

## World Bar Conference

### War is not the answer: The ever present threat to the rule of law

Friday 5<sup>th</sup> September 2014

By Julie Ward<sup>1</sup>

---

*'In all countries and in all ages, it has often been found necessary to suspend or modify temporarily constitutional practices, and to commit extraordinary powers to persons in authority in the supreme ordeal and grave peril of national war...'<sup>2</sup>*

The last time that Australia declared war on another nation was during WWII. We have been fortunate not to have had a recent history of having to defend our territory against attacks by foreign powers. In 21<sup>st</sup> century Australia, the only threat of violence on a scale comparable to wartime hostilities is that posed by international terrorism. War has not, therefore, been seen as “the answer” to anything in my country in my lifetime.

I propose to approach the question of threats to the rule of law that arise in the context of war by reference to the proposition, implicitly acknowledged by Higgins J in the High Court of Australia in *Lloyd v Wallach*, handed down at the height of WWI, that extraordinary

---

<sup>1</sup> Judge of Appeal, NSW Supreme Court. I wish to acknowledge the diligent research and invaluable assistance provided by Ms Jessica Natoli, the Court of Appeal researcher, in the preparation of this paper, and to my tipstaff, Ms Kate Ottrey, and the Chief Justice’s research director, Mr Haydn Flack, for their insights on this topic. My gratitude also to Ms Kate Eastman SC for her incisive comments on a draft of this paper.

<sup>2</sup> *Lloyd v Wallach* 20 CLR 299, 310 per Higgins J.

measures infringing the rule of law have been considered permissible during wartime, when the continued existence of the nation as we know it is threatened.<sup>3</sup> In so doing, I acknowledge that threats to the rule of law in modern-day Australia are more likely to come from outside the defence context.

The Hon Murray Gleeson AC QC, when Chief Justice of Australia, presenting the first of the six Boyer lectures in 2000 and speaking of the law as a restraining and civilising influence on the exercise of power, said:

Many Australians are so accustomed to living in a community governed upon those principles [i.e., those encompassed by the rule of law] that they fail to make the connection when they see, sometimes close to home, violence and disorder, in societies where the rule of law either does not exist, or cannot be taken for granted. In our society, threats to the rule of law are not likely to come from large and violent measures. They are more likely to come from small and sometimes well-intentioned encroachments upon basic principles, sometimes by people who do not understand those principles.<sup>4</sup>

Throughout the 20<sup>th</sup> century, established constitutional doctrine ensured that emergency measures implemented in times of war were temporary, as they ceased to be supported by the defence power after a period of post-war readjustment.<sup>5</sup> I wish to discuss some of this historical material, and to pose the question of its continued relevance in 21<sup>st</sup> century Australia. This is particularly important in the context of

---

<sup>3</sup> Ibid 310-311 per Higgins J.

<sup>4</sup> The Hon Chief Justice AM Gleeson, "A Country Planted Thick with Laws", Boyer Lecture 1, 19 November 2000. See also his Honour's speech on Courts and the Rule of Law as part of the Rule of Law Series at Melbourne University on 7 November 2001 contrasting the concepts of legitimacy and arbitrariness.

<sup>5</sup> *R v Foster* (1949) 79 CLR 43.

Australia's engagement in conflicts outside Australia and efforts to prevent terrorist attacks within Australia, where there has been no formal declaration of war, and the clear line between when the rule of law may be infringed and when that infringement must end is harder to draw. If established principles can no longer ensure that extraordinary measures enacted in response to the threat of violence do not result in permanent encroachments on the rule of law, how are we to protect the rule of law moving forward?

In the Boyer lecture, the Hon Murray Gleeson adopted, as applicable to Australia, the description of the rule of law given in the 1998 Canadian opinion relating to the possible secession of Quebec.<sup>6</sup> First, that it vouchsafes to the citizens and residents of a county or state a predictable and ordered society in which to conduct their affairs; that it provides a shield for individuals from arbitrary state action; that it provides that the law is supreme over the acts of governments and private persons; in short that there is one law for all. Second, that it requires the creation and maintenance of an actual order of positive laws. And, third, that the relationship between the state and the individual must be regulated by law.<sup>7</sup>

Modelled on the United States Constitution, the Australian Constitution assigns express enumerated legislative powers to the Commonwealth Parliament, leaving the remaining powers to the States.<sup>8</sup> At the pinnacle of the first and second World Wars, this distribution of power was

---

<sup>6</sup> The Hon Chief Justice AM Gleeson, "A Country Planted Thick with Laws", Boyer Lecture 1, 19 November 2000.

<sup>7</sup> The Hon Chief Justice AM Gleeson, "A Country Planted Thick with Laws", Boyer Lecture 1, 19 November 2000; citing *Reference re Secession of Quebec* [1998] 2 SCR pp 247-63.

<sup>8</sup> The Hon Murray Gleeson AC, *The Rule of law and the Constitution* (ABC Books, 2000) 41.

significantly altered, with the central government assuming control over many areas of power quintessentially within the authority of the States.

The machinery through which this was achieved was the power pursuant to section 51(vi) of the Constitution to make laws with respect to 'the naval and military defence of the Commonwealth', described by Isaacs J in *Farey v Burvett* as 'a power which is commensurate with the peril it is designed to encounter'.<sup>9</sup>

What this means is that the scope of the defence power waxes and wanes depending on the factual circumstances confronting the nation. Justice Fullagar, in the *Communist Party Case*,<sup>10</sup> described the power as encompassing a primary and a secondary aspect. The primary aspect, operative in times of both war and peace, 'authorizes the making of laws which have, as their direct and immediate object, the naval and military defence of the Commonwealth', which encompasses measures such as the enlistment, training and equipment of the navy, army and airforce.<sup>11</sup> The secondary aspect, which is enlivened upon the immediate apprehension of war and which continues for the war's duration, 'extends to an infinite variety of matters which could not be regarded in the normal conditions of national life as having any connection with defence.'<sup>12</sup>

By way of example, Geoffrey Sawer provides the following list of Commonwealth measures held to be supported by the secondary aspect of the defence power during WWII - forming a monopoly over the

---

<sup>9</sup> *Farey v Burvett* (1916) 21 CLR 433, 455.

<sup>10</sup> *Australian Communist Party v The Commonwealth* ('Communist Party Case') (1951) 83 CLR 1.

<sup>11</sup> *Ibid* 253-254.

<sup>12</sup> *Ibid* 254.

collection of income tax by preventing the States from collecting income tax, fixing the price of all goods and services, controlling the sale of alcohol, regulating employment conditions in all industry, controlling all essential materials and restricting Christmas advertising.<sup>13</sup> The list reflects Dixon J's statement in *Stenhouse v Coleman* that 'in grave emergencies, it may be necessary...to assume control of the greater part of the human and material resources of the nation.'<sup>14</sup> Crucially, during the post-war period this secondary aspect contracts, rendering the bulk of the emergency laws that were previously supported by it invalid.

Of more significance at a conference concerned with the rule of law, is that during both World Wars the Commonwealth Parliament delegated this extraordinarily wide-ranging power with respect to defence to the Executive. This was achieved in WWI pursuant to the *War Precautions Act*, which authorised the Governor General to make regulations 'for securing the public safety and the defence of the Commonwealth,'<sup>15</sup> and to 'make provision for any matters which appear necessary or expedient'<sup>16</sup> to those objects. The *National Security Act* of 1939 was to similar effect.

Under any other head of Commonwealth power, an enabling Act in comparable terms may have been too wide and uncertain to be upheld.<sup>17</sup> However, again in the words of Dixon J, '[t]he defence of a country is particularly the concern of the Executive, and in war the

---

<sup>13</sup> Geoffrey Sawer, 'The Defence Power of the Commonwealth in Time of War' (1946) 20 *The Australian Law Journal* 295.

<sup>14</sup> *Stenhouse v Coleman* (1944) 69 CLR 457, 471.

<sup>15</sup> *War Precautions Act 1914* (Cth) s 4.

<sup>16</sup> *War Precautions Act 1914* (Cth) s 5.

<sup>17</sup> *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 101.

exigencies are so many, so varied and so urgent, that width and generality are a characteristic of the powers which it must exercise.’<sup>18</sup>

In his Bowen Prize winning essay, written in 1917, 23 year old Robert Menzies, who would later become wartime Prime Minister of Australia, discussed the repercussions of the *War Precautions Act* for the rule of law.<sup>19</sup> For the rule of law’s content, he relied on principles elucidated by A.V Dicey; in particular, that it entails

The absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.<sup>20</sup>

Menzies, while accepting that the extraordinary scope of Executive power during wartime could not be characterised as a complete departure from fundamental principles, given that it was conferred, and could be repealed, pursuant to an Act of Parliament passed in the ordinary way, and was not a product of the prerogative,<sup>21</sup> argued that

Though the cause be different the result, the arbitrary power, is there all the same.<sup>22</sup>

He concluded that the rule of law had been severely curtailed.<sup>23</sup> That this was the case cannot be seriously doubted.

---

<sup>18</sup> *Wishart v Fraser* (1941) 64 CLR 470, 484-485.

<sup>19</sup> Robert Menzies, *The Rule of law during the War: Bowen Prize Essay*, University of Melbourne (Charles F Maxwell 1917).

<sup>20</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution*, (MacMillan, 10<sup>th</sup> ed, 1959) 202.

<sup>21</sup> In Menzies, above n 19, 12-13.

<sup>22</sup> In Menzies, above n19, 24.

<sup>23</sup> Robert Menzies, *The Rule of law during the War: Bowen Prize Essay*, University of Melbourne (Charles F Maxwell 1917) 24.

The most striking example of the abrogation of the rule of law during the two World Wars were regulations that made the exercise of a power of administrative detention conditional merely upon a designated person's subjective opinion. The decision in *Lloyd v Wallach*, handed down in 1915, concerned the validity and operation of a regulation made under the *War Precautions Act*, which authorised the Minister of Defence to detain, for the duration of the war, any naturalised person whom the Minister had 'reason to believe' was disaffected or disloyal.<sup>24</sup>

Mr Franz Wallach, who was detained pursuant to the regulation, sought a writ of habeas corpus, and at first instance obtained an order for his release from the Supreme Court of Victoria.<sup>25</sup> The Chief Justice found that the detention was unlawful because the warrant issued by the Minister did not set out any basis in fact for his belief that Mr Wallach was a threat to public safety or defence.<sup>26</sup> The High Court reversed this decision, finding that the subjective belief of the Minister was the 'sole condition' of the power to detain.<sup>27</sup> The Court held that the Minister was not required to provide reasons for forming the belief that Mr Wallach was disloyal,<sup>28</sup> and that no judicial inquiry as to the sufficiency of the evidence or the reasonableness of the belief was permissible.<sup>29</sup>

During WWII, a regulation in similar terms was upheld in *Ex Parte Walsh*.<sup>30</sup>

---

<sup>24</sup> *Lloyd v Wallach* 20 CLR 299.

<sup>25</sup> *R v Lloyd; Ex parte Wallach* (1915) VLR 476.

<sup>26</sup> *R v Lloyd; Ex parte Wallach* (1915) VLR 476, 503 per Madden CJ; see also *Lloyd v Wallach* 20 CLR 299, 304 per Griffith CJ.

<sup>27</sup> *Lloyd v Wallach* 20 CLR 299, 304; 308.

<sup>28</sup> *Lloyd v Wallach* 20 CLR 299, 305; 309.

<sup>29</sup> *Lloyd v Wallach* 20 CLR 299, 304-305; 308.

<sup>30</sup> *Ex parte Walsh* [1942] ALR 359.

You will no doubt be familiar with Lord Atkin's dissenting judgment in *Liversidge v Anderson*,<sup>31</sup> which has been justifiably admired for its insistence that the Courts should not abandon their role as impartial arbiters of the legality of administrative decisions even in a situation of grave national emergency. By denying judicial review jurisdiction in *Lloyd v Wallach*, the High Court of Australia effectively removed the Constitution's foremost protection against arbitrary power.

The practical effect was that the regulation conferred an absolute discretion on the Minister, unconstrained by legal criteria of any kind, to detain citizens of whom it was not suggested that they had broken any law. As such, there was a patent risk that the power would be exercised in an arbitrary manner. An allegation of disloyalty could not only attach to individuals whose actual conduct apparently revealed disloyalty, but could also be founded on the private beliefs of the individual as perceived by the Minister. Any number of factors, one imagines, could be used to impute such a private belief, including the mere fact of one's ancestry.

Justice Isaacs, in an *obiter* comment in *Farey v Burvett*, expressed the rationale for restricting the Court's judicial review jurisdiction in times of war as follows

A war imperilling our very existence...is a fact of such transcendent and dominating character as to take precedence of every other fact of life...The Constitution cannot be so construed as to contemplate its own destruction or, what amounts to the same thing, to cripple by checks and balances the

---

<sup>31</sup> *Liversidge v Anderson* [1942] AC 206.

ultimate power which is created for the...purpose of preserving...the inviolability of the Commonwealth...<sup>32</sup>

Menzies concluded his 1917 essay by expressing a similar sentiment, declaring

However much we may cherish the Rule of law as one of our most precious possessions, we must recognise that permanent liberty is often best achieved only by a temporary sacrifice of individual freedom.<sup>33</sup>

With those words, Menzies foreshadowed perhaps the most important case in the High Court's history. Over thirty years later, as tensions increased in the lead-up to the Korean War, one of Menzies' first acts as the newly elected Prime Minister of Australia was to introduce into Parliament a bill for the dissolution of the Australian Communist Party.<sup>34</sup> At this time, although clearly engaged in conflict outside of Australia, there had been no official declaration of war.

The Act, as passed, was prefaced by a number of recitals, which were intended to bring the Act within the ambit of the defence power.<sup>35</sup> The recitals stated that the Australian Communist Party 'engages in activities or operations designed to bring about the overthrow ... of the established system of government' and that 'it is necessary, for the security and defence of Australia...that the Australian Communist

---

<sup>32</sup> *Farey v Burvett* (1916) 21 CLR 433, 453-454.

<sup>33</sup> In Menzies, above n19; quoted in George Winterton, 'The Communist Party Case', in Lee and Winterton, *Australian Constitutional Landmarks* (Cambridge University Press 2003) at fn 190. The Rule of law during the War: Bowen Prize Essay, University of Melbourne (Charles F Maxwell 1917).

<sup>34</sup> In the Hon Justice Michael Kirby, 'H V Evatt, The Anti-Communist Referendum and Liberty in Australia' (1991) 7 *Australian Bar Review* 93, 95.

<sup>35</sup> George Williams et al, *Australian Constitutional Law and Theory* (The Federation press, 6<sup>th</sup> ed, 2014) 19.41.

Party...should be dissolved and [its] property forfeited to the Commonwealth.<sup>36</sup>

The Act empowered the Governor General to declare other bodies unlawful if *satisfied* that they were affiliated with the Communist Party and that they were a threat to security and defence. The Governor General could also 'declare' specific individuals if *satisfied* that they were likely to engage in activities prejudicial to security and defence,<sup>37</sup> with the result that they could not hold office in the Commonwealth public service.

A majority of 6:1 judges held the legislation invalid. The crux of the decision was expressed by McTiernan J as follows

The Constitution does not allow the judicature to concede the principle that the Parliament can conclusively 'recite itself' into power.<sup>38</sup>

In other words, it was for the Courts, through the process of judicial review, to determine whether the *Dissolution Act* was supported by the defence power. Likewise, the Governor-General could not be granted an unreviewable discretion to determine the limits of his or her power, by 'declaring' individuals that in his or her *opinion* were prejudicial to defence.<sup>39</sup> This reasoning was at odds with the determination in *Lloyd v Wallach* that the opinion of the Minister that detaining an individual would tend to achieve a defence purpose would be sufficient to supply the connection with the enabling Act (and hence with the defence

---

<sup>36</sup> *Communist Party Dissolution Act 1950* (Cth).

<sup>37</sup> George Winterton, 'The Communist Party Case', in Lee and Winterton, *Australian Constitutional Landmarks* (Cambridge University Press 2003) 116-117; George Williams et al, *Australian Constitutional Law and Theory* (The Federation press, 6<sup>th</sup> ed, 2014) 19.44.

<sup>38</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 205-206.

<sup>39</sup> George Williams et al, *Australian Constitutional Law and Theory* (The Federation press, 6<sup>th</sup> ed, 2014), 19.47; 19.52.

power). However, as George Winterton observed, the *Lloyd v Wallach* principle was characterised as an exception to the general rule, which could only be relied on 'where the secondary aspect of the defence power comes into existence by virtue of a judicially noticed emergency.'<sup>40</sup> The Court held that the facts in existence at the time were not sufficiently grave for the secondary aspect of the defence power to be enlivened as, although Australian forces were fighting in Korea, Australia was in a period of 'ostensible peace'.<sup>41</sup>

The *Communist Party Case* was a victory for the rule of law over sweeping discretion in a time of perceived national emergency, achieved through the contraction of the defence power in the absence of a full-scale war. It is a fitting case to discuss at a conference titled 'advocates as protectors of the rule of law', due to the vital role played by H V Evatt in defending due process and the civil liberties of all Australians. Mr Evatt, who at the time of the bill's passage through Parliament was Deputy Leader of the Opposition and a former High Court judge, was adamantly opposed to the *Dissolution Act*, which he characterised as an 'Act of Attainder'.<sup>42</sup> It was, he believed, anathema to the rule of law to legislate so as to impose penalties on a particular group based on nothing more than their political ideology.<sup>43</sup> In Evatt's opinion, the proper course was to use the criminal law to prosecute individuals who

---

<sup>40</sup> George Winterton, 'The Communist Party Case', in Lee and Winterton, *Australian Constitutional Landmarks* (Cambridge University Press 2003), 128; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 266 per Fullagar J.

<sup>41</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 196.

<sup>42</sup> H V Evatt, 'Danger to All Citizens', *Herald* (Melbourne), 6 May 1950, quoted in George Winterton, 'The Communist Party Case', in Lee and Winterton, *Australian Constitutional Landmarks* (Cambridge University Press 2003) 118.

<sup>43</sup> George Winterton, 'The Communist Party Case', in Lee and Winterton, *Australian Constitutional Landmarks* (Cambridge University Press 2003), 118-121; the Hon Justice Michael Kirby, 'H V Evatt, The Anti-Communist Referendum and Liberty in Australia' (1991) 7 *Australian Bar Review* 93, 108.

engaged in conduct amounting to sabotage or sedition, affording accused persons all the protections inherent in the judicial process. The words of another former High Court judge are apt in this respect,

one of the central purposes [of the judicial process]...is...to protect “the individual from arbitrary punishment and the arbitrary abrogation of rights by ensuring that...rights are not interfered with other than in consequence of the fair and impartial application of the relevant law to facts which have been properly ascertained”.<sup>44</sup>

Evatt, despite his ambitions to become Prime Minister,<sup>45</sup> agreed to represent the Waterside Workers’ Federation in the *Communist Party Case*, with the result that he was promptly branded a ‘communist sympathiser’.<sup>46</sup> After leading the Communist Party to victory, Evatt dedicated his energies to ensuring that a referendum, to insert a Constitutional provision reversing the High Court’s decision, was unsuccessful.<sup>47</sup> The success of these efforts to protect the rule of law contributed to Evatt’s defeat by Menzies in the 1954 election, ensuring that his dream of becoming Prime Minister was never realised.<sup>48</sup> The Hon Michael Kirby has suggested that the South African *Suppression of Communism Act of 1950*, and its use over a forty year period to restrict

---

<sup>44</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 107 per Gaudron J, quoting *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 497.

<sup>45</sup> The Hon Justice Michael Kirby, ‘H V Evatt, The Anti-Communist Referendum and Liberty in Australia’ (1991) 7 *Australian Bar Review* 93, 94.

<sup>46</sup> George Winterton, ‘The Communist Party Case’, in Lee and Winterton, *Australian Constitutional Landmarks* (Cambridge University Press 2003), 125.

<sup>47</sup> The Hon Justice Michael Kirby, ‘H V Evatt, The Anti-Communist Referendum and Liberty in Australia’ (1991) 7 *Australian Bar Review* 93.

<sup>48</sup> The Hon Justice Michael Kirby, ‘H V Evatt, The Anti-Communist Referendum and Liberty in Australia’ (1991) 7 *Australian Bar Review* 93, 93.

civil liberties, reflects what might have eventuated without Evatt's efforts to ensure that Australia adhered to fundamental principles.<sup>49</sup>

The issue that now arises for consideration is how these principles should be adapted and applied, if at all, in the changed landscape of the 21<sup>st</sup> century. Justice Hayne highlighted this difficulty in *Thomas v Mowbray*, stating

the events of 11 September 2001 show that...[p]ower of a kind that was once the exclusive province of large military forces of nation states may now be exerted in pursuit of political aims by groups that do not constitute a nation state.

...The line between war and peace may once have been clear and defined by the declared state of relations between nations. But...that line is now frequently blurred.<sup>50</sup>

In *Thomas v Mowbray*, counter-terrorism legislation enacted by the Commonwealth Parliament in the aftermath of 9/11 was held to be supported by the defence power. The provisions of the *Criminal Code* upheld by the High Court empower a Federal Magistrate to issue a control order if satisfied on the balance of probabilities that it 'would substantially assist in preventing a terrorist act.'<sup>51</sup>

As a number of academics have noted, the definition of 'terrorist act'<sup>52</sup> is broad enough to include things such as anti-abortion or animal rights activism in addition to encompassing violence on a scale comparable to

---

<sup>49</sup> The Hon Justice Michael Kirby, 'H V Evatt, The Anti-Communist Referendum and Liberty in Australia' (1991) 7 *Australian Bar Review* 93, 100-101.

<sup>50</sup> *Thomas v Mowbray* (2007) 233 CLR 307, 458.

<sup>51</sup> *Criminal Code (Cth)* s 104.4(1)(c).

<sup>52</sup> *Criminal Code (Cth)* s 100.1.

wartime hostilities.<sup>53</sup> Significantly, the provisions do not prescribe any norm of conduct, the breach of which gives rise to liability,<sup>54</sup> and there is no requirement for the subject of a control order to have been charged with a criminal offence.<sup>55</sup> The exercise to be undertaken by the Federal Magistrate is therefore entirely predictive in nature. Measures imposed pursuant to a control order can remain in force for up to 12 months,<sup>56</sup> and may include requiring the subject to remain at specified premises between specified times each day,<sup>57</sup> (which theoretically could amount to fulltime detention).

Speaking at the 2008 Constitutional Law Conference, Professor Geoffrey Lindell expressed the view that (subject to Ch III of the Constitution) laws providing for *preventative justice*, such as those upheld in *Thomas v Mowbray*, contradict one of the elements of the rule of law as formulated by Dicey, namely that no one is punishable except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.<sup>58</sup> I do not propose in this paper to enter into the debate as to whether the defence power supports Commonwealth laws aimed at protection against domestic or internal threats to the peace.<sup>59</sup>

---

<sup>53</sup> See, for example, Anne Twomey, 'Review of the High Court Constitutional Cases 2007' (2008) 31(1) *UNSW Law Journal* 215, 224-225.

<sup>54</sup> *Thomas v Mowbray* [2006] HCATrans 660 (5 December 2006), per Mr Merkel (in argument).

<sup>55</sup> Australian Government, Independent National Security Legislation Monitor, Declassified Annual Report ('2012 Report') (20 December 2012) 6.

<sup>56</sup> *Criminal Code (Cth)* s 104.5(1)(f).

<sup>57</sup> *Criminal Code (Cth)* s 104.5(3)(c).

<sup>58</sup> Lindell, *The Scope of the Defence and other Powers: Thomas v Mowbray*, citing Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> ed) at pp 183-4.

<sup>59</sup> See, for example, the discussion by Andrew Lynch and Alexander Reilly in "The Constitutional Validity of Terrorism Orders of Control and Preventative Detention (2007) 10 *FJLR* 105 as to the limits to the extent to which the law can legitimately be used as a preventative tool, arguing that control orders and preventative detention orders present a direct challenge to the principle of the rule of law.

Bret Walker SC, Australia's former Independent National Security Legislation Monitor, has called for the repeal of the control order provisions. He argues that the availability of the criminal offence of 'conspiring to do an act in preparation for...a terrorist act' negates any policy justification for restricting the civil liberties of terrorist suspects in a manner divorced from an ordinary prosecution in accordance with the rule of law.<sup>60</sup> Following the tenth anniversary of 9/11, Walker, observing that there was no evidence that the risk of terrorism had decreased in the interim period, stated

This position means that the model of extraordinary powers to meet an emergency is an unconvincing justification for the counter terrorism laws and especially their most stringent restrictions on individual liberty. The putative emergency has lasted longer than either of the two World Wars, and both combined ... The effectiveness and appropriateness of the counter-terrorism laws should be assessed on the basis that they...will be in force for a long time to come.<sup>61</sup>

I do not comment on the merits or otherwise of control order regimes. What Walker's statement demonstrates, however, is that in 21<sup>st</sup> century Australia, established constitutional doctrine regarding the expansion and contraction of the defence power, may be of doubtful utility in ensuring that measures implemented in response to the threat of terrorism do not result in permanent encroachments on the rule of law.

In the United Kingdom, non-derogating control orders made pursuant to s 2 of the *Prevention of Terrorism Act 2005* (UK) were the subject of

---

<sup>60</sup> 2012 Report, above n 55, especially at 29-31. (Walker makes an exception for individuals who have already been convicted of a terrorism offence, where rehabilitation efforts have failed, and where there is a serious risk of recidivism upon release i.e a *Fardon* model, see p 37).

<sup>61</sup> Australian Government, Independent Security Legislation Monitor, 'Annual Report' (16 December 2011) 5.

challenge on the basis that the procedure that resulted in those orders violated the appellants' right to a fair hearing guaranteed by the European Convention on Human Rights.<sup>62</sup> Lord Phillips of Worth Matravers gave the lead judgment. The appeals were allowed on the basis that the judgment of the Grand Chamber of the Strasbourg Court in *A v United Kingdom* resolved the issue that had there been raised.<sup>63</sup> There, it was accepted that, regardless of the demands of national security, a person will not have a fair hearing for the purposes of the relevant articles in the Convention on Human Rights unless given sufficient information about the case against him or her to give effective instructions to the advocate representing his or her interests; though it may be acceptable not to disclose the source of some of the evidence.<sup>64</sup>

Lord Scott of Foscote expressly left open the possibility that the executive could be given by Parliament power to impose control orders on individuals accompanied by judicial procedures that do not comply with the European Convention on Human Rights or with the common law fair hearing requirements.<sup>65</sup>

The High Court, as Australia's Constitutional court, may need to grapple with this issue again in the future, something which may occur sooner rather than later, given that new counter terrorism measures have

---

<sup>62</sup> *Secretary of State for the Home Department v AF* [2010] 2 AC 269.

<sup>63</sup> *Secretary of State for the Home Department v AF* [2010] 2 AC 269, 349-356.

<sup>64</sup> *Secretary of State for the Home Department v AF* [2010] 2 AC 269, 349; referring to *A v United Kingdom* (2009) 49 EHRR 625, GC, [195].

<sup>65</sup> *Secretary of State for the Home Department v AF* [2010] 2 AC 269, 365.

recently been proposed to address the threat of foreign fighters returning to Australia from Syria and Iraq.<sup>66</sup>

Of course, as adverted to earlier, encroachments on the rule of law in Australia may arise in a far less obvious fashion: threats to the institutional integrity of the courts or incursions in relation to other fundamental common law principles (such as the right to silence and self-incrimination) are examples that come to mind. Furthermore, while the content of the rule of law is a common thread between many countries, the way in which it may be threatened will vary from country to country. We must be conscious of the contexts in which the rule of law may be undermined in order to be vigilant against such incursions.

As Murray Gleeson said in his November 2001 speech to which I have referred above, the rule of law is not enforced by an army; it depends upon public confidence in lawfully constituted authority.<sup>67</sup> An essential feature of our adversarial legal system is that advocates will be instrumental in framing the issues and formulating the arguments to be tested in Constitutional challenges brought in order to protect the rule of law. That task surely justifies the title of this conference, ‘advocates as protectors of the rule of law.’ And in that context, it is apposite to note that the Sydney Peace Foundation award for 2014 is soon to be conferred on Julian Burnside AO QC for, among other things, his

---

<sup>66</sup> The *Counter Terrorism (Foreign Fighters) Bill* is scheduled to be introduced into Parliament next week. See press conference: <https://www.pm.gov.au/media/2014-08-05/joint-press-conference-canberra-0>.

<sup>67</sup> The Hon Chief Justice AM Gleeson, “A Country Planted Thick with Laws”, Boyer Lecture 1, 19 November 2000.

unflinching defence of the rule of law as a means to achieve a more peaceful and just society.<sup>68</sup> Long may that continue.

\*\*\*\*\*

---

<sup>68</sup> The Sydney Peace Foundation, "2014 Sydney Peace Prize Lecture and Award Ceremony"  
<http://sydneypeacefoundation.org.au/events/2014-sydney-peace-prize-lecture/>.