1 Introduction

Section 119 of the Constitution states:

Protection of States from invasion and violence

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

Clearly the Constitution contemplates some internal security role for the Commonwealth. Even if s 119 does not mention Commonwealth military or naval forces, having the obligation to protect against invasion in the same sentence as that for domestic violence strongly suggests the use of such forces for internal security.¹ Having a Commonwealth Government of limited powers, and a federal division of responsibility which leaves primary responsibility for internal security to the States, makes finding authority for ADF internal security action less than straightforward. English common-law principles do not apply neatly within Australia’s federal structure. Dixon J made clear in R v Sharkey that:

Section 119 of the Constitution provides that the Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence. The reference to invasion explains the words ‘and of the several States’

in s 51 (vi), the defence power. But what is important is the fact that, except on the application of the Executive Government of the State, it is not within the province of the Commonwealth to protect the State against domestic violence. The comments made by Quick & Garran in the *Constitution of the Australian Commonwealth* bring out clearly the distinction between matters affecting internal order and matters, which though in one aspect affecting internal order, concern the functions or operations of the Federal Government: ‘The maintenance of order in a State is primarily the concern of the State, for which the police powers of the State are ordinarily adequate. But even if the State is unable to cope with domestic violence, the Federal Government has no right to intervene, for the protection of the State or its citizens, unless called upon by the State Executive.’

This federal division of responsibility will be central to much of this discussion.

This book distinguishes internal security from martial law because it is possible for the ADF to act for internal security purposes without assuming civilian government functions, although a situation of martial law may also require the ADF to conduct internal security operations. The term ‘internal security’ for this book encompasses any operational deployment of the ADF to use force for law enforcement purposes for civil disturbance or major event security. It will also use the term ‘public order’ where it relates more closely to the references under discussion.

Internal security is a concern which attracts much attention from commentators because the prospect of troops on the street is a chilling one. Internal security has also been a practical and theoretical legal issue

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since before Federation. The fears of a standing army in 17th-century England seem to have seeped into a modern Australian political culture which almost supposes a constitutional bar to using the ADF for internal security, even with the presence of s 119. For example, Mason CJ, Wilson and Dawson JJ in Re Tracey; Ex parte Ryan stated that ‘[i]t is not the ordinary function of the armed services to “execute and maintain the laws of the Commonwealth”’. Despite requests, the Commonwealth has not actually relied upon s 119 to protect a State. There is also a line of thinking in obiter dicta and extracurial judicial writing which sees the Commonwealth as having an inherent right of self-protection because the Commonwealth has occasionally used the ADF internally to protect Commonwealth interests. The Bowral call-out to protect visiting Commonwealth Heads of Government in 1978 is the most prominent example of this.

The Defence Act 1903 (Cth) now provides a statutory footing for most potential internal security actions by the ADF. There are still some possible actions which fall outside the statutory framework however. What then are the limits of any residual executive power for internal security? Can the ADF break the law in order to restore it? The limits for internal security would appear to be very similar to those for internal martial law but the difference is that there have been prominent instances of the ADF conducting internal security operations without statutory authority.

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4. INTERNAL SECURITY

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Interestingly there are three key incidents and they are all relatively recent. The first is the 1978 Bowral call-out mentioned above. The other two are the use of fighter jets to provide security for the Commonwealth Heads of Government Meeting in 2002 and the visit of the President of the United States in 2003.\(^\text{11}\) The prerogative for control and disposition of the forces would have been sufficient authority for the ADF at least to be present in each of these instances. The question is whether the ADF could have then used force just upon the authority of executive power and not relying upon statute. A further question is whether this executive authority relied upon incidental executive power, which would be power available to any citizen, a prerogative power or the nationhood power. The source of such executive power could have important implications for its limits.

This chapter will first consider the prerogative for the control and disposition of the forces. It will then address the effect of Part IIIAAA of the *Defence Act* on the availability of executive power for internal security. It will then turn to the implications of the source of the executive power, whether ordinary citizens’ powers, prerogative or nationhood power, for the use of the ADF under such power. It will then analyse the three uses of the ADF under executive power for internal security. It will also consider how the *Tampa* incident fits into this analysis. It will argue that there is scope for the ADF to conduct internal security operations under executive power but it does not extend to the use of lethal force. This executive power authority will also only extend beyond the powers available to any ordinary person in the clearest cases of necessity.

II Control and Disposition of the Forces

The prerogative for the control and disposition of the forces is important in relation to internal security because it is the authority for the Crown to place its forces where it chooses, whether on bases or in public places. Whilst some Australian case law and comment has focused upon aspects of this prerogative in respect of the employment relationship between the Crown and members of the ADF;\(^\text{12}\) it is more significant in respect of internal security for giving the executive government the authority to

\(^{11}\) Discussed below at Part IV.

place, organise and equip its forces. Whilst there is no Australian case law directly on point, there is little reason to think that the reasoning of the cases on control and disposition of the forces discussed in Chapter 2, such as *China Navigation Company Ltd v Attorney-General* and *Chandler v Director of Public Prosecutions*, would not be relevant to an assessment of the prerogative as to disposition of the ADF. This is important because ‘call-out’, explained further below, is not required to be able to move forces about. The prerogative for control and disposition of the forces means that the ADF has freedom of movement anyway. Call-out just places forces at the disposal of the civil authority to use force. As will be discussed below, it is for the purpose of ‘Aid to Civilian Authorities’ as the title of the *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2006* (Cth) indicates. Forces are not confined to their bases the rest of the time. For example, call-out as such is not required to allow the ADF to give noncoercive assistance in natural disasters or even for strikebreaking, although the extent to which this is lawful after *Pape v Commissioner of Taxation* and *Williams v Commonwealth* is another question. Importantly, it is this prerogative which would also authorise the arms and equipment that the ADF uses. It could authorise the provision of riot-control equipment, or live small-arms rounds or armoured vehicles.

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14 [1932] 2 KB 197.
16 There is no particular legal authority which states that military units require freedom of entry to be able to enter a city or other local government area. Freedom of entry appears just to be a ceremonial survival from feudal times as the author has not located any legal authority which relates to it.
17 (2009) 238 CLR 1 (‘*Pape*’) and (2012) 248 CLR 156 (‘*Williams*’). Notably, of the English context, Geoffrey Marshall in *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, 1984) stated that ‘the deployment and use of the armed forces is a prerogative of the Crown and there seems to be no reason why the Crown should need express authority to order troops to do what it is lawful for anyone to do (to fight fires, for example)’, 163–8. Such action in Australia might rely upon a prerogative with respect to emergencies generally, or the nationhood power, as discussed in Chapter 1. Post *Williams* however such action might actually require statutory authority. This point does not particularly relate to the ADF as it does not involve the use of military force, even if it involves the use of military resources, so it will remain unexplored.
18 *Defence Act 1903* (Cth) s 123 states that members of the ADF do not require permission under a State or Territory law to carry a firearm or do anything else in the course of their duties. This section does not provide the actual authority for the carriage of the weapon or the conduct of the duty though, which would be authorised by the prerogative under discussion.
Taking to the street, air or sea and looking ready to use force could obviously create a perception of threat or political intimidation so it must be done with such concerns in mind. Part 3 of the Defence Force Regulations apply ‘if the Defence Force is called out under any lawful authority other than Part IIIAAA of the Act’. Importantly, reg 11C(2)(a) states that, in utilising the Defence Force in such a call-out, the Chief of the Defence Force, ‘must not stop or restrict any protest, dissent, assembly or industrial action, except where there is a reasonable likelihood of the death of, or serious injury to, persons or serious damage to property’.

The Defence Act 1903 Part IIIAAA Defence Force Aid to the Civil Authority provisions discussed below prohibit actions of this type under s 51G as well. In as recent a case as Haskins v Commonwealth in 2011, Heydon J recalled the potential for military forces to threaten internal security themselves, citing Maitland:

[I]low though the reputation of Cromwell is among those who love human liberty, he made a great negative contribution to that cause after his forces ensured the victory of the House of Commons over King Charles I. During the Commonwealth:

‘England came under the domination of the army, parliament itself becoming the despised slave of the force that it had created. At the Restoration the very name of a standing army had become hateful to the classes which were to be the ruling classes.’

Whilst moving forces from one place to another would be authorised by the prerogative for control and disposition of the forces, patrolling streets without a call-out might look like a usurpation of civil authority which the prerogative would not authorise. The important point here is that whilst there may be a point at which moving forces about could look like an unauthorised call-out, of itself, placing forces in various places does not require a call-out. It is important to make this point before discussing the concept of call-out further.

19 Fox and Lydecker, above n 5, 301–2; Head Calling out the Troops: The Australian Military and Civil Unrest, above n 3, 46.
20 Reg 11A.
21 (2011) 244 CLR 22.
23 Haskins v Commonwealth (2011) 244 CLR 22, 60.
24 Fox and Lydecker, above n 5, 302, state that having troops on standby is not the same as calling out the ADF.
III Part IIIAAA

A History

Use of the ADF for internal security under executive power excited significant comment after the ‘Siege of Bowral’ in 1978.25 In the Protective Security Review which followed, Justice Hope recommended that ADF internal security operations should be on a statutory basis because of the uncertainty of relying upon common-law powers.26 Interest in the issue diminished, however, and it was 20 years before this recommendation had effect when, with the prospect of the Sydney Olympics, Parliament passed amendments to the Defence Act concerning Defence Force Aid to the Civil Authority.27 It was not long before events demonstrated the limitations of the new Part IIIAAA of the Act concerning Defence Force Aid to the Civil Authority. The often-cited attacks of 11 September 2001 in the United States substantially increased the perception of the threat of terrorism.28 The use of civil airliners to attack large buildings was also completely outside of the traditional hijacking, sieges, kidnapping, assassination, bombing or chemical or biological attack contemplated in Part IIIAAA of the Defence Act. The 2000 amendments simply did not contemplate attacks from the air or sea or the need to use force in the air or maritime environment.29 The inconceivable became manifest, Fortuna presented itself.

Part IIIAAA of the Defence Act could not authorise the subsequent combat air patrols over the Commonwealth Heads of Government Regional Meeting in Coolum in 2002 and the visit of the President of the United

25 Term taken from Blackshield, above n 5, 6. For a history of this and earlier strikebreaking incidents involving the ADF, see Head, Calling out the Troops: The Australian Military and Civil Unrest, above n 3, 37–60.
26 Hope, above n 4, 175, app 18.
29 The author recalls being asked specifically at the time of the drafting of the legislation whether it needed an air or maritime aspect and, after consideration, replying ‘no’. For a critique of Part IIIAAA, see Bronitt and Stephens, above n 5; and also Bronitt, above n 3; Head, ‘The Military Call-out Legislation – Some Legal and Constitutional Questions’; Head, ‘Calling out the Troops – Disturbing Trends and Unanswered Questions’; Head, ‘Australia’s Expanded Military Call-out Powers: Causes for Concern’, Head, Calling out the Troops: The Australian Military and Civil Unrest, 100–22, above n 3.
States in 2003. It also could not provide any additional authority for warships to use force for the augmented security patrols around Australian offshore oil and gas platforms which commenced in 2005.

The approach of the 2006 Melbourne Commonwealth Games and the creation of Border Protection Command (then Joint Offshore Protection Command) in 2005 provided impetus to amend the legislation. In early 2006, Parliament added substantial new powers to Part IIIAAA to provide for the use of force in the air and at sea as well as enhanced powers in the land environment. The ADF relied upon these powers, although without using force, to provide combat air patrols for both the Commonwealth Games in 2006 and the Asia-Pacific Economic Community Leaders’ Forum in Sydney in 2007. The latter event did see a Royal Australian Air Force fighter jet intercept a light aircraft which had strayed into a restricted zone over Sydney, although without doing more than warn the light aircraft off.

B Key Provisions and Limits

Since 2006, Part IIIAAA of the Defence Act has provided, inter alia, for the use of lethal force by the ADF to destroy certain aircraft in the air and ships at sea, as well as to defend property designated as critical infrastructure, even without a direct threat to life. It also provides cordon and search powers, both at sea and ashore around the sites of incidents, including around moving ships on the high seas. It has

31 Ibid 4.
34 Department of Defence, Operation DELUGE (9 May 2007).
36 Defence Act, s 51SE.
37 Ibid s 511B.
38 Ibid s 51CB.
39 Ibid ss 51SF–51SK, 51SL, 51SM.
40 Ibid ss 51K–51R.
41 Ibid s 51SF.
provision for a certain degree of protection from liability for ADF members acting under orders. The powers are at least as extensive as any found in the common-law world.

Without addressing the detail of the legislation, the key limitations are, essentially:

- that domestic (as opposed to external) violence must be occurring or is likely to occur,
- any authorised action must be to protect Commonwealth interests,
- that, where relevant, any State or self-governing Territory is not, or is unlikely to be, able to protect the Commonwealth interest, and
- that the ADF should be utilised.

The last requirement implies that a military level of capability is required to respond to the threat. The Act requires that the Prime Minister, Attorney-General and Defence Minister be satisfied of these requirements before the Governor-General can make an order calling out the ADF.

There are variations on these requirements. In the offshore area, there is only a requirement that the authorising ministers be satisfied that there be a threat to Commonwealth interests and that the ADF should be utilised to respond to it before the Governor-General can issue a call-out order. There is also provision for an anticipatory call-out with respect to air threats or to respond to a request from a State or self-governing Territory to protect it from domestic violence. The Prime Minister alone or the two other authorising ministers together, or one of them together with the Deputy Prime Minister, Treasurer or Foreign Affairs Minister, can, without an order from the Governor-General, make an expedited call-out order. Such an order can last for only five days.

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42 Ibid s 51WB.
43 Ibid s 51A.
44 Ibid s 51A.
45 Ibid s 51AA.
46 Ibid s 51AB.
47 Ibid ss 51B, 51C.
48 Ibid s 51CA.
49 Ibid s 51CA(7)(b).
C Statutory Interpretation

Section 51Y of the Defence Act is careful to preserve any power the ADF may otherwise have outside the statutory provisions. It states, in unusual language for a statute: ‘This Part [Part IIIAAA] does not affect any utilisation of the Defence Force that would be permitted or required, or any powers that the Defence Force would have, if this Part were disregarded’. This section would appear to preserve prerogative powers with respect to control and disposition of the forces (most importantly the movement of the forces), war, external operations other than war and even martial law.50

On the face of it, s 51Y would permit the exercise of internal security powers under the authority of executive power as well. Part 3 of the Defence Force Regulations also clearly contemplates this and provides limited regulation of the responsibilities of the Chief of the Defence Force and interaction with State and Territory authorities in a call-out other than under Part IIIAAA. As discussed in Chapter 1, however, necessity should be a limit upon the use of executive power within the realm. Defence Force Regulation 11B actually requires that the Chief of the Defence Force only utilise the ADF ‘in a way that is reasonable and necessary’ in such situations. As discussed, there are compelling reasons for preferring statutory power to authorise the use of lethal force over executive power, not least being the supremacy of the Parliament over the executive. If Part IIIAAA provides a comprehensive set of internal security powers, it would be very difficult to argue that it is necessary to rely upon executive power to do what the legislation provides for, as long as the legislation is operating as it should. This is not to say that Part IIIAAA extinguishes executive power on the same topic, it just makes it mostly unnecessary, and therefore unjustifiable, to resort to executive power.

It comes then to consider when it might be necessary to resort to executive power to authorise internal security operations by the ADF. The conceivable situations, except two, are only remotely likely but it is worth restating that the first iteration of Part IIIAAA in 2000 did not contemplate the threats which presented on 11 September 2001, only the year after it came into force. The need to resort to executive power to respond to contingencies, or Fortuna, is consistent with the theory of executive power discussed in Chapter 1.

50 See Head, Calling out the Troops: The Australian Military and Civil Unrest, above n 3, 122–6.
As to unforeseen threats, there are few scenarios which the legislation could not cover. It is very broad in its scope and appears deliberately drafted to address the widest range of possibilities. The terms ‘domestic violence’ \(^{51}\) and ‘threat’ to Commonwealth interests\(^ {52}\) would cover nearly all potential reasons for the ADF to use force outside of war. Even so, should an unforeseen threat to internal security emerge which the legislation did not address then, where necessity demanded, this chapter argues that the ADF could rely upon executive power to authorise internal security operations.

It is slightly more possible to imagine the statutory framework being inoperable due to the inability of key officials to act, such as the Prime Minister, other authorising ministers or the Governor-General. In these situations, executive power may be available. Such a scenario could be one of martial law because the elected government had ceased to function, such as occurred in Fiji in 2000.\(^ {53}\) The other possibility is where civilian government continues but the Prime Minister, Attorney-General and Defence Minister, as well as the Deputy Prime Minister, Treasurer and Foreign Minister could not act, perhaps due to a bomb blast where they were all together. In the martial law situation, the ADF would need to exercise internal security powers on its own authority. In the latter situation, the Governor-General might assume such powers herself or himself, or quickly swear in a new government from other ministers. In either case, the procedural requirements for authorising the use of the ADF in accordance with Part IIIAAA could not operate (unless the newly sworn ministers could act in accordance with the legislation). In such a case, necessity should permit reliance upon executive power to authorise ADF internal security operations.

As to foreseeable threats, at the other extreme, an internal security situation might actually be beneath the statutory threshold for the application of Part IIIAAA. There could be situations where there is no general level of domestic violence or threat to Commonwealth interests that would warrant the exercise of Part IIIAAA, but they could require the use of force nonetheless. Examples might include small-scale protests at ADF

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51 Eg Defence Act s 51A.
52 Eg ibid s 51AA.
53 Republic of Fiji Islands v Prasad (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001) (‘Prasad’).
bases or around ADF personnel that turned violent. The ADF in this case would need to be acting to prevent an effect on itself. Where this is the case, the powers of ordinary citizens might provide an authority to act. This will be discussed below.

There is a further foreseeable scenario which lies outside the scope of Part IIIAAA as the legislative scheme does not apply beyond the Australian offshore area. For the purposes of Part IIIAAA, s 51(1) defines the Australian offshore area to extend no further than the seas and airspace over the continental shelf. Section 51(1) provides for areas prescribed by the regulations but no such regulations exist. The effect of this is that, should a threat arise in relation to an Australian-flagged vessel beyond the Australian offshore area, there would be no power available under Part IIIAAA to deal with it. Any action would have to rely upon executive power. Such a situation might arguably be an external rather than an internal security operation. Given that Australian-flagged vessels are subject to Australian criminal law by virtue of s 6 of the *Crimes at Sea Act 2000* (Cth), and not any other national law when such vessels are in international waters, the concerns over the use of the ADF for internal security operations discussed in the introduction to this chapter would also be applicable. It is worth considering, then, the extent to which the powers of ordinary citizens or prerogative power might authorise security actions in relation to Australian-flagged vessels outside the Australian offshore area.

Quite apart from threats, there is also the possibility of a High Court challenge to Part IIIAAA powers which resulted in the invalidity of some or all of that part. Should the ADF have been relying upon powers which were subsequently found to have been invalid at the time, then the court may look to see whether executive power could have authorised the same action. It is not possible to speculate in any more detail but such a situation would not be unlike that in the *Tampa Case* where the *Migration Act 1958* (Cth) did not apply to a situation where it might have been expected to. As discussed in Chapter 1, executive power supplied the authority instead. For this reason, s 51Y of the *Defence Act* may potentially be very significant in the case of any invalidity in Part IIIAAA.

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54 See the discussion of the protest at the Nurunngar Base in South Australia in 1989. Members of the 2nd Cavalry Regiment were hastily dispatched to assist South Australian Police protect the base, although they were not reportedly required to use any force. The operation relied upon ordinary statutory and common-law powers of arrest and self-defence. Ward, above n 7 (no page numbers).

55 *Ruddock v Vadaris* (2001) 110 FCR 491 (‘*Tampa Case*’).
IV Three Sources of Authority and their Limitations

A Ordinary Powers of Members of the ADF

Chapter 3 rejected Dicey’s view that the Crown had no prerogative with respect to martial law. This was partly because Dicey saw the Crown as having only the same common-law power and obligation as any other subject to quell a riot or similar disturbance. Dicey’s view on martial law is hard to maintain in the face of the cases discussed in that chapter. His views on the shared powers of Crown and subject though with respect to riots and similar disturbances—that is, internal security as opposed to martial law—are a different matter. The ordinary Australian citizen today does have some limited power to respond to a violent situation and this is a power upon which the Commonwealth, through members of the ADF, might also rely.

In each jurisdiction, there is common-law or statutory power for any person to make an arrest for an indictable offence, as well as various common-law and statutory defences of self-defence or defence of another, preventing a crime, necessity, and also of sudden and extraordinary emergency. Members of the ADF, whether acting in their personal capacity or in the course of their duty, are also always citizens. These powers and defences are also available to them. In this sense, the Commonwealth could require members of the ADF, in the course of their duty, to defend themselves and others or make an arrest by virtue of the same authority that any citizen could do these things. This could be an exercise of the prerogative with respect to control and disposition of the forces as expressed through

57 Eg Arrest or Preventing Crime: Crimes Act 1900 (ACT) s 349ZC; Criminal Code Act 2002 (ACT) s 41; Crimes Act 1914 (Cth) s 3Z; Criminal Code Act (NT) ss 27(e), 33 of Schedule 1; Criminal Code Act 1899 (Qld) ss 25, 266; Criminal Code Act 1924 (Tas) s 39; Criminal Code 1913 (WA) ss 25, 243.
Self-Defence, Necessity or Sudden and Extraordinary Emergency: Zecevic v DPP (Vic) (1987) 162 CLR 645, 660; R v Loughnan [1981] VR 443, 448; Criminal Code Act 2002 (ACT) s 42; Criminal Code Act 1995 (Cth) ss 10.3 & 10.4; Crimes Act 1900 (NSW) ss 418–22 (noting that New South Wales has codified the law of self-defence); Criminal Code Act (NT) s 28(f); Criminal Code Act 1899 (Qld) ss 31(1)(c), 271(1), 272, 273; Criminal Code Act 1924 (Tas), s 46; Crimes Act 1958 (Vic) ss 9AB–9AF; Criminal Code 1913 (WA) ss 31(3), 248, 249, 250; see Bronitt, above n 3, 53.
command power, or as part of its express power under s 61 to execute and maintain the laws of the Commonwealth. This is consistent with the statement of French CJ in *Williams* that:

> [T]he executive power of the Commonwealth extends to the doing of all things which are necessary or reasonably incidental to the execution and maintenance of a valid law of the Commonwealth once that law has taken effect. That field of action does not require express statutory authority, nor is it necessary to find an implied power deriving from the statute. The necessary power can be found in the words ‘execution and maintenance … of the laws of the Commonwealth’ appearing in s 61 of the Constitution. The field of non-statutory executive action also extends to the administration of departments of State under s 64 of the Constitution and those activities which may properly be characterised as deriving from the character and status of the Commonwealth as a national government.\(^60\)

It is not for this chapter to go into the detail of the powers of arrest and self-defence and related powers as it is a complex area of the law on its own, particularly given the subtle differences between the various Australian jurisdictions, and it has been well traversed elsewhere.\(^61\) The main point is that such powers and defences are available to ordinary citizens, and therefore to members of the ADF. The question then is the extent to which the Commonwealth can require members of the ADF to exercise their own powers as ordinary citizens on behalf of the Commonwealth.

Of course, when well-armed, equipped, uniformed and organised members of the ADF exercise any of the powers of an ordinary citizen it is not the same as any ordinary citizen exercising these powers. As discussed in Chapter 1, Winterton saw a fundamental difference between government

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\(^{60}\) *Williams* (2012) 248 CLR 156, 191; See also limited discussion of ‘ordinary and well recognised functions of government’, 234 (Gummow and Bell JJ), s 61 grants a power to spend where authorised by statute or the Constitution, 249, recognised power of Commonwealth to inquire which is held in common with every other citizen, 206 (Hayne J). Commonwealth may exercise the capacities of a juristic person ‘in the ordinary course of administering a recognised part of the Commonwealth government’, 342 (Crennan J), ‘an activity not authorised by the Constitution could not fall within the power of the Executive’, 373–4 (Kiefel J). Other than the reference to French CJ, these references are indirect at best in support of this point but they indicate views which are at least not inconsistent with it. Gabrielle Appleby and Stephen McDonald, ‘Looking at the Executive Power Through the High Court’s New Spectacles’ (2013) 35(2) *Sydney Law Review* 253, 261, note this as a source of executive power as well but do not cite an authority for it.

doing what any citizen could do and a citizen doing the same things. 62

Williams would indicate that such actions may not be Commonwealth actions per se as the Commonwealth does not have the same powers as that of a natural person. Hayne J in Williams touched on this, without resolving the matter fully, in referring to Clough v Leahy and the power of an official to seek information and ask questions:

Griffith CJ recognised that a State, as a polity, acts through individuals and accepted that an officer of the State executive was not somehow prevented, when ‘acting for the Crown’, from undertaking action that ‘every man is free to do’, being ‘any act that does not unlawfully interfere with the liberty or reputation of his neighbour or interfere with the course of justice’. 63

His Honour did not take this to mean that a polity generally, or the Commonwealth in particular, therefore had the same capacities as a natural person. 64 While only an observation by one judge in the case, it would suggest however that officials acting in the course of their duty may rely upon their own powers as a natural person in the course of that duty. This is consistent with Pirrie v McFarlane, 65 as discussed in Chapter 2. Further, as discussed in more detail below, the individual ADF member would be the subject of any prosecution for an excess use of power, not the Commonwealth. However, as discussed in Chapters 1 and 2, the Commonwealth might be the subject of civil action for exceeding its power with respect to the control and disposition of the forces or to execute and maintain the laws of the Commonwealth, or as vicariously liable for the actions of its officials. As Gageler J stated in M68:

The inclusion of s 75(iii) had the consequence of exposing the Commonwealth from its inception to common law liability, in contract and in tort, for its own actions and for actions of officers and agents of the Executive Government acting within the scope of their de facto authority. 66

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62 He saw this as an exercise of prerogative power, George Winterton, Parliament, the Executive and the Governor-General (Melbourne University Press, 1983) 112.
63 Williams (2012) 248 CLR 156, 257–8 quoting Clough v Leahy (1904) 2 CLR 139, 155, 167, 157; Appleby and Macdonald, above n 60, 262, 275, note that Williams did not really consider this area of executive power.
64 Williams (2012) 248 CLR 156.
65 (1925) 36 CLR 170, although that case did not concern the use of force.
The consequence of this is that the Commonwealth could only require members of the ADF to effect arrests and defend others where it relates to another Commonwealth power.\(^{67}\) This is a limitation on the use of the powers of members of the ADF which they possess by virtue of also being citizens. For example, it would appear to relate to the execution and maintenance of a law of the Commonwealth to protect foreign dignitaries visiting events such as CHOGM (Commonwealth Heads of Government Meeting) and APEC. In particular it is an offence under the *Crimes (Internationally Protected Persons) Act 1976* (Cth) to attack such a person.\(^{68}\) It follows that, even without specific statutory authority such as Part IIIAAA, a member of the ADF could act to defend such a person and arrest the assailant, much as any other citizen has the power to do.\(^{69}\)

Alternatively, ADF members operating under quite low-level authority, such as unit or detachment command might, where necessary, use the powers of an ordinary citizen to protect themselves, their mission, their equipment or their base or, indeed, members of the local community where disorder might affect the local ADF presence as part of the prerogative with respect to control and disposition of the forces.\(^{70}\) It might be difficult to argue that such action was an exercise of a power of the Commonwealth if the disturbance really had no effect on the local ADF presence at all.

The main difference is that the ADF member is likely to be much more capable of such action than any ordinary citizen. On the other hand, it would not very likely be an exercise of Commonwealth executive power to require ADF members to exercise these powers to maintain order in the streets around their own homes. As discussed, this would be a matter for the relevant State or Territory police, or the ADF member in their personal capacity. This is an important limitation arising from the federal structure of the Constitution, as proposed at the end of Chapter 1. This would be consistent with the careful distinction in Part IIIAAA between calling out

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67 Williams (2012) 248 CLR 156.
70 See also *Defence Act* s 72P relating to the offence of unauthorised entry to Defence premises, which is very widely defined in s 71A to include virtually any place occupied by the ADF, or *Crimes Act 1914* (Cth) s 30K relating to the offence of obstructing or hindering Commonwealth government services.
the ADF to protect Commonwealth interests as opposed to responding to requests from States and self-governing Territories to protect against domestic violence, reflecting the fundamental limitation of federalism.\footnote{Defence Act ss 51A, 51B, 51C.}

1 Liability of ADF Members

As mentioned above and consistent with the principle of legality such as found in\textit{ A v Hayden}\footnote{(1984) 156 CLR 532.} as discussed in Chapter 1, members of the ADF who exercise powers of arrest or defence of others are personally liable to criminal prosecution for any excess of force which occurs. This is a key limitation. As much as such action might be an exercise of Commonwealth power, without additional specific statutory power such as Part IIIAAA, members of the ADF carrying out the Commonwealth’s requirement to maintain the law have no more power than any ordinary citizen in doing so. Apart from in Queensland,\footnote{Criminal Code 1899 (Qld) s 31.} Western Australia,\footnote{Criminal Code 1913 (WA) s 31.} Tasmania,\footnote{Criminal Code Act 1924 (Tas) s 38, only in regard to riots.} and for certain war crimes,\footnote{Criminal Code Act 1995 s 268.116(3).} obeying orders is no defence to criminal charges. It may be that this defence should be more broadly available where such orders are not manifestly unlawful. As quoted in the introduction to this book, Starke J neatly stated the position with regard to liability for following orders in\textit{ Shaw Savill & Albion Co Ltd}:

\begin{quote}
If any person commits … a wrongful act or one not justifiable, he cannot escape liability for the offence, he cannot prevent himself being sued, merely because he acted in obedience to the order of the Executive Government or any officer of State.\footnote{Shaw Savill & Albion Co Ltd v Commonwealth (1940) 66 CLR 353 344, (‘Shaw Savill & Albion Co Ltd’).}
\end{quote}

Further, without special statutory powers, a member of the ADF stands in the same position as an ordinary citizen with regard to enforcing the law. In his much-quoted \textit{Charge to the Bristol Grand Jury on a Special Commission}, 1832, Lord Tindal CJ said:

\begin{quote}
The law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same authority to preserve the peace of the King as any other subject.\footnote{5 C & P 254, 261 quoted in H P Lee, \textit{The Emergency Powers of the Commonwealth of Australia} (Law Book Company, 1984) 229.}
\end{quote}
Re Tracey made clear that the position in Australia is the same. It would also not be possible to argue that a matter was nonjusticiable within the terms of Council of the Civil Service Unions v Minister for the Civil Service, discussed in Chapter 2.

2 Necessity

Another important consequence of the exercise of the powers of an ordinary citizen by a member of the ADF is that the threshold of necessity might be easier to satisfy, insofar only as it relates to the liability of ADF members. Necessity is usually an element of the exercise of the power of arrest or the right of self-defence. For example, s 266 of the Criminal Code Act 1899 (Qld) states:

It is lawful for a person to use such force as is reasonably necessary in order to prevent the commission of an offence which is such that the offender may be arrested without a warrant.

As far as the ADF member is concerned, as opposed to the Commonwealth, the standard of necessity required for any exercise of the power of an ordinary citizen is only the same as any citizen would have to satisfy in conducting the same actions. It is a matter for the Commonwealth, rather than the ADF member, as to whether there is a general level of domestic violence that has to occur, as with Part IIIAAA, or unforeseen or extraordinary circumstances as might be required to rely upon prerogative or nationhood power (discussed below).

3 A Duty to Suppress?

A notable point made by Dicey is that there is a positive duty upon members of the armed forces to help restore order in situations of riot and disturbance and the like. This is because this is an obligation which any subject has. Dicey cites R v Pinney from 1832 as authority for this but this was a case about a magistrate, not any ordinary subject. The common-law rights and duties in that case were for a justice of the peace to put down a riot and for the King’s subjects to assist the justice in

81 Criminal Code Act 1899 (Qld) s 266.
82 Reid and Walker, above n 3, 134–5, note doubts on this point.
83 (1832) 3 B & AD 349.
84 Dicey, above n 56, 284–6.
doing so. It did not see the obligations of ordinary subjects as anything like those of a justice.85 Marshall suggests that the emerging convention in the United Kingdom has been not to permit troops to suppress public disorder without ministerial approval, in spite of the common-law duty.86 This common-law duty must now be at least questionable. Rowe certainly rejects such a view with respect to soldiers or citizens.87 To begin with, the power to quell a riot is effectively a power of government even if, absent statute, it rests upon a common-law basis. Describing this as the duty of any citizen or subject seems to have disguised the fact that since the Bristol riots in 1832, the subject of R v Pinney88 and Lord Tindal LCJ’s Charge to the Bristol Grand Jury on a Special Commission,89 there is no record of a prosecution of a military member for failing in this duty.90 Suppressing riots and dealing with emergencies has primarily been a governmental function. A court faced with this question may well decide that the development of police forces since then has relieved the ordinary subject of this duty.

If this is the case, it seems unlikely that a member of the ADF would have an obligation, independent of his or her chain of command, to act to put down a riot. If maintaining internal security is actually a governmental function, it should be done at the direction of government. In the case of the ADF, this would mean through the chain of command and not by individual members. In R v Clegg, the 1995 appeal case of a British soldier found to have used excessive force in self-defence whilst on patrol in Northern Ireland, Lord Lloyd quoted Lord Diplock’s more recent perspective on the issue in Attorney-General for Northern Ireland’s Reference:91

There is little authority in English law concerning the rights and duties of a member of the armed forces of the Crown when acting in aid of the civil power; and what little authority there is relates almost entirely to the duties of soldiers when troops are called upon to assist in controlling

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85 R v Pinney (1832) 3 B & AD 349, 354.
86 Marshall, above n 17, 163–8.
87 Rowe, above n 13, 45–7.
88 Dicey, above n 56, 284–6.
89 5 C & P 254.
90 Rowe, above n 13, 45; Cardledge, above n 61, 158, discusses the court martial of Lieutenant Colonel Brereton and Captain Warrington for failure in their duty in respect of the riots, stating ‘Brereton committed suicide before the completion of his court martial and Warrington was cashiered’. Reported in Charles Clode, The Military Forces of the Crown: Their Administration and Government (John Murray, 1869) 179–80.
a riotous assembly. Where used for such temporary purposes it may not be inaccurate to describe the legal rights and duties of a soldier as being no more than those of an ordinary citizen in uniform. But such a description is in my view misleading in the circumstances in which the army is currently employed in aid of the civil power in Northern Ireland … In theory it may be the duty of every citizen when an arrestable offence is about to be committed in his presence to take whatever reasonable measures are available to him to prevent the commission of the crime; but the duty is one of imperfect obligation and does not place him under any obligation to do anything by which he would expose himself to risk of personal injury, nor is he under any duty to search for criminals or seek out crime. In contrast to this a soldier who is employed in aid of the civil power in Northern Ireland is under a duty, enforceable under military law, to search for criminals if so ordered by his superior officer and to risk his own life should this be necessary in preventing terrorist acts. For the performance of this duty he is armed with a firearm, a self-loading rifle, from which a bullet, if it hits the human body, is almost certain to cause serious injury if not death.92

The point here is that the soldier’s duty arose from his superior orders and not independently from the common law.

Further, if internal security is a government function, then, in accordance with the division of responsibility of powers in the federation discussed above, public order rests with the States. It is not for the Commonwealth, or members of the ADF as a local initiative, to interfere with State responsibilities. With respect to ‘domestic violence’ in particular, s 119 of the Constitution makes clear that Commonwealth action to protect a State against domestic violence should occur at the request of the executive government of the State.93 This obligation would then rest with the Commonwealth, not members of the ADF having the obligation to suppress a riot as any other citizen may have. It would appear that ADF members, as Commonwealth officials in State jurisdictions, could not have the same positive duty to suppress riots as members of the armed forces might have in English common law which Dicey asserts. The situation might be different in the Commonwealth’s Territories, whether

92 1995] 1 AC 482, 497. As a result of new evidence, Clegg was subsequently retried and acquitted of murder in 1999. He was found guilty of a lesser charge of unlawful wounding, for which he was also acquitted on appeal in 2000. These trial cases were not reported in the law reports. Nicholas Watt, ‘Paratrooper Lee Clegg cleared of last charge over death of teenagers’ Guardian (online), 1 February 2000, cited in Head, Calling out the Troops: The Australian Military and Civil Unrest, above n 3, 169.
93 See generally Stephenson, above n 1.
self-governing or not, but the effect of s 119 in respect of the States would appear to preclude an obligation upon individual members of the ADF to maintain internal security.

B Prerogative Power

Chitty’s observation in relation to the King’s war prerogative, quoted more fully in Chapter 3, that the ‘King may … do various acts growing out of sudden emergencies’ appears relevant to internal security as well.94 Blackstone, albeit in relation to justice generally, stated that the King was the ‘general conservator of the peace of the Kingdom’.95 Should Part IIIAAAA be inoperable in an internal security situation, as discussed above, or the legislation repealed for some reason, prerogative power to maintain internal security could be relevant. A key point is that the courts will treat the repression of riots and other internal disturbances as justiciable as they do not amount to the conduct of war, even if an exercise of prerogative power.96

Although a case concerned with the war prerogative, in 1964 in *Burmah Oil*97 Viscount Radcliffe made useful observations on the flexible nature of the prerogative, which echo those made by Chitty, including its possible applications to public safety emergencies such as riots:

> [T]he prerogatives of the Crown have been many and various, and it would not be possible to embrace them under a single description … Others were as much duties as rights and were vested in the Sovereign as the leader of the people and the chief executive instrument for protecting the public safety. No one seems to doubt that a prerogative of this latter kind was exercisable by the Crown in circumstances of sudden and extreme

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95 *Blackstone’s Commentaries with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* (1803, Hein Online reproduction) 265. Sir Matthew Hale appears not to have distinguished the King’s war prerogative, including the power to suppress rebellion, from any separate prerogative with respect to internal security, Sir Matthew Hale, *The Prerogatives of the King* (Selden Society, written between 1640 and 1664 but unpublished, D E C Yale (ed) (1976 ed) 123, see *Tabula Quarta – Tempore Belli and Pax et Belli Constitutio*, xiv, and generally Chapter XII ‘Concerning the Jurisdiction and Office of the Constable and Marshal, Martial Law, Tempus Belli and Acquisitions by Right of War’.
96 *Marais v General Officer Commanding the Lines of Communication* [1902] AC 109 115 (‘Marais’). This is perhaps because any proceedings have been criminal proceedings against an official, such as *R v Pinney* (1832) 3 B & AD 349 and the *Charge to the Bristol Grand Jury on a Special Commission 5 C & P 254*, rather than an application for judicial review.
97 *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 (‘Burmah Oil’).
emergency which put that safety in peril. There is no need to say that the imminence or outbreak of war was the only circumstance in which that prerogative could be invoked. Riot, pestilence and conflagration might well be other circumstances; but without much more recorded history of unchallenged exercises of such a prerogative.98

With respect to English common law, Rowe sees the use of military force to put down riots as a prerogative power governed by the common-law doctrine of necessity.99 Renfree sees that prerogative as being available to the Commonwealth as well.100 There is no Australian authority on this point but there is the 1989 English case of R v Secretary of State for the Home Department, Ex parte Northumbria Police Authority (‘Northumbria Police Case’), which identifies a prerogative with respect to keeping the peace or maintaining public order. Nourse LJ said:

The wider prerogative must have extended as much to unlawful acts within the realm as to the menaces of a foreign power. There is no historical or other basis for denying to the war prerogative a sister prerogative of keeping the peace within the realm. I have already expressed the view that the scarcity of references in the books to the prerogative of keeping the peace within the realm does not disprove that it exists. Rather it may point to an unspoken assumption that it does. That assumption is, I think, made in the judgment of Lord Campbell CJ in Harrison v Bush (1855) 5 E & B 344, 353 … Of special importance for their demonstration of the Crown’s part in keeping the peace are these words of Lord Blackburn in Coomber v Berkshire Justices, 9 App Cas Q 61, 67, which may have been based on Blackstone’s Commentaries (1830), vol 1, p 343:

‘The sheriff also was bound to raise the hue and cry, and call out the posse comitatus of the county whenever it was necessary for any police purposes; in so doing he was acting for the Crown, but the burthen fell on the inhabitants of the county.’

I am of the opinion that a prerogative of keeping the peace within the realm existed in mediaeval times, probably since the Conquest and, particular statutory provision apart, that it has not been surrendered by the Crown in the process of giving its express or implied assent to the modern system of keeping the peace through the agency of independent police forces.101

99 Rowe, above n 13, 44–7.
100 Renfree, above n 69, 466–7.
This case only concerned the provision of riot equipment to the police by the Home Secretary without statutory authority. It did identify that the armed forces could exercise the prerogative, but in doing so did not describe any specific actions beyond that which any ordinary citizen could take. It might extend to putting troops on the street with the apparent intention of using force but there is virtually no authority that justifies the use of lethal force beyond the requirements of self-defence.

McLaughlin notes that *Attorney-General for Northern Ireland’s Reference* and some earlier cases may appear to grant some limited authority to shoot fleeing suspects without an immediate associated threat to life. These cases are not consistent with more recent authorities though, and may be explicable by the political context of the Northern Ireland troubles. *Attorney-General for Northern Ireland’s Reference* is not even really consistent within itself. McLaughlin is emphatic that there is no broader power for military forces in Australia or the United Kingdom to use lethal force in internal security operations beyond that required for self-defence. Particularly as *Attorney-General for Northern Ireland’s Reference* referred to statutory powers, there is no authority for the prerogative power with respect to public order alone to authorise the use of lethal force. There is not even authority for any direct interference with the liberties of members of the public beyond that which any ordinary citizen could lawfully exercise.

1 Necessity

Consistent with the theoretical discussion in Chapter 1, necessity may possibly authorise nonlethal actions under prerogative power which no ordinary citizen could perform. In a situation like the Bowral example discussed below, this may possibly include the cordon and search of areas, maintaining vehicle checkpoints and so on. This is different to the use of lethal force.

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104 McLaughlin, above n 61, 459, 467.
106 McLaughlin, above n 61, 459, 467.
109 Cartledge, above n 61, 131, 136.
of the powers of an ordinary citizen because it goes beyond actions which any ordinary citizen could perform. Necessity in the case of prerogative power to restore internal security would have to be a state necessity in the sense discussed in the previous chapter on martial law.\(^{110}\) In the absence of any authority this is a most uncertain area of the law.\(^ {111}\) The necessity would have to be very clear if members of the ADF were to be able to avoid personal criminal or civil liability for what would otherwise be unlawful acts. Lord Pearce usefully distinguished the stricter requirements of necessity in case of riot as opposed to war in *Burmah Oil*:

It may well be that, so far as riot and rebellion within the realm are concerned, ‘the power of the Crown, like the power of any other magistrate and, indeed, of every citizen, is derived from and measured by the necessity of the case.’ See Professor Holdsworth’s *History of English Law*, vol. 10, pp 708–9 … But the right of the Crown to take extreme measures or declare martial law against its own subjects differs from its rights when there is a state of war against enemy subjects and is more jealously regarded by the law. And no authority has been cited to show that the Crown prerogative in war has been regarded as having the same limitations as its rights in dealing with riot and rebellion.\(^ {112}\)

This is perhaps why there have been indemnity acts\(^ {113}\) in the past where internal security actions have been legally questionable and, therefore, perhaps why there is a dearth of authority on the subject.

### 2 Federal Division of Responsibility

While necessity still must justify and limit the use of prerogative power in the Australian context perhaps, more significantly, the scope of the ADF to take internal security action is also limited by the scope of Commonwealth executive power. As mentioned above, general public order is a matter for the States, not the Commonwealth.\(^ {114}\) The 2002 *Inter-Governmental Agreement on Australia’s National Counter-Terrorism Arrangements* recognised this as it provided for the States to refer quite

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111 As to the uncertainty of necessity as a common-law defence see *R v Loughnan* [1981] VR 443.

112 *Burmah Oil* [1965] AC 75, 144.

113 *Martial Law Indemnity Act* 1854 (Vic).

specific powers to criminalise terrorist acts to the Commonwealth while retaining primary jurisdiction for operational responses to terrorism. As a result, the Commonwealth’s responsibility for internal security is less for general public order matters, such as riots, than it is for the security of such matters as foreign dignitaries, including around major events, the conduct of federal elections, the postal service, the execution of court processes, and the air and maritime domains.

These are not matters which the authorities for the prerogative with respect to public order really touch upon. They will be discussed within the context of nationhood power below. Renfree saw them as aspects of the ‘King’s peace in relation to the Commonwealth’, and therefore probably matters of prerogative power. As stated in Chapter 1, Twomey argues that there is a prerogative power of self-protection relying upon Burmah Oil and so there is no need for a nationhood power source of authority. She does not cite a pinpoint reference in the case however and it is difficult to see how it could be authority for a federal government to intervene in a State to protect its own functions. If there can have been no new prerogatives since 1689, when there was no contemplation of a federal Commonwealth of Australia, it is difficult to see how prerogative power could authorise Commonwealth intervention in a State to protect Commonwealth functions. For this reason it is arguably preferable to refer to the text of s 61 itself, a nationhood power approach, for the source of authority. Where the Commonwealth could be concerned with general public order, it would be in the Territories and in situations so serious as to be beyond the capacity of the States to cope and leading to a request for Commonwealth assistance.

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115 This occurred under s 51(xxxvii) of the Constitution, see, eg, Terrorism (Commonwealth Powers) Act 2003 (NSW), sch 1 of which actually provided the relevant draft amendments to the Commonwealth Criminal Code Act 1995.
117 Inter-Governmental Agreement on Australia’s National Counter-Terrorism Arrangements, para 2.4 (e).
118 Renfree, above n 69, 460–1.
120 [1965] AC 75.
121 On call-out on the Gazelle Peninsula, Papua New Guinea (then an Australian territory), where troops did not actually deploy, see Ward, above n 7 (no page numbers).
If the division of responsibilities between the States and the Commonwealth leaves general public order to the States, can the Commonwealth exercise prerogative power to maintain public order on behalf of the States? As discussed in the introduction to this chapter, s 119 of the Constitution provides that the Commonwealth shall protect the States from domestic violence. The condition is that this be on the application of the executive government of the State. This appears to be a quid pro quo for the States transferring their military capability to the Commonwealth under ss 69 and 114 of the Constitution.\(^{123}\) Given that at the time of drafting the Constitution, nationhood power was not a concept known to constitutional law,\(^{124}\) it is likely that the effect of these provisions was meant to be that the Commonwealth would exercise prerogative power to maintain public order in the States. Section 119 recognises that the States had jurisdiction over public order, and therefore had the relevant prerogative power, but that the Commonwealth had the military capability to enforce it. It would appear, then, that when the Commonwealth intervenes in a State to protect against domestic violence, at the application of the executive government of the State, it can rely upon the authority of prerogative to do so.\(^{125}\) This would be no different in a Territory, except that there would be no constitutional requirement for the Commonwealth to receive a request from the executive government of the Territory concerned.\(^{126}\)

C Nationhood Power

Chapter 1 discussed that there may be a basis to use the ADF under nationhood power where there is no prerogative available. This is likely only to be in circumstances where the English character of the prerogative cannot operate within Australia’s distinct constitutional arrangements. This makes the actual experience in Australia of the use of the ADF for internal security, which this chapter will discuss below, at least as significant as the predominantly English common-law authorities on restoring public order. As the prerogative to restore order resides primarily with the States, the Commonwealth therefore might only act unilaterally when it is doing so to protect its own functions. Such unilateral action would most likely be an exercise of nationhood power because, as discussed above, there

\(^{123}\) See Evatt, above n 114, 232–3.
\(^{124}\) See Twomey, above n 119, 327–43.
\(^{125}\) See Renfree, above n 69, 467–9. This is consistent with Stephenson’s view that s 119 is not the source of the power but merely regulates it, above n 1, 292.
\(^{126}\) See Renfree, above n 69, 484–6.
are no authorities which would support prerogative power as the basis to protect Commonwealth government functions.\textsuperscript{127} It is a distinct issue in the debate which followed the Bowral call-out as to whether it was actually some form of nationhood power which provided the source of executive power in that situation.\textsuperscript{128}

As discussed in Chapter 1, in an extreme case, nationhood power justified by necessity may even extend to restoring State government functions without a request from the State concerned, where the State was no longer capable of making the request. If a State government effectively collapsed, it would most likely be ‘peculiarly within the capacity and resources of the Commonwealth Government’ to restore its functioning.\textsuperscript{129} This view relies upon the text of s 61 as well as the theory that executive power must be able to respond to contingency, \textit{Fortuna}. As prerogative power in the Australian setting could not extend that far, the only power that could be available is nationhood power. Experience in Australia has not tested the limits to this point but it has provided some significant exercises of using the ADF which illustrate the potential scope of nationhood power.

\section*{V The Three ADF Internal Security Operations under Executive Power}

\subsection*{A Bowral 1978}

Justice Hope in his \textit{Protective Security Review} of 1979 provided a detailed description of the events which became known as the ‘Bowral call-out’, the essence of which is as follows.\textsuperscript{130} On 13 February 1978, a bomb exploded outside the Hilton Hotel in Sydney, killing two people, fatally wounding another and injuring a further eight people.\textsuperscript{131} A number of visiting heads of government were staying at the Hilton Hotel for the Commonwealth Heads of Government Regional Meeting (CHOGRM).\textsuperscript{132} The meeting

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\begin{itemize}
\item \textsuperscript{127} See also discussion in Joe McNamara, ‘The Commonwealth Response to Cyclone ’Tracy: Implications for Future Disasters’ (2012) 27(2) \textit{The Australian Journal of Emergency Management} 37.
\item \textsuperscript{128} See Lee, \textit{The Emergency Powers of the Commonwealth of Australia}, above n 78, 207 and Blackshield, above n 5, 7, discussed further below.
\item \textsuperscript{129} \textit{Pape} (2009) 238 CLR 1, 63.
\item \textsuperscript{130} Hope, above n 4.
\item \textsuperscript{131} Ibid 258; Lee, \textit{The Emergency Powers of the Commonwealth of Australia}, above n 78, 195.
\item \textsuperscript{132} Hope, above n 4, 257.
\end{itemize}
was due to visit Bowral the next day for two days. The Prime Minister Fraser and Premier Wran of New South Wales met to discuss the appropriate response. The New South Wales Police Commander stated that he did not have adequate resources to guarantee the security of the visitors between Sydney and Bowral. A meeting of the Federal Cabinet the same day decided to call out the ADF to provide security between Sydney and Bowral. With the concurrence of Premier Wran, there was no formal request from the Government of New South Wales for protection. The call-out would essentially be to protect the interests of the Commonwealth, that is the security of the visiting heads of government. At a meeting of the Executive Council later the same day, the Governor-General signed an order-in-council calling out the ADF. It stated, in part:

Whereas I am satisfied, by reason of terrorist activities and related violence that have occurred in the State of New South Wales, that it is necessary

a. for the purpose of safeguarding the national and international interests of the Commonwealth of Australia;

b. for giving effect to the obligations of the Commonwealth of Australia in relation to the protection of internationally protected persons.

There was no specific statutory basis for this call-out, other than the indirect reference to the Crimes (Internationally Protected Persons) Act 1976 (Cth), and the ADF relied upon no specific statutory powers. Also on 13 February 1978, the Minister for Foreign Affairs signed a Requisition of the Civil Authority requiring Brigadier Butler, the officer commanding the forces involved, to order his forces out. The Minister for Foreign Affairs signed a requisition ordering those forces in on 16 February 1978. The Governor-General revoked the call-out order at an Executive Council meeting on 20 February, when the last of the visitors had left Australia.

Approximately 1,900 armed Army and Royal Australian Air Force (RAAF) personnel secured the route between Sydney and Bowral with equipment including helicopters, armoured personnel carriers and mine

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133 Ibid 258.
134 Ibid.
136 Ibid 258–9.
137 Ibid 257–62.
138 Ibid 321.
detectors. The arrangements were to have the New South Wales police interact directly with the civil community and for the ADF to maintain a low profile, conducting searches for explosives and surveillance of the area generally.140 Even so, the ADF had Rules of Engagement authorising the use of lethal force as a last resort, with the emphasis on minimum force.141

In essence a very large ADF presence secured the CHOGRM travel route for three days, with authority to use lethal force. The legal basis for this action was executive power. The only explicit powers available to the ADF would have been those available to an ordinary citizen relating to arrest, self-defence and necessity. There was a good deal of consideration after the event of the legal basis of the Bowral call-out. The opinions of Justice Hope in his Protective Security Review and former High Court Justice Sir Victor Windeyer in his extracurial legal opinion annexed to that Review142 are worth examination.

1 Protecting Commonwealth Interests and Nationhood Power

The opinions of Justice Hope and Sir Victor Windeyer in the Protective Security Review are the most thorough consideration of the legal basis of the 1978 operation. Sir Victor did not cite authority for the proposition that the Commonwealth has the inherent power ‘to employ members of its Defence Force “for the protection of its servants or property or the safeguarding of its interests”’,143 other than the constitutional commentary of Quick and Garran referring to the United States case Re Debs of 1895.144 Sir Victor saw such power as an incident of nationhood:

The power of the Commonwealth Government to use the armed Forces at its command to prevent or suppress disorder that might subvert its lawful authority arises fundamentally, I think, because the Constitution

141 Hope, above n 4, 263.
143 Hope, above n 4, 279, quoting from the Australian Military Regulations, although explicitly stating that these regulations do not create the power, but assume it. See also Ward, above n 7, for a view of Sir Victor’s opinion.
144 158 US 564 (1895).
created a sovereign body politic with the attributes that are inherent in such a body. The Commonwealth of Australia is not only a federation of States. It is a nation.145

Referring to section 61, Sir Victor said that:

[T]he ultimate authority for the calling out of the Defence Force ... was thus the power and the duty of the Commonwealth to protect the national interest and to uphold the laws of the Commonwealth. Being by order of the Governor-General, acting with the advice of the Executive Council, it was of unquestionable validity.146

Justice Hope agreed with Sir Victor and elaborated further on this point. He relied upon the obiter dicta of Dixon J in the Communist Party Case, quoting the following passage (excluding that in square brackets):

[In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend. As appears from Burns v Ransley (1949) 79 CLR, at p 116 and R v Sharkey (1949) 79 CLR, at pp 148, 149, I take the view that the power to legislate against subversive conduct has a source in principle that is deeper or wider than a series of combinations of the words of s 51 (xxxix) with those of other constitutional powers. I prefer the view adopted in the United States, which is stated in Black's American Constitutional Law (1910), 2nd ed, s 153, p 210, as follows: ‘... it is within the necessary power of the federal government to protect its own existence and the unhindered play of its legitimate activities. And to this end, it may provide for the punishment of treason the suppression of insurrection or rebellion and for the putting down of all individual or concerted attempts to obstruct or interfere with the discharge of the proper business of government’.147

Justice Hope also referred to the obiter dicta of Dixon J in R v Sharkey, including this statement quoted from Quick and Garran, the first part of which appeared in the introduction to this chapter:

146  Ibid 280. It is important to note that Sir Victor was not asked to give an opinion on the constitutional validity of the call-out, but rather on the powers and obligations of a member of the Defence Force when called out, and whether there should be changes to the law relating to them.
147  Australian Communist Party v Commonwealth (1951) 83 CLR 1 (‘Australian Communist Party’); Hope, above n 4, 28.
If, however, domestic violence within a State is of such a character as to interfere with the operations of the Federal Government, or with rights and privileges of federal citizenship, the Federal Government may clearly, without a summons from the State, interfere to restore order. Thus if a riot in a State interfered with the carriage of the federal mails, or with interstate commerce, or with the right of an elector to record his vote at federal elections, the Federal Government could use all force at its disposal, not to protect the State, but to protect itself. Were it otherwise, the Federal Government would be dependent on the Governments of the States for the effective exercise of its powers.148

Justice Hope suggested that a relevant Commonwealth statute would indicate a Commonwealth interest, but that there could be Commonwealth interests worthy of protection by the ADF even without a relevant statute. He gave the example of protecting a visiting United States nuclear submarine.149

It is important to note however that Dixon J, in the Communist Party Case150 and R v Sharkey151 discusses only the legislative power of the Commonwealth operating with the executive power to intervene to protect its interests. He did not discuss executive power as the sole source of authority in this context. To rely on this authority, one has to presume that the executive power can authorise action on the basis of the words in s 61, which state ‘extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth’.152

A number of those who wrote on the Bowral call-out at the time have not disputed that executive power authorised the operation. Lee wrote that ‘[i]t is also possible to justify such intervention by invoking a doctrine of inherent power, in this instance, inherent executive power of self-protection.’153 Blackshield stated:

148 (1949) 79 CLR 121, 150.
149 Hope, above n 4, 152, although ordinary citizens’ powers to defend others or defend property might be sufficient to do this.
150 (1951) 83 CLR 1.
151 (1949) 79 CLR 121.
152 Justice Hope stated that ‘Generally speaking, where the Commonwealth has power to legislate, it also has executive power’ above n 4, 32. Williams (2012) 248 CLR 156, clearly makes this view of the law no longer tenable on such a bare formulation.
The object of calling out the troops was not to protect the people of New South Wales against ‘domestic violence’, but to protect eleven visiting heads of state against possible threats to their safety … The Commonwealth, in calling out the troops, was thus protecting an inherent interest of its own … just as the 1971 [Public Order (Protection of Persons and Property) Act] legislation was clearly valid as an exercise of Commonwealth legislative power over external affairs (Constitution s 51 vi) [sic: should be s 51(29)], so the CHOGRM call-out was valid as an exercise of the corresponding executive power … the Commonwealth’s executive power … includes an amorphous and unexplored bundle of attributes of sovereignty, inherent in the fact of nationhood and of international personality.154

As discussed in Chapter 1, there has been some significant case law on nationhood power since 1978. Even so, the views expressed above are consistent with a view of nationhood as the source of power, even if more recent jurisprudence has refined the source and characteristics of that power.155 However, while a number of authorities support the ‘incident of nationhood’ as a source of power, the High Court’s more recent cases concern such things as financial crises156 or the Bicentennial celebration.157 These cases do not specifically address the use of force by the ADF for internal security.158 The High Court judgment that most directly addressed the use of force under nationhood power was that of Isaacs J in R v Kidman.159 His Honour described the existence of necessary executive powers for the Commonwealth’s inherent right of self-protection, stating that ‘a man obstructing any Commonwealth officer in the performance of his duty may be thrust aside with all the force necessary to enable the officer to perform his duty’.160 The only source of executive authority for the Bowral call-out could have been nationhood power as there is no readily identifiable prerogative power to protect visiting dignitaries, and, as Premier Wran and Prime Minister Fraser decided, the security of CHOGRM was a Commonwealth responsibility.

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154 Blackshield, above n 5, 7; Cartledge, above n 61, 131.
159 (1915) 20 CLR 425.
160 Ibid 440–1. In the Communist Party Case (1951) 83 CLR 1, 188, 259, Fullagar J quoted Isaacs J with approval on this point, but in respect of a Commonwealth power to legislate for its own protection.
B CHOGM 2002 and POTUS 2003

The Government clearly stated in each case of the use of the ADF—to protect the Commonwealth Heads of Government Meeting (CHOGM) in 2002 and to protect the President of the United States in 2003—that such actions were to fulfil Australia’s obligations to protect visiting heads of state and government.161 There was no public review of these actions akin to the Hope Protective Security Review, and there are few relevant documents in the public domain. Based on the public statements however, the 2002 and 2003 operations relied upon the same legal basis as that for the Bowral call-out, even if the procedural aspects may have differed.

As discussed, the potential threat from the air to the 2002 CHOGM at Coolum took the use of the ADF for internal security outside the provisions of Part IIIAAA. The Defence Minister announced that the RAAF would use force against civilian aircraft perceived to be a threat to CHOGM.162 Conceivably, this could have involved the shooting down of civilian aircraft by fighter jets in order to prevent a suicidal crash into the meeting place. There was no clear statement as to the legal basis of this operation at the time although it was made clear subsequently in the 2005 Department of Defence Submission to Senate Legal and Constitutional Committee Inquiry into Defence Legislation Amendment (Aid to Civilian Authorities) Bill.163 In 2003 the ADF conducted a similar operation over Canberra to protect the visiting President of the United States. As stated by the official Defence Spokesperson, Brigadier Hannan:

[O]n this occasion we’ll also be providing a number of F/A-18 fighter aircraft that will provide protection in the very unlikely event of a threat emerging from the air. This isn’t the first time we’ve done this, the public will be familiar with the arrangements that were put in place for CHOGM last year and these arrangements will be similar.164

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161 See Robert Hill, above n 28; Department of Defence, Submission to Senate Legal and Constitutional Committee, above n 30.
163 Department of Defence, Submission to Senate Legal and Constitutional Committee, above n 30, 10.
C Implications for Executive Power

None of the three operations in question actually saw the use of force but each of them contemplated it. Even without the use of any force, in the case of the Bowral call-out, the call-out procedure itself ensured that the actions of the ADF in patrolling around Bowral were clearly subordinate to the control of the civilian government. Had the need to use force escalated, it would not have been within the power of ordinary citizens to cordon off public areas and control the movement of people and vehicles in order to protect visiting dignitaries. If this had occurred, and the operation had gone beyond the authority which the powers of ordinary citizens could have provided, it could only have been under the authority of nationhood power as there was no prerogative or statute authorising more forceful action. Given that the bomb blast at the beginning of the meeting was unexpected and the Commonwealth had a responsibility to protect the dignitaries, executive power, whatever its characterisation, arguably was available to authorise necessary action to protect life. It was the only source of power available within the time period. Parliament did not have time to grant relevant statutory power. Necessity is a key limitation and, again, an imprecise one but in this case the action was quite limited in both geographical scope and intensity. If the Bowral call-out had required more than the powers of ordinary citizens, it might have been consistent with a characterisation of executive power as a means to respond to *Fortuna*.

The difficulty is that, as discussed, there is very little authority to do such things under prerogative power, let alone nationhood power. The authorities for nationhood power do not extend explicitly to the conduct of internal security operations by the ADF. The closest authority involving ADF action is the *Tampa Case* which is subject to much criticism, as discussed in Chapters 1 and 2, and can be confined to border protection actions.\(^{165}\) A reliance on nationhood power for ADF internal security operations is only arguable at best. It should be relied upon, as French CJ put it in *Pape*,\(^ {166}\) ‘conservatively’ because to rely upon such precarious authority for extreme measures such as putting troops on the street could challenge the principle of legality and enter the realm of extra-constitutional power. As much as nationhood power exists, without more substance it could become a pretext rather than a lawful authority in such a situation.

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165  (2001) 110 FCR 491. See below n 176 for examples of criticism.
166  (2009) 238 CLR 1, 24.
As Winterton feared, ‘once the realm of extra-constitutional power has been entered, there is no logical limit to its ambit’. Such action could also expose ADF personnel to personal liability for carrying out unlawful orders, which they would likely obey because of Australia’s long heritage of military subordination to the civilian government.

As with prerogative power, nationhood power alone could not be an authority to use lethal force or force likely to cause serious injury, nor to deprive a person of their liberty. Nationhood power could only authorise such action when ordinary criminal law would permit it. Nationhood power alone might be argued, without the support of the powers available to ordinary citizens, where it justifies the minimum necessary encroachment upon the law. It might authorise interference with freedom of movement such as in the examples mentioned above of blocking roads, maintaining vehicle check points and possibly even trespassing upon property or person by searching vehicles, buildings and people where the threat to life warranted it. It might be little different to prerogative power in that regard but possibly even more fraught with uncertainty.

The combat air patrols in 2002 and 2003, on the other hand, had a different character. They were planned well in advance for a foreseeable threat. The prerogative as to the disposition of the forces would have been sufficient to authorise fighter aircraft to patrol the skies. While clearly it is not for any ordinary person to use a fighter jet to defend another, it would be difficult to argue that necessity could justify anything further than what the ordinary criminal law of defence of others would authorise.

In the air there are no intermediate levels of force available between warning and lethal levels of force, such as cordonning off areas or setting up road blocks, because it is physically impossible. After escalating through levels of warning to an aircraft, possibly including warning shots fired close to it, the only use of force option possible is firing at or into the aircraft with most likely lethal consequences. Any firing at or into an aircraft is highly likely to cause death. If nationhood power alone should...

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168 Re Tracey (1989) 166 CLR 518, 538, 546 (Mason, CJ, Wilson and Dawson JJ); also CPCF v Minister for Immigration and Border Protection [2015] HCA 1 (French CJ) (‘CPCF’).

169 See Blackshield, above n 5, 10.

170 Hannan, above n 164.
not extend to the use of lethal force, then it seems that only when it operates together with the law of the defence of others could it authorise the use of any force in the air. If the requirements of the defence of others are not met then it is difficult to see how any other use of force against an aircraft could be lawful.\(^\text{171}\) Bronitt and Stephens would appear to share this view.\(^\text{172}\) For this reason no additional executive power, beyond simply having aircraft in the air, should have been available because it could not authorise any action in the air other than the use of lethal force. In respect of the combat air patrols in 2002 and 2003 then, ADF members could only have used the powers they have as ordinary citizens, such as the law of defence of others.

Nationhood power was also important insofar as it might justify Commonwealth intervention outside of s 119 but even then, State police forces have virtually no capacity to respond to a threat from the air. Air patrols over a State hardly seem to be an intrusion in that State contrary to s 119, so a resort to a nationhood power argument to justify this seems unlikely to be necessary.

VI Tampa?

Where does the use of the ADF to board the MV *Tampa* in 2001 under the authority of executive power fit into all of this? Although this book has discussed the profound implications of the *Tampa Case*\(^\text{173}\) for nationhood power, executive power more generally and the incident as a whole for the relationship between the ADF and the elected civilian government, it has not yet discussed the implications of the *Tampa* incident for the limits on the use of the ADF under executive power. Was it internal security or was it an external security operation? Within the taxonomy of this book it could possibly be both. Chapter 6 will discuss external security operations other than war. It will analyse such operations as being external to Australia and relying upon prerogative power, where there is no intention to prosecute offences within Australian courts. Conceivably the *Tampa* operation could have met this description but it also occurred within Australia’s territorial sea off Christmas Island,\(^\text{174}\) a place within Commonwealth

\(^{171}\) Except in an armed conflict.
\(^{172}\) Bronitt and Stephens, above n 5, 267–9.
\(^{174}\) Ibid 491.
jurisdiction but constitutionally external to the States and Territories.\textsuperscript{175} The significance of this is that the implications of the \textit{Tampa} incident for the use of the ADF under executive power are essentially unique to the circumstances of border protection.

In the \textit{Tampa Case}, French J, referring to an ancient prerogative to expel aliens, saw the executive power as 'measured by reference to Australia’s status as a sovereign nation'.\textsuperscript{176} This is not the same as a prerogative with respect to emergencies or internal security, or external affairs. Noting the discussion in Chapter 1 about whether this decision should have relied on prerogative power or nationhood power, either way, the power in question relates to preventing the entry of aliens. Section 7A of the \textit{Migration Act} since 2001 has explicitly preserved only a very specific field for executive power in this regard:

The existence of statutory powers under this Act does not prevent the exercise of any executive power of the Commonwealth to protect Australia’s borders, including, where necessary, by ejecting persons who have crossed those borders.

Insofar then as the \textit{Tampa Case}\textsuperscript{177} provides authority for the ADF to use executive power, it is limited to protecting Australia’s borders. It does not provide a more expansive authority with respect to internal security more generally, notwithstanding the implications of the case for so many aspects of the relationship between the ADF and executive power. Importantly, this

\textsuperscript{175} NSW \textit{v} Commonwealth (1975) 135 CLR 337 (‘\textit{Seas and Submerged Lands Case}’).


\textsuperscript{177} (2001) 110 FCR 491.
provision also does not create any ‘executive power of the Commonwealth to protect Australia’s borders’, it merely ensures the Act does not prevent the exercise of any such executive power which may exist.

Given the judgments in CPCF and M68 discussed in Chapter 1, it is difficult now to argue that there is any executive power to protect Australia’s borders. Only Keane J supported it in CPCF\(^\text{178}\) but even French CJ did not take the opportunity to develop his earlier position on the issue.\(^\text{179}\) Conversely, Hayne and Bell JJ stated clearly that there was no executive power ‘to prevent the persons concerned entering Australian territory without a visa’.\(^\text{180}\) After lengthy consideration, Kiefel rejected the proposition\(^\text{181}\) and in M68 Gordon J also rejected the idea.\(^\text{182}\) The more arguable view therefore is that any power to protect Australia’s borders from nonviolent threats must be found in statute, not executive power.

VII Conclusion

The *Tampa Case*\(^\text{183}\) does not assist much in an analysis of the use of executive power for internal security by the ADF. Part IIIAAA seems almost to cover the field with respect to ADF internal security powers now, but there are conceivable situations where this legislation might not apply and there may have to be a resort to executive power. An analysis of *Pape*\(^\text{184}\) and *Williams*\(^\text{185}\) and Australia’s constitutional structure, some English common-law authorities, as well as ADF experience, indicates that there are three main potential sources of this executive power—‘executing or maintaining a law of the Commonwealth’ or the exercise of a prerogative or nationhood power. Supporting the exercise of each of these sources of power is the aspect of executive power which the ADF members share in common with any citizen. The main limitation for the ADF in using this power, in addition to the limitations which would apply to any citizen doing such things as effecting an arrest or defending themselves, is that its use must be relate to ‘executing or maintaining a law of the Commonwealth’ or the exercise of a prerogative or nationhood

\(^{178}\) [2015] HCA 1 [476]–[495].

\(^{179}\) Ibid [40]–[42].

\(^{180}\) Ibid [137]–[151].

\(^{181}\) Ibid [258]–[293].

\(^{182}\) [2016] HCA 1 [372].

\(^{183}\) (2001) 110 FCR 491.

\(^{184}\) (2009) 238 CLR 1.

\(^{185}\) (2012) 248 CLR 156.
power. Given that such power is the most ordinary, in that any ordinary citizen may exercise it, it is ironic that it has been essential to the three nonstatutory ADF security operations around Bowral in 1978, over CHOGM in 2002 and to protect the visit of the President of the United States in 2003.

As to prerogative power, Australia’s federal division of responsibilities means that the prerogative for maintaining public order, a central aspect of internal security, lies with the States. The ADF could only possibly rely upon this prerogative in maintaining public order in the Territories, or when there is a request from the executive government of a State. This creates a greater significance for nationhood power. There is a strong view in some cases, the Hope Protective Security Review and among some scholars that the Commonwealth has an inherent right to protect itself and its functions. In the absence of an identifiable prerogative for this purpose it may well be that nationhood power could be the source of executive authority for the ADF to protect the Commonwealth and its functions, such as by protecting visiting dignitaries or in restoring a collapsed State government. Any action relying upon prerogative or nationhood power alone that went beyond the power available to any ordinary citizen would have to be justified by state necessity. Any such power is fraught with uncertainty however.

Internal security by the ADF, in practice, has really relied upon the powers available to an ordinary citizen or upon Part IIIAAA of the Defence Act. Nationhood power may have justified Commonwealth action within States in the three incidents as not being contrary to s 119. There has been no constitutional challenge by a State though, and there has been no use of force such as to cause death or injury, or any significant damage to property. As a result, there has been no real judicial testing of ADF powers with respect to internal security. Taking French CJ’s warning to approach executive power ‘conservatively’ then, the use of force in ADF internal security operations should be no more than any citizen could exercise and must relate to maintaining a law of the Commonwealth or supporting the exercise of a prerogative or nationhood power. This is the limit of federalism as proposed in Chapter 1. Prerogative power, in the case of a request under s 119 or in a Territory, or nationhood power, to protect a Commonwealth interest, arguably, could only authorise more, nonlethal, force in the clearest cases of necessity.
