

## AUSTRALIA'S ANTI-TERRORISM LAWS - TRIALS AND TRIBULATIONS

Justice Mark Weinberg  
Judge, Victorian Court of Appeal<sup>1</sup>

1           The events of September 11<sup>th</sup> 2001 (hereafter '9/11') are forever etched into the minds of all Australians. The attacks upon the World Trade Center, and the Pentagon, were so utterly horrific, and shocking, as to prompt an immediate rethink of the dangers associated with global terrorism. They resulted in the enactment, in Australia, of a series of anti-terrorism laws, the like of which had never before been seen in that country.

2           At the federal level, the Commonwealth Parliament has enacted more than fifty separate anti-terrorism statutes. This legislation has been described as having 'unprecedented reach'.<sup>2</sup> In its original form, it created serious restrictions upon freedom of speech through a series of what were described as sedition offences. In its current form, it confers upon the Australian Security Intelligence Organisation ('ASIO'), a body traditionally regarded as having only intelligence-gathering functions, unprecedented powers of detention and questioning. It allows for the banning of organisations by executive order. It enables 'house arrest', for up to 12 months, through the use of what are described as 'control orders'. It allows for detention without charge for up to 14 days. It permits police to carry out warrantless searches of private property. It creates a series of terrorism-related offences, a number of which are ill-defined. Some of these offences are of such scope and

---

<sup>1</sup> Formerly Commonwealth Director of Public Prosecutions (1988-1991) and Judge, Federal Court of Australia (1998-2008). The author wishes to thank his Associate, Jack O'Connor, as well as Evgenia Bourova, Katrina Chow and Bec Mouy, Court of Appeal Research Associates, for their assistance in the preparation of this paper. The views expressed are, of course, his own. They do not necessarily represent the views of any other member of the Court of Appeal.

<sup>2</sup> George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136, 1137 ('Williams').

indeterminacy as to extend the reach of the criminal law into areas never previously considered appropriate for criminal sanctions.

3           These laws were originally enacted as a temporary emergency response to the terrorist attacks that took place overseas, and not just on 9/11. Australia itself has only once before been subjected to a significant terrorist act. This was in 1978 when the Hilton Hotel in Sydney was bombed during a Commonwealth Heads of Government Meeting. That incident was generally regarded as an aberration. It did not result in anything like the response generated after 9/11.

4           Of course, Australia, like many other nations, has a history of having enacted legislation during wartime that was intended to protect national security. However, those laws were of specific duration, designed to apply only while the country was at war, and intended to cease operation once peace returned. By contrast, Australia's anti-terrorism laws are today viewed as permanent.

5           The genesis of the current spate of anti-terrorism laws in Australia is Resolution 1373 of the United Nations Security Council. This was adopted on 28 September 2001, and called upon states to ensure that

terrorist acts are established as serious criminal offences in domestic laws and regulations, and that the punishment duly reflects the seriousness of such terrorist acts.<sup>3</sup>

6           The difficulty with drafting laws designed to deal specifically with terrorism is that they inevitably necessitate a radical departure from basic principle. Traditionally, the criminal law has been concerned to punish crimes that have been committed. It has rarely, if ever, acted pre-emptively.<sup>4</sup>

7           In large measure, this is because attempts to anticipate or predict crime have always been regarded as fraught. Liberal democracies, governed by the rule of law,

---

<sup>3</sup> SC Res 1373, UN SCOR, 56<sup>th</sup> sess, 4385<sup>th</sup> mtg, UN DOC S/RES/1373 (28 September 2001).

<sup>4</sup> Mark Weinberg, 'The Move Toward Preemption in the Criminal Law' (2009) 35 *Monash University Law Review* 25.

have always eschewed the idea of acting against individuals based upon what has been termed 'the precautionary principle'.<sup>5</sup>

8 Lord Denning famously once said:

It would be contrary to all principle for a man to be punished, not for what he has already done, but for what he may hereafter do.<sup>6</sup>

9 Justice Robert Jackson, when a member of the United States Court of Appeals for the Second Circuit, joined in that sentiment:

The jailing of persons by the courts because of anticipated but as yet uncommitted crimes [could not be reconciled with] traditional American law ... Imprisonment to protect society from predicted unconsummated offences [is] unprecedented in this country ... and fraught with danger of excess.<sup>7</sup>

10 So strongly entrenched was this aversion to pre-emption that the common law, in its earliest state, did not penalise even those who attempted harm to others, but only those who had brought about such harm.<sup>8</sup>

11 After 9/11, this most basic approach was swiftly set aside. The enactment in Australia, within the *Criminal Code Act 1995* (Cth) ('*Criminal Code*'), of various provisions dealing with the commission of terrorist acts, and proscribing membership of terrorist organisations, each of them designed to criminalise conduct occurring well before any resultant acts of violence, represented a tectonic shift in thinking on this subject.

12 The impact of such a revolutionary change in philosophy has gone far beyond merely anti-terrorism laws. Today, in Australia, a number of States have enacted legislation which is predicated upon the assumption that it is possible to predict dangerousness, or if not, that it is still better to err on the safe side. Thus, we have

---

<sup>5</sup> Ibid 25.

<sup>6</sup> *Everett v Ribbands* [1952] 2 QB 198, 206.

<sup>7</sup> *Williamson v United States* 184 F 2d 280, 280 (2<sup>nd</sup> Cir, 1950).

<sup>8</sup> Alan M Dershowitz, *Preemption – A Knife That Cuts Both Ways* (W W Norton, 2006).

laws designed to deal with what are described as ‘serious sexual offenders’.<sup>9</sup> Where such offenders have completed their entire prison sentences, they may nonetheless be subjected to what are described as ‘extended supervision orders’.<sup>10</sup> An application may be made to a court for such an order if it is thought that the offender may re-offend if released into the community without supervision. The net effect of such an order can be to require the offender to reside at what is, for all practical purposes, a ‘prison’, though one located outside actual prison walls.

13 Another area where, in recent times, the precautionary principle has been invoked is in relation to the dismemberment of motor cycle gangs, and other groups thought to be involved in various forms of organised crime. Several States have enacted laws designed to make it difficult, if not impossible, for such groups to continue to exist.

14 These provisions have been the subject of constitutional challenge. The High Court has struck down some of these laws. Curiously, at least to a foreign observer, this is not because they are considered to violate basic human rights, such as freedom of expression or freedom of association. It is rather because they involve judges in the exercise of functions that are regarded as incompatible with the independence of the judiciary mandated by the doctrine of the separation of powers.<sup>11</sup>

15 However, these developments in the criminal law, important as are, do not fall within the scope of this paper. Rather, my aim is to focus primarily upon the anti-terrorist laws that have been enacted since 9/11, and to explain how they have been interpreted and applied.

16 In schedule A to this paper, there is contained a brief summary of a number of

---

<sup>9</sup> See, eg, *Sentencing Act 1991* (Vic) Pt 2A which provides for disproportionately heavy sentencing in the case of such offenders.

<sup>10</sup> *Serious Sex Offenders Monitoring Act 2005* (Vic).

<sup>11</sup> *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181.

the most significant trials for terrorism offences that have thus far been conducted in Australia.

17 In schedule B, I set out some of the key anti-terrorism provisions contained in the *Criminal Code*. A number of these are taken from other laws enacted by other countries in response to 9/11. For reasons that will be explained, however, they have a particular potency in Australia.

### *Terrorism, and terrorist acts*

18 The starting point in any discussion of anti-terrorism laws must surely be to consider what constitutes terrorism.<sup>12</sup> It has been said that ‘terrorism is a form of asymmetric warfare: an approach that uses non-traditional methods to counter an opponent’s conventional military superiority’.<sup>13</sup> It pits clandestine methods against open societies, using small teams whose operations are cheap, but demands a response that is enormous in scale and expensive in resources. It exploits the foundations of civil society, such as principles of human rights, efforts to avoid civilian casualties, and adherence to the rule of law – including the laws of armed conflict. It leaves no room for compromise, and seeks no place at the negotiating table. It uses violence to signal its committed path to a final end.

19 Section 100.1(1) of the *Criminal Code* defines a ‘terrorist act’ as conduct engaged in or threats made for the purpose of advancing a ‘political, religious, or ideological cause’. The conduct or threat must be designed to coerce a government, influence a government by intimidation, or intimidate a section of the public. It must also cause one of a number of possible harms, ranging from death and serious bodily injury, to endangering a person’s life, seriously interfering with electronic systems, or creating a serious risk to the health or safety of a section of the public.

---

<sup>12</sup> See Ben Golder and George Williams, ‘What is “Terrorism”? Problems of Legal Definition’ (2004) 27 *University of New South Wales Law Journal* 270.

<sup>13</sup> Department of Foreign Affairs and Trade, *Transnational Terrorism: The Threat to Australia* (2004) < <https://www.dfat.gov.au/publications/terrorism/overview.html>>.

20 The definition of ‘terrorist act’ in the *Criminal Code* expressly excludes advocacy, protest, dissent, or industrial action so long as there is no intention to cause things such as serious physical harm, death, or a serious risk to the health or safety of the public.<sup>14</sup>

21 Section 101.1(1) of the *Criminal Code* creates the offence of ‘engaging in a terrorist act’. Other provisions within that Division of the *Code* create a wide range of offences for conduct that might be viewed as merely preparatory to a terrorist act. These offences include providing or receiving training connected with terrorist acts,<sup>15</sup> possessing ‘things connected with terrorist acts’,<sup>16</sup> ‘collecting or making documents likely to facilitate terrorist acts’,<sup>17</sup> and doing any ‘other acts’ in preparation for, or planning, terrorist acts.<sup>18</sup>

22 Section 102 of the *Criminal Code* confers upon the Commonwealth Attorney-General a power to make a written declaration that an organisation is a ‘terrorist organisation’. In order to make such a declaration, the Attorney-General must be satisfied that the organisation is ‘directly or indirectly engaged in, preparing, planning, assisting in, or fostering the doing of a terrorist act’, or ‘advocates the doing of a terrorist act’.<sup>19</sup> Where an organisation has not been proscribed as a terrorist organisation, a court may nonetheless find that it meets that description based upon evidence led in the course of a prosecution of an individual for a relevant terrorism offence.<sup>20</sup>

23 Once a declaration is made, a range of offences apply to individuals who are linked to that organisation. These include directing the activities of a terrorist

---

<sup>14</sup> *Criminal Code* s 101(3).

<sup>15</sup> *Ibid* s 101.2.

<sup>16</sup> *Ibid* s 101.4.

<sup>17</sup> *Ibid* s 101.5.

<sup>18</sup> *Ibid* s 101.6.

<sup>19</sup> *Ibid* s 102.1(2)(a)-(b).

<sup>20</sup> *Ibid* s 102.1(a).

organisation,<sup>21</sup> intentionally being a member of a terrorist organisation,<sup>22</sup> recruiting for a terrorist organisation,<sup>23</sup> receiving funds from or giving funds to a terrorist organisation,<sup>24</sup> providing support to a terrorist organisation,<sup>25</sup> and associating with a terrorist organisation.<sup>26</sup>

24 Division 103 of the *Criminal Code* creates an offence punishable by life imprisonment where a person provides or collects funds and is reckless as to whether those funds will be used to facilitate or engage in a terrorist act.

25 Part 5.1 subdivision C of the *Criminal Code* contains a series of offences involving what is termed 'urging violence'. It is an offence punishable by up to seven years' imprisonment to urge the overthrow of the *Constitution* or government by force. It is also an offence to urge violence against a group, or an individual, on the basis of their race, religion or political opinion. These offences were first described as 'sedition offences' when introduced by the *Anti-Terrorism Act (No 2) 2004* (Cth). In 2010, they were rebranded by the *National Security Legislation Amendment Act* (Cth) pt 2, in large part due to criticism of the term 'sedition' by the Australian Law Reform Commission.<sup>27</sup> That body had concluded that the term was 'much too closely associated in the public mind with its origins and history as a crime rooted in criticising ... the established authority'.<sup>28</sup>

26 Moving to other aspects of the anti-terrorism regime introduced after 9/11, investigating authorities have up to 24 hours, in total, as an 'investigation period'<sup>29</sup>

---

21 Ibid s 102.2.

22 Ibid s 102.3.

23 Ibid s 102.4.

24 Ibid s 102.6.

25 Ibid s 102.7

26 Ibid s 102.8.

27 Australian Law Reform Commission, *Fighting Words: A Review of Seditious Laws in Australia*, ALRC Report No 104 (2006).

28 Ibid 67.

29 The period during which the authorities are entitled to detain a person without bringing him or her before a court.

in relation to a terrorism offence. By way of contrast, the period for non-terrorism offences is only 12 hours. In the case of a terrorism offence, the authorities may apply to a magistrate for up to seven days 'dead time' if they need to suspend or delay questioning a suspect, as might occur, for example while making overseas inquiries.<sup>30</sup>

27 Part III div III of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*') allows the Director-General of ASIO to apply to the Attorney-General for what are known as questioning and detention warrants. A person may be questioned in blocks of up to eight hours each to a maximum of 24 hours where this would 'substantially assist the collection of intelligence that is important in relation to a terrorism offence'.<sup>31</sup> In addition, a person may be detained for up to a week for questioning where there are reasonable grounds to believe that he or she will alert another person involved in a terrorism offence, not appear before ASIO for questioning, or destroy a record or thing that may be requested under the warrant.<sup>32</sup> It is an offence to refuse to answer ASIO's questions, or to give false or misleading information.<sup>33</sup> The privilege against self-incrimination is not available in relation to such questioning.<sup>34</sup>

28 I spoke briefly, earlier, of the regime of control orders introduced after 9/11 as a prophylactic measure designed to prevent terrorist acts. Division 104 of the *Criminal Code* enables individuals not suspected of any criminal offence to be subjected to a wide range of restrictions, potentially amounting to house arrest, if these are 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act'.

---

<sup>30</sup> *Crimes Act 1914* (Cth) ss 23DB-23DF (terrorism offences). Cf ss 23C-23DA (non-terrorism offences).

<sup>31</sup> *ASIO Act* ss 34D-34G, 34R-34S.

<sup>32</sup> *Ibid* s 34F(4)(d).

<sup>33</sup> *Ibid* s 34L.

<sup>34</sup> *Ibid* s 34L(8).



29           In addition to control orders, Division 105 creates a ‘preventative detention order’ regime in which individuals may be taken into custody and detained for a maximum period of 48 hours. Such an order may be made where reasonably necessary to prevent an ‘imminent’ terrorist act from occurring, or to preserve evidence relating to a recent terrorist act. An extended period of detention may then be possible under state law to a maximum of 14 days.

30           In Australia, control orders are almost a dead letter. So far as I am aware, there have only ever been two such orders made. As for preventative detention, the fact is that no order of that kind has yet been made.

31           In *Thomas v Mowbray*,<sup>35</sup> the High Court upheld the constitutional validity of the control order regime. For obvious reasons, there has never yet been a challenge to preventative detention. The constitutional issues, arising out of Ch III of the *Australian Constitution* and the doctrine of separation of powers, are interesting and important. However, for the purposes of this paper, they need not be further explored.<sup>36</sup>

32           In a detailed and scholarly paper written recently by Professor George Williams, it was noted that, as at 2011, thirty-seven men had been charged under Australia’s anti-terrorist laws.<sup>37</sup> Twenty-five of these men had been convicted. Some had been sentenced to lengthy terms of imprisonment.<sup>38</sup> In addition to those twenty-five men who had been convicted at the time Professor Williams wrote his paper, a retrial was pending for one Belal Khazaal whose conviction on terrorism

---

<sup>35</sup> (2007) 233 CLR 307.

<sup>36</sup> See Mark Weinberg, ‘Australia’s Anti-Terrorism Legislation – Is there a *Boilermakers Spanner* in the Works’ (2007) *Federal Journal of Judicial Scholarship* 1. See also Williams, above n 2, 1157.

<sup>37</sup> Williams, above n 2, 1175.

<sup>38</sup> The former Commonwealth Attorney-General, Mr Robert McClelland, in a speech delivered at the United States Studies Centre, The University of Sydney on 7 June 2011 counted 38 individuals as having been ‘prosecuted’ under Australian law. The 38<sup>th</sup> person in that count was David Hicks who was subject to a control order. Such orders are civil in nature, and do not constitute a prosecution for a criminal offence.

charges had been overturned by the New South Wales Court of Criminal Appeal.<sup>39</sup> However, in August of this year, the High Court reversed that decision and restored Mr Khazaal's conviction.<sup>40</sup>

33           What emerges from the cases outlined in schedule A is that none of the terrorism charges that have been laid have involved terrorist attacks that actually took place. Instead, they all related to what might be described as preparatory conduct.

34           This takes me to the nature and scope of the anti-terrorism provisions contained in the *Criminal Code*.

35           In *Lodhi v The Queen*, Spigelman CJ, speaking as a member of the New South Wales Court of Criminal Appeal, had this to say:

[T]he provisions creating the offence are directed to preparatory acts and the seriousness with which Parliament regards such acts is manifest in the maximum penalty. By the extended range of conduct which is subject to criminal sanction, going well beyond conduct hitherto generally regarded as criminal, and by the maximum penalties provided, the Parliament has indicated that, in contemporary circumstances, the threat of terrorist activity, requires condign punishment.<sup>41</sup>

36           Similar views were expressed by Whealy J when, as the trial judge sentencing the offenders in *R v Elomar*<sup>42</sup> (which is discussed in some detail in schedule A) he said:

The broad purpose of the creation of offences of the kind involved in the present sentencing exercises is to prevent the emergence of circumstances which may render more likely the carrying out of a serious terrorist act. ... The legislation is designed to bite early, long before the preparatory acts mature into circumstances of deadly or dangerous consequence for the community.<sup>43</sup>

---

<sup>39</sup>       *Khazaal v The Queen* [2011] NSWCCA 129.

<sup>40</sup>       *R v Khazaal* (2012) 289 ALR 586.

<sup>41</sup>       (2007) 179 A Crim R 470, 489.

<sup>42</sup>       (2010) 264 ALR 759.

<sup>43</sup>       *Ibid* 779.

37 Professor Williams has commented, in relation to the anti-terrorism provisions of the *Criminal Code*:

It is this kind of predictive approach, exemplified in the doubly pre-emptive offence of 'conspiracy to do an act in preparation for a terrorist act', which gives Australian anti-terror laws an extraordinary reach.<sup>44</sup>

38 Of course, the *Criminal Code* creates not merely substantive offences involving terrorist acts, but also inchoate offences that apply across the board to all federal crimes. Thus, there are the usual provisions that criminalise attempt, incitement and conspiracy, and apply in cases where a substantive offence is contemplated but not actually committed.

39 However, the anti-terrorism provisions go further. As Professor Williams observes, the combination of these inchoate offences with the terrorism offences that are themselves, in some respects, 'inchoate' means that the criminal law can be invoked at a point well before it would ordinarily be applied. This explains how, as in at least one case, the accused were charged with conspiracy to plan the commission of a terrorist act. The idea that there can be a 'conspiracy to plan' might strike some as problematic.

40 The *Criminal Code* is itself a difficult law to construe. It distinguishes between 'physical elements'<sup>45</sup> and 'fault elements'.<sup>46</sup> Of course, that delineation is entirely orthodox. The difficulties arise because, under the *Code*, different fault elements often apply to different components of an offence. Thus, it may be that one element of the offence requires proof of actual knowledge, while another element of the same offence can be satisfied merely by proof of recklessness.<sup>47</sup>

---

<sup>44</sup> Williams, above n 2, 1155.

<sup>45</sup> Actus reus: s 4.1.

<sup>46</sup> Mens rea: s 5.1.

<sup>47</sup> As that term is defined in s 5.4.

41           The conceptual problems associated with this style of drafting, coupled with  
the practical difficulties of instructing a jury as to the relevant elements of the  
offence, should not be underestimated.

42           For example, consider some of the problems associated with determining  
whether a group of individuals, who discuss among themselves the commission of  
some form of terrorist act, constitute a ‘terrorist organisation’.

43           In *Benbrika v The Queen*,<sup>48</sup> a group of men were convicted of being members of  
a terrorist organisation which was fostering or preparing the commission of a  
terrorist act. It was argued on their behalf on appeal that the group could not  
properly be described as a ‘terrorist organisation’. In rejecting that argument, the  
Victorian Court of Appeal set out indicia for determining when an ‘organisation’  
comes into existence. Drawing on concepts articulated in civil cases,<sup>49</sup> the Court  
distinguished an ‘organisation’ from a mere ‘amorphous or fluctuating group of  
individuals’.<sup>50</sup> The identification of the precise point at which a group with shared  
aims and objectives becomes an ‘organisation’ was said to be one of fact and degree,  
to be considered by reference to certain criteria (none of which being individually  
determinative). Those criteria include:

- whether there exists any arrangement for the recruitment of members  
and the appointment of officers;
- whether the group has the ability to include and exclude members;
- whether the association will continue in existence independently of any  
change in its composition;
- whether there was an identifiable moment in time at which certain  
persons banded together to create the association;

---

<sup>48</sup> (2010) 29 VR 593 (*Benbrika (No 1)*).

<sup>49</sup> See, eg, *Kibby v Registrar of Titles* [1999] 1 VR 861.

<sup>50</sup> *Benbrika No 1* (2010) 29 VR 593, 595.

- whether there is an internal structure which enables the group to consider and make decisions as a collective; and
- whether there are clear criteria for the identification of the group's members.<sup>51</sup>

44 Another example of the difficulties associated with the legislation, also taken from *Benbrika (No 1)*, is the meaning to be accorded to the term 'fostering' a terrorist act. It was argued on behalf of Benbrika and the members of his group that they could not be said to have 'fostered' a terrorist act unless they contemplated committing a specific terrorist act, rather than committing a terrorist act in abstract terms. Therefore, it was submitted, the trial judge had erred in directing the jury that 'fostering' was synonymous with 'encouraging'.

45 The Court of Appeal rejected that submission. It followed the approach in *Ul-Haque v The Queen*, where McClellan CJ at CL observed:

An organisation will be a terrorist organisation if it engages in conduct which may result in a completed terrorist act even if the act has not been completed or the planning has progressed no further than a generalised aim without descending to a specific act<sup>52</sup>

46 Further problems of definition arose in *R v Khazaal*.<sup>53</sup> Khazaal had been convicted of making a document connected with assistance in a terrorist act. The document in question was entitled *Provisions on the Rules of Jihad: Short Judicial Rulings and Organizational Instructions for Fighters and Mujahideen Against Infidels*. At trial, the judge had directed the jury that the phrase 'connected with' should be understood according to its plain English meaning. The High Court found that there was no error in that direction, and rejected an argument that the ordinary meaning of the phrase was impermissibly broad in the context of this particular offence.

47 In *Benbrika (No 1)*, however, the Court of Appeal came to a different

---

<sup>51</sup> Ibid 615-7.

<sup>52</sup> [2006] NSWCCA 241, [39].

<sup>53</sup> (2012) 289 ALR 586 ('*Khazaal*').

conclusion regarding the separate offence of possessing a 'thing' connected with preparation for a terrorist act. In that case, the trial judge had directed the jury that the phrase 'connected with' was 'a very wide phrase' which did 'not mean connected with in any particular way'. His Honour directed the jury that there merely had to be 'some connection between the thing and a terrorist act'.<sup>54</sup>

48           The Court of Appeal held that that exposition of the law left open 'the real possibility that the jury reasoned to guilt without directing any attention to whether the requisite connection had been established'.<sup>55</sup> The Court referred to the example given in *R v Zafar*<sup>56</sup> of a person in possession of a cheque book, intending to use it to make payment for air tickets to transport others for the purpose of preparatory activity (of which he is aware) for an act of terrorism. The Court in *Benbrika (No 1)* went on to say that a connection of that kind was 'peripheral', and too far removed from the ultimate commission of a terrorist act. The requisite connection, as a matter of ordinary statutory construction, ought to be one that was 'real and substantial'.<sup>57</sup>

49           The High Court in *Khazaal* distinguished *Benbrika No 1* in part upon the basis that it dealt with a different provision of the *Criminal Code*. Further, the document possessed by Khazaal was, by its very nature, in purporting to justify terrorist acts and containing instructions as to how to carry them out, 'connected with' preparation for a terrorist act.<sup>58</sup> By contrast, the possession of the relevant items in *Benbrika No 1*, consisting of various videos and manuals, appalling as their contents may have been, might conceivably have been 'innocuous'.

### *Criticisms*

50           The terrorism offences created by the *Criminal Code* can, of course, be

---

<sup>54</sup> (2010) 29 VR 593, 665.

<sup>55</sup> Ibid.

<sup>56</sup> [2008] QB 810.

<sup>57</sup> (2010) 29 VR 593, 662.

<sup>58</sup> (2012) 289 ALR 586, 597 (French CJ).

committed even if a terrorist act does not in fact occur. Moreover, these offences can be committed even if the particular activity alleged cannot be linked to the commission of a specific terrorist act.<sup>59</sup>

51           The indeterminate nature and sheer breadth of some of these offences has led to criticism from certain quarters. To anyone with a concern for human rights, it will be troubling that the government of the day can, in effect, ban a particular organisation. It will also be troubling that individuals can commit serious criminal offences merely by being members of such an organisation, and, in effect, associating with each other.

52           The greatly expanded powers of search and seizure conferred upon police in the course of investigating such offences also raise legitimate concerns. The fact that a purely intelligence gathering agency, such as ASIO, is now empowered, for the first time in its history, to detain, and compulsorily interrogate individuals not themselves suspected of involvement in any terrorist activity surely represents a major inroad into civil rights.

53           That is not to say that it was wrong to enact a suite of anti-terrorism laws after 9/11. No government could possibly be expected to respond to the terrorist threat that plainly exists today by relying solely upon traditional criminal law techniques.

54           Professor Williams expresses the matter well. He writes:

The criminal law in place in 2001 was not sufficient for the task of preventing terrorism. It failed to adequately deal with matters such as those relating to terrorist organisations, and was not adequately directed to prevention. It is not appropriate in the context of terrorism, as is often the case for other types of crime, to primarily apply the force of law once an act has been committed so as to bring the perpetrator to justice. Instead, given the potential for catastrophic damage and loss of life, intervention to prevent terrorism is justified at an earlier point in the chain of events that might lead to an attack.<sup>60</sup>

---

<sup>59</sup> See ss 101.2(3), 101.4(3), 101.5(3), 101.6(2); *Lodhi v The Queen* (2006) 199 FLR 303.

<sup>60</sup> Williams, above n 2, 1162.

55           The question is not whether we need specific anti-terrorism laws. Clearly we do. It is rather whether the laws which have been enacted to meet this phenomenon really go too far. There is a reasonable case to be made for the proposition that some preparatory acts are so far removed from the actual commission of a terrorist act that, without more, they should not give rise to criminal liability.<sup>61</sup>

56           In this area, as in many others, the task is one of achieving the correct balance. If we incarcerated everyone who might conceivably be thought to pose a risk of violence to others, society might well be rendered safer. However, this would be at the cost of destroying the central values of a liberal democratic society. There are some risks that we simply have to accept, if we are to maintain those values. Of course, there can be no justification for denying anyone charged with a terrorism offence the right to a fair trial, or any of the other rights afforded to anyone charged with any serious criminal offence.<sup>62</sup>

57           It may come as a surprise to this audience to learn that, almost alone among Western liberal democracies, Australia has no Bill of Rights or equivalent. While human rights standards can be found in various international treaties to which Australia is party (including the *International Covenant on Civil and Political Rights*), these are not binding in Australian domestic law unless specifically incorporated by legislation.<sup>63</sup> As a result, there are few, if any, limits upon the power of the government of the day to enact such laws as it thinks fit. In the case of anti-terrorism laws, any doubts as to the Commonwealth's ability to pass such legislation have been resolved by the States having referred such powers.<sup>64</sup>

---

<sup>61</sup> Professor Williams comments that it is difficult to justify the sentences of between 23 and 28 years' imprisonment imposed upon the accused in the *Elomar* trial given that they had not reached a firm conclusion as to the nature of the attack they intended to carry out, and did not necessarily intend to kill anyone. His opinion would not necessarily command general acceptance.

<sup>62</sup> Justice A G Whealy, 'Difficulty in Obtaining a Fair Trial in Terrorism Cases' (2007) 81 *Australian Law Journal* 743; *R v Benbrika (Ruling no 20)* [2008] VSC 80.

<sup>63</sup> *Kioa v West* (1985) 159 CLR 550, 570.

<sup>64</sup> See, eg, *Terrorism (Commonwealth Powers) Act 2003* (Vic).



58           The judiciary can, and must, play a central role in ensuring that human rights, and, in particular, the right to a fair trial, are adequately protected. Those charged with terrorism offences face the very real risk of prejudice.

59           The courts are able, within significant limits, to ameliorate the very worst features of penal statutes that are potentially unduly oppressive. It is a maxim of interpretation that such statutes are construed so as to protect fundamental rights so far as possible. The High Court has stated that:

[t]he courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language.<sup>65</sup>

60           Nonetheless, in the absence of constitutional safeguards, or other legislative protection, there are few constraints upon the actions that the executive may see as desirable in this area.

61           Turning once again to the comments of Professor Williams, he observes:

The result in Australia is a body of anti-terror laws that undermines democratic freedoms to a greater extent than the laws of other comparable nations, including nations facing a more severe terrorist threat. For example, it would be unthinkable, if not constitutionally impossible, in nations such as the United States and Canada, to restrict freedom of speech in the manner achieved by Australia's 2005 sedition laws. It would also not be possible to confer a power upon a secret intelligence agency that could be used to detain and question non-suspect citizens.

A further consequence is that Australia has copied anti-terror laws from other nations, especially the United Kingdom, without also copying the corresponding safeguards. A good example is the United Kingdom's control order regime, which was adapted to Australia in 2005. The United Kingdom scheme is subject to the protections of the *Human Rights Act 1998* (UK) ... Indeed, a number of that nation's court decisions have, on the basis of that Act, imposed significant constraints upon the use of control orders. No such decisions or constraints are possible in Australia in the absence of the safeguards provided by a *Human Rights Act* or other like law.<sup>66</sup>

---

<sup>65</sup> *Coco v The Queen* (1994) 179 CLR 427, 437.

<sup>66</sup> Williams, above n 2, 1172-3.

## *Conclusion*

62            Terrorism is real. It cannot be ignored. It will not simply go away. Any  
sensible response requires anti-terrorist laws that are broad and far-reaching. This  
creates its own dangers. Such laws can erode the very democratic freedoms that  
they are designed to protect.

63            Australia's response to terrorism has, in many ways, followed that adopted in  
other Western nations. Regrettably, some of the laws passed immediately after 9/11  
were hastily conceived, and poorly drafted. Others arguably go too far.

64            Nonetheless, and on balance, and with one exception,<sup>67</sup> these laws have not,  
to date, been abused. Those who have been charged with terrorism offences, and  
convicted, have, on the whole, been treated fairly.

65            That is no justification for complacency. The extraordinary breadth of some of  
the anti-terrorism provisions contained in the *Criminal Code* creates considerable  
potential for abuse. It is the task of the legal profession, as well as the responsibility  
of the courts, to ensure that this potential does not come to fruition.

---

<sup>67</sup> See the discussion of Dr Haneef's case in schedule A.