

CALL-OUT THE GUARDS – WHY AUSTRALIA SHOULD NO LONGER FEAR THE DEPLOYMENT OF AUSTRALIAN TROOPS ON HOME SOIL

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I INTRODUCTION

On 30 April 1970, President Nixon announced that the United States government had authorised the military to use overwhelming force in its invasion of Cambodia. In essence, the announcement proclaimed that the government would send another 150,000 draftees from across the United States to be deployed in what was, by then, a long-running and bloody conflict. In response to this announcement, and similar to other reactions across the United States, thousands of students from various universities demonstrated against further drafting of soldiers and involvement in what was seen to be a war that was not theirs to be fighting, and dying, in at all. Instead, the demonstrations highlighted the deployment of young men, usually of college age, dying compulsorily in unheard-of jungles in a military action that was seen as intrusive and pointless. One day, in May of that year, the voices of these demonstrations were heard throughout the world when they came face to face with American troops on home soil. The Ohio State National Guard was deployed against the students and protestors to quell what was thought to be a serious civil disturbance with anticipated violence. There was nothing unusual about the deployment of troops during that time and those exercising their right to protest were simply seen as troublesome by those in positions of power, including the President when he addressed the nation:

My fellow Americans, we live in an age of anarchy, both abroad and at home. We see mindless attacks on all the great institutions, which have been created by free civilisations in the last 500 years. Even here in the United States, great universities are being systematically destroyed.¹

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1 Richard Nixon, 'Address to the Nation on the Situation in Southeast Asia' (Speech delivered at Washington D.C, 30 April 1970). This speech was made five days prior to the calling out of the Ohio State National Guard on the Kent State University campus.

The most significant and memorable day of the anti-war protests in the United States came four days after President Nixon's announcement when the National Guard opened fire onto the university campus killing four innocent young Americans. Amateur photographer John Filo captured the Pulitzer Prize winning image of 14-year old Mary Ann Vecchio crouched in horror and sorrow over the body of Jeffrey Miller. It was to be an image etched in the memory of the American people – it was, and still is, a vivid and haunting reminder of the possible dangers of when a military force is called out to deal with 'civil unrests'. It is condemning evidence which demonstrates that when called out on that day in 1970, the National Guard used force and weaponry far beyond that was required. These soldiers were not acting in self-defence; nor were they protecting any national interest or person; they were simply soldiers deployed on home soil, acting in the capacity of hybrid law enforcers. In fact, the soldiers were merely volunteer citizens with assault rifles, burdened with what were unaccustomed civil police responsibilities.

What the world witnessed leading up to that day in Ohio is not that different to the protests we see today in Australia. Australian citizens from all backgrounds have used various city streets, parks and university campuses throughout history, including in recent years, to rally in organised demonstrations; demonstrating and voicing their concerns in relation to, amongst other things, the war on terror, globalisation, university fees and voluntary unionism. In 2000, there was some concern in the community that the Australian Defence Force ('ADF') could, or would, be deployed into Australian streets to disperse such protestors if they too caused a serious civil disturbance or domestic violence to an extent that was beyond the control of the civil authorities.

The fear and paranoia that some in society had in relation to the ADF being deployed domestically was expounded further when the Defence Legislation Amendment (Aid to the Civil Authorities) Bill 2000 (Cth) was tabled mid-2000 to amend the *Defence Act 1903* (Cth) prior to the Sydney Olympics. The Bill was introduced to provide the statutory mechanism that would enable the ADF to be called out. The insertion of Part IIIAAA was specifically aimed at dealing with the utilisation of the Defence Force to protect the interests of the Commonwealth, the States and self-governing Territories, against domestic violence. Part IIIAAA provides that ADF personnel acquire a number of powers such as the power to search and recapture buildings and people, free hostages and seize dangerous articles such as weapons and ordinance. The ADF may be utilised in this way when a threat or actual occurrence is identified and deemed to be serious enough to require a call-out:

to assist the civil authority to resolve that incident. That callout process goes through the steps...mentioned: [whether] it is State initiated to the Commonwealth - that is; the state asks the Commonwealth – or the Commonwealth initiates in its own interest. The Governor-General in Council then signs off, saying the call-out is authorised. It will be for a specific area, and this is where the changes emerged in Part IIIAAA. It was quite specific in terms of the geographic area; there has to be a designated area. An example might be that within the precincts of Parliament House there is an incident. In the past it was non-specific and there would just be a general call-out for the ADF to the ACT, for example. Now we have to actually specify where this

incident is taking place and the area within which the ADF can act in support of the civil authority. There are certain powers that are given to the ADF within that designated area. They relate to the powers of arrest and the powers of search, and it is quite complicated with regard to who can do what and under what circumstances.²

The reaction to the legislation by some Australians was one that stemmed either from scare-mongering or from misunderstanding of the implementation of the amendments.³ In the last four years, Australians have now come to expect that they will be defended against terrorist attacks; regardless of whether that protection is in the form of the civilian State police and other agencies or from the ADF and the Special Forces capability. The current climate of terror has created an overriding and shifting attitude towards the ADF being called out. It is now expected by Australians that they will be accorded adequate protection and proportional responses to any threat or attack on their lives. These are but some of the reasons why the ADF should no longer be feared or seen as the enemy when, or if, they are called out to patrol Australian streets in case of either terrorism or what has been deemed to be threatening or serious 'domestic violence' within a State or Territory.

II AUSTRALIA'S HISTORY OF CALLING OUT THE TROOPS

There have been numerous instances in Australia's history where there has been a call-out of, or an attempt to call-out, the military. The first time the Australian Army was called out, but not required, by the Government was not to mainland Australia, but to the island territory of New Guinea in 1970. Eight years later, the Australian public witnessed for the first time, troops and military hardware on the streets of Sydney, including on the Hume Highway leading to, and within, the town of Bowral. The justification for the use of these troops was an explosion detonated outside the Hilton Hotel on George Street Sydney, where the Commonwealth Heads of Government Meeting ('CHOGM') was being held, on 13 February 1978. The explosion killed two men instantly, with a third later dying from his injuries.

During rescue and recovery, the NSW Police requested assistance from the Army Bomb Disposal Unit. Concurrently, Prime Minister Fraser and Cabinet agreed that armed troops were to be deployed in NSW; without a formal request but with the concurrence of Premier Wran. Cabinet also authorised and provided armoured personnel carriers and soldiers to assist in the relocation of the meeting to Bowral. The Governor-General, in his capacity as Commander-in-Chief, issued an Order calling out the ADF for the purposes of 'safeguarding the

2 Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Review of the Defence Annual Report 2001-2002: Joint Standing Committee on Foreign Affairs, Defence and Trade* (2003) [11].

3 It was portrayed by some that the Department of Defence and Attorney-General were 'gearing up' to be ready for the anti-globalisation protests (called 'S11' and aimed at blockading the Crown Casino where the World Economic Forum was being held). See *Australia plays down using the Army during Olympics*, 12 August 2000 <<http://southmovement.alphalink.com.au/southnews/000811-armypowers.htm>> at 24 August 2005. See also Radio 2UE, 'Interview of Bob Brown by John Laws', 24 August 2000, <<http://www.smh.com.au/articles/2003/11/20/1069027236431.html>> at 22 August 2005.

national and international interests of the Commonwealth of Australia' as well as 'giving effect to the obligations of the Commonwealth of Australia in relation to the protection of internationally protected persons'.⁴

As well as those three tragic deaths, the use of the Australian Army in the urban landscape also caused great concern and panic among the Australian people and continued to do so for many years. The calling out of the troops to confront the terror in Sydney's street was undertaken and authorised by the Governor-General, via an Executive Cabinet Minute. The Governor-General was satisfied that terrorist activities in NSW could encroach on the obligations which the Commonwealth had in protecting internationally protected persons. The Hilton bombing call-out also meant that, for the first time, armed troops were authorised for domestic security on home soil. In subsequent years, the Commonwealth has deployed the ADF several times in the capacity of protecting national or Commonwealth interests. For example, in 1983, the Royal Australian Air Force ('RAAF') were requested by the Federal Government to undertake photographic sorties over southwest Tasmania with the intention of establishing and obtaining evidence relating to work being undertaken by the Tasmanian Government. Furthermore, in 1989, Prime Minister Hawke employed the services of the RAAF again by using pilots and crew during the airline pilot strike of that year; in addition to this, the Prime Minister used Australian military personnel to guard the Nurrungar military base.

Historically, there have been several other instances where the Australian States have requested the assistance of the Commonwealth in the form of military intervention. Evidence suggests, however, that there has been great reluctance by the Australian Government in issuing orders that the troops be deployed. Over the last century, there were at least six 'official' occasions on record that demonstrate that the States requested and were prepared to use troops in the domestic arena. These occasions included militant strikes and general labour troubles as well as guarding property and persons that were under threat from perceived 'domestic violence'. Between Federation and 1949, the States of Queensland, Western Australia, Tasmania and South Australia each requested military intervention and assistance in some form or another from the Commonwealth. For example, in 1912 the Queensland Government made a request for military assistance relating to striking workers specifically pursuant to s 119 of the *Australian Constitution*. In 1916, Tasmania sought assistance, without reference to s 119, to an expected 'disturbance' relating to Referendum Day. In 1919, the West Australian Government requested military intervention to assist in suppressing 'expected violence' in relation to a wharf labour strike. In 1920, the West Australian Government again sought the deployment of the military in the form of a warship to Broome - as a precaution against riots. In 1921, the West Australian Government again requested that the Federal Government set aside a military contingent to be available at the State Governments' disposal in case of a riot occurring. In 1923, when the Victorian

4 Commonwealth, Defence Legislation Amendment (Aid to Civil Authorities) Bill 2000 (Cth), Bills Digest No 13 2000-01 (2000).

Government requested military assistance during a police strike, the Commonwealth Government refused the Victorian Government's request for military aid and instead indicated that military action should be taken in the protection of 'Commonwealth interests' – the 'Commonwealth interests' were identified as being the Government Post Office, Federal Parliament House, the Treasury buildings and the telephone exchanges. In 1928, the South Australian Government also requested military assistance in the form of weapons and ammunition during a waterfront strike.⁵ Later, in 1949, military troops were called out to work in some of the NSW coalmines during labour strikes – these military personnel who were called out were not involved in law and order functions, but were instead engaged in laborious mining tasks.

Although not officially a 'call-out', in March 2000, the Minister of Defence announced that *Operation Gold* was to commence later in that year. The intention behind the Operation was to provide support security at the Sydney Olympic Games. The aim of the support was to deploy and engage the ADF in a number of tasks including possible bomb disposal, searches and clearance of venues and vehicles. The number of ADF personnel used in the operation was up to 4 000, with troops being deployed from the SAS as well as the 1st Commando Company, to the cost of approximately A\$71 000 000.⁶ Although not used against terror threats during the Olympic Games, ADF personnel still remained on standby and ready to respond to any type of threat to the Games with the Commander of Special Forces issuing a warning to potential terrorists or persons intending to interfere with Games by stating that the ADF would 'interfere with them ... we are prepared to meet any challenge'.⁷

III CONSTITUTIONAL POWER

The Commonwealth of Australia is not prevented from calling out ADF troops of its own accord when there are justified circumstances. These circumstances were highlighted in 1978 when the Governor-General issued the Order to ensure that Australian international dignitaries were adequately protected. The Commonwealth has express power to legislate for the purposes of defence pursuant to s 51(vi) of the *Australian Constitution*, which provides that the Commonwealth may make laws with respect to 'the control of forces to execute and maintain the laws of the Commonwealth'. More specifically, in relation to the call-out of troops, the Commonwealth can rely on s 119 of the *Australian*

5 Commonwealth, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000: *House of Representatives* <<http://www.aph.gov.au/library/pubs/bd/2000-01/01BD013.htm>> Bills Digest No. 13 2000-01, 28 June 2000.

6 National Audit Office, *Commonwealth Agencies' Security Preparations for the Sydney 2000 Olympic Games*, Audit Report No 5 (1998) 121.

7 Martin Chulov and David Kennedy, 'Games Security Revealed', *The Australian* (Sydney), 1 March 2000. The article can be found quoted in the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000 <<http://www.aph.gov.au/library/pubs/bd/2000-01/01BD013.htm>> Bills Digest No. 13 2000-01, 28 June 2000.

Constitution. Section 119 provides that the Commonwealth has an obligation to protect the States against invasion and, on the application of the Executive Government of the State, against 'domestic violence'. The Commonwealth does, however, have the discretion to determine (based on its own assessment and advice of the situation) whether or not 'domestic violence' actually exists prior to the authorising and subsequent mobilising of ADF personnel.

Furthermore, s 61 of the *Australian Constitution* provides that the Executive power is 'exercisable by the Governor General and extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth'. This was the provision that provided the legal basis for the call-out in 1978; although some aspects are still somewhat unclear and untested. Sir Victor Windeyer's legal opinion on the power and its use at that time was that '[t]he ultimate constitutional authority ... was the power and the duty of the Commonwealth Government to protect the national interest and to uphold the laws of the Commonwealth'.⁸

The events of the past, although at times controversial, have reinforced the fact that Australian governments have always had the power to intervene in the domestic affairs of the States, or deploy troops within those State borders, if the Commonwealth believes that it is justified in doing so with the intention of protecting the interests (or persons) of the Commonwealth. The year preceding the 2000 Olympic Games seemed to have provided an opportunity for the Federal Government to clarify and codify its power in relation to calling out troops when it tabled the Defence Legislation Amendment (Aid to Civil Authorities) Bill 2000 (Cth) ('The Bill'). The Bill provided a number of amendments to the *Defence Act 1903* (Cth) that, inter alia, were aimed at assisting the already overworked civilian services, ensuring that there was a cooperative and collective structure in the event of serious civil disturbances or terrorist attack and ensuring that there was a unified agreement from both houses of Parliament on what the amendment meant when they were used 'on the ground'. However, nowhere in the Bill were there any references to calling out heavily-armed soldiers and empowering them, pursuant to s 51G, in order to suppress civilian protestors simply because they have 'thrown rocks through the front door of Crown Casino'.⁹ The real intention and purpose of the Act is highlighted in the Second Reading speeches, which stated the legislature's intent was to:

modernise the procedures to be followed for call-out of the Defence Force, set out safeguards including parliamentary supervision, and specify the powers and obligations of the Defence Force when used to assist police, as a last resort, in the counter terrorist assault role and for related public safety risks.¹⁰

8 Protective Security Review, *Opinion of Sir Victor Windeyer, KBE, CB, DSO on Certain Questions Concerning the Position of Members of the Defence Force when Called out to Aid the Civil Power* (1979) Appendix 9, 282.

9 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 September 2000, 18447 (Peter Andren, Independent MP).

10 Second Reading Speech, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000 (Cth), House of Representatives, 7 September 2000, (Ryan Moore, Minister for Defence).

On 28 June 2000, after a short period of debate, the Bill was passed through the House of Representatives and subsequently introduced into the Senate on 14 August 2000. In their united front on the issue, both the Coalition and the Australian Labor Party saw the Bill as '[a] way of codifying exactly who is consulted before the Army is called in and under what rules they operate'.¹¹

IV IS IT CONSTITUTIONALLY VALID?

Authority for affirming the right of the Commonwealth to intervene, or interfere, within State jurisdiction is the case of *R v Sharkey*.¹² Justice Dixon quotes authors Quick and Garran in support of the view justifying the Commonwealth's intervention into a State or Territory without any form of official request from the respective government. His Honour held that when a situation:

[is] of such a character as to interfere with the operations of the Federal Government, or with the rights and privileges of federal citizenship, the Federal Government may clearly, without summons from the State, interfere to restore order. Thus if a riot in a State interfered with the carriage of the federal mails, or with interstate commerce, or with the right of an elector to record his vote at a federal election, the Federal Government could use all of the force at its disposal, not to protect the States, but to protect itself. Were it otherwise, the Federal Government would be dependent on the Governments of the States for the effective exercise of its powers.¹³

Given the new generation of terror the world is facing, as well as the size of the functions and agencies that fall within the realm of the Commonwealth, any attack on Australian soil empowers the Commonwealth to circumvent any implied restriction or argument in relation to s 119 of the *Australian Constitution* and intervene into the States' affairs 'in the interests of the Commonwealth'. The amended Act is now in place to provide authority for the Commonwealth to fulfil its responsibility in protecting the Australian people. Terror attacks would undoubtedly affect the entire Commonwealth, both here and internationally, much like the Hilton bombing, where the call-out was for the protection of 'national and international interests' of the Commonwealth. There, the call-out was not made by NSW but was, in fact, made to protect the Commonwealth and Commonwealth interests. In *Farey v Burvett*,¹⁴ the Court indicated that it seems clear that the Commonwealth does have the ability to call-out the military regardless of any observed constitutional limitations by recognising that '[t]he *Constitution* is not so impotent a document as to fail at the very moment when the whole existence of the nation it is designed to serve is imperilled'.¹⁵

11 ABC Radio, 'ALP Pushing for New Powers for the Army', *AM*, 17 August 2000 <<http://www.abc.net.au/am/stories/s164528.htm>> at 22 August 2005.

12 (1949) 79 CLR 121, 151 (Dixon J). See also *Australian Communist Party v The Commonwealth (Communist Party Case)* (1951) 83 CLR 1, 188 (Dixon J).

13 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 964.

14 (1916) 21 CLR 433.

15 *Ibid*, 451 (Isaacs J).

V WHO WOULD BE CALLED OUT?

There is another type of warfare - new in its intensity, ancient in its origin - war by guerrillas, subversives, insurgents, assassins; war by ambush instead of by combat, by infiltration instead of aggression, seeking victory by eroding and exhausting the enemy instead of engaging him. It preys on unrest.¹⁶

The Act now provides authority for the Prime Minister, the Defence Minister and the Attorney-General (or in time of extreme urgency one of these authorising officers) to advise the Governor-General to call-out the ADF. These three ministers, however, must be satisfied that domestic violence is occurring, or likely to be occurring, before the ADF can be deployed in protecting the Commonwealth and its interests – as well as protecting a state or territory where the state or territory is unable to protect itself.

When the Defence Legislation Amendment (Aid to Civil Authorities) Bill 2000 (Cth) was introduced into Parliament for debate, it was passed with very few amendments and with bipartisan support. Its introduction and passing through both houses occurred prior to the terrorist attacks on the United States, Indonesia, Spain and the United Kingdom. The drafting of the amendments demonstrated the forethought of the Parliament by ensuring that the legal bases for the government deploying troops and the ADF being called out were entrenched. Sadly, the passing of the legislation also demonstrated that both sides of Parliament realised that there could be, at some point in the future, a terror attack on Australian citizens on Australian soil – resulting in the ADF being deployed to assist in civilian emergencies beyond or outside the scope of the state and territory police and emergency services.

With the dramatic shift from nation states engaging in conventional warfare to a world with more covert and indiscriminate attacks by non-nations, many countries' respective defence capabilities have been adapted to meet these new demands. In Australia, conventional war-fighting capabilities now exist in conjunction with the ever-expanding anti-terrorist capability within our defence force. The Australian government recognises the importance and necessity for urban environment anti-terrorist resources. As provided in the Defence Portfolio Budget,¹⁷ there is a strong commitment by the Government to fighting international terror both here and abroad with a projected four-year budget allocation of A\$219 400 000 to establish and upgrade Australia's tactical response capability. This particular area of the Defence portfolio has also been provided with a further boost of A\$400 000 000 in the 2004 Budget for the

16 President John F. Kennedy, 'Address to the Graduating Class of the United States Naval Academy', 6 June 1962 <<http://jdeis.cornerstoneindustry.com/jdeis/paragraphsPop.jsp?cId=232&parId=1702&SearchString='>> at 22 August 2005.

17 Commonwealth Department of Defence, *Portfolio Budget Statements 2002-2003* (2002) 20 <<http://www.defence.gov.au/budget/02-03/pbs/>> at 22 August 2005.

purposes of distribution throughout other government agencies to assist in the continuing fight against terrorism.¹⁸

These budget figures, the acquisition and development of hardware, the recruiting and training of specific tactical response and anti-terrorist soldiers demonstrate that these capabilities, and the new provisions of defence legislation, are not at all aimed at those protestors and their supporters prior to the 2000 Olympics. Such protests have appeared to have quietened rather suddenly since the attacks of 2001 and 2002. The government has been more concerned with the protection of Australian citizens and that of the lives of the international citizens whom they are obliged to protect. Australia's anti-terrorist capabilities have been developed, and continually trained and refined, to respond to any threats during major events such as that of the Sydney Olympics, the Rugby World Cup and in support of the security of CHOGM.¹⁹ As Australia witnessed during the last CHOGM in Australia, the government is not afraid to utilise the ADF when it deployed RAAF F/A-18 fighter jets to patrol the skies over CHOGM in Queensland, in what was a large-scale logistical cooperative between several agencies, including the Queensland and Federal Police.

The ADF currently has anti-terrorist capabilities on-line and fully operational with the government ensuring that overseas deployments do not interfere with the readiness of the anti-terrorist capability and that the public is fully aware that it is ready to utilise the ADF now or in the future during such events as the Melbourne Commonwealth Games and the 2007 APEC meetings.²⁰

The attacks on both the United States and Bali provided the catalyst for the government to reshape the modern ADF. Australia now has a defence force capability that can, and will, be utilised both inwardly on Australian soil and outwardly internationally in relation to Australia's security and defence. The restructure of the ADF required the increasing of its counter terrorist capability to meet possible rogue threats against the high population of the eastern seaboard in mind. The government set about creating a second Tactical Assault Group ('TAG') to complement the first group that is traditionally located in Perth. As well as this formation, the Incident Response Regiment ('IRR') was re-formed after its service during 2000. Both the second TAG and IRR, collectively known as TAG East, will be based approximately 15 kilometres from the Sydney CBD, after the Federal Government announced²¹ the A\$207 000 000 redevelopment of

18 Cynthia Banham and Tom Allard, '\$400m Boost for War on Terrorism', *Sydney Morning Herald* (Sydney), 18 March 2004, <<http://www.smh.com.au/cgi-bin/common/popupPrintArticle.pl?path=/articles/2004/03/17/1079199293569.html>> at 22 August 2005.

19 Department of Defence, *Terrorism: Defence response to a Terrorist Incident in Australia* <<http://www.defence.gov.au/terrorism>> at 22 August 2005.

20 AAP, 'SAS force to go to Afghanistan: PM', *Sydney Morning Herald* (Sydney), 13 July 2005 <<http://www.smh.com.au/news/national/sas-force-to-go-to-afghanistan-pm/2005/07/13/1120934284628.html>> at 22 August 2005. The ADF, Federal and Victorian police will also be undertaking a week-long operation in October 2005 code named 'MJEX 05' in preparation for the Commonwealth Games to ensure that the coordination and security is in place to protect the estimated 90,000 visitors. AAP, 'Terror exercise planned for Games', *Sydney Morning Herald*, (Sydney), 13 July 2005 <<http://www.smh.com.au/news/National/Terror-exercise-planned-for-Games/2005/07/13/1120934282387.html?oneclick=true>> at 22 August 2005.

21 Senator Robert Hill, 'Major Investment in Australia's Special Forces' (Press Release 112/2005, 8 July 2005) <<http://www.minister.defence.gov.au/Hilltpl.cfm?CurrentId=4976>> at 22 August 2005.

Holsworthy Military area, which had previously been the home to the armoured/mechanised battalion that was deployed in the 1978 call-out.

The Incident Response Regiment itself has been structured to maintain on hand a designated staff of 300 soldiers and scientific specialists to strengthen 'Australia's preparedness and consequence management of Chemical, Biological, Radiological, Nuclear and Explosive ('CBRNE') incidents'.²² This military/scientific capability is not only aimed at counter terrorism, but is also intended to be utilised in an everyday conventional application. The IRR itself also undertakes work in conjunction with the Defence Science and Technological Organisation ('DSTO') in the analysis of, and advice in relation to, CBRNE agents and materials. Overall, the role of the IRR varies from rendering safe CBRNE devices, decontamination duties in conjunction with State fire and emergency services, to treating civilian casualties when and where required.

The overall command structure of Australia's newest terrorist capability was launched in May 2003 comprising a Joint Headquarters with offices in both Sydney and Canberra; elements of the Royal Australian Navy ('RAN'); TAG West (SAS); TAG East (4 RAR, 1st Commando Regiment); IRR and the Special Operations Service Support Company. Moreover, any deployment of ADF on home soil will be closely supported by other federal agencies, such as the Australian Secret Intelligence Organisation, Australian Security Intelligence Service and the Australian Federal Police. The overall role of the ADF when used, or prepared to be called out, in the domestic arena and within the defensive/protective framework, can be understood by dividing the role into three particular branches. The first branch is the intelligence and early warning capability, the second branch is the prevention and deterrence effect the ADF has and the third branch is the emergency response and crisis management.

The deployment and command of either TAG will involve a major coordination operation between the Commonwealth and respective State. In April 2002, an agreement was reached between the Commonwealth and the States and Territories that determined that the Commonwealth was to be responsible for 'national terrorist situations'. The agreement means that all of Australia's anti-terrorism resources will be coordinated at a national level. In particular, the agreement provides that 'the Commonwealth will consult and seek the agreement of affected States and Territories before a national terrorist situation is declared and states and territories agree not to withhold unreasonably such agreement'.²³ The ADF has provided the following outline of the coordination between the agencies in the event of a call-out to respond to a counter-terrorist threat:

Where a site is designated to be a counter-terrorist incident, the police will nominate a police forward commander. That police officer is the authority for that area and he remains the authority throughout, whether the Defence Force is acting within the area or not. The police officer is in charge. At some point the police

22 Department of Defence, *Terrorism: Defence Response to a Terrorist Incident within Australia* (2005) Australian Government <<http://www.defence.gov.au/terrorism>> at 22 August 2005.

23 Commonwealth Attorney-General, 'National Move to Combat Terror', (Press Release, 7 April 2002) <<http://www.ag.gov.au/agd/www/Attorneygeneralhome.nsf/0/620B3335CDBD946EBCA256B94007F37E5?OpenDocument>> at 22 August 2005.

officer may come to the view that the incident has deteriorated to such a point that, with his civil resources, he can no longer resolve the incident and will call on the Defence commander present, who is the commanding officer of the TAG, to resolve the incident.

If that is done in a deliberate and time allowing way, then approval for that employment of the Defence Force will be sought through the minister to government. If, however, time does not allow – if there is a cataclysmic collapse of the situation – then the Military Commander (Forward), in conjunction with the police commander, can launch the Defence Force in an assault on his own call, but he needs to satisfy a number of legal requirements, obviously, before that is done.²⁴

VI IN WHAT CIRCUMSTANCES WOULD THE ADF BE CALLED OUT?

Generally, there are two types of call-outs that the ADF may be required to respond to. The first is known as Defence Assistance to the Civil Community ('DACC') and the other being the Defence Aid to the Civil Power ('DACP'). The role of DACC is a community-based one which deploys the ADF in a non-defensive assistance type role in times of natural disasters and emergencies; the other, DACP, is the less common type of call-out that has been the focus of so much controversy in the past.

The ADF, in particular one of the TAG units, would be called to internal defensive service when there was such a call-out, by either the States or Territories requesting or the Commonwealth by its own accord, to respond to a domestic terrorist threat or serious 'domestic violence'. The call-out situation would be one in which the police and emergency services did not have the ability, or capability, to respond to the threat sufficiently. The ADF would undertake the anti-terrorist role that state police are not trained or equipped to undertake; the ADF troops, on the other hand, having trained in offensive operations and the urban landscape are capable of responding to situations such as 'recapturing buildings, freeing hostages, cordoning off areas or responding to a chemical, biological, radiological, nuclear or explosive attack'.²⁵

The practical effect of a call-out of the ADF in Australia does not mean that martial law has been declared or that the troops deployed on the streets have complete command and control. In fact, the ADF personnel stand in the same position as ordinary citizens and are subject to the laws of that jurisdiction in which they are operating. These personnel do, however, have a wide-range of powers pursuant to ss 51I and 51Y subsequent to the amendments made to the Act. Under these provisions ADF personnel are able to seize buildings, places and transport facilities; they are also able to detain people, search premises and seize both possessions and goods. However, the ADF personnel who are called out are not immune from either civil or military prosecution (or even both).

24 Major General Duncan Lewis, *Review of the Defence Annual Report 2001-2002* (2003) 13 <http://www.aph.gov.au/house/committee/jfadt/defence_report2001-2002/d_annualreport/chapter2.pdf> at 22 August 2005.

25 Department of Defence, above n 22.

A recent report by former Chief of Defence, General John Baker, as well as former Attorney-General Department head Anthony Blunn, has highlighted one possible deficiency in relation to the legislation. The report affirms that soldiers are not protected when, or if, they undertake raids or ambushes and resulting in the inadvertent killing or injuring of bystanders or cause damage to private property. The report goes on to provide that when the ADF were called out in the past, as done in 2000 and 2002, the ADF lacked legal protection because the *Defence Act* was tailored to 'conventional siege/hostage situations where the aim is to secure concessions from government[s] or release of prisoners'.²⁶ Although being provided with expanded powers that police do not have, working within a strategic framework across several agencies and jurisdictions, the biggest concern in relation to the amendments to the Act should be for the ADF personnel who will be called out with short notice to deal with terrorist threats and violence. ADF Personnel may be obliged, in accordance with their orders, to place themselves in positions of danger, and in such a scenario there is only the possibility that they *may* be able to claim a defence against prosecution based on a reasonable belief that those orders for using force were lawful and justified.

VII THE ADF AND BORDER PROTECTION

Prior to any of the terror attacks of recent times, the ADF was traditionally focussed on undertaking the conventional military operations internationally; most notably in recent times, in the form of peacekeeping operations with the ADF being deployed to East Timor, Bougainville and the Solomon Islands. Internal domestic security was generally left to be undertaken by the relevant state and territory civilian agencies with possible minimal assistance from the ADF when required.

At the time of drafting the ADF White Paper *Defence 2000*²⁷ Defence recognised that there were in fact more serious threats to Australia beyond what was considered 'conventional'. A number of those threats recognised in the research of the paper included cyber crime, organised crime, people and drug trafficking as well as piracy. Defence also recognised the importance of addressing issues such as quarantine and fishing infringements and where these crimes reside in relation to the overall strategic plan for the ADF.

Despite the external role the ADF undertakes, it still plays an active role in maritime policing and border protection activities. Most notably, the RAN engages in an 'on-going call-out' by assisting the Australian Federal Police, the Australian Customs Service and the Department of Immigration in policing criminal activities within Australia's territorial waters. Moreover, the RAN undertakes these roles in conjunction with exercising and controlling Australia's sovereignty and sovereign rights in the maritime environment. The RAN

26 John Kerin, 'No Legal Backing for Terror Troops', *The Australian* (Sydney), 1 March 2004.

27 Commonwealth, *Defence 2000: Our Future Defence Force* (2000) 8 <<http://www.defence.gov.au/whitepaper/docs/WPAPER.PDF>> at 12 September 2005.

maintains a visible presence on the sea-lanes and is often closely supported by the RAAF. Through bilateral and multilateral agreements, the ADF continually operate and patrol throughout southeast Asia and the southwest Pacific – with such a responsibility falling on the ADF, it is important now, more than ever, to cooperate with all agencies in Australia and regional neighbours to have access to restricted areas that will ensure terrorists do not engage in extra-unconventional means, such as freight ships and the open passage of international waters, to transport explosives into ports, such as Sydney or Melbourne.²⁸

The ADF also plays a major role in the surveillance of the Australian coastline through its participation in 'Coastwatch'. The coordinating authority, the National Surveillance Centre, was established in 1999 and co-ordinates the patrolling of Australia's coastline on a 24-hour, 365 day-a-year basis. As previously noted, the ADF undertakes the role of deterrent and apprehension of illegal fishing vessels, as well as the prevention of 'unauthorised arrivals' and contraband entering into Australia's sovereign territory – in total there are 1800 patrol boat-days recorded each year that are dedicated to the task of coastal surveillance – this is also in conjunction with the 250 flying hours of aerial surveillance undertaken by the RAAF.

Operation Relex in 2001 has been one of the more prominent operations which has seen the RAN deployed to undertake the role of 'policing' to prevent boats containing people arriving off the Western Australian coast. By the end of 2001, the ADF had contributed to the interception and apprehension of illegal boats that were found to be transporting 3680 'unlawful arrivals' in Australian waters; the most infamous of recent times being the *MV Tampa*. Other contributions throughout that year included the boarding of 137 foreign vessels, the apprehension of 34 suspected illegal fishing vessels. Furthermore, joint operations like that of *Operation Teebone*, which usually consist of troops from the SAS, ensure that all vessels and their crew are apprehended for their roles in poaching the Patagonian tooth fish within Australia's Exclusive Economic Zone. Moreover, in the 2005 Federal Budget, defence received an increase of A\$507 000 000. Of that budget, an extra A\$200 000 000 has been earmarked to prevent terrorist attacks on Australia's offshore gas and oil platforms. Amongst the extra boost in the defence budget allocation, funding has been providing for the purchase of two additional patrol boats and unmanned aerial surveillance craft to assist in the prevention of attacks on Australia's offshore interests. Funding has been specifically prioritised for *Operation Relex II*, an initiative by the government to ensure that the successful police and defensive patrols by the RAN continue in Australia's northern sea lanes.²⁹

Although it appears that the RAN are 'policing' rather than defending, the RAN does, in fact, undertake many of its policing duties in accordance with several Federal statutes, such as the *Customs Act 1901* (Cth) and the *Quarantine*

28 Keith Suter, 'Shipping "will be next Target"', *Sydney Morning Herald* (Sydney), 15 March 2004, <<http://www.smh.com.au/articles/2004/03/15/1079199148365.html>> at 22 August 2005.

29 Cameron Stewart, 'Terror Shield for Offshore Oil Platforms', *The Australian* (Sydney), 11 May 2005, <http://www.theaustralian.news.com.au/common/story_page/0,5744,15247134%255E2702,00.html> at 22 August 2005.

Act 1908 (Cth) and the *Fisheries Act*. Such Acts provide the authority for ADF to assist other ‘civilian’ government agencies to pursue and apprehend illegal vessels and persons, arrests on board suspect vessels. However, these arrests are generally carried out by those persons designated to be ‘law enforcement officers’ after the suspect’s apprehension.

The ADF, despite possessing enhanced powers currently, will still be subject to the cooperative approach of all agencies to an internal threat. Within that collective group, responding to a threat will be, depending on the forum, a state Special Operations Group (‘SOG’), consisting of an element of the police service with expertise in dealing with hostage and siege situations. Essentially, these personnel are police with armoured vehicles, high-powered semi-automatic rifles and grenades – there has been no public campaign or outrage against this resource, a resource that is similar to the ADF counter terrorism element, apart from the uniform. Although the Government has been enhancing the ADF anti-terrorist capability, it is still recognised that these civilian SOG services play a fundamentally important role in the event of a terrorist attack and that these services should never be left out of the overall strategic plan. The Australian Strategic Policy Institute, in fact, believes that in the future it may be a more sensible strategic move to shift the counter terrorist role away from the ADF whilst strengthening and upgrading that civil policing capability. Amongst the reasons for the shifting away from the ADF to civilian services is that:

in the longer term the primary counter terrorism response capability might best be moved from the ADF to Federal and State police forces, which will almost always be able to get to a terrorist scene more quickly than the ADF, and are on a surer legal footing to undertake such operations. NSW and Victoria have made important starts to further developing their own counter-terrorist and response capabilities. But this approach needs to be mirrored across all States and Territories. This would then free up ADF Special Forces to focus on their overseas missions.³⁰

VIII WHY CALLING OUT THE ADF IS NOT THE END OF CIVILISATION

Indeed, a soldier is a soldier is a soldier – but there are a number of important issues that need to be kept in mind when the ADF are called out and ordered to patrol the Australian streets. Firstly, the ADF will only ever be deployed for a legitimate purpose, a purpose which we may have yet to experience in this country. Nevertheless, deploying Australian troops onto the streets is not a decision that can be justified lightly; therefore one must have faith in those elected representatives to undertake such a responsibility. Prior to a decision being made to deploy troops, the key decision-makers would have considered and assessed the capacity and role of civilian emergency services, the impact on our civil liberties and weighed those against the threat, whether or not the

30 Aldo Borgu, *Beyond Bali: ASPI Strategic Assessment 2002* (2002) Australian Strategic Policy Institute <http://64.233.187.104/search?q=cache:f374h3J3AMAJ:www.securitymanagement.com/library/Australia_terrorism0403.pdf+%22beyond+bali%22+aspi&hl=en> at 24 August 2005.

command structure itself is competent, as well as whether or not there is a clear line of authority and cooperation between all agencies at all levels.

Initially, the *Defence Legislation Amendment (Aid to Civil Authorities) Act 2000* (Cth) was thought to be an encroachment on our civil liberties, in that the ADF will be allowed to openly fire on civilians and that '[the] domestic use of the armed forces has become widely regarded as conduct to be expected of a military or autocratic regime, not a democratic government'.³¹ Sentiments such as these had the concurrence of Senator Bob Brown when he too claimed that '[the] Bill will inevitably raise the temptation for military intervention in civil protests in the future'.³² Both these sentiments and statements provide little to the public except for unwanted and unjustified fear. Such hypothetical protests or situations of domestic violence would have to be ones that are quite remarkable – the likes of which this country has never witnessed before, in order for the Federal Government to deploy fully-armed and equipped soldiers against its civilian population. The Prime Minister also responded to these assertions by stating that:

of course it's not aimed at civil disobedience. I mean there's no way the Government I lead is ever going to use the Army in [an] environment ... I mean, I noticed in the Courier Mail this morning there've got a reference to Greens Senator Bob Brown: 'He insisted that the legislation in force at the end of the environmental battles in 1980 would have allowed the Army to disperse people protesting against planned damming of wilderness rivers'. I mean that is nonsense. It's not that at all.³³

The *Defence Legislation Amendment (Aid to Civil Authorities) Act 2000* (Cth) now provides clarity in relation the legal status and powers of the State, Territory and Federal Governments when dealing with the deployment, or requesting, of ADF in extreme emergency situations. There was a time when the ADF was simply seen as the 'back up', a measure of last resort or a resource relied upon to assist in natural disasters. The last four years has seen the world change overnight and with it the mindset of our leaders and our governments. These ADF capabilities are permanently on notice to respond to terror attacks as a matter of first recourse, any attack in Australia will require the assistance of the ADF in many different forms – this assistance is nothing to fear.

The terrorist attacks over the last four years have demonstrated that terrorism and extremist activities around the world do not discriminate in relation to the individual. These recent terrorists activities are 'more than a transitory phenomenon'³⁴ and as such will more than likely affect Australia due to the invoking of the ANZUS Treaty alliance after 11 September 2001, as well as the

31 Michael Head, *Australian Government uses Sydney Olympics to Strengthen Military Power* (2000) World Socialist Web Site <http://wsws.org/articles/2000/aug2000/olymp-a05_prn.shtml> at 24 August 2005.

32 Bob Brown, 'New Martial Law comes Armed and Dangerous', *The Sydney Morning Herald* (Sydney), 16 August 2000, 14.

33 Radio 4BC, 'Interview with John Howard by John Miller', 22 August 2000 <<http://www.pm.gov.au/news/interviews/2000/interview401.htm>> at 24 August 2005.

34 Robert Hill, Minister for Defence, *Australia's National Security: A Defence Update 2003*, Commonwealth of Australia (2003) 5.

subsequent joining of the 'Coalition of the Willing' and the 'War on Terror'.³⁵ In the year prior to the United States attacks, Australia was celebrating the successful work undertaken by the soldiers of International Force for East Timor ('INTERFET') in East Timor; it was a relatively safe deployment in comparison to the last contingent of that size deployed on operations (Vietnam). INTERFET consisted of men and women of what was a 'peacetime army'; it was a defence force very different to many others in the world at that time with its primary focus on United Nations peacekeeping operations. Now, as a result of the recent terrorist attacks, the Australian Defence anti-terrorism capability has essentially been doubled in the past four years.

Although terrorism itself had been used by various people throughout the world for centuries, it was the horrifying events of 2001 that saw terrorism emerge and become a real and present threat on a scale not seen for generations – it was these events, or the anticipation of such events, that placed terrorism as a high priority on the Australian Government's agenda, it was not the domestic or so-called civil unrests such as protests that some individuals claimed. With these crucial new provisions firmly in place, and given the current political climate, Australians should no longer fear the sight, or possibility, of Australian troops being deployed onto our streets – protecting our civil liberties is important, but protecting these liberties should not be used as an excuse to prevent soldiers from detaining, apprehending or even killing those who seek to undermine these freedoms we all take for granted.

35 Robert Hill, Minister for Defence, *Winning in Peace, Winning in War: The Australian Defence Force's Contribution to the Global Security Environment* (2003) 5.