

‘TO EXECUTE AND MAINTAIN THE LAWS OF THE COMMONWEALTH’ THE ADF AND INTERNAL SECURITY – SOME OLD ISSUES WITH NEW RELEVANCE

CAMERON MOORE*

I INTRODUCTION

This paper discusses an old issue with new relevance; the use of force under the executive power of the *Constitution* by the Australian Defence Force (‘ADF’) for internal security. This has been a practical and theoretical legal issue since before Federation.¹ Recent events have made it a current issue again. The ADF conducted internal security under the executive power for operations in 2002 and 2003 to protect a Commonwealth Heads of Government Regional Meeting (‘CHOGRM’) and a visit of the President of the United States respectively. There is also a potential likelihood of the use of the executive power under new offshore protection measures announced in late 2004.

Use of the ADF for internal security under the executive power last excited significant comment after the ‘Siege of Bowral’ in 1978.² Interest in the issue diminished until 2000 when, with the prospect of the Sydney Olympics, Parliament passed amendments to the *Defence Act 1903* (Cth) (‘*Defence Act*’) concerning Defence Force Aid to the Civil Authority.³ It was not long before events demonstrated the limitations of the new Part IIIAAA of the *Defence Act*. The often cited attacks of 11 September 2001 in the United States substantially increased the perception of the threat of terrorism.⁴ They also drew attention to the potential for

* BA(Hons) (UWA), LLB (UNSW), LLM (JCU) is a former Navy legal officer and is now an Associate Lecturer in the School of Law, University of New England and an Honorary Fellow of the Centre for Maritime Policy, University of Wollongong. The author wishes gratefully to acknowledge the assistance of Professor Stuart Kaye, University of Wollongong, and Dr Imtiaz Omar, University of New England, for their assistance with this article. Responsibility for its flaws of course rests with the author.

1 Commonwealth, 1979 *Hope Protective Security Review*, Parl Paper 397 (1979) Appendix 16 ‘The History of Military Involvement in Civilian Security in Britain and Australia’.

2 Taken from A R Blackshield, ‘The Siege of Bowral – The Legal Issues’ [1978] March *Pacific Defence Reporter* 6, 6.

3 Bills Digest No 13, 2000-1, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000. All legislation cited is Commonwealth unless otherwise indicated.

4 See Senator Robert Hill, Defence Minister, ‘Defence Minister, Senator Robert Hill, outlines the contribution of the Australian Defence Force towards security for the forthcoming CHOGM meeting’ (Press Release, 22 Feb 2002).

terrorists to use methods of attack not anticipated by the Part IIIAAA amendments. The use of civil airliners to attack large buildings was outside of the traditional hijacking, sieges, kidnapping, assassination, bombing and chemical or biological attack contemplated in the *Defence Act*.

The perceived threat from the air to the 2002 Commonwealth Heads of Government Regional Meeting at Cooloom took the use of the ADF for internal security outside the provisions of Part IIIAAA. The Defence Minister announced that the Royal Australian Air Force ('RAAF') would use force against civilian aircraft perceived to be a threat to CHOGRM.⁵ Conceivably, this could have involved the shooting down of civilian aircraft by fighter jets in order to prevent a suicidal crash into the meeting place. There was no clear statement as to the legal basis of this operation. In the absence of identifiable legislation specifically authorising such action, it is fair to conclude that the action relied upon the executive power. In 2003, the ADF conducted a similar operation over Canberra to protect the visiting President of the United States. As stated by the official Defence Spokesperson, Brigadier Hannan:

[O]n this occasion we'll also be providing a number of F/A-18 fighter aircraft that will provide protection in the very unlikely event of a threat emerging from the air. This isn't the first time we've done this, the public will be familiar with the arrangements that were put in place for CHOGM last year and these arrangements will be similar.⁶

Another, perhaps more complex, development has been the change in security arrangements for Australia's offshore areas announced in December 2004. The Commonwealth has taken responsibility for these areas from the States and the Northern Territory. Furthermore, the Commonwealth has granted primary responsibility for counter-terrorism in Australia's offshore areas to the ADF. There is no longer a civil authority responsible for security for offshore areas. This is a reflection of the practical reality that only the ADF is capable of responding to terrorist incidents in offshore areas.⁷ As to the legal basis for offshore protection, Part IIIAAA has very limited application offshore and there is no other specific legislation for counter-terrorism. Without such legislation, it is quite likely that counter-terrorist action would rely on the executive power.

This paper will consider the executive power as the legal basis for ADF internal security operations, and, in particular, the air operations to protect CHOGRM in 2002 and the President of the United States in 2003, and its possible use at sea following the Prime Minister's offshore protection announcement in 2004. To examine the legal basis of these operations it is first necessary to consider the nature of the executive power and the major example of the use of the ADF for internal security around Bowral in 1978. This will also provide some context for the Part IIIAAA amendments of 2000 and the declining

5 Ibid.

6 Brigadier Mike Hannan, 'Defence Support to US President's Visit' (Transcript of Official Interview by Defence Spokesperson, 21 October 2003) <www.defence.gov.au/media/2003/ACF9A5.doc> at 9 May 2005.

7 The Hon John Howard MP, Prime Minister of Australia, 'Strengthening Offshore Maritime Security' (Media Release, 15 December 2004).

significance of State initiated call out. The paper will then consider the advantages of the flexibility of the executive power and possible ways to address its uncertainty. In particular, it proposes broadening Part IIIAAA type powers to air and sea operations. It will also propose making Rules of Engagement a source of legal authority to act, as well as providing legal protection for acts done in accordance with Rules of Engagement.

II THE NATURE OF THE EXECUTIVE POWER OF THE COMMONWEALTH

Section 61 of the *Constitution* is titled the Executive Power and provides:

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

Section 61 itself does not describe what the executive power is. A number of other provisions of the *Constitution* grant specific executive powers to the Governor-General, such as command in chief of the naval and military forces (s 68), or the Governor-General in Council, such as the appointment of justices (s 72) or civil servants (s 67). By convention, the Governor-General exercises these powers on the advice of relevant ministers. The executive power also now includes those powers of the Crown exercisable without the authority of parliament, traditionally identified as the prerogative powers.⁸ There is debate as to whether such powers derive from the common law or from the *Constitution* itself.⁹ Nonetheless, regardless of their source, it would appear the executive power extends to include powers in the nature of the prerogative powers. These include the prerogative to make war and peace, and to conclude treaties, as well as to deal with 'emergencies'.¹⁰ The executive power is potentially very broad yet 'its scope [is not] amenable to exhaustive definition'.¹¹ There is considerable history of the use of the ADF for the external defence of the realm pursuant to the executive power.¹² The use of the ADF for internal security is much more rare. Perhaps the most prominent incident was the Bowral call out of 1978. It is worth considering in some detail to illustrate the issues of the use of the ADF under the executive power for internal security.

8 *Barton v Commonwealth* (1974) 131 CLR 477.

9 See George Winterton 'The Limits and Use of Executive Power by Government' (2003) 31(3) *Federal Law Review* 421; Cf the judgment of French J in *Ruddock v Vadarlis* ('Tampa Case') (2001) 110 FCR 491; Also Bradley Selway (now Justice Selway) 'All at Sea – Constitutional Assumptions and "the Executive Power of the Commonwealth"' (2003) 31(3) *Federal Law Review* 495. For a discussion of the prerogative powers, see H V Evatt, *The Royal Prerogative* (first presented as a doctoral thesis 1924, with commentary by Leslie Zines, 1987).

10 *Attorney-General v De Keyser's Royal Hotel Ltd.* [1920] AC 508; *Burmah Oil Co Ltd. v Lord Advocate* [1965] AC 75.

11 *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason J).

12 This is the normal role of the ADF (see *Re: Tracey; Ex Parte Ryan* (1989) 166 CLR 518 (Brennan and Toohey JJ)) and is not the subject of this paper.

III BOWRAL 1978

On 13 February 1978, a bomb exploded outside the Hilton Hotel in Sydney, killing two people, fatally wounding another and injuring a further eight people.¹³ A number of visiting heads of government were staying at the Hilton Hotel for the CHOGRM. The meeting was due to visit Bowral the next day for two days. Prime Minister Fraser and Premier Wran of New South Wales met to discuss the appropriate response. The New South Wales Police Commander stated that he did not have adequate resources to guarantee the security of the visitors between Sydney and Bowral. A meeting of the Federal Cabinet the same day decided to call out the ADF to provide security between Sydney and Bowral. With the concurrence of Premier Wran, there was no formal request from the Government of New South Wales for protection. The call out would essentially be to protect the interests of the Commonwealth, that is the security of the visiting heads of government. At a meeting of the Executive Council later the same day, the Governor-General signed an Order in Council calling out the ADF.¹⁴ It stated, in part:

Whereas I am satisfied, by reason of terrorist activities and related violence that have occurred in the State of New South Wales, that it is necessary –

- (a) for the purpose of safeguarding the national and international interests of the Commonwealth of Australia;
- (b) for giving effect to the obligations of the Commonwealth of Australia in relation to the protection of internationally protected persons; ...¹⁵

There was no specific statutory basis for this call out, other than the indirect reference to the *Crimes (Internationally Protected Persons) Act 1976*, and the ADF relied upon no specific statutory powers. Also on 13 February 1978, the Minister for Foreign Affairs signed a Requisition of the Civil Authority requiring Brigadier Butler, the officer commanding the forces involved, to order his forces out. The Minister for Foreign Affairs signed a requisition ordering those forces in on 16 February 1978. The Governor-General revoked the call out order at an Executive Council meeting on 20 February 1978, when the last of the visitors had left Australia.¹⁶

Approximately 1900 armed Army and RAAF personnel secured the route between Sydney and Bowral with equipment including helicopters, armoured personnel carriers and mine detectors. The arrangements were to have the New South Wales police interact directly with the civil community and for the ADF to maintain a low profile, conducting searches for explosives and surveillance of the

13 Hope, above n 1, 258; Hoong Phun Lee, *Emergency Powers* (1984) 195.

14 Ibid, 'Appendix 3: Commonwealth Heads of Government Regional Meeting, Sydney, 13-17 February 1978', 257-62.

15 Ibid 321.

16 Ibid 258-9, 262, 'Appendix 15: Documents Relating to the Call Out of the Defence Force During the Commonwealth Heads of Government Regional Meeting, Sydney, February 1978', 320-3.

area generally.¹⁷ Even so, the ADF had Rules of Engagement authorising the use of lethal force as a last resort, with the emphasis on minimum force.¹⁸

In essence a very large ADF presence secured the CHOGRM travel route for three days, with authority to use lethal force. The legal basis for this action was the executive power. The only specific powers available to the ADF would have been those available to an ordinary citizen relating to arrest, self-defence and necessity. There was a good deal of consideration after the event of the legal basis of the Bowral call out. The opinions of Hope J in his *Protective Security Review* of 1979 and Sir Victor Windeyer in his extra-curial legal opinion annexed to that Review¹⁹ are worth examining because the legal basis of the 2002 and 2003 operations to protect visiting dignitaries would essentially be the same.

IV PROTECTING COMMONWEALTH INTERESTS

Sir Victor did not cite authority for the proposition that the Commonwealth has the inherent power ‘to employ members of its Defence Force “for the protection of its servants or property or the safeguarding of its interests”’²⁰ other than the constitutional commentary of Quick and Garran referring to the US case *Re Debs*²¹ of 1895. Sir Victor saw such power as an incident of nationhood:

The power of the Commonwealth Government to use the armed Forces at its command to prevent or suppress disorder that might subvert its lawful authority arises fundamentally, I think, because the *Constitution* created a sovereign body politic with the attributes that are inherent in such a body. The Commonwealth of Australia is not only a federation of States. It is a nation.²²

Referring to s 61 of the *Constitution*, Sir Victor said that

the ultimate authority for the calling out of the Defence Force ... was thus the power and the duty of the Commonwealth to protect the national interest and to uphold the laws of the Commonwealth. Being by order of the Governor-General, acting with the advice of the Executive Council, it was of unquestionable validity.²³

Justice Hope agreed with Sir Victor and elaborated further on this point. He relied upon obiter dicta of Dixon J in the *Australian Communist Party v Commonwealth* (‘*Communist Party Case*’), quoting the following passage (excluding that in square brackets):

¹⁷ Ibid 260-1.

¹⁸ Ibid 263.

¹⁹ Ibid, ‘Appendix 9: Opinion of Sir Victor Windeyer KBE CB DSO on Certain Questions Concerning the Position of Members of the Defence Force When Called Out to Aid the Civil Power’, 277

²⁰ Ibid 279, quoting from the Australian Military Regulations, although explicitly stating that these regulations do not create the power, but assume it. See also Bills Digest, above n 3, for view of Sir Victor’s opinion.

²¹ 158 US 564 (1895)

²² Hope, above n 1, ‘Appendix 9: Opinion of Sir Victor Windeyer KBE CB DSO on Certain Questions Concerning the Position of Members of the Defence Force When Called Out to Aid the Civil Power’, 279.

²³ Ibid 280. It is important to note that Sir Victor was not asked to give an opinion on the constitutional validity of the call out, but rather on the powers and obligations of a member of the Defence Force when called out, and whether there should be changes to the law relating to them.

[In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend. As appears from *Burns v. Ransley* (1949) 79 CLR, at p 116 and *R. v. Sharkey* (1949) 79 CLR, at pp 148, 149, I take the view that the power to legislate against subversive conduct has] a source in principle that is deeper or wider than a series of combinations of the words of s.51 (xxxix.) with those of other constitutional powers. I prefer the view adopted in the United States, which is stated in Black's American Constitutional Law (1910), 2nd ed., s. 153, p. 210, as follows: - "... it is within the necessary power of the federal government to protect its own existence and the unhindered play of its legitimate activities. And to this end, it may provide for the punishment of treason the suppression of insurrection or rebellion and for the putting down of all individual or concerted attempts to obstruct or interfere with the discharge of the proper business of government ..."²⁴

Justice Hope also referred to the obiter dicta of Dixon J in *R v Sharkey*, including this statement quoted from Quick and Garran:

If, however, domestic violence within a State is of such a character as to interfere with the operations of the Federal Government, or with rights and privileges of federal citizenship, the Federal Government may clearly, without a summons from the State, interfere to restore order. Thus if a riot in a State interfered with the carriage of the federal mails, or with interstate commerce, or with the right of an elector to record his vote at federal elections, the Federal Government could use all force at its disposal, not to protect the State, but to protect itself. Were it otherwise, the Federal Government would be dependent on the Governments of the States for the effective exercise of its powers.²⁵

Justice Hope suggested that a relevant Commonwealth statute would indicate a Commonwealth interest, but that there could be Commonwealth interests worthy of protection by the ADF even without a relevant statute.²⁶

It is important to note though that Dixon J in the *Communist Party Case* and *R v Sharkey* only discusses the legislative power of the Commonwealth to intervene to protect its interests. He did not discuss executive power in this context. To rely on this authority, one has to presume that the executive power can authorise action not authorised by legislation on the basis of the words in s 61 'extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth'.²⁷

A number of those who have written on the Bowral call out have not disputed that the executive power authorised the operation.²⁸ Lee wrote that '[i]t is also possible to justify such intervention by invoking a doctrine of inherent power, in this instance, inherent *executive* power of self protection'.²⁹ Blackshield stated that

²⁴ (1951) 83 CLR 1, 188; and *ibid* 28.

²⁵ *Ibid* 32-33.

²⁶ *Ibid* 151.

²⁷ Justice Hope stated that: 'Generally speaking, where the Commonwealth has power to legislate, it also has executive power.' *Ibid* 32.

²⁸ See also G J Cartledge, *The Soldier's Dilemma: When to Use Force in Australia* (1992) 131.

²⁹ Lee, above n 13, 207

just as the 1971 [*Public Order (Protection of Persons and Property) Act*] legislation was clearly valid as an exercise of Commonwealth legislative power over external affairs (*Constitution* s 51 vi), so the CHOGRM call-out was valid as an exercise of the corresponding executive power. ... the Commonwealth's executive power ... includes an amorphous and unexplored bundle of attributes of sovereignty, "inherent in the fact of nationhood and of international personality."³⁰

A number of authorities support the 'incident of nationhood' as a source of power. The most prominent perhaps are *Victoria v Commonwealth* ('the AAP Case')³¹ and *Davis v Commonwealth*³², but neither of them specifically address the use of lethal force by the ADF for internal security.³³ These cases discuss funding economic development schemes and the Bicentennial celebration respectively. Justice Fullagar in the *Communist Party Case*³⁴ was perhaps closer to the issue. He referred to the judgment of Isaacs J in *R v Kidman*³⁵ on the existence of necessary powers for the Commonwealth's inherent right of self protection. Justice French in *Ruddock v Vadarlis* ('Tampa Case')³⁶ also referred specifically to the incident of nationhood as a source of executive power. This is perhaps the closest source of authority for the use of the ADF for internal security under the executive power. Still, the *Tampa Case* dealt with preventing non-violent illegal immigration, rather than violent acts of terrorism.

In essence, there would appear to be considerable authority and support for the use of the executive power as an incident of nationhood. Importantly, as noted by a number of commentators, none of these authorities specifically address the use of lethal force by the ADF under the executive power to protect Commonwealth interests.³⁷ It should be a source of concern that such considerable power, which may countenance the taking of many lives, should rest on such an uncertain basis.

V PROTECTING STATE INTERESTS

While the issue of protecting State interests under s 119 of the *Constitution* is also important, this paper will not discuss it at any length for two main reasons. Firstly, there is legislation covering protection of State interests in Part IIIAAA of the *Defence Act*. It is not obvious that there is room any more for ADF action to protect State interests relying primarily upon the executive power. Secondly, Part IIIAAA of the *Defence Act* and the executive power support action by the

30 Blackshield, above n 2, 7.

31 (1975) 134 CLR 338

32 (1988) 166 CLR 79

33 See discussion on coercive aspects of the executive power in Graeme Hill 'Will the High Court 'Wakim' Chapter II of the Constitution?' (2003) 31(3) *Federal Law Review* 445, 458-9.

34 (1951) 83 CLR 1, 188 and 260.

35 (1915) 20 CLR 425

36 (2001) 110 FCR 491, 542 paras 192-3.

37 Peter Johnston 'Re Tracey: Some Implications for the Military Civil Authority Relationship' *Western Australian Law Review* 20(1) 73, 79; Elizabeth Ward 'Call Out the Troops: An Examination of the Legal Basis for Australian Defence Force Involvement in Non- Defence Matters' *Update of a Background Paper issued 5 September 1991* (1997), Commonwealth Parliament; Bills Digest, above n 3.

Commonwealth to protect its own interests, without a request from a State. Most internal security threats would now involve a Commonwealth interest, particularly given the extent of Commonwealth interest in countering terrorism.³⁸ The main threats to internal security where the Commonwealth may not have a sufficient interest would most likely be rioting and public unrest. There is nothing to suggest a likelihood of such a threat on a scale where a State would seek protection from the Commonwealth.

VI PART IIIAAA OF THE DEFENCE ACT 1903

To place the use of the executive power in context, it is worth briefly considering the statutory scheme for call out now in Part IIIAAA of the *Defence Act*. Although the subject of considerable public and parliamentary debate, the 2000 amendments actually substantially modernised the relevant legislation. The amendments were a notable improvement in going beyond the limited focus on 18th century food riots of the legislation they repealed.³⁹ They also finally implemented in part some of Sir Victor Windeyer's recommendations.⁴⁰ The amendments gave legislative clarity to circumstances in which call out could occur, the process of call out⁴¹ and the powers available to ADF members during a call out⁴². Part IIIAAA allows for a range of actions which would otherwise be unlawful. These include stopping and searching people⁴³ and vehicles,⁴⁴ cordoning off areas and removing people and vehicles,⁴⁵ and re-capturing buildings and vehicles.⁴⁶ This list of powers is illustrative in that it indicates some of the powers that may be relevant to internal security where Part IIIAAA is not applicable.

Part IIIAAA does not deal effectively with air or sea operations. It does not deal with control of airspace or contemplate terrorist threats coming from the air. For aircraft hijacking, the provisions would mainly allow for action when the aircraft was on the ground. With regard to the sea, at most Part IIIAAA could only apply to the territorial sea because its provisions relate only to violence occurring in Australia⁴⁷ which, by virtue of s 15B of the *Acts Interpretation Act*

38 See, eg, the *Security Legislation Amendment (Terrorism) Act 2003*, the *Security Legislation Amendment (Terrorism) Act 2002*, the *Suppression of the Financing of Terrorism Act 2002*, the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*, the *Border Security Legislation Amendment Act 2002*, the *Telecommunications Interception Legislation Amendment Act 2002*, and the *Criminal Code Amendment (Terrorism) Act 2003*.

39 Bills Digest, above n 3.

40 Hope, above n 1, 302.

41 Division 1.

42 Divisions 2, 3 & 4.

43 s 51 P.

44 s 51 O.

45 s 51 R.

46 s 51 I.

47 *Defence Act* ss 51A, 51B and 51C.

1901, includes the territorial sea.⁴⁸ This would place ADF internal security actions in the air, on offshore platforms or ships beyond the territorial sea outside Part IIIAAA.

VII THE 2002 COMMONWEALTH HEADS OF GOVERNMENT REGIONAL MEETING AND THE 2003 VISIT OF THE PRESIDENT OF THE UNITED STATES

The Government clearly stated in each case of the use of the ADF to protect the Commonwealth Heads of Government Regional Meeting in 2002, and to protect the President of the United States in 2003, that such actions were to fulfil Australia's obligation to protect visiting heads of state and government.⁴⁹ There was no public review of these actions akin to the *Hope Protective Security Review* and there are few relevant documents in the public domain. Based on the public statements though, it is reasonable to assume that the 2002 and 2003 operations relied upon the same legal basis as that for the Bowral call out, even if the procedural aspects may have differed.

VIII OFFSHORE PROTECTION

The other new development with regard to the use of the ADF for internal security under the executive power relates to Prime Minister Howard's statement on 'Strengthening Offshore Maritime Security' of December 2004.⁵⁰ In announcing a series of maritime security initiatives he said:

They focus, in particular, on the protection of Australia's offshore oil and gas facilities, and on ensuring that any terrorist threat to Australia's maritime assets and our coastline can be quickly detected and defeated. ...

The Australian Government will assume direct responsibility for counter-terrorism prevention, interdiction and response in all offshore areas of Australia.

The Australian Defence Force will take responsibility for offshore counter-terrorism prevention, interdiction and response capabilities and activities, including the protection of offshore oil and gas facilities and the offshore interdiction of ships. ...

48 Even then, there is a view that Part IIIAAA may not extend below the low water line on an argument that the domestic violence in question, for Commonwealth (s 51A (1)) or State initiated call out (s 51B (1)), has to be occurring in a State or self-governing territory. The constitutional jurisdiction of the States extends only to the low water line, *NSW v Commonwealth* (1975) 135 CLR 337 ('*Seas v Submerged Lands Case*').

49 See above n 4 and 6.

50 Howard, above n 7.

Offshore areas are constitutionally external to Australia, even if subject to Australian jurisdiction.⁵¹ On this view, ADF responsibility for security in offshore areas is consistent with its function of providing security against external threats.⁵² On the other hand, offshore security will not necessarily be against conventional military threats. It is just as likely to be against non-military threats, privately or politically motivated, from both foreign and Australian citizens. This places offshore security in the curious position of being both external and also against threats that civil authorities would normally deal with if encountered ashore. What powers does the ADF need to carry out its role and upon what authority would those powers be based?

There may be situations where the use of lethal force in offshore protection would be an issue. These could include recovery of a ship or offshore platform taken over by terrorists, or even the destruction of a ship by attacking it where it posed a sufficient threat. Short of lethal force, based upon Part IIIAAA and comparable maritime law enforcement legislation, there are a number of things the ADF may also wish to do aboard offshore platforms and ships in a counter-terrorist operation that would ordinarily be unlawful. In the case of a ship, this may include stopping, boarding, taking control of the navigation and machinery, searching, breaking open compartments and containers, directing the crew and others onboard, searching them, questioning them, and restraining or moving them.⁵³ In the case of an offshore platform, similar powers may be required, possibly including control of vessels and aircraft in the vicinity (but obviously excluding powers only relevant to a moving vessel).

The *Crimes at Sea Act 2000* (Cth) could apply to make such activities unlawful, but the various acts relevant to offshore protection which contain comparable powers, such as the *Fisheries Management Act 1991* (Cth), the *Customs Act 1901* (Cth) and the *Migration Act 1958* (Cth), are not directed to counter-terrorism.⁵⁴ The *Petroleum Submerged Lands Act 1967* (Cth),⁵⁵ which specifically mentions terrorism, effectively deals only with directing vessels within a certain distance of offshore platforms.

The only basis upon which to act against a terrorist threat offshore could be the executive power. The legal justification would be similar to that for the Bowral call out, with the key differences being that the action would be at sea, it would be more likely to affect the interests of other countries in their use of the sea and there would be no civil authority like the police. Furthermore, whereas there is a great deal of detail on specific powers in offshore protection legislation, there is no such detail on the limits of the executive power.

51 *Seas and Submerged Lands Case* (1975) 135 CLR 337.

52 *Re Tracey; Ex Parte Ryan* (1989) 166 CLR 518.

53 See, eg, *Fisheries Management Act 1991* s 84; *Customs Act 1901* Part XII, Division 1; *Migration Act 1958* Part 12A.

54 *Ibid.*

55 Part 6A.

IX IS THE EXECUTIVE POWER A SATISFACTORY BASIS FOR THE ADF TO USE FORCE FOR INTERNAL SECURITY PURPOSES?

The executive power may well meet the requirements of government. The authorities suggest that it is powerful and capable of meeting a number of threats. The basis of action under the executive power is uncertain though, as are its limits. Reliance on the executive power does little, if anything, to protect the legitimate interests of other relevant legal actors – those who enforce the executive power, in this case the ADF, those whom it affects, whether innocent or malign, and the public at large. To some extent the public at large would be likely to share the government's interest in protecting it against terrorism. Nonetheless, it also has an interest in knowing the boundaries of the government's ability to act pursuant to the executive power.

Ideally, any attempt to clarify the use of the executive power by the ADF would preserve the government's flexibility to tackle new internal security challenges as they emerge.⁵⁶ The way events showed the limitations of Part IIIAAA so soon after its enactment illustrates this point. Indeed, the use of the executive power in the 2002 and 2003 air operations, and the offshore protection announcement, suggest that the executive power is more important than ever. To leave the government without constitutional means to respond to serious threats to internal security not previously envisaged by the law could damage the rule of law itself. On the other hand, much could be done to protect the interests of those members of the ADF who execute the government's decisions, as well as the interests of those whom such decisions affect. This paper suggests two possible means of achieving this as set out below.

X BROADENING THE PART IIIAAA APPROACH

Part IIIAAA of the *Defence Act* is a thorough attempt to regulate the use of the ADF in internal security situations. One option could be to apply similar provisions to the maritime and air environments, with modifications necessary to suit the unique characteristics of air and sea operations. The danger of such an approach is that it could limit the flexibility of the executive power. There is debate as to the extent to which legislation on a particular topic extinguishes executive power on the same topic.⁵⁷ One way to attempt to avoid this could be for the legislation to state explicitly that it preserves the executive power, as s 7A of the *Migration Act 1958* does with respect to protecting Australia's borders.

New legislation could apply Part IIIAAA-type powers beyond the low water line to the territorial sea, Australian ships and offshore installations. It could

56 See discussion of flexibility and uncertainty in the executive power in Robin Creyke 'Executive Power – New Wine in Old Bottles: Foreword' (2003) 31(3) *Federal Law Review* iv.

57 See Winterton and the contrasting judgments of Black CJ and French J in the *Tampa Case*, above n 9. Also Creyke, above n 56.

provide for temporary exclusion zones, where necessary, around platforms and around moving ships. It could even do this on the high seas and around foreign ships. In international law such legislation could normally only apply to Australians and Australian flagged shipping but it could have the valuable practical effect of discouraging benign foreign vessels from approaching.⁵⁸ This would limit the number of vessels of interest in a particular area and keep benign vessels potentially out of harm's way. The legislation could authorise the use of necessary and reasonable force, subject to a requirement to act in good faith, and then further specify a range of detailed powers. There should be clarification of when lethal force may be authorised. Legislation could also include powers to render any vessel or platform safe through searching it and taking over control. There could be further powers, such as search, question and direct movement, to exercise sufficient control over those on board to ensure they presented no threat.

In the air, new legislation could provide for air exclusion zones and greater control of airspace where civil regulatory control was inadequate. There could also be clear authority to shoot an aircraft down on certain indicia.

Legislation could do much to clarify the specific powers that members of the ADF could exercise for internal security purposes. Given the events discussed above, there should be no assumption that even a comprehensive legislative package that preserves the executive power will anticipate every threat. Nor would it necessarily provide clear limits on specific acts done under the executive power.

XI EXECUTIVE CONTROL OF THE FORCES: RULES OF ENGAGEMENT

An additional and more novel approach could be to leave the exercise of the executive power very much in the hands of the executive, as it is now, but with some further legal safeguards. The aims of this proposal are to preserve maximum flexibility for the government and to clarify the specific limits of executive action. The idea would not be to provide the source of the power but to regulate it.

The novel aspect would be to do this by granting greater legal significance to Rules of Engagement (ROE). This could limit specific actions by the ADF to those authorised by the executive government. Rules of Engagement

58 *Law of the Sea Convention*, opened for signature 10 December 1982, ATS 1994 31, art 87 (entered into force 16 November 1994).

are directions to operational and tactical level commanders that delineate the circumstances and limitations within which armed force may be applied by the ADF to achieve military objectives. ROE are issued both in peace and armed conflict. ROE will be issued by the Chief of Defence Force to Commander Australian Theatre (COMAST). Joint Force Commanders and Australian Contingent Commanders will also receive ROE from COMAST. The factors that influence the formulation of ROE are diplomatic, political, operational, and international and domestic law. Any ROE issued will include legal consideration of these factors.⁵⁹

ROE are an instrument of executive action, for which the political level of the executive may be accountable. ROE are not, however, presently a source legal authority other than for internal ADF disciplinary purposes.

A member of the ADF has a legal duty to obey lawful orders and could be expected to follow ROE.⁶⁰ Centuries of historical development have also ingrained in the ADF a culture of acting at the direction of the civilian government.⁶¹ Critically though, the executive power may not support the ROE if tested in court, although the ADF member may not necessarily be aware of this. Regardless of the confidence of the government and the ADF in the legal merit of the ROE, ROE are no protection from liability at law for a member of the ADF. A member of the ADF may be personally liable for unlawful actions carried out in accordance with ROE. ROE are a form of orders. Apart from in Queensland,⁶² Western Australia,⁶³ Tasmania,⁶⁴ and for certain war crimes,⁶⁵ obeying orders is no defence to criminal charges. The position with regard to liability for following orders was neatly stated by Starke J:

If any person commits ... a wrongful act or one not justifiable, he cannot escape liability for the offence, he cannot prevent himself being sued, merely because he acted in obedience to the order of the Executive Government or any officer of State.⁶⁶

Moreover, without statutory powers, a member of the ADF stands in the same position as an ordinary citizen with regard to enforcing the law. In his much quoted *Charge to the Bristol Grand Jury on a Special Commission*, 1832, Lord Tindal CJ said:

The law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same authority to preserve the peace of the King as any other subject.⁶⁷

59 Royal Australian Air Force, Australian Air Publication 1003, *Operations Law for RAAF Commanders*, (2004) 45.

60 *Defence Force Discipline Act 1982* ss 15F, 27 and 29.

61 See *Re Tracey; Ex Parte Ryan* (1989) 166 CLR 518 (Brennan and Toohey JJ).

62 *Criminal Code 1899* (Qld) s 31.

63 *Criminal Code* (WA) s 31.

64 *Criminal Code Act 1924* (Tas) s 38, only in regard to riots.

65 *Criminal Code Act 1995* (Cth) s 268.116(3).

66 *Shaw Savill and Albion Co Ltd v Commonwealth* (1940) 66 CLR 344, 353 (Starke J).

67 5 C & P 254, 261 in Lee, above n 13, 229.

Re Tracey; Ex Parte Ryan made clear that the position in Australia is the same.⁶⁸

As ROE conform to government policy for any operation the ADF undertakes, and the ADF are obliged to follow them, there should be legal authority and protection for members of the ADF who act in good faith in accordance with the ROE. That is, legal authority for specific actions pursuant to the executive power could be statutorily invested in the ROE. This would address the problem with the lack of clear limits to the exercise of specific powers under the executive power. At the same time, such actions could be protected from legal liability. An analogous precedent for statutory protection exists in s 90 of the *Fisheries Management Act 1991* (Cth):

90 Officer etc. not liable to certain actions

An officer or a person assisting an officer in the exercise of powers under this Act or the regulations, is not liable to an action, suit or proceeding for or in respect of anything done in good faith or omitted to be done in good faith in the exercise or purported exercise of any power conferred by this Act or the regulations.

It would be necessary to extend this precedent to cover the use of lethal force.

Making the Rules of Engagement the standard would be more likely to ensure consistency with government policy and legal views, rather than just orders which may originate from a very low level and not be so consistent. If compliance with the Rules of Engagement in good faith did grant protection from legal liability, authority and accountability could then rest with those who make the decisions to use the ADF in accordance with the executive power. That would be with the elected government rather than the individual member of the ADF.⁶⁹

XII CONCLUSION – THE EXECUTIVE POWER, SOME OLD AND NEW ISSUES

The use of the ADF under the executive power for internal security is not a new issue but it has had little prominence since the Bowral call out in 1978. What is new is that, despite new legislation governing call out, the government has had to resort to using the ADF under the executive power for internal security, with the real prospect of the use of lethal force. This has happened twice since 2002 to protect visiting dignitaries and is potentially likely in the context of offshore protection.

68 (1989) 166 CLR 518 (Mason CJ, Wilson and Dawson JJ).

69 A difficulty with this idea is that ROE are not generally made public. This would appear to be so as to avoid handing any potential opponent of the ADF an advantage (see Brigadier Hannan, above n 6). The government did make public the Rules of Engagement for the 1978 Bowral operation but after the event. One way to deal with this could be only to divulge Rules of Engagement to a prosecutor should an investigation result from an incident covered by the ROE. There could still be prosecutorial scrutiny of the extent to which a member may have complied with the ROE without making the ROE known to the public at large. In the event of a dispute, the matter could still be subject to judicial scrutiny. This assumes the Commonwealth would assume vicarious liability for civil claims. Another possibility could be to make ROE public after the event generally. This would increase the public accountability of the ADF and government but would most likely compromise the secrecy of future ROE for similar operations.

The breadth and depth of the executive power for this purpose is unsettled.⁷⁰ There are certainly clear opinions in support of it. There is some general authority that could be drawn upon to support it, such as *Davis v Commonwealth* and the *Tampa Case*. However, there is no specific authority that does support it. Furthermore, the limits of action under the executive power are unclear.

Legislation could address such uncertainty. Given current deficiencies, it would be worth specifying powers for air and sea internal security operations as much as possible. The risk is, however, that the legislation would not anticipate the next threat that the government may need to counter. This is what happened with the 2000 Part IIIAAA amendments to the *Defence Act*. Part IIIAAA would have well suited another situation like the Bowral CHOGRM operation in 1978. Within two years of Part IIIAAA becoming law though, the ADF provided protection to another CHOGRM meeting under the executive power. Part IIIAAA simply did not anticipate the use of aircraft to protect the meeting from the air. The price of legislative certainty could well be an inflexibility that prevents government from countering unforeseen threats.

Still, should there be complete reliance on the executive power and an internal security operation by the ADF that results in loss of life, it is not clear whether a court would uphold the legality of the action. Who should bear the legal risk for this? Members of the ADF can be individually criminally and civilly liable for any wrongs they commit in carrying out orders, yet they are obliged to follow orders unless they are manifestly unlawful. This is an old issue but one that needs revisiting. One way of preserving the flexibility available to government through the executive power, while protecting members of the ADF from legal liability, could be to grant the Rules of Engagement some status at law. Rules of Engagement should become a legal authority for members of the ADF to exercise specific powers. There should also be protection from civil and criminal liability for members of the ADF acting in good faith in accordance with the Rules of Engagement, providing that any such actions are not manifestly unlawful. Such protection is not new as it appears in fisheries legislation. The main developments would be to extend the protection possibly to lethal acts done under the executive power and to make the Rules of Engagement the standard for compliance rather than just orders. It would provide more protection for the ADF than currently exists and do much to ensure that authority and accountability rests with those who ultimately make the decisions to commit the ADF, the government. This is not a new issue but, given recent developments, it is certainly one with new relevance.

70 Winterton discusses the breadth and depth of the executive power, above n 9.