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WHAT FUTURE FOR AUSTRALIA’S CONTROL ORDER REGIME?

LISA BURTON* AND GEORGE WILLIAMS**

Control orders restrict the liberty of an individual in order to protect the community from future terrorist acts. Australia introduced control orders following the example of the United Kingdom, the first and only other nation to enact such measures. Yet in 2011 the UK abolished its control order regime, and replaced it with a more targeted system of Terrorism Prevention and Investigation Measures (TPIMs). In light of these reforms, what future is there for the Australian control order regime? This article compares the design and use of the Australian control order regime with the UK regime on which it was based, and the new system of TPIMs. The authors question whether there was, or is now, any adequate justification for the Australian control order regime.

I INTRODUCTION

Control orders are one of the most novel and controversial tools of counter-terrorism law to emerge in recent years. A control order restricts the liberty of an individual suspected of terrorism-related activity in order to prevent future terrorist acts. For example, a controlee may be required to report to police several times a week or stay in his or her home between midnight and dawn, or prohibited from contacting certain people. Control orders are made on the basis of predicted future dangerousness, rather than proven past wrongdoing. They are made via a civil procedure that lacks the evidentiary and procedural protections of the criminal law, but breaching a control order is a criminal offence.1

Control orders were introduced in Australia by the Anti-Terrorism Act [No 2] 2005 (Cth) (AT Act).2 The regime was enacted to follow the example of the UK, the first and only other nation to use control orders. The Australian government made clear that the regime was modelled on provisions of the Prevention of Terrorism Act 2005 (UK) (PT Act), which was said to represent international “best practice” in counter-terrorism strategy.3 However, the UK has since reconsidered. Its control order regime was heavily criticised and found to violate the European Convention on Human Rights (ECHR). In 2011, the UK abolished control orders and replaced them with a new regime of Terrorism Prevention and

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2 Control orders have since been adapted to other (non-terrorism) contexts. For example, several Australian states have enacted legislation which enables control orders to be imposed against members of organised crime groups, such as the Serious and Organised Crime (Control) Act 2008 (SA). See further McGarrity N and Williams G, “When Extraordinary Measures Become Normal: Pre-emption in Counter-terrorism and Other Laws” in Lynch A, McGarrity N and Williams G (eds), Counter-terrorism and Beyond: The Culture of Law and Justice After 9/11 (Routledge, Oxford, 2010), p 131.

Investigation Measures (TPIMs). This raises the obvious question: should Australia repeal its control order regime too?

The fact that the UK regime has been repealed might suggest that Australia should follow suit. However, the matter is not so clear cut. The Australian regime was modelled on the UK’s but the two were not identical. Most notably, the UK regime was constrained by the ECHR, of which there is no Australian equivalent. Further, the UK did not simply repeal control orders; it replaced them with TPIMs — which many commentators have argued are very similar. Hence, it is not necessarily clear that Australia should also repeal or modify its control order regime. However, the UK reforms do provide a sound rationale for reconsidering the use of control orders in Australia. This article is not intended to provide an in-depth analysis of the control order regimes of either country. Rather, our aim is to determine whether control orders can still be justified in Australia in light of their abolition in the UK.

This article begins with an overview of the origins of the Australian and UK control order regimes. Part III then outlines the Australian control order regime in more detail, and part IV the two occasions on which it has been used. In part V we compare the Australian control order regime with the now defunct UK control order regime, in order to determine how the two control order regimes compared. In part VI we outline the controversy engendered by control orders in the UK and the reasons for the reforms that took place in 2011. Part VII then outlines the TPIM regime enacted by the UK to replace control orders in 2011, and considers how TPIMs compare with Australian control orders. These comparisons are necessary to determine what, if anything, the UK reforms signal for the Australian control order regime. We consider this in light of two recent reports on the future of the Australian control order regime.

II ORIGINS OF THE CONTROL ORDER REGIMES

The origins of the UK and Australian control order regimes are very different. In the UK, control orders were created to fill the void created by the decisions in Chahal v UK [1996] ECHR 54 and A v Secretary of State for the Home Department [2004] UKHL 56. Chahal was a non-citizen whom the UK government sought to deport on national security grounds. The European Court of Human Rights found that Chahal faced a real risk of torture if he was returned to his home country. Therefore, deporting Chahal would breach Article 3 of the ECHR; an absolute protection that the UK cannot derogate from, even in times of emergency. The UK could not keep Chahal in immigration detention either. This could not be described as detention “with a view to deportation” and so would breach the right to liberty protected by Article 5 of the ECHR.

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6 ECHR art 15.
In the aftermath of the 9/11 attacks, the UK Parliament enacted the Anti-terrorism, Crime and Security Act 2001 (UK). Mindful of the restrictions identified in Chahal, part IV of this Act permitted the UK to preventatively detain “suspected international terrorists”, even if they could not be deported. This required the UK to derogate from the right to liberty protected by Article 5 of the ECHR, which it did, on the basis that the threat of terrorism was “a public emergency threatening the life of the nation”. In A v Secretary of State the UK House of Lords held that this derogation was invalid. The preventative detention powers only applied to non-citizens, though evidence showed that the security risk posed by citizens was just as great. As a result, the measure was not proportionate and not “strictly required by the exigencies of the situation” as required by Article 15 of the ECHR. It was also discriminatory, contrary to Article 14 of the ECHR. The absence of a valid derogation meant the preventative detention regime violated the right to liberty. This meant that there were some non-citizens, thought to pose a security risk, whom the UK government could neither deport nor detain.

Though the decision in A v Secretary of State was clearly the catalyst, there were other factors that motivated the enactment of the control order regime. First, there was an increased focus on the threat posed by “home-grown terrorists” – not just foreign nationals, who had been the target of the preventative detention regime. Secondly, aspects of the UK’s criminal law made it difficult to prosecute terrorism-related activity. Intercept evidence – often a key tool in terrorism trials – cannot be used as evidence in criminal proceedings in UK courts. The UK government has long asserted that the use of intercept evidence in court may reveal the operational techniques of the secret services and alter criminal behaviour so as to avoid detection. Thirdly, at that time, the UK did not have broad terrorism offences criminalising action taken in preparation for a terrorist attack. Some terrorism-related activity was not a criminal offence or, if it was, could not be prosecuted because there was no admissible ‘evidence’ that it had occurred. Persons engaging in this activity could not be preventatively detained, at least without a valid derogation from Article 5. Of course, this was only considered problematic because of a more fundamental premise: that the UK government ought to take steps to control behaviour that either falls short of a criminal offence, or could not be proven in court, in order to prevent terrorist acts.

Control orders emerged as the solution to these problems. The PT Act that established the control order regime was introduced into UK Parliament two months after the decision in A v Secretary of State.
The PT Act repealed the provisions for preventative detention, “but it introduced in their place an unprecedentedly intrusive device for holding terrorist suspects within the community: the control order”. These orders could be made against citizens and non-citizens. The PT Act received royal assent in March 2005 — just months before the July bombings on London’s public transport system. This attack killed 52 people, including one Australian.

It is clear that the UK control order regime was designed to deal with certain forms of terrorism activity in a way which mediated the constraints imposed by the ECHR and the UK’s criminal laws. It was enacted before the 2005 London bombings to plug a gap in the UK’s counter-terrorism laws – acutely revealed by the decision in A v Secretary of State. Conversely, the London bombings prompted Australia to enact its control order regime, despite facing none of the problems used to justify control orders in the UK.

There was no impediment in Australia to prosecuting a very wide range of terrorist-related activity. Broad terrorism offences which criminalised preparatory, pre-preparatory and inchoate conduct were introduced in 2003. Intercept evidence can be used as evidence in prosecutions of these and other terrorism offences in Australian courts. Australia did not face the difficulties revealed by Chahal v UK and A v Secretary of State either. Australia has no national human rights Act and is not bound by anything akin to Articles 3, 5 or 14 of the ECHR. Australia is a signatory to the International Covenant on Civil and Political Rights, Article 7 of which provides an absolute right to freedom from torture and Article 9 of which provides a right to liberty. However, this treaty has not been implemented by statute and so has no force in domestic law. The common law of Australia recognises a general right to liberty, but this can be overridden by statute.

In fact, as Andrew Lynch has noted, in the same year that A v Secretary of State “effectively snuffed out the policy of indefinite detention of aliens, the High Court of Australia actually upheld legislation enabling this to occur in the case of Al Kateb v Godwin”. Al-Kateb was a stateless person who arrived in Australia seeking asylum but was denied a refugee visa. The Migration Act 1958 (Cth) authorised the executive to detain such “unlawful non-citizens”
until they were removed from the country, deported or granted a visa.\textsuperscript{18} There was no reasonable prospect of Al-Kateb being removed, deported or granted a visa; in particular, the government could not find another country willing to accept him. A majority of the High Court held that the \textit{Migration Act} validly authorised the indefinite, executive detention of Al-Kateb. This did not violate any implied constitutional immunity from executive detention which, if it existed,\textsuperscript{19} would only require forbid executive detention which was \textit{punitive in purpose}. Al-Kateb was not detained as punishment, but to ensure he was kept separate from the Australian community and could readily be removed.\textsuperscript{20}

No principle of Australian law prevented Parliament from legislating to deport non-citizens or keep them in immigration detention for lengthy periods of time. Further, the weight of High Court authority states there is nothing inherently unconstitutional about preventative detention.\textsuperscript{21} The Australian government could also be empowered to preventatively detain citizens thought to pose a security risk.

If Australia did not need control orders — at least not for the same reasons as the UK — why were they introduced? The Australian federal government announced its proposal to enact the control order regime in September 2005, two months after the London bombings.\textsuperscript{22} Prime Minister John Howard stated that “[t]he terrorist attacks on the London transport system in July have raised new issues for Australia and highlighted the need for further amendments to our laws”.\textsuperscript{23} Howard explained that his government had “looked very carefully at what happened in the UK”,\textsuperscript{24} and described the proposals as “a combination of best practice from overseas and innovative solutions that respond to Australia’s security needs”.\textsuperscript{25} Attorney-General Philip Ruddock stated that the proposed control order regime was “modelled upon

\begin{thebibliography}{9}
\bibitem{MigrationAct} \textit{Migration Act}, ss 189, 196 and 198.
\bibitem{ChuKhengLim} Hayne J suggested non-citizens have no immunity whatsoever: (2004) 219 CLR 562 at 648-649. See also \textit{Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1}.
\bibitem{Ward} This was just weeks after the State and Territory governments agreed to refer some of their legislative power to the Commonwealth pursuant to section 51(xxxvii) of the \textit{Constitution}, which was necessary to “remove any lingering constitutional uncertainty” about federal Parliament’s power to enact the laws; Williams D, “The War Against Terrorism: National Security and the Constitution” (2002) (Summer) Bar News 42, p 43; \textit{Commonwealth and States and Territories Agreement on Terrorism and Multi-jurisdictional Crime} (5 April 2002).
\bibitem{Howard} Prime Minister John Howard, n 3.
\bibitem{Howard2} Prime Minister John Howard, n 3.
\bibitem{Howard3} Prime Minister John Howard, n 3.
\end{thebibliography}
the provisions in the United Kingdom”.26 As much could have been guessed, given the UK was the first and only other nation to introduce such a measure.

The Anti-Terrorism Bill [No 2] 2005 was introduced into Parliament on 3 November 2005. This 137 page Bill proposed the introduction of the control order regime and other major changes to Australia’s counter-terrorism laws, including a new system of preventative detention orders.27 Attorney-General Ruddock stated that “the government would like all elements of the [Bill] to become law before Christmas.”28 The Bill was reviewed by the Senate Legal and Constitutional Legislation Committee, but it had just six days to call for submissions, three days of public hearings and 10 days to prepare its final report.29 The Bill was passed on 7 December 2005 after 6 hours and 24 minutes of debate. Once consequence of this hasty process was a lack of considered debate on the extent to which it was appropriate to import control orders from the UK.

Parliamentary debate was generally broad-brush. Members focused on the broad preventative rationale behind control orders, not the specific problems that led to their creation in the UK, or the fact those problems did not exist in Australia. Parliamentarians spoke of the advent of “an era of global terror”30 that justified the expansion of Australia’s counter-terrorism laws in response to terrorism attacks overseas. There was also a perceived need to keep up with the counter-terrorism strategy of other nations, particularly the UK. As Opposition Senator Mark Bishop stated:

[The Bali bombings] did make us think. The personal safety of Australians, especially overseas, became a genuine concern. I suggest though that we were still in denial that it could happen in Australia. Then came the bombings in Spain, and more recently in London. It’s from the latter that the need for this legislation is justified. And judging from the recent role of the British security agencies, there’s some merit in that. Certainly British security preparedness seems to be light years in front of Australia, but in the light of recent bombings needs constant review.31

At times, the UK precedent was used to down-play concerns about the proposal.32 For example, Attorney-General Ruddock said:

Can I just say ... when I hear comments that suggest that this is somewhat akin to what you might expect in a police state that it’s modelled upon the provisions in the United Kingdom. So you know, you’re looking at countries that observe the rule of law of

26 Prime Minister John Howard, n 3.
27 Criminal Code, s 105.7. See also complementary state legislation, eg. Terrorism (Police Powers) Act 2002 (NSW), s 26K(2). See further Explanatory Memorandum, ATA Bill, pp 2–3.
30 Commonwealth, Parliamentary Debates, House of Representatives, 29 November 2005, p 72 (Michael Johnson). See also Commonwealth, Parliamentary Debates, Senate, 5 December 2005, p 18 (George Brandis) and 124 (Steve Fielding).
32 Lynch A, n 4, p 174.
democratic institutions and were certainly not accused of being a police state when those laws were enacted there.\textsuperscript{33}

However, not all MPs accepted the need to import control orders. For example, Peter Andren MP noted that:

Australia already has some 27 pieces of antiterrorism legislation, with existing ASIO legislation already deemed to be amongst the most comprehensive in the world. There has been no demonstrated need or any thoughtful argument put forward to say why these provisions in this bill are needed or why existing laws are insufficient, save for unsubstantiated assertions by the Attorney-General.\textsuperscript{34}

Some MPs questioned whether the London bombings justified the new laws, given there was no indication that the terrorism threat facing Australia had changed, and that the UK’s control order regime did not and could not have prevented the London attacks.\textsuperscript{35} Several MPs also expressed concern that an Australian control order regime would not be constrained by human rights protections like the ECHR.\textsuperscript{36} For example, Dr Carmen Lawrence MP stated: “[t]he comparison of our legislation with the British legislation ... overlooks the fact that their system contains more human rights safeguards than ours”.\textsuperscript{37}

These calls for a more compelling justification remained unanswered. The only further justification offered was that control orders are more cost-effective than surveillance. Attorney-General Phillip Ruddock repeatedly stated that the laws were necessary because there were inadequate resources for effective covert surveillance.\textsuperscript{38} The legislation was passed, and Australia’s control order regime came into force in November 2005.

The pre-enactment scrutiny of the AT Act was clearly deficient. The fact that control orders had already been introduced by the UK — a democratic nation with a shared cultural and political heritage with far more experience with terrorism and “light years in front of Australia” in its counter-terrorism strategy\textsuperscript{39} — provided the foundation for the passage of the law. Australian parliamentarians did not blindly accept the wholesale transplantation of a UK

\textsuperscript{33} Prime Minister John Howard, n 3.
\textsuperscript{36} Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 10 November 2005, p 91 (Jenny Macklin); 5 December 2005, p 104 (Lyn Allison). Similarly, Petro Georgiou MP suggested Australia create an officer similar to the UK’s Independent Reviewer (a proposal that was implemented in 2010) (Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 10 November 2005, p 78) and Arch Bevis MP argued for the addition of a sunset clause on the basis that the UK control order regime was subject to an annual review (Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 10 November, p 72).
concept. Some argued that the existence of control orders in the UK did not necessarily mean they were needed in Australia; some were alive to the differences between the UK and Australia, most notably the absence of a constraining human rights framework. However, the Australian control order regime was ultimately justified by the UK precedent, rather than a reasoned assessment that it was required in Australia. At the same time, there was no detailed comparison of the Australian regime and its progenitor and no engagement with the fact that the issues that prompted the creation of control orders in the UK did not exist in Australia.

The enactment of the Australian control order regime is a prime example of the tendency of counter-terrorism law to migrate between jurisdictions. First, it was introduced in response to a terrorist-attack overseas. Secondly, it mimicked the counter-terrorism laws of another nation. This tendency is not uniquely Australian, nor surprising. Terrorism attacks in other countries can kill and injure Australian citizens abroad and have a profound impact on the Australian psyche, particularly when they occur in a country to which Australia is politically, culturally or historically linked. In our fortunate “absence of any substantial experience both of a terrorist threat and of designing legal measures to counter it”, Australia may look to other countries for guidance. At a time of (actual or perceived) emergency, the government wishing to respond quickly to a terrorist act may prefer to work from precedent than start from scratch. Though understandable, the tendency to follow the legislative example of other countries in light of events occurring overseas produces a real risk that Australia may enact laws which are disproportionate to the domestic terrorism threat, or simply unnecessary.

III THE AUSTRALIAN CONTROL ORDER REGIME

The Australian control order regime is contained in Division 104 of the Criminal Code Act 1995 (Cth) (Criminal Code). The Code makes clear that the purpose of the regime is preventative; an objects clause states that control orders are to be made “for the purpose of protecting the public from a terrorist act”.

A The Process of Making a Control Order

Control orders are made by an “Issuing Court”, at the application of the Australian Federal Police (AFP). Before an order can be made, a “senior member” of the AFP must obtain the consent of the Commonwealth Attorney-General. The member must present the Attorney-General with a request, comprising of a draft of the proposed order, a summary of the

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42 After all, the UK enacted the Anti-terrorism, Crime and Security Act in response to the 9/11 attacks.

43 Lynch A, n 4, 159.

44 Criminal Code, s 104.1.

45 The Federal Court, Federal Circuit Court and Family Court can all act as Issuing Courts: Criminal Code, s 100.1.

46 Criminal Code, s 104.2(1). It is also possible for the AFP to obtain an urgent interim control order by telephone, email or other electronic means, without the Attorney-General’s prior consent, provided this consent is obtained within four hours of the interim order being made: Criminal Code, div 104 subdiv C.
grounds on which the order is sought, and a statement of the relevant facts.\textsuperscript{47} If the Attorney-General consents, the AFP member may then take the request to an Issuing Court.\textsuperscript{48}

First, the Issuing Court will decide whether or not to make an interim control order. This is decided\textit{ ex parte}. If the Issuing Court decides to make an interim control order, it must include a summary of the grounds on which the order was made.\textsuperscript{49} The interim order must then be personally served on the controlee by a member of the AFP as soon as practicable after the order is made.\textsuperscript{50} The order has no legal effect until this is done.\textsuperscript{51} When serving the order, the AFP must explain its effect, how long it will remain in force, the process by which the order may be confirmed and certain other facts.\textsuperscript{52} The AFP member should ensure that the controlee understands this information\textsuperscript{53} — but a failure to do so does not affect the validity of the order.\textsuperscript{54}

An interim control order only remains in force for 24 hours.\textsuperscript{55} If the AFP wishes the order to remain in force for a longer period of time, it must elect to proceed to a confirmation hearing. If it so elects, the AFP must notify the controlee and serve the controlee with additional information: a statement of the facts on which the AFP alleges the order should be made, each restriction or obligation imposed and “any other details required to enable the person to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order”.\textsuperscript{56} The AFP has no obligation to ensure the controlee understands this information.

The confirmation hearing is notionally a full adversarial hearing. The Issuing Court may hear evidence from the controlee or his or her representative as well as the AFP,\textsuperscript{57} and must consider the material previously adduced at the interim control order hearing.\textsuperscript{58} On this evidence, the Court will determine whether the relevant criteria have been satisfied and may then confirm the order (with or without variation), declare that the order is void, or revoke the order.\textsuperscript{59}

At various points in this process, information may be kept secret if its disclosure is “likely to prejudice national security”.\textsuperscript{60} First, the AFP can leave information out of the request it

\textsuperscript{47} Particularly, “a statement of the facts relating to why the order should be made” and why “each provision of the control order should be imposed”, and any facts which suggest they should not: \textit{Criminal Code}, s 104.2(3).

\textsuperscript{48} \textit{Criminal Code}, s 104.4.

\textsuperscript{49} \textit{Criminal Code}, s 104.5(1).

\textsuperscript{50} \textit{Criminal Code}, s 104.12(1). This must be at least 48 hours before the subsequent confirmation hearing.

\textsuperscript{51} \textit{Criminal Code}, s 104.12(1).

\textsuperscript{52} \textit{Criminal Code}, s 104.12.

\textsuperscript{53} \textit{Criminal Code}, s 104.12(1)(c).

\textsuperscript{54} \textit{Criminal Code}, s 104.12(4).

\textsuperscript{55} The AFP must elect whether or not to proceed to a confirmation hearing, no more than 24 hours after the interim control order is made: \textit{Criminal Code}, s 104.5(1A). If the AFP elects not to proceed, the interim control order will immediately lapse: \textit{Criminal Code}, s 104.12A(4)(a). This means an interim control order should only remain in force for a maximum of 24 hours.

\textsuperscript{56} \textit{Criminal Code}, s 104.12A(2).

\textsuperscript{57} If the matter occurs arises in Queensland, the Queensland public interest monitor can also attend and make submissions. \textit{Criminal Code}, ss 104.14(1), (2).

\textsuperscript{58} \textit{Criminal Code}, s 104.14(3).

\textsuperscript{59} \textit{Criminal Code}, ss 104.5(e), 104.14.

\textsuperscript{60} As defined in the \textit{National Security Information (Criminal and Civil Proceedings) Act} 2004 (Cth). That is, “a disclosure of information is \textit{likely to prejudice national security} if there is a real, and not merely a remote, possibility that the disclosure will prejudice national security”: s 17(1).
presents to the Attorney-General and in turn the Issuing Court. Secondly, the Issuing Court can leave information out of the summary of grounds on which an order is made. Thirdly, if the AFP elects to proceed to a confirmation hearing it is required to notify the controlee and disclose additional information, but it is not required to inform the controlee of security sensitive information.

**B Grounds on Which an Order Can be Made**

The AFP can only request a control order if satisfied “on reasonable grounds” of one of two criteria: either “that the person has provided training to, or received training from, a listed terrorist organisation (the training criterion) or that the order “would substantially assist in preventing a terrorist act” (the preventative criterion). The latter criterion means it is not necessary to show that the controlee has personally engaged in terrorism-related activity, or is suspected will do so in the future.

The Issuing Court can only make a control order if satisfied that the AFP’s request was properly made. More substantively, the court must also be satisfied “on the balance of probabilities”:

- of either the preventative criterion or the training criterion; and
- “that each of the obligations, prohibitions and restrictions to be imposed on the person is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act”.65

In determining the latter issue, the court must take into account “the impact of the obligation, prohibition or restriction on the person’s circumstances (including the person’s financial and personal circumstances)”.

**C Measures an Order Can Impose**

The Criminal Code contains an exhaustive list of the “obligations, prohibitions and restrictions” that a control order can impose. These are:

- (a) a prohibition or restriction on the person being at specified areas or places;
- (b) a prohibition or restriction on the person leaving Australia;
- (c) a requirement that the person remain at specified premises between specified times each day, or on specified days;
- (d) a requirement that the person wear a tracking device;
- (e) a prohibition or restriction on the person communicating or associating with specified individuals;

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61 Criminal Code, s 104.2(3)(a).
62 Criminal Code, s 104.5(2A).
63 Criminal Code, s 104.12A(3). In fact, the category of information that may be withheld at this stage is even broader than that “likely to prejudice national security”.
64 Criminal Code, s 104.2(2).
65 Criminal Code, s 104.4(1)(d). See also Criminal Code, s 104.14.
66 Criminal Code, s 104.4(2). If the court concludes that some of the measures sought by the AFP do not satisfy these tests, it can sever those measures from the order: Criminal Code, s 104.4(3).
(f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the internet);
(g) a prohibition or restriction on the person possessing or using specified articles or substances;
(h) a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
(i) a requirement that the person report to specified persons at specified times and places;
(j) a requirement that the person allow himself or herself to be photographed;
(k) a requirement that the person allow impressions of his or her fingerprints to be taken; and
(l) a requirement that the person participate in specified counselling or education.68

As noted above, each measure must be found to be reasonably appropriate and adapted to preventing a terrorist act by the Issuing Court.

Multiple, even successive control orders can be issued against the same person. The only additional requirement in such a case is that the AFP provide the Attorney-General, and in turn the Issuing Court, with details of any previous control orders sought or issued against the proposed controlee.69

A confirmed control order can remain in force for up to 12 months.70 The control order regime itself is subject to a sunset clause.71 The legislation, and any control orders in place, will cease to have any force on 16 December 2015 unless renewed by Parliament.

IV USE OF THE AUSTRALIAN CONTROL ORDER REGIME

Only two control orders have ever been made in Australia. Both have since lapsed. The first was made in August 2006 against Joseph “Jack” Thomas. The second was made against David Hicks in December 2007.72

Jack Thomas

Thomas is an Australian citizen who travelled to Afghanistan in March 2001. He then travelled to Pakistan in 2003, and intended to return to Australia. On 4 January 2003, Thomas was apprehended at Karachi airport in possession of an Australian passport that appeared to have been doctored, a plane ticket back to Australia and $3800 cash. Thomas was taken into custody by Pakistani authorities. While in custody, Thomas was interviewed by Australian officers of the AFP. Thomas told the officers that he had trained at an Al Q’aida training base in Afghanistan in 2002. 

67 This does not prevent the controlee from contacting a lawyer, unless the lawyer is specifically identified as someone whom the person cannot contact pursuant to measure (e): Criminal Code, s 104.5(5).
68 Criminal Code, s 104.5(3). The controlee must agree to participate in counselling or education under measure (l): Criminal Code, s 104.5(5).
69 Criminal Code, s 104.2(5).
70 Criminal Code, s 104.5(f). The controlee and AFP Commissioner can also apply to have the order revoked or varied: Criminal Code, ss 104.19, 104.24. The Commissioner can also apply to add measures to the control order, but this will require another hearing: Criminal Code, div 104 subdiv F.
71 Criminal Code, s 104.32.
72 There is no Australian equivalent to the UK provision that enabled controlees or the government to apply to keep the controlee’s identity confidential: PT Act, sch subs 5.
camp while he was in Afghanistan. He also admitted that the plane ticket and cash had been
given to him by a high-ranking member of Al Q’aida who was an associate of Osama Bin Laden. Thomas was released and returned to Australia, where he was arrested in 2004.\(^{73}\)

On the basis of the admissions he had made in Pakistan, Thomas was charged and convicted of receiving funds from a terrorist organisation\(^{74}\) and possessing a falsified passport.\(^{75}\) He was acquitted of the more serious charge of supporting a terrorist organisation.\(^{76}\) These two convictions were quashed later the same year when the Victorian Court of Criminal Appeal held that the admissions could not be used as evidence.\(^{77}\) The admissions had to be viewed in the broader context of Thomas’s detention by the Pakistani authorities, the mistreatment he had suffered, and the fact he was repeatedly told that his fate depended on the extent of his cooperation.\(^{78}\) Therefore the admissions could not be said to have been voluntary; Thomas only made them because he reasonably believed it was the only way to end his detention.\(^{79}\)

The matter was then remitted for a re-trial, which commenced in 2008. In the meantime the AFP obtained an interim control order from the Federal Magistrates Court. This order required Thomas to remain in his home between midnight and 5am each day and report to police three times a week. It also restricted Thomas’s use of telephone and internet services and prohibited Thomas from communicating with any member of a terrorist organisation or any one of 50 specified persons (including Osama Bin Laden).\(^{80}\) The issuing magistrate said he was not aware of the extent of this ban when he made the order and later described it as “silly” and “almost farcical”.\(^{81}\)

The control order was based on the very admissions that had been ruled inadmissible by the Victorian Court of Criminal Appeal. There was no evidence that Thomas had engaged in any terrorism-related activity since 2001. Despite this, the Issuing Court accepted Thomas’s “admission” that he had trained with Al Q’aida and therefore found that Thomas had been “groomed by Al Q’aida to become a resource – a person that can be trusted to carry out or assist with terrorism acts” in the future.\(^{82}\) The Issuing Court held that the discredited admissions could be admitted at the interim control order hearing because it was an interlocutory civil proceeding to which the rules of criminal evidence did not apply.\(^{83}\)

The AFP’s decision to apply for a control order against Jack Thomas has been criticised as “jurisprudential context-shopping” to avoid the procedural requirements of the criminal


\(^{74}\) Passports Act 1938 (Cth), s 9A(1)(e).

\(^{75}\) Criminal Code, s 102.6(1).

\(^{76}\) Criminal Code, s 102.7(1).

\(^{77}\) R v Thomas [2006] VSCA 165 at [1], [7].


\(^{80}\) Jabbour v Thomas [2006] FMCA 1286.


\(^{82}\) Jabbour v Thomas at 38 (Mowbray FM). For criticism, see Lynch A, “Thomas v Mowbray: Australia’s “War on Terror” Reaches the High Court” (2008) 32 MULR 1182, p 1187.

\(^{83}\) Jabbour v Thomas at 34.
law.\textsuperscript{84} This was recently echoed by the Independent National Security Legislation Monitor (Monitor) in his Declassified Annual Report for the year ending 2012. The Monitor stated that the case of Jack Thomas demonstrates the potential for control orders to be used against an “individual who has been acquitted of a terrorism offence, on the basis of the same evidence and the same conduct for which the person was acquitted”, as a “second attempt” at restraining that person’s liberty.\textsuperscript{85} This was described as “worrying from a rule of law perspective”.\textsuperscript{86} Though this is the only case in which a control order has been used in this way, the Monitor reported that the AFP has considered applying for a control order “against the contingency of an acquittal” on six other occasions.\textsuperscript{87}

The interim control against Thomas was never confirmed. However, Thomas and the AFP agreed that the interim order would remain in place, without confirmation, until Thomas’s High Court challenge to the constitutional validity of the control order regime was decided. On retrial, Thomas was convicted of possessing a falsified passport, but acquitted of receiving funds from a terrorist organisation.\textsuperscript{88} Thomas was thus never convicted of a terrorism offence.

**B David Hicks**

David Hicks is an Australian citizen who was convicted of a terrorism offence before a US Military Commission after years of incarceration in Guantanamo Bay. This charge was based on the allegation that Hicks had trained with Al Q’aida in Afghanistan between January and August 2001. In December 2001, Hicks was captured in Afghanistan by the Afghan Northern Alliance, handed over to the US military and detained in Guantanamo Bay as an ‘enemy combatant’. He was eventually charged with providing material support to terrorism under the *Military Commissions Act* 2006 (US),\textsuperscript{89} and pleaded guilty in 2007. However, Hicks claims that he only pleaded guilty in order to escape detention in Guantanamo Bay, where he alleges he was tortured.\textsuperscript{90}

The validity of Hicks’ conviction has since been thrown into further doubt by the decision in *Hamdan v United States* (US App DC, Oct 16 2012). Salim Hamdan was convicted in 2008 of the same offence as Hicks, on the basis of his involvement with Al Q’aida between 1996 and 2001. In 2012, the Court of Appeals for the District of Columbia overturned Hamdan’s conviction on the basis that the *Military Commissions Act* did not have retrospective effect. If it did, the Act would violate the ex post facto clause in the US Constitution,\textsuperscript{91} which prohibits the enactment of retrospective criminal offences. If Hicks were to challenge his conviction, it may too be overturned given Hicks was also convicted on the basis of conduct which occurred before the enactment of the *Military Commissions Act*.

\begin{footnotes}
\item[85] Walker B, n 1, 17. See further n 1, pp 15–19.
\item[86] Walker B, n 1, 29.
\item[87] Walker B, n 1, 29.
\item[88] *R v Thomas* [2008] VSC 620.
\item[89] 10 USC 950t(25).
\item[91] Art 1 § 9. See also art 1 § 10.
\end{footnotes}
Hicks was sentenced to seven years in prison but, pursuant to an agreement between the Australian and US governments, this sentence was reduced to nine months. Hicks was brought back to Australia to serve his sentence in Adelaide’s Yatala Prison. In the lead up to his release, the AFP sought an interim control order against Hicks. The order was made by the Federal Magistrates Court in December 2007. It required Hicks to stay in his home between midnight and 6am, report to police three times a week and provide fingerprints. It also prohibited Hicks from leaving Australia, communicating with members of terrorist organisations, acquiring or possessing weapons or military training materials and using telecommunications services not approved by the AFP.92

The AFP elected to seek to have the interim order confirmed and a confirmation hearing was held in February 2008.93 This meant the interim control order remained in force for far longer than the Criminal Code would appear to allow. Unusually, Hicks had been notified that an interim control order would be sought and his legal representatives attended and made submissions to the interim hearing. The confirmation hearing was adjourned on Hicks’ request, to give him sufficient time to prepare his case.94

Hicks did not personally appear at the confirmation hearing. His lawyers objected on his behalf to the requirements that he report to police three times a week, on the basis that it was “too onerous to lead a normal life ... and could interfere with his assimilation back into the community”.95 The AFP argued it was necessary to ensure Hicks could not attend remote locations to attend terrorist training and because there was no “technology based alternative”, but this latter claim was shown to be false under cross-examination.96 Ultimately, the control order was confirmed but its terms varied: Hicks had to report to police twice a week rather than three times, remain in his home between 1am and 5am, and could move to an approved address in another Australian state. This control order expired in December 2008.

**C A Seldom Used Device**

These are the only two occasions on which the Australian control order regime has been used.97 By contrast, control orders were made against 52 men in the UK.98 The low number of control orders made in Australia does not appear to correlate with official assessments of the terrorism threat facing Australia. Since 2005, Australia’s official terrorism threat alert level had remained at medium, meaning a “terrorist attack could occur”.99 The Director-
General of ASIO has continued to report that the threat of terrorism is “very real”, stating in 2011:

each year ASIO responds to literally thousands of counterterrorism leads … we are currently involved in several hundred counterterrorism investigations and inquiries.

Since control orders were introduced in late 2005, 33 men have been charged with terrorism offences. The Monitor recently reported that the AFP has “considered” applying for a control order on 25 occasions during this time, but only actually applied for two. No control order has been made since 2007.

This does not necessarily mean control orders ought to be repealed, but it does raise a legitimate question as to whether they are a useful counter-terrorism tool. As the Monitor recently reported, it is:

proper … to rate the importance and contribution of properly funded and resourced surveillance and investigation efforts in relation to suspected terrorist offences much more highly than resort to [control orders] … surveillance and investigation seem to have been effective; [control orders] have been ineffective.

**V UK AND AUSTRALIAN CONTROL ORDERS COMPARED**

At first glance, the abolition of control orders in the UK suggests the Australian control order regime should follow suit. However, this is not necessarily the case. The two regimes operated in markedly different legal contexts and there were important differences between the two. This section outlines three key differences between the UK and Australian regimes.

**A Nature and Purpose**

The essential character of the two control order regimes was the same. In both countries, control orders were a novel hybrid measure designed to protect the public via the civil rather than criminal law. Each could be described as evidence of broader shifts in the legal and political climate; of the rise of a “preventive state” that emphasises “the need for security,
the containment of danger, the identification and management of ... risk” before it eventuates into actual harm.  

Both countries encountered the difficulty of distinguishing this novel device from the criminal law. In the UK, the Home Secretary was required to consider whether a controlee could be prosecuted for committing a terrorism offence before making a control order. This notionally prioritised prosecution over control. The Chief Police Officer was also required to continue to investigate the possibility of a prosecution throughout the life of the control order. This was particularly important in the UK, where a control order could be renewed indefinitely. Many orders remained in place for more than a year — the longest for four and a half. This contrasts with Australia, where confirmed control orders can only remain in force for a maximum of 12 months.

The UK’s “priority to prosecution” requirement was imperfect, and to an extent illogical: if a control order works as it should, the controlee should not be able to commit a terrorist act. Nevertheless, it did attempt to distinguish civil control orders from the criminal justice process. This distinction is absent in Australia. There is no requirement at any stage that the AFP, Attorney-General or Issuing Court consider whether a controlee could be charged with a crime rather than subjected to a control order. Rather, there is a substantial and dangerous overlap between the control order regime and the criminal law. Some conduct can constitute a criminal offence under the Criminal Code and grounds for issuing a control order. For example, training with a terrorist organisation — the basis of the control order imposed on Jack Thomas — constitutes an offence under section 102.5(2) of the Criminal Code. Some of the conduct proscribed by a control order could also constitute a criminal offence. For example, Jack Thomas was prohibited him from manufacturing or acquiring explosives. This could be an offence under section 101.4 of the Criminal Code, which prohibits any person from knowingly possessing things “connected with preparation for, the engagement of a person in, or assistance in a terrorist act”. Finally, the Monitor recently noted that the requirement that each measure imposed by a control order be:

‘reasonably necessary, and reasonably appropriate and adapted, for the purposes of protecting the public from a terrorist act’ is virtually bound in all imaginable circumstances to involve a real apprehension that, but for the terms of the proposed [control order, the proposed controlee would commit] a terrorism offence.

This raises the question of whether there is a need for control orders in Australia. It also means that the AFP can use control orders to bypass the evidential and procedural requirements of the criminal law. The AFP can obtain a control order which imposes

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109 PT Act, s 8.
110 PT Act, ss 2(4), (6).
113 See also Walker B, n 1, pp 11, 26.
114 Jabbour v Thomas, sch 1 cl 5(b).
115 Walker B, n 1, 30.
116 See also Lynch A, n 82, p 1188.
criminal-like sanctions on the basis of information which does not satisfy the rules of
criminal evidence (as in the case of Jack Thomas), or imposes additional controls on an
individual who has already served his or her sentence for a crime (as in the case of David
Hicks). This compromises the integrity and proportionality of the criminal justice system.

The AFP recently assured the Council of Australian Governments’ Review of Counter-
terrorism Legislation (COAG Review) that “control orders … have not been sought wherever
sufficient evidence has existed to support a criminal charge and subsequent criminal
proceedings”.117 This is heartening, though the fact the AFP tends to use these extraordinary
powers with restraint is not an adequate substitute for the existence of satisfactory, statutory
limits on those powers. Further, the fact the AFP has only applied for two control orders
further suggests that in almost all cases it is possible to adequately contain the relevant threat
via the ordinary processes of the criminal law.

B Measures an Order Can Impose

The Australian legislation stipulates an exhaustive list of measures which a control order can
impose.118 The UK legislation provided that the Home Secretary could impose any measure
he or she “consider[ed] necessary for purposes connected with preventing or restricting
involvement by [the controlee] in terrorism-related activity”,119 and then set out a non-
exhaustive list of what those measures might include.120 It seems that no control order
imposed obligations other than those included on this list.121

The UK legislation listed 16 possible measures while the Australian legislation lists 12. The
two lists are broadly similar and all the measures imposed on Jack Thomas and David Hicks
could have also been imposed under the UK regime. However, the UK regime permitted
some remarkably invasive measures that the Australian regime does not. In particular, a UK
control order could require a controlee to leave his or her home and move elsewhere, often in
practice to a different town or city. This was intended to break up extremist associations and
generally disrupt terrorism-related activity.122 It became the “most controversial feature” of
the regime.123 Controlees’ families were permitted to move with them, but often could not or
would not.124 Twenty-three of the UK’s 52 controlees were subjected to a relocation
requirement.125 The Australian regime does not permit forced relocation.

The UK regime distinguished between control orders which restricted the liberty of the
controlee (non-derogating control orders) and control order which imposed measures of such
a degree as to amount to a deprivation of liberty (derogating control orders). For example, a
derogating control order could have imposed a permanent stay “in accommodation owned
and managed by the Government”.126 This distinction was necessary because an order that

117 n 4.
118 Criminal Code, s 104.5(3).
119 PT Act, s 1(3).
120 PT Act, s 1(4).
121 Anderson D, n 98 Error! Bookmark not defined., p 33.
122 Anderson D, n 98, p 35.
123 Anderson D, n 98 Error! Bookmark not defined., p 36.
124 Anderson D, n 98 Error! Bookmark not defined., p 36.
125 Anderson D, n 98 Error! Bookmark not defined., p 36.
126 United Kingdom, Parliamentary Debates, House of Commons, 22 February 2005, vol 431, col 152 (Charles
Clarke, Home Secretary).
deprived a controlee of his or her liberty would have required the UK to formally derogate from Article 5 of the ECHR.\textsuperscript{127} No derogating control orders were ever made, and so the UK never entered a formal derogation.\textsuperscript{128} Conversely, if the practical effect of the measures imposed by a purportedly non-derogating control order was tantamount to a deprivation of liberty, the order would be unlawful as there was no derogation in place to excuse it from Article 5.

For the purposes of Article 5, the distinction between restrictions and deprivations of liberty is one of degree. At a certain point, the practical or cumulative effect of multiple restrictions of liberty may become so great as to constitute a deprivation of liberty requiring a derogation.\textsuperscript{129} Several controlees challenged control orders on this basis. In Secretary of State for the Home Department v JJ and Others,\textsuperscript{130} the UK House of Lords confirmed that control orders which imposed, inter alia, 18-hour home curfews deprived the controlees of their liberty in breach of Article 5. In Secretary of State for the Home Department Respondent v E,\textsuperscript{131} a curfew of 12 hours was upheld as a mere restriction on liberty compatible with Article 5. The impact of these cases should not be overstated.\textsuperscript{132} They did, however, give some substance to the principle that an individual should not be deprived of their liberty via a civil process not attenuated by the safeguards of the criminal law, in all but the most exceptional cases.\textsuperscript{133} Article 5 enabled the UK courts to look beyond the form of a control order and examine its practical effect on the life of a controlee.

The Australian regime does not distinguish between control orders that amount to a deprivation of liberty and those which do not. The Australian legislation does not permit forced relocation (to a state-owned facility, or elsewhere). It would permit the imposition of a very lengthy curfew (for example, of 18 hours or more a day) equivalent to those which the UK House of Lords held amounted to a deprivation of liberty — though the two control orders which have been made so far imposed relatively short curfews, of 5 and 6 hours respectively.\textsuperscript{134} Hence, it would be possible to make a control order amounting to a deprivation of liberty in Australia, provided this could be shown to be “reasonably appropriate and adapted to preventing a terrorist act”. As explained above, there is no right to liberty that would prevent the making of such an order, provided the process by which it is made does not violate the separation of judicial power imposed by the \textit{Australian Constitution}.

The Australian regime also permits control orders to be made against a broader category of people. In the UK, the Home Secretary had to be satisfied that each measure imposed by the order was “necessary for purposes connected with preventing or restricting involvement by

\begin{footnotesize}
\textsuperscript{127} ECHR art 14.
\textsuperscript{129} Guzzardi v Italy (1980) 3 EHRR 533.
\textsuperscript{130} [2007] UKHL 45.
\textsuperscript{131} [2007] UKHL 47.
\textsuperscript{133} See also Walker B, n 1, 26.
\end{footnotesize}
that individual in terrorism-related activity”.

In Australia, a control order can be made if the preventative criterion is satisfied; that is, that making the order will “substantially assist in preventing a terrorist act”. Thus it is not necessary to show that the controlee has personally engaged in terrorism-related activity or is suspected will do so in the future.

C Process and Secret Intelligence

The process of making a control order differed substantially between the two nations. In the UK, the decision to make a control order was made by the Home Secretary, rather than a court. However, the Home Secretary had to obtain the permission of the High Court, and if a control order was made, a process akin to a confirmation hearing took place before a court within 7 days.

There were repeated calls to enhance judicial scrutiny of the process and vest the power to make control orders in the courts. UK commentators suggested that the Australian system was preferable, as giving the courts an “active role in issuing control orders ... is likely to ensure stronger protection of an individual controlee’s rights”. Yet in Australia, the fact control orders are made by courts has been criticised, for risking the integrity of the judiciary and straining the separation of powers.

Further, the ability of the Australian courts to scrutinise the impact of a control order on the controlee’s rights is actually far more limited than was the case for their UK counterparts. In the UK, an executive decision incompatible with the ECHR is ultra vires. When deciding whether to grant permission to make the order and reviewing the order after the fact, the UK courts could as a result consider whether the order infringed the controlee’s rights and declare it unlawful if it did. The controlee could also challenge the order in the European Court of Human Rights. In Australia, there is no judicially enforceable human rights Act at the federal level. A controlee can seek judicial review of a control order, but the fact a control order may be incompatible with fundamental common law rights is unlikely to constitute a reviewable error of law.

135 PT Act, ss 1(3) (emphasis added), 2.
136 Criminal Code, s 104.2(a).
137 Thomas v Mowbray at 352 (Gummow and Crennan JJ).
138 PT Act, s 2(1). The High Court’s consent had to be obtained prior to making the order, unless the case was urgent, in which case the Secretary of State was to obtain the permission of the High Court immediately after the order is made: PT Act, s 3(1). Derogating control orders had to be issued by a court, rather than the Home Secretary: PT Act, s 4.
139 PT Act, s 3(2). The controlee could also apply to have the order modified or revoked by the UK courts: PT Act, s 7(1).
141 Bachmann SD and Burt M, n 9, p 149.
144 In granting permission to make an order, and reviewing the order after it was made: PT Act, s 3. Note the PT Act sometimes specified “obviously flawed” and sometimes “flawed”, but this difference in language did not affect the standard of review.
145 The recently enacted Parliamentary Scrutiny (Human Rights) Act 2011 (Cth) does not create any scope for legal challenge. See further Williams G and Burton L, “Australia’s Exclusive Parliamentary Rights Model of
An inherent difficulty encountered by both regimes is the use of security sensitive intelligence to justify the making of an order.\textsuperscript{146} In the UK, if a control order hearing before a court required the disclosure of secret intelligence, it was held in camera. The controlee was represented by a state-appointed, security-cleared “Special Advocate”. The Special Advocate’s role was to test the cogency of the case for non-disclosure and to represent the controlee’s interests.\textsuperscript{147} However, the Special Advocate’s ability to do the latter was significantly impaired. A Special Advocate who had seen closed material could not discuss that material with the controlee or take instructions. The PT Act made clear that the Special Advocate was not the controlee’s “lawyer”, stating that the Special Advocate was “not to be responsible to the person whose interests he is appointed to represent”.\textsuperscript{148} Special Advocates had no access to independent expertise and evidence, restricted resources and no power to call witnesses.\textsuperscript{149}

This procedure was heavily criticised.\textsuperscript{150} One Special Advocate quit, stating he did not wish to give a “fig leaf of respectability and legitimacy” to an “odious” process.\textsuperscript{151} In Secretary of State for the Home Department v AF (No 3),\textsuperscript{152} the UK House of Lords eventually confirmed that the procedure stipulated by the PT Act had to be read down, lest it violate the right to a fair trial protected by Article 6 of the ECHR.\textsuperscript{153} The use of secret intelligence and Special Advocates could continue, but the controlee had to be informed of the core of the case against him and put in a position to effectively instruct the Special Advocate. The House of Lords suggested that this requirement could destroy the control order regime.\textsuperscript{154} This did not prove

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\textsuperscript{147} United Kingdom, Parliamentary Debates, House of Commons Constitutional Affairs Committee, Seventh Report of Session 2004/05, The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates (2005), para [58].

\textsuperscript{148} PT Act, sch cl 7(5).


\textsuperscript{150} See further Kavanagh A, n 149.

\textsuperscript{151} UK Parliament Constitutional Affairs Committee, 7th Report 2004/5 (2005), para [41].

\textsuperscript{152} [2009] UKHL 28.

\textsuperscript{153} Secretary of State for the Home Department v AF (No 3), esp at [24] (Lord Bingham), [59] (Lord Phillips), [72] (Baroness Hale), [84] (Lord Carswell), [90]-[92] (Lord Brown). The decision to read down the PT Act (pursuant to section 3 of the Human Rights Act) rather than declare it incompatible with Article 6, was controversial. See Kavanagh A, n 149, pp 848–851. This decision was the end result of significant ‘to and fro’ between the UK courts and Strasbourg. In Secretary of State for the Home Department v MB [2007] UKHL 46, the House of Lords expressed many different opinions, but signalled that it was possible that the provision of a Special Advocate would ensure the process was compatible with Article 6. In A and others v UK (Application no 3455/05, Council of Europe: European Court of Human Rights, 19 February 2009) cast significant doubt on MB and the Special Advocate process. Subsequently, the House of Lords admitted its earlier decision had been far too “sanguine”: Secretary of State for the Home Department v AF (No 3) at [101]. For broader discussion on the dialogue between the UK Courts and Strasbourg see Hale B, “Argentoratum Locutum; Is Strasbourg or the Supreme Court Supreme?” (2012) 12 Human Rights Rev 65; Elliott M, “The War on Terror and the United Kingdom’s Constitution” (2007) European Journal of Legal Studies (online).

\textsuperscript{154} Secretary of State for the Home Department v AF (No 3) at [70] (Lord Hoffman). See also [87] (Lord Hope).
to be the case. The UK government was criticised for paying lip-service to the ECHR and failing to comply with “either the spirit or the letter” of Secretary of State for the Home Department v AF (No 3),\textsuperscript{155} for example, by disclosing the bare minimum of information in the hope it would satisfy Article 6

The Australian method of dealing with special intelligence is entirely different. There is no equivalent to a Special Advocate in the Criminal Code.\textsuperscript{156} A controlee is entitled to full legal representation and advice, and the hearing at which a control order is confirmed is notionally an adversarial hearing complying with the rules of evidence. However, there are multiple ways in which intelligence on which the control order is based can be kept secret from the controlee.

First, the AFP may unilaterally withhold information from the request it presents to the Attorney-General and the Issuing Court. Specifically, the “summary of the grounds on which the order should be made” that must be included in the request for a control order need not include information “if disclosure of that information is likely to prejudice national security”, as defined in the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) (NSI Act).\textsuperscript{157} Such information would obviously not be relied upon by the Issuing Court in making the order, so this poses little danger to procedural fairness. However, it may mean the court is not informed of all important and relevant information, which does detract from the integrity of the process.

If the Issuing Court makes an interim control order, the order must include a summary of the grounds on which it was made.\textsuperscript{158} This will then appear on the public record and be served on the controlee. However, the court need not include information in this summary if its disclosure is “likely to prejudice national security”.\textsuperscript{159} Thus the AFP can disclose and rely on information at the interim control order hearing that is never revealed to the controlee. This means a person may be subjected to an interim control order without ever knowing the full reasons for the decision.

If the AFP elects to seek to have the interim order confirmed it must serve the controlee with additional information.\textsuperscript{160} This is apparently to ensure that the controlee knows the case against him or her and is put in a position to defend his or her interests at the confirmation hearing. However, the AFP need not give the controlee security sensitive information. In fact, the category of information which the AFP can withhold at this stage is even broader than that which applies at the interim stage. It includes information the disclosure of which is

\textsuperscript{155} Kavanagh A, n 149, p 852. See also PJCHR, Counter-terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010 (2010), para [50]; Bachmann SD and Burt M, n 9, pp 142-147.

\textsuperscript{156} It may be possible for an Issuing Court to appoint a special advocate, as part of its inherent powers to control its own proceedings. In R v Lodhi [2006] NSWSC 586 Whealy J rejected an application made by the defendant to appoint a special advocate to represent his interests at an upcoming closed hearing. His Honour held that the Supreme Court of NSW had the power to appoint a special advocate, but should only do so if “satisfied that no other course will adequately meet the overriding requirements of fairness to the defendant”: at [45]. In R v Khazaal [2006] NSWSC 1061 Whealy J rejected a similar application for the reason that it was not necessary: at [51]–[53].

\textsuperscript{157} Criminal Code, ss 104.2(3)(f), (3A).

\textsuperscript{158} Criminal Code, ss 104.5(1)(h), (2A).

\textsuperscript{159} Again, as defined in the NSI Act. Criminal Code, s 104.5(2A).

\textsuperscript{160} Criminal Code, s 104.12A(2).
likely to prejudice national security, “put at risk ongoing operations by law enforcement agencies or intelligence agencies”, or “risk the safety of intelligence officers”. This clear and unambiguous statement likely excludes the common law rules of procedural fairness, insofar as they would require the controlee to be informed of the case against them. Thus the notice the controlee receives may actually be heavily censored. It may not include information which is integral to the AFP’s case. This could significantly diminish the controlee’s ability to challenge the confirmation of a control order and the integrity and fairness of the process.

These provisions seem to establish an additional and alternative path for censoring security sensitive information to the NSI Act. Importantly, the control order regime does not obligate the AFP to notify the controlee that it wishes to rely on secret intelligence and provides no opportunity for the controlee to challenge the case for non-disclosure; indeed, the controlee may never know the information exists. The use of secret intelligence was raised by Jack Thomas in his constitutional challenge to the control order regime. This could only be considered indirectly, as there is no right to a fair trial in Australia of the kind protected by Article 6 of the ECHR. In Australia, the Issuing Courts empowered to make control orders can only exercise judicial power due to the separation of powers arising from Chapter III of the Constitution. Therefore, the question for the High Court was not whether the use of secret intelligence denies the controlee a fair hearing, but whether it renders the power to make a control order non-judicial, or requires a court to act in a manner that is repugnant to judicial process.

Kirby J concluded that the power was unconstitutional. He held that the fact intelligence may be relied upon by the AFP but never disclosed to the controlee, and therefore never tested before the Issuing Court, meant that “in effect, and in substance, the [Issuing Courts] are rendered rubber stamps for the assertions of officers of the Executive Government”. The

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161 Criminal Code, s 104.12A(3).
163 The NSI Act is designed to protect security sensitive information during federal court proceedings. If a party to a proceeding wishes to rely on information, the disclosure of which is likely to prejudice national security, it must notify the court, the other party and the Commonwealth Attorney-General. The Attorney-General may then restrict the disclosure or use of the information; for example, by ordering that the proceeding be held in a closed court. The control order regime adopts the definition of “likely to prejudice national security” from the NSI Act. However, it does not require the AFP to comply with the procedure set out in the NSI Act. See further Lynch A, Tulich T and Welsh R, n 146 Error! Bookmark not defined., pp 27–28, 31. See further Walker B, n 1, pp 8–9. The decision in Thomas v Mowbray is discussed at length elsewhere. For analysis as to the question of whether the control order regime fell within legislative power, see Saul B, “Terrorism as Crime or War: Militarising Crime and Disrupting the Constitutional Settlement?” (2008) 19 PLR 20; Lindell G, “The Scope of the Defence and Other Powers in the Light of Thomas v Mowbray” (2008) 10 Constitutional Law and Policy Review 42; Pintos-Lopez H and Williams G, “Enemies Foreign and Domestic: Thomas v Mowbray and the New Scope of the Defence Power” (2008) 27 U Tas LR 83. For a range of critiques of the High Court’s decision as to the separation of judicial power, see Lynch A and Reilly A, “The Constitutional Validity of Terrorism Orders of Control and Preventative Detention” (2007) 10 FJLR 105; Lynch A, n 82; Fairall P and Lacey W, “Preventative Detention and Control Orders under Federal Law: The Case for a Bill of Rights” (2007) 31 MULR 1072; Meyerson D, “Using Judges to Manage Risk: The Case of Thomas v Mowbray” (2008) 36 FL Rev 209. For a comment on the human rights implications of the case, see von Doussa J, “Reconciling Human Rights and Counter-terrorism: A Crucial Challenge” (2006) 13 JCULR 104, pp 114–117.
164 R v Kirby; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254.
165 Thomas v Mowbray at [369].
majority disagreed. They emphasised that an Issuing Court is left with an independent discretion to decide which intelligence is disclosed in the summary of grounds served on the controlee. As a result, the Issuing Court was not forced to act as an instrument of the executive.

The majority judgment suggests that there is little scope for challenging the judicial use of secret intelligence in Australia. However, Gleeson CJ did acknowledge that the constitutional validity of the process must be “decided in the light of the facts and circumstances of individual cases”. The High Court also refused to consider the process by which a control order is confirmed, as the order made against Thomas never reached this stage. It is not clear what the position would be if a control order progressed to a confirmation hearing — which is supposed to be an adversarial process reconsidering all the evidence — and the AFP insisted that crucial intelligence could not be disclosed to the controlee. In such a case, the High Court might identify an obligation to disclose the core of the case to the controlee, similar to that recognised by the House of Lords, for the reason that the confirmation hearing would otherwise be repugnant to the judicial process.

VI THE UK REFORMS: CONTROL ORDERS TO TPIMS

The UK control order regime was short-lived. The regime was subject to a sunset clause of just 12 months. It was renewed six times, until 31 December 2011, in spite of mounting criticism. The UK Parliamentary Joint Committee on Human Rights (PJCHR) repeatedly reported “very serious concerns” about the impact of control orders on human rights, of controlees and their families. The UK’s first Independent Reviewer, Lord Carlile, acknowledged that the usual range of measures imposed under ostensibly non-derogating control orders fell “not very far short of house arrest, and certainly inhibit[ed] normal life considerably”. These concerns were resoundingly echoed by UK academics and other commentators.

These criticisms were also confirmed in the courts, where control orders were sometimes found to have gone too far and contravened the ECHR. As noted above, the House of Lords held that several control orders imposed measures tantamount to house arrest, and were therefore incompatible with the right to liberty protected by Article 5 of the ECHR. The House of Lords also eventually held that, in its original form, the process for making a control order stipulated by the PT Act was incompatible with the right to a fair trial protected by Article 6. Therefore, the relevant provisions of the PT Act were read down. However, this litigation only prompted minor improvements. In any event, it was not enough to neutralise

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167 Thomas v Mowbray at [31].
168 PT Act, s 13.
171 See eg Zedner L, n 11, pp 181–182.
opposition to the control order regime, which seemed incompatible with “British traditions of liberty and fairness”\(^\text{172}\)

Control orders were linked to other worrying developments, including a loss of faith in the criminal law.\(^\text{173}\) Control orders could be used to impose criminal-like sanctions without prosecution and without affording the controlee the procedural protections he would be afforded if he were charged with a crime. Control orders “[laid] waste to the presumption of innocence; to the right to a fair trial; to adversarial justice; to transparency”.\(^\text{174}\) These coercive measures were imposed on the basis of prediction, and were supported by intelligence (rather than evidence) not tested in an adversarial trial. This created a real risk that orders would be disproportionate to the risk they were intended to control.\(^\text{175}\) In 2007, Lord Carlile confirmed that some control orders were “more cautious and extensive than absolutely necessary”.\(^\text{176}\) However, Carlile also reported that orders had become more targeted over time.\(^\text{177}\)

In any event, it was doubtful whether control orders actually worked. Lucia Zedner suggested a “determined terrorist” subject to a curfew could simply commit his intended crime in the eight hours he was permitted to be out in the community.\(^\text{178}\) In the final report on the control order regime, David Anderson reported that control orders had disrupted terrorist activity in the short term. However, it was “less clear” that they had caused controlees to “disengage” from terrorism related activities in the long-term, and clear that they did not assist the criminal prosecution of terrorism offences.\(^\text{179}\) Only one controlee was prosecuted for a terrorism offence during the life time of the regime. The rest remained subject to control orders, often for several years.\(^\text{180}\) This caused concern that control orders were being used to “warehouse” undesirables on a semi-permanent basis,\(^\text{181}\) or at the least, that control orders were a disproportionate restriction of liberty.\(^\text{182}\)

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\(^\text{172}\) Anderson D, n 98Error! Bookmark not defined., p 10 (summarising criticisms of the regime, rather than his own views).


\(^\text{174}\) Zedner L,\(^\text{126}\) Security (Routledge, Oxford 2009), p 133.


\(^\text{178}\) n 11, pp 190–191.

\(^\text{179}\) Anderson D, n 98Error! Bookmark not defined., p 6.

\(^\text{180}\) See further Walker C and Horne A, n 111, pp 429–430.


\(^\text{182}\) UK,\(^\text{126}\) Parliamentary Debates, Public Bill Committee, 30 June 2011, col 236 (James Brokenshire); Walker C, n 5, 1458; Council of Europe, Office for the Commissioner for Human Rights,\(^\text{126}\) Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights on his Visit to the United Kingdom (2004), p 25.
In light of this evidence, the PJCHR questioned whether the millions of pounds spent on the control order regime “may have become disproportionate to any benefit which can plausibly be claimed for them”. The PJCHR called for a comprehensive review of the UK’s terrorism laws.

The call was taken up in the lead-up to the 2010 general election. Counter-terrorism reform was identified as a priority by the Liberal Democrats and the Conservative Party and then formed part of the Coalition agreement between them. In 2011, the new Coalition Government announced a comprehensive review of the UK’s counter-terrorism and security powers. Home Secretary Theresa May declared the government was “committed to reversing the substantial erosion of civil liberties” produced by counter-terrorism laws:

I want a counter-terrorism regime that is proportionate, focused and transparent. We must ensure that in protecting public safety, the powers which we need to deal with terrorism are in keeping with Britain’s traditions of freedom and fairness.

Control orders were identified as “among the areas to be reviewed as a priority”. The results of this review were published in 2011. It was found that some of the UK’s counter-terrorism measures were “neither proportionate nor necessary”. As a result, the government announced a suite of proposals designed to “liberalise” its counter-terrorism laws to “correct the imbalance … between the State’s security powers and civil liberties” and make those powers more targeted. A key component of this reform was the abolition of control orders.

Though the government concluded that control orders must go, it remained committed to the basic premise of the regime. The government asserted that “[t]he … threat from terrorism … is as serious as we have faced at any time and will not diminish in the foreseeable future.” In 2006, the UK had introduced broad, preparatory terrorism offences like those that exist in Australia. The other two problems which had prompted the creation of the UK control order regime were still of concern: the inability to indefinitely detain or deport non-citizens to countries where they faced a risk of torture, or to use intercept evidence in court. Thus the

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183 £13 million was spent on the control order regime between 2006 and 2009. Just over £8 million of this was spent on legal fees defending applications for judicial review: PJCHR, Counter-terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010 (2010), p 32.
189 Walker C and Horne A, n 111, p 421.
190 UK Government, n 188, p 3.
191 UK Government, n 188, p 5.
192 This conclusion was supported by David Anderson, who maintained that “abandoning the control orders system entirely would have a damaging effect on national security”: Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 (UK) (2010), paras [85]–[86].
193 UK Government, n 188, p 3.
194 The UK Independent Reviewer predicted that this would mean that reliance on control orders would decrease: Lord Carlile, Second Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 (UK), p 1467. This however did not prove to be the case.
2011 government report stated that “for the foreseeable future there are very likely to be a small number of people in this country who are assessed to pose an immediate and significant terrorist threat but who we can neither prosecute nor deport”. Without something akin to a control order, potential terrorists would be “set free”. The constraints imposed by the ECHR were largely immovable; the ban on the use of intelligence as evidence was not. However, the UK government continued to reject calls to permit the use of intercept evidence in criminal proceedings.

As a result, the UK government proposed to replace control orders with TPIMs. TPIMs were described as “less intrusive and more focused” measures than control orders that “would mitigate risk while increasing civil liberties”. By contrast, critics described the reforms as an exercise in “rebranding”, describing TPIMs as “control orders-lite” which replicate the worst aspects of the control order regime. Others expressed a more cautious opinion. The PJCHR concluded that TPIMs are “less likely” to breach human rights than control orders, but still raise “significant human rights concerns”.

The government had been adamant that control orders could not be entirely replaced by increased surveillance, in part because the latter was far more expensive. Nevertheless, the UK government also announced it would provide additional resources to the UK’s domestic intelligence agency to cope with the added work-load of monitoring controlees now (relatively) free to move about the community for longer periods of time.

As of September 2012, nine TPIMs have been made. All nine were made against men previously subjected to control orders under the old regime. We now turn to consider how the new TPIM regime compares with the Australian control order regime.

**VII AUSTRALIAN CONTROL ORDERS AND TPIMS COMPARED**

**A Nature and Purpose**

The TPIM reforms made some attempts to clarify the problematic relationship between control orders and the criminal law. The TPIM Act stipulates that an investigation with a view to prosecution must be kept under police review for the life of the TPIM. The government stated that this amendment was made because TPIMs are “neither a long term nor an adequate alternative to prosecution, which remains the priority.”

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195 UK Government, n 188, p 37.
200 See e.g. n 10, p 510.
202 UK Government, n 188, p 38.
203 UK Government, n 188, p 42.
204 United Kingdom, Parliamentary Debates, House of Commons, September 7 2012, vol 549, c 38WS.
205 TPIM Act, s 10(5).
206 UK Government, n 188, p 41.
Clive Walker and Alexander Horne describe this as a “feeble augmentation”. In any event, it is likely to be pointless. As noted above, the objective of prosecution is, to an extent, irreconcilable with an objective of prevention, and UK control orders never proved a useful source of evidence for criminal prosecutions. This is an inherent difficulty which the TPIM reforms may fail to rectify. For the purposes of our comparison, the strengthened priority to prosecution makes the UK and Australian regimes more divergent in this regard, as there is no requirement to consider, let alone prioritise, prosecution in the Australian legislation.

The TPIM reforms also attempted to remedy concerns that control orders were being used to warehouse individuals without good reason. Unlike control orders, TPIMs have a limited life span. TPIMs may remain in force for an initial period of one year. They can be extended once for a further year, producing a maximum of two years. A fresh TPIM could then be imposed, but only on the basis of “new terrorism-related activity” occurring after the last TPIM was made. This means that TPIMs are far more constrained than their predecessors. However, TPIMs can still remain in force for at least twice as long as Australian control orders.

**B Measures an Order Can Impose**

Most of the measures that could be imposed under a control order can still be imposed under a TPIM. However, the most severe measure has been removed, and others have been blunted. The controversial relocation requirement that distinguished the Australian and UK control order regimes has been removed. A TPIM cannot impose a relocation requirement. Curfews have also been replaced with “overnight residence requirements”. These are more limited as they must be confined to the hours of the night. This means the Australian regime is broader in this respect than the TPIM regime as there is no limit to the length of curfew that an Australian control order can impose.

A TPIM can still restrict the possession or use of electronic devices, but cannot impose a total ban; the controlee must be permitted to use a fixed line phone, a computer with internet access and a mobile phone without internet access. This means the Australian regime is also broader in this regard. An Australian control order can impose a total “prohibition” on the use of telecommunications or the internet.

Finally, while control orders could ban a controlee from meeting anyone (unless authorised by the Home Office), TPIMs can only ban contact with specified persons. However, these bans can still be broadly framed; for example, to prevent contact with “persons living outside the United Kingdom”. This seems equivalent to Australian control orders, which can prohibit a controlee from contacting any “specified individuals”.

207 n 111, p 429.
208 Attempts to challenge control orders on the basis that section 8 of the PT Act was not complied with also had little success. See further Walker C, “The Threat of Terrorism and the Fate of Control Orders”, [2010] PL 3, pp 6–7.
209 TPIM Act, s 5.
210 TPIM Act, s 3.
211 Walker C and Horne A, n 111, p 425.
212 UK, Parliamentary Debates, House of Lords, 15 November 2011, col 618 (Lord Henley).
The **TPIM Act** does not maintain the distinction between derogating and non-derogating orders. Ostensibly, this means that TPIMs can only restrict and not deprive an individual of their liberty. However, the **TPIM Act** was accompanied by a draft Enhanced Terrorism Prevention and Investigations Measures Bill.\(^{213}\) This draft, ready and waiting for enactment should an “exceptional circumstance” arise, permits the making of “enhanced TPIMs”. An enhanced TPIM can impose all the most invasive measures previously available under the control order regime: a relocation requirement, a curfew not confined to night-time hours, and a total ban on the possession or use of electronic communications devices.

In the mean time, the Australian control order regime permits a more invasive range of measures than those which can be imposed by a TPIM. An Australian control order can impose a total prohibition on the use of telecommunications and the internet and an unlimited curfew. Thus an Australian control order can still impose measures amounting to house arrest, whereas a TPIM cannot. There remains no principle of Australian law which would prevent the making of such an order.

### C Process and Secret Intelligence

The UK government held up the fact the courts had read down the **PT Act** — rather than declared it to be incompatible with Article 6 altogether — as proof that the process by which control orders were made was compatible with the right to a fair trial.\(^{214}\) As a result, TPIMs are made by the same process as control orders.\(^{215}\) This ignored calls to enhance judicial oversight of TPIMs.\(^{216}\) No change has been made to the use of closed evidence or Special Advocates, provided both comply with *Secretary of State v AF (No 3)*; that is, that the controlee is told the core of the case against him or her. The UK government did report that it would provide additional training to Special Advocates.\(^{217}\) The criteria that must be satisfied in order to make a TPIM also remain the same; again, these are narrower than the Australian criteria, which enable a control order to be made without any suspicion that the controlee has personally engaged in terrorism-related activity.

Thus the process by which TPIMs are made is still significantly different to the process by which Australian control orders are made. Without overstating the benefits of the UK’s Special Advocate system, it remains the case that there is no mechanism in the Australian regime to ensure an independent party (other than the Issuing Court itself) scrutinises the government’s case for non-disclosure, and no requirement (given the absence of anything comparable to Article 6 of the ECHR in Australia) to ensure the process is procedurally fair to the controlee.

This comparison has revealed that the Australian control order regime is more invasive and less procedurally fair than the new UK TPIM regime in the following four ways. First, Australian control orders can impose measures tantamount to a deprivation of liberty. Such

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\(^{215}\) **TPIM Act**, ss 6, 7, 9(1), 9(2).


\(^{217}\) UK Government, n 188, p 41.
measures could not be imposed by a TPIM — and in any event, would be unlawful in the UK in the absence of a valid derogation from the right to liberty protected by Article 5 of the ECHR. An Australian control order could impose an 18 hour curfew, or other measures amounting to house arrest. There is no principle of Australian domestic law to constrain the making of such an order.

Secondly, Australian control orders can be made on the basis of broader criteria than TPIMs. A control order can be made on the broad basis that it would ‘substantially assist in preventing a terrorist act’. A TPIM can only be made if the Secretary of State reasonably believes that the individual is, or has been, involved in terrorism-related activity. The Australian criteria are broader because they do not require any reasonable belief – let alone proof – that the individual subject to the order has been personally involved in terrorism related activity.

Thirdly, the process by which Australian control orders are made is less procedurally fair and poses a greater danger to the integrity of the judiciary than the TPIM regime. An interim control order may be made without informing the controlee of the reasons for the decision. This significantly hinders the controlee’s ability to challenge the confirmation of the order. There is no principle of Australian domestic law akin to Article 6 of the ECHR to ensure the process is procedurally fair to the controlee. While the benefits of the UK’s Special Advocate system must not be overstated, it at least enables some independent scrutiny of secret intelligence and the case for non-disclosure. The absence of such a mechanism in Australia raises an additional constitutional difficulty: at a certain point, the use of secret intelligence may render a control order hearing so repugnant to the judicial process as to offend the constitutional separation of powers.

Finally, Australian control orders can overlap with the criminal law to a far greater extent than the UK TPIM regime. Australia has extremely broad terrorism offences, criminalising preparatory, pre-preparatory and inchoate conduct. The UK introduced offences of a similar scale in 2006. However, in Australia intercept evidence may be used as evidence in Australian courts to prosecute such offences; in the UK, it cannot. This greatly assists the prosecution of such offences in Australia. In Australia, the presence of the control order regime affords the AFP a choice. The same conduct could well constitute an offence against the Criminal Code, or grounds for a control order. The AFP may elect for a control order — via a civil process not attenuated by the procedural safeguards of the criminal law — rather than attempt to prosecute the individual concerned. This dilutes the integrity of the criminal law and the rule of law. Again, the efficacy of the “priority to prosecution” requirement which exists in the UK must not be overstated. However, it does at the very least indicate a distinction between the civil TPIM regime and the criminal law that is absent in Australia. The potential for overlap between the Australian control order regime and the existing criminal law indicates that control orders are not necessary in Australia.

VIII WHAT FUTURE FOR THE AUSTRALIAN CONTROL ORDER REGIME?

The future of the Australian control order regime has recently been considered by the Monitor, in his 2012 annual report, and by the COAG Review. In its written submissions to the COAG Review, the AFP asserted that control orders were a necessary “alternative measure” to the criminal justice system. The AFP argued that the repeal of the control order
regime “would create a substantial vacuum in counterterrorism options” and compromise its ability to protect the Australian community from terrorism and “respond to extraordinary events, such as terrorism on the scale of September 11 and the Anders Breivik attacks”.218 In response, the COAG Review reported that numerous other submissions had criticised the control order regime, called for its repeal and suggested it should never have come into existence in the first place. Nevertheless, it concluded (with very little elaboration or explanation) that:

The clear purpose of protecting the community and preventing a terrorist attack in Australia presently warrants the continuance of [the control order regime]. There remains a genuine risk of terrorist activity in this country, although its level should not be exaggerated. On that basis, control orders are, for the time being, necessary and justified in the counter-terrorism legislative scheme. We consider however that the present safeguards are inadequate and that substantial change should be made to provide greater safeguards against abuse and, in particular, to ensure that a fair hearing is held.219

The Monitor expressed in stronger terms grave doubts about the necessity and efficacy of the control order and its impact on individual liberties. He recommended that the control order regime should be repealed, but replaced with a more targeted system of “Fardon-type provisions authorizing [control orders] against terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness”.220

Are these recommendations justified and sufficient, or ought the Australian control order regime be repealed altogether? Charting out the ‘parallel lives’ of the Australian and UK control order regimes has revealed three important points relevant to answering this question. First, as the COAG review acknowledged, the UK control order regime was enacted to deal with terrorism-related activity in a way which mediated the constraints imposed by the ECHR and the UK criminal law. Secondly, the Australian control order regime was enacted in the wake of the London bombings to follow the example of the UK, despite Australia facing none of the difficulties which prompted the enactment of the UK regime. As a result, the foundations of the Australian control order regime were always shaky. Australia introduced control orders because the UK had done so — not in response to any evidence that Australia’s existing counter-terrorism laws were inadequate, or that Australia needed such laws. This has manifested in the fact that the Australian control order regime has been so rarely and unconvincingly used.

Thirdly, the two control order regimes were not identical. Though the Australian law borrowed heavily from the UK precedent, there were significant differences between the two regimes. The UK regime was also constrained by legal principles that do not apply in Australia; namely, the human rights protected by the ECHR. It is therefore difficult to transcribe the criticisms made of the UK regime to Australia because so many of these

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219 COAG Review, n 4, p 53.  
220 Walker B, n 1, p 44. “Fardon-type provisions” is a reference to legislation introduced by the Queensland government, authorising the Supreme Court of Queensland, on the application of the Attorney-General (Qld), to order the ongoing detention of dangerous sex offenders considered likely to pose a danger to the community after their sentence had expired. A majority of the High Court held the legislation was constitutionally valid in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.
criticisms were framed in terms of compatibility with ECHR rights. It is also simplistic to conclude that the repeal of the UK regime necessarily justifies the repeal of the Australian regime. Given this, what can the abolition and replacement of the UK control order regime tell us about the future of the Australian control order regime?

Though not conclusive, the UK reforms are clearly relevant. The UK control order regime was described as international “best practice”; a precedent which Australia ought to follow, even if only in broad terms. The fact that this regime was found to be disproportionate to its preventative purpose, unnecessarily restrictive of human rights and of limited utility provides good reason to reconsider the ongoing justifiability of the Australian regime. The UK reforms are also relevant because they reveal significant problems with mechanisms of this general type. Control orders restrict individual liberty on the basis of predicted future dangerousness, via a process not attenuated by the safeguards of the criminal law. This poses a serious affront to basic values of liberty and fairness. These are values which are, or ought to be, as important in Australia as in the UK. This is especially pertinent given, in key respects, the Australian control order regime is more invasive and less procedurally fair than both the repealed UK control order regime on which it was originally modelled and the new UK TPIM regime. This is difficult to justify given the greater potential of Australian law to prosecute people for terrorist acts, and the lower threat of terrorism faced by the Australian community.

The UK reforms are also relevant to the final stage of the inquiry: would it be sufficient to reform the Australian control order regime, or should it be repealed? The UK insisted that control orders had to be replaced with a more tailored mechanism of a broadly similar kind. This was based on the fact that two of the difficulties that spurred the creation of the control order regime in 2005 were still evident: the inability to deport or detain non-citizen potential terrorists and an inability to use intercept evidence in court.

These problems still do not exist in Australia. Intercept evidence can — now, as in 2005 — be used as evidence in prosecutions for Australia’s many and broad terrorism offences. As the Monitor reported, the possibility that a person may be charged with a terrorism offence at an early stage diminishes the “effectiveness, appropriateness and necessity” of control orders. There is still no principle of domestic law that prevents the Australian government deporting non-citizens, or keeping them in (potentially indefinite) immigration detention. Provided the process by which the detention is ordered is compatible with the separation of powers, the Australian government can preventatively detain non-citizens or citizens who are thought to pose a security risk. In fact, Australia’s federal Parliament has already enacted a separate regime of preventative detention orders.

221 n 1, 29.
222 The High Court was recently invited to overturn Al-Kateb v Godwin in Plaintiff M47/2012 v Director General of Security (2012) 292 ALR 243. A majority of the Court decided the case on other grounds, and did not consider whether Al-Kateb should be overruled. On the other hand, Gummow and Bell JJ did hold that Al-Kateb v Godwin should be overturned and that the dissenting judgement of Gleeson CJ from that case “should be accepted”: at [145]–[150] (Gummow J), [532]–[533] (Bell J), cf [331]–[343] (Heydon J). Only Heydon J considered whether there is a constitutional immunity from executive detention. He doubted that such an immunity exists, and in any event held that executive detention of aliens posing a risk to national security would be a lawful exception to it: at [345]–[346].
223 Criminal Code, div 105.
In this legal landscape, what legitimate purpose could control orders play in Australia? The answer appears to be none. This is reflected in the fact that control orders have been so rarely and unconvincingly used in Australia. Only two control orders have ever been made and only one of those confirmed. Moreover, neither of the two orders made in Australia appeared to serve a legitimate purpose. In the case of Jack Thomas, a control order was used to circumvent the procedural safeguards of the criminal law and impose restrictions on an individual who was ultimately not found guilty of any terrorism offence. In the case of David Hicks, the control order seemed to serve very little purpose as it was imposed against a man who had already served his sentence for a highly questionable criminal conviction. These cases suggest that the Australian control order is not just unnecessary, but can dangerously subvert the processes and principles of the criminal law. This conclusion is supported by the most recent report of the Monitor, which stated that he had found:

no evidence that Australia was made appreciably safer by the existence of the two [control orders] issues. It follows that neither [control order] was reasonably necessary for the protection of the public from a terrorist act.  

This casts real doubt on the AFP’s claim that the repeal of the control order regime “would create a substantial vacuum in counterterrorism options” and the COAG Review’s conclusion that “control orders are necessary and justified”. Hypothetical and alarmist claims that control orders may be needed in the future to deal with “terrorism on the scale of September 11 and the Anders Breivik attacks” should not be allowed to distract from the fact that control orders have not proven to be necessary or useful. Indeed, it is quite difficult to see how a control order could possibly have prevented either of those horrific attacks.

The only concrete justification given for the Australian control order regime, apart from the now discredited UK precedent, is the claim that control orders are cheaper than covert surveillance. Whether true or not, this is a poor rationale for extraordinary powers that permit such significant restrictions of individual liberties.

It is not surprising that the Australia Parliament reacts to terrorist attacks against neighbouring countries or close allies, particularly when those attacks kill or injure Australian citizens. It is also understandable that governments may follow the lead of nations with more experience of terrorism by working with whatever legislative precedent is to hand. However, this creates the risk of importing legislative concepts that are not a necessary and proportionate response to Australia’s particular counter-terrorism needs. This has proven to be the case with control orders. The fear and outrage that the London bombings generated caused Australian parliamentarians to look abroad for ways to strengthen Australia’s counter-terrorism laws, and the UK control order regime is what they found. That regime has now been thoroughly discredited. It has been replaced with a new regime of TPIMs, which are undoubtedly an improvement, but continue to cause significant human rights concerns. The UK government decided that this was a justifiable balance to strike, for reasons which do not exist in Australia. All this suggests that it would not be sufficient for Australia to reform its control order regime, as the UK has done. There is simply no basis for the Australian regime at all.

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224 n 1, p 14.
225 COAG Review, n 4, p 54.
226 See also Walker B, n 1, p 28.