Colouring in the Grey Zone

The Legal Capacity of the Australian Defence Force to Respond Domestically to Interference Operations

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ABSTRACT

The ability to, *en masse,* micro-target individuals based on their explicitly stated and implicitly assessed preferences is a capability unique in history. It has created a new form of statecraft that this thesis calls interference operations (IOs), which have undergone a paradigm shift from the high cost, low impact active measures of the Cold War. Modern IOs are increasingly preferred by States due to the legal grey zone surrounding them. Grey zone operations is a term increasingly used within Australian policy documents and academia to describe activities that deliberately take place below identified and articulated thresholds of international and domestic law. It is a term that is relative to both the operation being conducted, and the legal frameworks involved.

With respect to IOs, the grey zone is compounded by the fact that they have only recently begun to be explored by Australian policy-makers, with a strategic framework being centred on illuminating false information and allowing the Australian public to seek the truth themselves. This strategic framework, however, is founded upon the questionable assumption that in the 'marketplace of ideas' individuals will act rationally and actively seek the truth. This doctoral project advocates an alternate strategic framework: deterrence. It is a framework that aims to instil costs on those who would conduct IOs. These costs can be achieved through denial and punishment, the earlier of which this thesis focuses upon. Underpinning effective deterrence is legal credibility.

This thesis seeks to understand the legality of counter-IO activities by the one branch of Government whose task it is to deter: the Australian Defence Force (ADF). In doing so, this thesis focuses upon constitutional executive power as a lawful authority for ADF operations. Within constitutional executive power is found the oldest creature of the common law – the royal prerogative. Accordingly, this thesis examines the domestic constitutional legal context that empowers and restrains the ADF in domestically-focused operations with a specific emphasis on the royal prerogative.

The legal history of Anglo-Saxon military intervention provides for more restrictions internally, rather than externally. This is reflected within the Australian *Constitution* in the oft-neglected provision relating to 'domestic violence' – an undefined and archaic term that sets a high threshold on domestic intervention. This constitutional provision is operationalised by Part IIIAAA of the *Defence Act 1903* (Cth). This thesis therefore engages novelly with whether

constitutional executive power may provide a lawful authority for the ADF to respond to instances *below* domestic violence, and whether any legislation has abridged residual non-statutory power.

Ultimately, this thesis concludes by identifying gaps in the domestic legal framework (statutory and non-statutory) and provides suggested legislative amendments. Canvassing alternate models for legislative reform, the thesis grapples with whether non-statutory executive power should ultimately be abridged, or whether its flexibility should be retained. Finding that dynamic situations require dynamic legal authority, this thesis provides a model of legislative reform that allows the difficulties of federalism to be surmounted, in an attempt to colour in the grey zone.

DECLARATION

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name, in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name, for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of this degree.

I give permission for the digital version of my thesis to be made available on the web, via the University's digital research repository, the Library Search and also through web search engines, unless permission has been granted by the University to restrict access for a period of time.

I acknowledge that this thesis has been professionally edited.

I acknowledge the support I have received for my research through the provision of an Australian Government Research Training Program Scholarship.

Signature: ……………….

Dated: 28 January 2023

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My next thanks are to my two supervisors – Professor Dale Stephens CSM FAAL and Professor Matthew Stubbs – who have just as fully supported and catalysed my academic career. I am lucky that they took a chance on me. A further thanks must be given to Professor Cameron Moore who has always been in the background with this doctorate, willing to spend days talking about all the possibilities of constitutional executive power.

The Australian Army Legal Corps has given me the opportunity to embark on this doctoral journey concurrent with some wonderful postings – including both as a Staff Officer within the Directorate of Operations and International Law and as Deputy Command Legal Officer at Headquarters Maritime Border Command. These postings allowed me to see the legal frameworks of domestic operations on-shore and off-shore daily. Yet perhaps more importantly they highlighted the political restraints (both as a matter of policy and convention) put on the almost plenary power of the royal prerogative. I am grateful for the opportunities presented.

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PUBLICATIONS THROUGHOUT THESIS

The following material was published from research for this thesis, and referenced herein:

<u>Book</u>

Keeping the Peace of the Realm (LexisNexis, 2021)

<u>Edited Books</u>

The Laws of Yesterday's Wars – Volume 2 (Brill Nijhoff, 2022)

The Laws of Yesterday's Wars (Brill Nijhoff, 2021)

<u>Book Chapter</u>

White, Samuel, 'Force is in the Eye of the Beholder: An Australian Case Study' in Cheryl Patton and Elfethegra Egel (eds), *Ethical Implications of COVID-19 Management: Evaluating the Aftershock* (Ethics International Press, 2022) 222

<u>Journal Articles</u>

Samuel White and Morgan Thomas, 'Closing the (National Security) Gap' (2023) *Journal of Information Warfare* (forthcoming)

Samuel White, 'Taking the King's Hard Bargain' (2022) 96 *Australian Law Journal* 666

Samuel White & Cameron Moore, 'Calling out the ADF into the Grey Zone' (2022) 43(1) *Adelaide Law Review* 479

Samuel White, 'Colouring in the Grey Zone: Lawfare as a Lever of National Power' (2021) 21(2) *Journal of Military and Strategic Studies* 77

Samuel White, 'A Shield for the Tip of the Spear' (2021) 49(2) *Federal Law Review* 210

Samuel White, 'Keeping the Peace of the iRealm' (2021) 42(1) *Adelaide Law Review* 101

Don't believe everything you read on the Internet.

President Abraham Lincoln, 1945

PART I: INTRODUCTION

CHAPTER 1: INTRODUCTION

I PURPOSE AND SCOPE

Since the end of the Second World War, Australians have enjoyed the relative luxury of a distinction between domestic society and international competition. This luxury has in turn focused national security, emphasising the difference between combatant and non-combatant; peace and war; the external and the internal.[1]

However, Australia is currently witnessing a significant realignment of international geopolitics. As reflected in the *2020 Defence Strategic Update* (DSU), this realignment has had, and continues to have, profound effects on the Indo-Pacific region.[2] At the same time, a range of disruptive technologies are increasingly enabling states and non-state actors to aggressively use grey zone activities (those activities that 'coerce, confuse or harass without provoking conventional military responses').[3] Foremost amongst these grey zone activities used against Australia is the aggressive use of data and personalised content to manipulate public opinion – interference operations.[4] It is a threat of manifest importance, for if successful:

> The vast majority of the population of the victim country does not even suspect that it is being subjected to information-psychological influence. This leads in turn to a paradox: the aggressor achieves his military and political aims with the active support of the population of the country that is being subjected to influence. Control over strategically important state resources is handed over voluntarily, since this is seen not as the result of aggression, but as a progressive movement toward democracy and freedom.[5]

This thesis looks to address the viability of relying upon the oldest creature of the common law — the royal prerogative — to respond to the most modern threat facing the Australian Government. It does so to understand the nature and ambit of one legal framework that could

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[1] Katherine Mansted, 'Advancing People Power to Counter Foreign Interference and Coercion' (National Security College Policy Option Paper, No 13, December 2019) 2.
[2] Department of Defence, *2020 Defence Strategic Update* (Report, 2020) 25 ('*DSU*').
[3] Ibid 6.
[4] Duncan Lewis, 'Address to the Lowy Institute' (Speech, Lowy Institute, 4 September 2019). The target population of Australia has never been identified, but one likely target is Indigenous Australians and supporters of closing the gap — see Samuel White and Morgan Thomas, 'Closing the (National Security) Gap' (2023) *Journal of Information Warfare* (forthcoming). Foreign interference directed towards Indigenous populations has been feared by the Australian Government since at least the 1940s: see National Archives of Australia (NAA) 138/1952.
[5] Yu Kuleshov, BB Zhutdiev and DA Fedorov, 'Информационно-психологическое противоборство в современныхусловиях: теория и практика' [Information-Psychological Warfare in Modern Conditions] (2014) 1 *Vestnik Akademii Voyennykh Nauk* 104, 108.

enable the Australian Government to respond to grey zone operations (thus, colouring in the grey zone) and to make law reform recommendations to support Australia in deterring interference operations. Deterrence is a key concept that underpins this thesis. Grey zone activities are particularly low cost (politically, financially and legally) and are favoured accordingly by adversaries. Any response by Australia must therefore seek to increase costs either through denying gains, or by punishing aggressors. Underpinning deterrence, however, is legal credibility. The ultimate question this thesis seeks to answer therefore is what legal authorities can the Australian Government rely upon to deter grey zone activities, utilising the singular lever of national power historically utilised for defence: the Australian Defence Force (ADF)?

The clear answer to this, in a domestic setting, is section 119 of the *Constitution* which reads:

> The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

This provision is complex both in its mandatory language and its undefined concept of domestic violence. It is unclear how the provision interrelates with section 61 of the *Australian Constitution* which 'describes, but does not define'[6] executive power. That provision reads:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of the Constitution, and of the laws of the Commonwealth.'

The High Court has stated that the executive power in s 61 of the *Constitution* 'enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution'.[7] How this works with s 119 (being under the Constitution) is ill-defined. Executive power is 'a general power to carry out all the other functions of government'.[8] It can be added, however, that executive power is not a singular power but a collection of powers derived from multiple sources.[9] These can be categorised as statutory and non-statutory

[6] *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 440 (Isaacs J).
[7] *Williams v Commonwealth* (2012) 248 CLR 156, [22], [24], [30] (French CJ) ('*Williams [No 1]*').
[8] Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (ANU Press, 2017) 7.
[9] See Robert French, 'The Executive Power' (Inaugural George Winterton Lecture, Sydney Law School, University of Sydney, 18 February 2010) 5.

powers. Importantly for this thesis, the High Court has recognised that non-statutory executive power under s 61 of the *Constitution* encompasses at least:

a. powers defined by the capacities of the Commonwealth common to legal persons[10]

b. prerogative powers, privileges and immunities of the Crown which are properly attributable to the Commonwealth[11]

c. inherent authority derived from the character and status of the Commonwealth as a national government.[12]

Historically, these three sources of power have been discussed as separate concepts. However, in *Attorney-General (Cth) v Ogawa*, the Full Court of the Federal Court of Australia held that, in lieu of exercising prerogative powers, 'it is preferably described as the exercise of Constitutional executive power'.[13] Such a holistic approach to constitutional executive power is useful from a practitioner's perspective. Yet from an academic perspective, there is merit in retaining a three-limbed definition to help delineate in discussions and analysis between an exercise of royal prerogative power and an exercise of nationhood power.[14] This thesis specifically looks at the royal prerogative, rather than nationhood power. This is because the High Court has indicated that the Commonwealth executive government only has power to interfere with the legal rights of other persons if it is exercising its *prerogative* powers, absent statutory authority.[15] It is necessary to therefore discuss what this term means.

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[10] *Williams [No 1]* (n 7) [22] (French CJ). These powers do not extend to a general power to contract (eg for the purpose of establishing and executing grant programs), but do extend to carrying out those activities necessary or convenient for the administration of Commonwealth departments and agencies (eg activities funded by what used to be termed 'running costs'). See further at [45].
[11] *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J); *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369; *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ); *Cadia Holdings Pty Ltd v NSW* (2010) 242 CLR 195, 226; *Williams [No 1]* (n 7) [22] (French CJ), [123] (Gummow and Bell JJ).
[12] *Williams [No 1]* (n 7) [22] (French CJ).
[13] *Attorney-General (Cth) v Ogawa* (2020) 384 ALR 474, [64] (Allsop CJ, Flick and Griffiths JJ).
[14] See Samuel White, *Keeping the Peace of the Realm* (LexisNexis, 2021) (*Keeping the Peace*) 105–20; Samuel White and Cameron Moore, 'Calling Out the Australian Defence Force into the Grey Zone' (2022) 43(1) *Adelaide Law Review* 479 – 505 for wider discussion.
[15] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 135 ('*M68*').

A *What is the Royal Prerogative?*

As a historical entity, 'the prerogative can only be fully understood in its more recent manifestations through taking a long-term perspective'.[16] Necessarily, this requires a discussion of its etymology.[17]

The term comes from Latin, describing a collection of individuals who voted first in matters of state.[18] The English derivate, *prerogative*, took on the meaning of a special right or privilege, possessed by an individual or group. It was equally tied to the feudal concept of *majesty*, linked to those privilege holders.[19] This amalgam can be found in the period of history after the fall of the Western Roman Empire led to its division amongst successive Germanic tribal kingdoms. These kingdoms in turn influenced the legal evolution of prerogative power, combined with customary Germanic law. Feudal law, as this melting pot of legal systems came to be known, took precedence from the 8th century onwards, with 'its stress upon personal relations, landed property and lack of written, formal, legislation [which] is related to [Germanic] law rather than Roman law'.[20] The feudal melting pot of Roman and Germanic law is an important, and oft-understudied, part of executive power. It is an important theme that will be consistently referred to throughout this work.

Understandably, the bundle of original prerogative rights in Anglo-Saxon history was related to landholding and from this flows many prerogative powers concerned with land (both its ownership, and its protection) such as the prerogatives of war, peace, annexation and internal security.[21]

In accordance with its linkages to majesty as a concept, the Crown also began to adopt a theological basis, reflecting that the monarch was God's representative on Earth and without peer.[22] As a hierarchy, those underneath the monarch were required to provide service and

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[16] Andrew Blick, 'Emergency Powers and the Withering of the Royal Prerogative' (2014) 18(2) *International Journal of Human Rights* 195, 196.
[17] Noel Cox, *The Royal Prerogative and Constitutional Law: A Search for the Quintessence of Executive Power* (Taylor & Francis Group, 2020) 21. See also Sebastian Payne, 'The Royal Prerogative' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 77.
[18] William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–69) vol 1, 239.
[19] Thomas Poole, 'Judicial Review at the Margins: Law, Power and Prerogative' (2010) 60 *University of Toronto Law Journal* 81, 95–6.
[20] Maurice Keen, *The Laws of War in the Late Middle Ages* (Routledge, 1965) 72.
[21] Samuel White, 'The Late Middle Ages in Northern Europe' in Samuel White (ed), *The Laws of Yesterday's Wars* (Brill, 2021) 101, 108.
[22] Cox (n 17) 25.

absolute fealty. This requirement was derived from the Roman tradition of allegiance. In the Roman Republic, no one could lawfully serve in the military without taking the oath which bound him to be faithful and obedient to his general, saving the fidelity he owed to the Roman senate and people. It was absolute, and unconditional.[23] The destruction of the Republic meant that the same oath was taken to the Emperor as commander-in-chief and living deity, and expanded outside the remit of military personnel and to all inhabitants of the Empire.[24]

As the German concept of a human *konig* (king) merged with that of the Roman *August Imperator* (divine king) so too did the Crown evolve from feudal to theocratic. To this theocratic Crown is linked the notions that the king is absolutely perfect[25] and absolutely immortal,[26] is incapable of doing or thinking wrong and has no folly or weakness,[27] and in the eye of the law is present at one and the same instant in every court of justice in the realm.[28] The issue of the Crown, and its powers, being theocratic or feudal is neither novel nor unique; it occupied the minds of medieval Anglo-Saxon jurists when debating the nature of the Crown. For some, the Crown was theocratic, its wearer anointed by God and not subject to human law;[29] for others, the feudal king was simply human and accountable.[30] The current tension between extra-constitutional powers derives from the friction between theocratic and feudal Crowns.

This tension was solved, however, by the Glorious Revolution of 1688. The change in dynasty (from the House of Stuart to William III) saw a change in the Crown, but William and his wife Mary inherited 'a panoply of legal powers as ample as that borne by their two immediate predecessors'.[31] The subsequent *Bill of Rights* established, beyond doubt, the supremacy of Parliament but was for the most part declaratory. It only abolished two prerogatives — a standing army, and the power to suspend Acts of Parliament. Yet in doing so, it firmly established parliamentary supremacy and is argued to be the date that the powers of the Crown froze.[32] This, of course, had occurred earlier under Lord Coke's decision in the *Case of*

[23] Vegetius, *The Military Institutions of the Romans* (Loeb Classical Library, 1902) 22.
[24] John Allen, *Inquiry into the Rise and Growth of the Royal Prerogative in England* (Longman, Brown, Green and Longmans, 2nd ed, 1859) 134.
[25] Blackstone (n 18) 246.
[26] Ibid 249.
[27] Ibid 246.
[28] Ibid 270.
[29] Walter Ullmann, *Principles of Government and Politics in the Middle Ages* (Routledge, 4th ed, 1978) 121–3.
[30] Ibid. See further FW Maitland, *The Constitutional History of England* (Cambridge University Press, 1908) 181–3, 515–18.
[31] David Keir, *Constitutional History of Modern Britain 1485–1937* (A&C Black, 1938) 269.
[32] *British Broadcasting Corp v Johns* [1965] Ch 32, 79 (Diplock LJ).

Proclamations.[33] The *Bill of Rights*, however, implemented into formal law the political reality of England — the Crown's growing subservience to Parliament.[34] The *Bill of Rights* is therefore an incredibly important moment in legislative history, and provides a conceptual underpinning for the discussion of the royal prerogative within this thesis.

The Glorious Revolution provided that the Crown's powers can only be used in accordance with convention and the principle of responsible government.[35] The king, no longer appointed by God but by Parliament, could now do wrong. This is important, for the English courts have accepted that the maximum scope of the royal prerogative is to be ascertained from this date; for 'it is 350 years and a civil war too late for the Queen's court to broaden the prerogative'.[36] The importance of this is reiterated throughout the following chapters, and any discussion of prerogative powers must necessarily cover historical examples prior to 1688.

Whilst the Glorious Revolution saw the Crown firmly established as always being feudal, the prerogative powers have persisted in a residual fashion, reflecting their theocratic origins. This has led to a divergence in what is meant by the term 'prerogative', best epitomised by the positions advocated by Sir William Blackstone and AV Dicey. A comparative discussion of their definitions has become near-ritualistic, 'performed increasingly self-consciously and semi-ironically'.[37]

Sir William Blackstone was not the first to describe the royal prerogative, but he was the first to attempt to do so comprehensively. Blackstone declared:

> By the word prerogative we usually understand that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of common law, in right of his regal dignity … it can only be applied to those rights and capacities

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[33] *Case of Proclamations* (1611) 12 Co Rep 74.
[34] Article 1 specifically limited the royal prerogative, holding that 'the power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal': *Bill of Rights 1689*, 1 Wm 3 & Mary 2, c 2.
[35] Geoffrey Marshall, *Constitutional Conventions — The Rules and Forms of Political Accountability* (Oxford University Press, 1986).
[36] *British Broadcasting Corporation v Johns* [1965] Ch 32, 79 (Diplock LJ). However, in the *Case of Proclamations* in 1611 (prior to the Glorious Revolution) Coke held that the sovereign could only exercise the prerogatives he had, and not create new ones: see *Case of Proclamations* (1611) 12 Co Rep 74, 77 ER 1352 (KB).
[37] Thomas Poole, 'United Kingdom: The Royal Prerogative' (2010) 8(1) *International Journal of Constitutional Law* 146, 147.

> which the King enjoys alone, in contradiction to others, and not to those which he enjoys in common with any of his subjects.[38]

Such a position reflects the theocratic nature of the Crown, a power that is exercised by the monarch and the monarch alone. AV Dicey rejected this, and accused Blackstone of 'applying old and inapplicable terms to new institutions, and especially of ascribing in words to a modern and constitutional King the whole, and perhaps more than the whole, of the powers actually possessed and exercised by William the Conqueror'.[39] Dicey proposed alternatively that:

> The prerogative appears to be historically and as a matter of fact nothing else than the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the crown. The prerogative is the name of the remaining portion of the Crown's original authority … Every act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of the prerogative.[40]

Dicey's popularity in the United Kingdom,[41] is perhaps undermined by his careless articulation of the power.[42] Dicey fails to acknowledge the concept of the duality of the Crown. In comparison, Blackstone's restrained approach is 'consistent with Australia's legal independence from Britain, the constraints of federalism and the paramountcy of the Commonwealth Parliament'.[43] It will accordingly be adopted here.

There are, of course, alternative ways to categorise the royal prerogative — via the basis of its source; the effect the prerogative power has; or along a Montesquieuan taxonomy.[44] Within Australia, HV Evatt expanded on his seminal doctoral work whilst sitting on the bench, where

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[38] Blackstone (n 18) 232, cited with approval in *Davis v Commonwealth* (1988) 166 CLR 79, 108 (Brennan J); *Plaintiff M68* (n 15) 133 (Gageler J).
[39] AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Palgrave Macmillan, 10th ed, 1959) 8.
[40] Ibid 424–5.
[41] *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, 526 (Lord Dunedin); *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 99 (Lord Reid); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398 (Lord Fraser).
[42] Colin Munro, *Studies in Constitutional Law* (Butterworth, 1987) 160.
[43] *Williams [No 1]* (n 7) 344 [488] (Crennan J). See further *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278, 320 (Evatt J); *Davis v Commonwealth* (1988) 166 CLR 79, 108 (Brennan J); *Plaintiff M68* (n 15) 133.
[44] Cox (n 17) 47–8. Another line of academic thinking divides the prerogative power into two classes — one that is Germanic, and the other Roman. Chief Baron Fleming in *Bates' Case* divided prerogative power into 'the ordinary' and 'the absolute': (1606) 2 St Tr 371, 389. Blackstone (n 18) book 1, ch 4, 239–40 divided them into 'incidental' and 'direct'. Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (Garland, 1978) divided the powers into what he viewed as local, and others which were fundamental rights on which authority rested and were necessary to maintain it. More recently Sir William Wade divided them into 'simplistic' and 'eccentric' in William Wade, 'Procedure and Prerogative in Public Law' (1985) 101 *Law Quarterly Review* 180.

His Honour suggested the prerogative can fall within three categories.[45] The first category is what was titled ‘executive prerogatives’, which allowed the Commonwealth to perform *acts* such as declaring war, coining money, acquiring territory and granting pardons.[46] These prerogatives can also be linked to Germanic traditions. The second form of prerogatives that Evatt J titled were ‘common law prerogatives’, being those prerogative powers linked to the Crown as a person — such as legal immunities and exceptions.[47] The third class of prerogatives were titled ‘priority rights’, which included rights to royal metals, and land.[48] This division of the royal prerogative was adopted with approval in the United Kingdom,[49] and has advantages in particular with denoting executive prerogatives which are applicable in federal, or unitary, systems.

It may be shocking just how wide this remaining residual power really is. The royal prerogative is the authority to grant honours and awards,[50] as well as mercy.[51] It provides the authority to move military forces;[52] as well as a right to ownership of the royal metals.[53] Under the royal prerogative, the Crown could dismiss all the officers from the Governor-General down; or could appoint any individual as an officer.[54] The prerogative of war[55] allows for operations to be declared unilaterally in order to conquer land, and is ‘the only source of authority to kill or capture an enemy in war’.[56] Equally, under the prerogative of peace any or all part of Australian territory could be sacrificed to another state or non-state group in order to cease hostilities.[57] The royal prerogative is a wide, but misunderstood, power that is central to domestic operations and wider operations of the Executive.[58]

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[45] For the doctoral work, see Herbert Vere Evatt, ‘The Royal Prerogative’ (LLD thesis, University of Sydney, 1924). The thesis has been published as Herbert Vere Evatt, *The Royal Prerogative* (Law Book, 1987). For the case law, see *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278, 320 (*EO Farley*).
[46] *EO Farley* 278, 320–1.
[47] Ibid 322.
[48] Ibid.
[49] House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (Report, 2004) 5–6.
[50] Noel Cox, ‘The Royal Prerogative in the Realms’ (2007) 33(4) *Commonwealth Law Bulletin* 611.
[51] *Attorney-General (Cth) v Ogawa* (2020) 384 ALR 474 (Allsop CJ, Flick and Griffiths JJ).
[52] *China Navigation Co Ltd v Attorney-General* [1932] 2 KB 197, 207 (Scrutton LJ).
[53] *Cadia* (n 11) 210–11.
[54] Samuel White, ‘Taking the King’s Hard Bargain’ (2022) 96 *Australian Law Journal* 666. This particularly wide prerogative has been abridged by regulations, in particular the *Defence (Personnel) Regulations 2002,* and *Defence Regulation 2016.* See further *Martincevic v Commonwealth* (2007) FCA 453 [98] per Spencer J.
[55] *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344.
[56] Cameron Moore, ‘Military Law and Executive Power’ in Robin Creyke, Dale Stephens and Peter Sutherland (ed), *Military Law in Australia* (Federation Press, 2019) 69, 98.
[57] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
[58] KM Hayne, ‘Non-statutory Executive Power’ (2017) 28(4) *Public Law Review* 333, 337.

Reliance upon non-statutory executive power to maintain security is inherently more complex than reliance on statutory power, but it is a necessary exercise given non-statutory executive power has in fact been the major source of constitutional authority relied upon to maintain Australia's security since Federation. French CJ noted that executive power is both nurtured and bound in anxiety — 'anxiety which *fuels* expansive approaches to its content and anxiety *about* expansive approaches to its content'.[59] This anxiety is even more pronounced when it comes to non-statutory executive power — some consider prerogative power 'to be an obscure relic of an undemocratic past, and a potential threat to civil liberties'.[60] Yet it is a power that has survived almost four centuries beyond the Glorious Revolution's realignment of constitutional power, and underpins the separation of powers. This thesis must explore the historical, theoretical and comparative contexts of military intervention in domestic affairs, as well as questions about whether or not it would be better to place the ADF's operations on an entirely statutory footing.

Section II of this introduction outlines the threat Australia is currently facing through a discussion of the nature of the threat and the terminology used to define the threat, as well as key concepts such as disinformation and misinformation. This is important, for the language used in defining a problem (so called generative metaphors) dictates the legal and policy responses that are adopted by carrying 'over associations and assumptions about roles and obligations from one realm to another'.[61] This is particularly important when considering legal approaches to new technologies, as 'legal precedent works through analogy'.[62]

Section III then addresses a key issue of this thesis: why should the ADF be used to respond to the threat? The answer is threefold. First, military power underlies the existence of the state and is the primary lever of national power in responding to breaches of sovereignty. Second, in Australia's federal construct, defence is a matter for the Commonwealth. Third, there has been clear signalling by the Australian Government, through both the DSU and other policy documents, that the ADF is to prepare to respond to grey zone operations.

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[59] Robert French, 'Executive Power in Australia — Nurtured and Bound in Anxiety (2018) 43(2) *University of Western Australia Law Review* 16, 16.

[60] Benjamin B Saunders, 'Democracy, Liberty and the Prerogative: The Displacement of Inherent Executive Power by Statute' (2013) 41 *Federal Law Review* 363, 363 ('Democracy, Liberty'). See also Keith Syrett, 'Prerogative Powers: New Labour's Forgotten Constitutional Reform?' (1998) 13(1) *Denning Law Journal* 111; Poole (n 37) 146, 147.

[61] Julia Slupska, 'War, Health and Ecosystems: Generative Metaphors in Cybersecurity' (2020) 34(2) *Philosophy & Technology* 1.

[62] Lex Gill, 'Law, Metaphor and Encrypted Machine' (2018) 55(2) *Osgoode Hall Law Journal* 440, 441.

Section IV moves away from the threat, and towards the framework of the thesis. It first addresses the methodology, then the gap in the literature the thesis seeks to redress through a literature review. It addresses four separate spheres of research relevant to the thesis: interference operations and the law in Australia; classical sources on executive power; modern commentary on executive power; and contemporary academic discussion on ADF domestic operations. There are 'deeply held, if imperfectly understood, reservations' on the use of the ADF domestically.[63] This is clearly reflected in the sporadic, but deeply political, legal analysis surrounding the domestic deployments of the ADF. Section V concludes this introduction, providing a detailed structure of the thesis, and a breakdown of the issues to be examined in each chapter.

II A THREAT BY ANY OTHER NAME

Scholars, military professionals, reporters and politicians have used a host of terms to describe the threat this thesis aims to address: fake news;[64] computational propaganda;[65] information warfare;[66] influence operations;[67] strategic communications;[68] active measures;[69] hostile social manipulation;[70] hashtag warfare;[71] unrestricted warfare;[72] malign cyber operations;[73] psychological operations.[74] All of these, and more, are used interchangeably. But for the most part, these terms focus on specific and visible techniques, tools or modes of military action while ignoring the larger and more opaque manipulation of civilian populations. The exception of course is espionage — a distinct threat separate to that covered in this thesis. At the core of espionage are acts related to the theft of information — from industrial and trade through to

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[63] Margaret White, 'The Executive and the Military' (2005) 28(2) *UNSW Law Journal* 438, 438.
[64] Peter Roudik et al, *Initiatives to Counter Fake News in Selected Countries* (Library of Congress, 2019).
[65] See, eg, Oxford Internet Institute, 'Computational Propaganda', *University of Oxford* (Web Page) <https://www.oii.ox.ac.uk/research/projects/computational-propaganda/>.
[66] Michael Schmitt, 'Virtual Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law' in Christopher Whyte, A Trevor Thrall and Brian M Mazanec (eds), *Information Warfare in the Age of Cyber Conflict* (Routledge, 2020) 186; Duncan Hollis, 'The Influence of War: The War for Influence' (2018) 32(1) *Temple International and Comparative Law Journal* 31.
[67] Dale Stephens, 'Influence Operations and International Law' (2020) 19(4) *Journal of Information Warfare* 1.
[68] Mohammad Ali, 'Fake-News Network Model: A Conceptual Framework for Strategic Communication to Deal With Fake News' (2022) 16(1) *International Journal of Strategic Communications* 1.
[69] Thomas Rid, *Active Measures* (Macmillan, 2020).
[70] Michael Mazarr et al, *Hostile Social Manipulation* (RAND, 2019).
[71] Tom Sear and Michael Jensen, 'Hashtag War — Russian Trolls and the Project to Undermine Australian Democracy' (2018) 64 *Griffith Review* 29.
[72] Qiao Liang and Wang Xiangsui, *Unrestricted Warfare* (People's Liberation Army, 1992).
[73] Jeff Kosseff, 'Retorsion as a Response to Ongoing Malign Cyber Operations' (Conference Paper, 12th Conference 20/20 Vision, 2020) 9–25.
[74] Tim Hwang and Lea Rosen, 'Harder, Better, Faster, Stronger: International Law and the Future of Online Psyops' (ComProp Working Paper No 1, Oxford Internet Institute, 2017) 2.

official, classified government secrets.[75] The focus of this thesis is actions taken to achieve mass influence on opinions and/or actions of individuals, governments and/or publics.[76]

The conflation of terms is understandable: the use of information as a resource, environment and weapon within the 21st century is an emergent capability, 'still seeking both language and concepts to become normative for discussions of warfare'.[77] But it does have some consequences. As Antulio J Echevarria argues:

> While the original aim of such labelling, or re-labelling, may have been to draw the attention of busy policymakers to rapidly emerging security issues, it has evolved into something of a culture of replication in which the labels are repeated more out of habit than conscious reflection. This habit has led to a wealth of confusion that has clouded the thinking of policymakers and impaired the development of sound counter-strategies.[78]

The naming also risks conflating two broad forms of strategy: 'an all-encompassing effort to use all measures short of war; and the more targeted and specific approach of employing information to achieve disruptive effects'.[79] Part of the difficulty, therefore, is that there is no set definition, nor does the threat posed by foreign interference have any substance in law.

It could be argued that the nomenclature applied is a purely academic concern; but there are many consequences that flow from a poor choice of language.[80] The naming of the threat shapes how it is assumed the information will flow, who spreads it, and who receives it — so called 'generative metaphors'.[81] These metaphors shape or constrain possible solutions, such as approaching disinformation like a public health issue.[82] Further, a lack of clarity in naming helps to maintain an environment of confusion, where states may act without clear boundaries.

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[75] Gary Corn and Robert Taylor, 'Symposium on Sovereignty, Cyberspace, and Tallinn Manual 2.0: Sovereignty in the Age of Cyber' (2017) 111 *American Journal of International Law* 207; Brian Egan, 'International Law and Stability in Cyberspace' (Speech, University of California, Berkeley School of Law, 10 November 2016.

[76] United States Department of State, *Soviet Influence Activities: A Report on Active Measures and Propaganda, 1986–87* (Report, Bureau of Public Affairs, 1987) viii.

[77] Edward Morgan and Marcus Thompson, 'Building Allied Interoperability in the Indo-Pacific Region. Discussion Paper 3: Information Warfare: An Emergent Australian Defence Force Capability' (Discussion Paper No 3, Center for Strategic and International Studies, October 2018) 6.

[78] Antulio J Echevarria, *Operating in the Gray Zone: An Alternative Paradigm for U.S. Military Strategy* (Strategic Studies Institute, United States Army War College Press, 2016) 1.

[79] Mazarr (n 70) 11.

[80] Pascal Brangetto and Matthijs A Veenendaal, 'Influence Cyber Operations: The Use of Cyberattacks in Support of Influence Operations' in N Pissanidis, H Rõigas and M Veenendaal (eds), *8th International Conference on Cyber Conflict: Cyber Power* (NATO Cooperative Cyber Defence Centre of Excellence, 2016) 113.

[81] Slupska (n 61).

[82] Marise Payne, 'Australia and the World in the Time of COVID-19' (Speech, Lowy Institute, 16 June 2020).

Two potential nomenclatures highlight the difficulty. The first is 'political warfare' — a vogue term used by military personnel[83] and scholars[84] alike in the past ten years to describe non-military means of warfare. The term was popularised by the US State Department's Director of Policy Planning George Kennan. In May 1948, at the outset of the Cold War, Kennan wrote:

> Political warfare is the logical application of Clausewitz's doctrine in time of peace. In broadest definition, political warfare is the employment of all the means at a nation's command, short of war, to achieve its national objectives. Such operations are both overt and covert. They range from such overt actions as political alliances, economic measures (as ERP — the Marshall Plan), and 'white' propaganda to such covert operations as clandestine support of 'friendly' foreign elements, 'black' psychological warfare and even encouragement of underground resistance in hostile states.[85]

Kennan's use of the term political warfare was not original. George Kennan's British contemporary, the inaugural Director-General of the Political Warfare Executive, Sir Bruce Lockhart, was tasked with countering German propaganda in World War Two. It was he who was ultimately responsible for the political warfare campaign supporting Operation Overlord, the Allied campaign to reclaim Europe in World War Two. He remarked, after admitting that 'an essay could be written on the differences between propaganda and political warfare', that the latter is:

> Every form of overt and covert attack which can be called political as distinct from military. It seeks both to counter and by intelligent anticipation to forestall the political offensive of the enemy. It demands highly specialised intelligence service of its own and, above all, an accurate estimate of the enemy's intentions. It relies not only on open and truthful propaganda, but also on a whole series of secret or 'black' operations which can be suitably classified under the headings of subversion and deception. These operations include so-called 'secret' broadcastings from stations supposed to be operated in or close to the enemy and enemy-occupied territory by subversive enemy or enemy-occupied elements.[86]

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[83] From an Australian perspective, see Angus Campbell, 'War in 2025' (Speech, ASPI Canberra, 13 June 2019); for the British perspective see Nick Carter, 'Launch of the Integrated Operating Concept' (Speech, Policy Exchange, 30 September 2020) <https://www.gov.uk/government/speeches/chief-of-the-defence-staff-general-sir-nick-carter-launches-the-integrated-operating-concept>.

[84] See, eg, Mazarr (n 70); Linda Robinson et al, *Modern Political Warfare: Current Practices and Possible Responses* (RAND Corporation, 2018).

[85] George Kennan, 'The Inauguration of Organized Political Warfare' (Wilson Centre, Digital Archive, 30 April 1948) 1.

[86] Bruce Lockhart, *Comes the Reckoning* (University Press Glasgow, 1947) 155.

This is a very wide definition of political warfare by Lockhart, and one that centred on wartime efforts. Another interpretation of political warfare comes from Paul A Smith. Smith helpfully provides a narrower definition in *On Political War*: 'Political war may be combined with violence, economic pressure, subversion and diplomacy, but its chief aspect is the use of words, images, and ideas, commonly known, according to context, as propaganda and psychological warfare.'[87]

General Angus Campbell, when discussing what warfare would look like in 2025, remarked:

> Political warfare subverts and undermines. It penetrates the mind. It seeks to influence, to subdue, to overpower, to disrupt … It can be covert or overt, a background of white noise or loud and compelling. It's not limited by the constructs or constructions of peace and war. It's constant and scalable, and most important, it adapts. …
>
> Today a new, modernised version of political warfare has emerged. It mixes the old with the new. In a world that's becoming more increasingly connected, these activities range from information campaigns, cyber operations and theft of intellectual property to coercion and propaganda.[88]

Campbell describes a threat that matches that addressed in this thesis. But the term political warfare, despite some narrow interpretations, is far too broad to be applied to actions targeting civilian populations in the information domain. A broad interpretation of the term therefore is that it is an umbrella term that encompasses everything below the threshold of war, involving all levers of national power. It therefore includes everything from the sponsoring of proxy forces in third-country armed conflicts,[89] to the theft of intellectual property[90] and the withdrawal of ambassadors from a country.[91] Moreover, some have argued that political warfare, if interpreted broadly, requires the use or credible threat of violence: 'it may serve as a surrogate for actual war, but it does not work without actual force backing it up'.[92] Manipulation of civilian populations does not. Finally, some argue there is merit in retaining

[87] Paul A Smith, *On Political War* (Nation Defense University Press, 1989) 3.
[88] Campbell (n 83).
[89] Such as occurred within Ukraine in 2014 — see United States Special Operation Command, *Little Green Men: Ukraine 2013–2014* (Fort Bragg, 2015).
[90] Such as occurred within Australian in 2019 — see ABC, 'The ANU Hack Came Down to a Single Email', *ABC News* (online, 1 October 2019) <https://www.abc.net.au/news/2019-10-02/the-sophisticated-anu-hack-that-compromised-private-details/11566540>.
[91] Richard Roth, 'United States is Expelling 12 Russian Diplomats', *CNN* (online, 28 February 2022) <https://edition.cnn.com/2022/02/28/politics/us-expels-russian-un-diplomats/index.html>.
[92] Angelo Codevilla and Paul Seabury, *War: Ends and Means* (Basic Books, 1989) 184.

the term due to the intellectual effort spent during the Cold War in analysing, assessing, understanding and countering Soviet political warfare.[93]

Yet as Chapter 2 expands upon, there has been a paradigm shift in the manner in which manipulation can occur. It is not simply old techniques, new technology. 'Big data' has created new economic models, particularly with respect to advertising. As such, using 'the mental models, vocabularies and tools distilled from past catastrophes [can] obstruct progress'.[94] The term political warfare is therefore inappropriate.

The second example is the term 'information warfare'. The ADF has not to date provided a public definition of information warfare. In unpublished material, but apparently endorsed by the then Head of Information Warfare Division, Major General Marcus Thompson, the ADF indicates that information warfare is: '[t]he contest for the provision and assurance of information to support friendly decision-making, whilst denying and degrading that of adversaries.'[95]

Notable for its contrast, the unofficial Australian position does not limit itself to 'combat' nor 'conflict', but holds it to be 'a contest which can take place in any situation across the spectrum of war and peace'.[96] Alternatively, United States doctrine holds that 'information warfare is conflict between two or more groups in the information environment'.[97] But what is the information environment? That is defined elsewhere by the US Department of Defense Joint Publication 1-02 as: 'The aggregate of individuals, organizations, and systems that collect, process, disseminate, or act on information.'[98]

Information warfare is the overarching concept, under which fall information operations and influence operations. It is wider than simple influence — it can include electronic warfare,

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[93] Jeffrey Dickey et al, *Russian Political Warfare — Origin, Evolution and Application* (US Naval Postgraduate School, 2015). Scholar Dov H Levin estimated that during the Cold War, the United States and the USSR collectively attempted to shape 117 elections: see Dov H Levin, 'When The Great Power Gets a Vote: The Effects of Great Power Electoral Interference on Election Results' (2016) 60(2) *International Studies Quarterly* 189, 189.
[94] Shoshana Zuboff, *The Age of Surveillance Capitalism* (Profile Books, 2019) 62.
[95] Morgan and Thompson (n 77) 10.
[96] Ibid.
[97] Isaac Porsche et al, *Redefining Information Warfare Boundaries for an Army in a Wireless World* (RAND Corporation, 2013) 14.
[98] Department of Defense, *Department of Defense Dictionary of Military and Associated Terms* (Joint Publication 1-02, 2016) 110, <https://fas.org/irp/doddir/dod/jp1_02.pdf>.

psychological operations and information operations. But it would appear limited to the battlefield, under Western doctrine. Brian Nichiporuk postulates that:

> The goals of an offensive information-warfare campaign are to deny, corrupt, degrade, or destroy the enemy's sources of information on the battlefield. Doing so successfully, while maintaining the operational security of your own information sources, is the key to achieving 'information superiority' — that is, the ability to see the battlefield while your opponent cannot.[99]

There are two key issues with relying upon doctrinal definitions. The first is that doctrine is intended to be easily and readily used, by all members of the relevant armed forces. It is a guide, the product of various stakeholders seeking to carve out or distance themselves from roles. It can therefore include broad statements that are actually internally inconsistent. Equally, doctrine is intended for military personnel — it is therefore unsurprising, considering its audience, that it will focus upon military levers of national power. This is the second issue. Success under information warfare doctrine is thus marked when 'the adversary does not use the (fully operational) military assets it does have, and the military outcome is the same as if those military assets had been destroyed'.[100] Again, this is a battlefield-centric definition of the threat. This is also an inherently Eurocentric perspective of warfare, which perpetuates the issues of grey zone activities. Non-European definitions make this clearer.

Russian approaches to the information domain can cover a vast range of different activities, and include stealing information, planting information, interdicting and manipulating information, and distorting and destroying information. Information warfare — *informatsionnaya voyna* — is thus an ongoing activity, regardless of the state of relations with the opponent.[101] It is waged against both foreign and domestic peoples.

No discussion of modern Russian information warfare can be complete without discussion of the eponymously named 'Gerasimov Doctrine'. It is a little misleading, however, to suggest that it is a Russian concept. Valery Gerasimov, the Chief of the General Staff of the Russian Armed Force, in a short piece laid out his views on the benefits of Western political warfare. Gerasimov opined that, although there will always be a need for military force, non-kinetic and

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[99] Brian Nichiporuk, 'U.S. Military Opportunities: Information-Warfare Concepts of Operation' in Zalmay Khalilzad and John White (eds), *The Changing Role of Information in Warfare* (RAND Corporation, 1999) 179, 181.

[100] Herbert Lin and Jaclyn Kerr, 'On Cyber-Enabled Information Warfare and Information Operations' in Paul Cornish (ed), *The Oxford Handbook of Cyber Security* (Oxford University Press, 2021) 251, 253.

[101] Keir Giles, *Handbook of Russian Information Warfare* (Report, NATO, 2016) 4.

non-military means are of superseding effectiveness and importance. With reference to the Arab Spring uprisings, which Gerasimov viewed as part of Western military planning, he noted:

> The very rules of war have changed. The role of non-military means of achieving political and strategic goals has grown, and in many cases, they have exceeded the power of force of weapons in their effectiveness … In North Africa, we witnessed the use of technologies for influencing state structures and the population with the help of information networks.[102]

There are therefore issues with accepting the term information warfare, for its doctrinal flaws outlined above and the Eurocentric obsession with military operations and military units. Further, calling a persistent and comprehensive campaign of online coercion simply 'fake news' or 'propaganda' risks the threat being viewed by the public as 'normal, benign and not warranting serious concern'.[103] It is important, therefore, to find a term that fits the threat.

There is risk in moving forward with a new term or definition, for the 'acts or harm we seek to limit or control must be fitted into an existing framework of definitions and meanings … in order to take advantage of (legal remedies) to control the use or proliferation'.[104] Accordingly, this thesis will adopt the nomenclature 'interference operations' (IO). Although the term information operations is equally attractive, it is too broad, reflecting two sub-categories — influence operations and interference operations. The term influence operations was adopted by a 2009 RAND study which states:

> We use the term *influence operations* to describe efforts to influence a target audience, whether an individual leader, members of a decision-making group, military organizations and personnel, specific population subgroups, or mass publics. Because there was no agreed-upon joint force or Army definition of influence operations at the time of our study, we developed our own:
>
> Influence operations are the coordinated, integrated, and synchronized application of national diplomatic, informational, military, economic, and other capabilities in

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[102] Valery Gerasimov, 'The Value of Science Is in the Foresight: New Challenges Demand Rethinking the Forms and Methods of Carrying out Combat Operations' (2016) 96(1) *Military Review* 23, 24.
[103] Ross Babbage, 'Ten Questionable Assumptions about Future War in the Indo-Pacific' (2020) 2(1) *Australian Journal of Defence and Strategic Studies* 27, 31.
[104] Hwang and Rosen (n 74) 7.

> peacetime, crisis, conflict, and postconflict to foster attitudes, behaviors, or decisions by foreign target audiences that further [a party's] interests and objectives.[105]

Yet, under this definition, a lot of what happens in day-to-day life would qualify as an influence operation:

> Our families and friends regularly deploy resources to get us to adopt or change our views, social norms, or political beliefs. Companies expend significant resources on marketing to convince us to buy their products and services. And states deploy diplomacy, speeches, and other forms of strategic communication to affect the behavior of adversaries and allies.[106]

This thesis is not concerned with influence (an accepted part of international relations) but interference. In Australia, interference is marked by conduct that uses 'covert, deceptive, corrupting or threatening means to damage or destabilise the government or political process of a country'.[107] This test is found within various other Australian Government documents,[108] including the DSU, and it is appropriate to use it throughout this thesis.

Interference operations (IOs) is thus the chosen nomenclature for this thesis to describe the threat of covert attempts to manipulate. It specifically is not interference warfare. Frank Hoffman, a well-known academic of war studies, flinched at applying the term 'warfare' to behaviour done without formal declaration of hostilities, against both friends and foe, where physical violence is not employed.[109] Moreover, if IOs were to amount to warfare, then these operations would no longer fall within a grey zone. The term 'operation' therefore signals that the conduct, whilst hostile and provocative, still falls below the threshold of an armed attack. It further uses the term 'interference' rather than 'information' or 'influence' so as to distinguish covert and overt operations. IOs are, under Australia's definition, covert.

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[105] Eric V Larson et al, *Foundations of Effective Influence Operations* (RAND, 2009) 2.
[106] Hollis (n 66) 36.
[107] See the current definition within *Criminal Code 1995* (Cth) s 92.2 (1)(d); follows historic definition in the *Australian Security Intelligence Organisation Act 1979* (Cth) s 3; see further NAA SEC88/11806 for instances of this term in ASIO reporting. The definition has also been used in *Libertyworks Inc v Commonwealth* (2021) (2021) 391 ALR 188 [9].
[108] Australian Security Intelligence Organisation, *Annual Report 2017–18* (Report, 2018) 25; Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017* (Report, 2018) 6–7, 9–11, 17, 166–7; Australian Security Intelligence Organisation, *Director-General's Annual Threat Assessment* (Report, 2020) 9.
[109] Frank Hoffman, 'On-Not-So-New-Warfare: Political Warfare vs Hybrid Threats', *War on the Rocks* (online, 28 July 2014) <https://warontherocks.com/2014/07/on-not-so-new-warfare-political-warfare-vs-hybrid-threats/>.

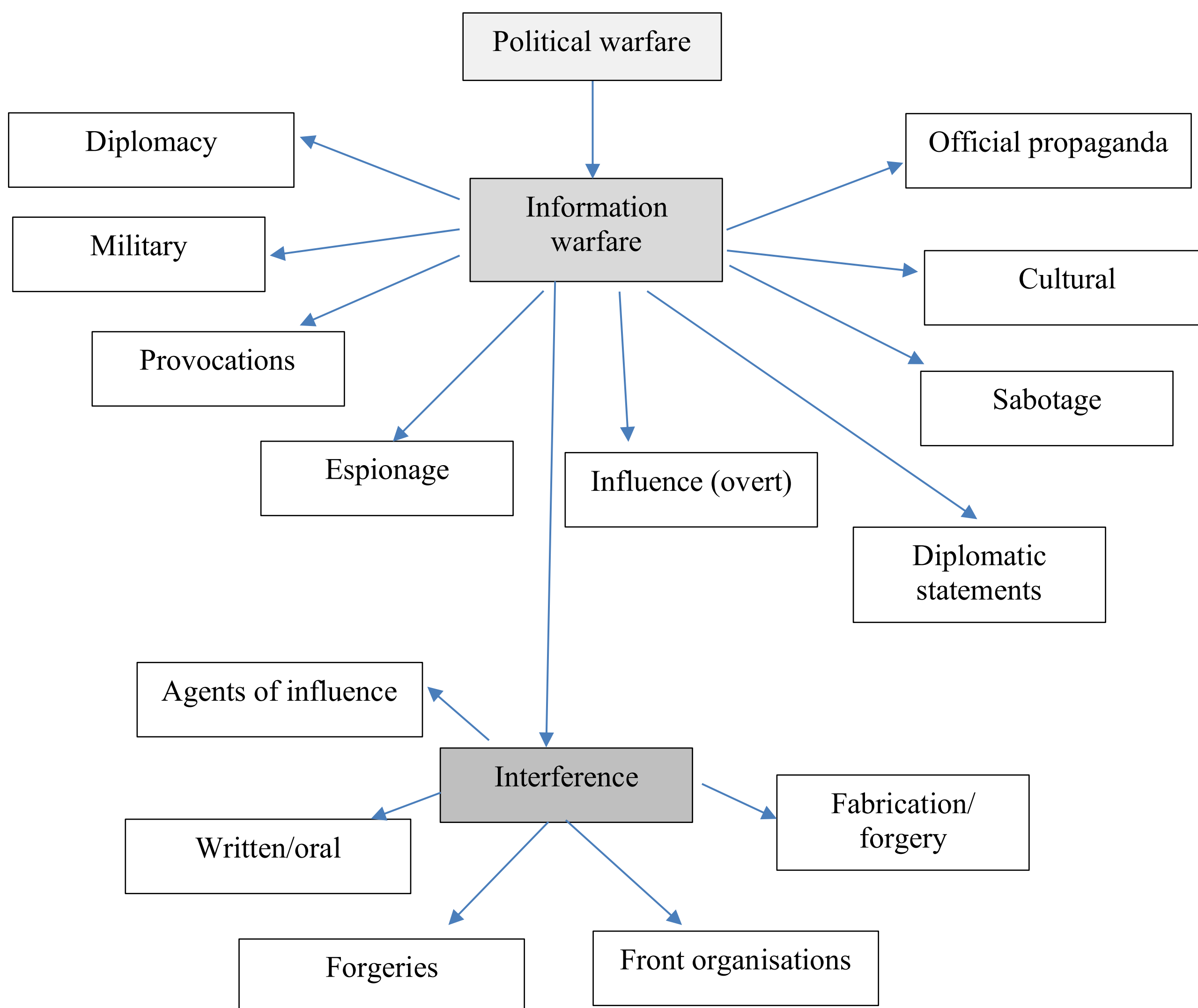

Figure 1: A Strategic Overview of Political Warfare

This of course, to some degree, is a matter of semantics. It is important, however, in the generative metaphors used around the issue to justify certain language, as has occurred above. The classifications of belligerency in Australian law — such as when 'domestic violence' occurs for the purposes of s 119 of the *Constitution*, or when 'war' occurs for the purposes of the defence power — are often razor thin and only in the eye of the beholder. Figure 1 accordingly provides an overview of the various forms of political warfare, identifying the place of IOs within the broader milieu of information warfare.

III WHY THE ADF?

The threat now defined, this section explains why this thesis will focus on military intervention in response to IOs. Primarily, it does so to challenge conventional Australian thinking that the

role of the military (and corresponding legal authorities) is limited to external operations. Noting that military power is at the heart of governments generally,[110] the major, but misguided, concept is that there is little precedent for responding to words with the military. As Part II of this thesis will demonstrate, there is clear constitutional authority for military intervention in domestic affairs.

Generally, the use of the ADF outside of external security operations has been highly contentious. Arguably, this cultural wariness has arisen from the strict, binary Roman approach to internal/external operations.[111] Generals and governors of Roman provinces were appointed and granted the right to use *imperium* — the right to command — from which their *authoritas* flowed.[112] Critically, within the sacrosanct province of Italy, only the elected (non-military) magistrates of the Roman Republic could hold *imperium*. This acted as a necessary check and balance against the excess of armed forces against Roman citizens and the republic.[113] The consequence of crossing a small stream — the Rubicon — was that one's right to hold *imperium* ceased, for troops could not operate on domestic Italian soil.[114] Although the Rubicon as a legal marker no longer affects many in the West, the underlying premise of a clear divide between internal and external deployments of armed forces remains one of the most important and deeply entrenched norms.

As recent experience has demonstrated, within Australia the ADF first and foremost provides a valuable, flexible workforce of 'spontaneous volunteers'[115] that can be directed towards vital tasks. These volunteers, unlike their civilian counterparts, have unique specialist capabilities otherwise unavailable to civil agencies. Equally, due to its size, operations planning and execution expertise mean the ADF will have a unique role to play in the lead up to, and response to, any grey zone activity in which Australia is involved. Finally, there has been clear signalling from the Australian Government that the ADF will be called upon to support the government in more non-traditional roles.[116] This mirrors the shifting public expectation of the ADF to

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[110] Moore, 'Militaries as Wielders of Executive Power' (n 56) 21, 24.
[111] Suetonius, *Lives of the Caesars* (Loeb Classical Library, 1913) vol 1, 32.
[112] On select occasions, *imperium maius* could be granted which superseded the *imperium* of commanders; see for example the *imperium maius* granted to Pompey Magnus in his clearance of pirates from the Mediterranean. See Victor Ehrenberg, 'Imperium Maius in the Roman Republic' (1953) 74(2) *American Journal of Philology* 113, 117.
[113] Cicero, *Against Verres*, 2.2, 8; 3.213.
[114] Ehrenberg (n 112) 113, 126.
[115] *Royal Commission into National Natural Disaster Arrangements* (Report, 28 October 2020) 192 [7.29] ('Bushfire Royal Commission').
[116] Department of Defence, *2016 Defence White Paper* (Report, 2016) 34 [1.19].

increasingly operate domestically in response to emergencies, and perhaps more generally in matters of national importance.[117] Operation Bushfire Assist 2019–20 was significant in this regard. Not only was it 'the largest ever mobilisation of the Australian Defence Force in response to a domestic disaster', it also 'ushered in a new era in which Defence is called upon in unique ways to assist civil authorities in response to national crises'.[118] This was signalled when the Prime Minister publicly shifted the ADF's force posture from 'respond to request' to 'move forward and integrate',[119] signalling increased domestic deployments.

This is not to say that the use of the ADF need be loud, or public. The U.K. Home Secretary, responsible for the suppression of dissent and subversive practices in the First World War, was concerned that the role of the military domestically should 'be neither seen nor heard'[120] in their mission to restrict the dissemination of the dissenters' message. It is an important point, and it ensures confidence remains with the ADF; any response to Australians must as far as practicable be in accordance with normal 'procedures and forms … moderate, incremental … an alteration of, but not a departure from, business as usual'.[121]

This touches on an underlying philosophical basis for this thesis — that of 'militant democracy'. The term has garnered strength in Australian legal academic discussions through the work of Svetlana Tyulkina.[122] Whilst there is no universal definition of militant democracy, it can be aptly summarised as 'a form of constitutional democracy authorised to protect its continued existence as democracy by pre-emptively restricting the exercise of civil and political freedoms'.[123] Underpinning this is that militant democracy implies that the military can be used to protect democracy.

It is a particularly useful model to provide a rationale for approaches to constitutions that might otherwise be considered outside the concept of liberal democracy. As the argument goes, all democracies are in some form militant; they must be in order to survive. Isaacs J recognised as

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[117] Bushfire Royal Commission (n 115) 187, 193.
[118] Department of Defence, *Annual Report 2019–20* (Report, 2020) 37.
[119] Scott Morrison, 'Bushfire Relief and Recovery' (Press Conference, 4 January 2020).
[120] Herbert Samuel, *Memoirs* (Cresset Press, 1945) 114.
[121] Brock Millman, 'HMG and the War Against Dissent, 1914–1918' (2005) 40(3) *Journal of Contemporary History* 413, 418. This was reiterated by the Australian Government in its request for internal security measures after World War Two to not be discussed by radio and press. See the series of correspondence in NAA E/318/1/2 between the Prime Minister and relevant Managing Directors.
[122] Svetlana Tyulkina, 'Militant Democracy: An Alien Concept for Australian Constitutional Law?' (2015) 36 *Adelaide Law Review* 517.
[123] Ibid 517. It could also be categorised as the 'preventative state': see Carol Streiker, 'The Limits of the Preventative State' (1998) 88(3) *Journal of Criminal Law and Criminology* 771, 776–80.

such when His Honour wrote that the *Constitution* 'is not so impotent a document as to fail at the very moment when the whole existence of the nation it is designed to serve is imperilled'.[124] Other theorists have noted that liberal constitutions are not, nor should they be, suicide pacts.[125]

The *Australian Constitution* highlights this philosophical underpinning through 'passive and procedural'[126] militant democracy. Key to Australia's militant democracy, Tyulkina notes, are two provisions – the 'defence power' (not the subject of this thesis),[127] and constitutional executive power (the subject of this thesis).[128] Both provisions reflect an early and constant intent by the drafters of the *Constitution* that the Commonwealth be able to maintain the legal order established within the document.[129] They are significant in that they are separate constitutional provisions with separate aims, but share mutual language (of maintaining the *Constitution*).

The use of the ADF is, of course, just one of many possible responses to grey zone activities. Other levers of national power (economic or diplomatic) can be used.[130] Yet the military lever of national power is the least analysed and the widest gap in the literature — as expanded upon below. It is also practical. Recent experience with natural disasters and public health responses have highlighted that 'federal government means weak government'.[131] The Commonwealth has limited means to respond to emergencies outside of funding and policy directions to states. Equally, it would be a highly exceptional situation, unknown in Australia since the Rum Rebellion,[132] where the Chief of the Defence Force or the ADF at large refused to follow the direction of the government even if the source of authority is unclear (notwithstanding section

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[124] *Farey v Burvett* (1916) 21 CLR 433, 451.
[125] Richard A Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press, 2006).
[126] Gregory H Fox and Georg Nolte, 'Intolerant Democracies' (1995) 36 *Harvard International Law Journal* 1, 22.
[127] *Australian Constitution* s 51(vi).
[128] Ibid s 61.
[129] See GB Barton (ed), *The Draft Bill to Constitute the Commonwealth of Australia* (George Stephen Chapman, 1891); Commonwealth of Australia Bill 1891 (UK) cl 52(6).
[130] For an example of an economic lever, see John Perkins, *Confessions of an Economic Hit Man* (Berrett-Koehler Publishers, 2004). For diplomatic, see the use of visa revocation under s 501 of the *Migration Act 1958* (Cth) and analysis thereof in Samuel White, 'Godlike Powers — Unfettered Ministerial Discretion' (2020) 41(1) *Adelaide Law Review* 1. The use of the military in controlling active measures has occurred in Australia since at least 1943 where Naval forces were used to patrol North Queensland over 'grave concerns about the leakage of secret operational information' see NAA A373/1 Letter of 29 June 1943.
[131] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th ed, 1915) 167.
[132] See Jeffrey Grey, 'Johnston, Lieutenant-Colonel George' in Peter Dennis et al (eds), *The Oxford Companion to Australian Military History* (Oxford University Press, 2nd ed, 2008) 294.

8 of the *Defence Act 1903* (Cth)). There is accordingly academic and practical benefit in colouring in the legal grey zone of domestic operations.

Finally, this thesis is concerned with responding to grey zone operations through the lens of deterrence theory. As covered in more depth in Chapter 2, this is a strategic response theory that has been advocated by Australian think-tanks[133] as well as the Australian Government.[134] In order to meet the new strategic objectives of 2020, the Department of Defence is required to, inter alia, 'expand Defence's capability to respond to grey-zone activities, working closely with other arms of Government'.[135] This in turn requires the ADF to acquire capabilities able to 'deliver deterrent effects against a broad range of threats, including preventing coercive or grey-zone activities from escalating to conventional conflict'.[136] To deter is now the official raison d'être of the ADF and it is appropriate that it be used accordingly.[137] If it is to be so used, it becomes essential to understand the legal basis for such use — the critical question which this thesis addresses.

To answer this, two research questions have been identified and explored. The first research question revolves around federalism and federal divisions of power: should IOs be considered a law and order issue, or a defence/external affairs issue? The second line of research asks: to what extent does Commonwealth executive power provide a lawful authority for ADF domestic operations, below the threshold of domestic violence in s 119 of the *Constitution*? This requires both identifying a relevant royal prerogative that might authorise domestic operations, and addressing how it is refined through Australia's constitutional framework. Specifically, the threshold of domestic violence must be defined and statutory powers (such as Part IIIAAA of the *Defence Act 1903* (Cth) (**Part IIIAAA**)) canvassed in order to assess whether or not any constitutional executive power has been abridged. Public policy positions by the Australian Government must also be engaged with, due to their prevalence in recent discussions around domestic deployments and operations. Noting this policy construct is

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[133] Fergus Hanson et al, *Hacking Democracies* (Report, ASPI, 2019) 18, Recommendation 6; Christopher Whyte, 'How Deep the Rabbit Hole Goes: Escalation, Deterrence and the "Deeper" Challenges of Information Warfare in the Age of the Internet' in Christopher Whyte, A Trevor Thrall and Brian M Mazanec (eds), *Information Warfare in the Age of Cyber Conflict* (Routledge, 2020) 388.
[134] See Department of Defence, *DSU* (n 2) and the three mission roles of the ADF: to shape, deter, respond.
[135] Ibid 25.
[136] Ibid 27 [2.24], 33 [3.3].
[137] David Cave, 'The Elevation of Deterrence: Examining the Language of the 2020 Defence Strategic Update' (2020) 3(1) *Australian Journal of Defence and Strategic Studies* 89, 95.

concerned with the concept of 'use of force', it is necessary then to address how under policy the ADF's presence alone can constitute force.

IV Methodology and Literature Review

A *Methodology*

This thesis takes the form of doctrinal legal research informed by matters of legal policy and principle, specifically constitutional law, public law and criminal law. As arises from any analysis of the constitutional executive power, and particularly with respect to the royal prerogative, such analysis must occur within historical, theoretical and comparative contexts. These methodologies are used by the High Court in constitutional analysis,[138] and amongst constitutional lawyers.[139] This is particularly relevant in the intent of the framers of the *Constitution* to codify British conventions at the time of Federation — such as the civil–military relationship and the instances of domestic deployment of the military. It is moreover relevant for assistance in interpreting the presumed purposes and meaning of English terms,[140] such as 'domestic violence' as found in s 119.

Legal history as a tool of legal analysis can enhance understanding of contemporary institutions and practices. WS Holdsworth noted that legal history is 'necessary to the understanding and intelligent working of all long established legal systems'.[141] This point is 'particularly true when examining constitutional rules',[142] especially British constitutional concepts, that are 'original and spontaneous, the product not of deliberate design but of a long process of evolution'.[143] Indeed, it has been said that '[t]o be a lawyer in Australia is, in a sense, to be a legal historian'.[144] The High Court has emphasised that 'the ambit of the executive power of the Commonwealth cannot begin from a premise that the ambit of that executive power must

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[138] *Cole v Whitfield* (1988) 165 CLR 360, which signified a large break with the High Court's precedent — see *Municipal Council of Sydney v Commonwealth* (2004) 1 CLR 208.
[139] Paul Schoff, 'The High Court and History: It Still Hasn't Found(ed) What It's Looking For' (1994) 5 *Public Law Review* 253; Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship' (2000) 24 *Melbourne University Law Review* 1.
[140] Kevin Booker and Arthur Glass, 'The *Engineers* Case' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 34.
[141] WS Holdsworth, *Some Lessons from our Legal History* (Macmillan, 1928) 8–9.
[142] Rosara Joseph, *The War Prerogative — History, Reform and Constitutional Design* (Oxford University Press, 2013) 7.
[143] Vernon Bogdanor, 'Conclusion' in Vernon Bogdanor (ed), *The British Constitution in the Twentieth Century* (Oxford University Press, 2003) 689, 719.
[144] Kirby (n 139) 8.

be the same as the ambit of British executive power',[145] but that '[c]onsideration of the executive power of the Commonwealth will be assisted by reference to British constitutional history'.[146] Thus, although modern case law can be helpful in understanding the relevance of the respective prerogative power, any discussion requires canvassing an era prior to the Glorious Revolution of 1688; for 'it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative'.[147]

This work utilises a review of primary legal authorities and secondary texts, as well as open source material on IOs. Use of open source obviously means that covert instances are not readily accessible; case selection is therefore restricted by the lack of publicly available information about intent and attribution. There is also a skewing towards English language and mainstream media sources. However, while these two factors limit the scope of the source material available, there remains sufficient material to enable a wide range of issues to be considered and robust conclusions to be drawn. These materials have been aided by access through the National Archives of Australia, where previously un-reviewed documents surrounding military aid to the civil authority were declassified and examined. They primarily inform discussions in Chapters 3 and 4.

A doctrinal approach to the material relating to executive power (statutory and non-statutory) occurs from Chapter 3 onwards; Chapter 2 canvasses relevant theoretical models that underpin and define the scope of research. The latter covers an analysis of the relevant scholarship and state practice on IOs, with the aim to place it in context with relevant legal, philosophical and international relations theories. This will involve understanding the concept of 'the marketplace of ideas' and its applicability within the modern era. So too does the theory section critically engage with deterrence theory as articulated in the international relations discipline, prior to and after the use of nuclear weapons, in order to assess which models are most applicable to respond to IOs. Particular relevance is attached to the minimalist theory of deterrence, which focuses upon the act of denial and punishment as concepts, detached from any specific weapon system or method of warfare (such as mutually assured destruction through nuclear

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[145] *Williams v Commonwealth [No 2]* (2014) 252 CLR 416, 469 [81] (French CJ, Hayne, Kiefel, Bell and Keane JJ).
[146] Ibid.
[147] *British Broadcasting Corporation v Johns* [1965] Ch 32, 79 (Diplock LJ), quoted in *Ruddock v Vadarlis* (2001) 110 FCR 491, 501 [30] (Black CJ). This position is a little misleading in that it suggests the Glorious Revolution froze the royal prerogative; in fact, the *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352 (KB) had already held that the powers could not expand.

weapons).[148] The two limbs of deterrence theory — denial and punishment — are unpacked through a normative investigation into the appropriate balance.

There are different approaches to interpretations of executive power, mainly revolving around whether or not there are any limitations to it. These schools of thought often focus on the conferral of executive powers, and who holds a duty to use them. Locke, whose work on the royal prerogative still pervades modern thinking, held that the purpose of government is the 'preservation of all'[149] and that government can act contrary to law if necessary for the people.[150] However, as George Winterton warned: 'once the constitution ceases to be the criterion of legality, logically there is no limit to executive power, other than the balance of military force within the nation'.[151] The High Court has made clear that, even at the full height of war, whilst significant deference will be given to the Executive, their decisions remain justiciable. The *Constitution* therefore remains a limitation. The Court has recognised that powers 'ultimately belong to, and are derived from, the governed'.[152]

B *Breadth and Depth: A Model for Assessment*

In order to properly assess the royal prerogative, this thesis adopts the methodology promoted by Professor George Winterton, between the 'breadth' and 'depth' of constitutional executive power.[153] This practice was adopted by Gageler J, who explains 'breadth' to relate to 'the subject-matters with respect to which the Executive Government of the Commonwealth is empowered to act having regard to the constraints of the federal system',[154] whilst depth denotes 'the precise actions which the Executive Government is empowered to undertake in relation to those subject matters'.[155] Interwoven in the above examples of the royal prerogative are matters that have a wide breadth but no depth (such as the ability to grant honours), or matters with limited breadth but exceptional depth (such as the war prerogative). Depth can moreover be understood to limit the Commonwealth executive government's ability to

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[148] Martin C Libicki, *Cyberdeterrence and Cyberwar* (RAND Corporation, 2009); Robinson et al (n 84).
[149] John Locke, *The Second Treatise of Government* (York University Press, 3rd ed, 1966) 76, 82.
[150] Ibid 103.
[151] George Winterton, 'The Concept of Extra-constitutional Executive Power in Domestic Affairs' (1980) 7(1) *Hastings Constitutional Law Quarterly* 1, 10.
[152] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70 (Deane and Toohey JJ). See also Benjamin Saunders, 'Popular Sovereignty, "the People", and the Australian Constitution: A Historical Reassessment' (2019) 30 *Public Law Review* 36.
[153] George Winterton, *Parliament, The Executive and the Governor-General* (Melbourne University Press, 1983) ('*Parliament*') 21.
[154] *Plaintiff M68* (n 15) 130 (Gageler J).
[155] Ibid.

undertake coercive activities. Although '[t]here has never been a clear and agreed analytical framework for the inherent executive power',[156] Winterton's model has been used by members of the High Court[157] and seems to be approaching orthodoxy in academic discourse.[158]

The reference to 'coercive activities' in turn reflects a number of fundamental constitutional principles, many of which derive from English case law and core constitutional documents such as the *Magna Carta* of 1215, *Petition of Right* of 1628, *Habeas Corpus Act* of 1640, *Bill of Rights* of 1689 and *Habeas Corpus Act* of 1816. As Brennan J observed in *Re Bolton; Ex parte Beane*:

> Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force.[159]

These fundamental constitutional principles were developed in the context of historical struggles between the Crown and the Parliament in England, which resulted in the Parliament establishing limits on the executive government's non-statutory power in the Glorious Revolution of 1688 (an important and recurring touchpoint throughout this work). Critically, these limitations are most severe when it comes to the 'internal', rather than 'external', aspects of society.

Several of these principles relate directly to the armed forces and continue to be relevant today. For example, three members of the High Court recently observed, in a separate context:

> The considerations that informed the measures established [in the Glorious Revolution] remain of abiding concern today. A modern standing army, like its precursors, consists of people who are empowered with 'the skills, knowledge and weaponry to apply lethal force. If Army members engage in ill disciplined use of violence at home or at work, then Army's confidence in them to execute their duties lawfully and discriminately in circumstances of immense stress on the battlefield is deeply undermined.' This

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[156] Cheryl Saunders, 'Executive Power in Federations' (2017) 17(1) *Jus Politicum* 271, 278.
[157] *Plaintiff M68* (n 15) 130 (Gageler J); *Williams (No 1)* (n 7) 312–13 (Heydon J).
[158] Robert French described Winterton's work as 'seminal work in the field': Robert French, 'The Executive Power' (Speech, Inaugural George Winterton Lecture, Sydney Law School, 18 February 2010) 1. See further Catherine Dale Greentree, 'The Commonwealth Executive Power: Historical Constitutional Origins and the Future of the Prerogative' (2020) 43(3) *UNSW Law Journal* 893, 902; Peta Stephenson, 'The Relationship between the Royal Prerogative and Statute in Australia' (2021) 44(3) *Melbourne University Law Review* 1001 ('The Relationship').
[159] (1987) 162 CLR 514, 520–1.

> consideration may be thought to be even more compelling today than during the constitutional struggles of the seventeenth and eighteenth centuries.[160]

In light of these fundamental constitutional principles, it is clear that in the absence of legislation the Commonwealth executive government generally has no power to create new offences.[161] It also generally has no power to impose obligations or compel behaviour (including producing documents or information),[162] or to levy taxes.[163] In addition, the Commonwealth executive government is subject to requirements under the general law (including the common law and statute), unless its conduct is authorised by legislation or otherwise lawfully justified.[164] The reference to conduct which infringes the 'law' includes statute law and the common law.[165] This includes (among other rights) the common law right to bodily integrity protected by the torts of negligence and trespass,[166] the common law right to liberty protected by the tort of false imprisonment and the writ of habeas corpus,[167] and common law rights in relation to private property protected by the tort of trespass and other torts.[168]

This principle finds its antecedents in the 18th century decision in *Entick v Carrington*.[169] John Entick's house was entered and sacked, without warrant, by the King's Chief Messenger, Nathan Carrington, under orders by Lord Halifax, the newly appointed Secretary of State for the Northern Department. The search was conducted under a general warrant in the hope of finding incriminating, seditious pamphlets. None were found, and Entick sued for trespass. The Court held that the general warrants were illegal, and the Secretary of State could not order searches of private property without authority conferred by an Act of Parliament or the

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[160] *Private R v Cowen* [2020] HCA 31, [75] (Kiefel CJ, Bell and Keane JJ) quoting *Grant v Gould* (1792) 126 ER 434 at 450.
[161] See, eg, *Davis v Commonwealth* (1988) 166 CLR 79, 112 (Brennan J); *Williams [No 1]* (n 7) [135] (Gummow and Bell JJ).
[162] *McGuiness v Attorney-General (Vic)* (1940) 83 CLR 73; *Victoria v Commonwealth* (1996) 187 CLR 416, 481.
[163] *Williams [No 1]* (n 7) [135] (Gummow and Bell JJ).
[164] See, eg, *Clough v Leahy* (1904) 2 CLR 139, 155–6 (Griffith CJ); *Pirrie v McFarlane* (1925) 36 CLR 170; *Shaw Savill and Albion Co v Commonwealth* (1940) 66 CLR 344, 355 (Starke J); *A v Hayden* (1984) 156 CLR 532, 540 (Gibbs CJ), 562 (Murphy J), 582, 588–9, 591 (Brennan J), 593 (Deane J); *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 575–6 (Brennan and Toohey JJ); *Re Residential Tenancies Tribunal (NSW) v Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410, 427–9 (Brennan CJ), 442–4 (Dawson, Toohey and Gaudron JJ), 472–3 (Gummow J); *Plaintiff M68* (n 15) 91 (Gageler J).
[165] See, eg, *Plaintiff M68* (n 15) [159] (Gageler J).
[166] *Binsaris v Northern Territory* [2020] HCA 22, [25] (Gageler J).
[167] *Plaintiff M68* (n 15) [162] (Gageler J).
[168] *Coco v R* (1994) 179 CLR 427, 435 (Mason CJ, Brennan, Gaudron and McHugh JJ).
[169] (1765) 19 Ste Tr 1029.

common law.[170] *Entick* reflects a watershed moment in the common law, for establishing a firm limit on executive power.[171]

The ratio of *Entick* forms part of Australia's constitutional inheritance, and was confirmed in the decision of *A v Hayden*.[172] In that case, Australian Secret Intelligence Service (ASIS) officers, employees and an army representative were directed to participate in a security training exercise, which involved freeing a 'hostage' from a hotel room in Melbourne. The training exercise went awry and it was alleged that the participants had committed criminal offences under Victorian legislation.[173] There was no Commonwealth legislation which authorised the relevant conduct or provided an exemption from the Victorian legislation. The High Court emphasised that the fact that the Commonwealth executive government had authorised the training exercise did not excuse the commission of criminal offences. Chief Justice Gibbs emphasised: 'It is fundamental to our legal system that the executive has no power to authorise a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer.'[174] Yet, as Professor Leslie Zines has commented, an exercise of constitutional executive power does not necessarily result in a breach of the law. Declarations of war and peace, the alteration of national boundaries, acts of state, the pardoning of offenders, and various immunities and privileges are capable of lawfully interfering with the legal rights and duties of others.[175]

C *Literature Review*

This thesis accordingly covers a large scope of concepts and topics: international relations and theories of state governance (such as deterrence theory); modern warfare and the impacts of the interconnection of individuals on tactics, operational planning and strategic goals; the use of the military in a domestic role; as well as Australian constitutional law. Yet this thesis is also quite narrow: it looks specifically at the intersection between section 119 of the *Constitution* (in Chapter 3) and section 61 of the *Constitution* (in Chapter 4).

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[170] Ibid.
[171] The case was later applied in *A v Hayden* (1984) 156 CLR 532, to extend the principle within the Australian common law jurisdiction.
[172] Ibid.
[173] Royal Commission on Australia's Security and Intelligence Agencies, *Report on the Sheraton Hotel Incident, February 1984* (Report, 1984).
[174] Ibid 540.
[175] Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 345–6. See further Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 *Public Law Review* 279, 280 ('Inherent Executive Power ').

On a topic as old as the royal prerogative there is a question of the possible relevance of dated literature. Although relevant literature begins with the Conquest of William of Normandy in 1066 and throughout the medieval period illuminate the plenary nature of the Crown,[176] as well as the evolution of the concept of 'the Crown' which Maitland decried,[177] it has limited relevance to modern domestic deployments outside of a historical basis. To that end, the most relevant literature (as opposed to legal history) is after the Glorious Revolution in 1688, when the royal prerogative was acknowledged to be at its widest.

For the purposes of a literature review, four categories have been established: material on IOs and the law in Australia; classic sources on executive power; modern commentary on executive power; and Australian commentary on domestic deployments. Each are discussed below.

1 *Interference Operations and the Law in Australia*

There has been very limited discussion within Australia of the interrelation between IOs, Australian domestic law and the ADF. There have been some academic discussions around the interplay of international law and IOs, most notably by Professor Dale Stephens[178] and Professor Duncan Hollis.[179] Only the latter mentions domestic law as a likely remedy.[180] Professor Gerard Carney has also discussed the interplay between the implied freedom of political communication and possible non-statutory executive power.[181] His work does not focus on the ADF specifically, nor IOs generally, but on wider constitutional legal considerations.

In 2019, Lieutenant-Colonels Hywel Evans and Andrew Williams discussed possible legal frameworks for offensive cyber operations (OCOs), which IOs could theoretically fall within.[182] Over two pages, the ADF members discuss the application of the royal prerogative in its war prerogative and security services manifestations.[183] The discussion and application to IOs is therefore of limited application but is of interest.

[176] Walter Ullmann, *Principles of Government and Politics in the Middle Ages* (Routledge, 4th ed, 1978) 121.
[177] FW Maitland, *The Constitutional History of England* (Cambridge University Press, 1908) 181–3.
[178] Stephens (n 67).
[179] Hollis (n 66).
[180] Ibid 35.
[181] Gerard Carney, 'A Comment on How the Implied Freedom of Political Communication Restricts the Non-Statutory Executive Power' (2018) 43(2) *University of Western Australia Law Review* 255, 266.
[182] Hywel Evans and Andrew Williams, 'ADF Offensive Cyberspace Operations and Australian Domestic Law: Proprietary and Constitutional Implications' (2019) 49(4) *Federal Law Review* 606.
[183] Ibid 610–12.

Only three works within the literature discuss the interplay between the ADF, IOs and domestic Australian law. All three have been published by the author of this thesis. In 2020, an article was published in the *Adelaide Law Review* titled 'Keeping the Peace of the iRealm'[184] — which was refined and very substantially expanded to become Chapter 4 of this thesis. It looked at the application of the royal prerogative of keeping the peace of the realm into the cyber domain. In late 2021, an article was published in the *Journal of Military and Strategic Studies* called 'Colouring in the Grey Zone'.[185] It addressed why deterrence theory is the most appropriate framework to respond to IOs and how use of the law as a lever of national power can assist the Australian Government. In 2022, a sequel to the *Adelaide Law Review* article was co-authored with then-Associate Professor Cameron Moore titled 'Calling Out the Australian Defence Force into the Grey Zone'.[186] This article looked at the viability and legality of deploying the ADF below the constitutional threshold of domestic violence through the lens of the nationhood power. Nationhood power does not fall within the scope of this thesis, being an extension of the breadth of constitutional executive power but not the depth.

Whilst the above paragraph would demonstrate that there is a viable topic, it is clear that a gap remains in the literature which this work engages with (and this is expanded upon below). No work engages with whether constitutional executive power has been abridged by Part IIIAAA; nor too does any work define domestic violence, nor apply the frameworks (statutory and non-statutory) to emerging issues such as IOs.

2 *Classic Sources on Executive Power*

John Locke provided the earliest relevant work on British executive power after the Glorious Revolution.[187] Written in 1689, the work is important in outlining the stewardship model of executive power, giving an important and oft-cited definition of the royal prerogative (for the public good) and for positing that the common law can be dispensed with in emergencies.[188] Indeed, the notion of emergency is particularly important in most classical sources on the executive power and finds its origin in Locke.

[184] Samuel White, 'Keeping the Peace of the iRealm' (2021) 42(1) *Adelaide Law Review* 101.
[185] Samuel White, 'Colouring in the Grey Zone: Lawfare as a Lever of National Power' (2021) 21(2) *Journal of Military and Strategic Studies* 77.
[186] White and Moore (n 14).
[187] Locke (n 149).
[188] Ibid.

Blackstone canvassed the powers of the Crown.[189] Blackstone's definition, provided above, is to be compared with AV Dicey's.[190] According to Dicey, the prerogative is exercisable by the Queen herself or by her Ministers and, accordingly, '[e]very act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative'.[191]

The difficulty with defining and researching elements of the royal prerogative is identifying the exact scope of their existence and power. Walter Bagehot, in *The English Constitution*, notes that any review of prerogative powers would conclude that the Crown holds many plenary powers which 'waver between reality and desuetude, and which would cause a protracted and very interesting legal argument if … [the Crown] tried to exercise them'.[192] One such power is that with respect to internal security, or keeping the peace of the realm (as covered in Chapter 4). The exact threshold for when the royal prerogative is enlivened is difficult to ascertain. Nearly 150 years later, Joseph Chitty wrote that the 'King may … do various acts growing out of sudden emergencies'.[193] The emphasis on and acceptance of a state of emergency was critical for scholars such as John Allen in his *Inquiry into the Rise and Growth of the Royal Prerogative*[194] and Arthur Berriedale Keith in his *The King and the Imperial Crown: The Powers and Duties of His Majesty*.[195] Allen went so far as to remark that emergencies could include abuse of monarchical power, relief from which included restoring peace to the realm through overthrowing the monarch.[196] Berriedale Keith was less emphatic, stating such operations were to support the Crown.[197] For the most part, however, classic sources on executive power are written from a unitary British perspective, and require an emergency to occur in order for the military to be deployed domestically. Classic sources on executive power do not engage with the effects of federalism on domestic security operations, nor engage with more recent case law which recognises a prerogative below the threshold of emergencies.

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[189] Blackstone (n 18) 232.
[190] AV Dicey, *The Law of the Constitution* (Palgrave Macmillan, 10th ed, 1959) 424.
[191] Ibid 425.
[192] Walter Bagehot, *The English Constitution*, ed Paul Smith (Cambridge University Press, 2001) 49.
[193] Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (Joseph Butterworth and Son, 1820) 49.
[194] John Allen, *Inquiry into the Rise and Growth of the Royal Prerogative* (Longmans, Brown and Green, 1849).
[195] Arthur Berriedale Keith, *The King and the Imperial Crown: The Powers and Duties of His Majesty* (Longmans, Green & Co., 1936).
[196] Allen (n 194) 87–8.
[197] Keith (n 195) 107.

3 *Modern Commentary on Executive Power*

In Australia, federalism clearly shapes both law and debate. The first major work that addressed constitutional executive power (under s 61 of the *Constitution*) was HV Evatt's doctoral thesis.[198] This work questioned the manner in which the recent Federation had shaped the powers of the Crown in Australia, and made the argument that a nation which federated and became sovereign in turn had inherited the rights to declare war or peace, to annex and to colonise and other prerogatives that were at that time reserved still for Britain. It did not engage, however, with constitutional executive authority for domestic operations.

George Winterton's *Parliament, The Executive and the Governor-General*[199] hailed itself as the first publicly available monograph on the nature and ambit of constitutional executive power.[200] It was, in a specific manner, as Evatt's doctoral thesis was unpublished at the time. Winterton's major impact was the creation of the abovementioned tool for the analysis of constitutional executive power.

Winterton's position on the issues at hand was that the Commonwealth executive could only do what it could legislate for (ie under s 51 of the *Constitution*).[201] Public order being a state issue, the Commonwealth was constitutionally constrained from assisting.[202] The tension between public order and defence was accurately captured by Anne Twomey.[203] Twomey illustrates that, since the first year of Federation, there has been tension in the management of what is a defence issue or a public order issue.[204] Twomey perhaps best represents the academic school that requires an emergency for Commonwealth intervention, in accordance with s 119 of the *Constitution.*

This conservative constitutional thinking came to the fore after the decision of *Ruddock v Vadarlis*.[205] The case is particularly relevant in two ways: it is common law authority for armed troops to deploy in the off-shore area; and it was only a decision of the Full Federal Court. It

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[198] Herbert Vere Evatt, 'The Royal Prerogative' (LLD thesis, University of Sydney, 1924). The thesis has been published as Herbert Vere Evatt, *The Royal Prerogative* (Law Book, 1987).
[199] Winterton, *Parliament* (n 153).
[200] Ibid 1.
[201] Ibid, 38.
[202] See *A-G (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644, 653−4 (Viscount Haldane LC, Lord Dunedin, Lord Shaw and Lord Moulton). See also John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 964.
[203] Anne Twomey, 'Pushing the Boundaries of Executive Power: *Pape*, the Prerogative and Nationhood Powers' (2010) 34(1) *Melbourne University Law Review* 313, 319–20 ('Pushing the Boundaries').
[204] Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006).
[205] (2001) 110 FCR 491.

has neither been overturned nor accepted by the High Court and academics have both praised[206] and critiqued it.[207] Later High Court jurisprudence has avoided the case.[208] It further has inspired a generation of constitutional lawyers to inquire into the nature and ambit of the nationhood power, as a subset of constitutional executive power.[209]

Yet almost no Australian scholars have engaged with the relevance and viability of using the prerogative of keeping the peace within the realm. This prerogative was recognised by the Divisional Court and then the Court of Appeal of England and Wales in *R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority* ('*Northumbria*').[210] The facts of the case are as follows. In the early 1980s the United Kingdom's Home Office centralised plastic batons and tear-gas rounds, to be made available to chief officers of police in situations of serious public disorder. In Home Officer Circular 40/1986, the Home Secretary announced that the store might be made available to those in need without the approval of the local police authority. This announcement displeased the Northumbria Police Authority, which applied for a declaration to the effect that that specific part of the circular was ultra vires.[211]

The case was first heard before a Divisional Court which found that the royal prerogative included a power to do whatever 'was necessary to meet either an actual or an apprehended threat to the peace'.[212] The Divisional Court moreover held that relevant statutory provisions (the *Police Act 1964*) did not 'confer a monopoly power so as to limit the prerogative by implication'.[213]

On appeal, the Court of Appeal of England and Wales upheld the primary decision, agreeing that the circular could be justified under the royal prerogative.[214] The Court of Appeal placed

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[206] Simon Evans, 'Developments — Australia' (2003) 1 *International Journal of Constitutional Law* 123; Mary Crock, 'In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) *12 Pacific Rim and Policy Journal* 49.
[207] CMJ Bostock, 'The International Legal Obligations owed to the Asylum Seekers on the MV Tampa' (2002) 14(2–3) *International Journal of Refugee Law* 279; Donald Rothwell, 'The Law of the Sea and the M/V Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty' (2002) 13 *Public Law Review* 118.
[208] *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514.
[209] Peter Gerangelos, 'Section 61 of the *Commonwealth Constitution* and an "Historical Constitutional Approach": An Excursus on Justice Gageler's Reasoning in the *M68* Case' (2018) 43(2) *University of Western Australia Law Review* 103. This approach is supported in Greentree (n 158); Peta Stephenson, *Nationhood, Executive Power and the Australian Constitution* (Bloomsbury, 2022); Saunders, 'Democracy, Liberty' (n 60) 367; Nicholas Condylis, 'Debating the Nature and Ambit of the Commonwealth's Non-Statutory Executive Power' (2015) 39(2) *Melbourne University Law Review* 385.
[210] At first instance [1987] 2 WLR 998; on appeal *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 QB 26.
[211] Ibid.
[212] Ibid 999.
[213] [1987] 2 WLR 998.
[214] *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 QB 26.

significant weight on the Crown's duty to keep those under its allegiance safe from physical attack within its dominions.[215] This duty was found to require a prerogative power and, importantly, was applicable at all times and not simply linked to emergencies. Arguing through the omission of evidence to the contrary, Nourse LJ opined that 'a prerogative of keeping the peace within the realm existed in mediaeval times, probably since the Conquest [of William I]'[216] and that 'there is no historical or other basis for denying to the war prerogative a sister prerogative of keeping the peace within the realm'.[217]

Within the United Kingdom, the case came under some sporadic critique. One issue is the lack of historical justification for the finding that the prerogative exists, with Robert Ward arguing that the sources used to justify the Court's position in *Northumbria* should result in 'full marks to it for creative thinking' but that the result was erroneous.[218] Other British academics have accused the decision of being 'more policy than principle'.[219] Further still, the decision has been criticised as failing to mark the limits of the specific prerogative, and thus normatively undesirable.[220] Yet for the most part these criticisms are *lex ferenda*, rather than *lex lata*. It is clear that both the Divisional Court and the Court of Appeal believed that the Crown held a prerogative power to keep the peace of the realm, importantly, where no emergency exists. Considering that s 61 of the *Australian Constitution* is informed by the British common law,[221] it would appear common sense that, if an internal security prerogative has been affirmatively upheld within the United Kingdom (thereby being found to have existed in 1688), it thereby exists within Australia, regardless of the absence of case law to uphold this finding.[222] Literature prior to the case is therefore of very limited application.

Since 1989, within Australia, the case has barely been engaged with. Professor Twomey made a fleeting mention to the case in 2010;[223] so too did Peta Stephenson as authority for the power

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[215] Ibid, 32.
[216] Ibid 59.
[217] Ibid 58.
[218] Robert Ward, 'Baton Rounds and Circulars' (1988) *Cambridge Law Journal* 155, 156.
[219] Conor Gearty, 'The Courts and Recent Exercises of the Prerogative' (1987) *Cambridge Law Journal* 372, 374. See also Christopher Vincenzi, *Crown Powers, Subjects and Citizens* (Bloomsbury, 1998).
[220] Ward (n 218) 155–6. See further Sebastian Payne, 'The Royal Prerogative' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown* (Oxford University Press, 1999) 77.
[221] *Davis v Commonwealth* (1988) 166 CLR 79, 92 (Mason CJ, Deane and Gaudron JJ) quoted *in Pape v Commissioner of Taxation* (2009) 238 CLR 1, 62 (French CJ) and *Williams v Commonwealth [No 1]* (2012) 248 CLR 156, 372 (Kiefel J).
[222] Michael Head, 'Calling Out The Troops — Disturbing Trends and Unanswered Questions' (2005) 28(2) *UNSW Law Journal* 528, 529.
[223] Twomey, 'Pushing the Boundaries' (n 203) 336.

to deploy domestically under the prerogative.[224] Professor Zines perhaps engaged more fully in a single sentence when arguing that the case is normatively undesirable.[225] Cameron Moore, whose doctoral thesis and subsequent monograph explored the ambit of constitutional executive power and its interrelation with the ADF, accepted that a power existed outside of necessity for the ADF to deploy.[226] Moore however was unsure how *Northumbria* would be operationalised in a federal context nor to what extent it had been abridged by statute.[227] So too did Peta Stephenson, a constitutional law academic, recently accept that the power to keep the peace existed in Australia.[228] This case and its application within Australia was discussed by the author of this thesis in a recent monograph titled *Keeping the Peace of the Realm*, which is expanded upon in Chapter 4.[229]

4 *Australian Commentary on Domestic Deployments of the ADF*

It is clear that there is a suite of modern literature on the issue of executive power — be it in a federal or unitary system. There is corresponding, but sporadic, literature on the legal authorities for domestic deployments of the ADF under executive power. The sporadic nature corresponds to moments when the military have been utilised in a manner contrary to social traditions. The first critical instance was the 1978 Hilton bombing. On 13 February, a bomb exploded before the opening of the Commonwealth Heads of Government Regional Meeting. Subsequently, the Governor-General by Order-in-Council called out the ADF, as authorised by an Executive Council minute,[230] leading to 1900 troops, utilised in a security force role, to secure Bowral.[231]

Until recently, this was the 'only major mobilisation of troops in an urban setting in Australia's history'.[232] It is perhaps best qualified now as being the only major mobilisation of *armed* troops. Professor Blackshield summarised the legal debates at the time:

[224] Stephenson, 'The Relationship' (n 158) 1001, 1028.
[225] Zines (n 175) 287.
[226] Moore, *Crown and Sword* (n 8) 187–8.
[227] Ibid.
[228] Stephenson, 'The Relationship' (n 158) 1001.
[229] White, *Keeping the Peace* (n 14). See also Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report* (Report, October 2009) 26 [102]; Noel Cox, *The Royal Prerogative and Constitutional Law* (n 17) 47–8.
[230] *Commonwealth Gazette*, No S30 (14 February 1978).
[231] Michael Head, *Calling Out the Troops — The Australian Military and Civil Unrest* (Federation Press, 2009) 44.
[232] Ibid 49.

> In terms of our popular social traditions, the idea is very firmly entrenched that the use of armed forced within the realm in peacetime is 'not cricket'. It is this longstanding social tradition that really underlies the disquiet surrounding the events at Bowral. But as soon as one asks whether this social tradition is reflected in any legal tradition that might be invoked as a constitutional restraint on the use of armed forces, one is plunged into an esoteric maze of uncertainties.[233]

This maze was navigated by Mr Justice Robert Hope, in his Protective Security Review which, inter alia, found that the use of the ADF was valid on the basis of the inherent power of the Commonwealth to protect its interests.[234] It should be recollected that the *Northumbria* case had not yet been decided. Sir Victor's opinion was thus in keeping with the legal theory at the time because it assigned this capacity to the nationhood power rather than the internal security prerogative.

Peter Salu's 1995 doctoral thesis titled 'Military Intervention in Australia' canvassed some legal history relating to colonial and early Federation industrial strike-breaking by the military.[235] His thesis is however dated in two respects. First, it relates to the now-overridden statutory provisions to respond to domestic violence; second, its focus is upon how extant policy should be changed to reflect common law principles of the primacy of civilian authorities in call outs.

The next major discussion, notwithstanding incidents of domestic deployment, corresponds with the passage of statutory authority for the deployment of the ADF to respond to incidents of domestic violence. This legislation (Part IIIAAA of the *Defence Act 1903* (Cth)) was introduced in anticipation of the 2000 Sydney Olympics. For the most part, academic discussion has provided a rather banal analysis of the statute, with some limited discussions of operations outside of it.[236] There has been some critical assessment however: Michael Head is particularly cautious of domestic deployments. His monograph *Calling Out the Troops* is one of the leading texts in domestic operations literature.[237] However, Head fails to meaningfully

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[233] Anthony Blackshield, 'The Siege of Bowral — The Legal Issues' (1978) 4(9) *Pacific Defence Reporter* 6, 9.
[234] Robert Hope, *Protective Security Review* (No 2002, 15 November 1979) 220.
[235] Peter Salu, 'Military Intervention in Australia: A Study of the Use and Basis of Defence Force Involvement in Civil Affairs in Australia' (PhD Thesis, The University of Adelaide, 1995).
[236] Penny Saultry and Damian Copeland, 'Domestic Legal Framework for Operations' in Dale Stephens, Peter Sutherland and Robin Creyke (eds), *Military Law in Australia* (Federation Press, 2019) 161.
[237] Head, *Calling Out the Troops* (n 231).

engage with the interplay between constitutional provisions and focuses upon emotive arguments around possible abuses of power by the military.[238]

Cameron Moore has written both on Head's work[239] and on the constitutional underpinnings of ADF deployments more generally.[240] His work and analysis is oft-cited by constitutional lawyers,[241] but his research focuses specifically on s 61 of the *Constitution* rather than its interrelation with other constitutional sections such as s 63 or s 119. Although the nature of constitutional executive power came to the fore during the recent domestic operations to counter the 2020 bushfires and later public health measures during the COVID-19 pandemic, for the most part, however, the literature remained focused upon the need for emergencies,[242] or whether the constitutional threat of 'domestic violence' (the focus of Chapter 3) had been met.[243] This constitutional provision underpins the discussions in Chapters 3–4. It is necessary therefore to examine the meaning of the term and its constitutional impact. Particularly, it is important to focus on the high bar that the term 'domestic violence' presents.

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[238] Michael Head, 'The Military Call-Out Legislation: Some Legal and Constitutional Questions' (2001) 29 *Federal Law Review* 271; Head, 'Calling Out the Troops' (n 222); Michael Head, 'Australia's Expanded Military Call-Out Powers: Cause for Concern' (2006) 3 *University of New England Law Journal* 125; Head, *Calling Out the Troops* (n 231); Michael Head, 'Another Expansion of Military Call Out Powers in Australia: Some Critical Legal, Constitutional and Political Questions' (2019) 5 *UNSW Law Journal Forum* 1 ('Another Expansion'); Michael Head, *Domestic Military Powers, Law and Human Rights: Calling out the Armed Forces* (Routledge, 2020).

[239] Cameron Moore, 'Calling Out the Troops — The Australian Military and Civil Unrest: The Legal and Constitutional Issues by Michael Head' (2009) 33(3) *Melbourne University Law Review* 1022.

[240] Cameron Moore, 'The ADF and Internal Security: Some Old Issues with New Relevance' (2005) 28(2) *UNSW Law Journal* 523; Moore, *Crown and Sword* (n 8).

[241] Anne Twomey, 'The Prerogative and the Courts in Australia' (2021) 3 *Journal of Commonwealth Law* 55 ('The Prerogative and the Courts'); Erik Paul, 'The State of Exception' in *Australian Imperialism* (Erik Paul ed., Palgrave Macmillan, 2001) 32; Efthymios Papastavridis, 'Intelligence Gathering in the Exclusive Economic Zone' (2017) 93 *International Law Studies* 446.

[242] Anthony Gray, 'The Australian Government's Use of the Military in an Emergency and the *Constitution*' (2021) 44(1) *UNSW Law Journal* 357, 362–4.

[243] See David Letts and Rob McLaughlin, 'Call-Out Powers for the Australian Defence Force in an Age of Terrorism: Some Legal Implications' (2016) 85 *AIAL Forum* 63; David Letts and Rob McLaughlin, 'Military Aid to the Civil Power' in Robin Creyke, Dale Stephens and Peter Sutherland (eds), *Military Law in Australia* (Federation Press, 2019) 112; Elizabeth Ward, 'Call out the Troops: An Examination of the Legal Basis for Australian Defence Force Involvement in "Non-defence" Matters' (Research Paper No 8/1997–98, Parliamentary Library, 1998); John Sutton, 'The Increasing Convergence of the Role and Functions of the ADF and Civil Police' (2017) 202 *Australian Defence Force Journal* 38; Head, 'The Military Call-Out Legislation' (n 238); Andrew Hiller, *Public Order and the Law* (Sweet & Maxwell, 1983); Norman Charles Laing, 'Call-Out the Guards: Why Australia Should no Longer Fear the Deployment of Australian Troops on Home Soil' (2005) 28(2) *UNSW Law Journal* 508; Hoong Phun Lee et al, *Emergency Powers in Australia* (Monash University Press, 2018) 218.

The term has not been defined by Australian courts and has only garnered passing mention.[244] Peta Stephenson in 2015 discussed the historical underpinnings of s 119, and concluded that the historical contexts of its drafting implied a quite high interpretation of what domestic violence entailed.[245] More recently Professor Anthony Gray attempted to utilise the jurisprudence around inter-family personal violence (i.e. domestic violence) to aid the interpretation of the constitutional provision, and argued that a low threshold should be adopted.[246] Military lawyers are not immune from a misunderstanding of the term as well — Associate Professor David Letts, a senior Reserve legal officer, suggested that the bushfires of 2020 may have triggered the constitutional term.[247] This might well be correct, although it was not the perspective taken by the author of this thesis in a series of journal articles[248] and monograph.[249] As Chapter 3 will demonstrate, it is clear that domestic violence is a relatively high bar and one that requires violence (as opposed to natural disasters). The meaning of the term is therefore a gap in literature that needs to be canvassed and explored, so as to understand when relevant legal thresholds have been met, and how other constitutional provisions — namely, s 61 — interplay with s 119.

D *The Gaps in the Existing Literature*

Navigating the above four lines of research within the literature review, a gap has emerged: to what extent does the internal security prerogative (as recognised in *Northumbria*) apply within Australia's constitutional framework as a lawful authority for ADF domestic operations?

As noted above, Michael Head and most other commentators have remained focused on the statutory provisions that regulate the call out of the military: Part IIIAAA. In all of Head's work, whilst questioning the constitutional head of power that authorises the statute, there is no mention to the *Northumbria* case. So too is the legislation often misunderstood and

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[244] It has been discussed in *Pirrie v McFarlane* (1925) 36 CLR 170, 206 (Isaacs J); *Carter v Egg and Egg Pulp Marketing Board for the State of Victoria* (1942) 66 CLR 557, 571 (Latham CJ); *R v Sharkey* (1949) 76 CLR 121, 151 (Dixon J); *Thomas v Mowbray* (2007) 233 CLR 307, 395 [248] (Kirby J).

[245] Peta Stephenson, 'Fertile Ground for Federalism? Internal Security, the States and Section 119 of the Constitution' (2015) 43 *Federal Law Review* 289, 294.

[246] Gray (n 242) 362–4.

[247] David Letts, ' Sending in the Military? First Let's Get Some Legal Questions Straightened Out' *The Canberra Times* (online, 8 January 2020) <https://www.canberratimes.com.au/story/6570161/sending-in-the-military-first-lets-get-some-legal-issues-straightened-out/>.

[248] See nn 109–11.

[249] White, *Keeping the Peace* (n 14) 57–63.

imperfectly cited.[250] So too with Moore's work. One chapter of his monograph *Crown and Sword*[251] focuses on internal security operations but does not engage with how *Northumbria* might apply in a federal construct. Notwithstanding Stephenson's work around the history of s 119, no academic piece apart from those by the author of this thesis has ever attempted to engage directly with the meaning of 'domestic violence'. This thesis refines and expands upon work published elsewhere, which sought to do this.[252] It is important, for by understanding the thresholds a discussion can be held about the framers' intent for the provision. The conclusion of this thesis is that s 119 provides a non-exclusive method of domestic deployment, without implied limitations on other means under s 61.

In addressing the gap in the literature, it is necessary to discuss any abrogation by Commonwealth legislation. Of the four authors that have specifically addressed a prerogative authority arising from *Northumbria* (Zines, Moore, Twomey, Stephenson) none have engaged in an in-depth discussion of its possible abrogation by statute. In pieces that have addressed the interrelation of Commonwealth statute and constitutional executive power, only Stephenson has focused on military deployments but merely mentions that part IIIAAA may have had an effect.[253] Benjamin Saunders merely outlines the divergence between the British and Australian interpretations of statutory abridgement.[254] Chapters 3 and 4 address this gap, which is critical to understanding the modern relevance and existence of constitutional executive power in light of the statute.[255]

Finally, arising from a lack of definition, no work (except one of the author's own[256]) has engaged with the critical question of how modern cybersecurity threats interplay with the royal prerogative. George Winterton's 1983 piece remains the only cited academic discussion of how to assess whether the prerogative has evolved or not;[257] and how to assess whether events within cyberspace can amount to domestic violence has not been discussed. To that end, this doctoral work represents new and novel approaches to an identified gap within the literature.

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[250] See, eg, the discussions around the necessity for domestic violence for a call out in Twomey, 'The Prerogative and the Courts' (n 241) 55, 62; Head, 'Another Expansion' (n 238) 1, 5. Domestic violence is not required for a call out in the Australian offshore area: see *Defence Act 1903* (Cth) s 33.
[251] Moore, *Crown and Sword* (n 8) ch 4.
[252] White, *Keeping the Peace of the Realm* (n 14) 57–63.
[253] Stephenson, 'The Relationship' (n 158) 1001, 1028.
[254] Saunders, 'Democracy, Liberty' (n 60).
[255] White, *Keeping the Peace of the Realm* (n 14) 81–104.
[256] White, 'Keeping the Peace of the iRealm' (n 184) 111.
[257] George Winterton, 'The Prerogative in Novel Situations' (1983) 99 *Law Quarterly Review* 407, 409.

V Structure of the Thesis

The thesis is divided into three parts. Part I contains both Chapter 1 (the introduction) and Chapter 2. Part II focuses on denial operations (under deterrence theory); Part III comprises the conclusion.

Chapter 2 covers the threat of IOs and begins with a history of the use of covert, corrupt or coercive methods in warfare. It does to so to highlight the paradigm shift that both the internet, and the shift in economic models to targeted advertising, has caused. Chapter 2 demonstrates exactly how data can be extracted and utilised in order to weaponise it, and the difficulty that states can have in both attributing and responding to IOs. The difficulty in attribution leads to a discussion of whether or not IOs breach international law. Finding that they do not, domestic legal remedies are posited as the only lawful way for states to respond. Chapter 2 then advocates that any response seeking to effectively counter IOs must seek to increase their costs — their cheapness being their assessed centre of gravity. Deterrence theory (and its dual limbs of denial and punishment) is accordingly outlined.

Chapter 3 addresses denial operations under Part IIIAAA. The Chapter is significant for two reasons. First, it attempts to define domestic violence in both a constitutional and statutory sense. Second, it is necessary to understand the extent of the legislation in order to make an assessment as to whether it has abridged prerogative power. Chapter 3 accordingly addresses the meaning of domestic violence through a contextual analysis methodology. It illustrates that a cyberspace threat can still amount to domestic violence. Chapter 3 then turns to the various divisions of Part IIIAAA, and questions their usefulness in responding to cyberthreats, as well as what amounts to a Commonwealth interest. Finding that two of the three Divisions are flexible enough to provide a legal basis for cyber operations in response to IOs, Chapter 3 foreshadows a potential law reform that is suggested in the conclusion.

Chapter 4 addresses the lawful authorities for ADF operations below domestic violence and outside of statute. It begins with an analysis of the case of *Northumbria*, and addresses key critiques. A particular critique of the case is that there is no historical justification for the decision. Chapter 4 thus undertakes a historical analysis of the power to keep the peace of the realm as it existed in 1688. It then turns to the application of the case in Australia and whether Part IIIAAA has abridged the prerogative. Finding the legislation only covers the field with respect to domestic violence, the chapter concludes that there exists a clear prerogative

authority for ADF domestic deployments, in order to conduct active, counter-IO denial operations.

Part III (constituted by Chapter 5) concludes the thesis. It addresses a critical concern raised by both the existing literature and these chapters about the ambiguous nature of constitutional executive power, particularly with respect to domestic operations. Although not agreeing it is necessary, Chapter 5 provides three possible models for law reform and clarification in this area of law: rely on state law through a Commonwealth enabling provision; create a general Commonwealth immunity; or draft legislation that covers the field with respect to all domestic operations. Chapter 5 then concludes with a recommended course of action, being a general Commonwealth immunity. This model affords the greatest clarity for both citizens and Defence members whilst retaining the flexibility of constitutional executive power — a necessary, but oft-forgotten, part of the separation of powers.

CHAPTER 2: LEGAL AND STRATEGIC FRAMEWORKS OF AN EFFECTIVE RESPONSE

I PURPOSE AND SCOPE

This chapter aims to establish a broad understanding of the threat posed by IOs (a term selected and defined in Chapter 1).[1] It is important to understand the sui generis nature of IOs, so as to highlight why current strategic and legal responses are insufficient. It is also important to understand the nature of the threat, so as to identify the range of possible deterrence responses, which in turn will determine what range of legal authorities may be required to enable effective deterrence responses.

Section II of this chapter begins with a broad history of IOs, culminating in the 'active measures' of the Cold War. Although active measures have been broadly discussed in Chapter 1, Section II canvasses different tactics, techniques and procedures used, primarily to highlight the high-cost, but low-impact, nature of active measures. This is a necessary base to compare modern IOs' cost effectiveness. Section III then addresses the paradigm shift that the rise of surveillance capitalism (a form of capitalism that rewards those who can create the most accurate user profile for advertisement purposes) has caused in the weaponisation of information. In discussing surveillance capitalism, Section III canvasses the methods of data extraction, the creation of user profiles, and the importance of social media. These have all reduced the costs associated with IOs. Section III then demonstrates how IOs have evolved and identifies the range of modern challenges arising from new technologies: micro-targeting; the use of fake accounts and bots; and the unique vulnerabilities of cyberspace. This is all intended to illustrate the low costs and yet potentially high impact of IOs, which is necessary to inform any potential response framework.

Section IV then turns to a broad discussion of relevant legal and strategic frameworks. Specifically, Section IV addresses why IOs do not breach international law. It addresses the difficulties of meeting thresholds for breach of sovereignty or prohibited interventions and the difficulty of countermeasures in cyberspace. Section IV therefore concludes twofold that international law is insufficient to respond to the threat of IOs and that, at any rate, domestic law and frameworks are the only viable framework for responses. Section IV accordingly

[1] Part of the research in this chapter was published in Samuel White, 'Colouring in the Grey Zone: Lawfare as a Lever of National Power' (2021) 21(2) *Journal of Military and Strategic Studies* 77; Samuel White and Morgan Thomas, 'Closing the (National Security) Gap' (2023) *Journal of Information Warfare* (forthcoming).

addresses the current Australian policy approach of 'illumination', a framework founded upon the questionable assumption of rational actors operating in a marketplace of ideas. Utilising a military planning tool called a centre of gravity analysis, Section IV concludes that responses to IOs must focus on imposing costs rather than merely on illuminating actions.

Section V addresses a strategic framework designed to instil costs: deterrence. Section V discusses the theory of deterrence, and the different waves of strategic theory. It addresses the shift that occurred after the invention of nuclear weapons, and how a minimalist model of deterrence theory (a model concerned with certain weapons, rather than actors) is best applied in countering IOs. Section V concludes with a discussion of the two limbs of minimalist deterrence theory: denial and punishment which is integral for framing the thesis to look at the legal basis for denial operations responding to IOs.

II A History of Active Measures

Foreign state and non-state actors attempting to interfere with others is not a new phenomenon; nor, too, is the use of information in warfare as a resource, environment and weapon.[2] However, historically, there have been some buffer zones.

Ancient attempts to interfere were often restricted by close-knit populations who knew their community and the individuals within. This made covert, clandestine or corrupt activities particularly difficult. Two options were available. The first is best highlighted by the historic IOs of Themistocles:

> As Themistocles sailed along the coasts, wherever he saw places at which the enemy must necessarily put in for shelter and supplies, he inscribed conspicuous writings on stones, some of which he found to his hand there by chance, and some he himself caused to be set near the inviting anchorages and watering-places. In these writings he solemnly enjoyed upon the Ionians, if it were possible, to come over to the side of the Athenians who were risking all in behalf of their freedom; but if they could not do this, to damage the Barbarian cause in battle, and bring confusion among them.[3]

[2] John Keegan, *Intelligence in War* (Hutchinson Press, 2003).
[3] Plutarch, *The Lives of Noble Grecians and Romans*, tr John Dryden (Encyclopaedia Britannica, 1952) 98. There was fear such operations might occur in North Queensland, where enemies were interned and the large coastline remained unpatrolled, during World War Two. See NAA A373/1, Letter of 29 June 1943, Director-General of Security.

The second involved peripatetic individuals — such as merchants — who were able to infiltrate and interfere within societies through knowledge of likeminded individuals.[4] Their impacts however were limited to verbal communications and, after the invention of the printing press, pamphlets.[5]

The methods and means of interference remained unchanged until Morse's code, Bell's telephone and Marconi's radio. Their operational use was quick to follow, particularly with respect to radios.[6] Radios were the primary means of interfering within targeted societies, and supporting underground movements, allowing the tyranny of distance to be surmounted. They also did not require the audience to be literate.

The mass manipulation of an enemy population, through both overt and covert means, was the subject of fascination and anxiety in the late 19th century. It was initiated by a landmark study by Gustave Le Bon, a French social psychologist, who published *The Crowd: A Study of the Popular Mind* in 1896.[7] The work encouraged the view that ordinary, rational people could lose their reason when caught in crowds, and influenced the view that populations could be manipulated.[8] Importantly, Le Bon and later scholars noted, individuals could not be forced to believe something without a prior disposition. The power of crowds was therefore limited to those that were easily influenced — or in modern parlance, targetable.[9]

This view in turn dominated the thinking of the Great Powers during the First World War, concerned as it was with the first total, national mobilisation. Modern technologies combined with broadcast media, such as film, were believed to offer a 'hypodermic needle' or 'magic

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[4] The Mongols, with an incredibly limited number of troops due to the sparsely populated steppes, relied upon spies to plant rumours of their 'huge numbers, stupidity and ferocity' among enemy populations to lower morale and frighten the enemy before an attack: Paul MA Linebarger, *Psychological Warfare* (Duell, Sloan & Pearce, 2nd ed, 1948) 15. So too did the Mexica (Aztecs) utilise merchants to spread rumours in target populations: see Samuel White and Ray Kerkhove, 'Aztec Laws of War' in Samuel White (ed), *The Laws of Yesterday's Wars* (Brill, 2021) 69, 81. Sun Tzu in *The Art of War* (Penguin, 2008) ch 13 advocated the use of 'dead spies' who would spread rumours until killed. Niccolo Machiavelli in *The Prince* (Penguin, 1951) highlighted the benefits of using a diaspora or colonists to interfere.

[5] Thomas Rid, *Active Measures* (Macmillan, 2020) 38. Eventually a method of control was found — the resource of paper — as it is rather difficult to produce dissenting literature without newsprint; see Peter Kenez, *The Birth of the Propaganda State: Soviet Methods of Mass Mobilization, 1917–1929* (Cambridge University Press, 1986) 44–7.

[6] Telegraphs allowed for the quick dissemination of information, providing the British Empire with a means to quickly summon reinforcements in Imperial provinces. One Indian mutineer in 1857 is reported as saying that the telegraph was 'the accursed string that strangles me': Niall Ferguson, *The Square and The Tower* (Penguin, 2008) 160.

[7] Gustave Le Bon, *The Crowd: A Study of the Popular Mind* (Macmillan, 1896).

[8] IS Bloch, *Is War Now Impossible? Being an Abridgement of the War of the Future and in Its Technical Economic and Political Relations* (Grant Richard, 1899).

[9] Brittany Kaiser, *Targetable* (HarperCollins, 2020).

bullet' to the masses which they were unable to resist.[10] The military application — of both an offensive and defensive nature — was clear to state and non-state groups.[11]

A *The Perfection of Active Measures*

Non-state groups seeking to exploit vulnerabilities within states is particularly important to the history of active measures (*aktivnyye meropriyatiya*), a term that emerged from the works of Vladimir Ilyaich Ulyanov (Lenin).[12] Specifically, Lenin wrote:

> The more powerful enemy can be vanquished only by exerting the utmost effort, and by the most thorough, careful, attentive, skilful and obligatory use of any, even the smallest, rift between enemies, any conflict of interests among the bourgeoisie of the various countries and among the various groups or types of bourgeoisie within the various countries, and also by taking advantage of any, even the smallest, opportunity of winning a mass ally, even though this ally is temporary, vacillating, unstable, unreliable and conditional.[13]

This form of operation was thus 'a war which is a hundred times more difficult, protracted and complicated than the most stubborn of ordinary wars between states'.[14] Its initiation by Soviet Russia as a formidable method of warfare, however, demonstrated to many states the benefits that could be gained by exacerbating 'the existing tensions and contradictions within the adversary's body politic, by leveraging facts, fakes and ideally a disorienting mix of both'.[15] The Soviet operationalisation of these existing tensions was called 'active measures'. It ran contrary to Greco-Roman ideals of a fixed battle,[16] and the Greco-Roman binary divide between peace and war.[17] This has shaped consequential Western assumptions that influence,

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[10] Nicholas Reeves, 'Battle of the Somme' (1997) 17(1) *Historical Journal of Film* 5; Sandra J Ball-Rokeach, *Media, Audiences and Social Structure* (Beverly Hills, 1986).
[11] Brock Millman, 'HMG and the War Against Dissent, 1914–1918' (2005) 40(3) *Journal of Contemporary History* 33.
[12] George F Kennan, 'The Inauguration of Organized Political Warfare' (Wilson Centre, Digital Archive, 30 April 1948).
[13] Vladimir Lenin, 'Left-Wing Communist, an Infantile Disorder' in Vladimir Lenin, *Collected Works*, tr Ronald Vroon (Progress Publishers, 1972) 62, 70–1. Lenin's approach to active measures was recognised in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 143 where Latham CJ held 'one of the most effective forms of fifth-column work is to use any real or pretended dispute — political, industrial or religious — as a means of promoting social confusion and dislocating the economy of a country'.
[14] Vladimir Lenin, 'What Is To Be Done?' in Vladimir Lenin, *Collected Works*, tr Ronald Vroon (Progress Publishers, 1972) 102, 108.
[15] Rid (n 5) 4.
[16] Thucydides, *History of the Peloponnesian War* (Penguin, 1956).
[17] Samuel White, 'Roman Laws of War' in Samuel White (ed), *The Laws of Yesterday's Wars 2* (Brill, 2022) 109. See further White, 'Colouring in the Grey Zone' (n 1).

subversion and deception are force multipliers to kinetic operations, not forces in their own right, capable of achieving strategic victory.

One difficulty of active measures was identifying, and contacting, target audiences. Under contemporary Soviet doctrine, there were two forms of individuals that active measures should try to target: 'fellow travellers' of the Communist cause and 'useful idiots' who did not realise who was funding their research or endeavours.[18] The identification of these individuals was a task that only well-resourced, bureaucratic organisations could afford.[19] So too was the logistics of contacting these individuals. As Table 1 highlights, contacting fellow travellers and useful idiots required messaging in a general, wide manner. At the height of Soviet active measures (being the 1960s and 1970s), there were six monthly brochures that targeted fellow travellers and useful idiots within West Germany (see Table 1).

Table 1: Soviet Active Measures in West Germany[20]

Name	Translation	Audience	Intended effect
Die Wahrheit	The Truth	General interest, mini-magazine	Spreading Soviet concepts
Der Kampfer	The Fighter	West German armed forces	Called into question the usefulness of American intervention in Germany
Der Pareiarbeiter	The Party Worker	Targeted Communist functionaries	To maintain support for Communism in Western Europe

[18] Soviet operatives used the term useful idiot to describe Western targets driven by fame and fortune. The term was coined by Polish agents in the 1860s to describe, in turn, Russian nihilists: see Clint Watts, *Messing with the Enemy* (Harper, 2019) 133. A good example in the Cold War era is the funding of the Generals for Peace initiative, in an attempt to use Western generals who opposed nuclear proliferation as a disguised Soviet front: see Rid (n 5) 81. A more modern example is the creation of social media accounts under the guise of supporting Black Lives Matter, but at a critical moment urging followers to not vote in the 2016 US elections, in an attempt to interfere – the risk of this happening in Australia was noted in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2016 Federal Election and Matters Related Thereto* (Report, November 2018).

[19] One estimate placed it at $4 billion annually, with over 15,000 personnel; see Kevin McCauley, *Russian Influence Campaigns Against the West: From the Cold War to Putin* (North Charleston, 2016) 51.

[20] Friedrich Wilhelm Schlomann, 'DDR-Desinformation', *Das Ostpreustenblatt* (Hamburg, 13 November 1993) 46; Rid (n 5) 138.

Geist und Leben	Spirit & Life	General interest, mini-magazine	Cultural news outlet with a focus on suppression of the church and spiritual life
Elternhaus und Schule	Home & School	Parents and students	To try to expose women and children to Soviet concepts
Der Bund	Colloquial nickname of the Bundeswehr	West German military personnel	Called into question the usefulness of American intervention in Germany

The difficulty with these magazines was multifaceted: they were high-cost and low-impact, as well as flawed by an inherent difficulty in measuring effectiveness, including whether or not the target audience were receptive to the messaging and the dissemination of the information.[21] Targeting individuals either required a generic message (mass broadcasting) or intimate knowledge of a target, gained through timely intelligence gathering, complicated by distance.

There was also difficulty in countering active measures. Although ex post facto reporting has claimed that 'the high professional standards of U.S. and allied journalism proved a formidable bulwark against Soviet disinformation efforts, including those to plant false stories and "leak" forged documents in the Western press',[22] this is an inherently difficult claim to justify, or deny. There were many instances of disinformation being actively published by the Western press; indeed *Der Bund* in Table 1 above was apparently not uncovered as a Soviet magazine until after the end of the Cold War, despite being read by the West German military.[23]

The strategic success of Soviet active measures resulted in the United States investigating them as a feasible strategy. In 1971, after the CIA had spent a decade looking into means of behaviour modification, a Senate Subcommittee on Constitutional Rights was raised, triggered by a growing sense of public alarm at the spread of psychological techniques for behaviour modification.[24] Specifically, it looked to investigate the CIA 'MKUltra' project, tasked with 'research and development of chemical, biological and radiological materials capable for

[21] Rid (n 5) 38–44.
[22] Ross Babbage, *Winning Without Fighting — Volume 1* (CSBA, 2019) 19, quoting Denis Kux, 'Soviet Active Measures and Disinformation: Overview and Assessment' (2013) 15(4) *Parameters* 26.
[23] Rid (n 5) 92.
[24] Rebecca Lemov, *World as a Laboratory: Experiments with Mice, Mazes and Men* (Hill and Wang, 2005) 189.

employment in clandestine operations to control human behaviour'.[25] The head of the Senate Subcommittee scathingly remarked:

> When the founding fathers established our constitutional system of government, they based it on their fundamental belief in the sanctity of the individual … they understood that self-determination is the source of individuality, and individuality is the mainstay of freedom … Recently, however, technology has begun to develop new methods of behavioral control capable of altering not just an individual's actions but his very personality and manner of thinking … The question becomes even more acute when these programs are conducted, as they are today, in the absence of strict controls. As disturbing as behaviour modification may be on a theoretical level, the unchecked growth of the practical technology of behaviour control is cause for even greater concern.[26]

It is this growth in the practical technology of behaviour control that is the focus of Section III, and is the threat that this thesis is concerned with.

III MODERN INTERFERENCE OPERATIONS

The digital age has made targeting fellow travellers or useful idiots overwhelmingly easier than historic active measures. Whilst many of these Cold War tactics, techniques and procedures continue today (such as disinformation and *kompromat*) with a technological update,[27] there has been a paradigm shift in the ability to target individuals. This has made modern IOs a sui generis threat. Indeed, the evolution is so novel that it has taken almost two decades to shake off the intellectual paralysis surrounding it.[28] This new state of being is increasingly being referred to as 'surveillance capitalism',[29] a term that focuses on a shift from the means of *production* to means of *behaviour modification*.

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[25] Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Book 1: Foreign and Military Intelligence* (Final Report, 26 April 1976) 390.

[26] Sam J Ervin, 'Preface' in Subcommittee on Constitutional Rights, *Individual Rights and the Federal Role in Behaviour Modification* (Report, November 1974) iii, iii–iv.

[27] Archival evidence shows the Prime Minister of Australia was briefed on disinformation techniques by ASIO in the late 1970s and 1980s, although the particularities of 'active measures' remain redacted; see NAA A236. That archival file has a useful United States Department of State, Bureau of Public Affairs, 'Forgery, Disinformation and Political Operations' (October 1981). For example letter brigades have turned into online troll farms; leak operations are done under the disguise of 'doxing' (an internet jargon term derived from an alternative spelling of the abbreviation 'docs' for document).

[28] Shoshana Zuboff, *The Age of Surveillance Capitalism* (Profile Books, 2019) 18.

[29] Ibid.

A *The Theory of Surveillance Capitalism*

Surveillance capitalism looks to exploit behavioural data (termed *surplus*), which is the raw material of human experience online. Through a manufacturing process, utilising machine intelligence, this data is fabricated into prediction products.[30] Such predictions are based upon individual user profiles that outline the personal preferences of customers. These user profiles, and predictions, are then sold to advertising companies in a market that rewards the most accurate profile. As Shoshana Zuboff notes:

> Firms will be bought and sold, fail or succeed; people will come and go. Specific technologies, products and techniques will be abandoned, refined and surpassed. When they fall, new ones will take their place, as long as surveillance capitalism is allowed to flourish … It is the pattern and its purpose we want to grasp.[31]

Google paved the way with its search engine, a technological shift that allowed for the observation, and then collection, of behavioural surplus in a manner completely impossible at any point in history beforehand. In 2004 Google filed a patent to look at user data titled 'Generating User Information for Use in Targeted Advertising'.[32] This shifted identification of individual needs from an art, as experienced in active measures in the Cold War, to a science. The patent noted:

> There is a need to increase the relevancy of ads served for some user requests, such as a search query or a document request … To the user that submitted the request … the present invention may involve novel methods, apparatus, message formats and/or data structures for determining user profile information and using such determined user profile information for ad serving.[33]

In plain language, in 2004 Google realised it could 'infer and deduce the thoughts, feelings, intentions and interests of individuals and groups'.[34] The market rewarded the innovation through remarkable profits: 3,590% increase in revenue in less than 4 years.[35] The success of

[30] Ibid 8.
[31] Ibid 241.
[32] *US Patent, Amendment No 9 to Form S-1 Registration Statement Under the Securities Act of 1933 for Google Inc*, filed on 18 August 2004.
[33] Ibid.
[34] Zuboff (n 28) 81.
[35] Ibid 77. Google experienced a 400% increase in the first year of user profiles in 2000; which increased revenues to $347 million in 2002, then $1.5 billion in 2003, and $3.2 billion in 2004.

Google in generating income has led a suite of companies to adopt the surveillance capitalism model.[36]

1 *Extraction Methods*

But how is this behavioural data extracted? The simplest manner is open source. The term is best defined as: 'information that has been published or broadcasted for public consumption, is available on request to the public, is accessible online or otherwise to the public, or is available to the public by registration, subscription or purchase.'[37] The definition excludes information obtained under the use of an assumed identity (a defined term[38]), which is a common tactic in foreign interference. Open source data provides the largest possible extraction method, and is a method that many states have actually promoted. The *Budapest Convention on Cybercrime* — to which Australia is a party — specifically gives parties the right to 'access publicly available [open source] stored computer data, regardless of where the data is located geographically'.[39] It can be collected through automated 'web crawlers', data scraping and data mining. As a recent report from IBM opined: 'thanks to the internet of things, physical assets are turning into participants in real-time global digital markets. The countless types of assets around us will become as easily indexed, searched and traded as any online commodity … We call this the "liquification of the physical world".'[40]

A second method is purchasing data from specialist companies — so-called 'surveillance-as-a-service' — that offer quick, easy data-mining opportunities: from approvals of quick home loan[41] or rental applications[42] to buying food[43] or catching a shared ride.[44]

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[36] Microsoft did so in 2014 and its revenue doubled. See Supantha Mukherjee, 'Microsoft's Market Value Tops $500 Billion Again After 17 Years', *Reuters* (27 January 2015). See also the example of the Roomba, which sells floor plan data and soft data on cleaning schedules. Its share price grew 157% in one year, translating into a market capitalisation of $2.5 billion on revenues of $660 million. Zuboff (n 28) 235.
[37] J Bartlett et al, *Policing in an Information Age* (Demos, 2013) 27.
[38] *Crimes Act 1914* (Cth) pt 1AC.
[39] Council of Europe, *Convention on Cybercrime* (23 November 2001) art 32(a) (came into force for Australia on 1 March 2013), discussed in Transborder Group, 'Transborder Access and Jurisdiction: What Are the Options?' (Discussion Paper No T-CY (2012) 3, Cybercrime Convention Committee, Council of Europe, 6 December 2012) [91]–[93] (describing this right to publicly available information without MLAT as international customary law). See also Nicolai Seitz, 'Transborder Search: A New Perspective in Law Enforcement?' (2004) 7 *Yale Journal of Law and Technology* 23.
[40] IBM Institute for Business Value, *The Economy of Things: Extracting New Value from the Internet of Things* (Report, 2014) 1–2.
[41] Such as NanoDigital Home Loans.
[42] Such as Snug.
[43] Such as UberEats.
[44] Such as UberX.

A third is the use of cookies — bits of software installed on computers that monitor and track online behaviour. Cookies are prolific. Studies by the Web Privacy Census, which measures cookies, analysed the top 100, 1000 and 25,000 sites on the internet in 2011, 2012 and 2015. Between 2012 and 2015, the number of websites that required cookies doubled, and by 2015 the number of cookies collected from simply visiting the top 100 sites numbered over 6000. Of these 6000 cookies, 83% were from third-party sites, which collected data and continued to do so.[45]

Recently, these software packages have begun to be enhanced. In 2010, then Harvard Business School academic Benjamin Edelman researched a product called Google Toolbar, which allows for searches without having to use the Google search engine, and transmits to the company 'the full URL of every page view, including searches at competing search engines'.[46] These methods of data extraction have evolved in recent years, with the creation of the perma-cookie (or the zombie cookie, a cookie that automatically respawns when a user chooses to opt out or delete a cookie).[47] The collection of data continues even when the user explicitly instructs it not to, and when it is disabled. This position is mirrored in Australian case law after Lord Denning's 1971 explanation of an automated ticket machine.[48] His Lordship held the contract was formed when the user made the request to the machine and the machine issued the ticket.[49] So too when entering an internet site, a contract is formed. This position has also been reflected in US law,[50] which is significant as many of the contracts specify the application of US law in a US location as the choice of law and venue for any contract dispute. If there is no enforceable contract, once the page is loaded data may be manually copied from it, or it could be copied using an automated tool such as a browser script.

There has been recent development in case law, such as where Facebook was held to be operating in Australia (notwithstanding no physical infrastructure) due to the collection of

[45] Ibrahim Altaweel, Nathan Good and Chris Jay Hoofnagle, 'Web Privacy Census' (SSRN Scholarly Paper, 15 December 2015).
[46] Benjamin Edelman, 'Bias in Search Results? Diagnosis and Response' (2011) 7 *Indian Journal of Law and Technology* 16, 17.
[47] Julia Angwin and Mike Tigas, 'Zombie Cookie: The Tracking Cookie That You Can't Kill' *ProPublica* (online, 14 January 2015) <https://www.propublica.org/article/zombie-cookie-the-tracking-cookie-that-you-cant-kill>.
[48] *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163.
[49] Ibid.
[50] *ProCD Inc v Zeidenberg* (USCA 7th Circuit, 20 December 1996).

Australian data through cookies'.[51] However, at most this decision perhaps allows for judicial notice that 'cookies are central to the Facebook platform' and are not 'an outlier activity'.[52]

There are other extraction methods that do have legal consequences, such as raids. These raids can occur when state and non-state actors exploit cyber vulnerabilities and extract, without consent or knowledge, data from a site, individual or company. Often these data dumps and data extraction raids are reported without situational awareness of the larger strategic picture by media companies — such as the hacking and extraction of data on students at the Australian National University;[53] or the use of system vulnerabilities in the Bureau of Meteorology to extract data from the Department of Defence and wider Australian Government databases.[54]

2 *Creation of User Profiles*

Even though this data is often anonymous, it is simple to match an individual identity to open source material through three markers (birth date, zip code and sex).[55] With this reconstructed data, and generic data sourced from online searches, parties can create and refine user profiles with increasing accuracy through an amalgamation of what this doctoral thesis delineates as 'hard', 'sharp' and 'soft' data.

'Hard' data refers to clear information, such as the content of texts, emails, GPS co-ordinates, retail transactions and communication patterns.[56] 'Sharp' data is concerned with the analysis of:

> not *what* you write, but *how* you write. It is not what is in your sentences but in their length or complexity, not *what* you list but *that* you list, not the picture but the choice of filter and degree of saturation, not *what* you disclose but how you share or fail to, not *where* you make plans to see your friends but *how* you do so: a casual 'later' or a precise time and place? Exclamation marks and adverb choices operate as revelatory and potentially damaging signals of your self.[57]

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[51] *Facebook v Australian Information Commissioner* [2022] FCAFC 9.
[52] Ibid [43] (Perram J).
[53] ANU Newsroom, 'ANU Releases Detailed Account of Data Breach', *ANU News* (online, 2 October 2019) <https://www.anu.edu.au/news/all-news/anu-releases-detailed-account-of-data-breach>.
[54] Andrew Greene, 'Bureau of Meteorology Hacked by Foreign Spies in Massive Malware Attack, Report Shows', *ABC News* (online, 12 October 2016) <https://www.abc.net.au/news/2016-10-12/bureau-of-meteorology-bom-cyber-hacked-by-foreign-spies/7923770>.
[55] Zuboff (n 28) 244, n 33.
[56] Elizabeth Dwoskin, 'Lending Startups Look At Borrowers' Phone Usage to Assess Creditworthiness', *Wall Street Journal* (1 December 2015).
[57] Zuboff (n 28) 274.

'Soft' data, by contrast, is data that provides context that in isolation may not reveal much but when amalgamated can provide input into a psychological profile — such as the frequency with which you charge your phone, the number of messages you receive, if and when you return phone calls, how many contacts you have in your phone, how you fill out online forms, and how much you travel during the day.[58] Studies have shown that half of Generation Z[59] and a third of Generation Y indicated their main gateway to news was social media.[60] In Australia, nearly one fifth of Australians rely upon social media platforms for news consumption.[61] The use of these platforms to stay connected has created unprecedented supply lines of hard, sharp and soft data, which with every interaction further clarify and perfect individual user profiles.

The competitive dynamics of surveillance capitalism have seen a shift in data analytics and data extraction priorities. In particular, there is an economic imperative for companies to acquire predictive sources of behavioural surplus: voices, personalities, emotions. This data is most readily gained through social media, which 'can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard'[62] as well as recorded.

3 *The Rise of Social Media*

Social media companies, from their peer-to-peer structure, provide a means of identifying, targeting, measuring and grouping individuals in a method unavailable in the active measures shown in Table 1.

The particular risk of social media is that their economic model is based around maintaining users' attention. Accordingly, the need for growth of data and data sources has led to radical indifference for many companies about what occurs on their sites; for so long as the customer stays, more data can be collected. Indeed, as one former Facebook product manager writes:

> Experiments are run on every user [of social media] at some point in their tenure on the site. Whether that is seeing different size and copy, or different marketing messages, or

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[58] Ibid 172.
[59] Ruth N Bolton, et. al, 'Understanding Gen Y and their use of social media' (2013) 24(3) *Journal of Service Management* 245 - 267.
[60] News and Media Research Centre, Submission No 75 to the Joint Standing Committee on Electoral Matters, *Inquiry into and Report on All Aspects of the Conduct of the 2019 Federal Election and Matters Related Thereto* (2019) 4.
[61] Terry Flew et al, *Trust and Mistrust in Australian News Media* (QUT, 2020) 11.
[62] *Packingham v North Carolina*, 137 S Ct 1730, 1737 (2017). This was affirmed in Donald Trump, 'Executive Order on Preventing Online Censorship', *Trump White House* (Web Page, 28 May 2020), <https://www.trumpwhitehouse.archives.gov/presidential-actions/executive-order-preventing-online-censorship/>.

> different call-to-action buttons, or having their feeds generated by different ranking algorithms … The fundamental purpose of most people at Facebook working on data is to influence and alter people's moods and behaviour. They are doing it all the time to make you like stories more, to click on more ads, to spend more time on the site. This is just how a website works, everyone does this and everyone knows that everyone does this.[63]

Companies have also begun to 'cross-pollinate' user profiles, often within a wider corporate framework. For example, Meta owns four social media hegemons: Facebook, Messenger, Instagram and WhatsApp.[64] In total, Meta reports that 2.88 billion people use its products daily.[65]

This has led to increasingly bizarre corporate acquisitions, in a bid for companies to further calibrate their user profiles so as to secure advertisement income.[66] It has also de-incentivised companies to regulate content on their sites — so long as a user stays online and generates data, what they are reading, watching, sharing or commenting matters little. In many respects, the more controversial a matter, the more likely members will stay online. Facebook accordingly standardises the presentation of its news feed to make everything equal — from high-tier investigative journalism, to entirely bogus newspapers, and all information in between.[67]

B *Surveillance Capitalism and Interference Operations*

That then is the overarching economic system. This section will move onto the application of IOs to surveillance capitalism and how it has evolved into a sui generis threat. Four particularly distinguishing points will be covered below: the ability to conduct micro-targeted advertisements; the use of fake accounts (bots); the inherent vulnerability of cyberspace; and the low costs associated with surveillance capitalism.

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[63] Andrew Ledvina, quoted in Zuboff (n 28) 299.
[64] 'About Meta', *Meta* (Web Page, 2022) <https://about.facebook.com>.
[65] 'Second Quarter of 2020 Meta Users', *Statistica* (Web Page, 2022) <https://www.statista.com/statistics/1092227/facebook-product-dau/>.
[66] Angela Watercutter, 'Amazon Finally, Officially Owns MGM. Now What?' *Wired* (online, 18 March 2011) <https://www.wired.com/story/mgm-amazon-acquisition/>.
[67] Nicholas Thompson and Fred Vogelstein, 'Inside the Two Years that Shook Facebook — And the World', *Wired* (online, 12 February 2018) <https://www.wired.com/story/inside-facebook-mark-zuckerberg-2-years-of-hell/>.

1 *Micro-targeted Interference Operations*

It is clear from the foregoing that the identification of fellow travellers and useful idiots is manifestly easier now due to surveillance capitalism. Unlike the generalist delivery mode relied upon by the makers of the brochures listed in Table 1, threat actors can now micro-target individuals based on their needs and preferences.[68] Recently, as Zuboff notes: 'surveillance capitalists (have) discovered that the most-predictive behavioural data come from intervening in the state of play in order to nudge, coax, tune and herd behaviour towards profitable outcomes'.[69]

This can range from online video games[70] to voter manipulation.[71] Research into Facebook calculated that simply having a button that allowed individuals to say 'I voted' resulted in an additional 60,000 voters registering in the US polls in the 2010 midterm, and 280,000 people casting a vote.[72] The political benefits and uses of micro-targeting became apparent in 2008, when Barack Obama pioneered the use of voter metrics and user profile indexes.[73] Obama's campaign was about voter movement, targeting those who were most likely to vote and convincing them to do so. Axiomatically, micro-targeting can also aim to suppress, or divert, voters.

The now-infamous Cambridge Analytica provides a useful case-study. Taking heed of Obama's success,[74] the firm legally harvested an estimated 87 million Facebook users' personal data, and utilised psychometric profiling techniques, identified those who were most 'persuadable'.[75] Those profiled were then targeted with advertisements, to amplify and reinforce attitudinal preferences, in a bid to influence the 2016 US presidential elections, and

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[68] Also known as narrowcasting, hypertargeting, psychographics and pinpoint propaganda. See Hybrid CoE, *Trends in the Contemporary Information Environment* (Trend Report 4, May 2020) 20; Joint Standing Committee on Electoral Matters (n 18) 176 [7.74].
[69] Zuboff (n 28) 8.
[70] See Robert Muller, *Unclassified Report of the Select Committee on Intelligence: Russian Active Measures Campaigns and Interference in the 2016 U.S. Election — Volume 2* (Report, 2018). A movement emerged on Tumblr in which members named their Pokemon with a police brutality victim's name; the contest was then to take screenshots of their Pokemon's name, and share on other social networks. See further Paige Leskin, 'Russia's Disinformation Campaign Wasn't Just on Facebook and Twitter. Here are All the Social Media Platforms Russian Trolls Weaponized During the 2016 US Elections', *Business Insider Australia* (online, 19 December 2018) <https://www.businessinsider.com.au/all-social-apps-russian-trolls-used-spread-disinformation-2018-12>.
[71] Robert M Bond et al, 'A 61 Million Person Experiment in Social Influence and Political Mobilization' (2012) 487(7415) *Nature* 295.
[72] Ibid.
[73] Zuboff (n 28) 122; Sasha Isenberg, *The Victory Lab* (Random House, 2013).
[74] Christopher Wiley, *Mindf*ck* (Harper, 2019) 28.
[75] Ibid.

the 2016 UK Brexit referendum.[76] Although the effectiveness of these operations is under increasing scrutiny, such criticism fails to identify that they are simply early examples.[77] The individuals who are micro-targeted might also be selected, based on their psychological profiling, due to their perceived susceptibility to disinformation.

2 *The Rise of Bots*

Separate to micro-targeting, social media has seen the rise of fake online accounts (so called bots).[78] Bots can be used in a variety of roles. They may manipulate the relevance of newsfeeds, and accordingly dictate what appears in social media: so called 'commanding the trend'.[79] The most dangerous form of commanding the trend is trend creation (so-called 'astroturfing' because it is a fake grassroots movement).[80] It is no longer necessary to find and use the fellow travellers and useful idiots of the Cold War. They can simply be created. Bots may also be 'designed to carry out specific tasks online, such as analysing and scraping data. Some are created for political purposes, such as automatically posting content, increasing follower numbers, supporting political campaigns, or spreading misinformation and disinformation.'[81]

Automation of bots, combined with artificial intelligence and machine learning, represents a quantum shift in the use of bots on social media. The cheap application Ingramer provides Instagram bot services, which allow for fully automated, simulated behaviour on the platform that allows for likes/follows/direct messaging and scheduled posts.[82] Similar processes exist on most social media platforms.[83] Accordingly, there are 'a potentially unlimited number of accounts on multiple social media platforms that can be orchestrated by one individual, through

[76] See Information Commissioner's Office, *Investigation into the Use of Data Analytics in Political Campaigns* (Report, 6 November 2018) <https://ico.org.uk/media/action-weve-taken/2260271/investigation-into-the-useof-data-analytics-in-political-campaigns-final-20181105.pdf>.
[77] Katherine Mansted, *Activating People Power to Counter Foreign Interference and Coercion* (Report 13/2019, National Security College, Australian National University, December 2019) 2.
[78] The term 'bot' is a shortening of the term robot, itself derived from the Czech for forced labour.
[79] Jarred Preier, 'Command the Trend' in Christopher Whyte, A Trevor Thrall and Brian M Mazanec (eds), *Information Warfare in the Age of Cyber Conflict* (Routledge, 2020) 90.
[80] Ibid. The other forms are trend distribution and trend hijacking.
[81] House of Commons Digital, Culture, Media and Sport Committee, *Disinformation and 'Fake News'* (Final Report, 18 February 2019) 19.
[82] Mashum Mollah, 'Ingramer Instagram Story Viewer Without an Account', *Search Engine Magazine* (online, 20 April 2022) <https://www.searchenginemagazine.com/ingramer/>.
[83] Kim Hartmann and Keir Giles, 'The Next Generation of Cyber-Enabled Information Warfare' (Conference Paper, International Conference on Cyber Conflict: 20/20 Vision — The Next Decade, 2020) 233, 244.

one single application, spreading content generated by artificial intelligence pursuing a single and coordinated strategic goal'.[84]

The use of bots has real-world consequences too. One study of Russian IOs during the 2016 US elections found that 'approximately every 25,000 additional IRA [Internet Research Agency] re-tweets predicted a one per cent increase in election opinion polls for one candidate'.[85] The volume of social media posts corresponds with how extensive bots are online. This is true for two reasons.

First, social media companies, focused on growth with new user registration a key performance indicator, have little reason to delete them.[86] One Australian study during the 2019 Australian election found that that 13% of accounts surveyed were 'very likely' to be bots.[87] Indeed, individuals are often unaware of whether the content they have read has been created by a human or a bot.[88]

Second, increasing technological complexity has made it difficult to identify bots. Historically, if the same profile picture was used on multiple accounts, under a different name, then it was clear that at least one account was deceptive or spurious. However, the rise of deepfake software has allowed completely novel pictures to be created. Although doctored imagery is neither novel nor unique, and photographs have long been manipulated, the contemporary ability to create unique user profile pictures undermines current anti-bot practices.[89]

In early 2019, 'Katie Jones' was the first publicly denounced instance of a deepfake image used in a social media campaign.[90] By December 2019 this technique had become mainstream.[91] It

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[84] Ibid.
[85] Damian J Ruck et al, 'Internet Research Agency Twitter Activity Predicted 2016 U.S. Election Polls' (2019) 24 (7) *First Monday*.
[86] Facebook estimates that as many as 60 million bots may be infesting its platform: Nicholas Confessore et al, 'The Follower Factory', *The New York Times* (online, 27 January 2018) <https://www.nytimes.com/interactive/2018/01/27/technology/social-media-bots.html>.
[87] Responsible Technology Australia, Submission to the Select Committee on Foreign Interference through Social Media (27 March 2020) 9.
[88] OECD, *Online Advertising: Trends, Benefits and Risks for Consumers* (Report No 272, January 2019) 26.
[89] Rid (n 5) 88.
[90] Preier (n 79) 105.
[91] The term comes from early adopters of the technology — pornographers — who interposed the faces of celebrities into sex videos; see Bobby Chesmey and Danielle Citron, 'Deep Fakes: A Looming Challenge for Privacy, Democracy and National Security' (2019) 107 *California Law Review* 1753, 1757. See for a practical example Benjamin Strick, 'West Papua: New Online Influence Operation Attempts to Sway Independence Debate', *Bellingcat* (online, 11 November 2022) <https://www.bellingcat.com/news/2020/11/11/west-papua-new-online-influence-operation-attempts-to-sway-independence-debate/>.

involves editing audio/visual content or using software so as to promote something that appears realistic (such as a person saying something or doing something).

The creation of deepfake audio and visual material, alongside automated user profiles, has changed the way in which parties may command the trend, in a manner never possible in the era of active measures. The combination of these accounts with machine-driven communication tools, a form of artificial intelligence that allows for conversations, could allow entire networks of bots to create artificial conversations (so called 'chatbots'). These bots would be 'the first to respond, commanding disproportionate attention, and guiding the social media narrative in whichever direction best suits its human owners' hidden ends'.[92] Indeed, these chatbots could be fed conversations from other bots, which analyse target-specific data, allowing for culturally targeted conversations — for as long as they 'grasp the essentials of the culture of those they wish to influence, there is every reason to believe that a data-mining campaign to characterize individuals can help in crafting the message most likely to resonate with them'.[93] This is to be contrasted to the time-intensive work of active measures, including training culturally sensitive human operators.

3 *Cyberspace Vulnerability*

Another unique shift since active measures is the ubiquity of cyberspace. Cyber-enabled IOs may now target the physical infrastructure of voting, in a high-value, low-cost operation. Interference in voting infrastructure can occur in multiple ways: direct tampering with the process by which the votes are tallied (such as the manner in which the votes are tallied); directly changing the election results (such as changing a vote from Party A to Party B); or remotely altering the final votes (such as not changing the number of votes physically, but simply the announcement of the end result). It can also aim to crash electoral servers at critical moments through distributed denial of service attacks, in order to spread doubt as to the legitimacy of the votes. Elections and referendums are often targeted, as 'they are opportunities when significant political and policy change occurs and they are also the primary means through which elected governments derive their legitimacy'.[94] Such operations were

[92] Peter Singer and Emerson Brooking, *LikeWar* (Mifflin Harcourt, 2018) 256.
[93] Martin C Libicki, 'The Convergence of Information Warfare' in Christopher Whyte, A Trevor Thrall and Brian M Mazanec (eds), *Information Warfare in the Age of Cyber Conflict* (Routledge, 2020) 15, 24.
[94] ASPI, 'Cyber-Enabled Foreign Interference in Elections and Referendums' (Policy Brief no 41/2020) 5.

unavailable in the pre-internet era, and their effectiveness is compounded by the fact that sometimes it is simply the *act* of interfering that suffices.[95]

But elections are not the only way in which elected governments derive their legitimacy. IOs can aim to target the information environment around government decisions; to alter proceedings in political bodies (such as the House of Representatives or the Senate) or behind the closed doors of registered political parties; or to interfere with individual representatives or even potential representatives.[96] Historical, traditional hierarchical models of information distribution (from government, from national broadcasters, from mainstream media) have been replaced by a proliferation and spectrum of social media forums.[97] This makes infiltrating, and interfering in, the information environment even easier.

4 *Low Cost*

Last, but most importantly, the rise of surveillance capitalism has drastically lowered the costs of IOs in comparison to active measures. Costs can be measured in many ways — financially, politically, militarily and opportunity. Financially, Soviet active measures in the 1970s have been calculated to have cost $4 billion annually;[98] $1.3 billion for the United States.[99] Comparatively, cost estimates of Russian IOs in the 2016 US election total no more than $100,000 over two years on advertisements.[100]

Politically, interference has always been low cost, but the cost has decreased even further due to difficulty in attribution arising from cyberspace and surveillance capitalism. There are a few means through which actions may be attributed to a state; however, the most pragmatic is the tripartite system developed by the Dutch, in ascending order of difficulty: technical, legal and political.[101] Political attribution is submitted to be hardest due to the political consequences (such as trade embargos) if a cyber operation is publicly attributed. Legal attribution requires

[95] Keir Giles, *Handbook of Russian Information Warfare* (Report, NATO, 2016) 22.
[96] See *Criminal Code 1995* (Cth) div 92.
[97] Jake Wallis and Thomas Uren, Australian Strategic Policy Institute, Submission to the Senate Select Committee on Foreign Interference Through Social Media (13 March 2020) 3.
[98] McCauley (n 19) 51.
[99] Richard H Cummings, *Cold War Radio: Dangerous History of American Broadcasting in Europe, 1950–1989* (McFarland & Co, 2009).
[100] Muller (n 70) 7.
[101] Dutch Minister of Foreign Affairs, 'Letter to the Parliament on the International Legal Order in Cyberspace' (Letter, 5 July 2019).

in-depth legal analysis of state responsibility, and possible internationally wrongful acts (expanded upon below).

Technical attribution is perhaps the easiest of the three, aided by increasingly agile technology and pattern recognition.[102] There are of course difficulties.[103] Yet, knowing the true location of a machine is not the same as knowing whom the instigator of the attack was. It is then that the challenges of political and legal attribution arise. By the very definition of interference — corrupt, covert or coercive — states do not openly acknowledge their actions. Accordingly, many states conduct their IOs with or through proxies.[104] The difficulty is that these proxies are also categorised as individuals — 'patriotic hackers' or 'trolls'. These individuals may be directed by a state, or they may indeed be patriots. Equally, they may constitute non-state groups. If directed by a state, they may be joined by fellow travellers and useful idiots in the target countries.[105]

Freedom of speech, a critical component of liberal democracy, also provides a shield for malign actors. It may be that technical attribution is made to an individual, for someone needs to buy advertisements assisted by micro-targeting, or make a comment on social media. But it is unclear whether or not that individual is acting under the instructions, direction or control of a state,[106] or is simply acting as a genuine private citizen. This poses difficult questions of legal attribution.[107]

Further, it still may be politically damaging for one state to call another state out on poor practice. Barriers to political attribution can arise from of any number of reasons, including economic interdependence, military weakness or diplomatic blackmail. This contributes to the low cost.

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[102] Scott Wilkie, 'The Infrastructure of the Internet' (Future of War Podcast, University of Queensland, 29 April 2021), discussing how artificial intelligence can become increasingly quicker at identifying and attributing digital behaviour.

[103] See, eg, Operation Olympic Destroyer where adversaries can mask their point of origin: Andy Greenberg, 'The Untold Story of the 2018 Olympics Cyberattack, the Most Deceptive Hack in History', *Wired* (online, 17 October 2019) <https://www.wired.com/story/untold-story-2018-olympics-destroyer-cyberattack/>.

[104] Muller (n 70).

[105] 'Portrait of a Troll', *Organized Crime and Corruption Reporting Project (OCCRP)* (Web Page, 19 June 2016) <https://www.occrp.org/en/other/5369-portrait-of-a-troll>.

[106] *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*) (Merits) (1986) ICJ Rep 14 ('*Nicaragua Case*'); International Law Commission, *Responsibility of States for Internationally Wrongful Acts* (Report, 2001) arts 8, 10.

[107] The standards as outlined in International Law Commission (n 106) arts 8, 10.

It may also be that technical attribution is possible, but revealing the culprit would disclose the method by which the technical attribution occurred. This reveal in turn might prove to be diplomatically or militarily sensitive (such as unauthorised use of an ally's networks[108]). This is all to say that cyber-enabled IOs are often undertaken on the operational assumption that attribution will be difficult to technically assess, let alone politically called out or legally pursued. The benefits are high, and costs low, for IOs.

C *Summary of the Threat*

Manipulation of the information environment is as old as war itself, although shifts in technology have created a unique system of increasingly accurate user profiles, often comprised of information willingly given by individuals. In an area where ease comes at the price of data security, most individuals are willing to have user profiles in order to have personalised service.

Surveillance capitalism is not a purely insidious economic system; there are many benefits for individuals. However, it is a system that has allowed a sui generis threat to evolve. As one observer noted:

> Every social media platform serves a purpose for active measures, and through preference, Russia can help usher social media nations to inform sources they've co-opted, repurposed or even in some cases created to entice a useful audience. They use Twitter to infiltrate the preference bubble and reinforce useful narratives or spread new Kremlin ones. Facebook groups offer a circle of confirmation and implicit bias for saturating sympathetic audiences. Anonymous posting platforms like 4chan and Reddit offer the perfect platform for releasing *kompromat*, seeding ill-informed conspiracies suiting preference-bubble vulnerabilities, or re-writing history in support of false and alternative realities. LinkedIn is ideal for reconnaissance of foreign governments, defense contractors, and academia. Wikipedia is perfect for character assassination.[109]

This is only one manner in which foreign interference through social media can occur. Indeed, the examples given so far have only highlighted the hegemons of the social media world, not the smaller players. The rise of surveillance capitalism as a business model has been rewarded

[108] Richard Stengel, 'The Untold Story of the Sony Hack: How North Korea's Battle with Seth Rogen and George Clooney Foreshadowed Russian Election Meddling in 2016', *Vanity Fair* (online, 6 October 2019) <https://www.vanityfair.com/news/2019/10/the-untold-story-of-the-sony-hack>.
[109] Watts (n 18) 229.

by the market and would appear to be here to stay. The question, then, is what can Australia do — legally and strategically — to respond.

IV The Solution (or Frameworks for Getting One)

Now that we have identified the threat, it is important to canvass and select the appropriate legal and strategic framework through which to counter it. Both are important, although perhaps understanding the applicable legal frameworks is more so as it shapes the strategic options available. Of particular importance, then, is to understand why international law is not an appropriate legal framework for responding to IOs and why the focus must be upon domestic law.

A *International Legal Framework*

As explained in Chapter 1, espionage and IOs are similar but distinct; the former is about the collection of information and the latter about changing opinions. Accordingly, whilst espionage is not explicitly illegal under international law, a separate analysis must be undertaken in respect of IOs. This section reflects existing legal thinking that international law, whilst important, is insufficient to respond to IOs.[110] In order to highlight the ineffectiveness of international law as a legal authority for countering IOs, this section will address some key principles and rules of international law from narrow to broad: the prohibition on the use of force and armed attack; the principle of non-intervention; and the prohibition on breach of sovereignty. It then discusses the dissonance between countermeasures and IOs.

1 *Can IOs Amount to a Use of Force?*

The *United Nations* (UN) *Charter* holds under article 2(4): 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State'. Accordingly, any activity that would amount to a use of force is

[110] See Tony Ross, 'The Weight of a Word: "Covert" and the Proportionality of Australia's Foreign Interference Laws' (2022) 52(1) *Federal Law Review* 581; Duncan Hollis, 'Why States Need an International Law for Information Operations' (2007) 11 *Lewis & Clark Law Review* 1023; Duncan Hollis, 'An e-SOS for Cyberspace' (2011) 52 *Harvard International Law Journal* 373; Duncan Hollis, 'The Influence of War: The War for Influence' (2018) 32(1) *Temple International and Comparative Law Journal* 31; Dale Stephens, 'Influence Operations and International Law' (2020) 19(4) *Journal of Information Warfare* 1; Henning Lahmann, 'Information Operations and the Question of Illegitimate Interference under International Law' (2020) 53(2) *Israel Law Review* 189; Peter Smyczeck, 'Regulating the Battlefield of the Future: The Legal Limitations on PSYOPS under Public International Law' (2005) 57 *Air Force Law Review* 209; Michael Schmitt (ed), *Tallinn Manual 2.0* (Cambridge University Press, 2020) 336.

prohibited under international law (unless conducted in self-defence under article 51 of the *UN Charter*, or with Security Council authorisation).

A review of the drafting history of the *UN Charter* makes clear that the intended interpretation and meaning of 'use of force' was kinetic, physical damage. It was on this basis that it was accepted that economic sanctions do not constitute a use of force against a member state.[111] Extrapolating from this position, scholars have also noted that political pressure per se also does not fall within the prohibition of article 2(4) as constituting a use of force.[112] Yet the International Court of Justice has held that the training and arming of rebels, intent on overthrowing the incumbent government, would fall within the doctrinal concept of use of force under article 2(4).[113] This mirrors the non-binding definition of the *Tallinn Manual* which focuses upon effects rather than means or methods of warfare.[114]

As Stephens notes, it is improbable but not impossible that IOs might fall within this prohibition. He cites a scenario of 'an IO campaign that clearly manipulated individuals to organize into armed groups and to undertake physical attacks against another government (in the absence of an armed conflict against that State)'.[115] Continuing, however, Stephens notes that no parties asserted that the call to Kurdish arms, in Iraq, by the US President in 1991 violated article 2(4).[116] Further, Stephens' example is an extreme case — in the vast majority of instances, IOs are likely to have no demonstrable connection to any physical violence: indeed, the point of IOs is that they can achieve their aims without the need for physical violence. Given words alone cannot constitute a use of force, most IOs cannot be responded to under the use of force paradigm at international law.

2 *Can IOs Amount to a Prohibited Intervention?*

There can be instances where a breach of sovereignty can amount to a prohibited intervention under international law. The question is whether, given only the most extreme IOs might ever

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[111] Summary Report of Eleventh Meeting of Comm I, Doc 784, I/1/XXVII UNCIO Docs 335 (4 June 1945); this mirrors Australia's understanding – see Explanatory Memorandum to the *Autonomous Sanctions Bill 2010,* 1.
[112] DW Bowett, *Self Defense in International Law* (Praeger, 1958) 148 ('Taking the words in their plain, common-sense meaning, it is clear that, since the prohibition is of the "use or threat of force", they will not apply to economic or political pressure but only to physical, armed force').
[113] *Nicaragua Case* (n 106) [228].
[114] Schmitt (n 110) 328.
[115] Stephens (n 110) 1, 8.
[116] Ibid.

amount to a use of force, any greater range of IOs might breach the obligation of non-intervention.

The prohibition is reflected in the UN *General Assembly Declaration on Friendly Relations*:

> [e]very State has an inalienable right to choose its own political, economic, social and cultural systems, without interference in any form by another State. No State or group of States has the right to intervene, directly or indirectly for any reason whatsoever, in the internal or external affairs of any other State.[117]

The leading case in this area is *Nicaragua v United States of America* (*Nicaragua*).[118] In *Nicaragua*, the International Court of Justice found that US funding of the *contras* in Nicaragua constituted a violation of the principle.[119] The Court relevantly held that:

> A prohibited intervention must … be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.[120]

Thus, in order for an act to qualify as a prohibited intervention, the activity does not need to have the element of force as is necessary under article 2(4).[121] But it must have some element of coercion, which 'indeed forms the very essence of prohibited intervention'.[122]

What is coercion for the purposes of non-intervention? The *Tallinn Manual* offers that the term should 'not [be] limited to physical force, but rather refers to an affirmative act designed to deprive another State of its freedom of choice, that is, to force that State to act in an involuntary manner or involuntarily refrain from acting in a particular way'.[123] The manual goes on to state:

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[117] *Concerning Friendly Relations and Co-Operation Amongst States in Accordance with the Charter of the United Nations*, UN Doc A/RES/2625 (XXIV) (24 October 1970).
[118] *Nicaragua Case* (n 106) [228].
[119] Ibid.
[120] Ibid [205].
[121] Nicholas Tsagourias, 'Electoral Cyber Interference, Self-Determination and the Principle of Non-intervention in Cyberspace' (Speech, EJIL, 26 August 2019).
[122] *Nicaragua Case* (n 106) [205]. See further Russel Buchan, 'Cyber Attacks: Unlawful Use of Force or Prohibited Intervention?' (2012) 17(2) *Journal of Conflict & Security Law* 211, 212.
[123] Schmitt (n 110) 315 [18].

'coercion must be distinguished from persuasion, criticism, public diplomacy, propaganda, retribution, mere maliciousness and the like in the sense that, unlike coercion, such activities merely involve … influencing the voluntary actions of the target State'.[124]

The Australian Department of Foreign Affairs and Trade in 2019 provided an international law supplement, updating its interpretation of legal rules and their application.[125] Australia held that coercion means a targeted state is effectively deprived 'of the ability to control, decide upon or govern matters',[126] which can result from cyber operations that 'manipulate the electoral system to alter the results of an election in another State, intervention in the fundamental operation of Parliament, or in the stability of States' financial systems'.[127] In 2021 the Australian Government stated:

> The use by a State of cyber activities to prevent another State from holding an election, or manipulate the electoral system to alter the results of an election in another State, intervene in the fundamental operation of Parliament, or significantly disrupt the functioning of a States' financial systems would constitute a violation of the principle of non-intervention.[128]

This is a position Germany[129] and the United States have taken,[130] as well as some of Australia's Indo-Pacific neighbours.[131] New Zealand[132] and the Netherlands[133] have advocated a lower threshold. Importantly for this thesis, Australia's definition, whilst encapsulating IOs against voting infrastructure, does not encapsulate IOs against the information environment more broadly. If coercion is to be understood as implying some form of compulsion, which leads the target state to act in a way it would not have done otherwise *or* to take a decision it

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[124] Ibid 318 [21].
[125] Department of Foreign Affairs and Trade, *Australia's International Cyber Engagement Strategy: 2019 International Law Supplement* (2019).
[126] Ibid 2.
[127] Ibid.
[128] UN General Assembly, *Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States Submitted by Participating Governmental Experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security Established Pursuant to General Assembly Resolution 73/266*, UN Doc A/76/136 (13 July 2021) 5 ('*Official Compendium*').
[129] Ibid.
[130] Stephens (n 110), citing Brian Egan, 'International Law and Stability in Cyberspace' (Speech, University of California, Berkeley School of Law, 10 November 2016): 'a cyber operation by a State that interferes with another country's ability to hold an election or that manipulates another country's election results would be a clear violation of the rule of non-intervention'. See also Schmitt (n 110) 313.
[131] Eric Corthay, 'The ASEAN Doctrine of Non-interference in Light of the Fundamental Principle of Non-intervention' (2016) 17(2) *Asian-Pacific Law & Policy Journal* 1, 14.
[132] New Zealand Ministry of Foreign Affairs and Trade, 'The Application of International Law to State Activity in Cyberspace' (Position Paper, 1 December 2020).
[133] UN General Assembly, *Official Compendium* (n 128).

would not have taken[134] then by their very nature IOs cannot amount to prohibited interventions. How can covert operations that aim to have a target adopt or change certain behaviours willingly even be measured?[135]

It is for this reason that some scholars argue that coercion should be reinterpreted through a lens of deception — and accordingly advocate that IOs that manipulate 'the capacity to reason' are therefore coercive, as 'the projection of a different set of facts constrains one's freedom to act by making certain options and conclusions no longer seem viable or making others seem mandatory'.[136] Yet, Australia's Department of Foreign Affairs and Trade has been clear in its international law supplement that that would not constitute coercion.

3 *Can IOs Amount to a Breach of Sovereignty?*

Beyond the use of force, international law may treat IOs as a breach of sovereignty. Sovereignty has been subject to heavy academic debate and criticism — is it a rule (to be enforced)[137] or a principle (that should be abided by)? The position is presently 'unclear'[138] although states are slowly starting to take public positions and cement their interests. These positions, however, often relate to cyber intrusions rather than IOs. States have said very little about the interrelation between IOs and sovereignty. The Netherlands has opined that 'the precise boundaries of what is and is not permissible have yet to fully crystallise',[139] whilst New Zealand believes 'further state practice is required for the precise boundaries of its application to crystallise'.[140]

No state has accused another, to date, of violating the principle of sovereignty through IOs. Accordingly, any examples are merely speculative as in practice claims of breach of sovereignty have not arisen. If sovereignty is a principle, it is not a freestanding rule capable

[134] Michael Schmitt, 'Virtual Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law' in Christopher Whyte, A Trevor Thrall and Brian M Mazanec (eds), *Information Warfare in the Age of Cyber Conflict* (Routledge, 2020) 186.
[135] Hollis, 'The Influence of War' (n 110) 41.
[136] Björnstjern Baade, 'Fake News and International Law' (2019) 29 *European Journal of International Law* 1357.
[137] Milton L Mueller, 'Against Sovereignty in Cyberspace' (2019) *International Studies Review* 1 provides a good summary of the general arguments about sovereignty. See also Schmitt (n 110) 14 [41] ('Rule 4: A State must not conduct cyber operations that violate the sovereignty of another State').
[138] Harriet Moynihan, 'The Application of International Law to State Cyberattacks: Sovereignty and Non-intervention' (Research Paper, Chatham House, December 2019) 51 ('In due course, as further state practice and *opinio juris* emerge, a cyber-specific understanding of sovereignty may develop, much like that developed for other domains of international law. In the meantime, because it is unclear whether there is a limit or threshold to violations of sovereignty, states may prefer to use the more clearly established framework of non-intervention where that is possible').
[139] UN General Assembly, *Official Compendium* (n 128).
[140] New Zealand Ministry of Foreign Affairs and Trade (n 132).

of being breached. Even if sovereignty is accepted as a rule, there is still great uncertainty as to its content and the circumstances that would amount to a breach.[141] Existing precedent centres on physical effects, and territorial limits. IOs, centred on cognitive effects, would not currently seem to breach sovereignty.[142]

4 *Can Countermeasures Work?*

The above has outlined the difficulties of demonstrating both the legal attribution of an IO to a state, and also identifying the breach of a relevant rule of international law even if an IO can be attributed. Even if those barriers can be overcome, however, there are difficulties in applying the remedy of countermeasures to an IO.

Countermeasures require attribution. In order to take legally justified countermeasures, the target state must have sufficient factual certainty of the source of the malign activity.[143] The difficulties with attributing IOs were covered above. The speed at which attribution would need to occur, in order to take countermeasures, means that this international legal remedy might be too slow for cyberspace. The delay in attribution is partly technological, partly political. Whilst advances in technology will of course increase the speed at which IOs can be attributed, there still remains the issue that an IO campaign may have ceased months earlier, but the consequences are only starting to manifest. Countermeasures must be proportionate,[144] temporary[145] and preceded by a demand that the offending state comply with its international obligations (unless the circumstances are urgent),[146] which all result in delays. Accordingly, even if the challenges of attribution and demonstrating a breach of international law can be overcome, there are some further difficulties in identifying how effective and legal countermeasures could be taken.

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[141] Dutch Minister of Foreign Affairs (n 101).
[142] Hollis, 'The Influence of War' (n 110) 31.
[143] Ibid.
[144] International Law Commission (n 106) art 51.
[145] Ibid arts 49(2), 53.
[146] Ibid arts 43, 52.

5 *Conclusion as to International Law*

Hollis argues that international law is not well suited to regulate operations 'primarily defined by their connection to the cognitive dimension'.[147] This would seem reflected in the above legal analysis. Others disagree and walk a middle line. Stephens opines:

> Influence Operations are generally permitted under international law. While it is possible to conceive of circumstances where an IO can violate Art 2(4), the principle of non-intervention and possibly even sovereignty (if that comprises a stand-alone rule under international law), such circumstances are very unique. Similarly, while due regard must be afforded the right to privacy under international human rights law (IHRL), it is clear that the equally applicable IHRL right to freedom of expression strongly underpins the capacity to undertake IO, especially where the narrative is credible.[148]

Accordingly, Stephens argues, it is likely that only the most extreme IOs such as those 'that clearly manipulated individuals to organise into armed groups and to undertake physical attacks against another government (in the absence of an armed conflict against that State)'[149] would breach international law. But these scenarios are extreme and, whilst possible, are less than plausible. They are also outside the scope of this thesis, which focuses upon grey zone operations (and thus below the threshold of the use of force).

However, just because most IOs are probably legal under international law does not mean that Australia must remain a victim to them. The UN has consistently emphasised the importance of domestic legal remedies in the 1976 *Resolution on Non-interference in the Internal Affairs of States*[150] and the 1981 *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*.[151] Both made clear, explicit references to information operations conducted through the technology of the time, such as broadcast media, that attempted 'campaigns of vilification' and 'subversion and defamation'[152] in 1976, as well as 'any defamatory campaign, vilification or hostile propaganda for the purpose of intervening or interfering in the internal affairs of other States'[153] in 1981. The latter declaration, importantly,

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[147] Hollis, 'The Influence of War' (n 110) 44.
[148] Stephens (n 110) 9.
[149] Ibid.
[150] *UN General Assembly Resolution on Non-interference in the Internal Affairs of States*, GA Res 31/91, UN Doc A/RES/31/91 (14 December 1976) ('*Non-interference*').
[151] *United Nations Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, GA Res 36/103, UN Doc A/RES/36/103 (9 December 1981).
[152] UN General Assembly, *Non-interference* (n 150) preambular para 6.
[153] United Nations (n 151) annex, para II(j).

confirmed 'the right and duty of States to combat, within their constitutional prerogatives, the dissemination of false or distorted news which can be interpreted as interference in the internal affairs of other States'.[154]

Although this is not Australia's current interpretation of interference (and coercion), it is clear that domestic law (the so-called constitutional prerogatives) provides a degree of flexibility and power that international law simply does not have.

States can exercise a range of responses authorised with domestic law. For the reasons explored above, international law will look to see if this an internationally wrongful act. Before a response may be lawfully undertaken (with the exception of necessity) will require attribution to the State. In most cases with IOs, this is unlikely to occur although attribution is technically, legally and politically viable. Domestic legal remedies may be relied upon, consistently with international law, exercise a range of responses to IOs where these are authorised by their domestic law. In *Rahmatullah (No 2) v Ministry of Defence*, the United Kingdom Supreme Court held executive power authorised

> conduct of military operations which are themselves lawful in international law (which is not the same as saying that the acts themselves are necessarily authorised in international law).[155]

Obiter in *Rahmatullah* suggested that certain types of coercive activities did not fall within the prerogative power, even in times of war and warlike operations.[156] Lady Hale (with whom Lord Wilson and Lord Hughes agreed) and Lord Sumption considered the royal prerogative did not apply to acts of torture or to the maltreatment of prisoners or detainees.[157] Lady Hale (with whom Lord Wilson and Lord Hughes agreed) considered that these types of activities were not 'governmental' in character, and therefore are not authorised by the prerogative.[158] Lord Sumption regarded these actions as beyond the scope of the prerogative power, stating:

> Given the strength of the English public policy on the subject, a decision by the UK Government to authorise or ratify torture or maltreatment would not as a matter of domestic English law be a lawful exercise of the Royal prerogative.[159]

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[154] Ibid para III(d).
[155] [2017] UKSC 1, [37] (Lady Hale, with whom Lord Wilson and Lord Hughes agreed).
[156] [2017] UKSC 1.
[157] *Rahmatullah (No 2) v Ministry of Defence* [2017] UKSC 1, [36] (Lady Hale, with whom Lord Wilson and Lord Hughes agreed), [96] (Lord Sumption).
[158] Ibid.
[159] Ibid.

Torture is of course specifically prohibited by Australian statute,[160] so the issue as raised by Their Lordships would not appear in Australian courts. *Rahmatullah* however would seem to raise three different tests:

a) Was there torture?
b) Was the conduct 'governmental', and/or
c) Was the conduct consistent with a public policy test.

In the courses of action outlined in Chapters 3 and 4, tests (b) and (c) are highly applicable. Assessments of what is 'governmental' are likely to shift with society. Arguably, protecting Australian interests will always be 'governmental' (if authorised) but the particulars of *Rahmatullah* and the alleged misconduct are accepted. To that end, some large generalities can be drawn that might limit punishment operations: deliberately attacking civilians and civilian infrastructure; prolonged detention of civilians, in-particular women and children; and the use of prohibited weapons under international law (such as, through cyber means, releasing biological/chemical/nuclear material) are all likely to be held to fall outside the scope of constitutional executive power (if *Rahmatullah* is to be followed).

This mirrors the reasoning of Legatt J in *Alseran v Ministry of Defence*.[161] His Honour suggested that there are limits to the scope of the Crown's prerogative powers to engage in conduct that would harm civilians, even in the context of military operations, finding that it would be 'most surprising' if the United Kingdom executive government had authorised British armed forces to detain people in circumstances that are not permitted by international law.[162] Justice Leggatt observed:

> acknowledging that a government decision to engage in a military operation abroad entails the use of lethal force and detention on imperative grounds of security does not require the courts to accept that, for example, such lethal force may be deliberately targeted at civilians or that such detention is permissible when there are no imperative reasons of security capable of justifying it.[163]

There is very limited Australian case law dealing with these issues. This provides an interesting question of law and legal positions. There is only one particularly relevant precedent that can be applied, which is the Federal Court in *Habib,* which related to alleged complicity by Australian intelligence agents in the cruel and inhumane treatment of Habib after his capture

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[160] *Criminal Code* (Cth) Division 268.13, 268.25, and 268.73.
[161] *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB), [325].
[162] Ibid, [325].
[163] Ibid, [71].

in Afghanistan. The Federal Court emphasised that the Commonwealth's prerogative powers with respect to external affairs would not authorise the Commonwealth executive government to engage in crimes against humanity, or to breach Commonwealth legislation.[164]

The earlier situation would be in breach of a public policy test at any rate and the latter is a matter for domestic law. *Habib* does not, therefore, provide much use in answering the Australian position. It is clear that Australia's approach to interpretations of the royal prerogative (as opposed to the existence of an element of the royal prerogative) can of course differ from the British approach.[165] International law is therefore, for the purpose of this thesis, articulated as informing public policy, but will not provide a definitive limit to constitutional executive power. In order to understand what domestic legal authorities Australia might need, the next section identifies what responses Australia might wish to take to IOs.

B *Strategic Framework*

Having canvassed the applicable legal frameworks, and demonstrated the need to rely upon domestic law, this chapter will now conclude with a discussion and analysis of the appropriate strategic framework to respond to IOs. It will do so utilising a military planning process known as a centre of gravity construct. In military parlance, a centre of gravity relates to 'the source that provides moral or physical strength, freedom of action, or will to act'.[166] In other words, it is the single capability that enables the act to be taken. Once the centre of gravity of an adversary is confirmed, analysis can be taken to identify critical vulnerabilities to be exploited. Axiomatically, an incorrect centre of gravity construct results in resources and labour being directed against the wrong objective — a supposed critical vulnerability — which turns out to not be as critical, or potentially not as vulnerable, as first assessed.

Choice of strategic framework, focused upon the correct analysis of a centre of gravity construct, is integral to any successful operation, and failure to choose the correct framework can have disastrous consequences. The Great War of 1914 provides a relevant case study. The strategic thinking of the Great Powers in the lead up to war failed to foresee and accept the consequences that the Industrial Revolution would have on warfare. Pitched battles, utilising Napoleonic tactics, were maintained notwithstanding warnings to the contrary.[167] Trench

[164] *Habib v Commonwealth* (2010) 183 FCR 62, [114], [124], [128] (Jagot J, with whom Black CJ agreed).
[165] *Barton v Commonwealth* (1974) 131 CLR 477.
[166] Department of Defense, *Department of Defense Dictionary of Military and Associated Terms* (Joint Publication 1-02, 2016).
[167] Laurence Freedman, *A History of the Future of Warfare* (Penguin, 2018) 41.

warfare ensued, and the Industrial Revolution led to industrial-scale slaughter. It was only with the shifting of strategic frameworks (from pitched battles to targeting state critical infrastructure) that the war concluded.

Surveillance capitalism, and the evolution of the means of behaviour modification, is analogous to the shifting technologies that underpinned the Great War. So, too, are the risks of choosing an incorrect strategic framework — and it might be that Australia has already begun progressing down the wrong road, utilising an erroneous centre of gravity construct.

In a speech introducing the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, then Prime Minister Malcolm Turnbull noted that at the core of the anti-interference policy was the concept of 'sunlight' — a 'disinformation disinfectant' that aims 'to ensure activities are exposed'.[168] This strategic framework mirrors that of the United States in the late 1930s, and can be titled *illumination*.[169] The importance of illumination as a central tenant of countering IOs was reinforced a year later with the *Australian Counter Foreign Interference Strategy*, operationalised by the National Counter Foreign Interference Coordinator within the Department of Home Affairs.[170] The strategy, in acknowledging the need for 'convincing foreign interference actors that their actions will have costs',[171] clarified that this would occur through 'showing foreign interference actors that their actions can and will be revealed'.[172]

Illumination would appear to be founded on the doctrine of the 'marketplace of ideas' or 'counterspeech'.[173] These concepts denote the philosophical rationale for freedom of expression, using the analogy of the economic concept of a free market, where ideas can be traded and accepted. It is the underlying concept of Australia's implied freedom of political communication.[174] The marketplace of ideas, and thus illumination, is premised on a rational audience where individuals exposed to the same information and who are able to distinguish

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[168] Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13145 (Malcolm Turnbull).
[169] The use of this metaphor derives from an essay written by Louis D Brandeis, 'What Publicity Can Do', *Harper's Weekly* (New York, 20 December 1913) 10. See also Louis D Brandeis, *Other People's Money and How the Bankers Use It* (Frederick A Stokes Publishing, 1932) 92. The metaphor was adopted by the Committee on the Judiciary of the House of Representatives of the United States in explaining the *Foreign Agents Registration Act 1938* (US). See 1381 *Congressional Record* 2 (1937, House of Representatives).
[170] Department of Foreign Affairs and Trade, Submission No 10 to Senate Select Committee on Foreign Interference through Social Media (13 March 2020) 3.
[171] Ibid.
[172] Ibid.
[173] Bill Swannie, 'Speaking Back' (2021) 42(2) *Adelaide Law Review* 39.
[174] *Libertyworks v Commonwealth of Australia* (2021) 391 ALR 188.

between true and false information will place more value on the truth. John Milton, arguing against British censorship laws, stated in 1644:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?[175]

It is important to note that this rational audience, also known as the 'wisdom of crowds' or 'wealth of networks', has been subject to sustained criticism from at least the advent of a broadcast-era model of information distribution.[176] One critique aptly notes that as a model it is 'undeniably elegant and compelling, an Enlightenment-era cocktail of Bayesian opinion formation, free speech, and capitalism. Unfortunately, its most foundational premise is false.'[177] This fatal flaw has crystallised in an algorithmic marketplace of ideas, and the efficacy of counter-speech has been questioned by former Prime Minister Kevin Rudd.[178]

A comprehensive study of online mis- and disinformation found that 'falsehood diffused significantly farther, faster, deeper and more broadly than the truth in all categories of information'.[179] This reflects findings by cognitive psychologists, whose research demonstrates that the human brain evolved to prioritise novel and negative threats and to spread that information quickly.[180] This issue has only magnified online, where filter bubbles have compounded this issue, creating siloed echo chambers where individuals may seek out only certain interpretations of current events, and indeed filter out and remain wilfully blind to alternate perspectives. Formulating a strategic framework around a model of information flow,

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[175] John Milton, 'Areopagitica' in John Gray and GW Smith (eds), *John Stuart Mill On Liberty: In Focus* (Routledge, 1991) 40.

[176] Darren Bush, '"The Marketplace of Ideas": Is Judge Posner Chasing Con Quixote's Windmill' (2000) 32 *Arizona State Law Journal* 1107, 1146; Stanley Ingber, 'The Marketplace of Ideas: A Legitimizing Myth' (1984) *Duke Law Journal* 1; Daniel E Ho and Frederick Schauer, 'Testing the Marketplace of Ideas' (2015) 90 *New York University Law Review* 1160, 1167.

[177] Trevor Thrall and Andrew Armstrong, 'Bear Market? The American Marketplace of Ideas' in Christopher Whyte, A Trevor Thrall and Brian M Mazanec (eds), *Information Warfare in the Age of Cyber Conflict* (Routledge, 2020) 73, 78.

[178] Kevin Rudd, *The Case for Courage* (Monash Publishing, 2021); Kevin Rudd, Submission No 52 to Senate Standing Committee on Environment and Communications, *Inquiry into Media Diversity in Australia* (January 2021) 2 [4], 3 [7].

[179] Soroush Vosoughi, Deb Roy and Sinan Aral, 'The Spread of True and False News Online' (2018) 359(6380) *Science* 1146.

[180] Robinson Meyer, 'The Grim Conclusions of the Largest-Ever Study of Fake News', *The Atlantic* (online, 8 March 2018) <https://www.theatlantic.com/technology/archive/2018/03/largest-studyever-fake-news-mit-twitter/555104>; Philip M Napoli, 'What If More Speech Is No Longer the Solution?' (2017) 70(1) *Federal Communications Law Journal* 55; Daniel Kahneman, *Thinking Fast, Thinking Slow* (Penguin Books, 2012) 55–7, 61–4.

critiqued in an analogue world and now demonstrably inappropriate for an algorithmic world, is risky and practically ineffective.

The failure of illumination policy is made clear in the facts. In 2017, the former Director-General of Security (head of the Australian Security Intelligence Organisation), Duncan Lewis, stated that '[f]oreign powers are clandestinely seeking to shape the opinions of members of the Australian public, of our media organisations and our government officials in order to advance their country's own political objectives'.[181] Due to this, and other concerns on foreign interference, the aforementioned *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* was enacted, making sweeping amendments to existing, and introductions of new, offences. Two years later, in late 2019, Duncan Lewis declared that foreign IOs posed an 'existential threat to Australia' and are 'by far the most serious issue going forward' for Australian security, occurring on a scale and intensity that 'exceeds any similar operations launched against the country during the Cold War, or in any other period'.[182] As *Alexander v Minister for Home Affairs* informs us, such a statement by an intelligence organisation must be taken in good faith.[183]

What is clear from this evidence from 2017 to 2019 is that the strategic framework of illumination has not worked, is not working and will not work. It is a strategic framework that is a shibboleth which may be politically and superficially satisfying but strategically misplaced for two reasons: it presupposes that the marketplace of ideas acts rationally; and it fails to address IOs' centre of gravity. It is important that IOs' centre of gravity is targeted — and as the foregoing has argued, this centre of gravity is their low financial, political and opportunity cost. Rather than illumination, this thesis accordingly argues that the correct strategic framework is *deterrence*.

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[181] Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 24 October 2017, 128 (Duncan Lewis).
[182] Duncan Lewis, *ASIO Annual report 2019 –* 20 (Report, 4 September 2019) 3; see also Duncan Lewis, 'Address to the Lowy Institute' (Speech, Lowy Institute, 4 September 2019).
[183] [2022] HCA 19, [126] (Gageler J).

V Deterrence Theory

To deter is 'to discourage or turn aside or restrain by fear; to frighten from anything; to restrain or keep back from acting or proceeding by any consideration of danger or trouble'.[184] It is characterised by two limbs: denial and punishment.

Deterrence is a concept that has been practised throughout history,[185] but has in recent history fallen into neglect. This is because, as Sir Laurence Freedman notes:

> A doctrine that is so associated with the continuity and the status quo, which occupies a middle ground between appeasement and aggression, celebrates caution above all else, and for that property alone is beloved by officials and diplomats, was never likely to inspire a popular following. Campaigners might march behind banners demanding peace and disarmament, the media might get excited by talk of war and conflict, but successful deterrence, marked by nothing much happening, is unlikely to get the pulse racing. It has no natural political constituency.[186]

It was, however, in the onset of the Cold War and the advent of nuclear weapons that the concept gained a level of orthodoxy in strategic thinking.[187] The difficulty is therefore to navigate the maze of definitions and theoretical models applicable; for whilst the threat clearly has evolved from state vs state conflict, and from a focus on kinetic effects, the theories surrounding modern deterrence for the most part 'still rest upon nuclear and conventional forces to avoid escalation of conflict'.[188]

A *Models of Deterrent Theory*

Robert Jervis helpfully outlined the three waves of deterrence theory.[189] The first wave (so-called minimalist theory in comparison to the complexity of other waves) includes the first half of the 20th century — from the advent of air power to the Soviet Union gaining mastery of

[184] *Oxford English Dictionary* (online at 09 December 2022) 'Deter'.
[185] Thucydides (n 16) 6.18. See also Samuel White, 'The Late Middle Ages in Northern Europe' in Samuel White (ed), *The Laws of Yesterday's Wars* (Brill, 2021) 101, 109 and the act of *chevauchée* and siege warfare.
[186] Laurence Freedman, *Deterrence* (Polity Press, 2004) 25.
[187] Jeffrey W Knopf, 'The Fourth Wave in Deterrence Research' (2010) 31(1) *Contemporary Security Policy* 1; Freedman, *Deterrence* (n 175).
[188] Media Ajir and Bethany Vailliant, 'Russian Information Warfare: Implications for Deterrence Theory' (2018) *Strategic Studies Quarterly* 71, 86.
[189] See Robert Jervis, 'Deterrence Theory Revisited' (1979) 31(2) *World Politics* 289; George Quester, *Deterrence before Hiroshima: The Airpower Background to Modern Strategy* (Wiley, 1966).

thermonuclear weapons. George Quester has added to Jervis' examples the older example of maritime warfare as:

> For most of history, the imposition of damage on an adversary had entailed the prior defeat of his military forces … But the fluidity of the sea has offered an exception, and the third-dimensional innovation of the submarine, and then of various forms of aerial weapons, has compounded this exception, so that it is now the rule.[190]

In many ways, Themistocles' campaign is the perfect example of this. Air power however had two key features that distinguished it from land and sea warfare. The first was that the fight was unequal between aviators and their targets; the gap resulted in aviators 'who were neither excited … nor in any danger, pouring death and destruction upon homes and crowds below'.[191] They were thus difficult to deter through fear of punishment. Second, air power was not a capability that could be absolutely deterred — a bomber could always get through the air defence.[192]

Air power demonstrated the necessity to look beyond punishment, expanding strategic thinking into the realm of denial. This could be done through active and passive measures. Active denial included anti-aircraft guns; passive denial relied upon increasing social resilience.[193] Nuclear weapons however shifted this thinking into the second wave, which recognised that nuclear war could be threatened, not fought.[194] It accordingly looked to answer the question of the best methods to threaten without resorting to war.

Glenn Snyder approached this question in 1958, with the first comprehensive study of deterrence.[195] He concluded denial alone was insufficient, and canvassed the most effective combinations of denial and punishment, opining that denial is more reliable.[196] This was based on the observation that punishment places the onus on the target, and denial on the defender.[197]

With an emphasis placed back on punishment, the works of Jeremy Bentham underwent a revival. Bentham was the first to develop the concept that there should be both a degree of

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[190] Quester (n 189) xiv.
[191] HG Wells, *War In the Air* (Wordsworth Classics, 1907) 84. Wells' statement predates the first experience of aerial bombing from aircraft (*vice* balloons).
[192] United Kingdom, *Parliamentary Debates*, House of Commons, 10 November 1932, cols 631–8 (Stanley Baldwin).
[193] Such as through bomb shelters and gas masks.
[194] Jervis (n 189) 289.
[195] Glenn Snyder, *Deterrence by Denial and Punishment* (Center of International Studies, 1958).
[196] Samuel Huntington, 'Conventional Deterrence and Conventional Retaliation' (1983/4) 8(3) *International Security* 32.
[197] Snyder (n 195).

clarity and predictability in punishment. As Freedman explains of Bentham, '[a]s a utilitarian, he supposed that criminals, along with everybody else, were rational and self-interested, and could calculate when the costs of punishments would outweigh the potential benefit of the crime.'[198] Bentham wrote:

> In so far as by the act of punishment exercised on the delinquent, other persons at large are considered as deterred from the commission of acts of the like obnoxious description, and the act of punishment is in consequence considered as endued with the quality of DETERMENT. It is by the impression made on the will of those persons, an impression made in this case not by the act itself, but by the idea of it, accompanied with the eventual expectation of a similar EVIL, as about to be eventually produced in their own instances, that the ultimately intentional result is considered produced: and in this case it is also said to be produced by the EXAMPLE, or by the force of EXAMPLE.[199]

Credibility required technical attribution development, and an ability to signal. Signalling, in turn, required a nuanced understanding of the target audience — the rational state.[200] It further was underpinned by the logical requirement that the threat be able to be actioned. This was implicit under Bentham's theory, but the advent of nuclear weapons and concerns with first- and second-strike capabilities brought the issue of credibility to the fore.[201]

Third wave deterrence theory, however, questioned the operational assumption of a rational actor. This was based on the foundations laid by emerging research from social psychologists,[202] and new vogue terms such as group think reinforced that there were no such things as rational actors. Third wave theory was therefore concerned with the idea that rational actors, working with rewards and punishment, did not exist. Deterrence, and the theory underpinning it, was reinterpreted to be a strict term, inseparable from the threat of retaliatory punishment.[203]

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[198] Freedman, *Deterrence* (n 186) 8.
[199] Jeremy Bentham, *Principals of Penal Law: Volume II* (Harvard University Press, 1843) 383. Bentham used a term that was common at the time, determent, which the *Oxford English Dictionary* defines as 'the action or fact of deterring, a means of deterring; a deterring circumstance'. This remains a powerful word, as it describes a 'situation in which what was intended has been achieved': Freedman, *Deterrence* (n 186) 8.
[200] Ajir and Vailliant (n 188) 85.
[201] Freedman, *Deterrence* (n 186) 114; Glenn H Snyder, *Deterrence and Defense: Towards a Theory of National Security* (Princeton University Press, 1961) 10.
[202] See Irving Janis, *Victims of Group-Think* (Houghton Mifflin, 1972); Graham Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* (Longman, 1971).
[203] Thomas Schelling, *Arms and Influence* (Yale University Press, 1966) 71.

B *Post-Nuclear World: Fourth Wave Deterrence?*

The end of the Cold War saw deterrence as a strategic framework fall out of fashion, as: 'weariness began to surround deterrence, reflecting moral unease about such dependence upon threats of mass destruction and the nagging fear that in the absence of any active belligerence on the part of either super-power, something could still go terribly wrong'.[204]

This remained the state of play until the events of September 11, 2001 when terror attacks on American soil were viewed as a demonstrable failure of denial of gains, through active and passive defences. Questions were asked about how the individuals who orchestrated the terror attacks could be punished, considering they were martyrs. In a landmark June 2002 speech at West Point, President Bush noted to the graduates that deterrence could not work because the enemies being faced had 'no nation or citizens to defend'.[205] Pre-emption, reflecting a 'yearning for a world in which problems can be eliminated by some bold, timely and decisive stroke'[206] was considered the ideal strategic framework. To date, 'defending forward' remains the primary model for US operations.[207]

This does not mean that Australia should move to a 'defend forward' model to counter IOs. At its core, deterrence is about perception which, when the threat posed by information operations itself is one of perception, is useful.[208] Further, deterrence is focused on maintaining the status quo of international relations, an underlying foundation in keeping with Australia's emphasis on a global rules-based order.[209]

But much has changed in international relations and in strategic thinking since the advent of the bomber, and in the two decades since the terror attacks of 11 September 2001 (where the plane, if not the bomber, literally got through). It is apparent that a fourth wave of deterrence has emerged through scholarly debate which has addressed some of the key shortfalls of Cold War thinking and adapted to a modern age of multilateral competition.[210] With nuclear weapons, the defence of the country was clearly within the remit of the military; with IOs,

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[204] Freedman, *Deterrence* (n 186) 19.
[205] George W Bush, 'Graduation Speech — West Point' (Speech, West Point Military Academy, 1 June 2002).
[206] Freedman, *Deterrence* (n 186) 107.
[207] Department of Defense, *2018 National Defense Summary* (Report, 2018).
[208] Robert Jervis, *Perception and Misperception in International Politics* (Princeton University Press, 1976).
[209] Department of Defence, *2016 Defence White Paper* (Report, 2016).
[210] Knopf (n 187).

responsibility falls along a spectrum from Government to private firms and even individual citizens of the body politic.[211]

C *Preferred Model*

As George Quester has noted: '[t]he enormous destructive power of nuclear weapons has tended to persuade military historians and military strategists that the military experience prior to the nuclear bomb is no longer relevant'.[212] The relevance of air power clearly counters this view.

The difficulty with a preferred model is that IOs occur across a spectrum of actors; a minimalist model must be adopted as it is a model that works with a high degree of abstraction.[213] A minimalist model is simply one that relies upon the strength of denial and the necessity for some capacity to punish. The minimalist model dismisses broader third wave theories of entanglement or norm entrepreneurship.[214] But to hold them as separate limbs of deterrence theory is erroneous; a more attentive analysis reveals that they are simply different instances of deterrence by retaliation.[215]

Unlike air power, however, IOs have an added complexity of the difficulty of attribution. Attribution, from a deterrence perspective, underpins messaging and credibility of threats, for 'the lower the odds of getting caught, the higher the penalty required to convince potential attackers that what they might achieve is not worth the cost'.[216]

The difficulty of attribution in cyberspace generally has led some to suggest that deterrence theory cannot work; Lan et al stress: 'the anonymity, the global reach, the scattered nature, and the interconnectedness of information networks greatly reduce the efficacy of cyber deterrence and can even render it completely useless'.[217] This is a rather bleak view, and sweepingly dismissive of the ability to attribute (which does exist). Attribution has always been difficult in

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[211] Mariarosaria Taddeo, 'Information Warfare: A Philosophical Perspective' (2012) 25(1) *Philosophy & Technology* 105.
[212] Quester (n 189) xiii.
[213] Barry Schneider, 'Deterrence and Saddam Hussein' in Anthony Christopher Cain (ed.) *Deterrence in the Twenty-First Century* (Air University Press, 2009) 159.
[214] Aaron Brantly, 'The Cyber Deterrence Problem' (Conference Paper, International Conference on Cyber Conflict, 2018) 37.
[215] NJ Ryan, 'Five Kinds of Cyber Deterrence' (2018) 31 *Philosophy & Technology* 331; Mariarosaria Taddeo, 'The Limits of Deterrence Theory in Cyberspace' (2018) 31 *Philosophy & Technology* 342.
[216] Martin C Libicki, *Cyber Deterrence and Cyberwar* (RAND, 2009) 43.
[217] Tang Lan et al, *Global Cyber Deterrence: Views from China, the U.S., Russia, India, and Norway* (EastWest Institute, 2010) 8.

the grey zone — that is *why* it is a grey zone.[218] Yet attribution can occur. It just needs to be accepted that attribution will not be ironclad but will come in degrees of certainty.[219] As aforementioned, many states do have the capacity and capability to attribute actions within the cyber domain either through sovereign capabilities or through third parties.[220] Accordingly, this thesis does not agree with the suggestion that deterrence is useless in the face of difficult attribution.

1 *Minimalist Model: Denial*

As Snyder noted, and the minimalist model promoted, denial is the stronger form of deterrence.[221] Denial must be the preferred option and lens for this thesis. Denial is also the form of deterrence most directly related to statecraft, whereas punishment (at least as regards individuals) is primarily a matter for the ordinary criminal law. The strength of denial was advocated by JB Ashmore, World War One Commander of London Air Defences. Retaliatory forces, for Ashmore, could simply not be structured so as to *discourage*, rather than *encourage*, attack. As he noted in 1929:

> no measures of any kind, whether bombing enemy towns and aerodromes or defensive arrangements in this country, are going to ensure that no bombs will fall on London. What the defences can and should do is take such toll of the enemy that he will find bombing too expensive, and will, therefore, stop his attack. And the question to be decided is: Which form of defence will most quickly produce the desired results?[222]

Air warfare showed that the hardening of the human target, making the population less vulnerable, was an effective defensive measure. There will, inevitably, be situations which require an escalation in force 'when the bomber gets through'.[223] This might be with conventional defences of denying access to the physical infrastructure surrounding the network; it might also include denying access to the logical infrastructure surrounding information. Chapter 3 discusses the existing statutory framework that can allow for this: Part

[218] One need only think of Elizabethan privateers; see Andrew Read, 'Pirates & Privateers' in Samuel White (ed), *The Laws of Yesterday's Wars* (Brill, 2021) 135.
[219] Christopher Haley, 'A Theory of Cyber Deterrence' *Georgetown Journal of International Affairs* (Washington, DC, 6 February 2013).
[220] Bellingcat – an open source intelligence analyst organisation - is one of the leading examples of this.
[221] Glen Sydner in Joseph S Nye, 'Deterrence and Dissuasion in Cyberspace' (2017) 41(3) *International Security* 44, 56.
[222] EB Ashmore, *Air Defence* (Longmans, Green and Co, 1929) 151.
[223] United Kingdom, *Parliamentary Debates*, House of Commons, 10 November 1932, cols 631–8 (Stanley Baldwin).

IIIAAA. There is a difficulty in this statutory framework, however, in that the statute requires 'domestic violence' to be occurring prior to its application. The meaning of this phrase is discussed in Chapter 3. Equally, this framework for calling out the ADF was designed for land, air or sea domains; not the information domain. It requires a strict analysis of how it may be applied.

Chapter 4 addresses the possible reliance on non-statutory executive power as a lawful authority for ADF denial operations, below the threshold of domestic violence. It specifically focuses on the royal prerogative of keeping the peace of the realm, an acknowledged prerogative in the unitary system of the United Kingdom, but one that has never been applied in Australia in a context of federalism. It is a necessary discussion, as many denial operations (in a domestic setting) will fall outside the scope of Part IIIAAA.

2 *Minimalist Model: Punishment*

Denial can only deter so much. There must be an ability, even if it is not utilised, to punish aggressors.[224] As Italian air power theorist Giulio Douhet noted:

> The population can and must be inured to the horrors of war, but there is a limit to all resistance, even human resistance. No population can steel itself enough to endure aerial offensives forever. A heroic people can endure the most frightful offensives as long as there is hope that they may come to an end; but when the aerial war has been lost, there is no hope of ending the conflict until a decision has been reached on the surface, and that would take too long. A people who are bombed today as they were bombed yesterday, who know they will be bombed again tomorrow and see no end to their martyrdom, are bound to call for peace at length.[225]

In many ways, punishment can also be a counterforce that increases resilience.[226] But critically, punishment is a separate limb of deterrence theory, concerned with externality. From a legal framework perspective, particularly with respect to the royal prerogative, external operations are somewhat clearer. Punishment, as a limb of deterrence theory, is therefore not subject to analysis within this thesis.

[224] Freedman, *Deterrence* (n 186) 60.
[225] Giulio Douhet, *The Command of the Air*, tr Dino Ferrari (Coward-McCann, 1942) 188.
[226] Quester (n 189) 46.

VI CONCLUSION

This chapter has provided the overarching legal and strategic frameworks that regulate, shape and ultimately will allow Australia to respond to the threat of IOs. First, it canvassed the history of the use of IOs that culminated in Soviet active measures. This demonstrated the high cost, and uncertain impact, of such operations. It moreover provided a point of comparison to the new, sui generis nature of IOs in the age of surveillance capitalism — a term that captures the economic possibilities of behaviour modification, which has increasingly been adopted by a variety of companies, including social media. Surveillance capitalism brings with it a suite of benefits as well as consequences, including the historically unique and novel threat posed by micro-targeting, and the use of bots online.

This chapter then demonstrated through legal analysis that international law is not suitable to counter IOs. This was a conclusion reached by the United Nations in 1981, where it was emphasised that domestic legal remedies were to be prioritised to combat 'campaigns of vilification' and 'subversion and defamation'.[227] It was submitted that, notwithstanding the economic models changing, the abovementioned international legal conclusion remains correct. Domestic law, therefore, is the lens through which Australia must respond to IOs.

Accordingly, the chapter then turned to Australia's current domestic strategic framework to respond to IOs: illumination. This framework is based on the underlying premise of rational individuals, which was of questionable validity in the Enlightenment era, and is clearly no longer a valid premise in the modern era where the marketplace of ideas is fragmented and subject to social media echo-chambers. This chapter accordingly applied a centre of gravity construct to the problem, identifying that the key to IOs' success is their low cost — legal, economic and political. This is a cost that is compounded by difficulties in attribution and unclear international thresholds. Accordingly, any strategic framework to successfully counter IOs must be concerned with costs — *ergo*, deterrence.

[227] UN General Assembly, *Non-interference* (n 150) preambular para 6.

Despite the different waves, at its core, deterrence is about affecting the cost–benefit analysis of striking the target. This is why it has been an internationally[228] and domestically[229] favoured strategic framework for countering IOs. Utilising a minimalist model of deterrence, this chapter has identified that Australian responses to IOs should focus on denial operations, and has foreshadowed how Part II of this thesis will investigate the Australian legal framework regulating domestic operations. It is now necessary to undertake this analysis, beginning with a focus on the role of the one branch of the statutory framework that empowers domestic operations: Part IIIAAA of the *Defence Act 1903* (Cth).

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[228] Estonian President Toomas Ilves stated: 'the biggest problem in cyber remains deterrence. We have been talking about the need to deal with it within NATO for years now', quoted in David E Sanger, 'As Russian Hackers Probe, NATO Has No Clear Cyberwar Strategy', *New York Times* (online, 16 June 2016). The United States has also adopted a deterrence posture in cyberspace. See Department of Defence, *Cybersecurity Strategy Report* (dated 17 April 2015) 2: 'In the face of an escalating threat, the Department of Defense must contribute to the development and implementation of a comprehensive cyber deterrence strategy to deter key state and non-state actors from conducting cyber-attacks against U.S. interests.'

[229] Fergus Hanson et al, *Hacking Democracies* (Report, ASPI, 2019) 18 (Recommendation 6); Christopher Whyte, 'How Deep the Rabbit Hole Goes: Escalation, Deterrence and the "Deeper" Challenges of Information Warfare in the Age of the Internet' in Christopher Whyte, A Trevor Thrall and Brian M Mazanec (eds), *Information Warfare in the Age of Cyber Conflict* (Routledge, 2020) 388; Angus Campbell, 'War in 2025' (Speech, ASPI, 13 June 2019).

PART II: DENIAL

CHAPTER 3: STATUTORY DENIAL OPERATIONS

I Purpose and Scope

There will always be situations 'where the bomber gets through'.[1] Regardless of the best social resilience and passive denial operations, inevitably there will be instances of IOs targeting the Australian population which call for active denial measures to be taken in response. This chapter specifically addresses the sole statutory authority currently available for ADF members to conduct domestic operations: Part IIIAAA of the *Defence Act 1903* (Cth).[2] Part IIIAAA, relevantly, operationalises section 119 of the *Constitution* and encompasses its threshold of 'domestic violence'.

It is necessary therefore to discuss the constitutional provision and its legislative operationalisation, both to understand the scope of the relevant statutory power, and also so as to understand whether the statute has abridged any Commonwealth non-statutory executive power such as the internal security prerogative, which will be examined in Chapter 4. This is particularly important for, in *Pirrie v McFarlane*, Isaacs J commented that:

> No obligation as a civilian can exist in conflict with a man's duties as a soldier [quoting section 119 of the Constitution] … *A soldier acting for this purpose is acting not in his capacity of State citizen but as a soldier of the Commonwealth*. In other words, military commands, lawful by Commonwealth law, are not susceptible of denial or abridgment by State law as to citizenship.[3]

This is a critical point. When ADF members are operating in response to a situation below the threshold of domestic violence, this would suggest that individuals are operating in their capacity as citizens (albeit a 'citizen in uniform').[4] But if operating to respond to domestic violence, ADF members are in a different legal category. As I have noted elsewhere, to hold

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[1] United Kingdom, *Parliamentary Debates*, House of Commons, 10 November 1932, cols 631–8 (Prime Minister Stanley Baldwin). Part of the research in this chapter was published in Samuel White, 'A Shield for the Tip of the Spear' (2021) 49(2) *Federal Law Review* 210; Samuel White, *Keeping the Peace of the Realm* (LexisNexis, 2021).

[2] There are two other provisions that may be argued to be frameworks, but they do not provide any authority for action: *Defence Act 1903* (Cth) s 123AA provides an immunity, not a positive authority for action and *Defence Regulation 2016* (Cth) s 69 simply states that any operation outside of Part IIIAAA against domestic violence must be done with necessary and reasonable force.

[3] *Pirrie v McFarlane* (1925) 36 CLR 170, 206 (Isaacs J) (emphasis added).

[4] See on this legal doctrine Samuel White, 'A Soldier By Any Other Name' (2019) 57(2) *Military Law and Law of War Review* 279.

otherwise may be 'superficially satisfying and have some political merit, but is in reality, legally questionable'.[5]

Section II of this chapter first addresses the meaning of 'domestic violence' and whether IOs could meet this threshold. Although Part IIIAAA has been subject to in-depth (albeit sporadic) academic discussion,[6] the term 'domestic violence' finds no definition within the *Australian Constitution* nor the *Defence Act*, nor has it been subject to any substantive jurisprudence or academic commentary.[7] The closest discussion of what the term means is perhaps Peta Stephenson's discussion of the provision, although she does nothing more than reiterate that the term comes from the United States *Constitution.*[8] Section II thus utilises a counterfactual model to interpret the original, contextual and dynamic meaning of a constitutional term, in order to assess whether or not it is possible that domestic violence can occur in the online environment. Although IOs can occur through many different means (as discussed in Chapter 2) there is benefit on focusing upon the online domain as it remains a sui generis threat and one that, as will become clear, Part IIIAAA has not expanded to specifically address. Section II then addresses the nature of the obligation placed on the Commonwealth, utilising historical

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[5] Ibid 331.

[6] Michael Head, 'The Military Call-Out Legislation: Some Legal and Constitutional Questions' (2001) 29 *Federal Law Review* 271; Margaret White, 'The Executive and the Military' (2005) 28(2) *UNSW Law Journal* 438; Norman Charles Laing, 'Call-Out the Guards: Why Australia Should no Longer Fear the Deployment of Australian Troops on Home Soil' (2005) 28(2) *UNSW Law Journal* 508; Cameron Moore, 'The ADF and Internal Security: Some Old Issues with New Relevance' (2005) 28(2) *UNSW Law Journal* 523; Michael Head, *Calling Out the Troops: The Australian Military and Civil Unrest* (Federation Press, 2009); Michael Head, 'Australia's Expanded Military Call-Out Powers: Cause for Concern' (2006) 3 *University of New England Law Journal* 125; Janine Fetchik, '"Left and Right of Arc": The Legal Position of the Australian Defence Force in Domestic Disaster Response Using the 2009 'Black Saturday' Victorian Bushfires as a Case Study' (2012) 27(2) *Australian Journal of Emergency Management* 31; David Letts and Rob McLaughlin, 'Call-Out Powers for the Australian Defence Force in an Age of Terrorism: Some Legal Implications' (2016) 85 *AIAL Forum* 63; John Sutton, 'The Increasing Convergence of the Role and Functions of the ADF and Civil Police' (2017) 202 *Australian Defence Force Journal* 38; Cameron Moore, '*Calling Out The Troops: The Australian Military and Civil Unrest: The Legal and Constitutional Issues* by Michael Head' (2010) 33(3) *Melbourne University Law Review* 1022; Peta Stephenson, 'Fertile Ground for Federalism — Internal Security, the States and Section 119 of the Constitution' (2015) 43 *Federal Law Review* 289; Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (ANU Press, 2017); Hoong Phun Lee et al, *Emergency Powers in Australia* (Monash University Press, 2018); David Letts and Rob McLaughlin, 'Military Aid to the Civil Power' in Robin Creyke, Dale Stephens and Peter Sutherland (eds) *Military Law in Australia* (Federation Press, 2019) 112; Nicholas Johnston, 'Considering Military Involvement in Australia's Domestic Counter-Terrorism Apparatus' (2019) 15(2) *Australian Army Journal* 104; White, 'A Soldier By Any Other Name' (n 4); Samuel White, 'Military Intervention in Australian Industrial Action' (2020) 31(3) *Public Law Review* 423; Michael Head, *Domestic Military Powers, Law and Human Rights: Calling out the Armed Forces* (Routledge, 2021); White, 'A Shield for the Tip of the Spear' (n 1); Anthony Gray, 'The Australian Government's Use of the Military in an Emergency and the *Constitution*' (2021) 44(1) *UNSW Law Journal* 357; White, *Keeping the Peace of the Realm* (n 1).

[7] The most recent discussion of the provision was in *Thomas v Mowbray* (2007) 233 CLR 307, 311 (Kirby J).

[8] Stephenson (n 6) 293; Gray (n 6) 362–4 also attempts some discussion of the meaning of the term. The errors within are expanded upon below.

examples of requested call outs to demonstrate that any obligation placed on the Commonwealth is imperfect. Noting then that there has only ever been one formal request by a state,[9] but multiple instances of the Commonwealth responding to a threat of domestic violence,[10] this section challenges constitutional academic thinking that s 119 marks the limits of federal power for domestic operations.

Section III then moves from the constitutional framework to the statutory empowerment of the ADF to counter domestic violence. Having found in Section II that domestic violence *can* occur in the online environment, it then addresses the probable call out that would occur, namely a Commonwealth interest call out, which necessarily requires a discussion of what a 'Commonwealth interest' is. Taking heed of the Explanatory Memorandum to the Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (2018 Amendments) and jurisprudence on Commonwealth executive power,[11] Section III discusses whether a state election can actually amount to a Commonwealth interest. The section then concludes with an analysis of the powers that are available under Divisions 3, 4 and 5 of Part IIIAAA and highlights where amendments are required to provide a secure legal basis for conducting successful denial operations in response to a threat rising to the level of domestic violence. It further canvasses the provisions and the process established by Part IIIAAA to inform legal analysis in Chapter 4 of whether the statute has abridged the royal prerogative of keeping the peace of the realm.

II Constitutional Framework

A *The Importance of Federalism*

Constitutions are about power, and who holds it. Particularly within the Australian tradition, the importance of a federal construct and a federal division of power is constantly reinforced by the High Court as a necessary tool of interpretation of Commonwealth power.[12]

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[9] 'Protection of Australian States against Domestic Violence' (1978) 52 *Australian Law Journal* 350, 351.
[10] Ibid; Elizabeth Ward, 'Call out the Troops: An Examination of the Legal Basis for Australian Defence Force Involvement in "Non-Defence" Matters' (Research Paper No 8/1997–98, Department of the Parliamentary Library, 2012) 3.
[11] *R v Sharkey* (1949) 79 CLR 121.
[12] Even in times of war: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 203 (Dixon J). See more generally David Hume, Andrew Lynch and George Williams, 'Heresy in the High Court? Federalism as a Constraint on Commonwealth Power' (2013) 41 *Federal Law Review* 71; Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35(2) *Sydney Law Review* 253.

Federalism can be constructed across two axes — a design axis (dualist or integrated), and a constitutional axis (separation of powers).[13] Australia, relevantly, is a dualist federation, dividing spheres of responsibility between state and federal governments along thematic lines. The *Constitution* distributes legislative powers (from which executive power follows), some of which are exclusive in nature, others of which are concurrent in nature. Referring back to the definitions of prerogative power in Chapter 1, Evatt J in *Farley* noted that Federation saw the 'executive prerogatives' almost exclusively granted to the Commonwealth under ss 51, 52 and 122.[14] For the most part, thematic divisions increase clarity of roles and responsibilities. The one apparent exception here is public order.[15]

As Twomey notes, 'Federation did not transform Australia into an independent sovereign nation. It merely consolidated six colonies into one federated larger colony.'[16] The status of these colonies can be viewed in contradistinction to its empire sister on the other side of the Pacific — Canada. In Canada, the separate colonies had sunk to the position of provinces, subordinated to the Canadian federal government. These provinces represented the Queen through Lieutenant-Governors, individuals appointed by the Governor-General. The *Australian Constitution*, however, deliberately rejected the subordination of the colonies. The States therefore retained their ability to appoint Governors. This difference was, and is, rather significant. One indicator at the time of empire of the status of colonies was whether or not the administrators were 'sterling' or 'currency' — British born, or colony born.[17] State Governors, coming from 'the lesser nobility' and historically liaising directly with the Colonial Office were prima facie 'more sovereign' rather than 'the Governors of the Canadian Provinces (who) were of local origins and had no direct relations with the United Kingdom'.[18]

Communication rights came to the fore particularly with Federation, through the delineation of what fell within a state's interest, and what fell within the Commonwealth's. In November 1900, the British Secretary of State for the Colonies wrote to the individual Australian colonial Governors, informing them that any correspondence back to the Colonial Office on matters

[13] Cheryl Saunders, 'Executive Power in Federations' in Amnon Lev (ed), *The Federal Idea — Public Law Between Governance and Political Life* (Hart, 2017) 145, 156–7.
[14] *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278, 320, 321–2.
[15] *A-G (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644, 653–4 (Viscount Haldane LC, Lord Dunedin, Lord Shaw and Lord Moulton).
[16] Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006) 18.
[17] Robert Hughes, *The Fatal Shore* (Vintage Books, 2003) 88.
[18] Twomey (n 16) 21.

that were a Commonwealth interest would be required to include the Commonwealth as a recipient, for awareness.[19]

The first test of this divide — state or Commonwealth interest — came in 1902 when the Dutch Government sought action from the British Government for lack of action taken by South Australia to arrest the crew of a Dutch ship, in breach of treaty obligations with respect to deserters.[20] The British Government directly communicated with the Commonwealth Government for a situation report, who took umbrage at this, noting that internal security and public order fell within the remit of the State. The Secretary of State for the Colonies, having taken submissions on the matter, concluded that, as the matter fell within external affairs and treaties, it was a Commonwealth matter.[21] This tension between external affairs and defence (clearly Commonwealth interests) and the maintenance of civil order (a state affair) would routinely emerge in the appropriate recipients for communiques on issues such as permission of foreign warships to land in state ports, or riots.[22] It is a tension that still remains and is core to Part IIIAAA. It is necessary therefore to address the critical question of thresholds.

B *What is Domestic Violence?*

As outlined in Chapter 1, it is important to understand the key term of 'domestic violence', which underpins section 119 of the *Constitution.* The phrase underpins both law and policy. Legally, it is a statutory trigger for ADF domestic deployments.[23] Under policy, responding to domestic violence is the only time that a Defence Force Aid to the Civil Authority (DFACA) operation can occur.[24] The issue however is that the term 'domestic violence' has no clear definition in the *Defence Act* (which just holds the term to have the same meaning as in the *Constitution*)[25] nor within the *Constitution* itself. It has not received any binding or in-depth Australian jurisprudential commentary. The term has only been subject to narrow, sporadic academic commentary,[26] and has been accordingly described as the 'wallflower of the *Constitution*'.[27]

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[19] Ibid 20.
[20] Ibid 21.
[21] Ibid 22.
[22] Ibid.
[23] Per *Defence Act 1903* (Cth) pt IIIAAA.
[24] Department of Defence, *Defence Assistance to the Civil Community Manual* (17 August 2020).
[25] *Defence Act 1903* (Cth) s 31.
[26] Head, *Calling Out The Troops* (n 6) 38; Ward (n 10) 3.
[27] Stephenson (n 6) 289–90.

The provision is anything but. It can be interpreted as a reaffirmation of the enumerated powers doctrine,[28] and a confirmation of the reserve powers of state authority.[29] In one of the few judgments that discusses s 119,[30] Kirby J noted that:

> While s 119 is properly characterised as a provision imposing a special duty and, of itself, does not exhaust federal legislative power or require that such power be read down where otherwise available, the section remains instructive when considering s 51(vi) in the context of the one coherent constitutional instrument … [the provision] assumes that, ordinarily, the reach of federal legislative power, including the defence power, excludes areas of civil government and matters usual to 'police powers', including those of the States.[31]

There is a lot to unpack in Kirby J's judgment. First, it was in dissent and does not form part of the ratio (although none of the majority explicitly discussed s 119). Implicit in the majority's view was that s 119 did *not* provide a protection to the states from Commonwealth intervention. Whilst general public order is a matter for the states,[32] the provision also clearly assumes that some internal disturbances, namely domestic violence, can flow into the Commonwealth's area of responsibility.

Professor Anthony Gray has attempted to advocate for 'narrow' and 'broad' interpretations of the constitutional term.[33] Gray, in a somewhat disconnected manner, appears to try to link jurisprudential developments in the concept of 'domestic violence' between individuals in their personal relationships to the constitutional concept of 'domestic violence'.[34] Gray then posits that a liberal, non-literal interpretation of domestic violence should be applied,[35] recognising that the meaning of words in the *Constitution* can change over time.[36] There is some benefit to

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[28] *Attorney-General (Vic) (Ex rel Dale) v Commonwealth* (1945) 71 CLR 237.
[29] *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644, 653–4.
[30] Another key one is *Pirrie v McFarlane* (1925) 36 CLR 170, where Isaacs J discusses when called out under s 119 service personnel could not be considered citizens. See discussion of this in Chapter 3. The provision is also discussed in *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557, 571 (Latham CJ) amongst other cases.
[31] *Thomas v Mowbray* (2007) 233 CLR 307, 395 [248].
[32] *Attorney-General for the Commonwealth v Colonial Sugar Refining Co.* (1913) 17 CLR 643, 653–4 (Viscount Haldane LC, Lord Dunedin, Lord Shaw and Lord Moulton). See also John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 964; Herbert Vere Evatt, *The Royal Prerogative* (Law Book Co, 1987) 226–38; Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 *Public Law Review* 279, 287; Cheryl Saunders, 'The Australian Federation: A Story of Centralization of Power' in Daniel Laberstam and Mathias Reimann (ed), *Federalism and Legal Unification* (Springer, 2014) 87.
[33] Gray (n 6) 362–4.
[34] Ibid.
[35] Gray (n 6) 362–4.
[36] *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 495 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

this, despite an erroneous link between the alternate meanings of domestic violence and the incorrect and dangerous conclusions drawn from them with respect to the use of the military in Operation COVID-19 Assist.[37] Gray's proposal also has broad federal consequences, so that his broad interpretation of 'domestic violence' would seem to subordinate the states to the Commonwealth. There is a necessary balance to be struck.

In making this assessment of how the constitutional term should be interpreted, it is useful to utilise Jonathan Crowe's tryptic contextual analysis methodology — this involves interpreting words in their ordinary meaning, their holistic meaning and their dynamic meaning.[38] It has benefits because it demonstrates the term domestic violence both as it was intended, and as it currently stands.

1 *Ordinary Meaning of Domestic Violence*

The first step is to assess the lexical meaning of the term domestic violence at the time of enactment. The term comes from the American *Constitution* article IV § 4. Relevantly, the term was intended to allow the federal government to counter domestic dangers, which one American Founding Father thought 'more alarming than the arms and arts of foreign nations'.[39] American jurisprudence has held the term to include: 'local uprisings, insurrections or internal unrest … which may also threaten the existence or institutions of the states'.[40]

This American jurisprudence was cited with approval by Sir Victor Windeyer in his 'Opinion on Certain Questions Concerning the Position of Members of the Defence Force when Called Out to Aid the Civil Power'.[41] It was not the first time, however, that the term came under political use. Although conventional academia holds that the first time the phrase was used in Australia was in 1908 in discussions around the Broken Hill strike by Prime Minister Fisher,[42] archival evidence collected for this thesis has highlighted that threats of 'domestic violence'

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[37] Gray (n 6) 373. Gray concludes that the nature and scale of the global health emergency in OP COVID Assist, and the bushfires of OP Bushfire Assist, would meet the threshold of domestic violence.
[38] Jonathan Crowe and Peta Stephenson, 'An Express Constitutional Right to Vote? The Case for Reviving Section 41' (2014) 36 *Sydney Law Review* 205, 229. For a detailed argument in support of this approach, see Jonathan Crowe, 'The Role of Contextual Meaning in Judicial Interpretation' (2013) 41 *Federal Law Review* 417.
[39] Alexander Hamilton, 'Concerning Dangers from Dissensions between the States' (1787) 6 *The Federalist Papers* 26.
[40] *Luther v Borden*, 48 US 1 (1849).
[41] Victor Windeyer, 'Opinion on Certain Questions Concerning the Position of Members of the Defence Force when Called Out to Aid the Civil Power' in Victor Windeyer, *Victor Windeyer's Legacy: Legal and Military Papers*, ed Bruce Debelle (Federation Press, 2019) 211, 215.
[42] Michael Head, *Calling Out the Troops* (Federation Press, 2009) 10.

were assessed in 1902 in the Torres Straits.[43] The threat was not defined, merely noted. Nor was it defined in repeated references to domestic violence uncovered within archival records with respect to a possible threat posed by New Guinean separatists in 1970,[44] Australian National Socialists in 1978[45] and Croatian communities in 1979;[46] Aboriginal activist groups,[47] animal rights groups,[48] an attack on a diplomat's wife in Sydney,[49] and a bomb threat to the Polish Embassy all in 1982;[50] as well as the assassination of the Turkish ambassador, in Sydney, by Armenian commandos (although the term was interchanged with 'political violence').[51] Cables from the Department of Foreign Affairs further raised fears of 'domestic violence' by members of the Japanese Red Army,[52] and later by members of Libyan terrorist groups.[53] In the 1990s, fears turned to Albanian communities who resided in Australia.[54] In none of these documents is a definition offered of the term 'domestic violence'.

The culmination of the use of this term, however, is reflected in the Addendum to the Explanatory Memorandum to the 2018 Amendments, which notes that domestic violence:

> refers to *conduct that is marked by great physical force, and would include a terrorist attack, hostage situation, and widespread or significant violence*. Part IIIAAA uses the term 'domestic violence' as this is the term used in section 119 of the Constitution, which deals with state requests for assistance in responding to domestic violence. *Peaceful protests, industrial action or civil disobedience would not fall within the definition of 'domestic violence.'*[55]

The passages in italics are key for IOs, as they are often (and as covered in Chapter 2) in the guise of peaceful protests or civil disobedience.[56] As Sir Victor commented, the ordinary meaning of the term is thus one concerned with conduct 'which would rupture the social fabric'.[57] Making the assessment of whether or not IOs have met the threshold of domestic

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[43] NAA B168, 1902/442.
[44] NAA 12007/1, Letter of 19 July 1970; Cable No 1044 of 20 May 1969.
[45] Australian Security Intelligence Organisation, *Revival of National Socialist Party of Australia* (Report, 25 June 1978).
[46] File 1652.3.1 (1979).
[47] PSCC 010444Z April 1982.
[48] NAA 1652/3/1; ASIO 131 08.12.82.
[49] NAA 1652/3/7.
[50] NAA 1910/1982.
[51] NAA 1652/3/9, Part I.
[52] Ibid; Cable 0.SE0556 1700 18.12.80 CLA.
[53] NAA 1652/3/7.
[54] NAA 44/2/90.
[55] Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth), 2 (emphasis added).
[56] Keir Giles, *Handbook of Russian Information Warfare* (NATO Defense College, 2016) 39.
[57] Windeyer (above n 41) 224.

violence is an inherently political determination. However, there are likely instances where IOs could rise to the (admittedly high) threshold of rupturing social fabric, causing widespread significant violence.

Does a simple riot rise to the threshold of domestic violence? Potentially. In 1921, military planning was focused on responding to two sorts of domestic violence: a 'general organised outbreak against authority' as well as 'sporadic outbreaks against authority in isolated localities'.[58] John Quick and Robert Garran noted in *The Annotated Constitution of the Australian Commonwealth* that:

> The Federal Authority is not required or empowered to interfere to protect a State against domestic violence, except on the application of the Executive Government of the State. … If, however, domestic violence within a State is of such a character as to interfere with the operations of the Federal Government, or with the rights and privileges of federal citizenship, the Federal Government may clearly, without a summons from the State, interfere to restore order. *Thus if a riot in a State interfered with the carriage of the federal mails, or with inter-state commerce, or with the right of an elector to record his vote at federal elections*, the Federal Government could use all the force at its disposal, not to protect the State, but to protect itself. Were it otherwise, the Federal Government would be dependent on the Governments of the States for the effective exercise of its powers.[59]

The above passage, outlining so-called 'Commonwealth interests', was quoted with approval by Dixon J in *R v Sharkey*[60] ('*Sharkey*'). It remains the clearest authority for Commonwealth executive power to enable domestic security operations.

Yet William Finlason, writing in 1868 on the use of martial law to suppress rebellion, described the difference between a riot and a rebellion in terms of the legal framework that could be employed to deal with each:

> And these words, riot and rebellion, indicated the scope of the powers of common law and of natural law respectively. *Riot is, in its nature, casual, actual, and simple*; and simple measures of resistance may suffice, and the simple powers of the common law may be sufficient. But rebellion, as it is more dangerous and deep-seated, so it is necessarily more difficult to deal with, and may require not only full liberty of attack, but, as it may be passive as well as active, may follow a policy of exhaustion and devastation rather than one of aggression or attack, even full liberty of attack may be

[58] NAA B197, 1887/1/64, 6.
[59] Quick and Garran (n 32) 964 (emphasis added).
[60] (1949) 79 CLR 121, 151.

> insufficient to subdue it, and deterrent measures may be necessary, and the power of speedy punishment … *Rebellion is war: that is the cardinal principle*. War requires measures of war.[61]

The difference between riot, domestic violence and rebellion was recognised in the legal advice provided to the Chiefs of Staff regarding the 1970 call out of the Pacific Island Regiment in Papua New Guinea.[62] Specifically, archival evidence shows that the Attorney-General's Department advised that in instances of 'levying war against the Crown' military commanders held a discretion to request its suppression.[63] This was in juxtaposition to instances of domestic violence which could 'evolve from a riot situation'.[64] A Defence Committee minute recorded that the term 'domestic violence' was much discussed but was interpreted as 'A phrase meant to embrace a sizeable and continuing disturbance by substantial numbers involving violence and armed resistance rather than threats to commit violence or isolated instances of violence'.[65]

This was in juxtaposition to earlier Defence Committee findings in 1921 that domestic violence could occur in either 'case of a general organised outbreak against authority', or 'in the case of sporadic outbreaks against authority in isolated localities'.[66] This seems to imply the term is relative to the possibility of control. However, the ordinary meaning of domestic violence is not clear — either through archival legal advice, Defence Committee interpretations, or extra-curial opinions. The *Constitution* makes clear that domestic violence is not an actual and simple matter that can be dealt with under simple common law powers of citizens; the nature of the threat is one that therefore requires the use of Commonwealth assets, primarily the military (through the implication of s 114; see Table 2 below). This thesis therefore argues that the ordinary meaning of the term domestic violence is sui generis — a classification of belligerency that arguably fits above the concept of riot (being casual, actual and simple) and below that of rebellion (being war).

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[61] William Finlason, *A Review of the Authorities as to the Repression of Riot or Rebellion: With Special Reference to Criminal or Civil Liability* (Nabu Press, 2010) 47–8 (emphasis added).
[62] NAA P133, 36.
[63] Ibid.
[64] NAA P134, 4.
[65] Ibid.
[66] NAA B197, 1887/1/64, 6.

2 *Contextual Meaning of Domestic Violence*

The next step, according to Crowe, is to identify the broader contextual factors that underpin the meaning of the term domestic violence.[67] Noting the term comes from the United States' *Constitution*, it is therefore relevant to explore both the American and Australian contextual meanings of the term.

Within the United States, the history of the provision starts in 1786 when a group of British traders refused credit to Bostonian merchants; these merchants in turn demanded cash payments from subsistence farmers.[68] These farmers, under Revolutionary War veteran Daniel Shay, led armed mobs through Massachusetts closing down public services.[69] The Governor, James Bowdoin, dispatched state militia who proved ineffective, and federal troops were called for.[70] This call, importantly, largely went ignored.[71]

By February 1787, Shay's Rebellion was over but concerns lingered whether or not the newly federated United States of America could survive internal discord, with Great Britain looking to reinstate the monarchy in America.[72] The discord could stem either from internal dissidents conducting a rebellion against the respective state, or one state invading another, a fear at the forefront of the Constitutional Convention debates that opened three months later.[73] It resulted in two additions to the United States' *Constitution* — a Preamble which promised to 'insure domestic Tranquillity' and a new section designed to respond to domestic violence (hence it is called the 'guarantee clause'). It read:

> **Article IV — Relationship between the States**
>
> (4) The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

[67] Crowe and Stephenson (n 38) 229.
[68] Bybee (n 34) 19.
[69] David Szatmary, 'Shays' Rebellion in Springfield' in Martin Kaufman (ed), *Shays' Rebellion: Selected Essays* (Westfield State College, 1987) 1.
[70] Ibid 14.
[71] Ibid.
[72] Robert J Taylor, *Western Massachusetts in the Revolution* (Brown University Press, 1954) 128–6.
[73] See Robert Feer, 'Shay's Rebellion and the Constitution: A Study in Causation' (1969) 42 *New England Quarterly* 338, 404 n 32.

The Australian experience was somewhat similar. La Nauze comments section 119 was first introduced into the constitutional debates by Sir Samuel Griffith, in March 1891 in light of the shearers' strike.[74] The draft proposal raised no debate at the convention; it was simply adopted. Here, unlike the American experience, the Queensland Government was successful in crushing the industrial action. But the provision must necessarily be read in the context of other Australian constitutional provisions, and the wider contextual history of the *Constitution* itself.

The Australian experience of federalism is different to that of the United States. The High Court has made this clear.[75] Unlike the American intent to divide and constrain government power through strict federal divides,[76] the Australian experience was driven towards self-actualisation. The preamble to the primary resolutions of the National Australasian Convention in Adelaide in 1897 held the purpose of Federation was 'to enlarge the powers of self-government of the People of Australia'.[77] Sir Robert Garran explained this preamble was to make clear that Federation was not a reduction in citizen rights and powers, 'but only the transfer of those rights and powers to a plane on which they could be more effectively exercised'.[78]

The consequential withdrawal of imperial troops from the colonies prior to Federation placed the onus of defence of the Commonwealth upon Australia and Australian militia.[79] The barracks and fortifications of imperial troops were handed to the local colonial governments, and imperial military advisers were sent to ensure the requisite state of efficiency could be reached. Accordingly, Major-General Edwards was sent to Australia in 1889 to inspect and report on the defence of the colonies. His recommendations included a uniform system of military organisation, the establishment of 'a federal military college for the education of the officers' and 'a uniform gauge for the railways'.[80]

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[74] John La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 62.
[75] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 146–7.
[76] Richard Hofstadter, 'The Founding Fathers: An Age of Realism' in Robert H Horwitz (ed), *The Moral Foundations of the American Republic* (University Press of Virginia, 2nd ed, 1979) 67.
[77] *Official Report of ADL*, 17.
[78] Robert Garran, 'The Federation Movement and the Founding of the Commonwealth' in J Rose, A Newton and E Benians (eds), *The Cambridge History of the British Empire* (Cambridge University Press, 1933) 455.
[79] Alpheus Todd, *Parliamentary Government in the British Colonies* (Longmans, Green & Co, 1880) 295.
[80] Alpheus Todd, *Parliamentary Government in the British Colonies* (Longmans, Green & Co, 2nd ed, 1894) 399–401.

These recommendations heavily influenced the drafting of the *Australian Constitution*, and indeed were one of the major drivers for Federation generally.[81] Table 2 below extracts some of the key provisions regulating civil–military relations in the *Australian Constitution*.

Table 2: Key Civil–Military Constitutional Provisions

s 51	The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good governance 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.
s 61	The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth.
s 68	The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.
s 69	(Transfer of naval and military defence from states to Commonwealth)
s 114	A State shall not, without the consent of Parliament of the Commonwealth, raise or maintain any naval of military force …
s 119	The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

Accordingly, unlike the American experience, Australian states would not have their own militia per se to rely upon.[82] Stephenson posits this may explain why Griffith was so 'concerned to seek a guarantee from the Commonwealth that military assistance would be provided to a state in cases of *uncontrollable* domestic violence'.[83] It may further explain why the Australian provision does not require the request of the legislature, but the state executive.

[81] Quick and Garran (n 32) 447: '[the defence of Australia could not work] unless the forces were placed under one command … there could not be one command except under one government; and one common system of taxation by a representative Parliament'.
[82] By virtue of the *Australian Constitution* ss 69, 114.
[83] Stephenson (n 6) 294, citing *Official Report of the Australasian Federal Convention Debates, Sydney*, *4 March 1891*, 25.

Contextually, then, domestic violence is a term that carries with it the implications of federalism. Within the United States' form of federalism, the provision does not intend a mere policing role of the federal government but must rely upon a 'state … in which life and property were absolutely unsafe'.[84] Yet there is an important distinguishing factor between the American and Australian federal systems: state militia. In Australia, as noted above, states are unable to raise or maintain any naval or military force without parliamentary consent. This is not an utter prohibition; however, this consent has never been given. There is a necessary contextual difference then as to how the term 'domestic violence' and its obligation are to be interpreted.

The first incident on a scale of unrest to attract official mention of the nature of the obligation imposed by the constitutional section in 1909 during a strike at Broken Hill. The Prime Minister at the time, Andrew Fisher, was reported as saying:

> If the State Government asks us to give it assistance we have got to do so under the Constitution, no matter how much we think as a Government that such help is not needed. Control of the military force is vested in the Federal authorities … under that section [section 119] we would have to order the troops out to help the police. It won't do us any good if we have to do it. But that will make no difference to the Government. We will have to see the law carried out.[85]

No request was made by the New South Wales Government under the relevant provision of the *Defence Act* and no call out occurred. The issue came to a head in 1912, when the Queensland Government made the first formal request by a state under section 119 for support against the besieging of Brisbane by unionists.[86] It was denied. Table 3 outlines further requests. It is particularly important for in 1971 in Parliament the question was raised whether any formal application had occurred since Federation for assistance under s 119.[87] The answer was 'the Commonwealth has not received an application by a State'.[88] It is important then to understand that there have, in fact, been such requests.

Table 3: Requests for Commonwealth Assistance against Domestic Violence as at 2020

[84] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 1912, 153 (Attorney-General William Hughes).
[85] *Sydney Morning Herald* (Sydney, 6 January 1909).
[86] Quarterly despatch, 24 Feb 1912, ACJP reel 4208, 101.
[87] Commonwealth, *Parliamentary Debates*, House of Representatives, 15 September 1971, 1395–6 (Gough Whitlam).
[88] Commonwealth, *Parliamentary Debates*, Senate, 18 April 1978 (Peter Durack).

Year	Event	Result
1912	Queensland Government formally proclaimed a state of domestic violence; requested Commonwealth troops under the *Defence Act* for Commonwealth support against domestic violence (general strike, riot and imminent bloodshed).	Denied.[89]
1912	Queensland Government formally requested Commonwealth naval support of HMAS *Condor*.	Denied.
1912	Queensland Governor requested Colonial Office to float British 'Ship of War on the Coast of Queensland' for 'moral support'.[90]	Denied by Colonial Office.[91]
1916	Tasmanian Government requested the assistance of troops from the Commonwealth to put down expected disturbances on the occasion of a referendum about conscription, after bomb goes off.[92]	Adjutant General advised all Military District Commandants to prepare to operate.[93] Victorian Commandant requested permission to use air support.[94]
1919	Freemantle Wharf strike, where unions refused to unload ship with influenza-infected passengers. Unable to control the wharf, state government formally requested Commonwealth troops to resolve.[95]	Denied.[96]
1920	Governor of Western Australia forwarded to the Governor-General a request from the Western Australian Premier for Commonwealth assistance to control expected racial violence during annual paying of pearling fleet.	Warship sent by Commonwealth.[97]
1921	Premier of Western Australia telegraphed the Acting Prime Minister requesting him to 'instruct permanent force to be sent to Perth and be made available to maintain order' in the event that the Western Australian Police were unable to do so during 'labour troubles'.[98]	Denied.
1923	Premier of Victoria, in a letter to the Acting Prime Minister, requested the Commonwealth Government to	Armed troops are placed to protect

[89] 'Protection of Australian States against Domestic Violence' (n 9) 351.
[90] Cover note to the telegram requesting aid, 6 February 1912, CO 418/102 at 52.
[91] Ibid.
[92] 'Protection of Australian States against Domestic Violence' (n 9) 351.
[93] Minute of 13 December 1916; quoted in Brian Beddie and Sue Moss, *Some Aspects of Aid to the Civil Power in Australia* (Occasional Monograph No 2, Department of Government, Faculty of Military Studies, UNSW Canberra, 1982) 21.
[94] Minute of 18 December 1916 from Acting Commandant to Secretary, Department of Defence, AA 1887/1/52.
[95] Beddie and Moss (n 93) 27, n 77.
[96] Ibid 27.
[97] ACJP Reel 4307, 16 November 21.
[98] 'Protection of Australian States against Domestic Violence' (n 9) 351.

	‘arrange for troops to parade the City and take positions’ at specified locations during a police strike, as a ‘precautionary measure designed to make an impression and to have a strong force of men available at suitable points ready for instant use if the situation should demand their being called upon in the regular manner’.	Commonwealth facilities; equipment provided to state special constables[99]
1928	Premier of South Australia requested Commonwealth troops and/or Commonwealth-issued ammunition to the South Australian Police Commissioner for use in case of absolute necessity during a strike. At about the same time, the Premier also made a request for military equipment.	Military equipment provided by Commonwealth.[100]

Contextually Table 3 is a reconfirmation that public order falls within the remit of the states.[101] It also confirms that domestic violence is a concept that falls above that of a simple riot but is sui generis. It finally confirms, contextually, that the determination of domestic violence is held at the Commonwealth level and is, therefore, a political determination. John Quick and Robert Garran noted as such in the above quoted section of their *Annotated Constitution of the Australian Commonwealth*.[102] As covered in Chapter 4, domestic operations have occurred outside of the request of states. These were outside the ambit of domestic violence and fall under the constitutional authority of section 61.

3 *Dynamic Meaning of Domestic Violence*

The final step to understanding the constitutional term domestic violence is to ask for its dynamic meaning, reflecting that constitutional terms are not locked in a display cabinet in a constitutional museum.[103] This involves looking at the social facts underpinning a term,[104] and trying to minimise the cognitive bias within a single author’s interpretative horizon.[105]

Although the Explanatory Memorandum to Part IIIAAA holds that domestic violence is action that has great *physical* force, the above analysis has demonstrated that it does not necessarily follow that this is correct. It is of course open to Parliament to narrow the interpretation

[99] *The Argus* (Melbourne, 7 November 1923) 11.
[100] Beddie and Moss (n 93) 27. It is interesting to note that this may provide the consent required under s 114 to raise paramilitary forces.
[101] *Attorney-General (Commonwealth) v Colonial Sugar Refining Co* (1913) 17 CLR 643, 653–4 (Viscount Haldane LC, Lord Dunedin, Lord Shaw and Lord Moulton)
[102] Quick and Garran (n 32) 964.
[103] *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 60 (French CJ).
[104] Ferdinand de Saussure, *Course in General Linguistics*, tr Roy Harris (Open Court, 1986) 9–11.
[105] Martin Heidegger, *Being and Time*, tr John Macquarie and Edward Robinson (Harper and Row, 1962) 194–5.

according to its intent; yet s 33 of Part IIIAAA holds the meaning of the term statutorily to be the same as that constitutionally. Constitutionally, the notion of 'domestic violence' clearly envisaged, at the time of Federation, non-peaceful and destructive actions by individuals, in person, against the government or organs thereof. Whilst the term is used in a manner similar to external invasion under s 119, at its core the term probably most closely resembles Sir Victor's opinion about situations that tear the social fabric. This has been extended to secessionist movements in an Australian territory and terrorist attacks.

As the federal debates in the United States demonstrated, internal unrest perhaps is a greater threat to democracies than external threats. In the modern era, this obviously encompasses the online environment (which brings its own complications about the notions of internal and external, blurred by the ubiquity of the internet). It may be open, albeit through a different analytical path, to accept Gray's proposal that domestic violence encompasses a failure to comply with public health directions in a global pandemic, which threaten to tear a state apart and overwhelm public health services. This would clearly be decided case by case, but would require an assessment by the government of the day. In making this assessment recourse could be taken to Finlason's framework, a form of belligerency that falls above riot but below rebellion.

C *Conclusion*

This section has sought to outline what domestic violence means from a constitutional perspective. This is relevant in order to assess whether or not the ADF can be called out, under Part IIIAAA of the *Defence Act*, to respond to instances of domestic violence which may occur due to an IO campaign. It is a task made difficult by a lack of definition of the term, and varying approaches to its interpretation.

Applying the contextual analysis approach, it is clear that IOs can amount to domestic violence in certain circumstances. The original meaning of the phrase was concerned with a certain state of affairs — specifically, the tearing of the social fabric. This is a situation that could change with time and society. What might tear the social fabric in the 1890s (such as pastoralist industrial strikes) could change a century later to include circumstances which the state cannot resolve under its responsibility for public order. As Sir Owen Dixon noted: 'it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers

expressed in general propositions wide enough to be capable of flexible applications to changing circumstances'.[106]

Contextually, the Commonwealth of Australia has the responsibility for the defence of Australia: hence section 119 talks in the same provision about 'domestic violence' and 'invasion'. One is internal; the other external. Both fall within the ambit of the Commonwealth to respond to as they hold the authority to use the unified, federal naval and military forces. If IOs are beyond the capacity of a state to respond to, section 119 provides a constitutional ability to request Commonwealth assistance. This might extend to utilising the ADF, under Part IIIAAA, to respond to IOs if the political determination is made by the relevant statutory authorities.

III STATUTORY FRAMEWORK: DIGITAL CALL OUTS

Since 1903, and the original *Defence Act*, there has been a statutory ability to call out the ADF to respond to instances of domestic violence.[107] In 2000, in preparation for the Sydney Olympic Games and the threat of possible terrorist activities, Part IIIAAA was introduced to the *Defence Act*, replacing the previous four sections with 27 new ones.[108] The focus of Part IIIAAA related to land-based counter-terrorism and hostage recovery situations and provided a statutory footing for 'the mechanics for the deployment of the ADF in aid of the civil authorities'.[109]

A call out order is generally made by the Governor-General, on the satisfaction of all three authorising Ministers (the Prime Minister, the Attorney-General and the Minister for Defence)[110] that the relevant mandatory considerations are met. When deciding to call out the ADF with respect to IOs, there is one particularly relevant mandatory consideration for authorising Ministers — whether it meets the threshold of domestic violence. The meaning of this term has been canvassed above.

Yet the authorising Ministers must also make an assessment as to whether the ADF *should* be called out. This is a higher threshold and reflects that not every instance of domestic violence

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[106] *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81.
[107] *Defence Act 1903* (Cth) s 51.
[108] Letts and McLaughlin, 'Military Aid to the Civil Power' (n 6) 114; *Defence Legislation Amendment (Aid to the Civilian Authorities) Act 2000* (Cth).
[109] Lee et al (n 6) 226.
[110] *Defence Act 1903* (Cth) s 31.

will be sufficient to warrant a call out.[111] Again, the Addendum to the Explanatory Memorandum to the 2018 Amendments provides guidance as to when the 'nature' of the domestic violence supports implies that the ADF *should* be called out under Part IIIAAA.

> matters such as *the type of violence, the types of weapons* used, *the number of perpetrators* involved, as well as the scale of domestic violence (or anticipated domestic violence) where such information is available. For example, the ADF could be called out in response to unique types of violence, such as *chemical, biological, radiological or nuclear attack* … The ADF could also be called out where the type of violence is not unique — for example an active shooter — but *where the violence is so widespread*, or there are so many shooters involved, that law enforcement resources are in danger of being exhausted.[112]

The focus on physical force is merely policy guidance; as highlighted above there is no constitutional need. The overall intent of the mandatory considerations for the authorising Ministers is to clearly articulate that there are certain domestic violence threats (such as chemical, biological, radiological or nuclear threats) that the ADF are particularly suited to counter. It could just as easily include the information domain or the cyber domain, which are areas that the ADF is well placed to respond to, as they are a unique type of violence, requiring sophisticated levels of software and specific training, and where an ADF response at the national level may be better placed than a series of disparate responses from state entities.[113] It equally could include situations where the local law enforcement — if they even have cyber capabilities — are not able to deal with the threat. The inability to respond to IOs from a state level would, per the above, suggest an instance of domestic violence is occurring. As an example, New South Wales police recently doubled their Cybercrime Squad from eight to sixteen.[114] The ADF has a large, and increasingly offensive cyber operations capability, whose use would easily meet the threshold of enhancing the states' or territories' ability to respond to instances of domestic violence.[115]

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[111] Samuel White and Andrew Butler, 'Reviewing a Decision to Call Out the Troops' (2020) 99 *AIAL Forum* 58, 67.
[112] Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth), 36 (emphasis added).
[113] Marcus Thompson, 'The ADF and Cyber Warfare' (2016) 200 *Australian Defence Force Journal* 43.
[114] New South Wales Liberal Party, '250 Additional Police Set to Hit the Beat', *New South Wales Liberal Party* (Web Page, 21 April 2020) <https://nsw.liberal.org.au/Shared-Content/News/2020/250-ADDITIONAL-POLICE-SET-TO-HIT-THE-BEAT>.
[115] Thompson (n 113) 43, 45.

There are four potential call outs that may occur under the amended Part IIIAAA, as outlined in Table 4. The first two relate to Commonwealth interest call outs; the latter two to state and territory call outs. In each case, the legislation provides for both actual call outs and contingent call outs.

Table 4: Types of Call-Out Orders

Section	Call-Out Type
33	Commonwealth interest
34	Commonwealth interest — contingent call out
35	Protection of states and territories
36	Protection of states and territories — contingent call out

Whilst all types are relevant to countering IOs (in that a state may request Commonwealth assistance) it cannot be assumed this will always be the case. Indeed, as noted above, the Commonwealth has called out the ADF to protect its own interests more frequently than it has called out the ADF in response to a request from a state or territory. It is therefore necessary to discuss what constitutes a Commonwealth interest. Similar to the term 'domestic violence', the phrase 'Commonwealth interest' has no clear definition in the *Constitution* or the *Defence Act*, nor has it received any jurisprudential commentary. The ADF may be used without a state or territory request when domestic violence would, or would be *likely to*, affect a Commonwealth interest.[116] It is necessary, then, to discuss the notion of a Commonwealth interest and whether IOs would meet the threshold.

A *Commonwealth Interests*

Since *Sharkey*, the notion of a Commonwealth interest has begun to litter Commonwealth legislation, particularly with respect to calling out the ADF under Part IIIAAA, and to enliven a national emergency declaration under the eponymous Act.[117] These statutes, however,

[116] Ibid s 33(1).
[117] *National Emergency Declaration Act 2020* (Cth) s 11.

deliberately do not define the term,[118] to some concern and criticism.[119] In the report of the Senate Foreign Affairs, Defence and Trade Legislation Committee into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000, which introduced Part IIIAAA, the committee rejected submissions that the phrase should be defined. It stated:

> The Committee appreciates the desire of the States to have a clearer definition of 'Commonwealth interests'. It too would like greater certainty given to the meaning of this phrase. But, as noted by legal experts such as Quick and Garran, the scope of Commonwealth interests is extensive and it would be difficult to include a definitive list of Commonwealth interests. Indeed, the Constitution serves as the best authority in defining areas that come under the umbrella of Commonwealth interests.[120]

This was reflected in s 100.4 of the *Criminal Code 1995* (Cth), which provides much more detail as to what an 'interest of the Commonwealth' constitutes. This provision was introduced after the referral from the states to the Commonwealth of powers for the purposes of counter-terrorism.[121] Section 100.4(5), in turn, attempts to codify non-exhaustively what the Commonwealth views as its interest when there is no consent from a state or territory. It reads:

> (5) Without limiting the generality of subsection (4), this Part applies to the action or threat of action if:
>
> (a) the action affects, or if carried out would affect, the interests of:
>
> (i) the Commonwealth; or
>
> (ii) an authority of the Commonwealth; or
>
> (iii) a constitutional corporation; or
>
> (b) the threat is made to:
>
> (i) the Commonwealth; or
>
> (ii) an authority of the Commonwealth; or
>
> (iii) a constitutional corporation; or
>
> (c) the action is carried out by, or the threat is made by, a constitutional corporation; or

[118] Addendum to Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth). 7; Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth), 3.
[119] Australian Human Rights Commission, Submission to Senate Legal and Constitutional Affairs Legislation Committee, *Review of National Emergency Declaration Act 2020* (24 March 2021) 3.
[120] Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000 Report* (Report, 16 August 2000) [1.59].
[121] In accordance with the referral power in the *Constitution* s 51(xxxvii).

(d) the action takes place, or if carried out would take place, in a Commonwealth place; or

(e) the threat is made in a Commonwealth place; or

(f) the action involves, or if carried out would involve, the use of a postal service or other like service; or

(g) the threat is made using a postal or other like service; or

(h) the action involves, or if carried out would involve, the use of an electronic communication; or

(i) the threat is made using an electronic communication; or

(j) the action disrupts, or if carried out would disrupt, trade or commerce:

  (i) between Australia and places outside Australia; or

  (ii) among the States; or

  (iii) within a Territory, between a State and a Territory or between 2 Territories; or

(k) the action disrupts, or if carried out would disrupt:

  (i) banking (other than State banking not extending beyond the limits of the State concerned); or

  (ii) insurance (other than State insurance not extending beyond the limits of the State concerned); or

(l) the action is, or if carried out would be, an action in relation to which the Commonwealth is obliged to create an offence under international law; or

(m) the threat is one in relation to which the Commonwealth is obliged to create an offence under international law.

The above provisions attempt to capture all relevant provisions of the *Constitution* and the enumerated heads of power under s 51, and the existence of constitutional executive power in these areas is straightforward enough. To this, one could add 'the protection of trading and financial corporations, banks and insurance companies as well as the protection of federal legislative, executive, judicial, administrative and military institutions, public authorities and statutory bodies'.[122]

Of particular relevance to IOs is that 'the threat is made using an electronic communication'. Although increasingly, through the use of surveillance capitalism, a majority of IOs may occur

[122] Zines (n 32) 289.

in this space it is theoretical that IO campaigns will also occur outside of the radio-telecommunication spectrum. IOs against federal bodies, elections and officials would be prima facie threats to Commonwealth interests; *Sharkey* is clear on that point, and Commonwealth legislation would make it undebatable.[123]

Of more pressing concern are instances that are not automatically resolved — such as state elections, or the information environment (a term covered in Chapter 2) more generally. It is possible that Commonwealth treaty obligations (such as the obligation under the *International Covenant on Civil and Political Rights*)[124] may provide any necessary link to a Commonwealth head of power and, ergo, a Commonwealth interest. This was the approach taken by the Commonwealth when responding to Dutch deserters in South Australia in 1902. It is not necessary that a Commonwealth interest be named in a statute — it would be illogical and paradoxical that non-statutory interests of the Commonwealth, such as its continued existence, should have to be enumerated.[125] Equally too it is paradoxical that Cabinet, which finds no house in the *Constitution*, would not be a Commonwealth interest. Such an approach was apparently adopted by the Attorney-General's Department, as recently reviewed archival files demonstrate. The Acting First Assistant Secretary of the Criminal Law and Security Division advised in 1985 that it would be 'too narrow a view to confirm the "interests" that may be safeguarded … to interests of a physical or human kind'.[126]

Whilst 'it is conventional wisdom that the *Australian Constitution* does not expressly guarantee a right to vote',[127] the reasoning underpinning the implied freedom of political communication would appear to suggest a non-statutory Commonwealth interest in ensuring the 'marketplace of ideas' remains uncorrupted by foreign influence.[128] The High Court has stated that the

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[123] See *Radiocommunications Act 1992* (Cth); *Telecommunications Act 1997* (Cth); *Criminal Code Act 1995* (Cth) s 92.2 (Foreign Interference). This is supported by Windeyer (n 41) 211.

[124] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Australia signed the covenant in 1972, and ratified it in 1980. See specifically art 25(a) and the right to take part in the conduct of public affairs directly, or through freely chosen representatives.

[125] *R v Kidman* (1915) 20 CLR 425; *R v Sharkey* (1949) 79 CLR 121. This is the basis for the Commonwealth's sedition laws. See further Michael Head, 'Calling Out The Troops — Disturbing Trends and Unanswered Questions' (2005) 28(2) *UNSW Law Journal* 528, 529.

[126] NAA A432, 1985/004424-01, 5.

[127] Crowe and Stephenson (n 38) 205. This article is particularly useful in discussing the nuanced decisions around s 41 of the Constitution, and the resisted implication of a *right* to vote. See *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1.

[128] These concepts denote the philosophical rationale for freedom of expression, using the analogy of the economic concept of a free market, where ideas can be traded and accepted. It presumes that individuals will, if exposed to information, seek out and value 'truth' over 'falsehoods'. John Milton, in arguing against British censorship laws some years earlier, stated in 'Areopagitica' in John Gray and GW Smith (eds), *John Stuart Mill On Liberty: In Focus* (Routledge, 1991) 40, 41: 'And though all the winds of doctrine were let loose to play

implied freedom exists to enable ‘the people to exercise a free and informed choice as electors’,[129] and revolves around the principles of representative democracy, as implied within ss 7, 24, 64 and 128 of the *Constitution.* This is consistent with the abovementioned intent of Federation — self-actualisation of the Australian people.[130] Sir Victor recognised as much in *Victoria v Commonwealth*[131] in 1971, as was cited by the majority in *New South Wales v Commonwealth* in 2006.[132] Windeyer J opined:

> With these developments [since Federation] the position of the Commonwealth, the federal government, has waxed; and that of the States has waned … That the Commonwealth would, as time went on, enter progressively, directly or indirectly, into fields that had formerly been occupied by the States, was from an early date seen as likely to occur.

Elisa Arcioni has addressed the state/federal divide extensively in her work on the constitutional status of ‘the peoples’.[133] In her most recent work, she discusses the reconfirmation of state identity during the COVID-19 lockdowns, and the consequences of *Palmer v Western Australia* on state protectionism. Canvassing a century of jurisprudence and the intent of the House of Representatives and the Senate, Arcioni produces a convincing argument that state citizens are concurrently both a state and Commonwealth interest.[134]

The desire to protect the information environment, specifically with respect to elections, was addressed by the High Court in *Smith v Oldham*.[135] Subsequent to Federation, electoral legislation was introduced[136] prohibiting newspapers and other publishers from publishing

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upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?’

[129] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), quoted in *McCloy v New South Wales* (2015) 257 CLR 178, 193–4 [2], 206 [42] (French CJ, Kiefel, Bell and Keane JJ).

[130] See Stephen Gageler, ‘Beyond the Text: A Vision of the Structure and Function of the Constitution’ (2009) 32 *Australian Bar Review* 138.

[131] (1971) 122 CLR 353, 395–6.

[132] (2006) 229 CLR 1, 54.

[133] Elisa Arcioni, ‘The Core of the Australian Constitutional People — “The People” as “The Electors”’ (2016) 39(1) *UNSW Law Journal* 421; Elisa Arcioni, ‘Excluding Indigenous Australians from “The People”: A Reconsideration of Sections 25 and 127 of the Constitution’ (2012) 40(3) *Federal Law Review* 287; Elisa Arcioni, ‘Section 53 of the Constitution: An Overlooked Reference to the Constitutional People’ (2013) 87(11) *Australian Law Journal* 784.

[134] Elisa Arcioni, ‘The Peoples of the States under the Australian Constitution’ (2022) 45(3) *Melbourne University Law Review* (forthcoming), citing *Palmer v Western Australia* (2021) 246 CLR 182.

[135] (1912) 15 CLR 355.

[136] *Commonwealth Electoral Act 1902* (Cth), later amended by *Commonwealth Electoral Act 1911* (Cth).

anonymously written articles on matters of the election. In an eerily accurate statement over a century ago, Isaacs J scathingly remarked:

> The vote of every elector is a matter of concern to the whole Commonwealth, and all are interested in endeavouring to secure not merely that the vote shall be formally recorded in accordance with the opinion which the voter actually holds, free from intimidation, coercion and bribery, but that the voter shall not be led by misrepresentation or concealment of any material circumstance into forming and consequently registering a political judgment different from that which he would have formed and registered had he known the real circumstances … For an opinion into which a man has been tricked or misled, even innocently, is a double wrong. It means not merely a loss to the side on which he would otherwise have cast the vote, but it also strengthens their opponents.[137]

His Honour continued: 'the public injury, so far as political results are concerned, *is as great when the opinion of the electorate is warped by reckless, or even careless, misstatements, as when they are knowingly untrue; in each case the result is falsified*'.[138] The recent High Court case of *Libertyworks v Commonwealth* confirms this.[139] In *Libertyworks*, 'the compulsive provisions within the new *Foreign Influence Transparency Scheme Act 2018* (Cth) (FITS Act) as a precondition to engaging in political communication with the public, or a section of the public'[140] were challenged as unduly restricting the implied freedom of political communication. This legislation was part of the trifecta of Acts passed that sought to address the threat of foreign interference.[141] Noting the Australian Government's intent that the legislation empowered the 'sunlight of truth'[142] to act as a 'disinfectant to disinformation'[143] a majority of the Court found in favour of the provisions and their constitutionality. Importantly, the majority expressly affirmed and cited the above observations in *Smith v Oldham*.[144]

Although the underlying premise of the Australian Government's response to foreign interference has been questioned (that individuals will rationally seek and prefer true and

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[137] *Smith v Oldham* (1912) 15 CLR 355, 362.
[138] Ibid 362–3 (emphasis added).
[139] (2021) 391 ALR 188.
[140] Ibid 31 [92] (Gageler J).
[141] Being the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform Act 2018* (Cth) and the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth).
[142] Ibid 19 [57] (Kiefel CJ, Keane and Gleeson JJ); 35 [104] (Gageler J); 43 [122] (Gordon J); 79 [206] (Edleman J)
[143] Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13145 (Prime Minister Malcolm Turnbull).
[144] Ibid, 20 [59] (Kiefel CJ, Keane and Gleeson JJ).

correct information),[145] it is important that the High Court has consistently affirmed that open communication of ideas is essential to the constitutional institution of representative and responsible government.[146] Implied freedom of political communication cases arise from this. Obviously, these cases are concerned with restrictions on legislation, rather than authority for executive action. But it follows from the jurisprudence that there is a prima facie Commonwealth interest in the information environment.

How far can this concept go? Can a state elector, casting their vote, be a Commonwealth interest? Although there is no implied freedom of political communication case that directly relates to this, Mason CJ remarked that:

> The concept of freedom to communicate with respect to public affairs and political discussion does not lend itself to subdivision … the implied freedom of communication extends to all matters of public affairs and political discussion, notwithstanding that a particular matter at a given time might appear to have a primary or immediate connexion with the affairs of a State, a local authority or a Territory and little or no connexion with Commonwealth affairs. Furthermore, there is a continuing inter-relationship between the various tiers of government. To take one example, the Parliament provides funding for the State governments, Territory governments and local governing bodies and enterprises. That continuing inter-relationship makes it inevitable that matters of local concern have the potential to become matters of national concern.[147]

The constitutional requirement that the ability of an elector to make an informed choice in an election cannot be restrained (incidental to ss 7 and 24 of the *Constitution*) is necessarily a concern for the Commonwealth and the states by operation of s 106 of the *Constitution* which preserves representative and responsible government. It is arguable that the Commonwealth as a whole is reliant on the existence and functioning of its constituent representative democracies. Further, the *Constitution* requires, as does federalism as a concept, stable states and territories with elected representatives. Once this line of thinking is entered, it is hard to see where federal issues cease. As Jacobs J in *Victoria v Commonwealth* stated:

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[145] See Philip M Napoli, 'What If More Speech Is No Longer the Solution?' (2017) 70(1) *Federal Communications Law Journal* 55. Trevor Thrall and Andrew Armstrong, 'Bear Market? Grizzly Steppe and the American Marketplace of Ideas' in Christopher Whyte, A Trevor Thrall and Brian M Mazanec (eds), *Information Warfare in the Age of Cyber Conflict* (Routledge, 2021) 73, 78 state that the marketplace of ideas as a model is 'undeniably elegant and compelling, an Enlightenment-era cocktail of Bayesian opinion formation, free speech, and capitalism. Unfortunately, its most foundational premise is false.'

[146] Interestingly, the newly appointed Steward J in obiter made comments that His Honour's belief in the implied freedom was arguable. See *Libertyworks v Commonwealth* (2021) 391 ALR 188, [249].

[147] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 142.

> the growth of national identity results in a corresponding growth in the areas of activities which have an Australian rather than a local flavour. Thus, the complexity and values of a modern national society result in a need for co-ordination and integration of ways and means of planning for that complexity and reflecting those values.[148]

An alternate test as to when it is appropriate for the Commonwealth to intervene to protect its interests, specifically with the military, has appeared within academic thinking. The position is best advocated by Peter Johnston:

> An alternative approach in determining when resort to the [Australian] Defence Force is constitutionally justifiable [to operate domestically] is to focus on the *gravity of the risk* and the *nature of the persons* engaged in breaking a Commonwealth law, instead of the *kind* of Commonwealth interest entailed. No one would quibble about calling in specialist military units to counter terrorist assaults, for example …[149]

Johnston's test, in other language, can be summarised as a *nature and scale* test, and would appear to be supported by the High Court's decision in *Pape v Federal Commissioner of Taxation*[150] in which the majority relevantly approved comments in *Davis v Commonwealth.*[151] Their Honours held that the existence of Commonwealth executive power is clearest where there is no competition with the states in respect of the matter the subject of the purported power. Where there is a contest, consideration is given to the comparative capacity of the states and the Commonwealth to engage in the activity in question.[152] This further implies that section 119 does not *prohibit* Commonwealth intervention where there has been no request for assistance from the states. Such a position is reflected within the relevant statutory considerations for calling out the ADF domestically, namely, that the authorising Ministers must take into account the nature of the domestic violence threat and the capabilities of the ADF before the authorising Ministers may be satisfied that the ADF should be called out.[153]

Continuing to use the example of Commonwealth and state elections, a Commonwealth intervention without state request may be justified in response to threats of a certain *nature* and

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[148] (1975) 134 CLR 338, 412–13.

[149] Peter W Johnston, '*Re Tracey*: Some Implications for the Military–Civil Authority Relationship' (1990) 20(1) *University of Western Australia Law Review* 73, 79 (emphasis in original).

[150] *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

[151] Ibid 62 [131], quoting *Davis v Commonwealth* (1988) 166 CLR 79, 93–4 (Mason CJ, Deane and Gaudron JJ), 111 (Brennan J).

[152] *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 60–2 [127]–[131] (French CJ), 90 [239] (Gummow, Crennan and Bell JJ).

[153] See *Defence Act 1903* s 33(6). For an analysis of this decision-making process, see White and Butler (n 111).

of a sufficient *scale*. Arguably, in case of threats to voting infrastructure from digital IOs (such as distributed denial of service attacks, or manipulation of voting data), the Commonwealth may intervene. This intervention would be on the basis that only the Commonwealth has the capabilities to respond to IOs through the use of specialised organs such as the ADF and the Australian Signals Directorate, which might be able to verify original data, restore votes, and determine who caused the original interference.[154]

This applies further to the information environment (being IOs that target individual preferences, rather than how electoral votes are recorded). As Isaacs J noted in *Smith v Oldham*, '[t]he vote of every elector is a matter of concern to the whole Commonwealth'.[155] Nothing in this sentence is limited to federal elections, as Dixon J's judgment in *Sharkey* was. Isaacs J is simply concerned with the ability to vote. The process of reaching that vote clearly is a Commonwealth interest — hence the basis of the Commonwealth legislation central to that case. This mirrors comments made earlier in this chapter about the interconnectedness of state and federal elections as a Commonwealth interest. Indeed, this is an underlying assumption about the need for federal mail to transit. It could further extend to restoring the functions of a collapsed state or territory government, should it suffer a catastrophe.[156] One such catastrophe could be interference with elections within a state.[157] In addition to the external affairs power — which would enliven a Commonwealth interest — it could equally be argued that the *Constitution* requires for the existence of a Commonwealth the existence of state governments.[158]

What is clear, then, is that some IOs can and will meet the threshold of domestic violence for the purposes of constitutional and relevant statutory regimes to call out the ADF. Although the constitutional provision contains no express clause that allows unilateral Commonwealth call outs, Part IIIAAA clearly envisages this to occur when a Commonwealth interest is affected.

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[154] These specialised organs undercut the arguments made by Margaret White (n 6) 448 as to why the ADF should not be utilised for certain public order issues.
[155] *Smith v Oldham* (1912) 15 CLR 355, 362.
[156] Such as Cyclone Tracey, which effectively destroyed Darwin in 1974 (noting it was not self-governing until 1978).
[157] Department of Foreign Affairs and Trade, *Australia's International Cyber Engagement Strategy: 2019 International Law Supplement* (2019) 2.
[158] See Michael Eburn, Cameron Moore and Andrew Gissing, *The Potential Role of the Commonwealth in Responding to Catastrophic Disasters* (Report No. 530.2019, Bushfire and Natural Hazards Cooperative Research Centre, 2019) 9–15; Michael Eburn, 'Responding to Catastrophic Natural Disasters and the Need for Commonwealth Legislation' (2011) 10 *Canberra Law Review* 81, 82, 91; Joe McNamara, 'The Commonwealth Response to Cyclone Tracy: Implications for Future Disasters' (2012) 27 *Australian Journal of Emergency Management* 37; Moore, *Crown and Sword* (n 6) 74–6.

Whilst the state can request Commonwealth intervention (and historically has) it is important to understand the legal thresholds for the other branch of Part IIIAAA: Commonwealth interest call outs.

What constitutes a Commonwealth interest must be determined by the relevant authorising Ministers on a case-by-case basis.[159] What this section has demonstrated, however, is that the increasingly national consequences of state-based issues have resulted in a very wide ambit of what constitutes a Commonwealth interest. This is particularly important with respect to IOs, which may target state elections and state electors but avoid federal issues so as to exploit vulnerabilities in a federal construct. This is one of the key tactics of IOs and wider grey-zone operations. These two thresholds having been canvassed — what domestic violence constitutes, and when a Commonwealth interest is affected — this chapter will now turn to addressing whether or not the statutory regime is flexible enough to apply within cyberspace.

B *Powers Under Part IIIAAA: A Digital Application*

Having identified when the ADF might be called out (once the threshold of domestic violence has been met) to protect a Commonwealth interest, this section will now turn to examine what powers might be given to the ADF if called out, for the purpose of responding to an IO campaign. Through denial operations, the cost of IOs can be increased and they can be deterred.

A call-out order must specify which division, as per Table 5 below, authorises it, dictating the powers that might be utilised by ADF members.[160] More than one division may be in effect at one time.

Table 5: Part IIIAAA Divisions

Number	Division
3	Special powers generally authorised by the Minister
4	Powers exercised in specified areas
5	Powers to protect declared infrastructure

[159] *Davis v Commonwealth* (1988) 166 CLR 79, 111 (Brennan J): 'The variety of [Commonwealth] enterprises or activities which might fall for consideration preclude the a priori development of detailed criteria'.
[160] *Defence Act 1903* (Cth) ss 33(5)(c), 34(5)(c), 35(5)(c), 36(5)(c).

Each division will be covered in detail below, along with its potential digital applications.

1 *Division 3*

Generally speaking, Division 3 powers may only be exercised when authorised by an authorising Minister.[161] The powers under Division 3 are focused primarily on 'preventing, ending, and protecting people from, acts of violence and threats'.[162] Nothing in this division precludes these activities from relating to the online environment. Although they are separate divisions, powers under Division 3 may also be utilised under Division 4. If a power could be used under both, it is taken to be exercised under Division 3.[163] Specifically, and with reference to Table 6, ADF members operating under Division 3 may be authorised to do any of the following things.

Table 6: Powers of ADF Troops under Division 3

Section	Power	Digital equivalent
46(5)(a)	Capture or recapture a location	Control or shutdown a server
46(5)(b)(i)	Prevent, or put an end to, acts of violence	Remove data from a device
46(5)(b)(ii)	Prevent, or put an end to, threats to any person's life, health or safety, or to public health or public safety	Kill-switch the internet in a certain area
46(5)(c)(i)	Protect any person from acts of violence	Remotely remove data or shut down a device
46(5)(c)(ii)	Protect any person from threats to any person's life, health or safety, or to public health or public safety	Remotely remove data or shut down a device
46(5)(d)	Take measures (including the use of force) against an aircraft (whether the aircraft is airborne) or vessel, subject to restrictions	Use offensive cyber operations to physically impact a device (such as making it explode through overheating)

[161] Ibid s 41.
[162] Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth), 59.
[163] *Defence Act 1903* (Cth) s 41.

Division 3 is intended to be used by Australian Special Forces, which include Tactical Assault Group (East) or (West).[164] Accordingly, whilst the rest of Part IIIAAA requires ADF members to wear uniform, this is not so for Division 3 powers, based on the protected identify of Special Operations Command members. The Explanatory Memorandum justifies this:

> because the tasks that the ADF will be required to perform under Division 3 are higher end military actions and may involve the Special Forces. These tasks may require the ADF to operate in a covert manner where uniforms would be detrimental. ADF Special Forces soldiers have protected identity status because they are associated with sensitive capabilities. Protected identity status is required to maintain operational security and the safety of the individual and their family. By virtue of their protected identity status, ADF Special Forces soldiers are able to exercise powers under proposed Division 3 without being required to produce identification or wear uniforms. Tasks under Division 4 are more likely to be related to securing an area with, or in assistance to, the police. When carrying out Division 4 tasks, the ADF is more likely to need to display a visible presence and therefore uniforms will assist the conduct of these tasks.[165]

Accordingly, counter-IO personnel called out under Division 3 would have no need to provide identification (a requirement that may prove difficult in Divisions 4 and 5).

Importantly there are, however, situations where ministerial authorisation is not required in order for ADF members to utilise Division 3 powers. Any ADF member who believes on reasonable grounds that there is insufficient time to obtain the authorisation because of a sudden and extraordinary emergency, may take an action under the powers outlined in Table 6 or the additional powers under Table 7.[166] The term sudden and extraordinary emergency is undefined. An authorising Minister need only authorise one power in Table 6 to validate the remaining powers under subsections (7) and (9).[167] Table 7 lists the additional powers that are granted to ADF members in connection with undertaking the tasks listed in Table 6:

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[164] Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth), 60.
[165] Ibid.
[166] *Defence Act 1903* (Cth) s 46(1)(b).
[167] Ibid s 46(7), (9).

Table 7: Additional Powers Under Division 3

Section	Power	Digital equivalent
46(7)(a)	Free any hostage from a location (including a facility) or thing	N/A
46(7)(b)	Control the movement of persons or means of transport	Track a device
46(7)(c)	Evacuate persons to a place of safety	N/A
46(7)(d)	Search persons, locations, premises, transport or things for items that may be seized	Search a device
46(7)(d)	Search persons, locations, premises, transport or things for people who may be detained	Search a device
46(7)(e)	Seize any item the member believes on reasonable grounds is a thing that may be seized in relation to the call out order	Remotely lock a device
46(7)(f)	Detain any person that the member believes on reasonable grounds may be detained, for the purpose of placing the person in police custody at the earliest practicable time	N/A
46(7)(g)	Provide security (whether armed or not, and whether with police or not) including by patrolling or securing an area or conducting cordon operations	N/A
46(7)(h)	Direct a person to answer a question, or produce a document, that is readily accessible to the person (including requiring identification)	Do so remotely, through targeted text messages / phone calls
46(7)(i)	Direct a person to operate machinery or a facility	N/A
46(9)	Actions incidental to such powers, including entering any place or premises and boarding an aircraft or vessel	N/A

Again, whilst many powers under Table 7 are clearly land-orientated, this does not preclude them being applied in the online environment. Particularly relevant are the powers under ss 46(7)(d), (e), (g) and (h). The ability to search things for 'items that may be seized' gains more clarity because the latter is a defined term:

> ***thing that may be seized***, in relation to a call out order, means a thing that:

(a) is likely to pose a threat to any person's life, health or safety, or to public health or public safety; or
(b) is likely to cause serious damage to property; or
(c) is connected with the domestic violence or threat specified in the call out order, and that it is necessary, as a matter of urgency, to seize.

There is no statutory limitation however on the corps or service categorisation of the ADF members that may be used — Division 3 could just as readily be utilised by the Royal Australian Corps of Signals in a counter-IO capacity. This might have merit, if these specific corps are used to prevent threats to public safety and to protect individuals from threats to public safety.[168] Although circular, if a political determination is made that an IO campaign constitutes domestic violence, then all steps taken to counter that threat of domestic violence would seem consistent with this legal authority. This could arguably extend to shutting down computer networks, or virtually seizing (through ransomware) computer systems (a thing that may be seized) if they are being used in connection with the domestic violence. Equally, subsection (g) is not linked in any manner to land, but could be applied in the digital environment. One reading of the section would allow the ADF to provide security, with intent to use force (thereby being armed) without the police, patrolling and securing digital networks. It could also extent to collecting identifying data on individuals who are conducting IO campaigns, and potentially destroying their equipment.

Finally, subsection (h) could be used in a combination of land and digital domains, to ask questions of individuals and demand that they produce a document. 'Document' is not a defined term, but could be read to include computer documentation history (so-called 'logs'). This would be consistent with the broad definition of the term in the *Acts Interpretation Act 1901* (Cth).[169]

Importantly, ADF members may also do anything incidental to anything under subsection (5) or (7).[170] This specific provision has gone relatively undiscussed within the literature and it is unclear what the scope of the provision would entail. The 2018 Explanatory Memorandum notes that the purpose of the provision is to protect the ADF against unintended limitations to their powers.[171] One reading of the provision could argue that it may be incidental (to providing

[168] Ibid s 46(5)(b)(ii)
[169] Ibid per s 2B.
[170] Ibid s 46(5), (7).
[171] Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth), [324], [421].

security) for ADF members to breach sections of the *Radiocommunications Act 1992* (Cth), the *Telecommunications Act 1997* (Cth) or even the *Privacy Act 1988* (Cth).

There is risk in approaching Commonwealth immunity in this manner. In *Coco v The Queen* the High Court considered an argument that s 12 of the *Australian Federal Police Act 1979* (the AFP Act) meant that AFP officers did not require a listening device authority under Queensland law. Section 12 of the AFP Act is similar to s 123(1) of the *Defence Act*, relevantly providing that a member of the AFP is not required 'under, or by reason of, a law of a State or Territory … to obtain or have a licence or permission for doing any act or thing in the … performance of his duties'.

The High Court in *Coco v The Queen* dismissed an argument that s 12 of the AFP Act meant that AFP members could use a listening device, where the relevant state law provided that approval to do so could be given to members of the Queensland Police by a Supreme Court judge. Mason CJ, and Brennan, Gaudron and McHugh JJ said:

> In our view, s 12 is not capable of being given the broad operation for which the respondent contends. It may be that s 12 overcomes the need under State or Territory law to have a simple licence or permission, eg a driver's licence or a licence to carry firearms. But to say that falls far short of saying that s 12 also applies so as to dispense with the necessity for approval under s 43(2)(c) of the use of a listening device under a statutory regime which gives very careful attention to the need to ensure that the decision-maker balances the interests of privacy with the public interest in investigating criminal offences and in preventing and detecting such offences … the meaning contended for by the respondent is so wide as to be, in our view, unreasonable.[172]

Reading the incidental powers provision of Part IIIAAA through a lens of the principle of legality would argue that such powers need to be expressly granted and not be by inference.[173] It is safest to read the incidental powers provision of Part IIIAAA as extending to allowing the ADF to hack a computer system, in order to facilitate a cordon and search; or to shut down communication networks concurrent to ADF forces on land moving through an identified search area. Such an operation has been publicly acknowledged to be within the remit of the ASD.[174]

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[172] (1994) 179 CLR 427, 444.
[173] *Coco v The Queen* (1994) 179 CLR 427, 437.
[174] See United States Cyber Command, *After Action Assessments of Operation Glowing Symphony* (22 November 2016).

At any rate, Division 3 evidently envisages situations which require extreme, deliberate and potentially lethal force to be used; *a fortiori*, Division 3 would empower the ADF to take actions that are less than lethal, including blocking or destroying servers that facilitate IOs. It allows a wide discretion to ADF members on the ground, in the air or on the water, to prevent or put an end to violence. What is unclear is whether it provides a wide discretion for ADF members in the online environment. There is very little to suggest, in the Division, that it could not be applied to the online environment — indeed, it seems to confer powers that would be relevant and useful in the context of responding to IOs. However this is an area for potential law reform, as discussed in Chapter 5.

2 *Division 4*

Under Division 4, the authorising Ministers may declare a 'specified area'.[175] The intent of such a declaration by the authorising Ministers is to empower an ADF member to search premises in the specified area, and also to search means of transport and persons in the specified area.[176] The search powers in the specified area are accordingly divided into two subdivisions: one relating to premises (subdivision C),[177] and the other to means of transport and people (subdivision D).[178] The authorisation process for these subdivision search powers differs subtly.

A declaration of a specified area can relate to a part of the mainland Australian territory, or the Australian offshore area.[179] Importantly, a specified area declaration can occur with respect to a contingent call out, whether or not the circumstances specified have arisen.[180] Reasonably, as the Explanatory Memorandum makes clear, a specified area is three-dimensional and includes both the airspace and underground — such as subway areas — within the boundaries.[181] The intention of the provisions is to remove the distinction between the previous General Security Areas and Designated Areas, and 'allow for the full suite of powers to be exercised within a single specific area'.[182] The applicability of a specified area declaration to the online

[175] *Defence Act 1903* (Cth) s 51.
[176] Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth), 16.
[177] *Defence Act 1903* (Cth) s 51A.
[178] Ibid s 51B.
[179] Ibid s 51. This is a defined term: see s 31.
[180] Ibid s 51(2).
[181] Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth), 61.
[182] Ibid 59.

environment, from plain reading, seems improbable. Section 51(1) requires the area to be 'part of a State or Territory' and the Explanatory Memorandum makes clear that it is intended to be centred on the land, air and maritime domains.[183] It is unlikely that the information or cyber domains would fall within the remit of a state or territory.

3 *Division 5*

Division 5 expands on the powers of the ADF when protecting 'declared infrastructure' and is focused primarily on 'preventing and ending damage or disruption to the operation of declared infrastructure, and on preventing, ending and protecting people from acts of violence and threats'.[184] Under Part IIIAAA the authorising Ministers may, in writing, declare particular infrastructure, or part thereof, as 'declared infrastructure'.[185] The criteria by which the authorising Ministers may declare infrastructure requires belief, on reasonable grounds, that:

(a) Either:
  (i) There is a threat of damage or disruption to the operation of the infrastructure or the part of the infrastructure; or
  (ii) If a contingent call out order is in force — if the circumstances specified in the order were to arise, there would be a threat of damage or disruption to the operation of the infrastructure or part of the infrastructure; and

(b) The damage or disruption would directly or indirectly endanger the life of, or cause serious injury to, any person.[186]

The Explanatory Memorandum makes clear that it is *not* intended to cover or 'protect nationally significant buildings such as the Opera House in the absence of any concomitant risk to life. The type of infrastructure intended to be declared includes, for example, power stations, water treatment plants, nuclear power stations and hospitals'.[187] Yet critical infrastructure also includes:

> physical facilities, supply chains, *information technologies, and communication networks which if destroyed, degraded or rendered unavailable* for an extended period,

[183] Ibid 32.
[184] Ibid 72.
[185] *Defence Act 1903* (Cth) s 51H.
[186] Ibid s 51H(2).
[187] Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth), 71.

> would significantly impact on the social or economic wellbeing of Australia, or affect Australia's ability to conduct national defence and ensure national security.[188]

The italicised words above correspond to an understanding that the information environment, or physical facilities that support it, could be declared for protection against domestic violence. When empowered under Division 5, importantly, ADF members have a range of powers including the ability to use lethal force to protect declared infrastructure.[189] ADF members may also do anything incidental to these wider Division 5 powers, a notion canvassed above.[190]

Declared infrastructure may be either within Australia or the Australian offshore area; and whether a call out is in force or not.[191] Pertinently, it may relate to infrastructure in a state or territory whether or not the relevant state or territory government has requested it.[192] It may only operate whilst the call-out order is occurring.[193] Yet, it is clear that it can occur in the online environment.

C *Conclusion*

Noting Part IIIAAA was introduced in 2000 in preparation for the Sydney Olympics, and has developed and been amended against the backdrop of air threats and terrorist attacks, it is surprising how adaptable the legislation is to the cyber domain and counter-IOs. Divisions 3–5 provide a suite of statutory powers that the ADF could rely upon to respond to instances of domestic violence, either at a state's request or to protect a Commonwealth interest. For counter-IO operations, as part of a wider active denial campaign to deter IOs, it is highly unlikely that these operations would extend to lethal force. More likely other powers will be relied upon: cordon and searches, seizing documents, and incidental powers thereto.

The viability of retaining such a specific, niche piece of legislation will be covered in more depth in Chapter 5. It is probable that if Part IIIAAA was to be used in countering IOs, or wider cybersecurity incidents, there would be significant gaps where non-statutory executive power may have to be relied upon (the subject of the following Chapter 4). Reforms in the forthcoming, statutorily mandated review of Part IIIAAA could recommend that specified area

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[188] Department of Home Affairs*, Critical Infrastructure Resilience Strategy 2015* (Report, 2015) (emphasis added).
[189] *Defence Act 1903* (Cth) s 51L.
[190] Ibid s 51L(5).
[191] Ibid s 51H.
[192] Ibid s 51H(6)(7).
[193] Ibid s 51H(5)(ii).

declarations can occur within the radio- or telecommunication spectrum. If Parliament determines that its intent is for the ADF to operate in this domain, then it would also be relevant to discuss the viability and methods by which ADF members are to 'wear uniforms' in Division 4 call outs (as opposed to Division 3). It might be that certain digital markers are required to be left on devices that have been interfered with during the course of responding to instances of domestic violence.

IV CONCLUSION

This chapter has addressed the relatively high bar of domestic violence, a term found within the *Australian Constitution* but without any definition. Section II utilised a counterfactual methodology to arrive at the dynamic meaning of the term — finding it relates to the 'tearing of the social fabric' and can clearly extend to the cyber domain. The section addressed instances of requests by states to counter domestic violence, as well as newly accessed Commonwealth documents from the National Archives of Australia which determined domestic violence to have occurred. Section II posited that the term is sui generis and one for political determination.

The chapter then, in Section III, canvassed Part IIIAAA as the sole statutory regime for domestic operations. It first addressed the meaning of Commonwealth interest, applicable not only for statutory executive power but also as a marker of the breadth (the Winterton model for analysing constitutional executive power outlined in Chapter 1) of non-statutory executive power, addressed in the next chapter. It is important to reiterate that this chapter argued it is not necessary for a statute to be affected for a Commonwealth interest to be enlivened.[194] At a very minimum, the preservation of the *Constitution* and the Australian polity would appear to be a prima facie Commonwealth interest.[195] Section III then applied the divisions of Part IIIAAA to the threat of IOs, addressing what forms of active denial operations could be taken. It noted that the current formulation of Division 4, which requires a specified area declaration, would not appear to apply to the information or cyber domain. This may be an area that requires further clarification in any future review of the statute. However, it is clear that Divisions 3 and 5 would be applicable in the online environment.

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[194] See Justice Hope's discussion of visiting US submarine, discussed in Moore, *Crown and Sword* (n 6) 195.

[195] Further, a broad interpretation of the phrase could include the common law maxim *salus populi surprema lex*. — the welfare of the people is the paramount law. This position is supported, admittedly from a distance, by the position of Attorney-General Garran when reflecting on s 63(f) of the *Defence Act*: Opinion No 217 in Attorney-General's Department, *Opinions of the Attorneys-General of the Commonwealth of Australia, with opinions of Solicitors-General and the Attorney-General's Department, Vol 1: 1901–1914* (AGPS, 1981).

This chapter has demonstrated that the ADF could conduct a suite of operations, to deny IOs, under Part IIIAAA. This includes proactive digital 'patrols' unaccompanied by civilian constabulary forces for security purposes, requiring documents and identification to be given by civilians (useful in intelligence collection for anonymous accounts), searching locations for items and objects (which can include digital locations), and directing individuals to operate a facility — which might include a computer system, radiocommunication system, or telecommunication system. It would moreover extend to protecting declared infrastructure — which might, circularly, include infrastructure supporting telecommunications.

Operations under Divisions 3 and 5 are clearly possible in the information domain, but this chapter identified a gap in Division 4. Chapter 5 of this thesis addresses some critical law reform options that might assist in providing legal flexibility in this area. One such solution to the gap that does not require law reform, however, would be for the Commonwealth to utilise non-statutory executive power. The breadth and depth of this power, found in section 61 of the *Constitution*, and its application below the threshold of domestic violence, is examined in the next chapter.

CHAPTER 4: ACTIVE DENIAL — KEEPING THE PEACE OF THE REALM

I PURPOSE AND SCOPE

As outlined in Chapter 3, the constitutional threshold of domestic violence (required for Part IIIAAA of the *Defence Act 1903* (Cth) to be applicable) is quite high. How, then, can we respond to denial operations falling below this threshold?[1] As there are no statutory regimes that empower or regulate the ADF specifically in this context, non-statutory executive power must be looked to as the lawful authority.

As foreshadowed, there are three forms of non-statutory power within Australia: common law capacities, the royal prerogative, and the implied nationhood power. Chapter 1 noted that the nationhood power is best characterised as extending the breadth of Commonwealth executive power, but not providing any depth.[2] Whilst this is by no means the only interpretation of nationhood's breadth/depth, it points to the need for an in-depth discussion of the royal prerogative. This chapter is concerned with the royal prerogative of keeping the peace of the realm for two reasons. First, the depth of nationhood power is controversial and its application is questioned;[3] there is merit then in remaining within the remit of an accepted aspect of constitutional executive power. Second, the specific prerogative of keeping the peace of the realm has never been the subject of extensive analysis in Australia, although it is recognised in the United Kingdom.[4] As will be seen, it differs from the indisputable prerogative of the Crown to defend itself,[5] or to meet the threat of an emergency.[6] The following discussion is thus both radical in its thinking, and in its practical application, while also (as inevitable with the

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[1] Part of the research in this chapter was published in Samuel White, 'Keeping the Peace of the iRealm' (2021) 42(1) *Adelaide Law Review* 101; Samuel White, *Keeping the Peace of the Realm* (LexisNexis, 2021); Samuel White, 'Colouring in the Grey Zone' (2022) 21(2) *Military and Strategic Studies* 77.

[2] As noted in Chapter 1, fn 135. Peter Gerangelos, 'Section 61 of the *Commonwealth Constitution* and an "Historical Constitutional Approach": An Excursus on Justice Gageler's Reasoning in the *M68* Case' (2018) 43(2) *University of Western Australia Law Review* 103; Catherine Dale Greentree, 'The Commonwealth Executive Power: Historical Constitutional Origins and the Future of the Prerogative' (2020) 43(3) *University of New South Wales Law Journal* 893; Peta Stephenson, 'Nationhood and Section 61 of the Constitution' (2018) 43(2) *University of Western Australia Law Review* 149.

[3] Samuel White and Cameron Moore, 'Calling Out the Australian Defence Force into the Grey Zone' (2022) 43(1) *Adelaide Law Review* 479 – 505; see generally Peta Stephenson, *Nationhood, Executive Power and the Australian Constitution* (Bloomsbury, 2022).

[4] *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 QB 26. The prerogative is capitalised in a similar manner to the Royal Prerogative of Mercy: see *Attorney-General (Cth) v Ogawa* (2020) 384 ALR 474.

[5] *Case of the King's Prerogative in Saltpetre* (1607) 12 Co Rep 12; 77 ER 1294; *R v Hampden* (1637) 3 Howell's State Trials 826.

[6] *Hole v Barlow* (1858) 4 CB (NS) 344; 140 ER 1113.

prerogative) reflecting ancient rights of the Crown that have been part of our legal tradition for centuries.

Section II discusses the prerogative power to keep the peace of the realm, and the seminal judgment of the English Court of Appeal in *R v Home Secretary; Ex Parte Northumbria Police Authority* (*Northubria*) that confirmed its continuing existence.[7] It first addresses the facts and findings of the case, before addressing and answering the critiques of the case, and demonstrating its acceptance within the United Kingdom and Canada. It specifically highlights how the relevant prerogative has been relied upon in a suite of domestic deployments including nearly three decades of operations in Northern Ireland. Section II then addresses how the prerogative has been received in Australia and the dangers of accepting commentary suggesting that it is 'normatively undesirable'.

Section III responds to the main criticism of the case — that there is no historical authority for the recognition of this prerogative. This section, utilising the explanation of the characterisation of the royal prerogative in Chapter 1, demonstrates that from ancient Rome to Northern Ireland there has existed a clear prerogative power to utilise military members to keep the peace of the realm. Addressing British call outs under the royal prerogative provides useful analogies to assess the breadth and depth of the legal authority. It also allows an assessment to be made as to whether an emergency needs to be occurring for its use — a position adopted by some authors on the royal prerogative (as outlined in Chapter 1). British operations occur, however, in a unitary system. In Australia, it is also necessary to consider the royal prerogative through the lens of federalism. To that extent, the application and operation of the prerogative in Canada is of particular importance.

Sections IV and V accordingly address the application of this royal prerogative to Australia. Section IV addresses the breadth of this prerogative power. This necessarily involves a discussion of whether there is any threshold required in order for a valid exercise of the power, with reference to the British experience, and whether or not Part IIIAAA has abridged any non-statutory power (as foreshadowed).

Section V then turns to address the question of depth. It addresses the critical doctrine of desuetude (that a prerogative power becomes inaccessible after disuse) and, in doing so, provides historical examples of ADF intervention, below the threshold of domestic violence,

[7] [1989] 1 QB 26.

and identifies the force that was authorised in each case. It moreover grapples with a particular criticism of the *Northumbria* outlined in Section II — that the judgment is inconsistent with the case of *Entick v Carrington* (the facts of which were outlined in Chapter 1). *Entick* was concerned with viability of the royal prerogative authorising trespass without a warrant, and was expressly approved by the Australian case of *A v Hayden.*[8] Section V reconciles these cases with *Northumbria* and finds that the royal prerogative only extends to authorising the use of force in public areas. The modern applicability of this finding, and a discussion of the manner in which the royal prerogative can evolve, concludes the chapter through addressing its application to counter-IO operations.

II *Northumbria Police Authority*

As outlined in Chapter 1, the royal prerogatives relating to emergencies, although described as 'remarkably abstruse',[9] are for the most part accepted as necessary.[10] Chitty said that the Crown 'may do various acts growing out of sudden emergencies',[11] which appears relevant to internal security as well. The emphasis on, and acceptance of, a state of emergency was critical for scholars such as John Allen in his *Rise and Growth of the Royal Prerogative in England*,[12] and Arthur Berriedale Keith in his *The King and the Imperial Crown*.[13] Maitland, although not explicitly tying the exercise of the prerogative to an emergency, thought that the use of the military should be a last resort.[14] Reflecting on their line of academic thinking, modern scholar Peter Rowe sees that the use of military force domestically can be justified on the basis of a prerogative power emerging from the common law doctrine of necessity.[15] Moore accepts this to be the safest legal authority.[16]

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[8] (1984) 156 CLR 532.

[9] Stanley De Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books, 7th ed, 1994) 566.

[10] Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 *Public Law Review* 279, 287; Gerard Carney, 'A Comment on How the Implied Freedom of Political Communication Restricts the Non-Statutory Executive Power' (2018) 43(2) *University of Western Australia Law Review* 255, 266; David Feldman, 'The King's Peace, the Royal Prerogative and Public Order: The Roots and Early Development of Binding Over Powers' (1988) 47(1) *Cambridge Law Journal* 101.

[11] Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (Joseph Butterworth and Son, 1820) 50.

[12] John Allen, *Rise and Growth of the Royal Prerogative in England* (Longman, Brown, Green, and Longmans, 1849) 87.

[13] Arthur Berriedale Keith, *The King and the Imperial Crown* (Longmans & Green, 1936) 382-3.

[14] FW Maitland, *The Constitutional History of England* (Cambridge University Press, 1908) 422.

[15] Peter J Rowe, *Defence: The Legal Implications* (Brassey's, 1987) 44–7.

[16] Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (ANU Press, 2017) 186-188.

Not all British jurists agreed on an assumed requirement of a state of emergency. Halsbury opined that the standard authorities on the war prerogative perhaps extended to a general prerogative to suppress disorder.[17] Anson's *Law and Custom of the Constitution* held that the *Emergency Powers Act 1920* (UK) could not 'reasonably be interpreted to supersede the common law'.[18] On this common law power (as the prerogative was sometime referred to), Clode argued that:

> The primary object for which the military forces of the Crown are retained in arms is the defence of the realm … the secondary object for which the military forces being in arms may be used, is to aid the civil power in the preservation of public peace.[19]

The latter school of thought seems to have been vindicated, although the earlier has shaped Australian thinking. Specifically, the Court of Appeal in *Northumbria* recognised a prerogative right and duty of the Crown to keep the peace of the realm, below the threshold of emergency. In fact, no legal threshold whatsoever was found in the ratio of the case. Later political determinations, as covered below, have highlighted certain terror levels which will trigger British operations. What is important for this section are the facts of the case and its application within the Commonwealth. *Northumbria* has been the basis for British[20] and Canadian[21] domestic operations. It reflects a wider power to maintain internal security found in other Commonwealth nations – such as in Fiji, where the Court of Appeal of Fiji overturned the High Court of Fiji's decision that the *coup d'état* in Fiji was valid under the reserve powers of the President, on the basis that the Fiji Constitution dealt expressly with reserve powers, which had displaced any relevant prerogative.[22] It merits in-depth discussion of both the facts of the case, its critiques and its application in other jurisdictions, before turning to possible Australian applications as a legal basis for denial operations.

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[17] *Halsbury's Laws of England* (LexisNexis Butterworths, 1992) vol 6, 498–500.
[18] William Anson, *The Law and Custom of the Constitution* (Clarendon Press, 1892) 48.
[19] Charles Clode, *Military Forces of the Crown* (John Murray, 1869) vol 1, 1.
[20] See *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 114–15 ('*Burmah*'), where Viscount Radcliffe said that the prerogative of protecting public safety was not necessarily confined to the imminence or outbreak of war. See further *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 QB 26, 55 (Purchas LJ).
[21] *Canada (Minister of Citizenship and Immigration) v Kisluk* [1999] CanLII 8351 (FC). See further Phillippe Lagasse, 'Defence Intelligence and the Crown Prerogative' (2021) 64(4) *Canadian Public Administration* 539, 550.
[22] See *Qarase v Bainimarama* [2009] FJCA 9, [94] (Powell, Lloyd and Douglas JJA).

A *The Facts and the Conclusions of the Court*

One consequence of the inner-city riots of the early 1980s in the United Kingdom was the establishment, by the Home Office, of a central store of plastic batons and tear gas rounds, to be made available to chief officers of police in situations of serious public disorder. In Home Officer Circular 40/1986, the Home Secretary announced that the store would be made available to those in need without the approval of the local police authority. This announcement displeased the Northumbria Police Authority, which applied for a declaration to the effect that that specific part of the circular was ultra vires.[23]

The case was first heard before a Divisional Court. Mann J (with whom Watkins LJ concurred) wrote the primary judgment, rejecting the application on the basis that the royal prerogative included a power to do whatever 'was necessary to meet either an actual or an apprehended threat to the peace'.[24] The Divisional Court moreover held that relevant statutory provisions (the *Police Act 1964*) did not 'confer a monopoly power so as to limit the prerogative by implication'.[25]

On appeal, the Court of Appeal of England and Wales upheld the primary decision, agreeing that the circular could be justified under the royal prerogative.[26] This was with reference to a dictum of Lord Campbell CJ a century earlier, in *Harrison v Bush*, that 'in practice, to the Secretary of State for the Home Department … belongs peculiarly the maintenance of the peace within the Kingdom, with the superintendence of the administration of justice as far as the Royal prerogative is involved in it'.[27]

The Court of Appeal placed significant weight on the Crown's duty to keep those under its allegiance safe from physical attack within its dominions.[28] This duty was said to require a prerogative power and, importantly, was applicable at all times and not simply linked to emergencies. Croom-Johnson LJ in the Court of Appeal referred to 'times when there is reason to apprehend outbreaks of riot and serious civil disturbance',[29] although it is not clear that his Lordship was intending to limit it to that situation as opposed to saying it clearly extended that

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[23] *R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority* [1987] 2 WLRD 998.
[24] Ibid 999.
[25] Ibid.
[26] *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 QB 26.
[27] (1855) 5 E & B 344, 353.
[28] *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 QB 26, 32.
[29] Ibid 34.

far. Purchas LJ expressed it as a power 'to do all that is reasonably necessary to preserve the peace of the realm'.[30]

The ratio of *Northumbria* would therefore suggest the trigger for the exercise of the prerogative is 'an actual or an apprehended threat to the peace'.[31] This is a much lower bar than that of 'domestic violence'. *Northumbria* has not been overturned by any subsequent case law, and an application to appeal to the House of Lords was refused. The refusal provides some strength to the argument that the case was perceived as good law.[32]

Arguing through the omission of evidence, Nourse LJ opined that 'a prerogative of keeping the peace within the realm existed in mediaeval times, probably since the Conquest (of William I)'[33] and that 'there is no historical or other basis for denying to the war prerogative a sister prerogative of keeping the peace within the realm'.[34] The war prerogative — which provides authority for the killing of combatants and destruction of property — is perhaps the most expansive and destructive of prerogative powers. Nourse LJ's statements would therefore be supportive of a particularly wide breadth and depth of power in domestic operations. Nourse LJ explicitly noted that the British armed forces could exercise the prerogative;[35] by analogy, so too could the ADF. This is because the royal prerogative is enjoyed by the Crown in right of the Commonwealth, rather than the Crown in right of the states.

Although Renfree argues that the division of the Crown in a federal sense is an artificial construct,[36] it is not. The States clearly enjoy certain prerogatives exclusively.[37] So too do they enjoy prerogative rights in a separate, but not submissive, nature with the Crown in right of the Commonwealth.[38] It is likely that this latter category is one that the prerogative of keeping the peace of the realm falls into. Although case law holds that public order falls within the remit of state responsibility, so too is it clear that enforcing Commonwealth laws falls within the remit of the Commonwealth. For this reason, the duty to defend Australia is not exclusive to

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[30] Ibid 41.
[31] Ibid 52.
[32] Noel Cox, *The Royal Prerogative and Constitutional Law: A Search for the Quintessence of Executive Power* (Routledge, 2020) 206.
[33] *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 QB 26, 59.
[34] Ibid 58.
[35] Ibid 51.
[36] Harold Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984) 466–7.
[37] *Commonwealth v New South Wales (Royal Metals Case)* (1923) 33 CLR 1; *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, [30]–[33] (French CJ); [87]–[88] (joint judgment) ('*Cadia*').
[38] *Farey v Burvett* (1916) 21 CLR 433; Anne Twomey, 'The Prerogative and the Courts in Australia' (2021) 3 *Journal of Commonwealth Law* 55.

the Commonwealth although it holds constitutional legislative authority.[39] However, when utilising the ADF as the relevant lever of national power to keep the peace, the constitutional position in Australia clearly differs from that of the United Kingdom for reasons outlined in Chapter 3, Table 2. Twomey adopted this position in her discussions of the possible application of the prerogative in Australia.[40]

B *Criticisms of the Case*

Some commentators have criticised *Northumbria* from a variety of perspectives. One issue is the lack of historical justification for the finding that the prerogative exists. Robert Ward argued that the sources used to justify the Court's decision in *Northumbria* should result in 'full marks to it for creative thinking' but that the result was erroneous.[41] By this, Ward seems to suggest there was a lack of precedent or judicial authority that had recognised the internal security prerogative. Yet the common law does not create prerogative power; it merely recognises it.[42] Accordingly, just because a Court has not been asked to decide on the existence of a prerogative does not mean that prerogative power does not exist. Indeed, proof of the royal prerogative can be given by showing its historic exercise irrespective of its recognition by the common law.[43]

Under the common law, the Crown traditionally enjoyed an immunity from liability in tort and contract, as well as in the exercise of the royal prerogative. James I summarised the position well when His Majesty noted 'the Absolute prerogative' is not a subject which is appropriate 'for the tongue of a Lawyer'.[44] English courts have often commented on the paucity of modern cases concerning the scope of the Crown's prerogative powers with respect to defence activities. In *Attorney-General v De Keyser's Royal Hotel Ltd*,[45] a search was undertaken for historical records dating back to the 18th century. This was consistent with appropriate methodologies by the Court in assessing whether the prerogative existed. So too in *Burmah Oil Co v Lord Advocate*[46] Lord Reid noted that, prior to 1915, there had been no cases concerning

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[39] *Carter v Egg and Egg Pulp Marketing Board for the State of Victoria* (1942) 66 CLR 557, 572 (Latham CJ) which overtook the original position in *Joseph v Colonial Treasurer of New South Wales* (1918) 25 CLR 32.
[40] Twomey (n 38).
[41] Robert Ward, 'Baton Rounds and Circulars' (1988) *Cambridge Law Journal* 155, 157.
[42] *New South Wales v Commonwealth* (1975) 135 CLR 337, 487 (Jacobs J).
[43] *Burmah* (n 20).
[44] Quoted in Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 379.
[45] [1920] AC 508 ('*De Keyser*').
[46] *Burmah* (n 20).

the Crown's power to acquire property for defence purposes 'for some centuries' and emphasised that:

> It is extremely difficult to be precise because in former times there was seldom a clear-cut view of the constitutional position. I think we should beware at looking at older authorities through modern spectacles. We ought not to ignore the many changes in constitutional law and theory which culminated in the Revolution Settlement of 1688–89, and there is practically no authority between that date and 1915.[47]

The paucity of cases must be viewed against the backdrop of ancient maxims that 'the sovereign cannot be sued in its own courts', and that 'the sovereign can do no wrong'.[48] Historically, any such claims could only be brought against servants or agents of the Crown, and not against the Crown directly.[49] Particular to this were decisions relating to the 'defence of the realm' and 'national security' as they were generally treated as non-justiciable.[50]

The English courts' willingness to review exercises of prerogative powers shifted in 1985, as a result of the decision in *Council of Civil Service Unions v Minister for Civil Service* (*GCHQ*).[51] The House of Lords concluded that the question whether a particular exercise of prerogative power is justiciable would depend on the nature and subject matter of the particular prerogative power being exercised. English courts have subsequently emphasised that caution must be taken when relying on cases concerning the Crown's prerogative powers which were determined prior to the *GCHQ* decision in 1985.[52] Relevantly, *Northumbria* was determined in 1989. There seems no reason to find fault with their Lordship's legal reasoning, although it is expanded upon and confirmed below.

Other British academics have accused the decision of being 'more policy than principle'.[53] Further still, the decision has been criticised for failing to mark the limits of the specific

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[47] Ibid 99.
[48] See *Commonwealth v Mewett* (1997) 191 CLR 471, 497 (Dawson J), 547–8 (Gummow and Kirby JJ); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, [125] (Gageler J); *Rahmatullah [No 2] v Ministry of Defence* [2017] UKSC 1, [16] (Lady Hale, with whom Lord Wilson and Lord Hughes agreed).
[49] *Re a Petition of Right* [1915] 3 KB 649; *Rahmatullah [No 2] v Ministry of Defence* [2017] UKSC 1, [16] (Lady Hale, with whom Lord Wilson and Lord Hughes agreed).
[50] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 418 (Lord Roskill); *Re Minister of Arts, Heritage and the Environment v Peko Wallsend* (1987) 15 FCR 274, 277 (Bowen CJ).
[51] [1985] AC 374.
[52] See *Rahmatullah [No 2] v Ministry of Defence* [2017] UKSC 1, [101] (Lord Neuberger, with whom Lord Hughes agreed); *Al-Jedda v Secretary of State for Defence* [2011] 2 WLR 225, [206]–[208] (Elias LJ).
[53] Conor Gearty, 'The Courts and Recent Exercises of the Prerogative' (1987) *Cambridge Law Journal* 372, 374. See also Christopher Vincenzi, *Crown Powers, Subjects and Citizens* (Bloomsbury, 1998).

prerogative, and the decision has therefore been called normatively undesirable.[54] Yet for the most part these criticisms are *lex ferenda*, rather than *lex lata*. It is clear that both the Divisional Court and Court of Appeal believed that the Crown held a prerogative power to keep the peace of the Realm, importantly, where no emergency exists.

Another critique comes from HJ Beynon, who posits that an implicit assumption of the judgment was article 6 of the *Bill of Rights* (a prohibition on maintaining a standing army in peacetime); accordingly, it cannot be argued there exists a prerogative to keep the peace.[55] This is erroneous. The abolition of the prerogative right to maintain a standing army does not abridge a prerogative duty to keep the peace — a point that Beynon later, if not begrudgingly, admits.[56] With legislative authority for the maintenance of the military in peacetime, the use of force by military personnel under the prerogative of keeping the peace would be valid.

These criticisms, and more general criticisms of the royal prerogative as 'medieval chains'[57] or a 'relic of a past age'[58] out of step with a country dedicated to the rule of law, are not new. They reflect a strong desire in modern democracy that powers be clearly enumerated and transparent. However, there is some element of Orwellian doublethink required in this desire, for much of the day-to-day work of government is conducted using some form of prerogative power — as covered in Chapter 1.

A specific argument then with respect to domestic operations is that any coercive powers should be clearly defined and regulated by statute.[59] Whilst it may appear logical with respect to legislation, such actions are at risk of significantly altering the constitutional separation of powers. Ministerial responsibility allows for oversight in the exercise of executive power, and the exercise of the power is subject to judicial review. It does not occur in a so-called black hole of accountability.[60] The doctrine of separation of powers requires that the executive is free

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[54] Robert Ward (n 41) 156. See further Sebastian Payne, 'The Royal Prerogative' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown* (Oxford University Press, 1999) 77.
[55] HJ Beynon, 'Prerogative to Supply Plastic Baton Rounds and CS to the Police' [1987] *Public Law Review* 146, 150.
[56] Ibid 151.
[57] Margit Cohn, 'Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive' (2005) 25(1) *Oxford Journal of Legal Studies* 97.
[58] *Burmah* (n 20) 101 (Lord Reid).
[59] Michael Head, 'Calling Out The Troops — Disturbing Trends and Unanswered Questions' (2005) 28(2) *UNSW Law Journal* 528.
[60] Cohn (n 57).

to respond to issues - as Cox notes, 'the very independence of the royal prerogative from parliamentary control should be seen as part of its inherent strength, not weakness'.[61]

C *Acceptance of* Northumbria *in the United Kingdom*

In 2009, the United Kingdom conducted a full review of whether the royal prerogative should be codified. Relevantly, the review explicitly focused on the prerogative outside of emergencies to keep the peace of the realm. There, the Ministry of Justice concluded that 'the *Northumbria* case goes to the heart of the issue about the respective powers of police forces and the Government and how they should be exercised'.[62]

The report continued that attempting to define the prerogative to keep the peace would be simplistic, as well as counterproductive, for government 'may have the power to keep the peace, but further it has the duty to do so'.[63] Indeed, the report noted (with implicit approval) the historic prosecution of the Mayor of Bristol for failing to suppress riots.[64] The royal prerogative provides flexibility for government action and, as the report concluded, it would be undesirable to abolish the flexible power that allows the state to 'combat crime, violent disorder and ensure that law and order are maintained'.[65] The threshold of the prerogative, assessed by the British Government, would appear to be as low as ensuring that law and order are maintained — well below the posited threshold of an emergency as outlined above.

This has been seen operationally. There are many instances of British armed forces being relied upon for domestic operations within contemporary British history.[66] Perhaps most articulated however was the use of troops to break a massive industrial strike in 1911. Home Secretary Winston Churchill granted military commanders complete discretion to use the troops as they saw fit.[67] Invoking the state's right to act to keep the peace, he justified the discretion on the basis that:

> military authorities always enjoy the power to move troops in their own country — to move British troops around whenever it is found to be convenient or necessary, and the regulation which hitherto restricted their employment in places where there was

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[61] Cox (n 32) 206.
[62] Ministry of Justice, *Review of the Executive Royal Prerogative Powers* (Final Report, 2009) 27 [101].
[63] Ibid [104].
[64] Ibid.
[65] Ibid [106].
[66] BBC, 'Brexit: Military Reservists on Standby in Event of no Deal', *BBC News* (17 January 2019).
[67] Anthony Babington, *Military Intervention in Britain: From the Gordon Riots to the Gibraltar Incident* (Routledge, 1990) 142.

> disorder until there had been a requisition from the local authority *was only a regulation for the convenience of the War Office and the Government generally*, and has in these circumstances necessarily been abrogated to discharge the duties with which at this juncture they were officially charged.[68]

Of importance is that underlying the abrogated policy was a clear belief in the legality of keeping the peace. *Northumbria* simply found this element of the royal prerogative to be indeed viable.

The most notable modern instance is perhaps Operation Banner — where the British armed forces supported the Royal Ulster Constabulary from 1969 to 2007.[69] Although a majority of the operation occurred prior to *Northumbria,* and notwithstanding supporting legislation,[70] the operation predominately operated under the royal prerogative.[71] It was specifically a deployment of military aid to the civil authorities, at the request of the unionist government of Northern Ireland, in response to the August 1969 riots.[72] Operation Banner aimed at asserting the authority of the British government in Northern Ireland and involved British service personnel carrying out internal security duties such as guarding key points, mounting check points, carrying out raids and searches, riot control and bomb disposal.[73] At the peak of the operation 21,000 soldiers were deployed.[74]

After British armed forces killed Irish civilians, the House of Lords was requested to answer questions on the matter through an Attorney-General's reference. Lord Diplock commented thus:

> There is little authority in English law concerning the rights and duties of a member of the armed forces of the Crown *when acting in aid of the civil power* … Where used for such temporary purposes it may not be inaccurate to describe the legal rights and duties of a soldier as being no more than those of an ordinary citizen in uniform. But such a description is in my view misleading in the circumstances … in theory it may be the

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[68] United Kingdom, *Parliamentary Debates*, House of Commons, 22 August 1911, col 2286 (Winston Churchill) (emphasis added).
[69] Police Service of Northern Ireland, *Military Assistance to the Police Service of Northern Ireland* (Service Instructions SI917, 2017) 10.
[70] Such as the *Criminal Law Act (Northern Ireland) 1967* (NI).
[71] Police Service of Northern Ireland (n 78) 10; Question for Ministry of Defence, 'Contingency Planning in Northern Ireland', Mike Penning MP, 21 September 2016; Louisa Brooke-Holland, 'Coronavirus: Deploying the Armed Forces in the UK' (House of Commons Briefing Paper, 08074/2020) 6.
[72] Police Service of Northern Ireland (n 78) 10; see further Robert Mark, 'Keeping the Peace in Great Britain — The Differing Roles of the Police and Army' (Speech, Leicester University, 11 March 1976).
[73] Mark (n 81).
[74] Ibid.

> duty of every citizen when an arrestable offence is about to be committed in his presence to take whatever reasonable measures are available to him to prevent the commission of the crime; but the duty is one of imperfect obligation and does not place him under any obligation to do anything by which he would expose himself to risk of personal injury, nor is he under a duty to search for criminals or seek out crime. In contrast to *this a soldier who is employed in aid of the civil power in Northern Ireland* is under a duty, enforceable under military law, to search for criminals if so ordered by his superior officer and to risk his own life should this be necessary in preventing terrorist acts.[75]

This reference has been subject to scathing criticism, including for its own internal inconsistency.[76] But it is clear from the actions undertaken in Northern Ireland that the prerogative of keeping the peace of the realm extends from non-lethal force (cordons and searches) through to selected instances of lethal force. Domestic deployments of UK service personnel occur under three possible legal bases: a Defence Council Order under the *Emergency Powers Act 1964* for non-military work, emergency regulations under the *Civil Contingencies Act 2004* (which do not appear to have ever been used), or the royal prerogative for operations involving 'military work'.[77] Military work is an undefined term, but includes matters:

> where service personnel have been trained by the military, where service personnel undertake that work as their 'day job', and for work which traditionally has been seen as military work. This type of work is usually, but not exclusively, requested by law enforcement agencies, most commonly the police, the Border Force and Her Majesty's (HM) Revenue and Customs.[78]

Outside of Operation Banner, the power to keep the Queen's peace has been relied upon in the modern era — such as the deployment of service personnel to break strikes,[79] deployment of the Special Air Service to crush a Scottish prison riot,[80] the supply of search, detection and surveillance equipment in Scotland for the 2005 G8 Summit,[81] and the London 2012

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[75] *Attorney-General for Northern Ireland's Reference (No 1 of 1975)* [1977] AC 105 (HL) 136, 137 (emphasis added).
[76] For a summary of the criticism see Rob McLaughlin, 'The Use of Lethal Force by Military Forces on Law Enforcement Operations — Is There a "Lawful Authority"?' (2009) 37 *Federal Law Review* 441, 441.
[77] Ministry of Defence, *Joint Doctrine Publication 02 — UK Operations — The Defence Contribution to Resilience and Security* (3rd ed, February 2017) 32.
[78] Ibid 32–3.
[79] Christopher Whelan, 'Military Intervention in Industrial Action' (1978) 8 *Industrial Law Journal* 222, 288.
[80] Phil Scraton, Joe Sim and Paula Skidmore, 'Through the Barricades: Prisoner Protest and Penal Policy in Scotland' (1988) 15(3) *Journal of Law and Society* 247; BBC, 'The Prison Riot that Ended with the SAS' *BBC News* (27 September 2017).
[81] Ministry of Justice (n 71) 26 [101].

Olympics.[82] A majority of these operations were below lethal force, and were 'military work' only in the sense that they used military personnel and equipment.

In the wake of the Paris terror attacks of 7 January 2015, the plans for Operation Temperer were drawn up, which allowed for British armed forces to be placed on standby to respond to terrorist incidents. Particularly, the plan allowed for the military to take over general constabulary duties so as to provide more flexibility for civilian police.[83] It allowed for the deployment of up to 10,000 troops, held at various degrees of readiness.[84] It further maintained certain niche and specialist capabilities, such as bomb disposal and high-risk search units.[85] Operation Temperer's rules of engagement, relevantly, followed that of Operation Banner in Northern Ireland,[86] and fell under the same legal authority — the royal prerogative.[87]

Operation Temperer was only triggered when the Joint Terrorism Analysis Centre raised the terror threat to 'critical'.[88] This threshold was met in the aftermath of the Manchester bombing on 22 May 2017 (after some pressure from the government, and much criticism)[89] and after the Parsons Green attack on 15 September 2017.[90] This threshold is political in nature, but mirrors the proposed ratio in *Northumbria* (being that the power is enlivened due to 'an actual or an apprehended threat to the peace').

The foregoing — explicit British acceptance of the case law in subsequent legal policy reports, as well as operational frameworks — is of utmost importance. Notwithstanding academic critiques, *Northumbria* has been consistently reviewed, analysed and operationalised for decades. As will be highlighted below in Section III, this follows a longer historical pattern.

D *Acceptance in Canada*

Northumbria has also been recognised across the Atlantic Ocean in Canada. This is particularly important in two respects. First, it demonstrates the underlying principle that a prerogative

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[82] Barrie Houlihan, 'Politics and the London 2012 Olympics: The (In)security Games' (2012) 88(4) *International Affairs* 707; BBC, 'London 2012: 13,500 Troops to Provide Olympic Security' *BBC News* (15 December 2011).
[83] HM Government, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (June 2018) 67.
[84] Ibid.
[85] John Gearson and Philip A Berry, 'British Troops on British Streets: Defence's Counter-Terrorism Journey' (2021) *Studies in Conflict and Terrorism* (advance), 18.
[86] Ibid 5.
[87] Ibid.
[88] Ibid 17.
[89] Ibid 19, citing interviews with officials.
[90] Ibid 20.

power recognised in the United Kingdom will apply as a matter of law in other manifestations of the Crown (in this scenario, the Crown in right of Canada). Second, it is particularly important for its application in a federal construct similar to Australia.

As discussed in Chapter 3, Canadian federalism is materially different in one respect to Australia: it is a federation of provinces, not states. The status of provincial Governors in turn shaped their position and authority in exercising the royal prerogative. There has been a suite of case law that questioned the legal authority of the provinces and federal government to maintain internal security: ranging from questions on the legality of international deployments,[91] to domestic nuclear testing.[92] Ultimately, it was the Crown in right of Canada (the federal government) that was held to enjoy the prerogative for internal security.[93] This has for the most part been regulated by statute[94] but it is clear that some parallel prerogative authorities have remained. These specifically relate to Canadian Armed Forces' (CAF) assistance to domestic law enforcement,[95] and penitentiaries.[96] These authorities have been used operationally by CAF.[97]

Importantly, *Northumbria* has been remarked to be the authority for these domestic law enforcement operations both by the courts and Canadian academics. In *Canada (Minister of Citizenship and Immigration) v Kisluk*[98] a question arose as to the lawful authority for domestic operations. Citing *Northumbria*, the Court found that a power to keep the peace clearly existed. Specifically, the Canadian Court cited with approval that it was 'the responsibility of the Home Secretary to preserve internal security'.[99] Justice Lufty then opined: 'it is at least arguable, in my view, that the Canadian government fulfilled its duty to ensure national security through the exercise of a Crown prerogative, at least prior to 1960'.[100] This date was when relevant Canada's *National Security Act* was adopted, regulating domestic operations.

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[91] *Turp v John McCallum* (2003) FCT 301.
[92] *Operation Dismantle Inc v The Queen* [1985] 1 SCR 441.
[93] *Canada (Minister of Citizenship and Immigration) v Kisluk* [1999] CanLII 8351 (FC).
[94] *National Defence Act* (RSC, 1985) s 273.6 or pt 6.
[95] Canadian Forces Armed Assistance, PC 1993-624; Canadian Forces Assistance to Provincial Police Forces Direction, PC 1996-833.
[96] *Penitentiary Assistance*, PC 1975-131.
[97] See Office of the Judge Advocate General, *The Crown Prerogative as Applied to Military Operations* (Strategic Legal Paper Series, Issue 2, 2018).
[98] [1999] CanLII 8351 (FC). *Northumbria Police* was also cited in *Pharmaceutical Manufacturers Assn of Canada v BC (Attorney General of)* [1996] CanLII 3597 (BC SC), [98]–[101] as a precedent for abridgement.
[99] [1999] CanLII 8351 (FC), n 121.
[100] Ibid 53.

Further, academic commentaries support its application. Phillipe Lagasse has written extensively on this issue of Canadian law, concluding that 'public order prerogatives allow the government to take exceptional measures to keep the peace',[101] referencing *Northumbria*. Further, Jennifer Klinch has stated that 'historical precedent very likely supports a prerogative power to take urgent action to protect national security and public order where there is insufficient time to obtain statutory authorization'.[102] Accordingly, there is both judicial and academic authority that supports the reception of the prerogative of keeping the peace of the realm in Canada.

E *Questionable Reception in Australia*

Northumbria has never been engaged with in Australian jurisprudence.[103] The most important work on constitutional executive power — Winterton's *Parliament, the Executive and the Governor-General* — was published six years prior to *Northumbria*; it does not engage with the decision nor were there any subsequent editions. Professor Zines in 2005 marks the first Australian constitutional scholar who even acknowledged the Court's decision, although he simply adopts the aforementioned criticisms of the case (in particular the lack of 'historical evidence of such a prerogative in past decisions or law books'[104] as well as lack of clarity surrounding its exercise).[105] Zines noted but did not engage with the difficulty of exercising the power in a manner consistent with federalism.[106] Twomey and Stephenson mirror Zines' observation;[107] and, whilst both accept that the prerogative exists, they believe it to be abridged by legislation.[108] For reasons outlined below, this is incorrect.

Stephenson made a more passing affirmation of the case where she cited it as the authority for internal security operations.[109] Moore, whilst accepting the power exists, does not clarify how

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[101] Alexander Bolt and Phillipe Lagasse, 'Beyond Dicey Authorities in Canada' [2021] 3 *Journal of Commonwealth Law* 1, 29.
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[102] Jennifer Klinch, 'Modernising Judicial Review of the Exercise of Prerogative Powers in Canada' [2017] 54(4) *Alberta Law Review* 997.
[103] It would appear to have only been referenced once, and that was with respect to the test of statutory abridgement in *David Barry Logistics Pty Ltd v Victoria* [2021] VSC 828, [87].
[104] Zines (n 10) 288.
[105] Ibid 287.
[106] Ibid 287.
[107] Twomey, 'The Prerogative and the Courts' (n 38) 314, 336; Peta Stephenson, 'The Relationship between the Royal Prerogative and Statute in Australia' (2021) 44(3) *Melbourne University Law Review* 1001, 1001.
[108] Twomey, 'The Prerogative and the Courts' (n 38) 314, 319; Stephenson, 'The Relationship between the Royal Prerogative and Statute in Australia' (n 107) 1001.
[109] Stephenson, 'The Relationship between the Royal Prerogative and Statute in Australia' (n 107).

it would be operationalised, nor the relevant thresholds.[110] Neither Stephenson nor Moore engaged with its breadth or depth nor application in a federal construct. One of the most prolific authors on domestic operations — Michael Head — has not made mention of this prerogative.

The academic silence is deafening. It is not sufficient to simply state the prerogative should not be adopted in Australia, considering that s 61 of the *Australian Constitution* is informed by the British common law,[111] and that the prerogative is only recognised (rather than created by) the common law. Once recognised, it applies across the Commonwealth.[112]

The question therefore remains — what is the scope of the power? *Northumbria* was concerned with non-lethal weapon systems; does it extend past this? In order to answer this, it is necessary to address the history of this specific prerogative. As WS Holdsworth noted, legal history is 'necessary to the understanding and intelligent working of all long established legal systems',[113] a point 'particularly true when examining constitutional rules'[114] especially British constitutional concepts, that are 'original and spontaneous, the product not of deliberate design but of a long process of evolution'.[115] It further can act as an aid in challenging assumptions that are commonly made about constitutional arrangements; nowhere is this more pertinent that the royal prerogative and domestic operations.

Accordingly, in order to demonstrate the existence of the royal prerogative of keeping the peace of the realm, and the correctness of the decision in *Northumbria*, the following section of this

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[110] Moore, *Crown and Sword* (n 16) 187.
[111] *Davis v Commonwealth* (1988) 166 CLR 79, 92 (Mason CJ, Deane and Gaudron JJ), quoted *in Pape v Commissioner of Taxation* (2009) 238 CLR 1, 62 [131] (French CJ) and *Williams v Commonwealth [No 1]* (2012) 248 CLR 156, 372 [588] (Kiefel J).
[112] As Blackstone holds, all English law in 1788 was transferred to the colony of New South Wales: William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–69). See on this point *Cooper v Stuart* (1889) 14 App Cas 286, 291; *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 438; *Coe v Commonwealth* (1979) 24 ALR 118; *Cadia* (n 37) 226; *Barton v Commonwealth* (1974) 131 CLR 479, 498 ('*Barton*'); *Mabo v Queensland [No 2]* (1992) 175 CLR 1. See further RTE Latham, 'The Law and the Commonwealth' (1937) 1 *Survey of British Commonwealth Affairs* 517; Victor Windeyer, 'A Birthright and Inheritance' (1962) 1 *Tasmanian University Law Review* 635; Owen Dixon, 'Marshall and the Australian Constitution' (1955) 29 *Australian Law Journal* 420; Robert French, 'Executive Power in Australia — Nurtured and Bound in Anxiety' (2018) *University of Western Australia Law Review* 17; Cheryl Saunders, 'Australia: New Perspectives on the Scope of Executive Power' (2013) 1 *Public Law* 174, 174. Section 24 of the *Australian Courts Act 1828* (Imp) 9 Geo 4, c 83 made clear that all law as of 1828 in England applied in Australia. This was the position of the report of the *Royal Commission of Inquiry into the Alleged Telephone Interceptions* (Report, 30 April 1986) vol 1, 56 [5.3], which held the finding of a prerogative to read the mail applied in Australia until legislative abridgement in 1960.
[113] WS Holdsworth, *Some Lessons from Our Legal History* (Macmillan, 1928) 8–9.
[114] Rosara Joseph, *The War Prerogative — History, Reform and Constitutional Design* (Oxford University Press, 2013) 7.
[115] Vernon Bogdanor, 'Conclusion' in Vernon Bogdanor (ed), *The British Constitution in the Twentieth Century* (Oxford University Press, 2003) 689, 719.

chapter will chart the historical evolution of this prerogative and its acceptance through the ages.

III A History of Keeping the Peace of the Realm

It is arguable that, so long as the *polis* (city) as a concept has existed, there has existed a prerogative right to utilise the military, internally, for the good of the people. This is captured in the Latin maxim '*salus populi surprema lex*'.[116] This power necessarily has ranged from tasks where no force was used (such as the construction of aqueducts and roads), to the use of force to keep the peace (such as enforcing quarantines and destroying property in order to stop the spread of a fire) to the use of lethal force to suppress riots and insurrections.[117]

It is fitting, then, noting the etymological roots, that a discussion of the internal security prerogative begins with Rome.[118] During the era of the Roman Republic, any military operation was required to be conducted against a legally defined enemy — *justus hostis* — which enjoyed rights within warfare. These rights, however, were not extended to bandits, pirates, rebels and slaves who undermined internal peace and security.[119]

Germanic law become prominent at the fall of the Western Roman Empire, and as has been aforementioned, stressed 'personal relations, landed property and [a] lack of written, formal, legislation'.[120] Ecclesiastical law however was formalised and extended from the 8th century.[121] This law, incidentally, was primarily based on Roman law. As the Roman Catholic Church gained more power, Roman law again became increasingly important within medieval Europe, and medieval warfare, albeit fusing with customary and feudal law.[122]

Of primary concern for Catholicism was just war theory. Some states of armed conflict fell outside of 'war' as a construct because they were prima facie just – such as self-defence.[123] Equally, and indicative of the feudal nature of the period, where subjects revolted, a lord could

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[116] See Robert Garran, Opinion No 217 in Attorney-General's Department, *Opinions of the Attorneys-General of the Commonwealth of Australia, with opinions of Solicitors-General and the Attorney-General's Department, Vol 1: 1901–1914* (AGPS, 1981).
[117] *Burmah* (n 20).
[118] For a more in-depth discussion, see White, *Keeping the Peace* (n 1) 33–52.
[119] Wouter G Werner, 'From *Justus Hostis* to Rogue State: The Concept of the Enemy in International Legal Thinking' (2004) 17(2) *International Journal for the Semiotics of Law* 155, 158, 167.
[120] Ibid 158.
[121] Samuel White, 'The Late Middle Ages in Northern Europe' in Samuel White (ed), *Laws of Yesterday's Wars* (Brill Nijhoff, 2022) 101.
[122] Ibid 105.
[123] Ibid.

declare war in order to retain public order, and such a declaration was viewed as a simple exercise of a lord's jurisdiction.[124]

In contradistinction, the Anglo-Saxon (Germanic) tradition held that 'every member of a German state was bound by duty, as well as by regard to self-preservation, to defend the community to which he belonged'.[125] Individuals took an oath of allegiance (a *hyld-ath*) which bound them to their new *hlaford*. Every German chief was voluntarily surrounded by a band of followers and companions — a *comitatus* or warband (from which the modern concept of *posse comitatus* comes from).

The *comites* of the ancient Germans, once merged with the custom of Romans and hereditary property, began to be issued with *folcland* (folkland, or communal property) and *bocland* (book land, or that land with written exemptions).[126] In turn, the new Germanic kings had reciprocal 'right to the service of any of his subjects in any station or capacity he cho[se]'.[127] This was operationalised through the *fyrd*, in which men were obliged to aid the suppression of riots and civil disturbances in accordance with the principle that 'each civic grouping should be responsible for the maintenance of order within its own area'.[128] Those in the *fyrd*, necessarily, could use lethal force to maintain internal discipline and repel external interference.[129]

This tradition continued unchanged after the Norman Conquest.[130] Henry I, son of William the Conqueror, under authority of his absolute royal prerogative decreed: 'I establish my firm peace throughout the whole Kingdom and command that it henceforth be maintained'.[131] This declaration was important, for in the two centuries after the Conquest, the King's Peace perished with him.[132] On the death of Henry I the *English Chronicle* noted: 'there was tribulation soon in the land, for every man that could forthwith robbed another'.[133] It was only

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[124] Maurice Keen, *The Laws of War in the Late Middle Ages* (Routledge, 1965) 73.
[125] Allen (n 12) 57.
[126] Ibid 142.
[127] *Marks v Commonwealth* (1964) 111 CLR 549, 573 (Windeyer J), citing *R v Larwood* (1694) 1 Ld Raym 29; 91 ER 916; *Duke of Queensberry's Case* (1719) 1 P Wms 582; 24 ER 527.
[128] Babington (n 76) ix.
[129] Gerald R Williams, 'The King's Peace: Riot Law in its Historical Context' [1971] 2 *Utah Law Review* 240, 244.
[130] Babington (n 67) ix.
[131] *Coronation Charter of Henry I* (1100) in Carl Stephenson and Frederick George Marcham (eds and trans), *Sources of English Constitutional History: A Selection of Documents from AD 600 to the Present* (Harper and Brothers, 1937) 46–8.
[132] Frederick Pollock, 'The King's Peace in the Middle Ages' (1899) 13(3) *Harvard Law Review* 177, 184–5; Williams (n 141) 241.
[133] Pollock (n 132) 180.

on the succession of Edward I in 1272, when campaigning in the Crusades for the foreseeable future, that the King's Peace was declared without a period of interregnum following the demise of the monarch.

In the 11th century, the King's Peace contained a reserve of nearly all serious offences that demonstrated contempt of his authority, other than murder and highway robbery.[134] These caveats to the King's Peace reflect the private jurisdictions of feudal lords.[135] The confirmation of the King's authority to keep the peace is reflected today in that only the Crown can pardon an offense (being that any breach of the peace offends the Crown, not the subject).[136]

Operationally this responsibility was delegated to the positions of Justice of Peace,[137] and Lord Lieutenant.[138] These individuals were empowered to utilise the power of the warband — the *posse comitatus* — which provided that all able-bodied male inhabitants of the relevant county, with the exception of those in holy orders, could use force to keep the peace.[139] At this time, any individual using the *posse comitatus* 'in doing so was acting for the Crown, but the burthen fell on the inhabitants of the county'.[140] The decentralisation of the duty and power to keep the peace aimed to control and stimulate local public order, rather than supersede it.[141] It accordingly confirmed and expanded upon local customs and grew the power of the Crown 'in the lines of least resistance'.[142]

The obligation to assist was considered in the reign of Queen Elizabeth I, where the question was put: 'whether men may arm themselves to suppress riots, rebellions, to resist enemies and to endeavour themselves to suppress or resist such disturbers of the peace of quiet of the realm?'[143] In deliberating the question, the Court of Common Pleas held that any man might lawfully arm himself to keep the peace, although it was 'to be the more discreet way for

[134] Ibid 177.
[135] White, 'The Late Middle Ages' (n 121) 108.
[136] *Ogawa v Attorney-General [No 2]* (2019) 373 ALR 689.
[137] The modern title of Justice of *the* Peace only became common after the 18th century: see Pollock (n 144) 184.
[138] Clode (n 19) vol 1, 34. For a matter of specificity, it would also appear that a Justice of the Peace might raise the *posse comitatus.* See William Hawkins, *Pleas of the Crown* (Maxwells, 8th ed, 1824) 513–4. See also Blackstone (n 112) bk 1, 343. The Latin term *comitatus* was originally used to describe a Germanic warband — a community.
[139] Babington (n 67) 2. This was codified under the *Assize of Arms 1181*.
[140] *Coomber v Berkshire Justices* (1883) 9 App Cas Q 61, 67 (Lord Blackburn).
[141] Pollock (n 132) 186. This decentralised form of public order control was applied within the early colony of New South Wales against convict insurrections and warfare with First Nations; see Stephen Gapp, *Sydney Wars* (NewSouth Publishing, 2018).
[142] Pollock (n 132) 188.
[143] *Case of Armes* (1597) Popham 121; 79 ER 1227.

everyone in such a case to attend and be assistant to the justices, sheriffs or other ministries of the King in the doing of it'.[144] A preference was already shown at an early stage for those who held an executive position, reflecting that central government was so poorly placed to rapidly respond to issues that local authorities were required to take the initiative. In the Elizabethan era, the power to keep the peace crystallised with a particular emphasis on the protection of property,[145] and protection of the government. Respecting the latter, a special peace was declared for the monarch's presence and levied fines[146] and physical punishment for its breach.[147]

Justices of Peace at this stage had become 'the principal organs of local government, and were the most influential class of men in England'.[148] This power, relevantly, arose from their 'right to arrest anyone they considered to be disturbing the peace'.[149]

The use of localised governance continued unchanged until the civil administration of Britain under the Lord Protector, Oliver Cromwell. Under the Lord Protector, the eponymously named 'London Scheme' was introduced, establishing a military commission in London with authority to raise troops for the suppression of 'rebellions, insurrections, tumults and unlawful assemblies'[150] through a range of sanctions: arrest, banishment and potentially the lethal use of force.[151] This scheme was quickly adopted in major population centres[152] and continued at the re-establishment of the monarchy. Indeed, the perceived importance of military intervention was reflected in the preface to Charles II's 1668 Articles of War, which state that the military was maintained for 'the peace of the Kingdom till the minds of the people should be composed to unity and obedience'.[153]

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[144] Ibid.
[145] Williams (n 129) 242.
[146] *Dooms of Cnut*, quoted in F Attenborough (ed), *The Laws of the Earliest English Kings* (Cambridge University Press, 1922).
[147] Drawing a sword in the presence of keepers of the peace was punishable by a corporal punishment: see Manuel Calzada, 'The Dooms of King Aldred' (1998) 5(4) *Murdoch University Electronic Journal of Law*.
[148] Williams (n 141) 248.
[149] Alan Harding, *A Social History of English Law* (Peter Smith Publishing, 1966) 22.
[150] Babington (n 67) 3.
[151] Williams (n 129) 255. See also Mary Bateson (ed), *Burough Customs 83* (Seldon Society, 1904) vol 18.
[152] Over the course of its history, the etymology of the phrase 'call out' has developed; see generally Victor Windeyer, 'Opinion on Certain Questions Concerning the Position of Members of the Defence Force when Called Out to Aid the Civil Power' in Victor Windeyer, *Victor Windeyer's Legacy: Legal and Military Papers*, ed Bruce Debelle (Federation Press, 2019) 211. In the United States, the phrase remains 'calling forth', as per *United States Constitution* cl 15; see further *Martin v Mott*, 12 Wheat 19 (1927).
[153] Clode (n 19) 128.

In 1688, the 'Glorious Revolution' resulted in William of Orange and Mary, daughter of James II, being placed on the English throne. The new regents, William III and Mary II, utilised the troops stationed in London in an attempt to disband highwaymen who plagued the countryside,[154] reflecting that the use and direction of soldiers and sailors remained at the Crown's discretion.[155] These members of the armed forces were required to use force in order to disband the internal security threat. Both the military and naval position at this time was that the armed forces did not fall under civilian jurisdiction, but were directly answerable to the Crown, and that their use domestically was a simple extension of the Crown's prerogative power.[156] The Crown, however, 'relied heavily on the customary legal duty of all citizens to maintain the peace and to subdue those breaking it'.[157] The complexity of breaches of the peace, however, saw the duty move away from the citizen and towards the military (the latter having the necessary training and equipment).[158]

As the conditions of the 18th century fuelled mass protests, and the citizens whose powers were historically relied upon now constituted the protestors, military forces were increasingly used as riot controllers.[159] Rarely of national or political character, these civil disturbances were often in protest at a local grievance or food shortage. Military intervention, sometimes including the use of lethal force, was justified on the basis of the royal prerogative of keeping the peace of the realm.[160]

The death of Queen Anne in 1714 led to government apprehension of riots over the accession of George I. Accordingly, a statute (the Riot Act) was introduced which empowered public office holders (such as magistrates, sheriffs or mayors), whenever twelve or more individuals were 'unlawfully, riotously, and tumultuously assembled together', to read the following:

> Our Sovereign Lord the King chargeth and commandeth all persons being assembled, immediately to disperse themselves and peaceably to depart to their habitations or their lawful business, upon the pains contained in the Act made in the first year of King George for preventing tumultuous and riotous assemblies.

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[154] Babington (n 67) 4.
[155] Ibid 5.
[156] Ibid 4.
[157] Williams (n 129) 249.
[158] Ibid.
[159] Babington (n 67) 3.
[160] Ibid.

God save the King![161]

The *Riot Act of 1715* (UK) imposed a duty on any of the king's subjects of age and ability commanded to assist a public office holder to seize individuals who remained for more than an hour after the proclamation was read,[162] and provided all those enforcing this law with a broad immunity.[163]

Yet why introduce a statute? The *posse comitatus* had worked sufficiently for 500 years. Hinton provides the clearest historical reasoning — a fear of unregulated military personnel.[164] As Lord Mansfield noted in *R v Kennett,* the Act's effect was to order the duties, actions and responsibilities of civil authorities.[165] It provided immunity, which is central to the discussion of statutory reform in Chapter 5. But the *Riot Act* also confirmed the subordination of the military to the civil power. It might also be that Lord Mansfield, whilst insisting on the doctrine of *posse comitatus*, was of the opinion it had been effectively extinguished in the seventeenth century as Michael Head suggests.[166] As discussed below, however, it is clear that such a power had not fallen into desuetude.

In 1781 the Chief Magistrate of London was charged with criminal breach of duty in failing to raise the *posse comitatus* with respect to the Gordon Riots.[167] This was noted in the above-mentioned 2009 report of the Ministry of Justice with support.[168] The Gordon Riots were not unique in their existence though: the 18th century saw a plethora of situations where troops were used in aid to the civil authority. This included the 1737 Irish riots;[169] the 1768 Wilkes

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[161] In 1830, a charge of failing to disperse after the *Riot Act of 1715* (UK) was read apparently failed due to the omission of the magistrate to proclaim 'God save the King!'; see UK Parliament, *Reports from the Commissioners, Criminal Law, Volume 5* (1840) 100–1.

[162] A historical search has suggested the first instance of the Riot Act being read was in Southern Ireland in 1717, and it remained on the Statute Book until 1967; see Babington (n 67).

[163] 'if the persons so unlawfully, riotously and tumultuously assembled, or any of them, shall happen to be killed, maimed or hurt, in the dispersing, seizing or apprehending, or endeavouring to disperse, seize or apprehend them, that then every such justice of the peace, sheriff, under-sheriff, mayor, bailiff, head-officer, high or petty constable, or other peace-officer, and all and singular persons, being aiding and assisting to them, or any of them, shall be free, discharged and indemnified, as well against the King's Majesty, his heirs and successors, as against all and every other person and persons, of, for, or concerning the killing, maiming, or hurting of any such person or persons so unlawfully, riotously and tumultuously assembled, that shall happen to be so killed, maimed or hurt, as aforesaid'.

[164] Martin Hinton, 'And the Riot Act Was Read!' (2003) 24 *Adelaide Law Review* 78.

[165] (1781) 5 Car & P 282; 172 ER 976. Of interest, Lord Mansfield's house was burnt in the Gordon Riots, which may suggest why Kenneth's reluctance to call in the troops was so heavily punished. See Michael Head and Scott Mann, *Domestic Deployment of the Armed Forces: Military Powers, Law and Human Rights* (Ashgate, 2009) 21.

[166] Head and Mann (n 165) 22.

[167] *R v Pinney* (1832) 5 Car & P [254].

[168] Ministry of Justice (n 71) 27 [101].

[169] George Rude, *Paris and London in the Eighteenth Century* (Collins, 1970).

riots; the 1790 Birmingham riots;[170] the 1819 Peterloo Massacre;[171] the 1881 Lancashire dispute;[172] the 1890 Leeds Gas Strike;[173] the 1881 protection of the Edinburgh Prison;[174] and the 1886 Welsh tithe disturbances to name but a few.[175] In 1908, the Select Committee of the Employment of Military in Cases of Disturbances reported 'that in the last 39 years troops have been called out in aid to the Civil Forces on 24 occasions'.[176]

Against the backdrop of increasing, and violent, military interventions Sir Robert Peel created the Metropolitan Police in London, alongside proposed principles to efficiently maintain safety and security within the community. Within these Peelian principles was a recognition that community peace and security could only be maintained by policing with consent; but that the extent to which public co-operation could be relied upon diminished proportionately to the use of physical force.[177] Yet, as found within *Northumbria*, it is critical that the creation and role of police has not by implication displaced any prerogative power to keep the peace of the realm. Accordingly, it is clear that: 'the techniques of enforcing riot law have not drastically changed. Rather, history presents a series of peak moments in severity of riots which have engendered an ebb and flow in public and official reactions to disorder'.[178]

Underpinning these responses, since the Conquest, has always been the prerogative power and duty of the Crown to keep the peace of the realm. This power has extended from the personal capacity of the king (which ended with his death) to encompass a more idealised concept of 'peace' that reflects social expectations (now encompassing murder and highway robbery). As the power of citizens became both inadequate and impractical, emphasis was placed on military force and individuals of authority — Justices of Peace and magistrates. Whilst some positions have diminished in relevance, the historical validity of the decision in *Northumbria* is clear.

IV KEEPING THE PEACE OF THE COMMONWEALTH

Although the United Kingdom cannot, since the passage of the *Union with Scotland Act 1707*,[179] *Government of Wales Act 1998* and 2006, *Scotland Act 1998* and *Northern Ireland*

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[170] *New Annual Register* (London, 1791).
[171] Ibid.
[172] HO 144/183 PRO Kew — Part I, Military Aid to the Civil Power, Abstract of Noted Papers 1874–1886, 5.
[173] Ibid 5.
[174] Ibid 6.
[175] Ibid, 6.
[176] *Select Committee of the Employment of Military in Cases of Disturbances* (Report, HMSO, 1908) v.
[177] Peelian Principles, Principle 4.
[178] Pollock (n 132) 180.
[179] 6 Anne c 11 (Eng).

Act 1998, be considered a purely unitary state, the nature and exercise of the royal prerogative in the United Kingdom occurs in a purely unitary manner, unaffected by federalism or a federal construct. For Australia, as 'developments that will occur in Britain are developments that will be informed and moulded by a radically different constitutional setting',[180] it is necessary to thus interpret any use of the power to keep the peace through the lens of federalism.[181] The spectrum of domestic security operations under the royal prerogative prior to Federation is thus outside the scope of this thesis.[182]

Whilst, under strict legal theory, the concept of a Commonwealth and states are 'non-existent, being in law, the Crown in one aspect or another',[183] the High Court has made clear that federalism is a necessary tool of constitutional interpretation.[184] This is particularly so with respect to internal security, although jurisprudence around the ability of the Commonwealth to respond to internal security threats has often been focused upon legislative powers (under section 51(vi) of the *Constitution*) rather than constitutional executive power. Within these 'defence power' cases, however, are nuanced obiter comments on constitutional executive power.[185]

In *Attorney-General (Vic) v Commonwealth* the High Court held that the defence power obviously includes a power to make laws for the prevention or punishment of activities obstructive to preparing for war.[186] In *R v Hush; Ex parte Devanny*[187] it held that this power fell within the combination of constitutional executive power (through the maintenance limb) and s 51 (xxxix). With respect to the latter, Rich J held:

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[180] KM Hayne, 'Non-statutory Executive Power' (2017) 28 *Public Law Review* 333, 337.
[181] See generally *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ); *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 84 (Gummow, Crennan and Bell JJ); *Williams v Commonwealth* (2012) 248 CLR 156, [22] (French CJ), [123] (Gummow and Bell JJ); *Williams v Commonwealth [No 2]* (2014) 252 CLR 416, 465–9 (French CJ, Hayne, Kiefel, Bell and Keane JJ). See also Hoong Phun Lee et al, *Emergency Powers in Australia* (Cambridge University Press, 2nd ed, 2019) 58–61.
[182] See Enid Campbell, 'Prerogative Rule in New South Wales 1788–1823' (1964) 50 *Royal Australian Historical Society Journal* 162, 175–9; Peter Salu, 'Military Intervention in Australia: A Study of the Use and Basis of Defence Force Involvement in Civil Affairs in Australia' (PhD Thesis, The University of Adelaide, 1995).
[183] Gunther Doeker, 'The Prerogatives of the Crown in the Common-Wealth of Australia and External Affairs' (1962) 11(4) *American Journal of Comparative Law* 610, 627.
[184] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 (Dixon J); *Bank of NSW v Commonwealth* (1948) 76 CLR 1, 362–3.
[185] Of course, they exist outside of defence cases. See *R v Kidman* (1915) 20 CLR 425; *Ex parte Johnson; Re Yates* (1925) 37 CLR 36, 94; *Church of Scientology v Woodward* (1982) 154 CLR 25, 54. On the idea more generally see White and Moore (n 3).
[186] (1935) 52 CLR 533.
[187] (1933) 48 CLR 487.

> It is quite sufficient for the purposes of this case to say that it is impossible to doubt the legislative power to prohibit associations which by their constitutions or propaganda advocate or encourage the overthrow of the Constitution of the Commonwealth by revolution or of the established Government of the Commonwealth by force or violence. Section 51 (xxxix) of the Constitution includes matters incidental to the execution of powers vested by the Constitution in the organs of government. The survival of the Constitution appears to me to be a matter most incidental to the execution of power under it … To prevent persons associating together for the purposes of destroying the Constitution is a matter incidental to maintaining it.[188]

Although in dissent, Rich J's judgment was cited with approval by the majority in *Burns v Ransley* as the basis for counter-sedition laws.[189] The matter related to a Communist Party meeting in a town hall in Brisbane. Burns, when asked whether he would support a communist land invasion of Australia, answered yes. Burns was charged under statute, rather than the common law offence of sedition.[190] Acting Chief Justice Latham — whose decision carried weight in the evenly split bench, and deserves to be outlined in full — believed that outside of statute:

> The Commonwealth Parliament, which is the legislative organ of the Commonwealth, has power to make laws to protect them and itself, not only against physical attack and interference, but also against utterance of words intended to excite disaffection against the Government … And to prevent or impede the operation of governmental agencies which prepare for defence and conduct warlike operations during war in accordance with the policy of the Government, which is responsible to the Parliament of the Commonwealth. Such an encouragement is an incitement to the promotion of civil war at a time when the country is defending itself against hostile attack.
>
> In the provisions which have been attacked relating to disaffection Parliament has provided protection for the Government and governmental activities. Protection against fifth column activities and subversive propaganda may reasonably be regarded as desirable or even necessary for the purpose of preserving the constitutional powers and operations of governmental agencies and the existence of the government itself. The prevention and punishment of intentional excitement of disaffection against the Sovereign and the Government is a form of protective law for this purpose which is to be found as a normal element in most, if not all, organized societies.[191]

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[188] Ibid 506.
[189] (1949) 79 CLR 101.
[190] Ibid.
[191] Ibid 110.

In the subsequent case of *R v Sharkey*[192] the issue of sedition was again assessed. Sharkey — who had allegedly invited Soviet troops to Australia — argued there was no constitutional head of power with respect to crimes. The Court, five to one, held his conduct to be sedition. Dixon J dissented, holding that the states hold primacy for law and order, with his famous exception of a Commonwealth interest (discussed in Chapter 3).[193]

McTiernan J believed the authority for the provision came from the incidental power to criminalise actions 'accompanied by *violence* which strike at the Constitution, the established order of Government and the execution and maintenance of the Constitution and Commonwealth law'.[194] Latham CJ and Rich J agreed.[195]

The power to preserve the Commonwealth against internal threats, and maintain security, would become particularly relevant in two critical cases: *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*[196] (the *Jehovah's Witnesses Case*) and the *Australian Communist Party v Commonwealth* (*Communist Party Case*).[197]

The *Jehovah's Witnesses Case* related to actions that were potentially subversive to the war effort. Consistent with their religious beliefs, Jehovah's Witnesses were handing out pamphlets urging soldiers to not fight. This was done openly and transparently, with no forms of corruption or coercion. By the modern definition (as outlined in Chapter 1), Jehovah's Witnesses were conducting influence operations. The jurisprudence from the case is all the more powerful noting the communication was not of a covert nature.

The case was decided at the height of an intense war, during which mainland Australia had, the previous year, been attacked directly for the first time ever by belligerent enemy forces.[198] The regulations in question in the *Jehovah's Witnesses Case* provided that the Governor-General could declare an association to be unlawful based upon their opinion that the association was prejudicial to the efficient prosecution of the war; the declaration in turn rendered property liable to permanent forfeiture. It was on this latter point — permanent property forfeiture for a temporary state of affairs — that the Court struck down the legislation.

[192] (1949) 79 CLR 121.
[193] Ibid 150 (Dixon J).
[194] Ibid 157.
[195] Ibid 135 (Latham CJ); 145 (Rich J).
[196] (1943) 67 CLR 116.
[197] (1951) 83 CLR 1, 243.
[198] The bombing of Darwin and other targets in northern Australia occurred from 19 February 1942; Japanese submarines were found in Sydney harbour in 1942 among a wider range of naval attacks across the war.

Yet the threat words could pose, and the power of the Commonwealth to respond to them, was accepted by the Court. Rich J, citing with approval Lord Sumner, opined:[199]

> The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. The question whether a given opinion is a danger to society is a question of the times and is a question of fact. Society has the right to protect itself by process of law from the dangers of the moment, whatever that right may be.[200]

Relevant to the discussion in Section III, some members of the Court opined that the primary limb of the defence power could extend from the protection of military bases to the Commonwealth more generally. Latham CJ stated:

> No organised State can continue to exist without a law directed against treason. There are, however, subversive activities which fall short of treason (according to the legal definition of that term) but which may be equally fatal for the safety of the people. These activities, whether by way of espionage, or of what is now called fifth column work, may assume various forms … [One example is] propaganda tending to induce members of the armed forces to refuse duty.[201] …
>
> the power of the Commonwealth to protect the community against what are now called fifth-column activities, that is, internal activities directed towards the destruction of the people of the Commonwealth, is not so weak as to be limited to legislation for the punishment of the offences after they have been committed. Parliament may … seek to prevent such offences happening by preventing the creation of subversive associations or ordering their dissolution.[202]

McTiernan J agreed, noting that only a grave emergency could empower the executive to create the offence of subversion under the defence power;[203] however, it might be possible under a combination of Commonwealth executive power and the incidental powers provision.[204]

The term fifth columnist is important, for it was commonly used in early decisions of the High Court and encapsulates the threat of IOs. The term comes from a tactic used in the Spanish Civil War where General Vidal, as his four columns of regular soldiers marched on Madrid, called upon his militant supports (or 'fifth column') within the city to destabilise its defence.

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[199] *Bowman v Secular Society Ltd* [1917] AC 406, 466–7.
[200] (1943) 67 CLR 116, 149.
[201] Ibid 132–3.
[202] Ibid 137.
[203] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 206–7.
[204] Ibid 260.

The ‘fifth column’ thus means a clandestine group or faction of corrupt, coercive or clandestine agents that attempt to undermine a nation’s solidarity, by any means, but particularly through infiltration of key posts and the spreading of dis- and misinformation.[205] The term was used regularly in *Australian Communist Party*.

That case, although finding ultimately that the legislation banning the Communist Party was invalid, provided significant comments from the High Court on other steps that could have been taken under constitutional executive power. Williams J opined:

> In peacetime it is lawful to have a defence establishment and to take steps to protect it against spies, saboteurs, fifth columnists and the like. In other words, it is lawful to prepare for war, and the extent to which such preparations should be made is a matter of policy depending upon the judgements of Parliament on the information it has from time to time.[206]

Equally, referring back to His Honour’s judgment in the *Jehovah’s Witnesses Case*, Latham CJ commented:

> the Commonwealth can defend the people, not only against external aggression, but also against internal attack, and in doing so can prevent aid being given to external enemies by internal agencies … There are … subversive activities which fall short of treason … whether by way of espionage, or of what is now called fifth column work … [which] may be both punished and prevented.[207]

Dixon J went on, in a separate judgment, to write of ‘the power which the Federal legislature undoubtedly possessed to make laws for the protection of the Commonwealth against subversive designs … attributable to the interplay of s. 51(xxxix) with s. 61’.[208] Dixon J appeared to take a similar view to Latham CJ in respect of executive power to combat subversive activities.

This is all to say that there is a long, accepted line of thinking by the High Court of Australia of a breadth and depth to constitutional executive power that allows the Commonwealth to protect itself. This is unsurprising. As Andrew Blick notes: ‘Some functions of government are universal. They are so important to the basic cohesion of a society that they are common across

[205] Ibid 46–7.
[206] Ibid 243.
[207] Ibid 150, quoting *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 132.
[208] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 175.

different time periods, systems and geographic locations.'[209] One such area is the body politic protecting itself.

What then of the seminal case of *Entick v Carrington* (the facts of which were covered in Chapter 1)? The apparent misapplication of law in *Entick* is often cited in academic critiques of cases relating to the internal security prerogative.[210] Yet such critiques are legally erroneous. A discussion of the Australian case of *A v Hayden*[211] demonstrates how.

A v Hayden related to a 1983 Australian Secret Intelligence Service (ASIS) training operation, involving heavily armed ASIS employees, which saw agents use force within Melbourne's Sheraton Hotel. Complaints were made by the staff, owners and civilians, who were all unaware this was only an exercise, and the agents were detained by Victoria Police while trying to escape. A subsequent investigation found that 21 serious criminal offences had potentially arisen as a result of the exercise.[212] The case came before the High Court when the ASIS agents sought an injunction against the Commonwealth revealing their names to Victoria Police, on the basis of a contractual obligation of confidentiality. From the very premise of the case, questions about the legality of the operation were not in question.

The High Court accepted that the Commonwealth itself was immune from criminal prosecution, and only individual intelligence officers could be culpable.[213] Famously, in response to propositions by counsel, Chief Justice Gibbs noted that: 'it is fundamental to our legal system that the Executive has no power to authorise a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer'.[214]

There is no inconsistency with *Northumbria* here — the British case does not suggest there is a defence of superior orders;[215] simply that there is (if any prosecution were raised) a defence of lawful authority for actions undertaken in pursuance of the prerogative to keep the peace of

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209 Andrew Blick, 'Emergency Powers and the Withering of the Royal Prerogative' (2014) 18(2) *International Journal of Human Rights* 195, 195.
210 Vaughan Bevan, 'Is Anybody There' [1980] *Public Law* 430; Ward (n 41) 156.
211 (1984) 156 CLR 532.
212 Royal Commission on Australia's Security and Intelligence Agencies, *Report on the Sheraton Hotel Incident, February 1984* (Report, 1984) 18.
213 *A v Hayden* (1984) 156 CLR 532.
214 Ibid 540.
215 See on the defence of superior orders Samuel White, 'A Shield for the Tip of the Spear' (2021) 49(2) *Federal Law Review* 210.

the realm in a similar manner to military operations under the war prerogative. More relevant, then, is the decision of Murphy J. His Honour held:

> The Executive power of the Commonwealth must be exercised in accordance with the Constitution and laws of the Commonwealth. The Governor-General, the Federal Executive Council and every officer of the Commonwealth are bound to observe the laws of the land … I restate these elementary principles because astonishingly one of the plaintiffs asserted through counsel that it followed from the nature of the executive government that it is not beyond the executive power, even in a situation other than war, to order one of its citizens to kill another person. Such a proposition is inconsistent with the rule of law. It is subversive of the Constitution and the laws. It is, in other countries, the justification for death squads.[216]

Now, Murphy J must have meant to include here the clear constitutional authority under s 119 of the *Constitution* for lethal force to be used. Yet *Hayden* was decided in 1984 — four years before *Northumbria.* As noted above, a court finding a prerogative does not create it anew; it simply recognises it.[217] Such recognition therefore validates its existence to at least 1688 AD (and, in the case of *Northumbria*, since 1066 AD).

Justice Murphy's decision, amongst others of the Court, speaks to the absence of a power to dispense with compliance with the law, not the question of whether the internal security prerogative might provide a basis for the defence of 'lawful authority' in respect of actions taken in pursuit of that prerogative. While it clearly establishes that there is no general dispensing prerogative, which would have been obvious from s 75(v) of the *Constitution* in any event, it is simply silent as to the internal security prerogative and its use as a lawful authority in answer to a criminal charge. It may be that, had any of the plaintiffs ever come to trial, their actions would have been found to have the lawful authority of the internal security prerogative. But no such trial ever occurred. Thus, *A v Hayden* is an important authority which simply does not speak to the question here of whether the internal security prerogative provides lawful authority such as to found a defence to any potential charges.

On the legal authority point, the Justices were not entirely clear. Thus, Mason J was at pains to highlight

[216] *A v Hayden* (1984) 156 CLR 532, 562.
[217] *British Broadcasting Corporation v Johns* [1965] Ch 32, 79 (Diplock LJ), quoted in *Ruddock v Vadarlis* (2001) 110 FCR 491, 501 [30] (Black CJ).

> the primary role played by the Commonwealth in this enterprise, a primary role which should be kept steadily in mind if the criminal law ever comes to be set in motion against the plaintiffs. For the future, the point needs to be made loudly and clearly, that if counter-espionage activities involve breaches of the law they are liable to attract the consequences that ordinarily flow from breaches of the law.[218]

The first sentence here seems to suggest that the Commonwealth might have authority for this. The second sentence is merely a reiteration of the rule of law — that consequences flow from its breach. On this, Brennan J agreed, highlighting that the royal prerogative's subjection to parliamentary authority is the cornerstone of democracy.[219] Nothing in *Northumbria* would suggest otherwise; it simply recognises that a lawful authority extends to keeping the peace of the realm.

The early decision of *R v Kidman*, which was a case concerned with retrospective legislation to criminalise defrauding the Commonwealth, encapsulates this. Justice Isaacs held that the Commonwealth 'has an inherent right of self-protection … [which] carries with it — except where expressly prohibited — all necessary powers to protect itself and punish those who endeavour to obstruct it'.[220] Addressing the depth of such power, Isaacs J believed that:

> a man attempting to steal Commonwealth treasure may be resisted to death; a man obstructing any Commonwealth officer in the performance of his duty may be thrust aside with all the force necessary to enable the officer to perform his duty.[221]

Kidman was cited as the authority by the Acting First Assistant Secretary of the Criminal Law and Security Division in 1985 when advising on the legal validity of Commonwealth-initiated call outs.[222] Renfree, whilst supporting the decision of Isaacs J that 'the common law recognises the peace of the King in relation to the Commonwealth, just as it recognises the peace of the King in relation to each separate State'[223] goes on to note that, 'in the absence of legislative power, it is difficult to say by whom, and within what limits, this executive power may be exercised'.[224]

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[218] (1984) 156 CLR 532, 535 [2] (Mason J)
[219] Ibid, 568.
[220] (1915) 20 CLR 425, 440–5.
[221] Ibid 440.
[222] NAA A432, 1985/004424-01, 5.
[223] Renfree (n 36) 466–7.
[224] Ibid 461.

It is here that *Northumbria* provides a useful handrail for Australian jurisprudential development. As this chapter has so far demonstrated, there is a clear historical basis for the royal prerogative of keeping the peace of the realm. This prerogative has been accepted in the United Kingdom and Canada, and forms the basis for British domestic operations. Conversely, in Australia, the High Court has been clear that there exists a power to maintain internal security under constitutional executive power, even if its nomenclature is different. It is clear as well that the executive government believes that at least some non-statutory power exists: *Defence Regulation 2016* (Cth) has a specific provision for DFACA operations outside of Part IIIAAA.[225] The Explanatory Memorandum noted:

> Part IIIAAA is not an exhaustive code on when the Defence Force can be called out to protect against domestic violence — for example, the Defence Force may also be called out for this purpose using the executive power in section 61 of the Constitution.[226]

It may be, however, that the passing of the *Defence Regulation 2016* (Cth) and Part IIIAAA (the basis of Chapter 3) has had unintended consequences for the royal prerogative. It is therefore necessary in this section to discuss whether the legislation and regulations have abridged the royal prerogative, notwithstanding parliamentary intent.

A *Abridgment*

In *Northumbria*, it was held that (with the exception of statutory abridgement) the internal security prerogative 'has not been surrendered by the Crown in the process of giving its express or implied assent to the modern system of keeping the peace through the agency of independent police forces'.[227] The central question of abridgement in an Australian context will be discussed below.

It is necessary to discuss whether Part IIIAAA has abridged any non-statutory executive power, as it goes to the heart of the issue of the breadth of constitutional executive power.[228] This work uses the term 'abridged' because it is demonstrative that the prerogative is merely bridged over

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[225] *Defence Regulation 2016* (Cth) s 69.
[226] Explanatory Memorandum, Defence Regulation Bill 2016 (Cth), [212].
[227] *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 QB 26, 59.
[228] The prerogative is regarded as abrogated, displaced, diminished or abridged — the terms have been used interchangeably. See, eg, *Johnston v Kent* (1975) 132 CLR 164; John Goldring, 'The Impact of Statutes on the Royal Prerogative: Australasian Attitudes as to the Rule in *Attorney-General v De Keyser's Royal Hotel*' (1974) 48 *Australian Law Journal* 434, 438; Renfree (n 36) 397; Benjamin B Saunders, 'Democracy, Liberty and the Prerogative: The Displacement of Inherent Executive Power by Statute' (2013) 41 *Federal Law Review* 363. See Maitland (n 14) 418.

by statute; that bridge can be removed through repeal of the statute, and the prerogative would thereby be revived.[229]

Whether or not Parliament is held to have abridged a prerogative power or privilege will often depend upon the subject matter and nature of the prerogative. Historically the presumption required an intent from Parliament, which in turn was found through express words or necessary implication.[230] The more significant a particular executive power is to national sovereignty, then the less likely it is that Parliament would have intended to diminish its power without clear words.[231] It also reflects that statutory powers may 'provide an additional mode of attaining the same object',[232] leaving the prerogatives intact and open.

It follows that a non-statutory executive power will be abridged by statute that 'expressly or by necessary implication purports to regulate wholly the area of a particular prerogative power or right'.[233] Yet, whilst the principle is clear, there is strong disagreement about what *exactly* is required. The field has been described as 'complex'[234] and 'strangely abstruse'.[235] Sometimes, limitations upon the royal prerogative have come about without loudly being proclaimed to be as such; other times, it is clear that a specific prerogative is being targeted and abrogated.[236] It is necessarily case by case, but for the purposes of this chapter the legislation in question is solely Commonwealth; without any enabling Commonwealth legislation, any respective state legislation has no effect. The *Criminal Code Act 1995* (Cth), which for the most part would regulate the use of force domestically from a Commonwealth perspective, has within it a caveat for lawful authority;[237] it is under this provision that combat operations are undertaken under the lawful authority of the war prerogative.[238]

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[229] Such as the historical prerogative power to take ships in wartime, which when statute was repealed, allowed for ships to be requisitioned for the Falklands War; see Vincenzi (n 53) 25. From an Australian perspective, an interesting instance is the revitalisation of the command prerogative power to move individual soldiers around the country without a statement of reasons (so-called 'postings'); see *Martincevic v Commonwealth* (2007) 164 FCR 45.

[230] *Booth v Williams* (1909) 9 SR (NSW) 421, 440 (Street J); *De Keyser* (n 45); *Barton* (n 124); *Ruddock v Vadarlis* (2001) 110 FCR 491.

[231] *Ruddock v Vadarlis* (2001) 110 FCR 491, [185], [202] (French J).

[232] *Cadia* (n 37).

[233] *De Keyser* (n 45). See also *Cadia* (n 37) [14] (French CJ: 'It is an aspect of the more general proposition that the prerogative may only be abrogated or abridged "by express words, [or] by necessary implication"'), [94] (Gummow, Hayne, Heydon and Crennan JJ).

[234] Payne (n 54) 107.

[235] De Smith and Brazier (n 9) 144.

[236] Such as with the war prerogative, and attempts to abridge the prerogative power to declare war.

[237] *Criminal Code Act 1995* (Cth) pt 10.5. See *Henshaw v Mark* (1997) 95 A Crim R 115.

[238] *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344.

Logically, if the power of keeping the peace of the realm is sister-like to the war prerogative, the *Criminal Code Act 1995* (Cth) is not of issue. Neither is the *Intelligence Services Act 2001* (Cth), which only regulates intelligence agencies. These intelligence agencies predominately operate overseas and the legislation is drafted in this manner.[239] As explained below, it does not cover the field with respect to ADF intelligence collection and this interpretation has been supported in Canada vis-à-vis their own services.[240] Equally, notwithstanding the legislation, *Northumbria* clearly held that the existence of these organs of the state (and supporting legislation) does not imply a monopoly on the duty to keep the peace of the realm.[241]

As noted subsequently in this chapter, it is a live issue — Part IIIAAA must have been assessed not to have abridged any non-statutory power in order for the 2002 CHOGM and 2003 POTUS air patrol operations to take place, and in the making of s 69 of the *Defence Regulation 2016* (Cth) with its associated Explanatory Statement. If the statute has not abridged any power, then the ADF could be utilised in a fuller role for search operations (noting that, as Chapter III demonstrated, Division 4 of Part IIIAAA most likely does not extend to online operations).

1 *What is the Test?*

Determining whether or not a statute has abridged prerogative power requires answering a central question: whether or not a legislative intention can be found. This is not a question of searching for the *actual* intent of Parliament (the actual intent being fictitious)[242] but rather a determination ascertained via the rules and principles of statutory construction. Accordingly, what must be asked is whether the Act operates in a way that is necessarily inconsistent with the continued existence of the Commonwealth executive power in question. Such interpretation of intent requires a careful analysis of the meaning, operation and scope of the statute, which turns on the particular provisions.[243] It makes the statute itself the subject of analysis, not the *goal* of the legislation.[244]

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[239] ASD has acknowledged it conducts domestic operations in rare circumstances: see Foreign Affairs, Defence and Trade Legislation Committee, Senate Estimates Hearing (4 March 2020).
[240] Lagasse (n 21) 541.
[241] Ibid.
[242] *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 591–2 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[243] Basil Markesinis, 'The Royal Prerogative Re-Visited' (1973) 32(2) *Cambridge Law Journal* 287, 305.
[244] *Zheng v Cai* (2009) 239 CLR 446, 455–6 (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

The foundational case for prerogative abridgment remains *Attorney-General v De Keyser's Royal Hotel Ltd*[245] (*De Keyser*). *De Keyser* is authority for the constitutional principle that 'when a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory regime laid down by the Parliament'.[246] However, the exact ratio decidendi of *De Keyser* is nearly impossible to ascertain due to the 'heterogeneous reasoning' of the House of Lords.[247] The differing opinions of their Lordships merit analysis.

Lord Dunedin considered a 'covering the field' test — that being, does the statute cover the subject matter previously regulated by the prerogative?[248] If so, the principle of parliamentary supremacy results in '[t]he statute prevail[ing] and the executive must act in accordance with the statute. Any prerogative power to act contrary to the statute is abridged.'[249] This position was mirrored by Lords Atkinson, Moulton and Sumner — if the statute establishes a process, the executive must follow the process.[250] Benjamin Saunders opines: 'however, it only applies in limited circumstances: if there is no conflict between a statute and a prerogative, or the statute imposes no restrictions, then the principle does not apply'.[251] In many ways this is similar to the 'covering the field' test of inconsistency between Commonwealth and state laws under s 109 of the Constitution.[252]

But theirs are not the only tests. Lord Parmoor's judgment in *De Keyser* is equally important. His Lordship held that:

> [t]he constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such

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[245] *De Keyser* (n 45).
[246] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 459 (McHugh J). This has, in turn, been approved by the High Court: see *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, 69–70 (McHugh, Gummow and Hayne JJ) ('*Jarratt*'); *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24, 58 (Gleeson CJ, Gummow, Hayne and Crennan JJ) ('*Arnhem Land Trust*').
[247] Ben Saunders (n 228) 374.
[248] *De Keyser* (n 45) 526.
[249] Ben Saunders (n 228) 375.
[250] *De Keyser* (n 45) 538–40 (Lord Atkinson), 554 (Lord Moulton), 561–2 (Lord Sumner).
[251] Ben Saunders (n 228) 390.
[252] See *Ex parte McLean* (1930) 43 CLR 472, 483 (Dixon CJ).

> authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject.[253]

Lord Parmoor's approach also places Parliamentary *intent* at the centre of any question on abridgment. Historically this intent was found through express words or necessary implication.[254] Lord Parmoor confirmed this in *De Keyser*:

> [t]he principles of construction to be applied in deciding whether the Royal Prerogative has been taken away or abridged are well ascertained. It may be taken away or abridged by express words or necessarily implication, or … where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury or wrong.[255]

In these latter instances, Lord Parmoor held, it is to be implied that the necessary intent of Parliament for the statute was to abridge the prerogative. According to his Lordship in *De Keyser*, as the statute was concerned with the provision of compensation, the statute was thus 'made for the advancement of justice and to prevent injury and wrong'.[256] This is mirrored in cases relating to serving at the pleasure of the Crown, and the creation of statute-made rights.[257]

Such reasoning was not followed by the Divisional Court or the Court of Appeal in *Northumbria*. In the Divisional Court, Mann J held, with reference to the reasoning in *De Keyser*, that the relevant statute — the *Police Act 1964* — did not 'confer a monopoly power so as to limit the prerogative by implication'.[258] The judicial reasoning behind this determination is not subject to criticism; the statute empowered the police and did not seek to regulate the exercise of the prerogative. Yet on appeal, Purchas LJ noted *De Keyser* but modified the test to be whether the statutory provisions aimed

> to prevent executive action … in violation of property or other rights of the individual … Where the executive action is directed towards the benefit or protection of the individual, it is unlikely that its use will attract the intervention of the courts.[259]

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[253] *De Keyser* (n 45) 575.
[254] *Case of the Master and Fellows of Magdalene College in Cambridge* (1615) 11 Co Rep 66b; 77 ER 1235, 1247.
[255] *De Keyser* (n 45) 576.
[256] Ibid.
[257] *Bennett v Commonwealth* [1980] 1 NSWLR 581, 587 (Rogers J); *Barratt v Howard* (2000) 96 FCR 428, 447–8 (Beaumont, French and Merkel JJ); *Jarratt* (n 258); cf *Ling v Commonwealth* (1994) 51 FCR 88 ('*Ling*') as the *Overseas Students (Refunds) Act 1990* (Cth) had not created a new right.
[258] *R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority* [1987] 2 WLRD 998, 1001.
[259] *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 QB 26, 53–4 (Purchas LJ).

Lord Justice Purchas therefore found that the *Police Act 1964* had not abridged any prerogative powers by implication because no rights had been affected — the issuing of weapons did not prima facie interfere with liberty or property. Such a position was adopted by the majority judgment of the Full Court of the Federal Court in *Ruddock v Vadarlis*[260] (*Tampa*). That case concerned the Commonwealth's conduct in refusing to allow the MV *Tampa* to bring asylum seekers it had rescued at sea to Australia. The majority held that 'nothing done by the Commonwealth amounted to a restraint upon the … [asylum seekers'] freedom, they having neither right nor freedom to travel to Australia'.[261]

There is thus some obtuse support for the concept of an implication arising only when statute affects rights (or, the inverse, where the statute is made for the public good or to prevent injury or wrong). Yet what constitutes 'civil rights and liberties' is not as clear cut as might originally be thought.[262] If there is no right to enter or travel around a country,[263] nor are any rights affected by the proposed use of force (because there is no right to riot), then can it be argued that there is no right to commit widespread acts of violence, ergo, can it be argued that Part IIIAAA does not infringe individual liberties? This seems an odd and paradoxical position to take, especially given that the powers granted to the ADF, as outlined below, include the use of lethal force and placing them on a statutory footing would be implicitly for the public good.

The *Tampa* case, however, is only a Full Federal Court decision. The High Court has considered *De Keyser* on a few occasions, but has interpreted the principle differently. Although Lord Parmoor's judgment is the preferred test within Australia[264] (and the

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[260] *Ruddock v Vadarlis* (2001) 110 FCR 491.
[261] Ibid 548 (French J, Beaumont J agreeing at 514).
[262] This issue is also found in the concept of 'fundamental rights'; see *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 619 (Heydon J): 'a right does not become fundamental merely because cases call it that. And a right does not cease to be fundamental merely because cases do not call it that.' See further Alice Taylor, 'Anti-discrimination Law as the Protector of Other Rights' (2021) 42(2) *Adelaide Law Review* 132.
[263] This finding by French CJ is challenged in Peta Stephenson, 'Statutory Displacement of the Prerogative in Australia' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 203.
[264] *Barton* (n 124) 488 (Barwick CJ), 501 (Mason J); *Jarratt* (n 258) 69–70 (McHugh, Gummow and Hayne JJ), 84–85 [129] (Callinan J); *Arnhem Land Trust* (n 258) 58 (Gleeson CJ, Gummow, Hayne and Crennan JJ); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 600–1 (Kiefel J). *Re Richard Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 514 (Latham CJ); *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372, 386 (Taylor J); *Brown v West* (1990) 169 CLR 195, 202, 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Ling* (n 269) 92 (Gummow, Lee and Hill JJ); *Wik Peoples v Queensland* (1996) 63 FCR 450, 461–2 (Drummond J); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 459 (McHugh J); *Ruddock v Vadarlis* (2001) 110 FCR 491, 494 [33] (Black CJ), 539–540 [181]–[182] (French J, with whom Beaumont J agreed); *Oates v Attorney-General (Cth)* (2003) 214 CLR 496, 511 [37] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ) ('*Oates*'); *Cadia* (n 37), 204 [14] (French CJ), 228 [94] (Gummow, Hayne, Heydon and Crennan JJ).

Commonwealth has accepted that where a statute so comprehensively regulated the subject, an intent may arise by implication),[265] the High Court of Australia has historically held 'important' prerogatives have a more stringent test, one that requires clear, express and unambiguous language (a so-called 'inescapable' implication).[266] This is a large break from the reasoning of all judgments by the House of Lords, which did not apply any presumption or emphasise any particular stringency. Such a shift in language is important, and the gap between *necessary* and *inescapable* is quite significant.

Important prerogatives are not defined and, whilst this test has come under critique,[267] it is still the current test supported by the High Court.[268] So far, only two cases have addressed these important subjects, which are particularly relevant for any analysis of the abridgment of the internal security prerogative.

The first case that implied that 'important' prerogatives have a higher standard for necessary implication was *Barton v Commonwealth.*[269] The case revolved around whether the *Extradition (Foreign States) Act 1966* (Cth) had abridged any non-statutory power of the Commonwealth to request extradition, noting that the Act did not include any ability to request extradition from Brazil. The High Court unanimously held the Act had not, notwithstanding a 'strong suspicion that the draftsman of the Act intended it to be all embracing to displace all prerogative power to seek the surrender of fugitives'.[270] Justice Mason held that the power to request extradition was integral to the effective enforcement of Australian municipal law and thus was important.[271] Similarly, but separately, Jacobs J held that the ability to request extradition was an essential sovereign need, in order to be able to communicate with other countries.[272] *Barton* was supported in *Oates v Attorney-General*[273] where it was held that the prerogative to request extradition had survived the *Extradition Act 1988* (Cth) for similar reasons.

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[265] *Barton* (n 124) 488 (Barwick CJ), 501 (Mason J).
[266] Ibid, 488 (Barwick CJ). Although much is made of French J's decision in *Ruddock v Vadarlis* (2001) 110 FCR 491, 540 it would appear to be often overlooked that this was simply a Full Court matter; Simon Evans, 'The Rule of Law, Constitutionalism and the MV Tampa' (2002) 13 *Public Law Review* 94.
[267] Stephenson, 'The Relationship between the Royal Prerogative and Statute in Australia' (n 119) 28; George Winterton, *Parliament, The Executive and the Governor-General* (Melbourne University Press, 1983) 115. He cites in approval *Laker Airways Ltd v Department of Trade* [1977] QB 643, 722 (Roskill LJ), 728 (Lawton LJ); ibid.
[268] *Barton* (n 124); *Oates* (n 276) [34] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ).
[269] (1974) 131 CLR 477.
[270] Ibid 488 (Barwick CJ).
[271] Ibid 501 (Mason J).
[272] Ibid 505 (Jacobs J).
[273] *Oates* (n 264) 511–13 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ).

The second case to touch upon the notion of 'importance' as a tool of statutory interpretation was the aforementioned *Tampa* decision. In a two-to-one split, the majority of the Full Court held that there exists a non-statutory power to halt foreign asylum seekers in the offshore area, and that this power had not been abridged by the *Migration Act 1958* (Cth).[274] Justice French (as his Honour then was) noted that: '[t]he greater the significance of a particular Executive power to national sovereignty, the less likely it is that, absent clear words of inescapable implication, the Parliament would have intended to extinguish that power'.[275]

This decision has been again much-criticised,[276] yet the dissenting judgment of Black CJ is often overlooked. Chief Justice Black conceded that 'if a power is well used, well-established and important to the functioning of the Executive government, a very clear manifestation of an intention to abrogate will be required'.[277] Whilst Black CJ did not provide a test for what 'well used' entails, the examples given in Chapter 4 and the below discussion of desuetude demonstrate a venerable tradition of using ADF forces in domestic operations, below the threshold of domestic violence.

So while both *Barton* and *Tampa* have established that important prerogatives have a higher threshold for abridgment, they failed to identify any test or criteria by which to establish what are and what are not important. A plain reading of the judgments reinforces that important prerogative powers are those that go to the heart of government, to the core of sovereignty, to the running of an effective Commonwealth, and to effective law enforcement. These all fall squarely within the tryptic categorisation of Evatt J outlined in Chapter 3 — that being 'executive prerogatives'.[278]

Should the internal security prerogative be interpreted as an 'important' prerogative, requiring a higher threshold for necessary parliamentary implication? If the ratios of *Barton* and *Tampa* are to be followed, then the answer is yes. A nation cannot survive without the ability to respond to breaches of municipal law impacting national security, and to thus ensure internal stability and integrity. The ability to keep the peace is so significant to national sovereignty that it perhaps is the clearest example of the category of power alluded to by French J in *Tampa.* This

[274] *Ruddock v Vadarlis* (2001) 110 FCR 491, 543.
[275] Ibid 540.
[276] See Evans (n 266).
[277] *Ruddock v Vadarlis* (2001) 110 FCR 491, 504.
[278] There is obtuse support for this in Anne Twomey, '*Miller* and the Prerogative' in Mark Elliot, Jack Williams and Alison Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Oxford University Press, 2018) 69, 77.

reflects some obiter from the *Northumbria* appellate decision; Purchas LJ described the prerogative as a 'fundamental prerogative'[279] and Nourse LJ as one which was 'so valuable to the common good'.[280] That being the case, it is safe to apply the 'inescapable' test, as opposed to the 'necessary' test, for the following statutes.

2 *Is There an Inescapable Implication?*

It is clear that Part IIIAAA demonstrates an inescapable parliamentary intent to abridge the prerogative, with respect to domestic violence.[281]

This is notwithstanding the preserving clause found within Part IIIAAA. Section 51ZD notes: '[Part IIIAAA] does not affect any utilisation of the Defence Force that would be permitted or required, or any powers that the Defence Force would have, if this Part were disregarded.'

This section, when first introduced, was justified in the Explanatory Memorandum on the basis that the:

> New section 51Y [now section 51ZD] makes it clear that the new process for calling out members of the Defence Force does not in any way detract from the use of the Defence Force that would be permitted or required under any powers that the Defence Force would have if the new Part were not in place. Not only does this provision attempt to preserve Executive powers in relation to the Defence Force, it ensures that the process for using the Defence Force in this way does not detract from any other use of the Defence Force that would be permitted or required or any powers that the Defence Force would have if this new Part were disregarded.[282]

Preserving clauses are neither novel nor unique within Acts of Parliament; parliamentary drafters (alive to the issue of parliamentary intent and statutory interpretation) have increasingly placed provisions that purport to preserve non-statutory executive power.[283] Mirror provisions to s 51ZD above were addressed in the case of *CPCF v Minister for Immigration and Border Protection* (*CPCF*).[284] Pertinently, s 5 of the *Maritime Powers Act 2013* (Cth) (MPA) read that 'this Act does not limit the executive power of the Commonwealth', which the Commonwealth argued was clear intent for the MPA to allow

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[279] *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 QB 26, 55.
[280] Ibid 58.
[281] White, *Keeping the Peace* (n 1) 81–104.
[282] Explanatory Memorandum, Defence Legislation Amendment (Aid to Civil Authorities) Bill 2000 (Cth), [58].
[283] *Migration Act 1958 (Cth)* s 7A; *Defence Act 1903 (Cth)* pt IIIAAA, s 51ZD; *Maritime Powers Act 2013* (Cth) s 5.
[284] (2015) 255 CLR 514.

concurrent non-statutory operations and to authorise the detention of asylum seekers outside the statute.

All judges who considered the issue in *CPCF* rejected the Commonwealth's argument.[285] The provision was 'better understood as preserving such other … executive power as may be exercised comfortably' with the remaining provisions.[286] This could include the prerogative power of command, which allows ADF members to move around the country or to give lawful orders to ADF members.[287]

Accordingly, if the reasoning of *CPCF* is to be followed with respect to preserving clauses such as found within Part IIIAAA, notwithstanding *an express statement of* parliamentary intent to the contrary, the executive power may nonetheless be abridged depending on the court's reading of the provisions of the Act as a whole. A reading of the Explanatory Memorandum notes that the legislation aimed to 'preserve Executive powers in relation to the Defence Force',[288] but this does not necessarily relate to the executive power relating to call outs. In her Second Reading Speech, Dr Sharman Stone noted 'the unsatisfactory state of the existing call-out framework, including anachronistic provisions'.[289] The intent of the Bill was 'to modernise the procedures to be followed for call-out of the Defence Force'.[290] In 2005, the legislative regime was reformed and expanded into areas which were recognised, at the time, to 'be authorised under the Government's Executive power'.[291]

Following the foregoing, Part IIIAAA clearly falls within the test found within *De Keyser*. Whilst there remain some theoretical situations where the process required under Part IIIAAA might not apply,[292] the nature of the legislation is overwhelmingly suggestive of parliamentary intent. Only limited persons can make a call-out order, only certain powers are available and there are clear statutory restrictions on those powers. There are also explicit legal consequences for any breaches of those restrictions.[293] The statutory regime is so detailed that it is nearly

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[285] Ibid 538 (French CJ), 564–5 (Hayne and Bell JJ), 601–2 (Kiefel J).
[286] Ibid 601–2 (Kiefel J).
[287] The Governor-General has a constitutionally enshrined power of command under s 68; see White, 'Taking the King's Hard Bargain' (n 54). The impact of *Defence Act 1903* (Cth) s 9 is outside the scope of consideration here.
[288] Ibid.
[289] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2000, 18410.
[290] Ibid 18411.
[291] Ibid.
[292] If the process cannot be followed — such as if all authorising and alternative authorising Ministers were killed — then the prerogative would be amenable to use.
[293] White, 'A Shield for the Tip' (n 215).

impossible to contend that there continues to exist any parallel non-statutory executive power to deploy the ADF to respond to domestic violence. Such a position would seem to find support in the Protective Security Review report, and other works.[294] If Lord Parmoor is to be followed, the legislation is clearly intended for the public good, and to prevent injury or wrong to the civilian population against the military operating domestically.[295]

Equally, there is a strong implication that Parliament, in passing the initial Part IIIAAA and through subsequent amendments, has sought to abridge constitutional executive power notwithstanding s 51ZD. Such a position is a mirror reversal of *Barton.* This abridgment is *only* with respect to the subject matter that the statute regulates — instances of domestic violence, and the use of the ADF in the Australian offshore area when there is a threat to a Commonwealth interest. Despite Stephenson's comments to the contrary,[296] the legislation does not demonstrate an inescapable parliamentary intent to regulate the use of the ADF in instances outside (either above, such as rebellion or war, or below, such as riot) domestic violence. Equally, per *Northumbria*, the ADF does not have a monopoly on the duty to use force, and the legislation has not abridged any other organ of the Commonwealth's ability to respond to instances of domestic violence. Having found that there remains a wide ambit of constitutional executive power, below the threshold of domestic violence, this chapter will conclude by addressing whether this power has been lost due to disuse.

V The Continued Use of the Prerogative of Keeping the Peace of the Realm Showing the Principle of Desuetude is Inapplicable

Walter Bagehot noted that, on its face, any review of prerogative powers would conclude that the Crown holds many plenary powers which 'waver between reality and desuetude, and which would cause a protracted and very interesting legal argument if … [the Crown] tried to exercise them'.[297] Having argued that the internal security prerogative exists, the final issue for this chapter to address is whether the principle of desuetude applies.[298]

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[294] Justice Hope recommended that the ADF internal security operations be conducted under a statutory basis, as there was significant uncertainty (and legal risk) with relying upon common law powers; see Robert Hope, *Protective Security Review* (Report, 15 November 1979) 175; Moore, *Crown and Sword* (n 16) 165–205.
[295] *De Keyser* (n 45) 576 (Lord Parmoor).
[296] Stephenson, 'The Relationship between the Royal Prerogative and Statute in Australia' (n 119).
[297] Walter Bagehot, *The English Constitution*, ed Paul Smith (Cambridge University Press, 2001) 49.
[298] See especially *South Australia v Victoria* (1911) 12 CLR 667, 703 (Griffith CJ, Barton J agreeing at 706): '[t]he Prerogative may … be regarded as having … fallen into abeyance'.

This is not an accepted doctrine — it has been held that disused prerogatives are lost,[299] though it is also said that they are not lost by disuse.[300] Some hold that

> a rule of English common law [and by extension the royal prerogative] cannot become as dead as the dodo, it can at least go into a cataleptic trance like Brünnhilde or Rip van Winkle or the Sleeping Beauty. In such a state the rule in question cannot … be revived at the mere call of any passing litigant, but only if its appropriate moment has come again to operate *usefully and without gross anomaly*.[301]

The weight of the authority would suggest that as a principle it exists, and this section progresses on this assumption. In the absence of any specific authority, practice may provide a guide as to what is accepted as lawful. There is merit, therefore, in areas of legal ambiguity, to look at past practice to see whether there was legal controversy or subsequent specific statutory regulation in response. Indeed, it is not just academia that utilises past practice as a litmus test — the High Court considered practice as a guide in *Pape*[302] and *Williams*.[303] It is particularly important in discussions around prerogative power, as historic use is necessary to inform its use.[304] At any rate, as the following will demonstrate, it is apparent that the royal prerogative to keep the peace of the realm has never fallen into disuse since Federation.

To that end, this section expands on earlier work to demonstrate fourteen instances of relevant domestic operations, below the threshold of domestic violence.[305] Chronologically, they began in the aftermath of the First World War against the backdrop of centralised Commonwealth authority. It is noted that at least some of these events have been considered by legal scholars before, though it is emphasised that that has not been done in respect of the question whether the internal security prerogative has fallen into desuetude. The use of the royal prerogative for internal security operations prior to Federation is not examined here.[306]

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[299] Ibid.
[300] *Burmah* (n 20) 101 (Lord Reid).
[301] *McKendrick v Sinclair* (1972) SC (HL) 25, 60 (Lord Simon) (emphasis added) (citations omitted).
[302] *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 24 (French J), 74 (Gummow, Crennan and Bell), 122 (Hayne and Kiefel JJ).
[303] *Williams v Commonwealth* (2012) 248 CLR 156, 340 (Crennan J), 369 (Kiefel J).
[304] Anne Twomey, 'The Prerogative and the Courts' (n 38); Anne Twomey, 'Post-*Williams* Expenditure: When Can the Commonwealth and States Spend Public Money without Parliamentary Authorisation?' (2014) 33(1) *University of Queensland Law Journal* 9, 14.
[305] Samuel White, 'Military Intervention in Australian Industrial Action' (2020) 31 *Public Law Review* 423.
[306] White, *Keeping the Peace* (n 1) 53–4.

1 *1923 Melbourne City Police Strike*

When the Victorian Police went on a co-ordinated strike on the eve of the Melbourne Cup, the Victorian Government responded swiftly: 4,700 special constables were sworn in, and a squadron of Commonwealth Light Horse were mounted on police horses in aid to the civil power.[307] This, in turn, catalysed an extension of the police strike and subsequently a third of the force went on strike.[308] More special constables were sworn in, under the command of General Sir John Monash.[309]

Concurrently, the Premier of Victoria, in a letter to the Acting Prime Minister, requested the Commonwealth Government to 'arrange for troops to parade the City and take positions' at specified locations during the police strike, as a 'precautionary measure designed to make an impression and to have a strong force of men available at suitable points ready for instant use if the situation should demand their being called upon in the regular manner'.[310] Although denied by the Commonwealth, armed troops were subsequently marched through the city and placed to protect Commonwealth facilities. Elizabeth Ward posits that the only authority for this was non-statutory executive power.[311]

2 *1939 Darwin Wharf Strike*

In early November 1939, an industrial dispute in the port of Darwin saw defence stores held up. The cargo, which was perishable, was held to be in short supply by the Manager of the Railways and the Territory Administrator.[312] The short supply of coal in Darwin saw the Territory Administrator — with approval from the Prime Minister — requisition all the coal onboard the MV *Montoro*.[313] Defence Force members were used on 8 November to unload the material in lieu of the striking wharf workers. This was done under armed guard.[314]

A further opportunity was given the following day for union members to unload stores on the wharf; none presented themselves and thus sailors unloaded the SS *Koolina.* The overall use of armed forces to strike break, as the Australasian Meat Industry Employees Union claimed,

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[307] *Victorian Historical Magazine*, vol 3 (1972) 916.
[308] Ibid 911, 912.
[309] State Archives of Victoria, 1163/539/2832.
[310] Cited in Salu (n 182) 199.
[311] Elizabeth Ward, 'Call out the Troops: An Examination of the Legal Basis for Australian Defence Force Involvement in "Non-defence" Matters' (Research Paper No 8/1997–98, Parliamentary Library, 1998) 4.
[312] Department of the Interior; NAA A659, 1939/1/16118.
[313] Ibid 2.
[314] Ibid 14.

was conveyed by the Administrator of the Territory to the Prime Minister.[315] In turn, a memorandum was prepared by the Secretary, Department of the Army establishing the powers under which the intervention had occurred. The Secretary held that:

> The Commonwealth has the right to use any of its forces for the protection of Commonwealth property or services. This is a duty which devolves upon the Commonwealth itself and the Commonwealth has a duty to use all its powers for the protection of its own property and services. The power is not in any way affected by the provisions of s. 51 of the Defence Act which only deals with the liability of the Commonwealth to assist the Governments of the States when domestic violence has been proclaimed.[316]

As Table 3 highlighted, the latter statement about the requirement for proclamation of domestic violence is perhaps incorrect. At any rate, it is clear that constitutional executive power was considered a viable legal basis for domestic military operations.

3 *1942 Bombing of Darwin*

The Northern Territory again was cause for Australian troops to keep the peace. In the aftermath of the initial Japanese bombings of the town during World War Two, civil order totally collapsed. As Justice Lowe remarked in his secret Royal Commission on the Air Raids on Darwin report,[317] looting was rife and public administration inadequate. Accordingly, the military Commandant in the area took command from 21 February 1942. This was done outside of any statutory provisions or regulations, as the *National Security (Emergency Control) Regulations 1941* did not take effect until they were gazetted on 28 February 1942.[318]

Cameron Moore holds this to be an example of an exercise of martial law.[319] An in-depth discussion of martial law is outside the scope of this work. However, martial law can most properly be characterised as an absence of law, or the centralisation of law into the command of one individual.[320] The 1942 Darwin bombing is perhaps more properly characterised as an exercise of the royal prerogative to keep the peace. The ratio of *Northumbria* was assessed to be that the prerogative is enlivened when there is 'an actual or an apprehended threat to the

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[315] Letter dated 4 December 1939; received 8 December 1939, NAA: A1196, 58/501/13.
[316] Memorandum 47978, dated 22 December 1939, NAA: A816, 11/301/208.
[317] *Royal Commission on the Air Raids on Darwin* (Report, 1942).
[318] Commonwealth, *Manual of National Security Legislation* (1942) 247.
[319] Moore, *Crown and Sword* (n 16) 162.
[320] AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Palgrave Macmillan, 10th ed, 1959) 291.

peace'. No clearer example of apprehended threat is the total collapse of civil authority. The unilateral military adoption of control is best then viewed as an exercise of the duty to keep the peace, occurring outside of statute. Being a territory (and thus not subject to section 119 of the *Constitution*) the only constitutional authority for this conduct is executive power.

4 *1949 Coalminers' Strike*

In April 1949, Australian troops were used in unloading coal from an Indian ship which had been blacklisted by the communist-controlled Miners' Federation in New South Wales and Victoria.[321] The deployment of troops in this instance proceeded on the premise of ensuring the supply of coal, rather than of preserving law and order in the area.[322] This control of the coal supply, however, was viewed as a necessary precaution in order to prevent a breakdown of the peace (of the realm, it may be said) that might occur if industry ground to a halt. Interstate trade was no doubt affected, since

> more than 500,000 wage and salary earners in the several States were progressively thrown out of work. Reserves of coal had been practically nil, and of alternative fuels scanty. Much of heavy industry ground to a standstill. Electricity was sharply rationed in at least three States. Domestic gas was rationed to an hour a day in Melbourne and Sydney. Electric train and tram services ran at skeleton strength.[323]

Subsequently, troops were sent by the Commonwealth to work in the mines in a strike substitution capacity. In positioning the troops, it was agreed that the maintenance of law and order would remain the responsibility of the New South Wales constabulary forces.[324] However, the Australian military personnel raised a furore on being deprived of their arms. Accordingly, it was agreed that the troops could carry their weapon systems in the rail and road movements and could guard their own camps against the threat of communists in regional New South Wales.[325] The authority for this was not articulated. Legal advice was sought and war-time statutory authority was advised to be the lawful authority; it was not relied upon, however, and the provisions were subsequently repealed.[326]

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[321] Margaret White, 'The Executive and the Military (2005) 28(2) *UNSW Law Journal* 428, 448.
[322] Windeyer, 'Opinion on Certain Questions' (n 164) 232.
[323] LF Crisp, *Ben Chifley: A Biography* (Longmans, 1961) 362.
[324] Ibid.
[325] Margaret White (n 321) 448.
[326] Ward (n 311) 5.

Subsequent academic commentary has suggested the use of the military in this situation would be authorised by constitutional executive power.[327] HP Lee suggests that in the absence of statute, the prerogative could have be relied upon.[328] Ward agrees.[329] Dr Evatt, the Attorney-General during the strikes, later commended the 'strong executive action to defend the people against specific disruptive activities'.[330] The 1949 call out highlights a history of utilising a strong prerogative power to prevent disruption, in keeping with the ratio of *Northumbria.*

5 1952 Bonegilla Migrant Centre Riots

The influx of migrants at the end of the Second World War was used as an opportunity for the Commonwealth Government to develop large public works with limited costs, on the condition of passage and accommodation in Australia. Over 300,000 migrants were housed in Bonegilla, Victoria over two decades where 'New Australians' were acclimatised. These migrant centres were de-commissioned barracks across the road from the new accommodation at Latchford Barracks.

Poor food, limited work conditions, segregation of families and racist 'Old Australians' eventually led to a large migrant centre riot in 1952.[331] Over three thousand Italian and Spanish migrants protested their conditions, catalysed by the suicide of three young migrants.[332] Some buildings were burnt and the protest was classified as a 'riot' by the local civil authority, whose limited constabulary forces from regional Victoria (although boosted from neighbouring areas) was assessed as being of limited viability. Accordingly, 200 armed troops and four tanks were called out from Latchford Barracks to suppress the riot (which was characterised as a 'communist insurrection').[333]

It is unclear from the de-classified ASIO documents what the trigger for this domestic security operation was, and whether it was a unilateral decision of the Latchford Commandant.[334] The Commonwealth interests were explicit — a migration centre, and the threat of communism.

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[327] Ibid.
[328] Hoong Phun Lee, *Emergency Powers* (Law Book Co, 1984) 208
[329] Ward (n n 311) 12.
[330] HV Evatt, 'Danger to All Citizens', *The Herald* (Melbourne, 6 May 1950).
[331] National Film and Sound Archive of Australia, 'Bonegilla Migrant Camp', *NFSA* (Video, 2009) <https://www.nfsa.gov.au/collection/curated/bonegilla-migrant-camp>.
[332] Ibid.
[333] Charles Sturt University, 'Protests and Riots. Investigation 4: Troubles at Bonegilla in 1961' (Presentation) <https://cdn.csu.edu.au/__data/assets/pdf_file/0012/3378864/Protests-and-Riots.pdf>.
[334] NAA A6122, 2383.

The legality of the operation to keep the peace of the realm did not appear to be questioned and it remains a relatively undiscussed instance of aid to the civil power in Australian history.

6 *1953 Bowen Wharf Terminal Strikes*

In 1953, members of the Australian Army were deployed in the town of Bowen, Queensland, in an attempt to alleviate a labour shortage on the docks, which subsequently caused a backlog of meat and sugar for unloading onto the wharves. The industrial dispute arose over the failure of the Waterside Workers' Federation

> to fulfil its quota allowing new members to take up work loading ships on the dock. The union announced it would fill the quota but this was not immediately done. In the meantime a fire at the sugar mill exacerbated the problem of sugar storage … on the day of the mill fire, Mr Holt [the Commonwealth Minister for Labour] said that the Acting Premer of Queensland had contacted the Prime Minister to emphasise the seriousness of the situation.[335]

Five days after this representation, the Commonwealth covertly flew 200 troops to Bowen, from Brisbane.[336] The deployment of the troops was not classified as an intervention in an industrial dispute, but merely to relieve the backlog of loading work.[337] However, archival evidence has highlighted that the Commonwealth had long supported its power to keep the peace. Internal cables referred to earlier plans in 1918; the Acting Prime Minister, WA Watt, wrote to the Local Manager of the Queensland Meat Export Company that 'in the event of a definitive refusal from the State Government to supply the necessary protection … the Federal Government would consider it'.[338] These cables with respect to the Bowen Wharf strike then supported the position that the Commonwealth was prepared to use the armed forces as an armed guard, if the state government was unwilling to protect the workers.[339]

For a variety of reasons, the deployment of troops failed to secure local support; railway workers declared the wharf black and local meat and sugar workers supported them; the subsequent commandeering of the goods yard railway by troops led to threat of action by the

[335] Ward (n 311) 27.
[336] Margaret White (n 321) 449.
[337] Ward (n 311) 27.
[338] Letter of 12 December 1918.
[339] NAA 71/578.

Australian Railways Union. These public outcries by multiple unions, as well as the Queensland Government itself,[340] led to the withdrawal of the troops two days later.[341]

The calling out of troops was widely criticised as opening the ‘doors to unrestricted intervention by the executive in industrial disputes’.[342] It cannot be argued that the intervention was protecting an essential service, such as what occurred in the 1949 Coalminers Strike, because there were civilian individuals readily available to perform the work — they simply were not performing the work quickly enough for the Commonwealth’s liking. As such, the action could justifiably fall under the nebulous ‘Commonwealth interest’ — although no Commonwealth laws would appear to have been breached, nor Commonwealth property affected. The use of the armed forces in this scenario is most validly authorised by a non-statutory executive power.

7 *1954 Sydney Wharf Strike*

Through April to the end of May in 1954, a quite crippling strike occurred on Sydney docks over pay and conditions. The issue, however, was that the Waterside Workers’ Federation had been loading a charter vessel with military stores to support the French in Indo-China. The strike was characterised as pro-communist by a bipartisan Commonwealth Government,[343] and it seems to have been the case that it was: the unionists had passed a motion condemning Australian intervention in foreign disputes.[344] Indeed, the Vietminh General Confederation of Workers thanked the union for their ‘noble proletarian internationalism’.[345]

Troops were used to load the stores, on the legal/political basis that ‘The Government is not prepared to see arrangements it has made with the French Government disrupted by any political decision of the W.W.F.’.[346] The legal basis was not articulated. However, it is clear that external affairs and international relations are clear Commonwealth interests.[347] Use of the ADF to enforce these Commonwealth interests would fall within constitutional executive power.

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[340] Ibid.
[341] Ibid 28.
[342] Margaret White (n 321) 449.
[343] *Sydney Morning Herald* (Sydney, 9 April 1954) 5.
[344] Ibid 1.
[345] *Sydney Morning Herald* (Sydney, 28 April 1954) 3.
[346] Ibid.
[347] White and Moore (n 3).

Fears of agitation and foreign interference in the Territory of Papua and New Guinea had circulated within Commonwealth departments since the 1950s.[348] Against the backdrop of 'an alien-inspired global campaign of espionage, subversion and sabotage … by a hostile foreign Power'[349] plans had been drawn up for internal security operations involving civilian constabularies and Australian military forces. This was compounded by 'a growing proportion of dissident Europeans' and 'a wider group with strong racial and cultural ties with Asia'.[350]

These fears came to a head in 1970, when the then Administrator of New Guinea sought military assistance from the Commonwealth in response to secessionist agitation in Rabaul, and wider armed agitation across Papua and New Guinea.[351] It was reported that any death of a Tolai person would result in targeted killings of non-Indigenous inhabitants.[352] At the time of the civil unrest, Papua New Guinea was a territory of the Commonwealth of Australia under a governance agreement with the Trustee Council of the United Nations.

In July 1970, the Governor-General of Australia Sir Paul Hasluck signed an Order-in-Council calling out the members of the Australian Army's Pacific Island Regiment 'to render aid to the civil power'.[353] The order empowered the Administrator of the Territory, in the event that police lost or feared losing control of law and order, to permit the Pacific Island Regiment to use lethal force.[354] It was planned that the regiment would 'assume responsibility for the establishment of safe areas for elements of the local civilian population'[355] as well as 'active participation by way of cordon … anti-riot action and … armed intervention'.[356] This was despite considerable disquiet on the effectiveness of the call out by the Chiefs of Staff of the services.[357]

[348] NAA 138/1952.
[349] Ibid 2.
[350] Ibid.
[351] See NAA P133; RJ May, *The Changing Role of the Military in Papua New Guinea* (Canberra Papers on Strategy and Defence No 101, Research School of Pacific Studies, Australian National University, 1993) 39.
[352] NAA 12007/1, 5.
[353] Robert J O'Neill, *The Army in Papua-New Guinea: Current Role and Implications for Independence* (Australian National University Press, 1971) 1–2, 4. Interestingly, legal advice suggested a state Governor could have signed this on behalf of the Governor-General if requested: see NAA P133, 35 [28].
[354] NAA P133, 27.
[355] Ibid 47 [18.b].
[356] Ibid [18.e].
[357] Minute No 5/1970, 'Meeting of the Defence Committee 5 February 1970'.

In 1971, a Labor MP asked in the House of Representatives whether the use of 'Air Force Hercules aircraft, naval patrolboats and Army signalmen' on the Gazelle Peninsula was legally founded.[358] It seems that this concern was raised due to the cordon and searches of locals by members of the armed forces.[359] Prime Minister McMahon replied that it was, even though the House of Assembly of the Territory of Papua and New Guinea was not consulted.[360] Commonwealth documents highlighted that the 'U.N. Charter and the Trusteeship agreement provided no legal barrier to the use of military forces in aid of the civil authority'.[361] The Order-in-Council was subsequently revoked on 22 April 1971 without any reported bloodshed.[362]

As Beddie and Moss opined, it was open to the Commonwealth Government to devise whatever procedures it considered appropriate for an exercise of non-statutory Commonwealth executive power.[363] This mirrored the opinion of TEH Hughes (then Commonwealth Attorney-General) to the Governor-General.[364] The use of an Order-in-Council provided political form to what was an assessment of domestic violence in a territory. As the incident fell within a territory, not a state, neither section 119 of the *Constitution* nor the relevant legislative provision of the time (s 51 of the *Defence Act 1903*) were applicable. The use of an Order-in-Council was a political decision, rather than a legal requirement. The legal authority ultimately fell under constitutional executive power, and responding to an apprehended threat to the peace.

9 *1974 Cyclone Tracy*

Perhaps overshadowed by the ongoing Vietnam War, Cyclone Tracy was a disaster on a scale unparalleled in Australian history. It almost destroyed Darwin, and exposed cracks in the Commonwealth's disaster management responses.[365] With no electricity or water, and no clear

[358] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 March 1971, 896 (Les Johnson).
[359] NAA P133, 48.
[360] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 March 1971, 896 (William McMahon).
[361] NAA P133, 47 [13].
[362] Department of Defence, Minute, 71/802.
[363] Brian Beddie and Sue Moss, *Some Aspects of Aid to the Civil Power in Australia* (Occasional Monograph No 2, Department of Government, Faculty of Military Studies, UNSW, 1982) 59.
[364] NAA 12007/1, Letter of 19 July 1970.
[365] ER Chamberlain et al, *The Experience of Cyclone Tracy* (Australian Government Publishing Service, 1981) 97.

leadership, Major General Stretton made the unilateral decision to place himself in command of the area.[366]

Stretton's legal position is unclear. He occupied a dual role, also being the civilian head of the Natural Disasters Organisation, a Commonwealth body whose powers were poorly defined at the time.[367] In a similar manner to Churchill's 1911 decision to circumvent civil constabulary authorities, Stretton was answerable directly to the Prime Minister. Stretton sought to stress that his role was as a civilian director.[368] However, he occupied a military position and provided military orders. Although no weapons were used, ADF members openly patrolled the streets of Darwin.[369] They were clearly under the command power of the Major General. McNamara suggests that constitutional executive power would provide the key to the legal authority, and Kerr would support this proposition.[370]

10 *1978 Hilton Bombing*

Perhaps the best known instance of the ADF aiding the civil authority concerned the bomb explosion outside the Hilton Hotel in Sydney, on 13 February 1978; three men were killed with a further nine injured.[371] The blast occurred before the opening of the Commonwealth Heads of Government Regional Meeting. Subsequently, the Governor-General, by Order-in-Council, called out the ADF on the advice of the Executive Council.[372] This followed the tradition established by the New Guinean experience less than a decade before.

Accordingly, nineteen hundred troops were called out in a security force role to secure the town of Bowral, New South Wales, where the Regional Meeting subsequently took place.[373] Until Operation COVID-19 Assist, Bowral was '[t]he only major mobilisation of troops in an urban setting in Australia's history'.[374] Indeed, '[o]ne local newspaper said the "virtual siege

[366] H Robertson, 'Darwin's Churchill: The Role of Major-General Alan Stretton in the Days Following Cyclone Tracy' (1999) 10 *Journal of Northern Territory History* 55, 56.
[367] R Jones, 'Managing the National Response: The Canberra Story' (2010) 60 *Australian Meteorological and Oceanographic Journal* 221, 223.
[368] Alan Stretton, *The Furious Days: The Relief of Darwin* (Collins, 1976) 82–3.
[369] Joe McNamara, 'The Commonwealth Response to Cyclone Tracy: Implications for Future Disasters' (2012) 27(2) *Australian Journal of Emergency Management* 37.
[370] Ibid; D Kerr, 'Executive Power and the Theory of its Limits: Still Evolving or Finally Settled?' (2011) 13(2) *Constitutional Law and Policy Review* 22.
[371] Hope (n 294) 41.
[372] *Commonwealth Gazette: Special*, No S 30 (14 February 1978).
[373] Michael Head, *Calling Out The Troops: The Australian Military and Civil Unrest* (Federation Press, 2009) 44.
[374] Ibid 49.

conditions" were reminiscent of "Franco's Spain"'.[375] Anthony Blackshield summarised the position as follows:

> In terms of our popular social traditions, the idea is very firmly entrenched that the use of armed forced within the realm in peacetime is 'not cricket'. It is this longstanding social tradition that really underlies the disquiet surrounding the events at Bowral. But as soon as one asks whether this social tradition is reflected in any legal tradition that might be invoked as a constitutional restraint on the use of armed forces, one is plunged into an esoteric maze of uncertainties.[376]

This 'maze' was navigated by Sir Victor Windeyer's Opinion, annexed to Justice Robert Hope's report of his Protective Security Review.[377] As per Table 3 above, it did not occur at the request of the State of New South Wales. Windeyer held that the use of the ADF was valid on the basis of the inherent power of the Commonwealth to protect its interests,[378] similar to Dixon J in *Sharkey* who remarked on the power of the Commonwealth 'not to protect the State, but to protect itself'.[379] Sir Victor stated that the Commonwealth had the inherent power to 'employ members of its Defence Force "for the protection of its servants or property or the safeguarding of its interests"'.[380] This was because, prima facie, such power was an incident of nationhood:

> The power of the Commonwealth Government to use the armed Forces at its command to prevent or suppress disorder that might subvert its lawful authority arises fundamentally, I think, because the *Constitution* created a sovereign body politic with the attributes that are inherit in such a body. The Commonwealth of Australia is not only a federation of States. It is a nation.[381]

Specifically on s 61, Windeyer continued:

> The ultimate constitutional authority for the calling out of the Defence Force in … [Bowral] was thus the power and the duty of the Commonwealth Government to protect the national interest and to uphold the laws of the Commonwealth. Being by order of

[375] *Southern Highland News* (Bowral, 15 February 1978) 1.
[376] Anthony Roland Blackshield, 'The Siege of Bowral: The Legal Issues' (1978) 4(9) *Pacific Defence Reporter* 6.
[377] Windeyer, 'Opinion on Certain Questions' (n 152).
[378] Ibid.
[379] (1949) 79 CLR 121, 151 (Dixon J).
[380] Windeyer, 'Opinion on Certain Questions' (n 152) 279, quoting *Australian Military Regulations 1927* (Cth) reg 415.
[381] Ibid.

> the Governor-General, acting with the advice of the Executive Council, it was of unquestionable validity.[382]

Sir Victor's opinion was often cited in support of government positions.[383] Terrorist attacks — and threats thereof — were subsequently recognised as constituting domestic violence in the 1980s.[384] However, no request was made in accordance with the relevant constitutional provision or statutory framework at the time. It is clear that the ultimate constitutional authority remained constitutional executive power.

11 *1983 Spy Flights*

In April 1983, the Commonwealth Government used ADF assets — primarily, surveillance aircraft under the command of Royal Australian Air Force pilots — to collect evidence of Tasmanian Government contravention of federal regulations.[385] There was no suggestion that there was any threat of domestic violence. As Beddie and Moss opined, the flights were a law enforcement exercise, by the Commonwealth, acting in preparation to enforce a Commonwealth law.[386]

The 'spy flights' (as they became known) were subject to exhaustive debate in the Parliament[387] and at Senate Estimates,[388] with an aim to distil the legal basis for the tasking. Under the policy at the time, the flights could have fallen under either DACC or DFACA. The Attorney-General at the time, Senator Gareth Evans, opined it was the latter, commenting:

> As to the legality of the flights in question, I satisfied myself both before the flights took place, and certainly subsequently, that there was no question whatsoever but that the flights were legal … There are some legal uncertainties about the precise nature and extent of the powers available to the military and the limitations on those in the context of aid to the civilian power. There is no question but that under section 61 of the Constitution and with the legislative back-up of the Defence Act under section 51(6) … the flights in question were not only entirely within the range of normal practice so

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382 Ibid 280.
383 Department of Defence, 'Defence Corporate Support' (Budget Estimates, 7–8 June 1999); NAA 432/137 Letter of Attorney-General Peter Durrack and Solicitor-General MH Byers, 28 February 1978.
384 NAA 1652/3/7.
385 The evidence collected supported the Commonwealth's litigation in *Commonwealth v Tasmania* (1983) 158 CLR 1.
386 Beddie and Moss (n 363) 59.
387 Commonwealth, *Parliamentary Debates*, Senate, 21 April 1983, 26–7; Commonwealth, *Parliamentary Debates*, Senate, 5 May 1983, 249–50, 255–6, 257–8; Commonwealth, *Parliamentary Debates*, Senate, 26 May 1983, 865, 909–11, 958–62.
388 Senate Estimates Committee E, 12 May 1983, 140–5, 154 ff.

> far as the Royal Australian Air Force is concerned but also unquestionably within the legality of the RAAF and indeed the military role.[389]

There are some important points to extract from Senator Evans' opinion. Attorney-General Evans clearly noted that constitutional executive power provided ample lawful authority for the operation.[390] This confirms the conclusion reached in Chapter 3 as to the effect of section 119. Evans opined that the flights were conducted to enforce the laws of the Commonwealth and as such were legal.[391] The ability for the ADF (not just the RAAF) to conduct surveillance was confirmed, implicitly subject to the precise nature and extent of the powers available to the military. This is a clear instance where the actions undertaken would appear to have been taken in the exercise of the prerogative to keep the peace of the realm, demonstrating its exercise in Australia.

12 *1989 Newcastle Earthquake*

Although oft-cited as an assistance to the civil community operation,[392] the use of the ADF in the aftermath of the Newcastle earthquake shared many similarities with the 1942 bombing of Darwin and 1974 post-Cyclone Tracy operations. On 28 December 1989, a 5.5 earthquake struck the city, causing damage and loss of life.[393] Relevantly, two hundred military personnel were called in due to 'fear of possible looting in damaged buildings'.[394] Jointly, police and military units patrolled the city streets to retain order and keep the peace. Barricades were established, and cordons enforced by military personnel around the central business district.[395] Civilians were searched and screened by armed military personnel.[396] Local army units were relieved after 48 hours by 120 regular soldiers from Holsworthy Barracks.[397]

No formal requisition appeared in the press of the relevant Gazette; no state of domestic violence was declared; and it was unclear whether any orders for opening fire on looters were given. There is therefore limited legal documentation to rely upon to assess the authorities

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[389] Commonwealth, *Parliamentary Debates*, *Senate*, 21 April 1983, 36 (Attorney-General Gareth Evans).
[390] *Laird v Tatum*, 408 US 1 (1972).
[391] Commonwealth, *Parliamentary Debates*, Senate, 21 April 1983, 24 (Attorney-General Gareth Evans).
[392] National Film and Sound Archive of Australia, 'Newcastle Earthquake, 1989', *NFSA* (Video, 1989) <https://www.nfsa.gov.au/collection/curated/newcastle-earthquake-1989>.
[393] Ibid
[394] *Newcastle Herald* (29 December 1989).
[395] NAA C100, 1312572.
[396] Ibid.
[397] Salu (n 182) 199.

given for these actions. It is likely that if cordon and searches occurred, this was done in reliance of the prerogative to keep the peace from an apprehended disturbance.

13 *2001 MV Tampa*

On 26 August 2001, a Norwegian freighter — the *MV Tampa* — rescued 433 people from a stranded boat in the Indian Ocean. An attempt to land the stranded individuals on Christmas Island was refused by then Prime Minister Howard. Subsequently, armed members of the Special Air Service Regiment (SASR) boarded the ship and the *Tampa* was escorted under armed guard to Nauru.

Concurrent litigation found at first instance that the Australian Government did not have the authority to exclude the stranded individuals, as any residual prerogative had been abridged by the *Migration Act 1958* (Cth).[398] The matter was appealed to the Full Federal Court in *Ruddock v Vadarlis*; by majority, it was held that constitutional executive power was able to support coercive actions.[399] Justice French (as his Honour then was) held:

> In my opinion, the Executive power of the Commonwealth, absent statutory extinguishment or abridgement, would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect such exclusion … The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australia [*sic*] community, from entering.[400]

The majority judgment has been subject to much criticism.[401] Additionally, it is a decision of the Full Court of the Federal Court of Australia, and was not resolved by the High Court. Finally, the case has often been distinguished as dealing with 'non-violent illegal immigration, rather than violent acts of terrorism'.[402] There are, however, significant principles to be taken away from the case law with respect to the power to keep the peace.

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[398] *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452 (North J).
[399] (2001) 110 FCR 491.
[400] Ibid 543.
[401] Zines (n 10); Francine Feld, 'The Tampa Case: Seeking Refuge in Domestic Law' (2002) 8(1) *Australian Journal of Human Rights*; Paula O'Brien & Philip Lynch, 'From dehumanisation to demonization: the MV Tampa and the denial of humanity' (2001) 26(5) *Alternative Law Journal* 215.
[402] Head, 'Calling out the Troops' (n 59) 529.

As has been outlined throughout this thesis, the nationhood power is best categorised as expanding the breadth (but not the depth) of constitutional executive power. To this end, the executive power discussed by French J is best categorised as an element of the royal prerogative rather than nationhood. Although the Court did not refer to *Northumbria*, the assessed breach of the peace that the landing of the *Tampa* may have caused was a political determination. In a similar manner to the legal categorisation of the 1978 Bowral call out, it is more appropriate to categorise the boarding of the *Tampa* by armed members of the ADF as being lawful under the royal prerogative. Expanding from French J's decision as to the centrality of sovereignty, it can be held that maintaining the peace of the realm is arguably more central than excluding potential breaches to it.

14 *2002 CHOGM/2003 POTUS Visit*

A final example of the Commonwealth using ADF assets to protect itself against assessed instances of domestic violence are the air patrols of 2002 and 2003. Operation Guardian II — the operation with respect to the 2002 Commonwealth Heads of Government Meeting (CHOGM) at Coolum — established the framework for the use of force by the Royal Australian Air Force and authorised the shooting down of civilian aircraft by fighter jets in order to prevent a suicidal crash, in the wake of the September 11 attacks in the United States.[403] These security provisions were mirrored when the President of the United States (POTUS) visited Australia in 2003.[404] Although a contingent call out was authorised and enacted under Part IIIAAA, the statutory provisions at the time did not include any ability to authorise lethal force in air operations.

Unlike the 1978 Bowral call out, which occurred ad hoc, these two air operations 'were planned well in advance for a foreseeable threat'.[405] No clear legal basis was provided for the operations. Although the prerogative as to the disposition and arming of the forces would have authorised the take-off of the flights, and while self-defence could authorise the destruction of the aircraft in response to an actual attack, these air operations arguably went beyond the scope of these sources of power. Noting the use of Part IIIAAA, it is likely that the Commonwealth

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[403] Robert Hill, 'Defence Minister Outlines the Contribution of the Australian Defence Force towards Security for the Forthcoming CHOGM Meeting' (Press Release, 22 February 2002).
[404] See, eg, 'RAAF Poised to Shoot down Stray Aircraft', *Sydney Morning Herald* (online, 28 August 2003).
[405] Moore, *Crown and Sword* (n 16) 199. See further Simon Bronitt and Dale Stephens, '"Flying under the Radar": The Use of Lethal Force against Hijacked Aircraft: Recent Australian Developments' (2007) 7(2) *Oxford University Commonwealth Law Journal* 265, 267–9.

made an assessment as to a possible threat of domestic violence and took steps to protect itself.[406] What is clear, then, following the above is that the royal prerogative of keeping the peace of the realm has not fallen into disuse, and therefore the question of desuetude is not relevant.

VI Practical Implications

Both soldiers and civilians hold an obligation to ensure peace is maintained — the duty of the civilian is one of imperfect obligation.[407] For civilians, the use of lethal force has been regulated by the criminal law and developments in the common law (with the relevant defences applicable, including self-defence). An exception to this is that the Crown 'has an interest in all of [its] subjects; and is so far entitled to their services that in case of sudden invasion or formidable insurrection may legally demand and enforce their personal assistance'.[408] For military personnel, this duty has never ceased, even if it is no longer attested to upon enlistment or commissioning with the ADF.[409] This is the core of *Northumbria* — if the duty exists, it is paradoxical that the power does not. Its application in the modern public square of social media follows the principle that the royal prerogative can evolve.[410]

Although the royal prerogative, being recognised by the common law, necessarily holds the ability to evolve to novel situations, the line between evolution and creation may be a fine one. Determining where to draw this line a task for the Court, but no clear test exists to allow for any assessment to be made. Winterton suggested that the relevant test to apply is to look at whether the *expectation* of the citizens has changed. Winterton's example for this test is the questionable prerogative power of the Crown to open and read postal articles, and its potential evolution as a lawful authority to intercept telephone calls. The objectives of both intercepting letters and intercepting phone calls are the same, 'protecting state security and preventing and detecting crime'.[411] Yet Winterton opined at the time that the sender's expectations are

[406] See Department of Defence, Submission No 6 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005* (6 Feb 2006) 3.
[407] *Albert v Lavin* [1982] AC 546.
[408] *Marks v Commonwealth* (1964) 111 CLR 549, 574 (Windeyer J) who believed it was no longer applicable; however, in the same judgment, Kitto and Taylor JJ were of the opinion it was (at 557, 558).
[409] Victor Windeyer, 'Opinion on Certain Questions Concerning the Position of Members of the Defence Force when Called Out to Aid the Civil Power' in Victor Windeyer, *Victor Windeyer's Legacy: Legal and Military Papers*, ed Bruce Debelle (Federation Press, 2019) 211, 215; see *Defence Act 1903* (Cth) sch 1.
[410] See *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 QB 26, 44 (Croom-Johnson LJ), 55 (Purchas LJ), 56, 58–9 (Nourse LJ); George Winterton, 'The Prerogative in Novel Situations' (1983) 99(3) *Law Quarterly Review* 408.
[411] Winterton, 'The Prerogative in Novel Situations' (n 410) 408–9.

different – a letter sent can always be intercepted; a phone call is expected to be private.[412] This example, arguably, is one that is no longer relevant with the clear social expectation that data will be collected and mined from online interactions — hence the popularity of encrypted telecommunication applications. But Winterton's public expectation test is a useful one to apply.

So, can the internal security prerogative evolve to the digital domain? Military deployments are viewed cautiously, but there is a public expectation that military force can, and will, be applied in situations that demand it. For this purpose, a UK court found that the royal prerogative to control and disposition of armed troops clearly applied to the new warfighting domain of air (and thus, the Air Force).[413] Applying Winterton's test (noting that it has not been accepted by any court and indeed is a rather high threshold) it is logical to find that the internal security prerogative can and should be considered to have evolved into keeping the peace of the 'iRealm'. Citizens expect that their government is able to act, counter and neutralise a threat, especially an external threat. The history outlined above demonstrates that there is an expectation that military force can and will be applied, domestically, outside situations of riot and insurrection. Indeed, if British courts have accepted that the war prerogative can evolve to encompass new technology and new methods of warfare,[414] then there seems no reason to deny that evolution to its 'sister prerogative', the internal security prerogative.[415]

Realistically, this position would allow the ADF to conduct a suite of operations such as those outlined in Table 8 below.

Table 8: Potential Counter-IO Operations[416]

Cyber self-help	Non-cyber equivalent
Tracer routes/tracebacks	Public surveillance/security cameras

[412] Ibid.
[413] *Re a Petition of Right* [1915] 3 KB 649, 666 (Warrington LJ).
[414] *De Keyser* (n 45) 565 (Lord Sumner).
[415] *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 QB 26, 58 (Nourse LJ).
[416] The table is a collation of information and terms found within Wyatt Hoffman and Steven Nyikos, 'Governing Private Sector Self-Help in Cyberspace: Analogies from the Physical World' (Paper, Carnegie Endowment for International Peace, December 2018) 9–24.

Responding to hostile IP addresses with logic bombs	Dangerous perimeters/electric fence
Automatic response to cyber probes/honeypots/tarpits	Booby traps
Reasonable damage to hacker hardware	Proactive destruction of a dangerous item
Tracking and collecting stolen data	Theft of property — chasing a criminal into a private third party house
Installing/embedding malware or virus to be remote activated if stolen	Interference with private property
Kill switches[417]	Denial of the right to communicate or move

These operations, if conducted in a non-cyber environment, could violate common law rights to protection from negligence and trespass to the person,[418] the common law right to liberty from false imprisonment and the writ of habeas corpus,[419] and common law rights in relation to private property protected by the tort of trespass and other torts.[420] *Northumbria* makes clear that there exists a lawful authority for these operations.

This is all to say that the breadth and depth of action that this prerogative power could apply to in respect to counter IOs is clearly enormous. It is not to be dismissed as normatively undesirable, but to be actively engaged with and potentially clarified, curtailed or expanded by an Act of Parliament (as discussed in Chapter 5). Subject to the abridgment of the prerogative with respect to domestic violence (due to the statutory framework of Part IIIAAA), obiter in *Northumbria* would suggest that the power to keep the peace is analogous with the powers under the war prerogative. This includes the power to destroy property, to take lethal force and proactive operations, as well as anything in preparation for an apprehended breach of the peace.

VII Conclusion

This chapter has highlighted and justified that there exists a clear non-statutory executive power for the Commonwealth to utilise in order to keep the peace of the realm. Per *Northumbria*, this power is not limited to civilian police forces, but resides within the executive which may utilise anybody within its control to ensure that it keeps its duty. It must be exercised

[417] William D Toronto, 'Fake News and Kill-Switches: The US Government's Fight to Respond to and Prevent Fake News' (2018) 79(1) *Air Force Law Review* 167, 177.
[418] See, eg, *Binsaris v Northern Territory* (2020) 380 ALR 1, 6–7 [25] (Gageler J).
[419] *Plaintiff M68/2015* (n 48) 104–5 [159]–[162] (Gageler J).
[420] See, eg, *Coco v The Queen* (1994) 179 CLR 427, 435–6 (Mason CJ, Brennan, Gaudron and McHugh JJ).

in a manner consistent with federalism but the increasingly national impact of a variety of states of affairs means that a Commonwealth interest (defined in Chapter 3) is likely to be impacted. Yet, as confirmed in Chapter 3, both historical incidents and constitutional analysis has demonstrated that the executive power is not bound nor affected by s 119 of the *Constitution*; the Commonwealth may maintain itself, and keep the peace of the realm, without state request or consent.

This chapter then discussed the breadth, and depth, of this prerogative power. It noted that the royal prerogative has been abridged by Part IIIAAA in respect of responses to domestic violence; but argued that this has not excluded the prerogative in respect of matters below the threshold of domestic violence. This is consistent with s 69 of the *Defence Regulation 2016* (Cth) which expressly provides conditions for the exercise of non-statutory Commonwealth executive power outside of Part IIIAAA.

This chapter then turned to the principle of desuetude, and highlighted through fourteen historical examples the consistent use of the ADF to keep the peace since Federation. This power is not historically controversial — since 1066, the peace of the realm has grown in both importance and jurisdiction as the Crown has centralised authority. This section confirmed that *Northumbria* not only applies as a matter of constitutional law, but also has been relied upon consistently as an exercise of constitutional executive power.

This lawful authority could be relied upon for any active denial operations, below the threshold of domestic violence, in order to impose costs on IOs that are not resolved through passive denial operations. It has been the authority for surveillance, restriction on civilian movements, and breaking industrial actions. It can just as readily be applied to cyberspace operations to keep the peace of the iRealm.

This chapter thus concludes the discussion of possible denial operations, undertaken to enforce a deterrence framework against IOs. It has highlighted that such operations can rely upon constitutional executive power, adding credibility to any deterrence operations that are signalled by the Australian Government. Now this thesis will turn in Part III to legislative reform recommendations to fix the gaps identified up to this point.

PART III: CONCLUSION

CHAPTER 5: CONCLUSION

I PURPOSE AND SCOPE

This chapter will provide a conclusion and outline recommended law reforms to address the issues raised within the thesis. Section II addresses whether the royal prerogative of keeping the peace of the realm should be abridged by legislation. It is clear from Part II of this thesis that there is confusion over the nature and ambit of the non-statutory executive power for the ADF to respond to instances below the threshold of domestic violence. To that end, there is potentially a benefit of a statute that clearly outlines the roles, responsibilities, rights and defences for ADF troops operating domestically. So too, however, is there benefit in retaining the flexibility currently offered.

Section II proposes three separate models for legislation. This is a particularly pressing matter, noting the increasing reliance upon the ADF for non-traditional military roles. It is an area complicated, however, by the need to balance legal limitations and popular conventions. As Clarke Jones notes: 'few tasks are more vexing than establishing appropriate roles for the military in domestic security duties'.[1] Model One canvasses the viability of relying upon state and territory legislation with a corresponding Commonwealth enabling provision. Model Two looks to expand an immunity found within the *Defence Act* to operations below the threshold of disasters and emergencies. Model Three addresses the logical option of full codification of ADF operations.

Section III then addresses the recommended model, and discusses the operational and legal viability of retaining the flexibility of non-statutory executive power. It looks at the lessons from the United Kingdom, and discussions around the separation of powers which accept that executive freedom of action is necessary. Section III then turns to the concept of 'legislative mission command' and advocates that, if codification is to occur, it be underpinned by this theory.

Section IV then concludes the chapter and thesis, and confirms the key issues of the thesis.

[1] Clarke Jones, 'Military as Law Enforcers: Coming to Terms with the New Security Environment' (Working Paper No 72, Australian Defence Studies Centre, 2002) 16.

II To Legislate, or Not to Legislate?

The lack of clarity around the nature of the power discussed in Part II raises the question: should legislation be introduced? Legislation could provide clarity to the rights and obligations of ADF members operating domestically, as well as potentially codifying thresholds for the exercise by the ADF of coercive powers requiring statutory authority. Paradoxically, codification could also create more rigid legal frameworks for ADF members to respond to increasingly fluid military threats.

As noted in Chapter 1, reliance upon non-statutory executive power is not popular. French CJ characterised executive power as both nurtured and bound in anxiety — 'anxiety which *fuels* expansive approaches to its content and anxiety *about* expansive approaches to its content'.[2] The anxiety is compounded when relying upon the royal prerogative, a power considered by some 'to be an obscure relic of an undemocratic past, a potential threat to civil liberties',[3] and generally out of step with a country dedicated to the rule of law. A specific argument then with respect to domestic operations is that any coercive powers should be clearly defined and regulated by statute.[4] A primary criticism is that prerogative power by its nature is undefined. Some argue 'in the bare superficial theory of free institutions … every power in a popular government ought to be known'.[5] Yet as this thesis demonstrated, much of the day-to-day work of government is conducted using some form of prerogative power.[6] Executive power has evolved as a necessary tool for governments to respond to situations of uncertainty.

The 2009 Ministry of Justice review for the British Government found, 'the *Northumbria* case goes to the heart of the issue about the respective powers of police forces and the Government and how they should be exercised'.[7] The report continued that attempting to define the prerogative to keep the peace would be simplistic, as well as counterproductive, for the government 'may have the power to keep the peace, but further it has the duty to do so'.[8] The

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[2] Robert French, 'Executive Power in Australia: Nurtured and Bound in Anxiety' (2018) 43(2) *University of Western Australia Law Review* 16, 16.
[3] Benjamin B Saunders, 'Democracy, Liberty and the Prerogative: The Displacement of Inherent Executive Power by Statute' (2013) 41 *Federal Law Review* 363, 363. See also Keith Syrett, 'Prerogative Powers: New Labour's Forgotten Constitutional Reform?' (1998) 13(1) *Denning Law Journal* 111; Thomas Poole, 'United Kingdom: The Royal Prerogative' (2010) 8(1) *International Journal of Constitutional Law* 146, 147.
[4] Michael Head, 'Calling Out The Troops — Disturbing Trends and Unanswered Questions' (2005) 28(2) *UNSW Law Journal* 528. See further Leslie Zines 'The Inherent Executive Power of the Commonwealth' (2005) 16(4) *Public Law Review* 279.
[5] Walter Bagehot, *The English Constitution*, ed Paul Smith (Cambridge University Press, 2001) 76.
[6] Noel Cox, 'The Importance of the Royal Prerogative in Contemporary Governance' (2009) 18(3) *Commonwealth Lawyer* 25; Noel Cox, 'The Royal Prerogative in the Realms' (2007) 33(4) *Commonwealth Law Bulletin* 611.
[7] Ministry of Justice, *Review of the Executive Royal Prerogative Powers* (Final Report, October 2009) [101].
[8] Ibid [104].

royal prerogative provides flexibility for government action and, as the report concluded, it would be undesirable to abolish the flexible power that allows the state to 'combat crime and violent disorder and ensure that law and order are maintained'.[9]

In *Burmah Oil Co v Lord Advocate*, Lord Reid suggested that one of the rationales for codification is that 'it would be impracticable to conduct a modern war by use of the prerogative alone'.[10] Similarly, Viscount Radcliffe commented: 'To those who had to inspect the rusty weapons of the war prerogative in the summer of 1914 it must or should have appeared that some of them had become permanently unreliable.'[11]

It is here that legislation can, perhaps, be justified. Although the fourteen instances outlined in Chapter 4 demonstrate that the 'weapons' of the royal prerogative have not been allowed to rust, outlining these instances required considerable research. They are not readily apparent in conventional Australian history. For this reason, Sir Robert Marks (reviewing the state of Australia's counter-terrorism responses after the 1978 Bowral call out) remarked: 'I am sorry to have to make it clear that, at the best, I am being asked to cobble an ill-fitting 19th century boot'.[12] As the research in this thesis has demonstrated, the boot was not as ill-fitting as Marks feared, nor confined to the 19th century. It was well and truly worn from use in the 20th century, as it remains in the 21st.

Yet the implication from Sir Robert's statement (of the need for a custom-made boot) has seemed to have shaped Australian responses to internal security as the power extends to 'fit' the very emergency being dealt with (particularly Part IIIAAA). It is in keeping with Australian practice: it is significant that during the First and Second World Wars, wide-ranging and expansive legislation was specifically enacted to authorise compulsory and coercive measures by the ADF domestically.[13] Legislation also contained specific measures relating to enemy aliens within Australia, including authorising preventative detention.[14] The perceived need for legislative reform was central to Commonwealth inter-departmental cables during and after the

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[9] Ibid [106].
[10] [1965] AC 75, 101.
[11] Ibid 122, cited with approval in *Marks v Commonwealth* (1964) 111 CLR 549, 574 (Windeyer J).
[12] Sir Robert Mark*, Police Resources in the Commonwealth Area: Report to the Minister for Administrative Services* (6 April 1979) 2.
[13] See, eg, *National Security Act 1939* (Cth); *National Security (General) Regulations 1939* (Cth); *National Security (Emergency Control) Act 1939* (Cth); *National Security (Emergency Control) Regulations 1941* (Cth); *War Precautions Act 1914* (Cth); *War Precautions Regulations 1914* (Cth). See Samuel White, 'Military Intervention in Australian Industrial Action' (2020) 31(3) *Public Law Review* 423 for a discussion on s 63(1)(f).
[14] *War Precautions Regulations 1914* (Cth) reg 55(1); *National Security (General) Regulations 1939* (Cth) reg 26(1)(c); *National Security (Aliens Control) Regulations 1940–1943* (Cth). See generally *Lloyd v Wallach* (1915) 20 CLR 299; *Little v Commonwealth* (1947) 75 CLR 94.

Papua New Guinea call out in 1970;[15] after military exercises in the mid-1980s,[16] and to fix a perceived gap in respect of counter-terrorism operations in the 1980s.[17]

At the very least, this legislation highlights that the Parliament previously decided that it would be preferable to regulate these matters by statute, rather than relying on any non-statutory executive power. The proscriptive nature of Part IIIAAA, in comparison to the British approaches, demonstrate a particular hesitancy regarding the potentially unclear thresholds and unclear powers of ADF members acting under the prerogative.

It may be asked whether comparative jurisdictions support codification. In *Burmah Oil Co v Lord Advocate*,[18] Lord Reid noted that 'no war which has put this country in real peril has been waged in modern times without statutory powers of an emergency character'.[19] In Canada, the National Security and Intelligence Committee of Parliamentarians (NSICOP) argued that the prerogative is no longer an adequate basis for defence intelligence, and needed to be placed on a statutory footing.[20] NSICOP offered four rationales for its recommendation, which perhaps best summarise the arguments for codification in Australia:

i. No like organisations operate under non-statutory executive power.
ii. The prerogative is unclear in its application domestically, which is unacceptable for military effectiveness.
iii. The prerogative is difficult to review.
iv. The prerogative lacks democratic legitimacy.[21]

The third and fourth critiques of the prerogative are, with respect, unfounded. As this thesis has demonstrated, legislation does not correspond to ease in review — one need only to simply look at Part IIIAAA, discussed in Chapter 4. Conversely an exercise of the royal prerogative is no longer, as James I remarked, a subject which is inappropriate 'for the tongue of a Lawyer'.[22]

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[15] NAA 936/3/21 Part 1.
[16] See Geoffrey Talbot, evidence to Sub-Committee on Defence Matters of the Joint Committee on Foreign Affairs and Defence as reported in *The Australian* (Sydney, 5 June 1984). See further NAA A1209 2006/00077088.
[17] AWM227/646.
[18] [1965] AC 75.
[19] Ibid [101].
[20] As reflected and cited in Phillippe Lagasse, 'Defence Intelligence and the Crown Prerogative' (2021) 64(4) *Canadian Public Administration* 539, 540.
[21] Ibid, 540.
[22] See Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 379.

The common law has developed to provide authority for judicial oversight of an exercise of the royal prerogative.[23]

Further, the exercise of prerogative power has been subject to coarse and delicate checks and balances in the common law – in recognition of its democractic legitimacy.[24] Constitutionally, actions of 'officers of the Commonwealth' (which includes any Minister exercising such prerogative power) to be justiciable in the High Court.[25] It is erroneous to hold that the prerogative lacks democratic legitimacy — it is a constitutionally enshrined power, subject to statutory abridgement, and one that is recognised in the separation of powers.[26] Michael Eburn, an outspoken advocate for codification, notes:

> In the absence of counter-disaster legislation there is no process for a formal declaration of disaster or emergency at the national level, and no clear authorisation to waive the application of the 'normal' law or to take extraordinary action that is warranted by the emergency. The Commonwealth may be forced to rely on the historical prerogative power of the Crown, now encompassed in the phrase 'the Executive power of the Commonwealth' and provided for in section 61 of the Australian Constitution.[27]

This seems to suggest that an exercise of the royal prerogative is somehow outside the bounds of accountability. It is not.[28]

NSICOP's first two contentions, however, are relevant for this chapter. Specifically, Canadian Armed Forces had doubts about the legality of intelligence collection on national security threats who were Canadian citizens.[29] The lack of clarity in powers, thresholds and immunities is perhaps the strongest reason for codification (or clarification) by statute. The need for clarification in at least some of these areas is the resulting conclusion of this thesis, and the opinion of the author. Reasonable minds will differ reasonably on this matter. Notwithstanding the strength of the royal prerogative, there is merit both for the Australian community and ADF personnel for a statutory framework to be established for countering IOs.

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[23] See *Re Minister of Arts, Heritage and the Environment v Peko Wallsend* (1987) 15 FCR 274; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

[24] Bagehot (n 5) 88. A clear historical example of the use of coarse checks and balances was the impeachment, and execution for treason, of Thomas Wentworth, 1st Earl of Strafford, in 1641 for supporting Charles I (as the Crown, which could do no wrong, could not commit treason itself). On the topic and consequential shift in jurisprudence, see Geoffrey Robertson, *The Tyrannicide Brief* (Chatto & Windus, 2005) 54–7.

[25] *Australian Constitution* s 75(v). Samuel White and Andrew Butler, 'Reviewing a Decision to Call Out the Troops' (2020) 99 *AIAL Forum* 58.

[26] Samuel White, *Keeping the Peace of the Realm* (LexisNexis, 2021); Noel Cox, *The Royal Prerogative and Constitutional Law: A Search for the Quintessence of Executive Power* (Routledge, 2020).

[27] Michael Eburn, *Emergency Law* (Federation Press, 4th ed, 2013) 149.

[28] *Australian Constitution* s 75(v).

[29] Lagasse (n 20) 540, 541 citing the NSICOP 2019 Report, [114]-[116].

A key question is how far a statutory framework should go. Should it codify powers, thresholds and immunities? Or should it preserve some elements of the flexibility of the royal prerogative by not codifying powers, but instead provide for immunities for conduct undertaken in the exercise of the prerogative powers? Statute can provide clear, articulated powers that can expand and clarify constitutional executive power — such as the extent of the prerogative of keeping the peace of the realm recognised in *Northumbria* case.[30] Undertaking such a codification of powers could be a force multiplier for ADF operations,[31] and promote public and private confidence (as well as legal credibility). Minimising uncertainty around legal authorities also provide clear and concise training aids for the ADF. It was for legal clarity that NSICOP recommended codification; in a 2019 special report it argued: 'when encountering intelligence about Canadians who may be taking part in hostilities, CAF should have no doubts concerning its authority'.[32]

Lessons, however, can be learnt from pre-existing statute. Particular lessons can be learnt from Part IIIAAA; an intricate framework created with extensive provisions and multiple thresholds which has never been used (outside of contingencies) and has nonetheless been subject to a number of substantial revisions. Below three models of a statutory framework are offered, which will be considered through lenses of practicality, simplicity and flexibility. These three alternative models will be outlined before a recommended model is chosen and justified.

A *Model One: Reliance on State or Territory Legislation*

The first proposed model would rely purely on state or territory legislation, with an enabling provision in the *Defence Act 1903* (Cth). A potential model provision (based upon the existing s 123AA) might read:

> **Section 123AAA Support to States or Territories**
>
> (1) A protected person (see subsection (3)) may rely upon State or Territory authorities, in good faith, in the performance or purported performance of the protected person's duties, if:
>
> > (a) the duties are in respect of the provision of assistance, by or on behalf of the ADF or the Department, to:

---

[30] *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 QB 26.
[31] Simon Bronitt and Dale Stephens, '"Flying Under the Radar". The Use of Lethal Force Against Hijacked Aircraft: Recent Australian Developments' (2007) 7(2) *Oxford University Commonwealth Law Journal* 265, 266.
[32] Lagasse (n 20) 540, 541 citing the NSICOP 2019 Report, [114]-[116]

(i) the Commonwealth or a State or Territory, or a Commonwealth, State or Territory authority or agency; or

(ii) members of the community; and

(b) the assistance is provided at the direction of the Chief of the Defence Force Minister under subsection (2).

(2) The CDF may, in writing, direct the provision of assistance in relation to a natural disaster or other emergency if satisfied of either or both of the following:

(a) the nature or scale of the incident makes it necessary, for the benefit of the nation, for the Commonwealth, through use of the ADF's or Department's special capabilities or available resources, to provide the assistance;

(b) the assistance is necessary for the protection of Commonwealth agencies, Commonwealth personnel or Commonwealth property.

(3) Each of the following is a ***protected person***:

(a) a member of the Defence Force;

(b) an APS employee in the Department;

(c) a member of the naval, military or air force of a foreign country, or a member of a foreign police force (however described).

The requirement for CDF approval allows an assessment to be made of whether it would be appropriate, in the course of each domestic operation, for specific members of the defence workforce to be permitted to exercise the relevant powers. This is a necessary check and balance, and ensures that command is retained by ADF members.

The provision would allow the difficulties of *Bond v Commonwealth*[33] (that being, state legislative authority without corresponding Commonwealth legislative authorisation is invalid) to be surmounted. Accordingly, individual jurisdictions consistent with federalism could provide for what capacity they wish the Commonwealth to assist with.[34] One defining feature of Australia's federal construct, as raised in Part II, is that the responsibility for defence is centralised and resides with the Commonwealth.[35] Model One avoids the issue of determining the content of interfering powers in Commonwealth legislation. It further mirrors the

[33] (2000) 201 CLR 213. The Court held that a Commonwealth officer may only perform the functions under state law if there is a clear authority under Commonwealth law.
[34] *Therapeutic Goods Act 1989* (Cth) s 6AAA(1).
[35] White, *Keeping the Peace* (n 26) 44.

recommendations of Justice Robert Hope after his Protective Security Review, and could include provisions that allow for special constable delegations.[36] In many ways, it provides flexibility through not strictly delineating lines of responsibility and related capabilities which may not be matched to a corresponding threat. This avoids the pitfalls of federalism, and divides that could be exploited through grey zone operations.

As was made clear in this thesis, although the United Kingdom Parliament has unlimited legislative competence, the Commonwealth of Australia has defined subjects of legislative power. As the Royal Commission into National Natural Disaster Arrangements highlighted, confusion continues to exist between Commonwealth and state government stakeholders in relation to the role, functions, capabilities and constraints of the ADF in DACC and DFACA roles.[37] Model One, from a practical perspective, provides joint powers for both state and Commonwealth officials that may facilitate more effective coordination and cooperation.[38] It would require constant monitoring by ADF legal officers, for the content of relevant powers would be likely to differ between jurisdictions over time.

Moreover, Model One would surmount the issues raised in Chapter 3 regarding what is a Commonwealth interest, and the nature and effect of s 119 of the *Constitution* with respect to federal intervention. Every request by a state would give consent for federal intervention, and by allowing states and territories to retain control over the powers that are conferred, this model would avoid any issues regarding the enumerated powers doctrine (being that public order is, per se, a state issue).[39] It would recognise that, when exercising these powers, members of the defence workforce are generally acting at the request of state and territory authorities, and the purpose of providing this assistance is to supplement the capabilities and resources of the states and territories. It is consistent with the emphasis in the *2020 Defence Strategic Update* and *Defence Transformation Strategy* on increasing defence's capacity to work with state and territory agencies.[40]

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[36] *Public Health and Wellbeing Act 2008* (Vic) s 250 (appointment of additional authorised officers during COVID-19 pandemic); *Police Service Administration Act 1990* (Qld) ss 5.16, 3.2 (appointment of special constables); *Disaster Management Act 2003* (Qld) s 75(1) (authorisation of a class of persons with appropriate expertise or experience). See, eg, *Terrorism (Community Protection) Act 2003* (Vic) s 21K(1); *Crimes Act 1958* (Vic) ss 458(1), 462A; *Public Health and Wellbeing Act 2008* (Vic) ss 175(2), 192, 202(1); *Victorian State Emergency Service Act 2005* (Vic) s 32AA(b); *Police Powers and Responsibilities Act 2000* (Qld) ss 612, 614, 615; *Criminal Code 1899* (Qld) ss 254, 260, 261, 266, 546, 547A, 549, 550.
[37] See *Royal Commission into National Natural Disaster Arrangements* (Report, 28 October 2020) 186; *Royal Commission into National Natural Disaster Arrangements* (Interim Observations, 31 August 2020) 11–12.
[38] 'Working with Police' (2019) 56 *Smart Soldier*, 29 – 32.
[39] *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644.
[40] Department of Defence, *2020 Defence Strategic Update* (Report, 2020) [2.27]; Department of Defence, *Lead the Way: Defence Transformation Strategy 2020* (Report, 2020) 56.

There are, of course, negatives to such a fragmented approach. First, there could be wild differences between state and territory legal frameworks that only further complicate domestic operations. Second, and related to the first, a state or territory may withhold authority entirely – a not unlikely outcome given the experience of responses to domestic violence since federation. Third, model One also has flaws in its application to evolving threats: it might be that law reform is difficult to achieve, and will result in certain jurisdictions retaining archaic legislation. An example of this is Tasmania's defence of superior orders, which applies only to instances of individuals under military law suppressing a riot.[41] This is not found in any other jurisdiction, and only serves to complicate domestic operations.[42]

B *Model Two: Commonwealth Immunity*

The second model would still be contained in the *Defence Act*, and would involve the expansion of two existing immunity provisions — s 123 and s 123AA. The latter relates to instances of 'emergencies', which is a distinct term from 'domestic violence'.

The term 'emergency' is not defined in s 123AA, and this was a deliberate choice in order to not 'limit the circumstances in which a declaration can be made to certain types or kinds of defined emergencies'.[43] In doing so, the Bill Digest made references to the desired flexibility of the royal prerogative — and specifically the prerogative power recognised in *Northumbria.*[44] The term is intended to be read with 'its natural and ordinary meaning',[45] which in turn, with reference to the *Macquarie Dictionary*, relates to 'an unforeseen occurrence; a sudden and urgent occasion for action'.[46]

Importantly, the term is not intended to 'include predictable, ongoing or recurring events such as drought or the effect of long term coastal erosion'.[47] Nor too is it intended to be *limited* to:

> a single incident or disaster. It is intended that multiple concurrent or successive incidents or disasters, or incidents and disasters that occur in a particular set of circumstances, may together constitute an emergency. For example, the concept of an emergency is intended to encompass a situation where a tropical cyclone causes severe

[41] *Criminal Code 1924* (Tas) s 38.
[42] See Samuel White, 'A Shield for the Tip of the Spear' (2021) 49(2) *Federal Law Review* 210.
[43] Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth), 13 [28].
[44] Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020 (Cth) (Digest No 15) 23.
[45] Ibid.
[46] Cited in ibid.
[47] Ibid 13 [29].

damage to property and infrastructure in a region, followed by flooding that results in the failure of essential services such as sanitation and water supply.[48]

By implication, a single incident or disaster still amounts to an emergency. Clearly this is a high threshold. The proposed immunity relating to exercises of the prerogative of keeping the peace of the realm could therefore read:

> 123AAA **Immunity in relation to domestic operations**
>
> (1) A protected person (see subsection (3)) is not subject to any liability (whether civil or criminal) in respect of anything the protected person does or omits to do, in good faith, in the performance or purported performance of the protected person's duties, if:
>
> (a) the duties are in respect of the provision of assistance, by or on behalf of the ADF or the Department, to:
>
> (i) the Commonwealth or a State or Territory, or a Commonwealth, State or Territory authority or agency; or
>
> (ii) members of the community; or
>
> (b) the assistance is for the purpose of enforcing a law of the Commonwealth or is incidental to maintaining the *Constitution,* and
>
> (2) The assistance is provided at the direction of the Minister.
>
> (3) A protected person is any member of the Australian Defence Force, or any person(s) appointed in writing by the Minister.
>
> (4) Any direction by the Minister must be tabled in Parliament within one year, subject to redaction of any part(s) required by national security.

The proposed Model Two seeks to capture the concept of responsible government through requiring a direction of the Minister. As discussed in Part II, this is a critical aspect of Australia's constitutional framework and is a lens through which all actions must be taken.[49] It moreover captures the full ambit of constitutional executive power.

The use of Commonwealth legislation to provide civil and criminal immunity in domestic operations in not without critique. The Law Council of Australia made rather pointed comments with respect to s 123AA. Whilst accepting the balanced nature of the immunity applying when in good faith,[50] and the appropriate check and balance of ministerial

[48] Ibid [29]–[30].
[49] Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138.
[50] *Submission On Amendments to the Defence Act 1903 (Cth)* (15 October 2020), 1 [6].

responsibility,[51] the Council suggested certain improvements. These included ensuring that the immunity applied to individuals but not the Commonwealth itself, and that there be public annual reporting on the issuing of directions.[52] Model Two includes both of these recommended improvements.

C *Model Three:* Land Powers Act 2023 *(Cth)*

The third model advocates a separate statutory regime covering the field of domestic operations. Model Three would most appropriately be drafted with the principle of mission command in mind. Mission command is a military doctrinal concept that aims to place trust within junior officers and non-commissioned officers to achieve the intent of their superior officer's orders.[53] It grants junior officers the choice of *means* in order to reach a specified *end.*[54] This is in juxtaposition to the highly proscriptive nature of Part IIIAAA.

Accordingly, Model Three would replicate the analogous statutory regime of the *Maritime Powers Act 2013* (Cth) (MPA) which applies in the offshore area. The MPA was introduced to streamline and provide clarity to a suite of legislative authorities in the offshore area, and critically included a 'pivot provision'[55] which allowed for an authorised member to shift legislative authorities without having to disembark and re-embark a vessel (as they historically had to).[56] The MPA provides lawful authority for authorised members (including ADF members) to collect evidence,[57] and investigate suspected contraventions of an Australian law.[58] An Australian law includes both Commonwealth and state law, thereby reducing the exploitable gap of federalism.

Whilst the MPA was found to have displaced any non-statutory constitutional executive power due to its all-encompassing nature,[59] it also provided clarity to a questionable prerogative power to exclude aliens from Australia in times of peace.[60] It moreover includes a provision

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[51] Ibid 2 [6]
[52] Ibid 2 [12], [16].
[53] The doctrine has its critiques, including a lack of ability to command (and also potentially exposure to criminal command responsibility liability for failing to properly oversee subordinate actions — a point carefully avoided in the Brereton report). See Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* (Final Report, November 2020).
[54] For the concept of legislative mission command, see John Logan, 'Mission Command — Some Additional Thoughts on its Relevance to Policing and the Rule of Law' (Speech, Queensland Police Headquarters, Operational Command Training Continuum Course, 15 Feburary 2018).
[55] *Maritime Powers Act 2013* (Cth), s 32 (MPA).
[56] Michael W. Duckett White, *Australian Offshore Laws* (Federation Press, 2017, 1st edition) 38.
[57] MPA s 20.
[58] MPA s 17(1).
[59] *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514.
[60] See judgment of Black CJ in *Ruddock v Vadarlis* (2001) 110 FCR 491; obiter in *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514.

that provides immunity from civil and criminal convictions.[61] The proposed *Land Powers Act 2023* (Cth) would include all instances of domestic deployments, including natural disaster relief and those countering domestic violence (Part IIIAAA). It could contain a pivot provision for Commonwealth laws, which in combination with a power to collect evidence would allow the ADF a wider ability to work in a joint environment to deter IOs. It would moreover abridge constitutional executive power.

III Recommended Approach

Notwithstanding apparent historic desires for all-encompassing legislation, this thesis recommends that Model Two (Commonwealth immunity) be adopted. Model Two does not directly abridge constitutional executive power. This is particularly important, for the royal prerogative provides flexibility that is arguably necessary in a quickly evolving domain. This is particularly so with the power to keep the peace of the realm. As Chapter 4 demonstrated, keeping the peace is a concept that has evolved over time to reflect social expectations.[62] It now encapsulates an ideal state of affairs of domestic tranquillity,[63] a responsibility enshrined in the *Australian Constitution* to maintain and enforce the laws of the Commonwealth.[64] By providing a statutory immunity, without abridging the statutory authority as occurred with the MPA,[65] the ADF can maintain a credible and flexible legal authority capable of responding to a wide array of circumstances as well as train to operate within the scope of legislative immunities.

There would undeniably be benefits in the establishment of a comprehensive legislative framework to underpin the internal deployment of the ADF.[66] To hold that ADF members

[61] MPA s 107 states: 'None of the following is liable to an action, suit or proceeding for or in relation to an act done, or omitted to be done, in good faith in the exercise or performance, or the purported exercise or performance, of a power or function under this Act: (a) an authorising officer; (b) a maritime officer; (c) a person assisting; (d) any other person acting under the direction or authority of a maritime officer.' The *Fisheries Management Act 1991* (Cth) s 90 states: 'An officer or a person assisting an officer in the exercise of powers under this Act or the regulations, is not liable to an action, suit or proceeding for or in respect of anything done in good faith or omitted to be done in good faith in the exercise or purported exercise of any power conferred by this Act or the regulations.' ADF members can be appointed authorised officers under both regimes: see *Maritime Powers Act 2013* (Cth) s 104(1) and *Fisheries Management Act 1991* (Cth) ss 4, 83.
[62] Frederick Pollock, 'The King's Peace in the Middle Ages' (1899) 13(3) *Harvard Law Review* 117, 184–5.
[63] Gerald R Williams, 'The King's Peace: Riot Law in its Historical Context' [1971] 2 *Utah Law Review* 240, 240.
[64] Section 61.
[65] See *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514.
[66] By way of example, civilian emergency service agencies possess a wide range of powers and legal protections, as articulated in state and territory legislation, to assist in the completion of their duties. In contrast, ADF members, when providing DACC assistance, do not possess powers beyond those of an ordinary citizen. See David Letts, 'Sending in the Military? First Let's Get Some Legal Questions Straightened Out', *The Canberra Times* (Opinion, online, 7 January 2020) <https://www.canberratimes.com.au/story/6570161/sending-in-the-military-first-lets-get-some-legal-issues-straightened-out/>.

operating domestically are ‘spontaneous volunteers’[67] is legally distorted.[68] ADF members operating domestically may be ordered to use their citizen powers — for example to drive a car[69] — but they do so under the obligation to follow orders. By taking what has colloquially been called ‘the king’s hard bargain’, ADF members agree to serve (at least at common law) at the pleasure of the Crown.[70]

The ADF should be expected to act in accordance with the direction of the civilian government to assist in a civil emergency. It is important to remember that it is a fundamental principle of Australian democracy that the military is subordinate to the civilian government.[71] It does what the civilian government tells it to do.[72] As noted in Chapter 1, it would be a highly exceptional situation, unknown in Australia since the Rum Rebellion,[73] where the Chief of the Defence Force or the ADF at large refused to follow the lawful direction of the government. Even if the source of authority in the executive power is unclear (notwithstanding Part II), the ADF is highly unlikely to refuse the direction of the government.

Codification, it is true, could bring clarity. It could also *extend* the depth of action taken under the prerogative. It is unclear just how far the prerogative powers can evolve from the medieval battlefield where they were forged, to the modern battlespace where they are wielded.[74] It is important and relevant that prerogatives in emergencies short of war have not been authoritatively established[75] and have been described as ‘remarkably abstruse’.[76] There is no definitive list of prerogatives, despite attempts to produce one,[77] and any discussion must necessarily delineate between prerogative powers that theoretically exist and those that are used in practice as Bagehot warned.[78] Nonetheless, as federal power expands both in scope and

[67] *Royal Commission into National Natural Disaster Arrangements* (n 38) 7.29.
[68] Peter Rowe, ‘The Soldier as a Citizen in Uniform: A Reappraisal’ (2007) 7 *New Zealand Armed Forces Law Review* 1, 14.
[69] (1925) 36 CLR 170.
[70] Samuel White, ‘Taking the King’s Hard Bargain’ (2022) 96 *Australian Law Journal* 666.
[71] Cameron Moore & Jo Brick, ‘Australian civil-military relations: distinct cultural and constitutional foundations’ (2022) 4(2) *Australian Journal of Defence and Strategic Studies* 217 – 234.
[72] See Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (ANU Press, 2017) 91–9.
[73] See ‘Johnston, Lieutenant-Colonel George’ in Peter Dennis et al, *The Oxford Companion to Australian Military History* (Oxford University Press, 2nd ed, 2008) 294.
[74] *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75.
[75] Zines (n 4) 287; Gerard Carney, ‘A Comment on How the Implied Freedom of Political Communication Restricts the Non-Statutory Executive Power’ (2018) 43(2) *University of Western Australia Law Review* 255.
[76] Stanley De Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin, 7th ed, 1994) 566.
[77] See Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (Garland, 1978). The closest that can be found is Ministry of Justice (n 8) 26–7, which recognises a prerogative of internal security.
[78] Walter Bagehot, *The English Constitution* (Chapman & Hall, 2nd ed, 1873) 75.

practice, Model Two provides the most viable and flexible option for responding to rapidly-evolving, non-conventional threats, such as IOs.

Retaining constitutional executive power, informed and expanded with respect to immunities, is actually in the spirit of the separation of powers. Ministerial responsibility allows for oversight in the exercise of executive power, and the exercise of the power is subject to judicial review. It does not occur in a so-called black hole of accountability.[79] The doctrine of separation of powers requires that the executive respond to issues.[80]

Discussion of those 'medieval chains' or 'invisible inks' of the royal prerogative that use them to demonstrate its inconsistency with modern values fail to note the royal prerogative exists because it meets the recognised need for government responses to unforeseen circumstances. One such example is a global pandemic, which left the many governments (including that of the Commonwealth of Australia) unable to sit and legislate. Niccolo Machiavelli foresaw such instances occurring nearly 500 years ago. In advising *The Prince*, Machiavelli opined:

> I hold it to be true that *Fortune* is the arbiter of one half of our actions, but that she still leaves us to direct the other half, or perhaps a little less … So it happens with *Fortune*, who shows her power where valour has not prepared to resist her, and thither she turns her forces where she knows that barriers and defences have not been raised to constrain her.[81]

The flexibility of the royal prerogative, and wider constitutional executive power, under Model Two would be aided by revoking Part IIIAAA. As covered in Chapter 4, the removal of this statutory scheme would see the re-emergence of the royal prerogative.[82] This occurred with the historical prerogative power to take ships in wartime which, when the statute was repealed, allowed ships to be requisitioned for the Falklands War;[83] or the revitalisation of the command prerogative power to move individual soldiers around the country without a statement of reasons.[84]

The statutory regime that regulates the calling out of the ADF to respond to domestic violence is concurrently too technical, too convoluted and too broad, whilst not enabling a response to modern threats. Part IIIAAA clearly demonstrates that codification does not always bring

[79] Margit Cohn, 'Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive' (2005) 25(1) *Oxford Journal of Legal Studies* 97.
[80] Cox, *The Royal Prerogative* (n 27) 206.
[81] Niccolo Machiavelli, *The Prince*, tr WK Marriott (Penguin Publishing, 1952).
[82] White, *Keeping the Peace* (n 27) 81 - 95; Christopher Vincenzi, *Crown, Powers, Subjects and Citizens* (Pinter, 1998) 25; *Martincevic v Commonwealth* (2007) 164 FCR 45.
[83] Vincenzi (n 86) 25.
[84] *Martincevic v Commonwealth* (2007) 164 FCR 45.

clarity, contrary to the submissions of NSICOP. Part IIIAAA, since its enactment in 2000, has been subject to sweeping and major reforms in 2006, and again in 2018. This was done in a bid to 'streamline the legal procedures for call out of the ADF and to enhance the ability of the ADF to protect states, self-governing territories, and Commonwealth interests, onshore and offshore, against domestic violence, including terrorism'.[85] To date only contingent call outs have occurred, raising the question of whether the legislation provides the intended operational flexibility. The 2002 and 2003 air patrols, outside of statute (and discussed in Chapter 4), would highlight that the royal prerogative is relied upon when fortune requires.

Separately, the constitutionally opaque threshold of domestic violence does nothing to add to the credibility of the Australian Government's deterrence. The interoperation of the statute with other legislation is unclear. If Model One were adopted, powers within each state and territory would need to be identified and trained for by ADF personnel, constantly, in order to be operationally effective across the Commonwealth. Such interoperations have been noted historically to be difficult even under Commonwealth legislation.[86] Model Two provides a clear, uniform legislative authority for the ADF to conduct counter-IO operations, and adds to the credibility of the Australian Government's deterrence stance.

Finally, Model Two itself does not provide lawful authority for the ADF to operate. It merely provides an immunity. This is important when it comes to retaining constitutional executive power. Unlike Model Three, or the MPA, there is a risk in relying upon preserving clauses within legislation. As Chapter 4 noted with respect to *CPCF*, these provisions are 'better understood as preserving such other … executive power as may be exercised comfortably' with the remaining provisions.[87] Any legislation must be drafted in a manner that demonstrates a clear and articulated intent by Parliament to preserve the prerogative and not cover the field. Model Two achieves this.

IV Conclusion

This thesis has addressed how the oldest creature of the common law — the royal prerogative — can be applied to the most modern military threat. It specifically addressed the threat of IOs. Although the use of information as a weapon, environment and domain is not unique to the 21st century, the economic model of surveillance capitalism is. As Chapter 2 outlined, the ability to

[85] Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth) 2; as corroborated in the Second Reading Speech for the Bill: Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2018, 674 (Attorney-General Christian Porter).
[86] 'Working with Police' (2019) 56 *Smart Soldier*, 29 – 32.
[87] *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 601–2 (Kiefel J).

en masse micro-target individuals based on their explicitly stated, and implicitly assessed, preferences is a capability unique in history. It has created a new form of grey zone operation, which has undergone a paradigm shift from the high-cost, low-impact active measures of the Cold War.

Australia, like many democratic societies that value open communication, is particularly vulnerable to this form of grey zone operations. Philosophically, Australia subscribes both in law[88] and policy[89] to the concept of a marketplace of ideas — a model that assumes rationality in individuals seeking information, and premised on the belief that truth will be more appealing than falsehood. This model, questionable in a pre-digital age, is well and truly undermined by surveillance capitalism. Chapter 2 demonstrated the shift in the effectiveness of these operations since their Cold War usage (as active measures) and highlighted that Australia needs to change its strategic response modelling in order to properly counter them.

This doctoral project has demonstrated that it is necessary to rely upon an alternate strategic framework of deterrence — a framework that aims to impose costs on those who would conduct IOs. Deterrence is necessary in order to target the centre of gravity of IOs (their low cost) and appropriately respond. Through the lens of military responses — the only lever of national power available to the Commonwealth of Australia that can actually provide physical effects — this thesis then addressed the legal basis for denial operations. It did so not to promote the militarisation of cyberspace, or to condemn or condone the use of the military outside of traditional military roles. It did so because the ADF has been increasingly used in non-traditional roles, and the Commonwealth has flagged its intent for the ADF to respond to and deter non-geographic threats.[90] This includes IOs and wider grey zone operations. It is particularly important then to understand the constitutional foundations upon which the ADF can be utilised.

Generally, the use of the ADF outside of external security operations has been characterised by 'deeply held, even if imperfectly understood, reservations'.[91] This thesis therefore questioned what constitutional limitations apply to military operations, through the lens of the royal prerogative.

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[88] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[89] Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13145 (Malcolm Turnbull).
[90] Scott Morrison, 'Bushfire Relief and Recovery' (Press Conference, 4 January 2020).
[91] Margaret White, 'The Executive and The Military' (2005) 28(2) *UNSW Law Journal* 438, 438.

Chapter 3 addressed the impact of section 119 of the *Constitution* on domestic operations. This provision is operationalised by Part IIIAAA of the *Defence Act 1903* (Cth). Critical to the constitutional provision and the statute is a requirement for 'domestic violence'. The term has never been defined. Chapter 3 therefore, relying upon new archival evidence and a counterfactual methodology, sought to articulate what the term means in a dynamic manner. Chapter 3 posited that it relates to a 'rupture [of] the social fabric',[92] which is *sui generis* — above a mere riot, but below a rebellion. It then engaged with what operations to counter IOs could occur under Part IIIAAA, and identified some gaps in the application of the legislation to cyberspace. It particularly found that digital cordons and searches would be authorised under legislation, as well as instances of lethal force if required.

Chapter 4 then moved to the question of what constitutional authority exists to respond to threats below the threshold of domestic violence (and outside of s 119). This chapter represents novel and ground-breaking discussion of the royal prerogative to keep the peace of the realm. It accordingly addressed the seminal British case that recognised this prerogative, *Northumbria*, and canvassed its application in Britain and its acceptance in the federal system of Canada. Having shown the power clearly applies in Australia as a matter of constitutional law, it was necessary to address whether Part IIIAAA had abridged its application. Chapter 4 found it had, but only with respect to domestic violence. Chapter 4 then engaged in a deep legal history of the power to keep the peace in post-Federation Australia so as to demonstrate the reliance on the power since 1901, and that it had not been subject to desuetude. Chapter 4 concluded by addressing how this element of the prerogative, enjoyed by the Crown in right of the states and the Commonwealth, might apply to countering IOs.

This conclusion has addressed some selected law reform suggestions, recommending the proposed Model Two (a general immunity for actions taken in respect of operations under the prerogative power of keeping the peace of the realm). This immunity was drafted in a way that would fill the statutory gaps identified throughout the thesis. It moreover would provide training certainty for ADF operations to promote social resilience.

These reforms advocated in this chapter, as well as the in-depth legal analysis throughout this thesis, all provide the Australian Government credibility and a strong legal basis for deterring IOs. Yet it is important that it be noted that IOs remain only one of many ways in which traditional European thresholds of war and peace (which have been reflected through

[92] Victor Windeyer, 'Opinion on Certain Questions Concerning the Position of Members of the Defence Force when Called Out to Aid the Civil Power' in Victor Windeyer, *Victor Windeyer's Legacy: Legal and Military Papers*, ed Bruce Debelle (Federation Press, 2019) 211, 224.

international law) can be exploited. As these methods of exploitation change, so too will legal analysis need to be agile — this is the only way in which one can colour in the grey zone.

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