Control orders: Thomas v Mowbray [2007] HCA 33 (2 August 2007) 237 ALR 194 ; 81 ALJR 1414

Introduction

In this decision the High Court upheld the constitutional validity of the control order provisions in Division 104 of the Criminal Code (Cth) by a majority, comprising four separate judgments, of five to two.

However, the controversial nature of this legislation, which was evident in public debate at the time of its introduction, is reflected in the extraordinary dissenting judgment of Kirby J, who predicted that Australians in the future 'will look back with regret and embarrassment at the majority decision' for its departure from the 'foresight, prudence and wisdom' evident in the decision of an earlier High Court majority led by Dixon J in the equally challenging *Communist Party Case* (1950) 83 CLR 1.[1]

On 27 August 2006 Mowbray FM made an interim control order under Division 104 against Joseph Terrence Thomas on the grounds that: making the order would substantially assist in preventing a terrorist act; Thomas had received training from a listed terrorist organisation; and each of the obligations, prohibitions and restrictions to be imposed on Thomas by the order was reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

Thomas challenged the validity of Division 104 of the Code by commencing proceedings in the High Court to quash the interim control order on the grounds that Division 104: confers non-judicial power on a federal court contrary to Chapter III of the *Commonwealth Constitution*; insofar as it confers judicial power on a federal court, authorises the exercise of that power in a manner contrary to Chapter III of the Constitution; and is not supported by one or more express or implied heads of legislative power under the Constitution.

Legislative power

Gleeson CJ agreed with Gummow and Crennan JJ that Division 104 is supported by the defence power (s 51(vi)) and the external affairs power (s 51(xxxvii)). Gleeson CJ held that the necessary criterion for the issue of a control order – protecting the public from a terrorist act – was sufficient to invoke the legislative support of the defence power, supplemented where necessary by the external affairs power.[2]

The definition of 'terrorist act' includes an action that: causes death, serious physical harm or serious damage to property; endangers life; creates a serious risk to public health or safety; or seriously interferes with vital public infrastructure.

Noting that modern terrorist organisations operate outside the control of states and across international boundaries, Gleeson CJ held that the defence power 'is not limited to defence against aggression from a foreign nation; … external threats; … waging war in a conventional sense of combat between forces of nations; and … protection of bodies politic as distinct from the public, or sections of the public.'[3]

Gummow and Crennan JJ interpreted the defence power broadly as applying to both internal and external threats. English law preceding the Constitution extended defence of the realm to the 'levying of war' against the sovereign from within the realm and made that treasonous.[4] The matters proscribed by the content of the definition of 'terrorist act' fall 'within a central conception of the defence power'.[5] Gummow and Crennan JJ distinguished Division 104 from the *Communist Party Dissolution Act 1950* (Cth) because the latter was:[6]

> 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…'

In separate judments, Callinan J and Heydon J held that the defence power was not confined to external threats.[7] Both held that Division 104 was supported entirely by the defence power.[8]

Although finding Division 104 invalid on other grounds, Hayne J agreed with the majority that the defence power is not confined to protection of the Commonwealth from external enemies and supported the provisions of Division 104 as 'laws with respect to the naval and military defence of the Commonwealth. They are laws with respect to naval and military defence because, in their particular operation in this case, they provide measures directed to preventing the application of force to persons or property in Australia that is sought to be applied for the purpose of changing the federal polity's foreign policies.'[9]

Kirby J accepted that the defence power could be enlivened by internal as well as external threats but confined the power to threats directed at the bodies politic. Because the threats Division 104 is directed towards are to people and property within the bodies politic Kirby J held that the provisions were not supported by the defence power[10], the operation of which should be contained. State police power, supported where necessary by a valid reference of such powers to the Commonwealth should federal direction be required, should be sufficient to deal with the threats referred to in Division 104.[11] Kirby J also held that Division 104 was not supported by the external affairs power.[12]

Separation of powers

Gleeson CJ rejected the argument that by conferring power to determine what legal rights and obligations should be created rather than a power to resolve disputes about existing rights and obligations Division 104 confers non-judicial power on a federal court. Gleeson CJ also rejected the argument that the power under Division 104 was invalid because it could deprive a person of liberty on the basis of apprehended rather than past conduct.

Opposed to these arguments were bail and apprehended violence orders – 'two familiar examples of the judicial exercise of power to create new rights and obligations which may restrict a person's liberty'. An earlier example cited by Gleeson CJ was the 'ancient power of justices and judges to bind persons over to keep the peace' which Blackstone described as an example of 'preventive justice'.[13]

Gleeson CJ also rejected the argument that the wording of the power to make control orders under the Code was antithetical to judicial decision-making. Division 104 requires the relevant court to be satisfied on the balance of probabilities that the control order is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act. This language was not too vague for use in judicial decision-making.[14]

Gummow and Crennan JJ reached the same conclusion, noting the use in Division 104 of the concept 'reasonable' – 'the great workhorse of the common law' – and the origins of the term 'reasonably appropriate and adapted' in the well-known decision of the United States Supreme Court in *McCulloch v Maryland*.[15]

Gleeson CJ rejected the argument that Division 104, if it did confer judicial power, required it to be exercised in a manner inconsistent with Chapter III. Although interim orders may be made *ex parte*, the procedure requires a confirmation hearing to follow, governed by the rules of evidence, with the burden of proof on the balance of probabilities being on the applicant, the provision of documents, cross-examination, argument and rights of appeal.[16] Gummow and Crennan JJ reached the same conclusion.

Callinan J also rejected the plaintiff's arguments on the Chapter III issues and upheld the validity of Division 104. Heydon J agreed with Gleeson CJ, Gummow and Crennan JJ and Callinan J on the Chapter III issues.

Kirby J criticised Division 104 as an example of 'legal exceptionalism' and accepted the argument that the criteria for the exercise of the power conferred by Division 104 imposed on federal courts power which was not judicial, stating that:

> the stated criteria attempt to confer on federal judges powers and discretions that, in their nebulous generality, are unchecked and unguided. In matters affecting individual liberty, this is to condone a form of judicial tyranny alien to federal judicial office in this country. It is therefore invalid.[17]

Hayne J ruled the legislation invalid for the same reason, expressed as follows:

> To require a Ch III court to decide whether to impose upon a person obligations, prohibitions or restrictions of the kind specified in s104.5(3), by reference only to the relationship between those orders and the protection of the public from a terrorist act, would require the court to apply its own idiosyncratic notion as to what is just. That is not to require the exercise of the judicial power of the Commonwealth.[18]

The likelihood of Kirby J's estimation that had the Communist Party Dissolution Bill been challenged today its constitutional validity would have been upheld by the High Court cannot be tested.[19] Only time will tell whether Justice Kirby's prediction about future regard for the majority's decision in this case becomes true.

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Endnotes

1. [2007] HCA 33, para. [387].
2. Para. [9].
3. Para. [7].
4. Para. [140].
5. Para. [146].
6. Para. [147], citing Dixon J in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 192.
7. Callinan J at para [583]; Heydon J at para. [611].
8. Callinan J at para [585]; Heydon J at para. [649].
9. Hayne J at para. [444].
10. Kirby J at paras. [251] – [255].
11. Kirby J at para. [267].
12. Kirby J at para. [294].
13. Gleeson CJ at para. [16].
14. Gleeson CJ at para. [27].
15. Gummow and Crennan JJ at paras. [94 – 103].
16. Gleeson CJ at para. [30].
17. Kirby J at para. [322]
18. Hayne J at para. [516].
19. Kirby J at para. [386].

Key changes to the Evidence Act

Background

The *Evidence Amendment Bill 2007* (the Bill) was passed by both houses of the NSW Parliament on 24 October 2007. The Bill will commence upon proclamation, which is 'most likely' to be at least six months after assent, to give time for consultation with the legal profession in relation to the changes.[1]

The Bill will make miscellaneous amendments to the *Evidence Act 1995* (NSW) (and some related acts such as the *Civil Procedure Act 2005* (NSW) and the *Criminal Procedure Act 1986* (NSW)). The amendments arise out of the collaborative report on the review of operation of the Uniform Evidence Acts of 2005 by the Australian, New South Wales and Victorian law reform commissions. The report found that the Evidence Acts were generally working well with no major structural or policy problems, although 63 recommendations for reform were made. The amendments are uniform (with some very minor amendments) and are based on a Uniform Evidence Bill endorsed by the Standing Committee of Attorneys General on 26 July 2007. The amendments are said to 'fine tune' the law and promote harmonisation.

The amendments constitute the first thorough overhaul of the Evidence Act since it came into force in 1995 and will affect those who practise in both the criminal and civil areas.

This article is a summary of key changes and readers are referred to the text of the Bill for details of all of the changes to be made by the Bill.

Summary of key changes

Competence and Compellability

Section 13 of the Evidence Act will be repealed and replaced by a new section 13. All witnesses will be required to satisfy a new test of general competence in section 13(1).