

## LEGISLATIVE NOTE

### **'FLYING UNDER THE RADAR'—THE USE OF LETHAL FORCE AGAINST HIJACKED AIRCRAFT: RECENT AUSTRALIAN DEVELOPMENTS**

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#### A INTRODUCTION

In many common law jurisdictions, the use of the military in aid of civil power remains a murky legal and constitutional question. It is usually conceived either as an exercise of prerogative powers under the common law or as an exercise of executive power, which in Australia is contained in section 61 of the *Constitution*.<sup>1</sup> Reflecting British sensibilities towards standing armies, the role of the military in the maintenance of public order and domestic law enforcement has long been viewed with suspicion. That said, the use of the military in maintaining law and order was a common feature of Australia's early colonial landscape, involving reliance on the Riot Act 1715 (UK), common law powers to deal with breaches of the peace and declarations of martial law. In the British context, military deployment in aid of civil power was a daily reality until recently, where troops exercised public order and law enforcement powers in Northern Ireland.<sup>2</sup>

In the modern Australian context, the involvement of the Australian Defence Force ('ADF') in law enforcement activities has been confined predominantly to 'off shore' contexts.<sup>3</sup> Before 9/11, the only significant use of the military for internal security occurred in the aftermath of the 1978 Hilton Bombing, where the

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<sup>1</sup> Section 61 provides: '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.'

<sup>2</sup> Military personnel acting to preserve civil order in Northern Ireland relied upon statutory emergency powers in Northern Ireland (Emergency Provisions) Act 1978 (UK) and the common law powers available to every citizen to prevent the commission of a crime.

<sup>3</sup> Law enforcement actions are authorized under the Customs Act 1901 (Cth), Fisheries Management Act 1991 (Cth), and Migration Act 1958 (Cth).

military assisted in the relocation of a Commonwealth Heads of Government Regional Meeting ('CHOGRM') from Sydney to Bowral.<sup>4</sup> The lead up to the 2000 Olympics necessitated a review of the legal and constitutional basis for this deployment.<sup>5</sup> As a result, federal Parliament inserted Part IIIAAA into the Defence Act 1903 (Cth) ('Defence Act') which provided an explicit legislative basis for the use of the military in aid of civil power. But the limitations of these 'call out' powers soon became apparent: the powers were reactive (modelled on the Bowral operation) and could not be used to deal with terrorist threats involving aircraft.<sup>6</sup> Recent reforms to Part IIIAAA addressing these gaps have expanded the range of powers to include provisions dealing with aviation security, most significantly authorising the use of force (including lethal force) to protect critical infrastructure.<sup>7</sup>

The deployment of the language of 'war on terror' in the post 9/11 climate provokes debate as to whether legal responses should be framed within the paradigms of the law of armed conflict on one hand, or domestic crime prevention and law enforcement on the other. As we shall see, Part IIIAAA represents an emerging hybrid model that melds both military and civilian law concepts, and imports international law concepts, such as defences based on superior orders, into domestic legislation. It also reflects a growing recognition that civilian models based on crime prevention and law enforcement may not adequately address the serious nature of terrorist threats—threats which can no longer be viewed merely as criminal justice matters, but which also are of national security significance.

Emergencies present significant challenges to legal systems committed to the rule of law. While providing considerable latitude for state action to respond as deemed necessary the legal system nevertheless seeks to limit and render accountable (to some degree) the exercise of extraordinary powers in an attempt to minimise the risk of misuse or over-reaction.<sup>8</sup> Legitimacy of the pre-emptive use of force remains a key concern. Should lethal force be used against a civilian aircraft the question of its legality (in particular its reasonableness and necessity) would no doubt come under serious scrutiny.

<sup>4</sup> Commonwealth of Australia, *Protective Security Review: Unclassified Version*, Parl Paper No 397 (1979).

<sup>5</sup> Commonwealth of Australia, *Commonwealth Agencies' Security Preparations for the Sydney 2000 Olympic Games*, Audit Report No 5 (1998–99).

<sup>6</sup> In 2002, the ADF provided security to another Commonwealth Heads of Government Meeting. Since Part IIIAAA did not cover air operations, this was provided under the broad executive powers contained in s 61 of the Constitution: Cameron Moore, "'To Execute and Maintain the Laws of the Commonwealth': The ADF and Internal Security—Some Old Issues with New Relevance" (2005) 28(2) U of New South Wales LJ 523, 525.

<sup>7</sup> The 2006 amendments were enacted in anticipation of Australia's hosting of the APEC meeting in October 2007. The new powers to deal with aviation security incidents were tested when a Cessna civilian light aircraft ineptly strayed into a security zone: Tom Allard, Alexandra Smith, Jordan Baker and David Braithwaite, 'Cessna pilot flew into dogfight with RAAF' *Sydney Morning Herald* (Sydney, 10 September 2007).

<sup>8</sup> This theme of 'accommodation' of emergencies by legislative or judicial means is evident in both domestic law and international law: see Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis* (CUP, Cambridge 2006) ch 5.

As the next section will examine, pre-emptively destroying a hijacked aircraft does not fit comfortably within the existing framework of criminal law defences, a framework which places significant limits on the use of lethal force. Before turning to the new legislation the priority accorded to the sanctity of human life under the common law will be examined.

## B SANCTITY OF HUMAN LIFE AND THE COMMON LAW

The common law's commitment to the sanctity of human life is reflected in a range of common law offences, such as murder, but also in specific rules limiting the scope of defences.<sup>9</sup> In the criminal law context, this commitment finds expression in the law governing necessity as a defence to murder and the famous ruling in *R v Dudley and Stephens*.<sup>10</sup> That case concerned the practice of cannibalism, which the customs of sea accepted as a measure of last resort for shipwrecked sailors.<sup>11</sup> Dudley, Stephens, Brooks and the cabin boy, Parker, were cast adrift in an open boat. After 20 days without water or food, Dudley and Stephens agreed to kill Parker, who was the weakest, and eat his flesh. Brooks refused to take part in the killing. When Dudley and Stephens were subsequently rescued they admitted what had happened and were charged with murder. In the course of the trial the Court of the Queen's Bench offered a ruling on the scope of necessity. Lord Coleridge CJ was trenchant in his rejection of the availability of the defence on these facts:

It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own . . . it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime.<sup>12</sup>

Nothing in *Dudley and Stephens*, however, casts doubt on the availability of self-defence, which extends to defence of others. Indeed, the modern law of self-defence is sufficiently flexible to allow the pre-emptive use of force, provided both the person employing the force believes his or her conduct to be necessary and the use of force is objectively reasonable taking into consideration the surrounding circumstances.<sup>13</sup> That said, self-defence would not necessarily justify the

<sup>9</sup> Duress is not available as a defence to murder: *R v Howe* [1987] AC 417.

<sup>10</sup> (1884) 14 QBD 273.

<sup>11</sup> A W Brian Simpson, *Cannibalism and the Common Law* (University of Chicago Press, Chicago 1984).

<sup>12</sup> *Dudley and Stephens* (n 10) 287–8.

<sup>13</sup> For a review of the law governing self-defence, see Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd edn Lawbook Co, Sydney 2005) ch 6.

use of lethal force against hijacked aircraft threatening critical infrastructure, a matter further considered below.

A significant question then is whether the *Dudley and Stephens* ruling should still apply. There is a sound argument that the ruling may produce injustice in some cases, and further may overlook the State's duty to protect its citizens from unlawful criminal acts.<sup>14</sup> Some leading criminal scholars have argued that *Dudley and Stephens* should no longer apply, and that necessity and 'duress of circumstances' should be developed further to allow application to novel hijack scenarios.<sup>15</sup> In such cases the availability of these defences would turn on the consideration of the nature, gravity, and imminence of threat, and the proportionality of the response. Before we rush to embrace this 'modernisation' and the expansion of necessity and duress, it is worth examining the arguments against this approach.

One such argument is the importance of respecting the human lives and human dignity of the passengers and crew. The importance of these values, protected in Germany as fundamental rights under the Basic Law, led the Constitutional Court to declare invalid the Aviation Security Act (11th of January 2005). This Act purported to authorise police to use lethal force against any hijacked aircraft posing an imminent threat to human life. The Court ruled that by authorising lethal force against the innocent passengers and crew, the Act violated the Basic Law's guarantees relating to the right to human life and dignity.<sup>16</sup>

Of course the passengers and crew are not the only ones under threat, and the right to life of those innocent persons on the ground threatened by the hijacked aircraft is also relevant. However, as Lord Coleridge CJ's rhetorical questions eloquently raised in *Dudley and Stephens*: how do we weigh the value of one life against another? Adopting this approach would require consideration of further subsidiary questions. Does the status of the individuals or group matter? Should we be prepared to sacrifice a large number of citizens to preserve the life of a small number of elected representatives or single head of state? To what extent do national security and national interest considerations apply here in placing value on lives?

Some academics, such as Bohlander, neatly dispose of the right to life and human dignity of innocent passengers and crew by concluding that they have, in effect, ceased to be human beings:

<sup>14</sup> It has been held that the right to life under international human rights law implies a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual. *Osman v UK* [1999] EHRLR 228, 230.

<sup>15</sup> See JC Smith and B Hogan, *Criminal Law* (10th edn Butterworths, London 2002) 273–4; JC Smith, B Hogan and David Ormerod, *Criminal Law* (11th edn OUP, Oxford 2005) 322. No authority is provided by the learned authors for this reversal of *Dudley and Stephens* (n 10). It is more likely that statutory reform would be required to clarify the availability of necessity and duress to murder. See generally Chris MV Clarkson, 'Necessary Action: A New Defence' [2004] Crim LR 81 and Michael Bohlander, 'In Extremis—Hijacked Airplanes, "Collateral Damage" and the Limits of Criminal Law' [2006] Crim LR 579, 592.

<sup>16</sup> *Bundesverfassungsgericht* (1 BvR 357/05) (Unreported, 15 February 2006) (Germany); *Grundgesetz* (Basic Law) Art 2 II 1 GG (guaranteeing the right to life), Art 1 I GG (guaranteeing the right to human dignity) (Germany).

A harsh—but in my view ultimately correct—approach to that sort of case would suggest that their doomed lives cannot be used as one side to the balancing exercise, when trying to decide whether necessity could be applied as a means of justification or excuse. The outwardly cynical but logically proper approach is that necessity does not enter into it at all because there is no balancing exercise; *they are, to put it bluntly, already dead*. If the lives of the passengers will be lost in any case, then it would be a mere academic exercise to weigh the relatively minor shortening of those lives by shooting down the plane against the possibility of saving the otherwise unendangered lives of the people on the ground.<sup>17</sup> (emphasis added)

This idea—namely that the hijacked passengers and crew are alive but *deemed* to be dead—is moral objectionable. Indeed, a similar argument, that where the passengers and crew are considered doomed, their interests can be discounted, was rejected by the German Constitutional Court. The Court concluded that the right to human life and dignity must enjoy the same degree of protection irrespective of the probable remaining lifespan.<sup>18</sup> In addition to this moral objection, considering the current in-flight security measures, including armed undercover sky marshals, it may be premature to ‘write off’ hijacked passengers and crew as ‘doomed.’

Another problem with applying necessity in these hijack scenarios is that the risks of harm involved are very hard to calculate or indeed are incalculable under this test. The best available information about the threat may be incomplete or inaccurate. Further, there is a tendency to generalise from past terrorist attacks, particularly the spectacular, but largely unpredictable, losses flowing from the 9/11 attacks.<sup>19</sup> Since decisions will be made in situations of factual uncertainty, it seems inappropriate to apply a defence based on the objective calculation of known or predicted risks. This highly pressured and stressful environment in which such decisions will be made suggests that it would be more appropriate to frame the defence in terms of ‘sudden or extraordinary emergency,’ which is a general defence available under federal criminal law.<sup>20</sup> A psychological state of emergency may ‘excuse’ wrongful action, but would also send a clear message that the deliberate taking of life cannot be justified through a process which weighs the relative importance or value of some human lives against others. Such characterisation of the defence as an excuse rather than a justification better conforms with the decision-making context from both an explanatory and normative perspective.<sup>21</sup>

<sup>17</sup> Bohlander (n 15) 580.

<sup>18</sup> For further discussion of the philosophical works of Kant used in this decision, see Kai Moller, ‘On treating persons as ends: The German Aviation Security Act, human dignity, and the German Federal Constitutional Court’ [2006] Public L 457.

<sup>19</sup> The psychological research exploring these effects is explored in Gross and Ni Aoláin (n 8) 105.

<sup>20</sup> Criminal Code (Cth) s 10.3 (2). The defence is available to all offences including murder and remains available to ADF members acting under Part IIIAAA: Defence Act 1903 (Cth) s 51WB(3).

<sup>21</sup> Pleas of justification focus on the circumstances surrounding the act itself, whereas excuses focus on the actor’s state of mind: see Bronitt and McSherry (n 13) 299–300.

### C AUSTRALIAN LAW: CIVIL DEFENCE POWERS AND PROTECTING CRITICAL INFRASTRUCTURE

In this section, we outline the recent statutory developments concerning the powers that the ADF may exercise in aid of civil defence, focusing on Part IIIAAA of the Defence Act. This Part was inserted in 2000,<sup>22</sup> and further amended in 2006,<sup>23</sup> with new provisions coming into force shortly before the 2007 APEC Summit.

Before examining these new powers, it is useful to compare the legal position of the military personnel with that of law enforcement officials. The classic rule of law statement, reiterated in many leading judgements, is that law enforcement officials are subject to the law like anyone else—a proposition that equally applies to military personnel.<sup>24</sup> That said, there are many ways in which legislation treats public officials (including police and military officers) differently from ordinary citizens. One such way is through conferral of special enforcement powers or immunities: an example being the granting of authorisation certificates for ‘controlled operations’ that permit police and other civilian participants to engage in conduct that would otherwise constitute an offence (most commonly, though not limited to, serious narcotic offences).<sup>25</sup> Another way is through the development of special defences, an example in the military context being the ‘superior orders’ defence, which is further considered below.

Prior to the 2000 amendments, the legal framework governing military force in aid of civil power was modelled on archaic provisions in the Riot Act 1715 (UK). The provisions contemplated the use of magistrates in determining firing solutions and went so far as to prescribe the formation of troops in addressing internal threats with a level of specificity, which were obviously impractical and cumbersome for addressing modern terrorist threats.<sup>26</sup> The 2000 amendments, while modernising the ADF powers to use force, generated considerable debate within Parliament—concerns about the use of lethal force were allayed in part by the inclusion of section 51XA, which provides for an ‘independent review’ of orders under Part IIIAAA. Although the 2000 amendments while were more streamlined

<sup>22</sup> Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000 (Cth).

<sup>23</sup> Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006 (Cth).

<sup>24</sup> As Lord Tindall CJ noted: ‘The law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same authority to preserve the peace of the King as any other subject’: *Charge to the Bristol Grand Jury on a Special Commission* (1832) 5 C&P 254, 261, discussed in Moore (n 7) 535. See also *Attorney-General for Northern Ireland’s Reference* (No 1 of 1975) [1977] AC 105. On the liability of law enforcement officials under ordinary criminal law see *A v Hayden* (1984) 156 CLR 532 and *Ridgeway v R* (1995) 184 CLR 19.

<sup>25</sup> See Crimes Act 1914 (Cth), Part 1AB. Authorisations under s 151B, Crimes Act 1914 (Cth) do not provide immunity for law enforcement conduct involving the commission of a sexual offence or an offence involving the death of or serious injury to any person.

<sup>26</sup> The Riot Act 1715 (UK) confers wide powers and immunities for those who disperse riotous assemblies, and remains on the statute books of many Australian jurisdictions. See Andrew Hiller, *Public Order and the Law* (Law Book Company Ltd, Sydney 1983) 77–85. The Riot Act 1715 (UK) was abolished in England in 1973.

than their predecessors, they were nonetheless still largely modelled on a reactive hostage scenario. A review in 2004 noted that the ‘call out’ powers covered only a ‘limited set of circumstances’, was heavily based on ‘siege/hostage concepts’ and failed to accommodate ‘the wider range of terrorist scenarios now envisaged’.<sup>27</sup>

Addressing these limitations, the 2006 amendments to Part IIIAAA of the Defence Act create a legislative framework for prospective authorisation of force by the military in aid of civil power. As the Explanatory Memorandum (EM) notes, the legislation provides for ‘the use of reasonable and necessary force when protecting critical infrastructure designated by the authorising Ministers’<sup>28</sup> and enables a “‘call out” of the ADF to respond to incidents or threats to Commonwealth interests in the air environment’ as well as ensuring that ‘powers conferred to the ADF under Part IIIAAA can be accorded the ADF in the course of dealing with a mobile terrorist incident and a range of threats to Australia’s security’.<sup>29</sup> Part IIIAAA contains a non-exhaustive list of powers for ADF members to do certain things, coupled with a procedure governing their exercise which if followed renders inapplicable State and Territory criminal law. It also creates an additional defence based on superior orders.

## 1 General grant of special powers to members of the ADF

Section 51SE allows a member of the ADF, exercising power under Pt IIIAAA under the command of the Chief of the Defence Force, to take a variety of actions, including boarding vessels or facilities, searching persons, vessels, facilities etc and seizing any dangerous thing found in the course of a search.<sup>30</sup> In general, these powers are to be exercised with Ministerial authorisation, unless the member believes on reasonable grounds that there is insufficient time to obtain the authorisation because a sudden and extraordinary emergency exists.<sup>31</sup>

## 2 Taking measures against vessels or aircraft

Included in the general list of powers granted to members of the ADF under s 51SE is the power to ‘take measures (including the use of force) against a vessel or an aircraft, up to and including destroying the vessel or aircraft’,<sup>32</sup> and the power to order such measures.<sup>33</sup> The key requirements for the exercise of powers under s 51SE(1)(a)(i) and (ii) are that:

<sup>27</sup> Anthony Blunn, John Baker and John Johnson, *Statutory Review of Part IIIAAA of the Defence Act 1903 (Aid to Civilian Authorities)* (Australian Government Publishing Service, Canberra 2004) 12.

<sup>28</sup> Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (Cth) 2.

<sup>29</sup> Explanatory Memorandum (n 28).

<sup>30</sup> Defence Act 1903 (Cth) s 51SE.

<sup>31</sup> Defence Act (n 30) s 51SE (4), (5).

<sup>32</sup> Defence Act (n 30) s 51SE(1)(a)(i).

<sup>33</sup> Defence Act (n 30) s 51SE(1)(a)(ii).

- the member is acting under superior orders, either in carrying out measures against a vessel or aircraft or in issuing an order in relation to the taking of those measures;<sup>34</sup>
- ‘the member was under a legal obligation to obey the order’;<sup>35</sup>
- ‘the order was not manifestly unlawful’;<sup>36</sup>
- ‘the member has no reason to believe that circumstances have changed in a material way since the relevant order was given’;<sup>37</sup>
- ‘the member has no reason to believe that the order was based on a mistake as to a material fact’;<sup>38</sup> and
- ‘taking the measures was reasonable and necessary to give effect to the order’.<sup>39</sup>

The purpose of these provisions is to ensure that ADF members are under strict control, through a chain of command, when they are receiving orders. It also structures the use of powers in a way that will maximise the availability of the superior order defence, discussed below.

Division 3B of Pt IIIAAA relates specifically to measures against aircraft. Section 51ST confers similar powers to those in s 51SE(1)(a)(i) and (ii)—allowing a member acting under Pt IIIAAA to ‘take measures (including the use of force) against an aircraft, up to and including destroying the aircraft . . . whether or not [it] is airborne.’ The conditions for exercise of these powers are also substantially similar to those imposed by s 51SE,<sup>40</sup> as is the requirement that the measures have Ministerial authorisation.<sup>41</sup> However, s 51ST(6) allows the Minister to ‘authorise the taking of measures against an aircraft in specified circumstances’—that is, rather than authorise the taking of measures against a specific aircraft, the Minister can issue an authorisation that will apply on an ongoing basis if certain specified circumstances arise and Div 3B applies.<sup>42</sup> The power to authorise such measures prospectively is a reflection of the temporal pressures surrounding decisions to use force against a hijacked aircraft. The Minister must not authorise such measures, either in relation to a specific situation or prospectively in specific circumstances, unless taking action against the aircraft is (or would be) reasonable and necessary.<sup>43</sup> In authorising such measures, the Minister must also ‘have regard to Australia’s international obligations.’<sup>44</sup>

<sup>34</sup> Defence Act (n 30) s 51SE(2)(a), (3)(a).

<sup>35</sup> Defence Act (n 30) s 51SE(2)(b), (3)(b).

<sup>36</sup> Defence Act (n 30) s 51SE(2)(c), (3)(c).

<sup>37</sup> Defence Act (n 30) s 51SE(2)(d), (3)(d).

<sup>38</sup> Defence Act (n 30) s 51SE(2)(e), (3)(e).

<sup>39</sup> Defence Act (n 30) s 51SE(2)(f), (3)(f).

<sup>40</sup> Defence Act (n 30) s 51ST(2), (3).

<sup>41</sup> Defence Act (n 30) s 51ST(4), (5).

<sup>42</sup> Defence Act (n 30) s 51ST(5)(b), (6).

<sup>43</sup> Defence Act (n 30) s 51ST(7).

<sup>44</sup> Defence Act (n 30) s 51ST(8).

Significantly, this reference to Australia's international obligations in s 51ST(8) includes, *inter alia*, the application of art 3*bis* to the Convention on International Civil Aviation (Chicago Convention), which states:

The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.<sup>45</sup>

The reference to the 'rights and obligations of States set forth in the Charter of the United Nations' points directly to the right of national self-defence as contained within Article 51 of that document. This express reference to the Charter of the United Nations highlights the 'national security' prism through which ADF actions in engaging a hijacked aircraft must be viewed. It also demonstrates the legislative intention of imagining such engagement within a law of armed conflict/national security-type environment of assessment. This is a subtle, though decisive, legislative posture that will be further examined in the sections below.

### 3 Defence of Superior Orders

The defence of superior orders will always be contentious due to its association with the notorious 'Nuremburg' defence.<sup>46</sup> That said, most military law systems have allowed some version of this defence provided that the order is not 'manifestly unlawful'. The defence in relation to action taken under Part IIIAAA is probably best described as a hybrid defence melding elements of superior orders, lawful authority and necessity.<sup>47</sup> Its inclusion is a reflection of the military context, where, to ensure the effectiveness of the Defence Force, significant pressure is applied to subordinates through a chain of command, thus guaranteeing obedience to orders.

The legislation also seeks to regulate the use of force. As a starting proposition, under s 51T 'a member of the Defence Force may, in exercising any power under Division 2, 2A, 3, 3A or 3B or this Division, use such force against persons and things as is reasonable and necessary in the circumstances.'<sup>48</sup> However, the grounds that justify the use of potentially lethal force under each Division are further qualified in s 51T, including, controversially, justifying the use of force under

<sup>45</sup> Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 (Chicago Convention) as amended by Protocol Relating to an Amendment to the Convention on International Civil Aviation (adopted 10 May 1984, entered into force 1 October 1998) art 3*bis*(a).

<sup>46</sup> See Mark J Osiel, *Obeying Orders: Atrocity, Military Discipline and the Laws of War* (Transaction Publishers, New Brunswick 1999).

<sup>47</sup> Defence Act (n 30) s 51WB. The elements are identical to the conditions that must be complied with to justify the use of the powers, described above.

<sup>48</sup> Defence Act (n 30) s 51T(1).

ss 51SE(1)(a)(i) and (ii) and 51ST (i.e., the provisions dealing with measures against vessels and aircraft) in order to protect critical infrastructure. Subsection 51T(2B) provides:

Despite subsection (1), in exercising powers under subparagraph 51SE(1)(a)(i) or (ii) or Division 3B [action against aircraft], a member of the Defence Force must not, in using force against a person or thing, do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the member believes on reasonable grounds that:

- (a) doing that thing is necessary to protect the life of, or to prevent serious injury to, another person (including the member); or
- (b) doing that thing is necessary to protect designated critical infrastructure against a threat of damage or disruption to its operation; or
- (c) doing that thing is necessary and reasonable to give effect to the order under which, or under the authority of which, the member is acting.

Destruction of an aircraft to protect life or prevent serious injury is less contentious, consistent with the ambit of self-defence recognised under both domestic and international law. However, the use of lethal force to protect property designated as critical infrastructure is more problematic. This means that the right to life has not only to be weighed up against the life of people on the ground, but also against the importance of infrastructure that could be damaged or disrupted. This seems a very low threshold and contrasts with the position under federal criminal law, where the intentional use of lethal or grievous force to protect property is expressly forbidden under the self-defence provisions of the Criminal Code.<sup>49</sup>

The mechanism for designating infrastructure as ‘critical’ provides some control over the types of facilities which can be protected via the use of lethal force. Under s 51CB, only the authorising Ministers may designate particular infrastructure, or part thereof, as ‘critical’. Infrastructure may only be designated as ‘critical’ if the Ministers believe on reasonable grounds that:

- (a) there is a threat of damage or disruption to the operation of the infrastructure or the part of the infrastructure; and
- (b) the damage or disruption would directly or indirectly endanger the life of, or cause serious injury to, other persons.<sup>50</sup>

If the Ministers cease to hold that belief, ‘they must revoke the designation’.<sup>51</sup> The threshold that the damage or disruption to infrastructure must endanger life or cause serious injury seems on the face to limit the scope of these powers. Despite the application of the provision to obvious examples of infrastructure which pose a direct threat to life and public health, such as nuclear and bio-hazard facilities,

<sup>49</sup> Criminal Code Act 1995 (Cth). Section 10.4(3) provides that self-defence ‘does not apply if the person uses force that involves the intentional infliction of death or really serious injury: (a) to protect property; or (b) to prevent criminal trespass; or (c) to remove a person who is committing criminal trespass.’

<sup>50</sup> Defence Act (n 30) s 51CB(2).

<sup>51</sup> Defence Act (n 30) s 51CB(3).

there is much scope for the expansion of this power to ‘indirect’ threats. The breadth of the provision is apparent in the EM, which includes as examples of critical infrastructure gas pipelines, power lines and plants that supply hospitals, as their damage or disruption ‘could reasonably be said to indirectly endanger life or cause serious injury.’<sup>52</sup> Any decision to pre-emptively terminate innocent lives in order to protect property (albeit high value infrastructure) which is remotely connected to protecting human life or limb will be morally controversial. The potentially wide-range of civilian infrastructure which might be deemed ‘critical’ in this way signifies a move beyond the traditional criminal law paradigm of self-defence (which includes defence of others) towards a much broader national security necessity paradigm.

While Part IIIAAA provides some degree of legal protection to the ADF, the legislation could be a trap for the unwary. The EM suggests that the purpose of the amendments is to provide immunities to members of the ADF to act lawfully against threats to the security of the Commonwealth.<sup>53</sup> Yet unlike the criminal and civil immunities conferred on law enforcement officials by controlled operations legislation, there is no similar protection conferred on ADF members acting under Part IIIAAA. Indeed, the legislation states that the fact that a member of the ADF has acted in accordance with Part IIIAAA, thus attracting the superior orders defence, does not *otherwise* relieve that member of criminal responsibility.<sup>54</sup> Clearly, the ADF remain open to prosecution under discipline offences and applicable federal criminal offences. Rather, the protection conferred by the Part IIIAAA is partial, created by s 51WA(2), which ousts the application of State and Territory criminal laws. The Commonwealth DPP has been given powers to prosecute for criminal acts committed under the Act, though according to the EM, prosecutors are expected to exercise ‘common sense’ in prosecution decision-making, and give consideration to the applicable Rules of Engagement (‘ROE’). It should be noted that ROE are simply an instrument of executive action, and do not provide a source of legal authority for action.<sup>55</sup> Indeed, the ROE is another trap for the unwary—there is a strong culture of compliance around ROE in the military, which is underscored by the legal duty to obey lawful orders, with failure to do so constituting a disciplinary offence. Cameron Moore has suggested that ROE should be statutorily be invested with legal protection for the ADF member who acts in accordance with them in good faith provided that the order was not manifestly unlawful.<sup>56</sup> Prosecutorial discretion does not provide sufficient protection for the military exercising these powers, and it may be anticipated, that if mistakes are made and innocent lives are taken, the political and public pressure to scapegoat the military may be intense.

<sup>52</sup> Explanatory Memorandum (n 28) 14.

<sup>53</sup> Explanatory Memorandum (n 28) 8.

<sup>54</sup> Defence Act (n 30) s 51WB.

<sup>55</sup> ROE have some legal force indirectly constituting a ‘lawful general order’, breach of which is a disciplinary offence under the Defence Force Discipline Act 1982 (Cth) s 29.

<sup>56</sup> Moore (n 7) 536.

## D CONCLUSION

The purpose of amendments to Part IIIAAA is to clarify and limit the legal basis for the use of military action in aid of civil power. The amendments seek to both structure the decision-making process governing the use of force in a high pressure environment and limit the legal liability of those called upon to exercise these powers. They impose a chain of command structure in which the ultimate driver may be the responsible Minister, rather than an ADF member either in the form of the Chief of Defence Force ('CDF') or the personnel on the ground. They also move beyond the reactive 'call out' model by designating a set of circumstances where the CDF is prospectively authorised to act (whether in Australia or offshore) without ministerial authorisation or Governor General order.

The legislation contains safeguards and limitations. As the EM notes, 'civil power remains paramount' during the operation, and the military 'can only use force that is reasonable and necessary in the circumstances'.<sup>57</sup> While the rule of law demands this legal accountability, it is unclear whether compliance with the legislation will equally confer the anticipated degree of protection on ADF members against both criminal prosecution and civil suit. The most contentious aspect of the legislation is the novel power to use reasonable and necessary force in the protection of 'critical' infrastructure. In this respect, the new powers relating to use of force against hijacked aircraft move beyond the boundaries of conventional criminal law defences such as self-defence, duress or necessity (or its statutory variants). This means that the right to life may be weighed against the importance of preventing damage or disruption to critical infrastructure in addition to being weighed up against the lives of people in the targeted building or on the ground.

Assigning respective values to lives and assessing the significance of preserving critical infrastructure when deciding to destroy hijacked aircraft containing innocent passengers and crew will not be easy judgments. While this approach is not embraced by the common law, the formula in Part IIIAAA reflects fundamental principles well understood and applied by the ADF in other contexts. Such tensions lie at the core of the law of armed conflict decision-making,<sup>58</sup> where ADF

<sup>57</sup> Explanatory Memorandum (n 28) 3.

<sup>58</sup> Article 57(2) (a)(ii) of Additional Protocol 1, deals with precautions in attack and provides:

. . . With respect to attacks, the following precautions shall be taken:

(a) Those who plan or decide upon an attack shall:

- (ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
- (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilian, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated . . .'

members are required to assess the relative values of lives (including own force, enemy and civilian) when deciding on whether to launch an attack. Part IIIAAA provides a warrant to apply a similar approach in the domestic law context, and the core statutory concepts of reasonableness and necessity will require ADF decision-makers to make similar assessments of incidental injury to civilians and collateral damage to property prior to engaging a hijacked aircraft.

Part IIIAAA demonstrates that terrorism threats inhabit a legal space that spans both domestic criminal law and the international law of armed conflict. The emergence of hybrid laws melding concepts from both fields is not altogether surprising. In the immediate aftermath of 9/11, the United Nations Security Council adopted resolutions which prefaced measures against terrorist actors with references to preserving national rights of self-defence.<sup>59</sup> Such references were not arbitrary, recognising that terrorism may transcend the crime prevention and law enforcement paradigm and constitute a threat necessitating a response under the rubric of national self-defence (and concomitantly the law of armed conflict). An interesting prognosis is that this infusion of international law concepts into domestic law will reshape our understanding and interpretation of civilian criminal law defences such as necessity and self defence. Indeed, George Fletcher, a leading criminal law theorist, predicts that international law will play a significant role in the development of domestic criminal law theory, concluding that “[r]efining and elaborating the shared grammar and transnational principles of criminal law will be the challenge of the twenty-first century”.<sup>60</sup>

<sup>59</sup> Resolution 1368 (2001) Adopted by the Security Council at its 4370th meeting, on 12 September 2001 and Resolution 1373 (2001) Adopted by the Security Council at its 4385th meeting, on 28 September 2001.

<sup>60</sup> G Fletcher, *The Grammar of Criminal Law* (OUP, Oxford 2007) 20.

