Part 1 – Defence Power

S 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: 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.

When considering the validity of any measure from the point of view of defence, the HC is required to look at the purpose of the measure and to determine whether it could be considered to assist in the defence of the Commonwealth. The court’s function is not to decide whether any measure is appropriate for the purposes of defence. However, the court must be satisfied that there is a real connection between the law and the defence of Australia. The extent of the defence power varies according to the degree and nature of the danger of external or internal aggression at a given period of time. The HC has traditionally distinguished between the scope in peacetime and wartime.

- The range of matters that can be brought within the scope of the defence power expands and contracts according to the degree of apprehension of the danger of external or internal aggression.

3 issues in defence power – vagueness (proportionality as war gets more emergent); internal defence (blurring distinction b/w war and peace); deference (when will judiciary be more willing to assess proportionality/ sufficient connection etc – when ‘constitutional facts’ lie outside the core of defence power e.g. regulating insect repellent and apartment tenancies)

1.1 Seminal Case Law

Communist Party Case – 1951: this case concerned the Communist Party Dissolution Act 1950. It authorised the dissolution and forfeiture of certain bodies, and the detention of certain persons (reverse onus) associated with communism. The Government was authorised to take such actions if satisfied the bodies or persons were likely to be engaged in activities prejudicial to the security and defence of the Cth (without defining such conduct or establishing objective standards of liability).

Overlapping set of constitutional principles from Communist Party Case

1. Rule against vagueness – left aspects of language of the act open to the opinion of the executive government (what is a supporter of communism?)
2. Rational connection to defence purpose – must be a specific and rational connection to the defence purpose. The law must actually do what it aims to do. Looking to save Australia from being overtaken by communism by force, but why have a reverse onus? What does that have to do with pursuing a defence purpose? See also – Jehovah’s Witness reg 6A
3. Rule against overbreadth – reverse onus provision can also be seen as a law doing more than it needs to. Can’t we just save it by outlawing communism? See also – Latham CJ regs 7-9 and 11 in Jehovah’s Witness
4. The executive cannot be given legislative power – ‘a stream cannot rise higher than its source’. i.e. it cannot be left to the Executive to determine when a situation or fact falls within legislative power.
5. Judicial v legislative separation of powers – ‘parliament cannot recite itself into power.’
Dixon J: the power is concerned primarily with the protection of Federal authority against action or utterance by which it may be overthrown, thwarted or undermined. The incidental power does not extend to legislation which is not addressed to suppressing violence or disorder or to some ascertained and existing condition of disturbance, and yet does not take the course of forbidding descriptions of conduct or of establishing objective standards or tests of liability upon the subject, but proceeds directly against particular bodies or persons by name, and does so not tentatively but so as to affect adversely their status, rights and liabilities once for all.

Nothing but an extreme and exceptional extension of the operation of the defence power will support provisions upon a matter of its own nature prima facie outside Federal power, containing nothing in themselves disclosing a connection with Federal power and depending upon a recital of facts and opinions concerning the actions, aims and propensities of bodies and persons to be affected in order to make it ancillary to defence. It may be conceded that such an extreme and exceptional extension may result from the necessities of war and, perhaps, of the imminence of war. But the reasons for this are to be found chiefly in the very nature of war and of the responsibility borne by the government charged with the prosecution of a war.

McTiernan J: the recitals are not judicial findings and do not bind the judicature on any question within its own exclusive province. The judicature, of course, treats the recitals with respect and regards the views which they express as possible but cannot concede that they are probative of any matter of fact which is material to the question whether the Parliament had or had not the power to pass this Act. The constitution does not allow the judicature to concede the principle that the Parliament can conclusively ‘recite itself’ into power.

- In a period of grave emergency the opinion of Parliament that any person is a danger to the safety of the Cth would be sufficient to bring their civil liberties under the control of the Cth. In times of peace however, the position is otherwise because the Constitution has not specifically given the Parliament power to make laws for the general control of civil liberties and it cannot be regarded as incidental to the purposes of defence to impose such a control in peace time.
- The Communist Party manifests strong sympathy with the foreign and domestic policy of the government of the USSR. It follows that if war occurred in which that State was the enemy or there was imminent danger of such a war, the Cth could take preventive measures against communists... just as it could against alien enemies resident in this country. At the time this Act was passed... there is no situation which provided a constitutional foundation for this Act.
- The Executive Government is the final judge of how far it may go in operating these provisions... it is constitutionally wrong for Parliament to authorize the executive to decide finally as to the extent of any legislative subject matter enumerated in s 51 of the Constitution and to bring the Act into operation in such cases as it decides to be within the subject matter.

Williams J: the outstanding character of the Act is that, its main provisions ‘prohibit no act, enjoins no duty, creates no offence, imposes no sanction for disobedience to any command, prescribes not standard or rule of conduct.’ It operates to... make other bodies or persons tainted with communism, liable to be dissolved and their property forfeited, without creating any offence the commission of which will entail such consequences, and indeed without proof they have committed any offence against any law, without a trial in any court, and without such bodies or persons having
any right to prove that they have not done anything prejudicial to the security and defence of the Cth.

- The Act is an assertion by Parliament that it can decide for itself or leave it to some authority other than a judicial organ of the Cth to decide that facts exist which are sufficient in law to create a nexus between the particular legislation and such one or more of the constitutional legislative powers as are relied upon.

- If legislation under the defence power is challenged, the Court must be satisfied that the fact or facts exist which bring the legislation within the scope of the power. As the power is one of indefinite extent and expands and contracts according to the dangers to the security of Australia that exist from time to time, the power is peculiarly one with respect to which it is the duty of the court to be satisfied of such facts.

- In peace time the legislation, to be reasonably capable of aiding defence, must be reasonably necessary for the purpose of preparing for war. The recitals cannot be more than statement of the reasons why Parliament enacted the law. They indicate to the Court what Parliament believes to be the constitutional basis of the Act.

Any conduct which is capable of delaying or of otherwise being prejudicial to the Cth preparing for war would be conduct which could be prevented or prohibited or regulated under the defence power. BUT the legislation would have to define the nature of the conduct, and the means adopted to combat it, so that the Court would be in a position to judge whether it was reasonably necessary to legislate with respect to such conduct in the interests of defence and whether such means were reasonably appropriate for the purpose.

- Here: the acts alleged to be prejudicial are that the Australian Communist Party is part of a world communist revolutionary movement which engages in espionage and sabotage and in activities or operations of a treasonable nature. BUT none of this conduct is prevented or prohibited or made an offence by the operative provisions of the Act. If the Act did this, the Court could consider the conduct prohibited and decide whether it was capable of being so prejudicial and, if it considered that it was, pronounce in favour of the constitutional validity of the Act.

- Legislation to wind up bodies, dispose of their assets, or deprive individuals of their civil rights on the mere assertion of parliament or the Executive that they are conducting themselves in a manner prejudicial to the security and defence of the Cth, is not authorized by the defence power or the incidental power in peace time.

- Legislation of this nature can only be valid in times of grave crisis... and it must, even then, be limited to such preventive steps as are reasonably necessary to protect the nation during the crisis.

Fullager J: the aims asserted in the recitals... are such activities that could be subject of valid Cth laws. The difficulty in the present case is the fact the Act in question does not set out to deal with those activities as such. It has an actual direct operation upon a particular association of persons specified by name, and a potential direct operations upon those who become subject to it by virtue of an expression of opinion by the GG.

- In its first aspect, s 51(vi) authorizes the making of laws which have, as their direct and immediate object, the naval and military defence of the Cth. The power is clearly not confined to times of war. Matters such as enlistment, training and equipment, provisions of ships and munitions, manufacture of weapons and erection of fortifications, fall within this primary aspect of the defence power.
- The secondary aspect of the defence power has so far only been invoked and expounded in connection with an actual state of war. It comes into existence upon the commencement or immediate apprehension of war. In its secondary aspect – the power extends to an infinite variety of matters. It would be contrary to principle to allow probative force to recitals of facts upon which the power to make the law in question depends. The question whether the Act may be supported depends entirely on judicial notice.
- E.g. a power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse.

Kitto J: the character of the defence power fluctuates according to ‘the nature and dimensions of the conflict, the actual and apprehended dangers, exigencies and course of the war, and matters that are incident thereto.

Cf: Capital Issues Case – impugned law was the Defence Preparations (Capital Issues) regulations which allowed the Cth Treasurer to regulate the borrowing of money. It however, contained an elaborate judicial review mechanism. Held valid under defence power. Why? The law has objective standards, it has judicial review, not the same vague/overbroad discretion as Communist Party Case BUT it was also not about fundamental civil rights.

Andrews v Howell [1941] HCA 20: Impugned law: National Security (Apple and Pear Acquisition) Regulations. WWII: British Empire possession in the region falling to Japanese Empire. The law was designed to organise/ improve domestic pear and apple sales as sea export becomes dangerous.

What kind of laws can be passed under such total war situation? The basic rule is that the larger the war, the larger the defence power, and the greater range of laws than can be passed under it (proportionality between the war and the laws).
- Held (per Dixon J) a valid defence power exercise. Why? The power grows with war [proportionality]; it depends on how big the war is and what a given war effort requires.
- ‘Whether a given measure is authorised will depend upon the nature and dimensions of the conflict that calls it forth, upon the actual and apprehended dangers, exigencies and course of the war, and upon the means that are incident thereto.’
- Apples and pears don’t directly relate to the war effort or defence power, but they are incidental (given the disruption of shipping, need to regulate the economy and ensure the population is fed).

Stenhouse v Coleman (1944) 69 CLR 457: Impugned law - minister has wide discretion to regulate sale of ‘essential articles’, so long as the actual orders are sufficiently connected to defence [has this internal check/balance for proportionality within the law itself]. It constrains discretion of the minister and this is what makes it valid... it doesn’t go beyond what is needed. Held (per Dixon J) that this was valid under defence power. Must assess the law in the context of the war. Judge whether the law pursues a particular defence purpose
**Victorian Chamber of Manufactures v Cth (1943) 68 CLR 87**: Impugned law - Women’s Employment Act – this regulated unprecedented work for women (paying same rate for women in same roles as men). Ensuring they are well paid so they occupy certain roles. Many 100,000 men have left Australia to work in army and navy. Still have to manufacture guns and ships etc, as well as continuing domestic industrial activity. Women stepped in to fill these roles.

- Latham CJ: upheld validity under the defence power. Why? the law deals with a problem which has arisen from the war, and with which it may *reasonably* be considered to be necessary to deal in order to promote the successful prosecution of the war

### 1.2 Examples of invalid use of defence power

**Adelaide Company of Jehovah’s Witness Inc v Cth (1943):** The National Security (Subversive Associations) Regulations 1940 allowed the GG to declare certain bodies as prejudicial to the defence of the Cth. The regulations provided for the dissolution of declared bodies, and the occupation of premises provided there remains in the premises any property belonging to the body. Reg 7 prohibited the printing and publication of matter advocating and unlawful doctrines.

- Latham CJ: there are subversive activities which fall short of treason, but which may be equally fatal to the safety of the people. E.g. obstruction to recruiting, certainly in war-time, and perhaps in time of peace. Such obstruction may be both punished and prevented. So also propaganda tending to induce members of the armed forces to refuse duty may not only be subject to control, but suppressed.

The power to protect the community against ‘fifth-column activities’ is not so weak as to be limited to legislation for the punishment of offences after they have been committed. Parliament may, under the defence power, seek to prevent such offences happening by preventing the creation of subversive associations and ordering their dissolution.

- I can see no objection to validity of a regulation providing for the occupation by Cth authorities of premises occupied by an unlawful body for the purpose of preventing the use of such premises by that body.
- BUT under the regulations, the premises may be occupied so long as there is in the premises any property which a Minister is satisfied belonged to the body. As long as a table or chair belonging to an unlawful body remained in a building, the occupation of the building would be lawful under the regulation.
- The regulation therefore, does not depend for its operation upon any connection between the premises and the continued use or continued risk of use of the premises by the unlawful body. The occupation authorized has no relation to actual or probable unlawful use of the premises. Accordingly, reg 6A is not authorised by the defence power.

He continued – under the defence power the Cth Parliament may legislate to prevent propaganda of any kind prejudicial to the defence of the Cth or the efficient prosecution of war. But the definition of ‘unlawful doctrines’ includes within that term any doctrine or principle which was advocated by a declared body. Thus, if a declared body advocated observance of the Ten Commandments, or annual elections to the Cth parliament, all these matters would fall within the definition of unlawful doctrines. It is clear that the defence power does not authorize the Cth Parliament to prohibit the advocacy of such doctrines or principles simply because it happens that they have been advocated.
by a declared body. The regulations, so far as they depend upon this part of the definition of unlawful doctrines, are invalid. [McTiernan J agreed]

Thomas v Mowbray (2007): in this case the court held that the defence power is not limited to external threats from governments but also extends to internal threats. The plaintiff was subject to an interim control order under the Cth Criminal Code. The court held that the control order provisions were valid under the defence power.

Gleeson CJ: the object of Div 104 is to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act. Terrorist act requires three elements; a) the action must fall within a certain description and not excluded by another description; b) the action is done or the threat of action is made, with the intention of advancing a political, religious or ideological cause; and c) that the action is done, with the intention of coercing, or influencing by intimidation, a government, or of intimidating the public or a section of the public.

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

- In making a control order: the court must be satisfied on the balance of probabilities that making the order would substantially assist in preventing a terrorist act, or that the person has provided training to, or received training from, a terrorist organisation.
- Secondly, the court must be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

The legislative criterion for the sufficiency of the connection between the control order and the protection of the public from a terrorist act... means that the legislation is supported by the defence power

Gummow and Crennan (with who Gleeson agreed): the defence power is purposive in nature, and that a notion of proportionality is involved in relating ends to means.

- The plaintiff emphasises the concentration in these decisions is 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 (s 51(vi)). But this connection upon sufficiency of connection is not called for when dealing with the interim control order system. This turns upon the definition of ‘terrorist act’. What is proscribed by that definition falls within a central conception of the defence power... protection from a ‘terrorist act’ as defined necessarily engages the defence power.
- The vice of the Communist Party Act, 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 does not appear in the interim control order regime."
Callinan J: the language of s 51(vi) is expansive... the real question in every case will be, is the Cth or its people in danger, or at risk of danger by the application of force, and as to which the Cth military and naval forces, either alone or in conjunction with the State, may better respond, that State police 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... ‘reasonably necessary, or reasonably appropriate and adapted to protection against terrorism.’ [Here the court – Hayne J and the joint judgment – accepted that ‘terrorism’ as defined falls within the central conception of the defence power]

Control orders law is less problematic than communist party law. There is some vagueness, but it doesn’t have reverse onus, it is focused on actions rather than ideologies, and it has the inbuilt proportionality aspect.

Kriby J had an impassioned dissent.

1.3 How the Court has considered ‘deference’

Deference - Dixon and Fullagar, Latham CJ all considered this in different ways. In Thomas v Mowbray it sort of sits between Fullagar and Latham’s previous expressions. The bottom line is that other than justice Kirby, all the justices are advocating more deference to parliament (they should be the ones deciding whether the defence power applies or not, and the court does not want to be striking down laws as much). The ‘general public knowledge’ standard from Stenhouse v Coleman is applied here.

What is new? Gummow and Crennan JJ (in majority): ‘defence 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.

- Judges shouldn’t look at ‘constitutional facts’ nor balance, within the ‘central conception of the defence power.’ Open-ended legal means (e.g. preventing terrorist acts). BUT must still balance/tend to ‘constitutional facts’ outside this core – e.g. regulating insect repellent and apartment tenancies.
- So: if in core of defence power, shouldn’t be doing this proportionality balancing. What is included in this core? Definitely terrorism (from Thomas). Can throw whatever you want at this problem. Outside the core, proportionality is still relevant. This constitutes a radically new doctrine. If core, judges will be completely minimalist. This is not a liberalist constitutionalist perspective.

Callinan J (in majority): says we should balance, but allow these sources of constitutional facts:

1. Judicial notice
2. Facts ‘ascertainable by reference to indisputable reputable and broadly accepted historical writings’ (something notorious, that doesn’t need to be raised in court as evidence).
3. ‘Official Facts’

Parliament cannot recite itself into power... but this third point seems completely opposed to this. Parliament can state official facts which will help the court to decide. Seems to depart substantially from Communist Party Case.