

The Defence Power S 51 (vi)

SECTION 51 (VI)

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (vi) the **naval and military defence** of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;

To be read in conjunction with:

SECTION 114

- A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State
- This provides the Commonwealth with **exclusive power to defence**
- **The Defence Power**
- Would the law assist in the defence of the Commonwealth and the States?
- The role of the court is not to determine the necessity of the law – this is up to the parliament

Traditional view (No longer used) was accepted up until 2007, when the court heard the case of *Thomas v Mowbray* [2007] HCA 33:

- Traditionally, the power '**waxes and wanes**' according to circumstances, **varying between peacetime and wartime**. The court would allow the slight expansion of powers during wartime.
- The power dealt specifically with external threats, and by war it meant conflict between **Australia and another Nation's State**
- Peacetime – Narrower time, had to vary depending on the apprehension of dangers to Australia
- *Australia Communist Party v Commonwealth* ("The Communist Party Case") [1951] HCA 5
 - The government attempted to dissolve the Communist party within Australia. The parliament passed the Communist Party dissolution bill, which allowed the Cth to dissolve the communist party, to seize assets, powers with respect to people involved with the communist party. It was challenged by the Australian Communist Party. Cth argued that even though there was now over, there was still a threat to Australia from communists. HC took a very traditional view of the power, said that a distinguish has to be drawn between wartime and peacetime. **Those things important to Australia during wartime will differ during times of peace**. The Cth could use the power to regulate the activities of any group of people that could threaten the security of Australia.

Modern View –

- **Key Elements:**
 - Defence power no longer seen as limited to external threats or threats from other nation-states
 - Control orders are reasonably appropriate and adapted for defence purposes (Gleeson CJ)
 - Affirmed defence power as purposive (Gummow & Crennan JJ)
 - Line between external threats and internal threats now blurred, also line between power in peacetime and wartime blurred
- *Thomas v Mowbray* [2007] HCA 33
 - Concerned **anti-terrorism legislation**.
 - Court began to acknowledge that circumstances have changed, and traditional view no longer appropriate.
 - Cannot say our enemy is only another Nation's State

- Now during wartime/peacetime the test for validity remains the same – whether the law can be seen for the defence of the Cth and the States. **Court more prepared to find a sufficient connection between a law and the power during times of war.** Such as the manufacturing of clothes for the defence personnel, this is incidental to the defence of Australia.
- Had to consider the constitutional validity of division 104 of the Commonwealth Criminal Code, which enables a federal court to make a control order that imposes obligations on and restricts the activities of a person for the purpose of protecting Australia from a terrorist attack. This was really a form of detention. **Whether this power to make control orders was a valid exercise of the defence power?**
- Police applied to the federal magistrates court for an interim control order against Thomas. Thomas had admittedly trained in previous years at an Alkida training camp. Thomas had twice been prosecuted under other aspects of the criminal code for terrorism related offence, and was both times acquitted.
- The court can make an order only if the court is satisfied on the balance of probabilities that the making of the order would:
 - Assist in preventing a terrorist attack or that the person had had training in a terrorist organisation and the court was satisfied on the balance of probabilities that each of the obligations and restriction and prohibitions imposed were reasonably necessary and appropriate and adapted for the defence of Australia.
- Magistrate was satisfied that the elements were met. Control order placed restrictions on him including a curfew, where he could live and where he could go, restricted form telecommunication devices.
- Thomas argued that the issuing of a control order was not supported by any constitutional head of legislative power, including the defence power. And that it conferred non-judicial powers on a court.
- Majority found that it was a **valid exercise** of the defence power. The power is **not limited to external threats**, not confined to waging wars between nations. Part of the change in modern times, requires the court to **look beyond the narrow view** of who is to be protected. Control orders were **reasonably appropriate and adapted** to achieve the purposes of the defence of Australia. No distinction between another nation and where the threat is by a group of individuals who are attempting to have imposed upon the people/government a particular view. Terrorism - Where the motivation is **political, religious or etiological and the intention is to intimidate** the government to change policy. There was a **sufficient connection** between the law and the protection of the public from terrorism. Hayne said **no longer line between external and internal threats**. Rejected Thomas's arguments that it had to be an external threat. The traditional view is no longer accepted.

The power during wartime

- The courts are **more ready to uphold defence legislation in times of war**. In wartime it is easier to see a real connection between defence and laws which regulate ordinary civil activity.
- *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth* ("Jehovah's Witnesses case") [1943] HCA 12

Declared them to be **against the defence of the Cth**, because they are **pacifists** towards the war. They view themselves as being separate from the world and do not participate in military or political activities. The premises of JW were taken over by the Cth. The affect of being declared as a subversive organisation, Cth could seize the property and impose penalties of what it considered to be subversive communication. It was seen that there was