



The constitutional **validity** of the interim **control order** regime

Thomas v Mowbray [2007] HCA 33

By Amy Douglas-Baker

On 2 August 2007, the High Court of Australia handed down its decision in the matter of *Thomas v Mowbray*.¹ By a 5-2 majority, the Court upheld the validity of Division 104 of the *Criminal Code Act 1995* (Cth).

BACKGROUND

In November 2004, Jack Thomas was arrested and charged with offences under Part 5.3 of the *Criminal Code Act 1995* (Cth) (the Criminal Code) and the *Passports Act 1938* (Cth). He was tried in the Supreme Court of Victoria and was convicted of one count of intentionally receiving funds from a terrorist organisation and one count of possessing a falsified Australian passport. The Victorian Court of Appeal quashed the convictions in mid-August 2006² and ordered a re-trial in December 2006.³

On 27 August 2006, an Australian Federal Police officer (the second defendant), applied to the Federal Magistrates Court for an interim control order under Division 104

of the Criminal Code. Federal Magistrate Mowbray (the first defendant), made the order sought, *ex parte*. The confirmation proceedings in respect of the interim order were adjourned by consent, pending the outcome of the challenge in the High Court to the constitutional validity of Division 104 of the Criminal Code. As noted, however, in the joint judgment of Justices Gummow and Crennan, the legislative scheme envisages that interim control orders, having been made *ex parte*, 'should come as soon as practicable before the issuing court in an *inter partes* proceeding for confirmation, revocation or other disposition' ([34]).

The purpose of Division 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: s104.1. A 'terrorist act' is defined in s100.1. The power to make a control order is subject to the conditions set out in s104.4. The first condition is that the court must be satisfied on the balance of probabilities that the making of the order would substantially assist in

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Division 104 allows a control order to be imposed on a person to protect the public from a terrorist act.

preventing a terrorist act, or that the person has provided training to, or received training from, a 'listed terrorist organisation'. The second condition is that 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', or 'reasonably appropriate and adapted', for the purpose of protecting the public from a terrorist act.

ISSUES IN THE SPECIAL CASE

Thomas asserted three grounds of invalidity, phrased as questions in a special case:

1. Is Division 104 invalid because it confers on a federal court non-judicial power contrary to Chapter III of the Constitution?
2. Is Division 104 invalid because it authorises the exercise of that power in a manner contrary to Chapter III of the Constitution?
3. Is Division 104 invalid because it is not supported by one or more of the express or implied heads of legislative power under the Constitution?

REASONING

Is Division 104 supported by an express or implied head of legislative power?

Gleeson CJ ([6]), and Gummow and Crennan JJ ([145]-[146]) held that both the defence power and the external affairs power supported Division 104. Hayne J held that both the defence power and the reference power supported Division 104 ([407]), while Callinan J ([582]-[585]) and Heydon J ([650]), in separate reasons, held that the defence power alone provided sufficient support. Kirby J held that Division 104 was not supported by any established head of legislative power ([157]).

Gleeson CJ ([7]), Gummow and Crennan JJ ([141]-[142]), and Hayne J ([437] and [441]) held that the defence power of the Commonwealth is not limited to defence against external threats, to waging war in a conventional sense or to the protection of bodies politic as distinct from members of the public. Gleeson CJ emphasised the 'legislative criterion' contained in s104.4 – that there be a sufficient connection between the control order and the purpose of the protection of the public from a terrorist act, and found that the existence of that legislative criterion 'means that the legislation is

supported by the defence power, supplemented, where necessary, by the external affairs power' ([9]).

Gummow and Crennan JJ both emphasised the importance of construing the external affairs power with reference to its aims and objectives ([135]). They held that the interim control order system established by Division 104 necessarily engages the aims and objectives of the defence power because it is 'directed to apprehended conditions of disturbance, by violent means within the definition of "terrorist act", of the bodies politic of the Commonwealth and the states rather than to violent conditions which presently apply' ([145]-[146]). Their Honours held that where the object of coercion or intimidation by means of a 'terrorist act' is the government of a foreign country, the external affairs power supplied the relevant constitutional power ([150]).

Kirby J, in the minority, held that in order to enliven the defence power there must be an external threat directed at the bodies politic ([251]). His Honour noted that there is an important distinction to be drawn between matters of defence and matters of security, and held that Division 104 went beyond matters within the defence power and entered into 'areas of ordinary civil government' ([264]). His Honour also considered the external affairs power and held that, although resolutions of the United Nations Security Council may undoubtedly contain obligations binding on member states, including Australia, such obligations are necessarily subject to the limitations or restrictions of the Australian Constitution ([282]). In this regard, his Honour was critical of the generality of the terms of the United Nations Security Council Resolution 1373 ([284]) and held that it did not amount to an obligation of sufficient specificity such as to sustain the validity of Division 104 based on the external affairs power ([290]).

Hayne J held that the purpose of the impugned legislation is critical to the question of whether it falls within legislative power. His Honour held that the purpose of Division 104 was to respond to threats designed to force Australia to comply with the political, religious or ideological aims of groups who prosecute those aims by violence ([435]), and that this fell within the defence power properly construed ([441]). His Honour did, however, draw a distinction between the application of force by individuals whose motives are not to further an international political aim and those individuals who act in furtherance of an international political aim, observing that only in the latter circumstance would the defence power be engaged ([442]).

In relation to the reference power, Hayne J accepted that the insertion of Division 104 did not offend the *Terrorism (Commonwealth Powers) Act 2003* (Vic) (the Victorian Reference Act) because there were two distinct and different references ([451]). Further, his Honour held that, to the extent that any amendment to Division 104 referred to (terrorist acts and actions relating to terrorist acts), and was 'done by express amendment to the law that was enacted in the form of the scheduled text', there was 'no contrariety between the two parts of the definition of "express amendment"' in the Victorian Reference Act ([454]).

Conferral of power contrary to Chapter III of the Constitution

Gleeson CJ ([18]) and Gummow and Crennan JJ ([79]) rejected as too broad the proposition that restraints on liberty exist only as an incident of adjudging and punishing criminal guilt. Gleeson CJ emphasised that the control orders envisaged by Division 104 are a species of 'preventive restraint on liberty by judicial order', as distinct from orders involving deprivation of liberty, and that the power to interfere with a person's liberty on the basis of what that person might do in the future has been, and continues to be, exercised by courts in a variety of circumstances ([15]-[18]).

Gleeson CJ found the argument that the legislative formulation, 'reasonably appropriate and adapted,' is too imprecise to be of utility in judicial decision-making, to be implausible given the range of instances in which that formulation has been applied in both the High Court and in English courts ([27]). Gummow and Crennan JJ held that there was a sufficient connection between the desired end (prevention of a terrorist act) and the means proposed for its attainment (control order), and that this concept could be judicially applied ([103]). Their Honours also held, Callinan J agreeing ([595]), that the overall protective purpose of Division 104 did not involve considerations alien to judicial decision-making ([109]) and therefore did not have the effect of conferring judicial power contrary to Chapter III of the Constitution ([109]-[110]). Similarly, Gleeson CJ was unconvinced by the plaintiff's argument that a decision about whether a control order is justified requires an impossible prediction of future behaviour. His Honour cited instances of such assessment in the context of sentencing and parental access to children ([28]).

Kirby J held that Division 104 breached the requirements of Chapter III of the Constitution governing the judicial power of the Commonwealth ([157]). His Honour held that by providing that the protection of the public is the only factor relevant to the consideration of whether to make a control order, Division 104 conferred power that is 'at odds with the normative function proper to federal courts under the Constitution' ([322]).

Exercise of power repugnant to Chapter III of the Constitution

Gleeson CJ ([30]), Gummow and Crennan JJ ([121]), Callinan J ([598]), and Heydon J ([651]) held that Division 104 did not require the exercise of judicial power repugnant to Chapter III of the Constitution.

Gleeson CJ held that the evident purpose of conferring the function of making interim control orders on a court is to submit control orders to the judicial process ([17]). His Honour noted, among other matters, that in the ordinary course of events, applications for interim control orders would be made in open court, the rules of evidence would apply, the burden of proof would rest with the applicant, and an appeal would lie against the making of an order under the appellate process governing the issuing court's decisions ([30]).

By way of analogy, Gummow and Crennan JJ emphasised examples from the English tradition of preventative measures imposed by judicial order that were directed at protecting public peace, but which interfered with liberty, to refute the argument that Division 104 authorised the exercise of power repugnant to Chapter III ([116]).

Kirby J, however, held that Division 104 authorised the exercise of judicial power in a manner contrary to Chapter III, because it required the exercise of 'unbridled discretions, governed by the most nebulous criteria' ([370]). Similarly, Justice Hayne held that, while the terms 'reasonably necessary' and 'appropriate and adapted,' are familiar to judges and lawyers, the criterion that courts are required to apply in the making of an interim order – protecting the public from a terrorist act – with its focus upon a future consequence, was too indeterminate. In his Honour's opinion, the jurisdiction to determine whether to grant a control order was repugnant to Chapter III, since it could not be considered a 'matter' ([495]).

CONCLUSION

While a majority of the High Court accepted that Division 104 is supported by the defence power, Gleeson CJ, Gummow and Crennan JJ were of the view that the external affairs power supplied further and necessary support to the legislation, particularly in respect of protecting the governments of foreign nations. Significantly for a national scheme of anti-terrorism legislation, Callinan J expressed the tentative view that s100.8 of the Criminal Code, which provides that an express amendment may be made on approval by a majority of states and territories, might be repugnant to the reference power, which provides that state or territory legislative power may be referred to the Commonwealth ([605]). Kirby J held that the reference power did not support the introduction of Division 104, in the absence of any further reference ([203] and [207]).

A question arose, but was not finally decided, as to whether involvement with a listed organisation prior to that organisation becoming listed would suffice for the purposes of s104.4(1)(c). Gummow and Crennan JJ held that the issue was a matter of construction to be determined by the issuing court, but indicated that the preferable view is that involvement with an organisation prior to that organisation being listed is sufficient for the purposes of s104.4(1)(c) ([96]). Their Honours' observation in this regard may well be persuasive in cases turning on the interpretation of s104.4(1)(c). ■

Notes: 1 [2007] HCA 33; (2007) 237 ALR 194. 2 *R v Thomas* [2006] VSCA 165. 3 *R v Thomas (No. 3)* [2006] VSCA 300.

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