

# Alert and Alarmed: *The National Security Information Act (Cth)(2004)*

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## Introduction

In the five years since the events of 11 September 2001, we have seen an unprecedented number of Commonwealth and State Acts passed based on the supposed view that they are necessary in order to combat the threat of terrorism. Such Acts have the potential, depending on how they are interpreted by our courts, to greatly impact on the kind of society that we live in, and challenge long held fundamental common law rights and liberties that Australians tend to take for granted. Of course, the question of balancing community protection on the one hand with preserving civil liberties that go to the heart of the nature of our society on the other is a matter for Parliament. However, given our long tradition of judicial review in Australia it is submitted that the High Court has a role to play in assessing the constitutional validity of such measures,<sup>1</sup> and indirectly in upholding civil liberties, particularly in the absence of an express Bill of Rights in the Australian Constitution. The writer submits that some of the aspects of the recent anti-terrorism legislation might find some objections in the High Court.

A further complication for the Federal Government in this context is the ability of the defence power to support the raft of legislation enacted post 2001. Of course, the defence power is at its greatest during times of 'war'. In the past, whether or not Australia was at 'war' has been an easy question to answer – Australia was clearly at 'war' during both of the World Wars. It is not so easy to say that Australia is at 'war' post 2001 when the exact enemy or enemies is sometimes unclear, and where there has been no actual declaration of war. If there is a 'war' it is also unlike previous wars in that it is not based on geographical boundaries (and hence easy to categorise), but on belief systems that transcend borders, countries and continents.<sup>2</sup>

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<sup>1</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1; *Marbury v Madison* (1803) 1 Cranch 137, 2 Law Ed 135.

<sup>2</sup> Some argue that the 'terrorism threat' has been deliberately overstated by the Government: see for example Michael Head 'Counter-Terrorism Laws: A Threat to

### **Ambit of This Enquiry**

Others have critiqued the terrorism laws in totality<sup>3</sup> and this author will not revisit that ground. This article will focus only on the controversial provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)<sup>4</sup> relating to offences to which national security might be relevant.

### **Summary of Procedural Provisions for Trials for Offences Which Relate to National Security**

The Federal Government has recognised the difficulty that sometimes the evidence needed to prosecute a person accused of offences relating to national security, including most obviously terrorism or related offences, is of a highly sensitive nature and in some cases cannot in fact be used in an open court.<sup>5</sup> As a result it has introduced a certificate system for the disclosure of classified information.

Section 24 of the *National Security Information Act* requires that if a prosecutor or defendant knows or believes that during federal criminal proceedings they will disclose information that relates to or may affect national security, or that a witness will do so, they must as soon as possible give the Attorney General written notice of that belief.<sup>6</sup> It is interesting that the legislation on its face is very broad, applying to all federal criminal proceedings,<sup>7</sup> rather than terrorism offences, the issue which presumably created the momentum for the law being introduced.<sup>8</sup>

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Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 *Melbourne University Law Review* 666.

<sup>3</sup> Christopher Michaelsen 'Anti-Terrorism Legislation in Australia: A Proportionate Response to the Terrorist Threat?' (2005) 28 *Studies in Conflict and Terrorism* 321; Bernadette McSherry 'Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws' (2004) 27(2) *University of New South Wales Law Journal* 354; and Joo-Cheong Tham 'Casualties of the Domestic War on Terror: A Review of Recent Counter-Terrorism Laws' (2004) 28 *Melbourne University Law Review* 512.

<sup>4</sup> Hereafter *National Security Information Act*.

<sup>5</sup> *R v Lappas and Dowling* [2005] ACTSC 115 (unreported 26 November 2001) (note that this case is an espionage case rather than one involving terrorism).

<sup>6</sup> The notice must be in writing, and must include the document or extract from it that contains the information or, if unavailable, a description of the information. The notifying party must then let the court and the other party to the action know they have given such notice: s 24(2) and (3). Section 24 only operates in the prosecutions brought after the Act commenced, where the prosecutor gives notice that the Act applies to the proceeding.

<sup>7</sup> This phrase is broadly defined in ss 13-14 to mean criminal proceedings where an offence against any law of the Commonwealth is alleged. It includes bail, committal,

If a witness is asked a question, and the prosecutor or defendant knows or believes that information in the answer relates to or may affect national security, that person must notify the court immediately.<sup>9</sup> The court will then adjourn the proceeding and hold a closed hearing. At this time, the witness must give the court a written answer to the question, which will be shown to the prosecutor. If the prosecutor knows or believes that the answer relates to or may affect national security, they must immediately advise the court of that belief, and give the Attorney General notice of that belief.<sup>10</sup>

Once the notice is given to the Attorney General, a party to the proceedings who discloses that information, where that disclosure is likely to prejudice national security, is liable to imprisonment for two years.<sup>11</sup>

Once the Attorney General has notice as per either path mentioned above, or for any reason expects that any of the s 24 circumstances will arise, he or she may decide that disclosure of the information would be likely to prejudice national security. If so, the Attorney General may issue a certificate that limits the use of the information to particular situations. If the information is in a document, the Attorney General may return the document with the relevant information deleted, either with or without a summary of the information.<sup>12</sup> The effect of the certificate is that it is conclusive evidence that disclosure of the information in the proceeding is likely to prejudice national security,<sup>13</sup> until the matter is heard by the court. If the Attorney General believes that a potential witness will disclose information by his or her mere presence in the proceeding,

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sentencing and appeal proceedings, pre-trial proceedings, as well as discovery, inspection or disclosure of intended evidence.

<sup>8</sup> This generality may be because Kirby J in *Nicholas v The Queen* (1998) 193 CLR 173 said that the more specific legislation was in terms of its applicability to particular situations, the more likely it was to amount to a breach of separation of powers (at 260-261).

<sup>9</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 25(2).

<sup>10</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 25(6).

<sup>11</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 40(1); similar provisions apply to the answering of questions (s 40(2)), and where the mere presence of a person will disclose information in a manner likely to prejudice national security (s 41).

<sup>12</sup> Separate provision is made for the case where the information is or is not in the form of a document – refer to *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 26.

<sup>13</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 27(1).

he/she may issue a certificate to the effect that the prosecutor or defendant must not call that witness.<sup>14</sup> It is an offence to disclose information contrary to the Attorney General's non-disclosure certificate or call a witness contrary to the Attorney General's witness exclusion certificate.<sup>15</sup>

'Closed hearing requirements' apply to hearings where the court has been advised that a witness may disclose information about or affecting national security, or where the court is considering making a non-disclosure order in relation to the information. In closed hearing cases, s 30 allows the Attorney General to intervene in the hearing as a party to the matter. In such cases, only the court, court officials, prosecutor, defendant, any legal representatives of the court, the Attorney General and any court-authorized witnesses can be present at the hearing.<sup>16</sup> Exceptionally, if the court believes that disclosure could prejudice national security, the court may order that the defendant, the legal representative or the court official may not be present when details of the information or the reasons for its non-disclosure are heard by the court.<sup>17</sup>

The court must keep a record of the hearing, and make it available to any appeal court, the prosecutor and the Attorney General. If the defence legal representative has obtained a security clearance by the Secretary, they can have access to the record.

The function of the hearing is to determine whether, having regard to the Attorney General's certificate, there would be a risk of prejudice to national security if the information was disclosed or the witness called.<sup>18</sup> The court must also consider whether the non-disclosure would affect the defendant's right to receive a fair hearing and other matters the court considers relevant. The court is directed to 'give greatest weight' to the Attorney General's certificate.<sup>19</sup> The court may make various orders after deliberation.<sup>20</sup>

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<sup>14</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 28(2).

<sup>15</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 43 and s 44.

<sup>16</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 29(2).

<sup>17</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 29(3); the defence has a right to be heard on whether the information should be disclosed or the witness called (s 29(4)).

<sup>18</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31(7).

<sup>19</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31(8). These provisions are in sharp contrast with the more recent provisions of the *Anti-Terrorism Act (No 2)* (2005) regarding control orders and preventative detention

### Constitutionality of Trial Provisions

The author submits there are grounds on which the constitutionality of the above regime may be challenged. They will be discussed separately, as they have been in the various judgments, though there is clear overlap in the strands of reasoning to be discussed.

### Broad Principle of Separation of Powers

The first suggested ground for a challenge to the above provisions is that they breach the principle of separation of powers which is clearly provided for in the Commonwealth *Constitution*.<sup>21</sup> From the broad principle flow some secondary principles which will also be considered in this paper. It is axiomatic that the principle of separation of powers is based primarily upon the guarantee of liberty.<sup>22</sup> Two recent High Court

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of suspected terrorists. The Attorney General is required to give his/her consent to an application for a control order (s 104.2 *Criminal Code 1995* (Cth) as amended by the 2005 Act), but the court is asked to consider a range of factors in deciding on the application, including that the order would substantially assist in preventing a terrorist act. Unlike the provisions being discussed here, the 2005 provisions do not direct the court that the content of a certificate by a member of the Executive is the paramount consideration in considering whether or not to grant the application made.

<sup>20</sup> These include an order that the information not be disclosed at all, that a copy of the information with the security sensitive material deleted be given (with or without a summary of the deleted information or a statement of facts that the information would be likely to prove), or that all of the information be disclosed (s 31(2), (4) and (5)).

<sup>21</sup> *R v Kirby; Ex Parte Boilermakers' Society of Australia (Boilermakers')* (1956) 94 CLR 254; (1957) 95 CLR 529 is accepted as the leading Australian case to apply Montesquieu's theory, but refer also to Harrison Moore *The Constitution of the Commonwealth of Australia* (2<sup>nd</sup> ed, 1910) 322-323 (to which Evatt J referred with approval in *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73, 117); statements of the founding fathers collected in Fiona Wheeler 'Original Intent and the Doctrine of the Separation of Powers in Australia' (1996) 7 *Public Law Review* 96; Finnis 'Separation of Powers in the Australian Constitution' (1967) 3 *Adelaide Law Review* 159; and George Winterton 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (1994).

<sup>22</sup> Kitto J put it this way in *R v Davison* (1954) 90 CLR 353, 380-381:

It is well to remember that the framers of the Constitution, in distributing the functions of government among separate organs, were giving effect to a doctrine which was not a product of abstract reasoning alone, and was not based upon precise definitions of the terms employed. As an assertion of the two propositions that government is in its nature divisible into law-making, executive action and judicial decision, and that it is necessary for the protection of the individual liberty of the citizen that these three functions should be to some extent dispersed rather than concentrated in one set of hands, the doctrine of the separation of powers as developed in political philosophy was based upon observation in the experience of democratic states, and particularly upon observation of the

decisions invalidating legislation breaching separation of powers principles and offensive to human rights are thought to be apposite to the legislation being considered here.

Of course, while it is easy to agree with the doctrine of separation of powers, and the High Court has accepted the important distinction between judicial and non-judicial power,<sup>23</sup> it is more difficult to define precisely what is meant by judicial power,<sup>24</sup> given that many of its features are not exclusive to judicial power. The statement of Griffith CJ in *Huddart, Parker and Co* is at least a useful starting point:

The words 'judicial power' as used in s71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal, which has the power to give a binding, and authoritative decision (whether subject to appeal or not) is called upon to take action.<sup>25</sup>

Acknowledging the potential difficulties in coming up with an acceptable meaning of judicial power, however, the High Court has recently struck out two laws which were held to compromise the role of judges in our system of government and law-making.

In *Chu Kheng Lim and Others v Minister for Immigration, Local Government and Ethnic Affairs and Another*,<sup>26</sup> a provision of the *Migration Act 1958* (Cth), s54R, had provided that 'a court is not to order

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development and working of the system of government which had grown up in England.

This position was cited with approval in the joint judgment in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 11-12 agreed (Brennan CJ, Dawson Toohey McHugh and Gummow JJ). Refer also to George Winterton 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (1994); Leslie Zines 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166; Geoffrey Kennett 'Individual Rights, The High Court and the Constitution' (1994) 19 *Melbourne University Law Review* 581, and Cheryl Saunders 'The Australian Federal Judicial System' in Brian Opeskin and Fiona Wheeler (ed) *The Australian Federal Judicial System* (2000). Both the *International Covenant on Civil and Political Rights* (Article 14(1)) and the *European Convention on Human Rights* (Article 6(1)) require that legal proceedings be conducted by an independent tribunal.

<sup>23</sup> *R v Kirby: Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254; Fiona Wheeler 'The Boilermakers' Case' in H P Lee and George Winterton (ed) *Australian Constitutional Landmarks* (2003).

<sup>24</sup> The High Court in *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188 recognised the difficulty; and see *Re Tracey; Ex Parte Ryan* (1989) 166 CLR 518, 537 (Mason CJ, Wilson and Dawson JJ).

<sup>25</sup> (1909) 8 CLR 330, 357.

<sup>26</sup> (1992) 176 CLR 1 (*Lim*).

the release from custody of a designated person'.<sup>27</sup> A majority of the court found the provision to be invalid.<sup>28</sup> Brennan Deane and Dawson JJ in the majority found that the *Constitution*

(does) not permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth. Nor do those grants of legislative power extend to the making of a law which requires or authorises the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.<sup>29</sup>

It is submitted to be part of the essential character of a court to determine what is necessary for a defendant to have a fair trial. A majority of the High Court found in *Dietrich v R* that it is a constitutional requirement of the trial of Commonwealth offences that the trial be a fair one, such that if the trial were not fair, the court had jurisdiction to order a stay of proceedings.<sup>30</sup> In that case the precise context was the claimed right to government-funded legal representation if the accused could not afford their own lawyer, but the principle is clearly of broader application. It is for the court to make sure that an accused has a fair trial, as perhaps its primary obligation in a criminal matter. It may be part of a court's inherent jurisdiction<sup>31</sup> as a Chapter III court to stay proceedings which do not reflect a fair trial, accepting this phrase is open to different interpretation. Keith Mason identified four primary functions of a court's

<sup>27</sup> A designated person was a prohibited non-citizen whose application for refugee status had not been successful.

<sup>28</sup> Brennan, Deane, Dawson and Gaudron JJ; Mason CJ, Toohey and McHugh JJ dissenting.

<sup>29</sup> (1992) 176 CLR 1 (*Lim*), 27.

<sup>30</sup> (1992) 177 CLR 292 per Mason CJ and McHugh J 'the right to a fair trial ... [is] a central pillar of our criminal justice system' (298); per Deane J (326) 'the fundamental prescript of the criminal law of this country is that no person shall be convicted of a crime except after a fair trial according to law' (with which Toohey J at 361 agreed); and Gaudron J (362) 'it is fundamental to our system of criminal justice that a person should not be convicted of an offence save after a fair trial according to law'. Similar sentiments appear in *Jago v District Court (NSW)* (1989) 168 CLR 23, per Mason CJ (29), Deane (56), Toohey J (72) and Gaudron J (75), *McKinney v The Queen* (1991) 171 CLR 468, and *R v Macfarlane; Ex Parte O'Flanagan and O'Kelly* (1923) 32 CLR 518, 541-542, where Isaacs J referred to the 'elementary right of every accused person to a fair and impartial trial'. Article 14 of the *International Covenant on Civil and Political Rights*, to which Australia is a signatory but upon which this country has not legislated, confirms the right of an accused to have legal representation assigned to them where the interests of justice require, in the event the accused cannot afford to pay for it.

<sup>31</sup> This argument is put by Wendy Lacey 'Inherent Jurisdiction, Judicial Power and Implied Guarantees Under Chapter III of the Constitution' (2003) 31 *Federal Law Review* 57.

inherent jurisdiction, the first one being to ensure convenience and fairness in legal proceedings.<sup>32</sup>

However, it is submitted the *National Security Information Act* in effect makes the fairness of the defendant's trial a subsidiary, rather than a primary issue. This is because s 31, which allows a court to consider whether or not to make a suppression order regarding particular evidence in the interests of national security, requires the court to take account of various matters in considering the application. While the defendant's right to a fair trial is specifically mentioned as a factor in s 31(7)(b), the matter to which most weight must be given is the Attorney General's certificate (which says by definition that disclosure would be contrary to national security and therefore should not occur).

This section is thus argued to be unconstitutional because it

- asks the court to exercise judicial power in a manner inconsistent with the essential character of judicial power (including the right to a fair trial);
- subverts a principle that members of the High Court have previously found to be a fundamental constitutional right to subsidiary status; and
- gives primacy to another factor.

The fact that this factor is a certificate from the Executive will be considered and is also thought to be objectionable.<sup>33</sup>

#### Public Confidence in the Judiciary

As well as insisting on a separation between judicial and non-judicial power, the doctrine of separation of powers has also been interpreted to prevent powers being granted to a court of such a nature that might cause public confidence in the impartiality of our courts to be questioned.<sup>34</sup> These principles were established most clearly by the *Kable* case.<sup>35</sup>

<sup>32</sup> Keith Mason 'The Inherent Jurisdiction of the Court' (1983) 57 *Australian Law Journal* 449; I H Jacob 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23. Mason CJ in *Jago v District Court of New South Wales* (1989) 168 CLR 23, 27-30 referred to a court's inherent power to prevent their processes being used in a manner which gives rise to injustice.

<sup>33</sup> The author is reminded of the statement by Dixon J in the *Communist Party Case* (*Australian Communist Party v The Commonwealth* (1951) 83 CLR 1) that 'history ... shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power' (187).

<sup>34</sup> Public confidence is clearly related to the principle of separation of powers: Elizabeth Handsley 'Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power' (1998) 20 *Sydney Law Review* 183.

<sup>35</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*). The case involved the *Community Protection Act 1994* (NSW), which allowed the Attorney



For example, Justice Gaudron stated that the Parliament could not confer powers on a court which are 'repugnant to or incompatible with the exercise of judicial power'.<sup>36</sup> This would undermine public confidence in the judiciary:

Public confidence in the courts requires that they act consistently and that their proceedings be conducted according to rules of general application. That is an essential feature of the judicial process. It is that feature which serves to distinguish between palm tree justice and equal justice. Public confidence cannot be maintained in a judicial system which is not predicated on equal justice.<sup>37</sup>

Justice McHugh agreed the principle of separation of powers would strike down laws that would 'undermine public confidence in the impartial administration of the judicial functions of State courts'. Parliament could not be given functions which might lead ordinary members of the public to conclude that the State court as an institution was not free of government influence in administering the judicial functions vested in the court.<sup>38</sup> Gummow J found that courts could not administer laws that are 'repugnant to the judicial process in a fundamental degree' and which undermined the appearance of impartiality and maintenance of public confidence.<sup>39</sup> Toohey J said that laws, which are so offensive that public confidence in the integrity of the judiciary was diminished, could not be countenanced.<sup>40</sup>

The judges found that the Act's unusual procedural provisions, challenged in the *Kable* case, were one of the ways in which the Act undermined public confidence in the judiciary. Gaudron J commented on the uniqueness of the proceedings, and rules which applied only to this legislation.<sup>41</sup> McHugh J noted that the ordinary rules of evidence had

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General of that State to apply to the Supreme Court for an order that Kable be detained for a further period following the completion of his current jail term, if the Supreme Court were satisfied he was more likely than not to re-offend. A critique of the *Kable* decision appears in Elizabeth Handsley 'Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power' (1998) 20 *Sydney Law Review* 183; refer also to Fiona Wheeler 'The Rise and Rise of Judicial Power Under Chapter III of the Constitution: A Decade in Overview' (2000) 20 *Australian Bar Review* 283.

<sup>36</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*), 104.

<sup>37</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*), 107.

<sup>38</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*), 116-117.

<sup>39</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*), 133.

<sup>40</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*), 98. Refer also to *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v The Minister* (1996) 189 CLR 1, 11 and *Maxwell v The Queen* (1996) 184 CLR 501, 534.

<sup>41</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*), 108.

been substantially relaxed.<sup>42</sup> These factors contributed to a finding that public confidence in the independence of the judiciary was being undermined by the legislation in that case, because it helped create a perception that the judiciary was part of an executive plan to imprison certain offenders.

The author suggests that similar reasoning might apply to s 31 of the *National Security Information Act*. The argument is that the provision requires a court to perform a function inconsistent with the nature of judicial power. The provisions are again highly unusual, in that they could potentially lead to a situation where the accused is not given the detail of information or evidence given to the court to support the charge against the accused. Of course, this would have the effect of compromising the ability of the defendant to cross-examine any witnesses who gave this information to the court, or to otherwise test the veracity of the evidence given or led against the accused. Could these unusual provisions not also be said to create a perception that the judiciary was part of an executive plan to imprison certain offenders, by denying them fundamental rights to which all other accused persons have an expectation? If judges are worried about the rules of evidence not being applied in a trial, as at least some of the judges in the *Kable* case were, presumably they would also be concerned with legislation that potentially denies the accused the right to even hear or see the evidence.<sup>43</sup>

Gaudron J elaborated on her understanding of the requirements to maintain public confidence in the judiciary in *Wilson*:<sup>44</sup>

Public confidence depends on two things. It depends on the courts acting in accordance with the judicial process. More precisely, it depends on their acting openly, impartially and in accordance with fair and proper procedures for the purpose of determining the matter in issue by ascertaining the facts and the law and applying the law as it is to the facts as they are ... public confidence in the independence of the judiciary is diminished if ... judges perform functions which place them or appear to place them in a position of subservience to either of the other branches of government.

In the author's opinion, consistently with the views of Gaudron J, a court cannot be asked in one breath to consider a matter, but in the next breath

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<sup>42</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*), 120; section 17(3) of the Act stated that despite any act or law to the contrary, the court must receive certain kinds of evidence in relation to the offender *Kable*.

<sup>43</sup> Writing extra-judicially, Justice Kirby has written that 'defending, even under assault, and even for the feared and hated, the legal rights of suspects (is a way) to maintain the support and confidence of the people over the long haul', 'Australian Law - After 11 September 2001' (2001) 21 *Australian Bar Review* 253, 263.

<sup>44</sup> *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 22, 25.

be told that the view of the Attorney General on the matter is the overriding consideration. That does, with respect, appear to place judges in a position of subservience to the executive in a way that cannot be reconciled with fundamental aspects of the *Commonwealth Constitution*. It infringes upon the primary duty of a judge in a criminal trial, namely to ensure that the trial is a fair one. It is offensive to Chapter III of the *Constitution* and clearly has the potential to undermine public confidence in our federal courts.

### Independence of Judicial Function

A further (related) strand of reasoning apparent in the *Kable* decision, as well as its predecessor *Lim*,<sup>45</sup> is the principle that the Executive cannot interfere with the exercise of judicial power. Judicial independence is guaranteed, although the author must concede that the so-called minimum requirements for judicial independence have never been clearly articulated by the full High Court.<sup>46</sup>

Accepting this uncertainty, the general principle of independence is accepted. As Brennan Deane and Dawson JJ put it in *Lim*

[i]t is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Chapter III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates.<sup>47</sup>

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<sup>45</sup> *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

<sup>46</sup> *Northern Australia Aboriginal Legal Aid Service v Bradley* (2004) 206 ALR 315 per Gleeson CJ: 'there is no ideal model of independence and both historically and at the present time, arrangements capable of affecting independence have varied [among] Australian institutions'; per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ 'no exhaustive statement of what constitutes the minimum in all cases is possible'. Gleeson CJ then refers to statements of what the Canadian Supreme Court has regarded as *minima*, in *Valente v The Queen* [1985] 2 SCR 673; *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*; *Reference Re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3 (including security of tenure, salary level, and control over administrative procedures). Refer also to Stephen Parker 'The Independence of the Judiciary' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000).

<sup>47</sup> (1992) 176 CLR 1, 36-37. Their Honours confirmed that legislative power did not extend to the making of a law which requires or authorises the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power (27). Harrison Moore put it in a similar way, concluding that 'any interference with the essentials of judicial administration is a deprivation of

Similar sentiments are evident in the *Kable* case<sup>48</sup> as well as in the pronouncements of superior courts of other nations.<sup>49</sup> It is considered that this legislation also serves to interfere with the independence of the judiciary,<sup>50</sup> as a direction to the court as to the manner and outcome of the exercise of its jurisdiction. The court would not accept such laws in *Lim*; it should not in this case.

The Queensland Court of Appeal applied these principles in the *Re Criminal Proceeds Confiscation Act 2002* (Qld) case.<sup>51</sup> There s 30 of the Act required the court to hear a State application for a restraining order regarding property in the absence of the person whose property was the subject of the application. Williams JA, with whom White and Wilson JJ agreed, found the section was unconstitutional based on the *Kable* principle. As Williams JA noted,

[t]he Supreme Court is making the initial (restraining) order must also be satisfied that the 'public interest' is not such as to require the court to refuse to make the order. How could a judge possibly be so satisfied in the exercise of judicial power when the only entity entitled to place material before the court on which a judgment on that issue could be formed was the State ... Asking a judge to make a decision on such issues ... makes a

judicial power' (*The Constitution of the Commonwealth of Australia* (1910)) 323. Similarly, in 1986 the High Court drew a distinction between legislation interfering with the judicial process itself (unacceptable) rather than with the substantive rights at issue in the proceedings (acceptable): *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ).

<sup>48</sup> Eg Gaudron J (103) 'Ch III requires that the Parliaments of the States not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth'; McHugh J (109) found the Act invalid because it vested functions in the Supreme Court that were incompatible with an exercise of judicial power by that court. Refer also to *Nicholas v The Queen* (1998) 193 CLR 173 per Brennan CJ (185), Gaudron J (210), McHugh J (221), Kirby J (265) and Hayne J (278).

<sup>49</sup> In *United States v Nixon* (1974) 418 US 683, 709 the Supreme Court was clear that '[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence'; and elsewhere 'The legitimacy of the judicial branch ultimately depends on its reputation for impartiality and non partisanship' (*Mistretta v United States* (1989) 488 US 361,407; *Macmillan Bloedel Ltd v Simpson* [1995] 4 SCR 725, 749-750 (Supreme Court of Canada)). Refer also to Article 14(1) of the *International Covenant on Civil and Political Rights* (to which Australia is a signatory), and Article 6(1) of the *European Convention on Human Rights*.

<sup>50</sup> As indicated, this is not dissimilar to a finding that public confidence in the judiciary has been undermined – public confidence in the judiciary is being undermined because it is considered their independence has been compromised. However, these different strands have been maintained for the purposes of this article since the Courts have recognised them as such.

<sup>51</sup> [2003] QCA 249.

mockery of the exercise of the judicial power in question. The statutory provision removes the essential protection of the citizen inherent in the judicial process. Effectively the provision directs the court to hear the matter in a manner, which ensures the outcome, will be adverse to the citizen and deprives the court of the capacity to act impartially.<sup>52</sup>

It is suggested that the effect of the provisions of the *National Security Information Act* is similar, in providing for the possibility that the accused may not see or hear the case made against him by the Commonwealth, and may not have the right to cross-examine any witnesses used by the prosecutor. Surely the effect of such rules is to help ensure that the outcome of the case will be adverse to the accused – the legislation asks the accused to fight the charge with one arm tied behind their back. Further, while the law in the above case was bad enough in terms of denying property rights without proper hearing, the law under consideration here denies different rights (or may do so) in a criminal context. The right to due process<sup>53</sup> is fundamental in any trial, but surely when the liberty of a subject is at stake, it is even more important than in a trial which might affect (merely) property rights.

In *Nicholas v The Queen*,<sup>54</sup> Gaudron J set out her understanding of the minimum requirements necessary in order that the independence of a Chapter III court be maintained. These words require restatement here:

Consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with the rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law.<sup>55</sup>

If the 'right of a party to meet the case made against him or her' is fundamental, how can it not be breached by legislation that contemplates the accused not being aware of the details of the evidence used against

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<sup>52</sup> *Re Criminal Proceeds Confiscation Act 2002* (Qld) [2003] QCA 249, [57].

<sup>53</sup> Deane J has noted the separation of judicial power as the *Constitution's* only general guarantee of due process, see *Re Tracey; Ex Parte Ryan* (1989) 166 CLR 518, 580, but also see *Leeth v Commonwealth* (1992) 174 CLR 455 per Deane and Toohey (487) and Gaudron J (502-503); *Kruger v Commonwealth* (1997) 190 CLR 1; and Cheryl Saunders 'Concepts of Equality in the Australian *Constitution*' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (1994). The right to due process will be further discussed later in the article.

<sup>54</sup> (1998) 193 CLR 173.

<sup>55</sup> *Nicholas v The Queen* (1998) 193 CLR 173, 208-209.

him or her? One could also argue that denying the accused the right to cross-examine denies the court the opportunity to truly ascertain the facts of the case, and clearly compromises the ability of the accused to obtain a fair trial. To the extent that this law operates to make parts of a case secret, an attack on it may be justified further by referring to the judgment of Priestley JA (dissenting) in *John Fairfax Pty Ltd v Attorney General (NSW)*.<sup>56</sup> There His Honour was satisfied that provisions requiring that certain trials proceed in camera and were not reportable were inconsistent with the exercise of Chapter III judicial power, compromising its independence and integrity.

It may be thought that the relevant provisions of the *National Security Information Act 2004* (Cth) relate merely to the procedure of the case, such that the reasoning of the majority in *Nicholas*<sup>57</sup> applies. There the Federal Parliament passed a law to the effect that in determining whether a drug offence had occurred or not, the fact that an investigating officer had committed an offence in the process of securing evidence against the accused (entrapment) did not render evidence inadmissible for that reason, in some cases. The majority found the law to be valid, recognising the ability of Parliament to make rules of evidence that affected proceedings. The court found that laws regulating the burden or method of proving facts were not objectionable.<sup>58</sup>

However, it is submitted that this legislation is quite different to that considered in *Nicholas*. The Government is not merely changing the procedural rules of evidence, which it clearly is entitled to do; it is substantively allowing (and encouraging) the court to deny the accused the right to hear evidence being used against them. It is allowing (and encouraging) the court to deny the accused the right to cross-examine or test evidence led by the prosecution.<sup>59</sup> It so 'encourages' by directing the court that the most important consideration in exercising their discretion is that the Attorney General has issued a certificate that disclosure of the evidence would compromise national security. The author submits that such provisions do impinge on public perceptions of whether a fair trial has been conducted, and whether or not the court is independent of the executive. The fact that a trial has been conducted fairly is not a desirable

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<sup>56</sup> (2000) 181 ALR 694, 721-722.

<sup>57</sup> (1998) 193 CLR 173.

<sup>58</sup> Brennan CJ, Toohey, Gaudron, Gummow and Hayne JJ; McHugh and Kirby JJ dissenting.

<sup>59</sup> The High Court reiterated in 1986 that interference with the judicial process itself was unacceptable: *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ).

extra; it goes to the heart of the judicial process and cannot be relegated to subsidiary status.<sup>60</sup>

It is true that legislation commonly provides for various factors that a court should take into account when exercising its discretion. No one could object to such regulation on *Kable* grounds. This was confirmed recently in the *Fardon* case, where the appellant sought to rely on the *Kable* principle to invalidate legislation providing for the preventive detention of a past sexual offender (in similar vein to the *Kable* Act). The court in *Fardon* considered legislation which asked the court to consider various factors in hearing the application for continued detention, the most important of which was deemed to be 'community protection', as it had been declared also in the *Kable* Act. However, the High Court in *Fardon* found the law was valid.<sup>61</sup>

One might think that the legislation here, in directing the court to take account of different factors in deciding whether or not to allow the evidence to be made available to others (including the accused), might be similarly unobjectionable, according to the Court. However, this argument would ignore that while in *Kable* and *Fardon*, the paramount consideration was said to be 'community protection', in the legislation being discussed here, the paramount consideration is said to be the content of a certificate from a member of the Executive. It is submitted this creates an unsavoury impression that a judge is being directed in his or her discretion by the Executive, in an unacceptable manner. It is surely unlikely that a judge would defy such a certificate, and the unacceptable perception is surely created that a judge's independence has been compromised, and he or she is being asked to do the bidding of the Commonwealth.<sup>62</sup>

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<sup>60</sup> Gaudron J in *Leeth v Commonwealth* (1992) 174 CLR 455 reiterated that all judicial power had to be exercised in accordance with the judicial process. A legislative direction requiring the court to exercise its powers other than in accordance with that process would be invalid for that reason. The author believes this law asks a judge to exercise judicial power inconsistently with the judicial process.

<sup>61</sup> *Fardon v Attorney General (Queensland)* [2004] 210 ALR 50; as to which see Anthony Gray 'Standard of Proof, Unpredictable Behaviour and the High Court of Australia's Verdict on Preventive Detention Laws' (2005) 10 (1) *Deakin Law Review* 177.

<sup>62</sup> This perception is not avoided by allowing a court later to declare that proceedings under the Act be stayed on the ground that the accused did not get a fair hearing (s 19(2)).

### Right to a Fair Trial/Natural Justice

Related<sup>63</sup> to the above strand of reasoning is another which insists on the right of a person to a fair trial.<sup>64</sup> As indicated, the rights-sourced basis of the principle of separation of powers is clearly accepted.<sup>65</sup> It is trite law to say that the right to a fair trial is seen as fundamental in the administration of criminal law.<sup>66</sup> There remains debate about whether the right is guaranteed by the *Constitution*.<sup>67</sup> It is hard to see that denying the accused the opportunity to see or hear evidence against them, as well as denying the right to cross-examination, is a fair process.<sup>68</sup> As President of the New South Wales Bar Association Ian Barker QC puts it

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- <sup>63</sup> It may be argued that protection of judicial process is an implied constitutional principle in Chapter III of the Constitution. Implicit within the protection of judicial process may be a right to a fair trial: Christine Parker 'Protection of Judicial Process as an Implied Constitutional Principle' (1994) 16 *Adelaide Law Review* 341. Parker refers for support to a statement by Deane J in *Polyukhovich v Commonwealth* (1991) 172 CLR 501 that the very purpose of separating judicial power into Chapter III courts is so that the power can be exercised in accordance with judicial process (606).
- <sup>64</sup> Refer to Fiona Wheeler 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 (2) *Monash University Law Review* 248; Fiona Wheeler 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205.
- <sup>65</sup> *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); though some see it more as part of the inherent jurisdiction of the court to prevent abuse of process: Wendy Lacey 'Inherent Jurisdiction, Judicial Power and Implied Guarantees Under Chapter III of the Constitution' (2003) 31 *Federal Law Review* 57.
- <sup>66</sup> If any authority is needed, refer to the judgment of Isaacs J in *R v Macfarlane; Ex Parte O'Flanagan and Kelly* (1923) 32 CLR 518, 541-542 (describing the elementary right of every accused person to a fair trial, as a right 'which inheres in every system of law that makes any pretension to civilisation'); see also *Barton v The Queen* (1980) 147 CLR 75 and *McInnis v The Queen* (1979) 143 CLR 575. This has specifically been deemed to include the right to a fair opportunity to answer the case made against the accused (*In Re Hamilton; In Re Forrest* [1981] AC 1039, *Bonaker v Evans* (1850) 16 QB 162, 171). All members of the High Court agreed in *Dietrich v The Queen* (1992) 177 CLR 292 that an accused had a right to a fair trial (Mason CJ and McHugh J (311), Brennan J (323), Deane J (326), Dawson J (343), Toohey J (353), and Gaudron J (362)).
- <sup>67</sup> Refer to *Dietrich v The Queen* (1992) 177 CLR 292; Gaudron J stated in *Re Nolan; Ex Parte Young* (1991) 172 CLR 460 that 'Chapter III provided a guarantee, albeit only by implication, of a fair trial of those offences created by a law of the Commonwealth' (496). Kirby J in *John Fairfax v Doe* (1995) 130 ALR 488, 515 observed that the requirement of a fair trial may be implied into the *Constitution*, and Murphy J suggested it without deciding (*The Queen v MacKellar; Ex Parte Ratu* (1977) 137 CLR 461,483).
- <sup>68</sup> Somewhat perversely, s 19 of the Act claims to uphold the power of a court to conduct proceedings so as not to lead to an abuse of process, 'except so far as this Act expressly or impliedly provides otherwise'. Does this betray an admission that the drafter was aware that the provisions of the Act can be seen as an abuse of process?



[t]he idea that information might be used by the prosecution without the accused seeing the information need only be stated for its offensiveness to basic notions of fairness and justice to be apparent.<sup>69</sup>

Unfortunately, this is what the legislation contemplates.

Judgments of the High Court in *Dietrich* support this argument. If Deane J was worried in that case that the lack of legal representation might mean the accused will be brought to a trial to face a trial process 'for which he will be insufficiently prepared',<sup>70</sup> presumably the same concern would arise in a case where the accused has not been allowed to hear the case against him. If Gaudron J noted cases where evidence had to be excluded because 'its weight and credibility cannot be effectively tested',<sup>71</sup> presumably Her Honour would have difficulty with a proceeding where the accused may not conceivably have even seen or heard the evidence, let alone tested its credibility. Consistently with its finding in *Dietrich*, the High Court should not countenance such provisions.

As indicated, such legislation allows the possibility that the accused not have the opportunity to cross-examine a witness called for the prosecution. Yet the right to cross-examine a witness has been declared on many occasions to be fundamental.<sup>72</sup> Referring to the above cases, Heydon J (a member of the High Court of Australia) concludes

[n]o evidence given by one party affecting another party in the same litigation can be made admissible against the other party, unless there is a right to cross-examine.<sup>73</sup>

While the High Court has recognised that Governments may have a right to withhold documents from a court on the basis of public interest,<sup>74</sup> and

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<sup>69</sup> Ian Barker 'Human Rights in an Age of Counter Terrorism' (2005) 26 *Australian Bar Review* 267.

<sup>70</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 335. The first sentence in Deane J's judgment refers to the fundamental right of an accused person to a fair trial according to law (326).

<sup>71</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 363, citing *McDermott v The King* (1948) 76 CLR 511-515 (per Dixon J), *R v Lee* (1950) 82 CLR 133. The first sentence in Gaudron J's judgment also refers to the fundamental right of an accused person to a fair trial according to law (362).

<sup>72</sup> *Allen v Allen* [1894] P 248, 254; *Lord v Colvin* (1855) 3 Drew 222; 61 ER 888; *R v Hadwen* [1902] 1 KB 882; *Lonnkvist v Lonnkvist* [1952] WN 88; *Rigby v Woodward* [1957] 1 All ER 391; *Blaise v Blaise* [1969] 54.

<sup>73</sup> *Cross on Evidence: Seventh Australian Edition* (2004) 548. Refer also to Andrew Ligertwood *Australian Evidence* (3<sup>rd</sup> ed, 1998) 503 'The right to cross-examination is fundamental and granted to each and every party to the proceeding', referring to s 27 of the *Evidence Act* (Cth) which gives a party the right to question any witness, except otherwise provided in the Act.

<sup>74</sup> *Sankey v Whitlam* (1978) 142 CLR 1; *Gilligan v Nationwide News Pty Ltd* (1990) 101 FLR 139, 149.

has recognised the possible link between national security and secrecy,<sup>75</sup> it has indicated that it will be more reluctant to accept such an argument in criminal trials. In *Sankey*, Gibbs ACJ stated

If State papers were absolutely protected from production, great injustice would be caused in cases in which the documents were necessary to support the defence of an accused person whose liberty was at stake in a criminal trial; and it seems to be accepted that in those circumstances the documents *must* be disclosed.<sup>76</sup>

Gibbs ACJ also made clear in the case that it was the duty of the court, and not the privilege of the executive government, to decide whether a document would be produced or withheld. This seems at odds with the direction in the *National Security Information Act* that in deciding what the interests of justice require, the most important factor is the certificate from the Attorney General stating that disclosure would be contrary to national security interests.

One could also cite numerous administrative law authorities to support such a proposition. The words of Mason J are clear:

It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest in the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.<sup>77</sup>

It is hard to see that these provisions are consistent with the requirements of natural justice. While some judges have found that natural justice may not be required in the exercise of statutory functions,<sup>78</sup> certainly it is fundamental to judicial proceedings, and (of course) most fundamental of all when criminal proceedings and an individual's liberty are involved.<sup>79</sup> In recent cases we have seen explicit acknowledgement by members of the High Court that a failure to accord an accused natural justice may

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<sup>75</sup> *Attorney General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 46 (*Spycatcher Case*).

<sup>76</sup> Emphasis added. Gibbs ACJ cited for this proposition *Duncan v Cammell Laird and Co* [1942] AC 624, 633-634; *Conway v Rimmer* [1968] AC 910, 966-967, 987; *R v Lewes Justices: Ex Parte Secretary of State for Home Department* [1973] AC 388, 407-408.

<sup>77</sup> *Kioa v West* (1985) 159 CLR 550, 582, to like effect Brennan J (628) and Deane J (633). Mason J specifically rejected the proposition, in *State of South Australia v O'Shea* (1987) 163 CLR 378, 389 that the fact a case involves political or policy judgment means that natural justice is not applicable.

<sup>78</sup> *Salemi v MacKellar* (No2) (1977) 137 CLR 396 and *The Queen v Mackellar; Ex Parte Ratu and Another* (1977) 137 CLR 461.

<sup>79</sup> Deane J in *Re Tracey; Ex Parte Ryan* (1989) 166 CLR 518, 581 noted that the 'guarantee involved in the vesting of judicial power exclusively in Chapter III courts is at its most important in relation to criminal matters'.

contravene the requirements of Chapter III of the *Constitution* and affect the accused's right to a fair trial.<sup>80</sup> In *Leeth v Commonwealth*, Mason CJ, Dawson and McHugh JJ observed that

any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power.<sup>81</sup>

The author submits that according to this test, the relevant provisions of the *National Security Information Act* should be struck out as being contrary to the requirements of Chapter III of the *Constitution*.

Interestingly from a policy perspective, some psychological literature has found that criminal enforcement works best when administered in a way that their targets perceive as procedurally fair. Others have referred to the capacity of people to accept social control that delivers bad outcomes to them, provided they know those outcomes are dispensed through processes they accept as fair. Authors have concluded that deterrence effects (of anti-terrorism laws) will exceed defiance effects (those that create the will to break such laws) when the sanctions are seen as an outcome of fair procedures.<sup>82</sup>

#### **Some International Perspectives on the Right to a Fair Trial**

These views are reinforced when provisions of international law are considered. Given its universal importance, it is not surprising that the requirements of a fair trial are set out with some specificity in international law. Article 14(3)(d) of the *International Covenant on Civil and Political Rights* requires that an accused have the right to be tried in his presence, and para (e) gives the accused the right to examine, or have examined, the witnesses against him/her.<sup>83</sup> Article 6(3)(a) of the *European Convention on Human Rights* requires that an accused be informed promptly and in detail of the nature and cause of the accusation against him; be given adequate time and facilities for the preparation of a

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<sup>80</sup> Deane J in *Re Tracey; Ex Parte Ryan* (1989) 166 CLR 518, 580 noted that section 71 was the *Constitution's* only general guarantee of procedural due process.

<sup>81</sup> (1992) 174 CLR 455, 470. Gaudron J has agreed that the judicial process involves (amongst other things) the application of the rules of natural justice (*Harris v Caladine* (1991) 172 CLR 84, 150; and *Re Nolan; Ex Parte Young* (1991) 172 CLR 460, 496). The *Leeth* case is further discussed by Jeremy Kirk 'Constitutional Implications (II): Doctrines of Equality and Democracy (2001) 25 *Melbourne University Law Review* 24.

<sup>82</sup> Refer to John Braithwaite 'Pre-Emptying Terrorism' (2005) 17(1) *Current Issues in Criminal Justice* 96,97, summarising the work of Tyler (1990) *Why People Obey the Law*.

<sup>83</sup> Australia has ratified but not enacted this treaty.

defence, and that the accused has a right to examine witnesses.<sup>84</sup> The author does not believe that the Australian provisions discussed in this article are consistent with these internationally recognised rights. Of course, there remains debate about the extent to which our Courts should be guided by developments in international law in interpreting the *Constitution*,<sup>85</sup> including the requirements of the principle of separation of powers.

Similarly, in judgments of the United States Supreme Court,<sup>86</sup> we have seen an initial acceptance of the unfettered right of the military and government to determine who might pose a threat to the nation (justifying the enforcement of curfews and exclusion from United States territory)<sup>87</sup> eventually give way to a re-assertion of judicial review even when the defence of the country is at issue. In *Hamdi v Rumsfeld*,<sup>88</sup> the United States Government sought to continue the detention of Hamdi at Guantanamo Bay on the assertion that he had received training in Afghanistan and was affiliated with a Taliban military unit. He was said to be an enemy combatant of the United States. The Supreme Court insisted that the accused be given his due process rights, including the notice of the factual basis for his classification as an enemy combatant, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker.<sup>89</sup> The court accepted the view of Murphy J

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<sup>84</sup> Refer also to the *Human Rights Act* 1998 (UK), incorporating this Convention into United Kingdom law.

<sup>85</sup> Eg *Al-Kateb v Godwin* (2004) 208 ALR 124, especially McHugh J (140-145) and Kirby J (163-174).

<sup>86</sup> The author accepts that the United States decisions are based on a due process provision in that country's *Constitution* that has no express equivalent in the Australian *Constitution*, but re-iterates the view of some members of the High Court that an implied right to due process exists in our *Constitution*. United States authorities are as a result considered highly relevant.

<sup>87</sup> *Hirabayashi v United States* (1943) 320 US 81; *Korematsu v United States* (1944) 323 US 214.

<sup>88</sup> (2004) 542 US 507 – for further discussion of these cases see Eugene Rostrow 'The Japanese-American Cases – A Disaster' (1945) 54 *Yale Law Journal* 489; Mark Tushnet 'Defending Korematsu: Reflections on Civil Liberties in Wartime' (2003) *Wisconsin Law Review* 273. The Australian equivalent cases are discussed presently.

<sup>89</sup> (2004) 542 US 507, [11]; the court noted these principles were of long-standing, quoting *Baldwin v Hale* (1864) 1 Wall. 223,233; *Fuentes v Shevin* (1972) 407 US 67, 80: 'parties whose rights are affected are entitled to be heard; and in order that they may enjoy that right they must first be notified; it is equally fundamental that the right to notice and an opportunity to be heard must be granted at a reasonable time and in a meaningful manner'; *Armstrong v Manzo* (1965) 380 US 545; *Mullane v Central Hanover Bank and Trust Co* (1950) 339 US 306; and *Cleveland Board of Education v Loudermill* (1985) 470 US 532, 542: 'an essential principle of due process is that a deprivation of life, liberty or property be preceded by notice and opportunity for hearing appropriate to the nature of the case'. In a related way, the United States

(dissenting) in the *Korematsu* case that judicial review applied to military claims, as it did with all other claims.<sup>90</sup> It concluded in *Hamdi* that

[t]he threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.<sup>91</sup>

Indeed, the Declaration of Independence expressly refers to the separation of powers in a military context,<sup>92</sup> as one of the reasons for the decision of the then thirteen states to sever ties with Great Britain.

Similar issues arose in the United States recently with the trial against Zacarias Moussaoui, an alleged conspirator in the September 11 attacks. The accused requested the Federal Government give him access to others they had detained in relation to the attacks, because he believed they had useful information that would assist his case. The Federal Government refused, citing national security. The United States Court of Appeals was unanimous in holding that the Government's national security interest had to yield to the accused's right to a fair trial.<sup>93</sup>

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Supreme Court has found that the failure of the prosecution to give to the accused information that relevantly affects the credibility of the prosecution case also infringes the accused's due process rights: *Giglio v United States* (1972) 405 US 150; *Brady v Maryland* (1963) 373 US 83.

<sup>90</sup> *Korematsu v United States* (1944) 323 US 214, 233-234: 'the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interest reconciled'.

<sup>91</sup> (2004) 542 US 507, [12]. The court referred to its previous decisions in *Mathews v Eldridge* (1976) 424 US 319; *Heller v Doe* (1993) 509 US 312; *Zinermon v Burch* (1990) 494 US 113; *United States v Salerno* (1987) 481 US 739; *Schall v Martin* (1984) 467 US 253; *Addington v Texas* (1979) 441 US 418. The court reiterated that it was during the most challenging and uncertain times that the nation's commitment to due process was most severely tested, and that a United States court had to maintain at home the principles for which the nation was fighting abroad ((2004) 542 US 507, [10]). To like effect were the comments of Dixon J in the *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187-188 that 'history ... shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power ... the power to legislate for the protection of an existing form of government ought not to be based on a conception ... adequate only to assist those holding power or resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend. Further discussion of the Communist Party case appears in George Winterton 'The Significance of the Communist Party Case' (1992) 18 *Melbourne University Law Review* 630.

<sup>92</sup> 'He [the King of Great Britain] has affected to render the Military independent of and superior to the Civil Power'.

<sup>93</sup> *United States v Moussaoui* (2004, Court of Appeals 4<sup>th</sup> Circuit, 03-4792, 22/4/2004, citing the United States Supreme Court decision in *Arizona v Youngblood* (1988) 488 US 51,55 for the proposition; and to like effect *Roviaro v United States* (1957) 353 US 53,60-61.

In an effort to balance these competing considerations, the Court of Appeals allowed the witness evidence to be taken by remote video from an undisclosed location. The court was prepared to consider an application for a substitution of the deposition testimony of witnesses,<sup>94</sup> provided Moussaoui had input into the creation of the substituted material to check context and accuracy, that the jury (in a case like Moussaoui) was made fully aware that the substitutions were based on what the witness would say if they were in the court room, that the substitutions were obtained in circumstances making it likely they are accurate, and that neither the parties nor the court has ever had access to the witnesses.<sup>95</sup> Suffice to say, none of these minimal prescribed protections insisted upon by the United States Court of Appeals appear in the Australian legislation.

Similar to the American experience, previous High Court decisions have indicated a reluctance to second-guess Government decisions on military matters. In *Lloyd v Wallach*<sup>96</sup> the High Court validated legislation enabling the making of a declaration of a Minister that a citizen was disloyal, resulting in that person's possible indefinite detention. The Court found it could not question the basis on which the Minister found his belief.<sup>97</sup> The continuing correctness of such an approach must be questioned, even in wartime, in light of subsequent developments.<sup>98</sup> Of course in current times, perhaps best summarised as uneasy peace, there is even less scope for such draconian provisions.

In summary on the international material, it is submitted the High Court would do well to take notice of, and follow, the insistence of the United States Supreme Court on due process rights, even for those accused of the most serious crimes. Certainly the danger of terrorism to Australia must be rated lower than the danger of terrorism to the United States. However, that country's highest court has admirably stood firm against attempted intrusions by the executive on long-established civil liberties. The High Court of Australia must abandon its previous deference to the

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<sup>94</sup> However, on the facts the Court found the Government's suggested arrangements to be unsatisfactory.

<sup>95</sup> The judgment in that case itself had been edited, with security sensitive information deleted from the judgment, appearing as \* \* \* \*.

<sup>96</sup> (1915) 20 CLR 299.

<sup>97</sup> Griffith CJ (305), Isaacs J (309), Higgins J (313); (Gavan Duffy, Rich and Powers JJ concurred (314)); refer also to *Little v Commonwealth* (1947) 75 CLR 94 and *Ex Parte Walsh* (1942) ALR 359.

<sup>98</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1; their correctness was expressly questioned by Kirby J in *Al-Kateb v Godwin* (2004) 208 ALR 124, 166 though McHugh J in the same case seemed to confirm their continued correctness (140).

judgment of the Executive, even in times of great uncertainty and security risk.

### **Conclusion**

The High Court should strike out those parts of the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)* which contemplate a certificate being given by the Attorney General that evidence to be led in a trial will compromise national security if released, as a precursor to a judge making a decision that the evidence or testimony will compromise national security if released and should as a result be suppressed. It should strike out the provisions because:

- they infringe the principle of separation of powers;
- they undermine public confidence in the judiciary;
- they compromise judicial independence;
- they interfere with the role of a court to make sure that an accused has a fair trial;
- they are inconsistent with the established principle of natural justice; and
- there is strong support for the above principles in international law, and the United States Supreme Court has refused to allow the right to due process to be subordinated in the supposed interests of national security in a context where the security risk is greater than in this country, in a stand that has much to commend it.