power to a federal court does not mean that no Ch III question can arise. Whatever the ambit of the so-called chameleon doctrine, by which a power that may be exercised administratively or judicially may take its colour from the body to which it is given, the

doctrine does not strip the concept of separation of powers of all meaning. Contrary to the submissions of the Commonwealth, the chameleon doctrine does not mean that *Boilermakers* “does not matter much any more”. There remains a real and radical difference between the judicial power of the Commonwealth and executive and legislative power.

Although Mason and Murphy JJ concluded, in the *Shop Distributive Employees’ Case*, that the exercise of the power given to the Industrial Court to grant or withhold relief according to the consideration of “substantial injustice” was itself an exercise of judicial power, it is important not to divorce that conclusion from the context in which it was reached. In particular, it is important to recognise that the power to grant relief was predicated upon the Court’s finding that there was some invalidity in the affairs of the organisation. On any view, then, the issue about whether there was an “invalidity” in the affairs of the organisation constituted a “matter”. There was a controversy between parties about whether past action or inaction accorded with identified legal standards. The notion of “substantial injustice” was to be engaged in considering what orders should be made if an “invalidity” were established.

Now it may be thought, from the manner in which the joint reasons in the *Waterside Workers’ Case* were expressed, that it is useful to divide the problem into two questions: first, whether there is a claim of right depending upon the application to facts as ascertained of “some legal criterion provided by the legislature” [100 CLR at 317] and second, whether the remedy is discretionary. The utility of such a segmented approach to the problem of whether a power given to a court is a judicial power may be doubted. The whole of the relevant legislative provisions must be considered. Observing that a discretion is given to a federal court does not, standing alone, require the conclusion that the power is not judicial power. The decisions in the *Waterside Workers’ Case* and the *Shop Distributive Employees’ Case* (and many other decisions of the Court) show that to be so. But power cannot validly be given to a federal court if the decisions whether and when to exercise the power that is given are not governed or bounded by a “defined or definable, ascertained or ascertainable” [100 CLR at 291] standard. Such power is not power to decide a matter. There may be “a legal proceeding” [*In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265], but there is not that “arbitrament upon a question as to whether a right or obligation in law exists” [123 CLR at 374].

It is with these principles in mind that the impugned provisions must be examined. That examination will show that the impugned provisions have a number of features common to many forms of the exercise of judicial power. There is the giving of the power to courts, the requirement to find facts, the specification of a standard of proof, the articulation of the connection that is to be drawn between premise and conclusion using terms familiar to judges and lawyers (“reasonably necessary” and “appropriate and adapted”). But what sets the impugned provisions apart from an exercise of judicial power is the indeterminacy of the criterion that the courts are required to apply – “for the purpose of protecting the public from a terrorist act”.

That criterion is unlike any that hitherto has been engaged in the exercise of judicial power. It is a criterion that does not call for the judicial formulation of standards of conduct or behaviour. It is a criterion that does not require the application of any familiar judicial measure of a kind found in fields as diverse as the law of tort (“reasonable”), matrimonial causes (“just and equitable” or “necessary ... to do justice”), corporations law or related fields (“just and equitable”), regulation of contractual relations (“inequitable or unduly onerous”) or industrial relations (“oppressive, unreasonable or unjust”). It is a criterion that does not direct attention to whether an identified person is likely to offend against the criminal law if released from prison. It is a criterion that seeks to require federal courts to decide whether and how a particular order against a named person will achieve or tend to achieve a future consequence: by contributing to whatever may be the steps taken by the Executive, through police, security, and other agencies, to protect the public from a terrorist act. It is a criterion that would require a federal court to consider future consequences the occurrence of which depends upon work done by police and intelligence services that is not known and cannot be known or predicted by the court.

Standards expressed in general terms, like those that are referred to earlier, are susceptible of “strictly judicial application” [*R v Commonwealth Industrial Court; Ex parte The Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 368 at 383]. The criterion that is fixed by the impugned provisions is not. To explain why that is so, it is necessary to say something more about the impugned provisions, and to do that by reference to the Commonwealth’s submissions.

The Commonwealth submitted that in exercising the powers under Div 104 a court issuing an interim control order, or confirming such an order, gives effect to the rights created by the Division. The Commonwealth contended that the issuing court “is required to examine past facts relating to [the person concerned], and to assess those facts against the standards specified in the Division”. Those standards were identified as specified in ss 104.3, 104.4 and 104.12A of the Code and were said to be “sufficiently precise to engage the exercise of ... judicial power” [*Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 597]. Yet at the same time, the Commonwealth acknowledged that “[t]he area of operation of Division 104 adjusts with the level of threat”, that is, threat to the public constituted by the possibility of commission of a terrorist act. What then are the standards specified in ss 104.3, 104.4 and 104.12A?

Section 104.3 is directed to the manner in which an interim control order is requested. It says nothing about the criteria to be applied in deciding whether an interim control order should be granted. Section 104.12A regulates procedures for confirming an interim control order, but again says nothing about what criteria are to be applied by the issuing court in deciding whether to confirm the interim order. Whether to confirm an interim control order is a subject dealt with by s 104.14 which provides that the court may revoke the interim control order if “not satisfied as mentioned in paragraph 104.4(1)(c)”.

In the end, it is s 104.4(1) which states the only criteria that an issuing court is to apply in deciding whether to grant an interim control order or confirm such an order. Two conditions must be met. First, the court must be satisfied on the balance of probabilities that either (i) “making the order would substantially assist in preventing a terrorist act” or (ii) “the person has provided training to, or received training from, a listed terrorist organisation”. The second condition is that “the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act”.

Several features of this second condition should be noted. Each of the obligations, prohibitions and restrictions to be imposed by the order must have two characteristics: (a) that it is “reasonably necessary” for the purpose of protecting the public from a terrorist act, and (b) that it is “reasonably appropriate and adapted” for that purpose. In a case where it is not contended that the person concerned has provided training to or received training from a listed terrorist organisation, there is an evident overlap between the requirement of the alternative element of the first condition, that the court be satisfied that making the order would substantially assist in preventing a terrorist act, and the requirement that the particular obligations imposed are both reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

In the present case, it was alleged that Mr Thomas was a person who had received training from a listed terrorist organisation. That is, the second element of the first condition was said to be engaged. This element, provided by s 104.4(1)(c)(ii), that a person has provided training to or received training from a listed terrorist organisation would, on its face, appear to extend to any and every form of training. So much would appear to follow from the distinction drawn in s 101.2 between a person providing or receiving training, and the training being “connected with preparation for, the engagement of a person in, or assistance in a terrorist act”. But the significance of the apparent reach of the provision need not be explored.

The facts explicitly agreed in the special case included only that: “In March 2001, [Mr Thomas] left Australia and travelled to Pakistan, and then to Afghanistan. Whilst in Afghanistan, he undertook paramilitary training at the Al Farooq training camp for a period of three months. This training included training in the use of firearms and explosives.”

Who provided that training was not recorded as a fact agreed for the purposes of the special case.

The special case included both the Federal Magistrate’s reasons for granting the interim control order against Mr Thomas and the order itself. Schedule 2 to the order set out a “Summary of the grounds on which this order is made”. Paragraph 1 of that schedule recorded that Mr Thomas had “admitted that he trained with Al Qa’ida in 2001” and that “Al Qa’ida is a listed terrorist organisation under section 4A of the Criminal Code Regulations 2002, made under the [Code]”. It went on to record that Mr Thomas also admitted that “while at the Al Qa’ida training camp he undertook weapons training, including the use of explosives and learned how to assemble and shoot various automatic weapons”.

As noted earlier in these reasons, the special case is drawn in such a way that it is by no means clear whether the findings made by the Federal Magistrate, and recorded in the summary of grounds on which the interim control order was made, are to be taken to be established facts for the purposes of the special case. The better view may well be that they are not agreed facts. It is, however, not necessary to go beyond the point of noticing that one asserted basis for the grant of the interim control order was that Mr Thomas received training of the kind described with Al Qa'ida.

Now as counsel for Mr Thomas pointed out, in reply, the assertion was that Mr Thomas trained with Al Qa'ida in 2001, *before* Al Qa'ida was listed as a terrorist organisation in 2002. That temporal observation may or may not be relevant to the application of the first condition of s 104.4(1). That is, there may be a question whether, on its true construction, s 104.4(1)(c)(ii) requires that the training be given to or received from an organisation that is a listed organisation at the time of the training. That question need not be decided. But the facts agreed do not assert, and the parties did not assert in argument, that it is relevant to consider whether, at the time of Mr Thomas undertaking training, he was acting in breach of federal law, whether as stated in the Code or elsewhere.

Assuming, without deciding, that the way in which the two conditions specified in s 104.4(1)(c) are framed presents no separate question about the sufficiency of the statute's specification of the rights and obligations to be determined by a court in exercise of the judicial power of the Commonwealth, particular attention must be directed to the requirements that the court is satisfied, to the requisite standard, that the obligations, prohibitions and restrictions to be imposed are both reasonably necessary for the purpose of protecting the public from a terrorist act and reasonably appropriate and adapted for that purpose.

Again, some questions of construction of the provision arise. In particular, what is meant by the cumulative requirement that the court be satisfied that each of the obligations, prohibitions and restrictions to be imposed is reasonably necessary *and* reasonably appropriate and adapted for the stated purpose?

The expression "reasonably necessary" would make no sense if "necessary" were to be understood as "indispensable". The better view may therefore be that "reasonably necessary" is used to convey some less intense connection.

In oral argument it was suggested that it should be understood as having substantially the same meaning as the word "necessarily" has been construed to have in income tax law allowing deductions for expenditure "necessarily incurred" in the carrying on of a business. In that context "necessarily" has been understood to mean "clearly appropriate or adapted for", not "unavoidably". As Gleeson CJ pointed out in *Mulholland v Australian Electoral Commission* [(2004) 220 CLR 181 at 199-200], there is, in Australia, "a long history of judicial and legislative use of the term 'necessary', not as meaning essential or indispensable, but as meaning reasonably appropriate and adapted". And the latter expression, "reasonably appropriate and adapted", can be traced to *McCulloch v Maryland*.

If "reasonably necessary", when used in s 104.4(1)(d) and s 104.4(2) of the Code, were to be understood in this way, the further reference in those provisions to the orders being "reasonably appropriate and adapted" for the purpose of protecting the public would be superfluous. That may be a strong reason to think that "reasonably necessary" should be understood in some other way but no other construction of the expression was offered in the course of argument.

In the end, it is not necessary to resolve these issues of construction. For present purposes, it is sufficient to notice that the statutory question presented to a court asked to make an interim control order requires the court to draw a connection between the order and "the purpose of protecting the public from a terrorist act" (s 104.4(1)(d)) and then, under s 104.4(2), to take into account "the impact" of each element of the order that is to be made "on the person's circumstances (including the person's financial and personal circumstances)". The nature or intensity of the connection between the order and that purpose which is to be understood as being conveyed by the expressions "reasonably necessary" and "reasonably appropriate and adapted" need not be decided.

What is of critical importance is that the focus of the statutory question for a court asked to make an interim control order is upon protecting the public from a terrorist act. What is the standard which is thus engaged?

A court deciding whether to grant an interim control order, and deciding how that order would be framed, would usually, perhaps inevitably, give close attention to what the evidence adduced reveals about what the person who is to be the subject of the order would do, or would be likely to do, if the order were not made. The Code does not require, however, that the court decide, or even consider,

whether the conduct to be restrained would otherwise be lawful or not. The Code offers no legal standard of that kind as a standard against which threatened or intended conduct on the part of the person who is to be the subject of the order is to be measured. No question of antecedent right or liability is to be determined. Rather, the focus of the relevant provisions of the Code falls exclusively upon a future consequence: the order's achieving, or tending to the achievement of, "the purpose of protecting the public from a terrorist act".

The indeterminacy of the inquiry requires the conclusion that the task assigned to a federal court by s 104.4 is not the authority to decide a "matter". The task assigned is not to exercise the judicial power of the Commonwealth.

As noted earlier, the impugned provisions have a number of features common to many forms of the exercise of judicial power. Further, courts exercising the powers and functions given by the impugned provisions would inevitably approach the task according to the "skills and professional habits" [90 CLR 353 at 381] of the judicial branch of government. In particular, courts would look to past decisions, especially past decisions made under s 104.4 of the Code, for any guidance that the reasons given in those cases may provide for the disposition of issues presented in the instant case. But to say that the courts might thus "develop and elaborate criteria regulating the discretion" [135 CLR at 194], does not conclude the questions about Ch III of the Constitution that are presented by the impugned provisions. There are several points to make about the significance that may properly be attached to the observation that courts given the powers and functions that are now in issue will seek to do so in accordance with established judicial method.

The fact that the legislature reposes power in a court does not conclude any question about the nature of that power. It would be contrary to the fundamental basis for all that this Court has decided about Ch III to hold otherwise. Likewise, to observe that courts called upon to decide questions of the kind presented by s 104.4 would do so by the application of judicial method does not conclude the question that must be decided.

To say that the courts will develop criteria regulating the exercise of the powers given by the Code is a proposition that, at best, assumes rather than demonstrates that there is a basis to be found *in the impugned provisions* for the development of those criteria. If it does not make that assumption, it asserts no more than that courts given the relevant powers will seek to employ judicial method when considering whether to exercise those powers. That is an assertion that does not advance the argument.

The impugned provisions offer no legal standard against which an application for a control order is to be judged. Because that is so, a court which is asked to make an order under the impugned provisions is necessarily left to decide the case according to nothing more definite than its prognostication about the order's achieving, or tending to the achievement of, "the purpose of protecting the public from a terrorist act". The repeated exercise of that power would yield a succession of factually specific predictions made by individual judicial officers, each necessarily based on its own particular evidentiary foundation. Judicial method may very well have been used in undertaking the evaluation of the evidence that is tendered in connection with what, in the end, would be a particular species of fact-finding. But it is far from clear how a course of such decisions would yield any rule or standard of law that subsequent courts could identify and apply. If, however, a discernible pattern did emerge from a series of cases, and it was thought possible to distil some legal principle governing the making of the relevant prediction, the principle discerned would not come from the Code. The courts, not the legislature, would have created the legal standard that governs the application of the legislation.

All of these considerations point only to the conclusion that the task given to federal courts by the impugned provisions is not the exercise of the judicial power of the Commonwealth.

It is necessary to return to and amplify the proposition that the impugned provisions offer no legal standard against which an application for a control order is to be judged.

To decide what will (tend to) protect the public from a terrorist act it is necessary to know more than the fact that there is a threat to commit such an act. Even assuming that a particular threat is well defined (and much more often than not in the case of threats of terrorist acts, it will not) the utility of making an order to restrain a person in one or more of the ways specified in s 104.5(3), and in particular the tendency of such an order to secure public protection, cannot be assessed without knowing what other measures are being taken to guard against the threat. Knowing what other measures are being taken to guard against the threat may be seen as a matter for evidence that would prove the measures that have, or have not, been taken to thwart the threat that is under consideration.

But it is the evaluative judgment that the criterion requires to be made by the court asked to make a control order that is a judgment ill-fitted to judicial determination. Several considerations point to the conclusion that it is not a question that is to be resolved by application of a criterion or criteria which would suffice to govern or bound the decision “by some ascertainable tests or standards” [100 CLR at 312].

First, the statute says nothing about how a court is to decide whether or when its orders will (tend to) protect the public from a terrorist act. It may be accepted that the conditions stated in s 104.4(1)(c) are jurisdictional facts to be established before the power given by s 104.4 may be exercised. But taken as a whole, the section is not to be read as requiring a court, on establishment of the jurisdictional facts specified in s 104.4(1)(c), to make an order containing one or more of the obligations, prohibitions or restrictions specified in s 104.5(3). Section 104.4(1) is cast in a form that is radically different from provisions of the kind considered in cases like *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* [(1971) 127 CLR 106 at 134-135]. The several conditions identified in pars (a) to (d) of s 104.4(1) are stated as qualifying what otherwise is a general discretion given to the court (“[t]he issuing court *may* make an order ... but only if” the conditions are met). Further, no party to the present proceedings contended that satisfaction of the conditions stated in pars (a) to (d) of s 104.4(1) required the court to make an order. All accepted that the court could nonetheless refuse to make an order if, for example, there had been undue delay in making the application or there were some other disqualifying reason.

Secondly, whether or not the impugned provisions of the Code are supported in every aspect of their possible operation by the defence power, they are provisions which, at least in part, are to be understood as being directed to the protection of the public from threats which include threats of a kind that engage the defence power. As Kitto J pointed out in the *Communist Party Case* [83 CLR at 272]:

“This Court has always recognized that the Parliament and the Executive are equipped, *as judges cannot be*, to decide whether a measure will in practical result contribute to the defence of the country, and that such a question must of necessity be left to those organs of government to decide.” (emphasis added)

The subject-matter of the particular power given to federal courts by s 104.4 (the power to make orders for the purpose of protecting the public from a terrorist act) is public protection. That is a subject which is quintessentially for the Parliament and the Executive to consider and it is for those branches of government to decide what steps are to be taken to achieve that purpose. It is not for the judicature to establish criteria that will decide those questions. It is for the judicature to decide whether the steps taken by the legislative and the executive branches are lawful. That role of the judicature is fundamental to the system of government for which the Constitution provides and is as important in times of threat as it is in other, more peaceful times. It is a role that must not be abdicated.

Subject to this important qualification, the defence of the nation is peculiarly the concern of the Executive. The wartime cases like *Lloyd v Wallach* [(1915) 20 CLR 299], *Ex parte Walsh* [[1942] ALR 359], *Little v The Commonwealth* [(1947) 75 CLR 94] and *Wishart v Fraser* [(1941) 64 CLR 470] recognise that “in war the exigencies are so many, so varied and so urgent that width and generality are a characteristic of the powers which [the Executive] must exercise” [64 CLR 484-5].

But that does not mean that if, as I would hold to be the case, the present legislation is invalid for contravention of Ch III, it could validly be re-enacted in a form that confers powers on the Minister like those that the impugned provisions give to federal courts. As noted earlier in these reasons, there is a real question (that need not be decided in this matter) whether the point would come in a time of “ostensible peace” where the defence power would sustain a law conferring upon a Minister power to order either the detention of persons or their subjection to restraints like those which the impugned provisions of the Code allow a court to make as part of a control order, if the Minister believes it is necessary to detain or restrain those persons. It is not to be supposed that such extraordinary measures would be supported by the defence power except in extraordinary circumstances. And again, although the point does not arise here, the *Communist Party Case* reveals that there are limits to the capacity of the Parliament (or, I would add, the Executive) to recite those arms of government into a valid exercise of the defence power. The ultimate limit is provided by the duty of this Court to pronounce on the validity of legislative or executive action when challenged on the ground that it exceeds constitutional power: “It is, emphatically, the province and duty of the judicial department, to say what the law is.” [*Marbury v Madison* 5 US 87 at 111 (1803)]

The fact that the defence of the nation is particularly the concern of the Executive has two relevant consequences that must be considered. First, there are some consequences for what questions can validly be submitted to federal courts for their determination.

The Executive's decisions about what steps can or should be taken to protect the public from a terrorist act will often be affected by intelligence and other material of a kind not readily made available in courts which, at least as a general rule, transact their business in public on the basis that the parties to the litigation know what evidence is led and what arguments are advanced.

Difficulties that are presented for courts by reference to intelligence material are well illustrated by the decision of the House of Lords in *A v Secretary of State for the Home Department* [[2005] 2 AC 68]. The majority of the House formed its conclusions about whether "there was an emergency threatening the life of the nation" [[2005] 2 AC at 137] upon its examination of only some of the material that had been placed before the relevant administrative decision-maker: by reference to only the "public" as distinct from the "closed" material. Thus, although the question was one in which it was

"open to the judiciary to examine the nature of the situation that has been identified by government as constituting the emergency, and to scrutinise the submission by the Attorney General that for the appellants to be deprived of their fundamental right to liberty does not exceed what is 'strictly required' by the situation which it has identified"

that task was undertaken by reference to only so much of the available material as the Executive chose to make public.

The desirability of keeping intelligence material secret is self-evident. Often it will be essential. But the problem presented by the use of intelligence material is more deep-rooted than any question of preserving secrecy. Even if taking steps to secure the continuing secrecy of intelligence material is, or can be made, consistent with the generally open and adversarial nature of litigation in the courts, it is the nature of the material to be considered that presents issues of a kind not suited to judicial determination. In particular, by its very nature, intelligence material will often require evaluative judgments to be made about the weight to be given to diffuse, fragmentary and even conflicting pieces of intelligence. Those are judgments of a kind very different from those ordinarily made by courts.

For the most part courts are concerned to decide between conflicting accounts of past events. When courts are required to predict the future, as they are in some cases, the prediction will usually be assisted by, and determined having regard to, expert evidence of a kind that the competing parties to the litigation can be expected to adduce if the point in issue is challenged. Intelligence information, gathered by government agencies, presents radically different problems. Rarely, if ever, would it be information about which expert evidence, independent of the relevant government agency, could be adduced. In cases where it could not be tested in that way (and such cases would be the norm rather than the exception) the court, and any party against whose interests the information was to be provided, would be left with little practical choice except to act upon the view that was proffered by the relevant agency.

These difficulties are important, but not just because any solutions to them may not sit easily with common forms of curial procedure. They are important because, to the extent that federal courts are left with no practical choice except to act upon a view proffered by the Executive, the appearance of institutional impartiality and the maintenance of public confidence in the courts are both damaged. To that extent, "[t]he judiciary is apt to be seen as but an arm of the executive which implements the will of the legislature" [*Kable* (1996) 189 CLR 51 at 134]. These are signs or symptoms of a more deep-seated problem. The difficulties that have been mentioned both emerge from and reveal a fundamental feature of the impugned provisions: that a decision about what is necessary or desirable for public protection is confided to the judicial branch of government.

There is a second consequence that follows from the observation that the defence of the nation is particularly the concern of the Executive. It is for that arm of government to decide what is necessary for public protection. To achieve that end the Executive may well wish to intercept and prevent certain conduct before it occurs. But absent specific statutory authority, the Executive may not lawfully detain or restrain persons. If the conduct that is to be intercepted or restrained would, if undertaken, be contrary to law, legislation empowering a court to grant orders restraining a person from undertaking that conduct would be an orthodox and unremarkable conferral of jurisdiction. What sets the present legislation apart is that it seeks to give to the courts the decision of what is necessary to protect the

public and, for the reasons earlier given, offers the courts no standard by which to decide that question.

An important and revealing contrast may be drawn between the provisions now under consideration and certain provisions of the Canadian *Criminal Code* (particularly s 83.3 of that Code) which are directed to the same general end. The Canadian provisions hinge about conclusions reached by a “peace officer”. If that officer “believes on reasonable grounds that a terrorist activity *will* be carried out” and “suspects on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is *necessary* to prevent the carrying out of the terrorist activity” the officer may, with the consent of the Attorney General of Canada, lay an information before a judge. The issue that is then presented for judicial determination is whether the judge is “satisfied by the evidence adduced that the peace officer has reasonable grounds for the suspicion”. That is an issue of a kind that courts deal with frequently. It requires consideration and evaluation of what the relevant official puts forward as the grounds upon which the impugned decision has been made. It does not require, as the provisions now in issue do, the court to decide for itself what is necessary or desirable for protection of the public ...

Many rules applied by the courts are expressed in abstract terms of great generality. Phrases like “just and equitable” and words like “reasonable” require difficult judgments to be made in particular cases. Those judgments are to be made, however, in the context of deciding the rights and duties of identified parties. They are judgments that depend upon applying recognised, if imprecise, measures of what is “just and equitable” or “reasonable”. By contrast, the provisions now in issue require an assessment of how to protect the public from the conduct of persons who may have no direct connection with the person to whom the order is directed. By hypothesis the persons whose terrorist acts are to be impeded by the making of the order are themselves unwilling to obey Australian law. The federal courts are asked to make orders that will (help to) impede their conduct but are given no standard by which to decide when such an order should be made except the tendency of the order to protect the public.

In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [(2001) 208 CLR 199], a majority of the Court concluded that a statutory power for a State Supreme Court to grant an injunction “in all cases in which it shall appear to the Court or judge to be just and convenient” required that Court, when asked to grant an interlocutory injunction, to identify the legal or equitable rights which are to be determined at trial and in respect of which final relief is sought. The provision was held not to expand the jurisdiction of the Supreme Court to permit the grant of an interlocutory injunction where no legal or equitable rights were to be determined. Gaudron J identified [208 CLR at 231] the root of that conclusion as being found in a proposition “beyond controversy[,] that the role of Australian courts is to do justice according to law – not to do justice according to idiosyncratic notions as to what is just in the circumstances”. To require a Ch III court to decide whether to impose upon a person obligations, prohibitions or restrictions of the kind specified in s 104.5(3), by reference only to the relationship between those orders and the protection of the public from a terrorist act, would require the court to apply its own idiosyncratic notion as to what is just. That is not to require the exercise of the judicial power of the Commonwealth.