I Introduction

War is potentially the most destructive exercise of executive power by the ADF. As this chapter will discuss, it can involve deliberate killing, injuring, damaging of property and detention. It might also include seizing enemy shipping in port at the outbreak of hostilities, internment of enemy alien civilians, breaching traffic regulations in order to move military equipment, destroying property in order to deny it to an advancing enemy or in order to construct defences, and requisitioning property for military purposes. Ironically, perhaps, whilst possibly the best-recognised prerogative, its substance is one of the least considered in both case law and literature. The war prerogative seems mainly just to have operated and been accepted. The decision to go to war is nonjusticiable and government decisions concerning the conduct of hostilities have been mostly free from judicial scrutiny. There is ample regulation of the conduct of hostilities in international law and this finds expression in statutory form in the *Criminal Code Act 1995* (Cth) and the *Geneva Conventions Act 1957* (Cth). This statutory law is still silent however on where the authority lies for a member of the ADF to target and kill someone—or do anything else—in the execution of war; on the face of the statutes, this is murder. There is not a single case that positively asserts prerogative power as the authority for such action. There is a combat immunity from liability doctrine in *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66
CLR 344 (‘Shaw Savill & Albion Co Ltd’) but this is as far as the case law goes. War then sits as a strangely powerful prerogative without positive authority to explain its substance.

War seems to have remained a matter for prerogative power because of its dynamic and often unpredictable nature. Even if the commencement of war is well foreseeable, the course of events once it has commenced often is not. In Australia, consistently with the English constitutional compromise of the 17th century, Parliament has stayed out of the conduct of military operations. It has approved the funding of war and regulated administrative and economic matters in support of national war efforts.1 Parliament has proscribed certain conduct during military operations but it has essentially left it to the executive to decide when and how to use the ADF.2 Notably, war does not in itself justify, or even necessarily require, military interference with any of the constitutional limitations described in Chapters 1 and 2 such as subordination to the civilian government, the separation of powers or the federal system.3 Where this occurred it would be more a question of martial law.

This chapter will argue then that the limits of the war prerogative are primarily a question of statutory interpretation together with an assessment of necessity in a particular case. The proximity of the action in question in relation to engagement with the enemy is central to this assessment of necessity. The clearest point appears to be that the acquisition of property, including its destruction, must be on just terms by virtue of the express constitutional limit on the power of the Commonwealth Parliament. This relates to the limits of statutory power and the express provisions of the Constitution proposed in Chapter 1.

II Sources

A Writers

A number of writers have considered the war prerogative. Hale devoted a chapter to the subject in his *Prerogatives of the King*, stating that ‘the necessities of a time of war make those things legal which otherwise were not in time of peace’. As far as the traditional theorists are concerned, war was perhaps the main reason that they often cast executive power as requiring flexibility, strength and unity of purpose, as these are the qualities most likely to bring success to a sovereign in war. Montesquieu identifies the conduct of war and foreign relations together as the central and primary concerns of executive power:

In each state there are three sorts of powers: legislative power, executive power over the things depending on the right of nations, and executive power over the things depending on civil right. By the second, [the prince or the magistrate] he makes peace or war, sends or receives embassies, establishes security, and prevents invasions …

Blackstone stated:

Upon the same principle the king has also the sole prerogative of making war and peace. For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power: and this right is given up, not only by individuals, but even by the entire body of people, that are under the dominion of a sovereign.

4 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’.


6 Montesquieu, above n 5, 156–7.

7 Blackstone’s Commentaries with Notes, above n 5, 257.
Clode stated that, ‘The Defence of the Realm the Constitution has wisely intrusted [sic] to the Crown.’ 8 Dicey did not identify a war prerogative but only a common-law right shared between ‘the Crown and its servants to repel force by force in case of invasion …’, as discussed in Chapter 3. 9 In 1920, E F Churchill saw the wide powers allowed to the Crown under the Defence of the Realm Consolidation Act 1914 (UK) as consistent with the 17th-century constitutional settlement, stating:

Thus, though Parliament had, by 1689, circumscribed the prerogative of the Crown to legislate, to tax and to maintain a special droit administratif, it was unwilling to weaken the discretionary power of the Crown in matters pertaining to the defence of the realm. 10

Zines, Evatt and Renfree are the most notable of a very few Australian authors who have considered the war prerogative. 11 Pertinently, while Evatt stated in 1924 that the war prerogative ‘is recognised on all sides’, he also commented that ‘[m]any extravagant claims were made by the Executive during the late War without there being necessity for the Courts to deal finally with the validity thereof’. 12

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**B Cases**

Sir Edward Coke’s Report of the *Case of the King’s Prerogative in Saltpetre* is one of the earliest case law references on the King’s prerogative to defend the realm,\(^{13}\) which Starke J cited in *Shaw Savill & Albion Co Ltd*.\(^ {14}\) Despite the inherent significance of the war prerogative, it is not one that has often arisen for consideration in Australia. Most of the defence cases in Australia have concerned the legislative power of the Commonwealth.\(^ {15}\)

The High Court has considered the war prerogative only infrequently.\(^ {16}\) There are some First World War cases which touched upon it. The references to it in *Farey v Burvett*,\(^ {17}\) a case concerned with the prices of flour and bread, were essentially obiter dicta. *Zachariassen v Commonwealth* concerned the Comptroller of Customs not permitting a Russian ship to sail from Melbourne in 1916 unless it carried wheat to the United Kingdom, instead of sailing for Chile to collect nitrate as intended by its owner.\(^ {18}\) As part of its defence, the Commonwealth argued that the war prerogative authorised this action and the High Court stated that the Commonwealth could argue this justification at trial.\(^ {19}\) Both Gavan Duffy J in the High Court and the Privy Council, affirming the High Court’s decision, stated that the Commonwealth itself was not exercising the war prerogative but was doing so on behalf, and under the authority, of the King.\(^ {20}\) *Joseph v Colonial Treasurer (NSW)* was concerned with the procurement of wheat but confirmed that the Commonwealth,\(^ {21}\) as opposed to the States, is able to exercise aspects of the war prerogative on behalf of the King.\(^ {22}\) This chapter will address the question of when the prerogative became exercisable by the Commonwealth itself instead of on behalf of the King.

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\(^{13}\) (1606) 12 Co Rep 12, 14.

\(^{14}\) (1940) 66 CLR 344, 354.


\(^{16}\) The Commonwealth did come into existence during the Boer War in South Africa 1899–1902 but it was a war of quite limited scope from an Australian perspective and the High Court did not come into existence until after it ended, *Judiciary Act 1903* (Cth).

\(^{17}\) (1916) 21 CLR 433, 440, 452, 465, 466.

\(^{18}\) (1917) 24 CLR 166, 167–71.

\(^{19}\) Ibid 184–5, 187–8.

\(^{20}\) Ibid 187; *Commonwealth v Zachariassen and Blom* (1920) 27 CLR 552, 557 (Viscount Finlay, for their Lordships).

\(^{21}\) (1918) 25 CLR 32.

Two Second World War cases, *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (In Liq)*, 23 a case concerning the priority of the Crown as a creditor, and *Carter v Egg & Egg Pulp Marketing Board (Vic)*, 24 a challenge to a market control scheme, affirmed the existence of the war prerogative but did not elaborate much on the scope of the power other than to note that it is available to the Commonwealth and can be extensive. Much more recently, Crennan J also recognised the war prerogative in *Williams v Commonwealth* referring to:

the exercise of prerogative powers accorded to the Crown at common law (now reposed in the Commonwealth Executive alone25), such as the power to enter a treaty or wage war.26

Kiefel J acknowledged the existence of such a power in *CPCF v Minister for Immigration and Border Protection*, 27 as did Keane J. 28 Gageler also acknowledges the existence of this power in *Plaintiff M68 v Minister for Immigration and Border Protection* (`M68`). 29

1 Shaw Savill & Albion Co Ltd

Fortunately, the 1940 High Court case of *Shaw Savill & Albion Co Ltd* goes some way to drawing limits around the extent of the war prerogative.30 It makes a strong, though not precise, distinction between when the war prerogative prevails over the ordinary law and when the ordinary law applies to the armed forces, even in war. Dixon J was expansive in his description of the combat immunity doctrine. He stated that:

It could hardly be maintained that during an actual engagement with the enemy or a pursuit of any of his ships the navigating officer of a King’s ship of war was under a common-law duty of care to avoid harm to such non-combatant ships as might appear in the theatre of operations. It cannot be enough to say that the conflict or pursuit is a circumstance affecting the reasonableness of the officer’s conduct as a discharge of the duty of care, though the duty itself persists. To adopt such a view would mean that whether the combat be by sea, land or air our men go into action

23  (1940) 63 CLR 278, 320.
24  (1942) 66 CLR 557, 572.
28  Ibid [484].
29  [2016] HCA 1 [164].
30  (1940) 66 CLR 344.
accompanied by the law of civil negligence, warning them to be mindful of the person and property of civilians. It would mean that the Courts could be called upon to say whether the soldier on the field of battle or the sailor fighting on his ship might reasonably have been more careful to avoid causing civil loss or damage. No-one can imagine a court undertaking the trial of such an issue, either during or after a war. To concede that any civil liability can rest upon a member of the armed forces for supposedly negligent acts or omissions in the course of an actual engagement with the enemy is opposed alike to reason and to policy. But the principle cannot be limited to the presence of the enemy or to occasions when contact with the enemy has been established. Warfare perhaps never did admit of such a distinction, but now it would be quite absurd. The development of the speed of ships and the range of guns were enough to show it to be an impracticable refinement, but it has been put out of question by the bomber, the submarine and the floating mine. The principle must extend to all active operations against the enemy. It must cover attack and resistance, advance and retreat, pursuit and avoidance, reconnaissance and engagement. But a real distinction does exist between actual operations against the enemy and other activities of the combatant services in time of war. For instance, a warship proceeding to her anchorage or manoeuvring among other ships in a harbour, or acting as a patrol or even as a convoy must be navigated with due regard to the safety of other shipping and no reason is apparent for treating her officers as under no civil duty of care, remembering always that the standard of care is that which is reasonable in the circumstances … It may not be easy under conditions of modern warfare to say in a given case upon which side of the line it falls.31

Dixon J’s test does not require direct contact with the enemy, as 20th-century technology permitted engagement with the enemy from a distance. His test does though require ‘active’ or ‘actual operations against the enemy’, which excludes doing things when not engaged with the enemy which any ordinary person would have to do, such as ‘navigating with due regard’. His Honour stated that the course, speed and darkened state of HMAS Adelaide were nonjusticiable matters because:

The Court is not in a position to know or to inquire what measures are necessary for the proper conduct of a warlike operation and must depend upon those upon whom finally rests the responsibility of action.32

31 Ibid 361–2.
32 Ibid 363.
It should be a matter for the trial court however, as to whether the warship was engaged in active operations against the enemy, and therefore had no liability to the MV Coptic in respect of improper navigation. Rich ACJ, McTiernan and Williams JJ also saw such matters covered by combat immunity as nonjusticiable at any time. Starke J stated that such matters could become justiciable after the war.

The Court unanimously allowed the matter to proceed to trial. While this elaboration of the combat immunity doctrine does not provide precise content to the war prerogative, it does mark a strong distinction between acts of war and other operations occurring during the course of war. The Court will treat acts of war as nonjusticiable and yet, even in war, apply the law to any other actions of the armed forces as it would to anyone else. The defendants in the ‘Commando Court Martial’ in 2011 successfully relied upon Shaw Savill & Albion Co Ltd in interlocutory proceedings before the Chief Judge Advocate. Although they had inadvertently killed noncombatant children in the course of defending themselves from small arms fire, they did not owe a duty of care to others on the battlefield during actual combat operations. This is not a case authority in itself but nonetheless provides a persuasive contemporary application of the Shaw Savill & Albion Co Ltd combat immunity doctrine.

2 Smith v Ministry of Defence

The 2013 United Kingdom Supreme Court case of Smith v Ministry of Defence carefully considered the combat immunity doctrine in Shaw Savill & Albion Co Ltd. Notably, it did not doubt the existence of the
combat immunity doctrine in the common law or distinguish it as an Australian, as opposed to English, doctrine. The case involved claims relating to deaths of British soldiers in Iraq occurring when a British tank fired upon another British tank in error, as well as two separate incidents where lightly armoured ‘Snatch’ Land Rover vehicles failed to protect their occupants from the blasts of improvised explosive devices. The claims did not seek to question decisions made in the course of actual combat operations, or the high-level political decisions to commit troops to Iraq and the manner in which they were equipped generally. Rather the claims focused on the failure to provide specific protective equipment to the tanks and land rovers which might have prevented the deaths and also the decision to commit those vehicles to the particular operations in question without that equipment. These are quite different factual scenarios to the collision between HMAS Adelaide and the MV Coptic as in that case the harm did not result directly from enemy action or in the course of actual combat. Smith therefore deals with matters much closer to combat operations and also with the deaths of the Crown’s own troops, not civilians or the enemy.

The majority and dissenting judgments reveal an interesting and important divergence in the application of both the combat immunity doctrine and the concept of nonjusticiability. The majority position was that the claims were justiciable as they related to decisions made in the gap between the nonjusticiable tactical decisions made in actual combat operations and the high-level political decisions relating to commitment to war and equipment procurement. Even so, Lord Hope, on behalf of the majority, emphasised that, at trial, the evidence might indicate that combat immunity should apply to the decisions in question. In this case, the trial court should favour its application where appropriate. Lord Hope stated:

[I]t is of paramount importance that the work that the armed services do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong. The court must be especially careful, in their

43 Smith [2013] UKSC 41 [84]–[93].
44 Ibid [1]–[8].
46 Ibid.
47 Ibid [99] (Lord Hope).
case, to have regard to the public interest, to the unpredictable nature of armed conflict and to the inevitable risks that it gives rise to when it is striking the balance as to what is fair, just and reasonable.  

It was not for the Supreme Court to make decisions on the application of combat immunity however without having heard the evidence; noting that the trial judge found against the Commonwealth in respect of the collision between HMAS *Adelaide* and the MV *Coptic*. Lord Hope saw his position as consistent with *Shaw Savill & Albion Co Ltd*. 

By way of contrast, Lord Mance, in dissent, stated that the matters should simply be nonjusticiable because to put the claims to trial would inevitably result in questioning the decisions of operational commanders in actual operations against the enemy. If the purpose of the combat immunity doctrine was to avoid, in his words, ‘judicialising warfare’ then the claims should be nonjusticiable. Lord Mance also saw his position as consistent with *Shaw Savill & Albion Co Ltd*. His view would appear to be that the threat of litigation would impede decisive operational action and inappropriately impose the judicial branch into the sphere of the executive. This view reflects the theory that it would be inconsistent with the qualities of flexibility, strength and unity of purpose, favoured by writers such as Blackstone and Montesquieu, which are desirable in the executive. Lord Carnwath agreed with Lord Mance except that he viewed the Snatch Land Rover claims as occurring after combat operations in Iraq had ceased and being during a period of peacekeeping. The combat immunity doctrine, therefore, did not apply to the Snatch Land Rover claims. 

*Smith* illustrates the difficulties in applying Dixon J’s test for combat immunity and discerning on which side of the line any particular action might fall, which his Honour himself said would not be easy. If the aim of the combat immunity doctrine is not to ‘judicialise warfare’ then Lord Mance’s position is the most prudent. Lord Hope’s view prevailed,
however, so it appears that, at least in English law, combat immunity does not necessarily mean that a matter is nonjusticiable and it will be a matter of evidence and argument at trial as to whether combat immunity applies. Tugenhadt and Croft argue that this case unacceptably narrows the doctrine because it will make military ‘leaders focus on the duty of care rather than adaptability and mission success’.58 A United Kingdom House of Commons Defence Committee stated in its 2013 report titled UK Armed Forces Personnel and the Legal Framework for Future Operations that:

We are concerned about the failure of the previously well understood and accepted principle of combat immunity, most recently evidenced in the Supreme Court majority judgment in June 2013 allowing families and military personnel to bring negligence cases against the MoD [Ministry of Defence] for injury or death. This seems to us to risk the judicialisation of war and to be incompatible with the accepted contract entered into by Service personnel and the nature of soldiering. It also challenges the doctrine of the best application of proportionate response with the unintended consequence that it might lead to far bloodier engagements on the battlefield as commanders may take fewer risks with their own troops and make more use of close air support or remotely actioned weapons, resulting in greater violence against the opposition with potentially greater numbers of civilian casualties. More legal certainty might result in less destructive conflicts.59

Despite this, in future it might be difficult to argue that the courts should never put a matter to trial before determining that combat immunity applies. The statutory regime in div 268 of the Criminal Code Act 1995 proscribing conduct contrary to the law of armed conflict, discussed below, necessarily means that courts may now look into the operational decisions of commanders. Shaw Savill & Albion Co Ltd itself indicates that,60 even in 1940, the High Court of Australia was prepared to send aspects of a matter back to the trial court to determine whether it was operational

58 Thomas Tugenhadt and Laura Croft, The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power (Policy Exchange, 2013) 31–2. As much as this author shares the concerns in this report of the judicialisation of warfare, because this book argues that combat immunity should mean immunity from liability and not necessarily immunity from suit, and also because the nature of warfare does not lend itself to being able to prescribe in advance in legislation what should be immune and not, this book does not necessarily support the proposal to legislate for combat immunity at 56–7.
60 (1940) 66 CLR 344.
or not and, therefore, covered by combat immunity. This supports the
principle of legality, but it remains to be seen if it undermines combat
effectiveness or leads to bloodier conflicts.

III When Does the War Prerogative Apply?

When does the war prerogative apply? This issue has been confused
somewhat since the practice of declaring war and making peace fell into
disuse after the end of the Second World War. The Governor-General
made the first and last declarations of war on behalf of Australia in 1941
against Japan, Finland, Hungary and Romania, and in 1942 against
Bulgaria and Thailand. Previously the King had issued declarations of
war on behalf of the Empire in 1914 and 1939. This is discussed further
below. A declaration served the very useful purpose in domestic law of
clearly enlivening the war prerogative. It was one of the few ways in which
the executive could change legal rights and obligations within the realm
merely by declaration and without the authority of an Act of Parliament,
a court order or a private law instrument such as a contract. Upon the
declaration, within certain rules, enemy aliens and shipping within the
realm became liable to seizure and enemy combatants to lethal attack or
capture. There were potentially legal effects upon Australian subjects as
well, such as making it more difficult to have dealings with enemy aliens
without committing an offence.

61 See Sampford and Palmer, above n 11, especially 366–9; see also McKeown and Jordan, above n 2.
63 Commonwealth, Gazette, No 251, 8 December 1941, 1849, cited in McKeown and Jordan, above n 2, 31.
66 Commonwealth Gazette, No 50, 3 August 1914, 1335, cited in McKeown and Jordan, above n 2, 31.
67 Commonwealth Gazette, No 63, 3 September 1939, 1849, cited in McKeown and Jordan, above n 2, 31.
69 Department of Defence, Commonwealth War Book, 1956 vii, ch III, 12, ch IX, 10.
70 Oppenheim, above n 68, 63.
71 On trading with the enemy and the prerogative power of the Crown to approve such trading
by licence, see Donohue v Schroeder and Kaboutz (1916) 22 CLR 362. (This case is only one page in
length.) See Evatt, above n 12, 179.
The formerly secret *Commonwealth War Book* of 1956\(^{72}\) is illustrative of the types of measures contemplated in the height of the Cold War; and with the Second World War in relatively recent memory. It was the plan for the coordination and initiation of all government action on the actual or imminent outbreak of war.\(^{73}\) This is significant given that the Cold War period was the last time government probably considered taking such measures within Australia. Under this plan, many measures required statutory authorisation but, for example, the requisition of merchant shipping under 200 tons could be by prerogative power alone,\(^{74}\) preventing the departure of certain aliens could be done by deliberately delaying the exercise of existing statutory powers\(^{75}\) and the seizure of enemy-flagged merchant ships was to be authorised by order-in-council\(^{76}\) (although subject to condemnation as prize by a State or Territory Supreme Court sitting as a prize court).\(^{77}\) The exercise of *Droit de Prince*, the right to delay temporarily the departure of nonenemy shipping at the outbreak of war so as to prevent the spread of news of naval or military operations, was also to be by authority of prerogative power alone.\(^{78}\)

Were Australia to go to war in the second decade of the 21\(^{ st }\) century, it is not clear at what point these measures would operate. It was not a practical issue with respect to armed conflict with Iraq in 1991\(^{79}\) or 2003,\(^{80}\) or Afghanistan in 2001.\(^{81}\) If Australia became involved in war

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73 Ibid vii.
75 Department of Defence, *Commonwealth War Book*, above n 72, ch VII, 2.
76 Ibid ch VIII, 2–3. Interestingly this was to be done by Customs Officers acting with the support of naval or military parties. On the prerogative power to seize enemy shipping, exercisable by Customs or military personnel, see *Blom v Commonwealth* (1917) 24 CLR 189. (Another one-page case. The Privy Council heard it on appeal together with *Zachariasen v Commonwealth*, discussed above, affirming both decisions of the High Court, (1920) 27 CLR 552.)
77 Department of Defence, *Commonwealth War Book*, above n 72, ch VIII, 13. On days of grace for enemy ships to depart, see *The Turul* [1919] AC 515, a Privy Council case on appeal from the Supreme Court of NSW sitting as a prize court. The Hungarian ship in this case could not be confiscated because the Governor-General’s proclamation regarding days of grace was not sufficiently clear.
78 Department of Defence, *Commonwealth War Book*, above n 72, ch IX, 10.
81 Not debated in Parliament at the outbreak of hostilities, see McKeown and Jordan, above n 3, 20, 33.
with North Korea, for example, it is not clear at what point North Korean diplomats, shipping and aliens would acquire enemy status. It might be at the point that the executive government, most likely the Prime Minister, announced its commitment to military action. This could be the de facto declaration of war even if the term ‘declaration of war’ itself did not appear in the announcement. If military action was depending upon North Korea complying with an ultimatum, the war prerogative might only be enlivened at the point at which the ADF actually commenced combat operations against North Korean targets.82 Clarity on this issue might emerge only in the event of a challenge through the courts by an affected North Korean in Australia.83 Even then, if there was no action against North Korean persons or interests in Australia, the matter might not arise at all.84

Sanctions under United Nations Security Council Resolutions governed much of Australia’s relationship with Iraq in 1991 and 2003,85 Afghanistan in 2001,86 and still govern much of Australia’s current relationship with North Korea.87 These resolutions had effect in Australian law through regulations made under the Charter of the United Nations Act 1945 (Cth). Such regulations meant, or would mean, in most cases, that there was or would be no further need for actions under the war prerogative to move against enemy persons and interests in Australia at the outbreak of hostilities as this had, or would already have, occurred.

Notwithstanding the existence of relevant regulations under the Charter of the United Nations Act, Australian reliance upon a United Nations Security Council Resolution as an international law authority to engage in armed conflict, as occurred with North Korea in 195088 and Iraq in 1991,89 is probably not directly relevant to whether the war prerogative is enlivened

82 The traditional pre-UN Charter position did have the benefit of greater clarity. See Oppenheim, above n 68, 61.
83 Such as occurred in The Turul [1919] AC 515, discussed at n 77.
84 See Sampford and Palmer, above n 11, 370–84.
88 Security Council (SC), Res 84, UN SCOR, 476th mtg, UN Doc S/1588 (7 July 1950).
or not. As Bradley v Commonwealth made clear, the Charter of the United Nations is not automatically part of Australian law. The war prerogative existed prior to the Charter in any event and does not depend upon the authority of the Charter to operate. There is also no particular authority which requires a declaration of war from the Crown for the war prerogative to operate. As Shaw Savill & Albion Co Ltd clearly states ‘such matters are not justiciable’. For example, the Communist Party Case noted the existence of hostilities in Korea in 1950 but did not question the lack of a declaration of war. International law may very usefully inform a court as to whether an armed conflict is in existence or not, but the question of whether the war prerogative applies is fundamentally one for national, not international, law. Indeed, s 4 of the Defence Act still provides for proclamations of war, although it defines war narrowly to mean an attack or apprehended attack on Australia. Australian law, therefore, does not prevent a return to the use of declarations of war, or at least a state of hostilities, particularly if such declarations were made only in circumstances consistent with the right to use force in international law.

As Sampford and Palmer point out, the absence of some form of legal order from the Governor-General does cast doubt upon whether it is possible to state that the actions against Iraq in 1991 and 2003, and Afghanistan in 2001 properly relied upon the war prerogative. They regret that this reduced the level of scrutiny which the Governor-General might have been able to provide over such decisions. This is an important point. Further, a legal order invoking the war prerogative, however described, could serve to eliminate much doubt as to the applicability of the war prerogative discussed below.

90 (1973) 128 CLR 557, 583, Barwick CJ and Gibbs J rejected Security Council resolutions which had not been given legislative recognition in Australia as justification for executive action within Australia that would otherwise have been unlawful.
91 (1940) 66 CLR 344, 356 (Starke J); See discussion of English and Irish cases on this point in Lindell, The Coalition Wars, above n 11, 7–13, 29–30.
92 (1951) 83 CLR 1.
93 Communist Party Case (1951) 83 CLR 1, 196.
94 See Sampford and Palmer, above n 11, 367.
95 Ibid 370–84.
96 Ibid 378–81.
The need to be able to identify the enemy is central to much of the exercise of the war prerogative. As will be discussed below, the war prerogative provides authority to take hostile action against the enemy and the enemy’s interests, and the presence of the enemy also permits interference with the rights of Australian citizens. Determining who the enemy is in the case of an interstate conflict, such as with Iraq, is relatively clear. When the enemy is not a recognised state with armed forces, such as with the Taliban in Afghanistan or the Viet Cong in Vietnam, the matter is less straightforward. The problem is that, if it is difficult to determine who the enemy is, it is difficult then to distinguish whether a deliberate killing is a lawful exercise of the war prerogative or murder.\(^9\) This goes to the heart of the principle of legality. There is no case authority on this point, which suggests that it has not been a matter of dispute in a court in any of the ADF counter insurgency operations in Malaya, Borneo, Vietnam, Afghanistan or Iraq. The courts may now derive some guidance from Division 268 of the *Criminal Code Act 1995*, particularly references such as in s 268.35 to ‘individual civilians not taking a direct part in hostilities’ or the references in the *Geneva Conventions Act* to *Additional Protocol I* to the *Geneva Conventions* (*Additional Protocol I*),\(^9\) which addresses irregular combatants.\(^1\) This legislation incorporates much of the international law of armed conflict into Australian law. Such international law, whether customary or conventional, as well as the extensive associated scholarly debate, would be relevant to statutory interpretation in any cases of ambiguity in the legislation.\(^1\)

**A War vs Defence of the Realm**

The terms ‘defence of the realm’ and ‘the war prerogative’ appear to be used interchangeably in the authorities because in English law it seems that the prerogative to declare war and make peace is indistinguishable from the power to defend the realm. Dicey makes no distinction and

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99 *Geneva Conventions Act 1957* (Cth) s 5, sch 1.

100 *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts*, (opened for signature 8 June 1977) 1125 UNTS 3 (entered into force 7 December 1978) art 44 (*Additional Protocol I*).

101 See below n 180. So too would recent English cases arising from the conflicts in Iraq and Afghanistan, discussed below in this chapter and in Chapter 6.
Blackstone only talks of the prerogative to make war, not to defend the realm. Imperial arrangements, perhaps, made a distinction useful from the time of federation in 1901 to 1941, when Australia effectively declared war independently of the United Kingdom against Japan, but \textit{Farey v Burvett} and Evatt still made no distinction. In 1941, the Curtin Government took the view that it was consistent with the status of the dominions as a result of the \textit{Balfour Declaration} from the Imperial Conference of 1926 for Australia to make its own declarations of war. It arranged for the King to make a special Royal Instrument assigning the Governor-General the power to declare war against Japan, and separately with Finland, Romania, and Hungary, as well as Bulgaria and Thailand. The Governor-General then made the appropriate proclamations. Zines observes that it is arguable that, as a result of the Imperial Conference of 1926 seeing the dominions as being able to exercise international personality, the power to make war had, therefore, already became part of the ‘executive power of the Commonwealth’ and exercisable by the Governor-General within the terms of s 61 of the \textit{Constitution}. The alternative view is that such powers required an express grant from the King to the Governor-General, in accordance with s 2 of the \textit{Constitution}, which provides for the powers of the Governor-General. The retrospective application of the \textit{Statute of Westminster Adoption Act}

102 Dicey, above n 9.
103 \textit{Blackstone’s Commentaries with Notes}, above n 5, 43–50.
104 (1916) 21 CLR 433.
105 Evatt, above n 12, see, eg, 178–83.
106 Inter-imperial Relations Committee, ‘Report, Proceedings and Memoranda’ (E IR/26 Series) \textit{Imperial Conference} 1926.
107 McKeown and Jordan, above n 2, 4.
110 Ibid.
112 See above nn 61–7.
114 Ibid.
1942 (Cth) to the outbreak of war with Germany on 3 September 1939\textsuperscript{115} appeared to settle, finally, that the Governor-General could exercise the war prerogative in full.\textsuperscript{116}

The Commonwealth had, nonetheless, previously exercised aspects of the war prerogative in the conduct of war, even if other aspects of the power resided with the King.\textsuperscript{117} As Isaacs J put it in \textit{Farey v Burvett}:

These provisions [ss 2, 51(vi), 61, 114, 119] carry with them the royal war prerogative, and all that the common law of England includes in that prerogative so far as it is applicable to Australia. The creation of a state of war and the establishment of peace necessarily reside in the Sovereign himself as the head of the Empire, but apart from that, the prerogative powers of the Crown are exercisable locally. The full extent of the prerogative it is not necessary now to define, but it is certainly great in relation to the national emergency which calls for its exercise, as may be seen by reference to \textit{Chitty on the Prerogatives of the Crown} (49, 50).\textsuperscript{118}

There does not seem to have been an issue arising which has required such a distinction since 1941 however, so this book will treat the power to declare war and make peace, and the power to conduct war, or defend the realm, as deriving from the same prerogative.

**B A Duty to Defend the Realm?**

A curious point which this chapter must deal with is the question of whether there is a duty upon the Crown to defend the realm due to the mandatory language of s 119 of the \textit{Constitution} requiring the

\textsuperscript{115} (Cth), s 3.
\textsuperscript{116} If the passing of the war prerogative to the Commonwealth occurred in full as a result of Australia acquiring international personality in 1926 following the \textit{Balfour Declaration}, then this might arguably have a bearing on whether the prerogative is exercisable by the cabinet as is effectively the current practice, or must be exercised by the Governor-General in accordance with the Royal Instrument. The express nature of the Royal Instrument, which grants the power to the Governor-General rather than the cabinet, suggests that the latter view is stronger because the \textit{Balfour Declaration} was a statement from an imperial conference rather than a legal document. For a discussion of who should exercise the prerogative see Sampford and Palmer, above n 11.
\textsuperscript{117} Renfree, above n 11, 462. For an interesting analysis of the connection between the court martial in HMAS \textit{Australia} in 1942 and the \textit{Statute of Westminster Adoption Act 1942} (Cth), as well as the attitude of the Curtin Government to British control see Chris Clark, ‘The Statute of Westminster and the Murder in HMAS \textit{Australia}, 1942’ (2009) 179 \textit{Australian Defence Force Journal} 18.
\textsuperscript{118} (1916) 21 CLR 433, 452–2; See Evatt, above n 12, 178–83, 226–38.
Commonwealth to protect every State against invasion. The 1932 Privy Council case of *China Navigation* is the leading case on the duty of the Crown.119 It states the general principle this way,

The argument begins with the very general statement in *Calvin’s Case* (1):

‘For as the subject oweth to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects,’ which in turn is founded on a passage in Glanville as to the relation between the landlord and his tenant by homage. Henry II would, I think, have been surprised to hear that if his tenant went to China the King was bound to follow and protect him.120

The case goes on to elaborate upon the nature of the duty to defend the realm as follows:

[T]he manner in which the King should perform this alleged duty is entirely in his discretion; that it is for the King to say whether any case for its exercise has arisen and in whose favour it ought to be exercised, and that the King could not be compelled by any process of law to perform it; it is ‘a duty of what is called imperfect obligation. Supposing that the King were to neglect that duty, I know of no legal means—that is, no process of law—common law or statute law—by which the Crown could be forced to perform that duty, but there is that duty of imperfect obligation on the part of the Royal authority’: per Brett LJ in *Attorney-General v Tomline*.121

In addition to the common-law position in *China Navigation*,122 the Commonwealth has assumed an obligation to defend the several states from invasion by virtue of s 119 of the *Constitution*, as a quid pro quo for the colonies transferring their military and naval forces to the Commonwealth and giving up their right to raise such forces without the approval of the Commonwealth.123 Given the reasoning in *China Navigation*,124 and the Commonwealth’s constitutional obligation, any

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119 *China Navigation Company Ltd v Attorney-General* [1932] 2 KB 197 (‘*China Navigation*’).
120 Ibid 211.
121 Ibid 223. The single judge decision in *Hicks v Ruddock* (2007) 156 FCR 574, 594 cites *China Navigation* and notes that an imperfect obligation can still have legal consequences, but this decision went to whether the duty to afford diplomatic, rather than military, protection was justiciable. This is also quite a different question as to whether such a duty is enforceable, which, in the case of Mr Hicks, ultimately it was not.
122 [1932] 2 KB 197.
124 [1932] 2 KB 197.
legal obligation to exercise the war prerogative is at best an imperfect one. It may create a legal basis upon which the Commonwealth may act but not a clear measure upon which it may be held to account.125

For example, what if the Brisbane Line did really exist and it was the policy of the government in 1942 to let the Imperial Japanese Forces occupy those parts of Australia north and west of a line stretching from Brisbane to Adelaide before offering serious resistance?126 Assuming a subsequent Australian and allied victory permitted this, could the Queensland government, for example, have brought an action in the High Court to the effect that the Commonwealth had breached its constitutional duty to exercise the prerogative power to defend the entire nation? What would the remedy be—a declaration or compensation for damages? Could the High Court even find the allocation of scarce defence resources in the face of an invasion to be justiciable? Success in such an action seems unlikely given these questions over holding the Commonwealth to a legal duty to exercise the prerogative to defend the realm. Such a duty might be more a political duty, the consequences for the breach of which lie in the political realm, such as a motion of no confidence in the Parliament. China Navigation usefully quotes Blackstone on this being a political duty, not a legal one:

According to Blackstone, Comm i, 251: ‘In the exertion therefore of those prerogatives, which the law has given him, the King is irresistible and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to the grievance or dishonour of the kingdom, the Parliament will call his advisers to a just and severe account.’127

126 Commonwealth, Parliamentary Debates, House of Representatives, 22 June 1943, 56–64 (Eddie Ward) reproduced in the ‘The Brisbane Line’ in Kemp and Stanton, above n 79, 101; Newman Rosenthal, Sir Charles Lowe: A Biographical Memoir (Robertson and Mullens, 1968) 118–26 on the Lowe Royal Commission into the claims of Eddie Ward of the existence of the Brisbane Line policy. According to Rosenthal, the only basis for the claim was a military appreciation presented by General Sir Iven Mackay, Commander-in-Chief, to the Advisory War Council of the Curtin Government in February 1942 on where the next line of defence should be were the Japanese to force Allied forces out of northern Australia. Justice Lowe thought this to be entirely appropriate planning even though the Council rejected the plan. The Menzies government was no longer even in power when Japan entered the war despite Ward’s allegation that it was a plan of that government, 119–20, 126. In establishing the Royal Commission into the claims, Prime Minister Curtin clashed openly with Ward on this issue on the floor of Parliament, 121–2.
The duty of the Commonwealth under s 119 might best be argued in a legal sense where a State or private person claimed that the Commonwealth was acting unlawfully or ultra vires in a purported exercise of the prerogative as to war and defence of the realm. The Commonwealth’s defence may be that it is exercising its constitutional duty under s 119. Examples might be the deployment of troops or construction of defences, which this chapter considers below.

IV The War Prerogative and Statute

As to the substance of the war prerogative, there is no reference in an Australian statute to its existence. Recently, Australia has engaged in armed conflict in Afghanistan against insurgents, not the armed forces of the state of Afghanistan.128 Public information makes clear that this involved seeking out and attacking the enemy129 as well as detaining people against their will.130 This means deliberately seeking to cause death and destruction of property without fulfilling the requirements of the law of self-defence or detaining someone without necessarily fulfilling the requirements of an arrest. This could possibly amount to murder,131 manslaughter,132 criminal damage133 or forcible confinement134 under the Australian Capital Territory Crimes Act 1900, which applies to operations in Afghanistan through the effect of the Defence Force Discipline Act 1982 (Cth).135 While the Director

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130 Stephen Smith, above n 128.
131 Crimes Act 1900 (ACT) s 12.
132 Ibid s 15.
133 Ibid s 116.
134 Ibid s 34.
135 Defence Force Discipline Act 1982 (Cth) Section 61 (3) states:
A person who is a defence member or a defence civilian is guilty of an offence if:
(a) the person engages in conduct outside the Jervis Bay Territory (whether or not in a public place); and
(b) engaging in that conduct would be a Territory offence, if it took place in the Jervis Bay Territory (whether or not in a public place).

Section 4A Jervis Bay Territory Acceptance Act 1915 (Cth) applies the law as it applies in the Australian Capital Territory (ACT). This provision came into force through the ACT Self-Government (Consequential Provisions) Act 1988 (Cth) as the Jervis Bay Territory was part of the ACT until ACT self-government. It appears to have been expedient simply to continue the law of the jurisdiction in force as ACT law.
of Military Prosecutions has the discretion as to whether to prosecute under this Act, as mentioned above, the 2011 manslaughter prosecution of two commandos in relation to the accidental death of Afghan children clearly demonstrates that this discretion may be exercised in favour of prosecution.

The Crimes at Sea Act 2000 (Cth) also applies to actions occurring on or ‘in the course of activities controlled from’ Australian ships, including ADF ships, at sea anywhere in the world. This Act imports the criminal law of various States and Territories so that it applies at sea. In the case of activities beyond the area adjacent to Australia, it applies the law of the Jervis Bay Territory, which is the law of the Australian Capital Territory (ACT). Therefore, in the Middle East, for example—the location of much of the ADF’s exercise of war powers in recent decades—the substantive criminal law of the ACT also applies to ADF actions at sea in addition to its application through the Defence Force Discipline Act. A key difference is that it is the Commonwealth Attorney-General rather than the Director of Military Prosecutions who must consent to any prosecution under the Crimes at Sea Act 2000 of an offence alleged to have occurred beyond the area adjacent to Australia. Again, the existence of this discretion is not a reason to assume there would be no prosecutions of ADF members under this Act.

The important point here is that the substantive criminal law of the ACT applies to members of the ADF at war anywhere in the world as if they were in Canberra. This confronts the principle of legality as stated by Starke J in Shaw Savill & Albion Co Ltd:

The King cannot change by his prerogative of war, either the law of nations or the law of the land, by general and unlimited regulations. Indeed, the law has been clear, I think, since the judgment of Lord Camden in

136 Defence Force Discipline Act s 103.
138 Crimes at Sea Act s 6.
139 Ibid s 4.
140 Ibid s 6.
141 Ibid s 2 sch 1 ‘The Co-operative Scheme’.
142 Ibid s 6.
143 Ibid ss 6, 7.
144 The Crimes (Aviation) Act 1991 (Cth) does not operate in the same way as it does not provide for matters ‘in the course of activities controlled from’ Australian aircraft. It would, therefore, seem to have little potential application to actions by ADF aircraft during war.
Entick v Carrington,\textsuperscript{145} that a public officer cannot defend himself by alleging generally that he has acted from necessity in the public interest and for the defence of the realm, whether he has or has not the express or implied command of the Crown.\textsuperscript{146}

The challenge, then, is to determine how exercises of the war prerogative can be consistent with the principle of legality.

The only statutory defence available to a charge relating to deliberate killing, destruction and detention in war would appear to be that of lawful authority under s 43 of the Criminal Code 2002 (ACT), which operates with respect to all offences against Australian Capital Territory laws. The deliberate nature of such actions, at the level of national policy, would work against other possibly relevant defences, such as duress, sudden and extraordinary emergency or self-defence, being applicable. Section 43 requires that the actions be authorised under a law and provides as follows:

**Lawful authority**

A person is not criminally responsible for an offence if the conduct required for the offence is justified or excused under a law.

Conceivably, acts of war should be justified or excused under the law relating to the war prerogative.\textsuperscript{147} However, the Dictionary to the Criminal Code 2002 (ACT) defines ‘law’ to mean an Act or subordinate law. The war prerogative is not in any Act or subordinate law. The question remains then, how is deliberate killing, destruction and detention in war not contrary to the applicable legislation?

The answer to this question, arguably, lies in statutory interpretation. It seems highly unlikely that Parliament would have intended to prevent deliberate killing, destruction and detention under the war prerogative. As a matter of statutory construction, it is a presumption that Parliament would not limit the prerogative powers of the Crown without express words.\textsuperscript{148} It should be possible to presume that so important a prerogative as the war prerogative is available in the absence of any contrary indication.

\textsuperscript{145} Entick v Carrington (1765) 19 St Tr 1030.
\textsuperscript{146} Shaw Savill & Albion Co Ltd (1940) 66 CLR 344, 355.
by Parliament. This might be the appropriate place for the argument of French J in the *Tampa Case* for a power ‘so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the *Constitution*. This would mean that the preferable interpretation of relevant provisions of the *Defence Force Discipline Act* or the *Crimes at Sea Act 2000*, which apparently proscribe the conduct of warfare through deliberate killing, destruction and detention, is that they do not actually proscribe such actions when it occurs in the conduct of warfare. As such, these provisions do not expressly relate to the conduct of warfare, and they should not be interpreted to apply to the conduct of warfare. This is not a case of ‘covering the field’ as Parliament has not purported to provide the same powers as might be available under the war prerogative.

More significantly, perhaps, the *Defence Force Discipline Act* has a number of specific provisions which address conduct in relation to the enemy, including, for example, an offence of failing to use utmost exertions to carry out operations against the enemy. The Act defines the enemy as:

>[A] body politic or an armed force engaged in operations of war against Australia or an allied force and includes any force (including mutineers and pirates) engaged in armed hostilities against the Defence Force or an allied force.

This is significant because it allows the Crown to determine who the enemy is by virtue of whom it conducts armed hostilities against. These provisions of the *Defence Force Discipline Act* indicate that Parliament has provided for the conduct of war and has not intended to proscribe deliberate killing, destruction and detention under the war prerogative. This is a view of the law which accords generally with the practice of Parliament, the courts and the Crown with respect to warfare since the English Civil War as discussed in Chapter 2. As Dixon J stated in *Shaw Savill & Albion Co Ltd*, and as quoted above:

150 (2001) 110 FCR 491, 543.
152 Ibid s 15F.
153 Ibid s 3.
154 See Peter Rowe, *Defence: The Legal Implications: Military Law and the Laws of War* (Brassey’s, 1987) 3–5; and Office of the Judge Advocate General, above n 11, [2.6.5]–[3.6.2]. It is also a view of the law which would favour an accused member of the ADF, which is another relevant rule of statutory interpretation, *Beckwith v R* (1976) 135 CLR 569, 576.
The uniform tendency of the law has been to concede to the armed forces complete legal freedom of action in the field, that is to say in the course of active operations against the enemy, so that the application of private law by the ordinary courts may end where the active use of arms begins.155

Indeed, where Parliament has sought to regulate the powers of the Crown to wage war,156 in div 268 of the Criminal Code Act and the Geneva Conventions Act, Parliament has been mostly careful to be consistent with the international law of armed conflict,157 which permits deliberate killing, destruction and detention.158 This chapter will discuss some of the specific provisions of div 268 in relation to actions against persons and property below.

An important point worth noting about legislative proscription of conduct in war is that, consistently with Starke J’s restatement of the principle of legality in Shaw Savill & Albion Co Ltd,159 ADF members may still commit ordinary crimes or disciplinary offences in places where the ADF is engaged in warfare. Legislation still needs to provide for murder, rape, theft or assault, for example, wherever the ADF is. The war prerogative authorises the conduct of warfare, it does not excuse any criminal act or disciplinary infringement which occurs where warfare is taking place. Attempts to regulate the conduct of armed forces, so as to keep them ‘in good order and discipline’,160 are at least as old as the common law.161 In interpreting disciplinary or criminal statutes so as to allow the war prerogative to operate, it is necessary to distinguish between lawful acts of war and criminal or disciplinary misconduct as well as civil wrongs. Section 11 of the Defence Force Discipline Act addresses this issue to some extent in providing that, in assessing the standard of recklessness, a service tribunal:

shall have regard to the fact that the member was engaged in the relevant activities in the course of the member’s duty or in accordance with the requirements of the Defence Force, as the case may be [emphasis added].

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155 (1940) 66 CLR 344, 362.
156 McLaughlin and Oswald, above n 147, 27.
157 Noting the discussion about 268.24 in McLaughlin and Oswald, ibid, 27.
158 Discussed below under heading V.
159 (1940) 66 CLR 344.
160 Charles Clode, The Military Forces of the Crown: Their Administration and Government (John Murray, 1869) 73, citing the text of an officer’s oath to the Crown upon appointment.
It is worth noting that the *Defence (Personnel) Regulations 2002* requires enlisted personnel to swear an oath to ‘resist her [Majesty’s] enemies and faithfully discharge my *duty* according to law’. This is consistent with the duty of the Crown to defend the realm and the Commonwealth to defend the several states, even if the duty is one of imperfect obligation, as discussed above.

Similarly, in regard to negligence, s 11 of the *Defence Force Discipline Act* also provides that a service tribunal:

> shall … have regard to the standard of care that would have been exercised by a reasonable person who:

(a) was a member of the Defence Force with the same training and experience in the Defence Force or other armed force as the member charged; and

(b) was engaged in the relevant activities in the course of the member’s duty or in accordance with the requirements of the Defence Force, as the case may be.

The law of armed conflict, as expressed in the Australian law in div 268, also goes some way in regulating this distinction. There is still an important place for the common law however and, even as s 11 of the *Defence Force Discipline Act* quoted above suggests, the customs and usages of warfare or customs of the sea. This chapter will now turn to this explicit regulation of the conduct of war.

**V Powers and Limits**

As to what the war prerogative authorises, a survey of the cases indicates that while war is the exemplar of the connection between executive power and *Fortuna*, the war prerogative does have limits. Three main areas emerge where the war prerogative authorises actions which would otherwise be unlawful; these are: actions against the person—causing death, injury and indefinite detention; against property—either acquiring or destroying it; and where the war prerogative might authorise action that would otherwise be contrary to ordinary civil regulatory requirements, such as traffic restrictions, pollution controls, building regulations and so on.

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162 *Defence (Personnel) Regulations 2002* (Cth) sch 2.
A Actions against the Person

1 Causing Death and Injury

The martial law cases provide authority for the courts treating the conduct of military authorities during war as nonjusticiable or that it might be lawful to use military force to suppress an insurrection. There is no case or statute however which explicitly states that it is lawful to target a person deliberately in war with the intention of killing them because that person is an enemy, and not in self-defence or the defence of others. There is much law, whether statutory, common or international law, as well as practice which presumes that such action is lawful. Notably, and perhaps ironically, Murphy J appeared to make this presumption in *A v Hayden* in his strong rejection of any other basis upon which the executive might order someone to kill, as quoted in Chapter 1:

> The Executive power of the Commonwealth must be exercised in accordance with the *Constitution* and the laws of the Commonwealth. The Governor-General, the Federal Executive Council and every officer of the Commonwealth are bound to observe the laws of the land … I restate these elementary principles because astonishingly one of the plaintiffs asserted through counsel that it followed from the nature of the executive government that it is not beyond the executive power, even in a situation other than war, to order one of its citizens to kill another person. Such a proposition is inconsistent with the rule of law. It is subversive of the *Constitution* and the laws. It is, in other countries, the justification for death squads.

It is from this that it is possible to construct an argument for it to be lawful to kill deliberately in war. There is slightly more authority for detention in war being lawful.

English law has recognised the custom and usages of war since feudal times. Hale recognised, ‘the proper jurisdiction of the constable and marshal … [but] in these proceedings the customs and laws of war ought to direct their judgment …’ Although articles and ordinances of war

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163 Eg *Marais v General Officer Commanding the Lines of Communication* [1902] AC 109; *R v Allen* [1921] 2 IR 241; *R (Garde) v Strickland* [1921] 2 IR 317.
165 Ibid, 562.
167 Hale, above n 4, 119–20, but also generally Chapter XII ‘Concerning the Jurisdiction and Office of the Constable and Marshal, Martial Law, *Tempus Belli* and Acquisitions by Right of War’.
were originally prerogative instruments, and the Court of the Constable and Marshal a prerogative rather than a common-law court, it might, nonetheless, be arguable on this basis that the common law has recognised that it is lawful to kill deliberately as part of the conduct of warfare. The references to custom and usages of war are scanty and indirect however, and do not usually explicitly authorise deliberate killing.

As stated above, the international law of armed conflict is effectively now incorporated into Australian law by div 268 of the Criminal Code Act 1995. This means that any offences relating to the law of armed conflict must now be found in this Act or other statute law. The Full Court of the Federal Court in Nulyarimma v Thompson notably found that the effect of the Act was to abolish any offence not found in the Code or other statute law. The international law crime of genocide against Aboriginal people in Australia, therefore, was not cognisable in the courts. Although, even if there can be no common or international law offences, it is still relevant to refer to common law or international law in arguing that specific acts of killing in war are lawful, as well as in interpreting div 268.

This is important because the international law of armed conflict permits the deliberate killing not only of combatants but also innocent noncombatants where their deaths are incidental to the targeting of a military objective. In understanding the extent of the war prerogative then it is essential to read div 268 to identify what it does not state as much as for what it does. This is on the basis that Parliament has proscribed specific conduct in war, essentially that which the international law of armed conflict prohibits, but has remained silent on what the war prerogative authorises. Much of what the war prerogative authorises then is by necessary implication from what div 268 does not proscribe.

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169 Hale above n 4, 119–20, but also generally Chapter XII ‘Concerning the Jurisdiction and Office of the Constable and Marshal, Martial Law, Tempus Belli and Acquisitions by Right of War’.
172 Ibid 172.
174 Jumbunna Coal Mine NL v Victorian Coal Miners’ Association (1908) 6 CLR 309, 363.
175 Additional Protocol I, arts 43, 44, 51.
176 On statutory interpretation, the international law of armed conflict and div 268, and s 268.24 in particular, see McLaughlin and Oswald, above n 147, generally and at 31–3.
For this reason it is worth quoting in full and analysing some particular provisions of the *Criminal Code Act*:

268.35 War crime—attacking civilians

A person (the *perpetrator*) commits an offence if:

(a) the perpetrator directs an attack; and
(b) the object of the attack is a civilian population as such or individual civilians not taking direct part in hostilities; and
(c) the perpetrator’s conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for life.

It is implicit in this provision that it is not an offence in an international armed conflict to attack military personnel or even civilians who are taking a direct part in hostilities. If the ADF’s operation against the insurgency in Afghanistan was part of an international armed conflict, then this provision would suggest that deliberately killing insurgents—that is civilians taking a direct part in hostilities—is not an offence. If the war in Afghanistan was actually a noninternational armed conflict, then s 268.70 makes similar provision for civilians not taking an active part in hostilities. The Act does not define either type of conflict so it would be a matter of interpretation for which there would be much international

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178 268.70 War crime—murder

(1) A person (the *perpetrator*) commits an offence if:

(a) the perpetrator causes the death of one or more persons; and
(b) the person or persons are not taking an active part in the hostilities; and
(c) the perpetrator knows of, or is reckless as to, the factual circumstances establishing that the person or persons are not taking an active part in the hostilities; and
(d) the perpetrator’s conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict.

Penalty: Imprisonment for life.

(2) To avoid doubt, a reference in subsection (1) to a person or persons who are not taking an active part in the hostilities includes a reference to:

(a) a person or persons who are *hors de combat*; or
(b) civilians, medical personnel or religious personnel who are not taking an active part in the hostilities.

See also s 268.77.

179 Other than to include a military occupation in the definition of an international armed conflict, Dictionary to the *Criminal Code Act* 1995.
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law and scholarly commentary to assist.\(^{180}\) Arguably, a certificate from the Minister for Foreign Affairs under s 268.124 could be conclusive proof that the *Geneva Conventions* and *Additional Protocol I* applied in relation to a question arising in proceedings under the Act.\(^{181}\) This really goes to whether an armed conflict is in existence or not, not necessarily whether a conflict is an international or a noninternational armed conflict, so the international law and commentary could still be relevant to a court’s interpretation of the offence provisions.\(^{182}\)

As to attacking civilian objects, the *Criminal Code Act 1995* provides:

**268.36 War crime—attacking civilian objects**

A person (the *perpetrator*) commits an offence if:

(a) the perpetrator directs an attack; and

(b) the object of the attack is not a military objective; and

(c) the perpetrator’s conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 15 years.

Similarly this provision would indicate that it is not an offence to attack military objectives in an international armed conflict, which directly relates to the provision below:\(^{183}\)

**268.38 War crime—excessive incidental death, injury or damage**

(1) A person (the *perpetrator*) commits an offence if:

(a) the perpetrator launches an attack; and

(b) the perpetrator knows that the attack will cause incidental death or injury to civilians; and

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\(^{181}\) *Geneva Red Cross Conventions*, (opened for signature 12 August 1949), 75 UNTS 31, 85, 135, 287 (entered into force 21 October 1950), schs 1 to 4 of the *Geneva Conventions Act 1957 (Cth).*

\(^{182}\) See discussion in McLaughlin and Oswald, above n 147, 25. See the extensive discussion of the law relating to noninternational armed conflicts in *Serdar Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843 [167]–[176].

\(^{183}\) The equivalent provision for a noninternational armed conflict is s 268.77.
(c) the perpetrator knows that the death or injury will be of such an extent as to be excessive in relation to the concrete and direct military advantage anticipated; and
(d) the perpetrator’s conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for life.

Examining this provision indicates that it is not an offence in an international armed conflict to cause incidental death or injury to civilians provided that it would not be excessive in relation to the concrete and direct military advantage anticipated. Obviously, the military advantage test is very subjective but it is the subject of considerable international jurisprudence and scholarly commentary, which would be directly relevant to interpreting this provision.184 This provision does not apply to a noninternational armed conflict and, therefore, arguably, the stricter offence of causing death to persons not taking an active part in hostilities in s 268.70, quoted in footnote 179, could apply in such situations.185

2 Detention

The international law of armed conflict permits the indefinite detention of combatants as prisoners of war until the end of hostilities.186 It is also not dependent upon a combatant having committed an offence.187 It is not contrary to the international law of armed conflict to be a combatant and detention as a prisoner of war is not a punishment.188 In fact, prisoner-of-war status attracts some significant rights and protections under the international law of armed conflict.189 There is no explicit authority in Australian law for the taking of prisoners of war. Indeed, there is a strong presumption against indefinite detention without charge, let alone...

185 McLaughlin and Oswald’s analysis, above n 147, of s 268.24, relating to wilful killing in international armed conflict, is also relevant to s 268.70.
186 Third Geneva Convention on Prisoners of War, art 118.
188 Ibid arts 87, 99; see UK Ministry of Defence, above n 166, 141.
189 Third Geneva Convention on Prisoners of War; See, eg, UK Ministry of Defence, above n 166, 158–84.
conviction.\footnote{190} Although in\textsuperscript{190} Gageler J cited \textit{Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs} in acknowledging a ‘prerogative to detain such as that which might arise in relation to enemy aliens in time of war’ and quoted from that case in noting the status of aliens within Australia and the exception for enemy aliens:

\begin{quote}
Under the common law of Australia and subject to qualification in the case of an enemy alien in time of war, an alien who is within this country, whether lawfully or unlawfully, is not an outlaw.\footnote{191}
\end{quote}

There is also some statutory recognition that it is lawful to take prisoners of war and it is from this that it is possible to infer that the authority to do so lies in the war prerogative.

Section 7 of the \textit{Defence Force Discipline Act} applies that Act to prisoners of war, subject to and as defined by reference to the \textit{Geneva Conventions Act} and the \textit{Third Geneva Convention}, which deals with prisoners of war. The \textit{Geneva Conventions Act} makes provision for the trial of prisoners of war and civilian internees for offences they may have committed, but not for being enemy combatants or aliens.\footnote{192} It also allows for State and Territory Supreme Courts to hear applications to determine whether a person is entitled to prisoner of war status.\footnote{193} Further, the \textit{Geneva Conventions Act} has the four \textit{Geneva Conventions}, as well as \textit{Additional Protocol I} and \textit{Additional Protocol III}, as schedules to the Act, although without directly incorporating them into Commonwealth law. Both the \textit{Defence Force Discipline Act} and the \textit{Geneva Conventions Act} assume however that the authority to take prisoners of war lies elsewhere.\footnote{194} Similarly, s 268.99 of the \textit{Criminal Code Act 1995} prescribes unjustifiable delay in the repatriation of prisoners of war and other detainees but without identifying the domestic legal authority to take such prisoners and detainees to begin with, other than to refer to the \textit{Third} and \textit{Fourth Geneva Conventions}. The only authority that could then authorise taking prisoners of war is the war prerogative.

\footnote{190} \textit{Al Kateb v Godwin} (2004) 219 CLR 562, 616–17; \textit{CPCF} [2015] HCA 1 [45] (French CJ), [96] (Hayne and Bell JJ), [196], [218] (Crennan J), [380] (Gageler J); [453] (Keane J).
\footnote{191} [2016] HCA 1 [149] quoting \textit{Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs} (1992) 176 CLR 1, 19 (Brennan, Deane and Dawson JJ (with whom Mason CJ agreed)).
\footnote{192} \textit{Geneva Conventions Act}, ss 11, 12.
\footnote{193} \textit{Geneva Conventions Act}, s 10A.
\footnote{194} This was also the case with the \textit{National Security (Prisoners of War) Regulations 1943} (Cth). \textit{The Australian Digest} (Lawbook, 2nd ed, 1968) Vol 2, which deals extensively with ‘Defence and War’, does not mention any prisoner-of-war cases. This suggests that taking of prisoners of war was not a matter of legal controversy.
These references also mention civilian internees within the meaning of the Fourth Geneva Convention and Additional Protocol I. Article 42 of the Fourth Geneva Convention permits the internment of civilians ‘if the security of the Detaining Power makes it absolutely necessary’. With respect to international armed conflict, on the basis that the statutory provisions cited above also mention civilian internees, without there being a statutory authority to intern them, presumably the war prerogative also provides the power to intern civilians in war. The international law of armed conflict also informs when the ADF may intern or detain such civilians and also when they must be released, as well as the treatment of such people whilst interned or detained.

There may also be other situations of civilian internment or detention in noninternational armed conflict where the Geneva law mentioned does not assist. The Court of Appeal for England and Wales recently considered this issue in the 2015 case of Serdar Mohammed v Secretary of State for Defence (‘Serdar Mohammed’) and found that the international law of armed conflict, whether conventional or customary, does not authorise detention in noninternational armed conflicts:

We have concluded that in its present stage of development it is not possible to find authority under international humanitarian law [also known as the law of armed conflict] to detain in an internationalised non-international armed conflict by implication from the relevant treaty provisions, Common Article 3 and APII. As to customary international law, despite the interplay of treaty-based sources of international humanitarian law and customary international law sources, the possibility that the requirements for the emergence of a customary rule of international humanitarian law, and the position of the ICRC [International Committee of the Red Cross], we do not consider that it is possible to base authority to detain in a non-international armed conflict on customary international law.

196 See s 268.33—unlawful confinement. The section refers to the Geneva Conventions and Additional Protocol I.
197 Fourth Geneva Convention generally and Additional Protocol I, arts 45, 75.
198 [2015] EWCA Civ 843 [167]–[176] (The Lord Chief Justice of England and Wales, Lloyd-Jones, Beatson LJJ) (parentheses added). The appeal in this case was decided after 28 March 2016, the date which this book reflects the law up until, but before publication. In Al-Waheed v Ministry of Defence; Serdar Mohammed v Ministry of Defence [2017] UKSC 2 (‘Al-Waheed’) (being two appeals heard together) Lord Sumption, with whom Lady Hale agreed, provided the leading judgment for the majority and confirmed this point [13]–[17].
The Court stated that it was not possible to make an argument from the absence of prohibition in this case, although it was interesting that it looked to international law in making this point and did not address the war prerogative at all.199 Chapter 6 will return to this issue. The Court took the position then that such authority as there is to detain in a noninternational armed conflict must derive from the law of the nation in which the armed conflict is taking place. In this case, Afghan law permitted detention by foreign military forces assisting the Afghan government for 96 hours before a detainee had to be released or handed over to the Afghan criminal justice system.200 This was not the position argued for by the Secretary of State in the proceedings,201 nor the position of the International Committee of the Red Cross generally,202 but stands as the most persuasive common-law authority on the question. Apart from being a clear statement on the issue, the quote from this case is also worth reproducing to illustrate the use by a common-law court, as suggested above, of the relevant international law.

There are also concerns with the exercise of prerogative power to detain civilians in time of war within Australia, whether during international or noninternational armed conflict. Despite the war prerogative traditionally extending to control of enemy aliens within the realm,203 during the

199 Serdar Mohammed [2015] EWCA Civ 843 [195]–[198].
200 Ibid [129]–[137]. Al-Waheed [2017] UKSC 2 then determined that authority to detain ‘for imperative reasons of security’ could be found in the relevant authorising United Nations Security Council Resolutions, [30], [48] but this point related to the obligations of the United Kingdom under the European Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950), ETS 005 (entered into force 3 September 1953), implemented through the Human Rights Act 1998 (UK), and so, while important, is less directly applicable to Australia. Australia’s international human rights obligations are nonetheless relevant to detention in situations of noninternational armed conflict. In the Human Rights Committee, Replies to the List of Issues (CCPR/C/AUS/Q/5) to be Taken Up in Connection with the Consideration of the Fifth Periodic Report of the Government of Australia (CCPR/C/AUS/5) UN Doc CCPR/C/AUS/Q/5/Add.1 (21 January 2009), the Australian Government stated, ‘Australia assures the Committee that in all cases it respects the fundamental rights and freedoms provided for under the Covenant, and to the extent that Australia is in a position to afford them during military or civilian operations occurring outside Australia, it will as a matter of policy endeavour to implement reasonable and appropriate measures in the circumstances’, 5. Whilst this is a policy statement it nonetheless illustrates that such obligations should at least be taken into account.
201 Serdar Mohammed [2015] EWCA Civ 843 [207], [222].
202 Ibid [218], [237]–[240].
Second World War, the *National Security (Aliens Control) Regulations 1940–1943* (Cth) created a comprehensive statutory scheme for dealing with enemy aliens. Although now repealed, the previous existence of these regulations indicates that neither Parliament nor the Executive were willing to leave interference with the rights and liberties of civilian enemy aliens in Australia to prerogative power alone. It also suggests that it might not be possible to argue that it was necessary to rely upon prerogative power alone when control of enemy aliens has previously been the subject of a comprehensive statute. It might be necessary, and therefore justifiable, to rely upon prerogative power to control enemy aliens in an extreme situation when war might have erupted unexpectedly and enemy aliens posed a direct and serious threat. Given that in Australia’s only existential crisis of 1942 the matter was the subject of legislation, it might be more difficult to argue that it was necessary to rely upon prerogative power – that is, unless the situation was more dire than that in 1942.

It is difficult to discern between law and good policy in this regard. A statutory regime supports the supremacy of Parliament. It also supports the principle of legality in that members of the public in Australia, even if enemy aliens, should not be deprived of their liberty on the basis that, as previously cited, ‘the law to warrant it should be clear in proportion as the power is exorbitant’.204 Even so, as this aspect of the prerogative has authority supporting it,205 it is no longer the subject of a comprehensive statute and is the subject of an international law regime, at least in respect of international armed conflict, preferring reliance upon statute might be more a matter of good policy rather than law.

**B Actions against Property**

In *Shaw Savill & Albion Co Ltd*, Dixon J stated:

> There is no authority dealing with civil liability for negligence on the part of the King’s forces when in action, but the law has always recognized that rights of property and of person must give way to the necessities of the defence of the realm.206

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204 *Entick v Carrington* (1765) 19 St Tr 1030.
205 See generally above n 203.
206 (1940) 66 CLR 344, 362.
War has traditionally involved extensive interference with property rights. This has occurred, as will be discussed, through acquisition of property for defence purposes or through damage and destruction in the course of battle, to deny its use to the enemy or as a result of accidents. This raises questions of the extent to which the war prerogative can authorise this interference with property. Similar questions of statutory interpretation arise, as with actions against the person, as to whether the war prerogative displaces the application of general criminal law offences that would, prima facie, apply to deliberate acquisition, damage and destruction of property. Fortunately, in the case of property, there is a body of relevant case law which indicates that such action can be a lawful exercise of the war prerogative in the face of the enemy. There is still some uncertainty over how proximate the enemy must be. There has also been uncertainty over whether such action must be compensated on just terms, which now appears to be resolved in favour of compensation. As to negligent action, *Shaw Savill & Albion Co Ltd* has provided the ‘combat immunity doctrine’.

1 Damage and Destruction

The 1964 House of Lords case *Burmah Oil* involved the destruction of oil refineries in Burma in order to deny them to the advancing Japanese Army in 1942. As with the case of *De Keyser’s Royal Hotel* discussed below, the right of the Crown to take private property in *Burmah Oil* was not in dispute. The question was whether compensation should be payable, the claim being effectively a common-law claim, with the majority deciding that it should be. *Burmah Oil* does not attempt to provide an exhaustive analysis of the war prerogative but it did do much to state when and to what extent the Crown can interfere with private property rights in exercising it. The majority of the Lords in this case

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207 See Richards, above n 166, cited with approval in *Shaw Savill & Albion Co Ltd* (1940) 66 CLR 344, 362.
208 (1940) 66 CLR 344.
209 *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 (‘*Burmah Oil*’). See discussion in Campbell McLachlan, *Foreign Relations Law* (Cambridge University Press, 2014) 266–7, supporting the position that compensation should have been payable.
210 *Burmah Oil* [1965] AC 75, 75.
211 Attorney-General v De Keyser’s Royal Hotel Ltd [1920] AC 508 (‘*De Keyser’s Royal Hotel*’).
212 [1965] AC 75, 143.
213 Ibid 97. The action was commenced in Scotland but appears to be the equivalent of a common-law claim as no statutory basis for the claim was pleaded.
214 Ibid.
placed much emphasis on the scholarship of civil lawyers and De Vattel in particular. De Vattel distinguished between acts preparatory to battle and acts occurring in the heat of the battle itself. Battle damage was not compensable whereas preparatory acts were. The point on compensation is, perhaps, not as important as the point that, in both categories, extensive interference and even destruction of private property is lawful insofar as it is necessary for the conduct of military operations. (This is not unlike the military advantage test known to the law of armed conflict.) This case also moved away from the doctrine of necessity as applicable to any person and saw it more as an exercise of the war prerogative being limited only by necessity. In an age of total warfare, only the Crown can decide to do such acts as destroy oil refineries to deprive the enemy of fuel.

The minority acknowledged De Vattel but placed more emphasis on United States Supreme Court cases with similar facts, which saw little distinction between preparatory acts and battle damage. (The majority also addressed these United States cases but generally saw them as decided on different principles.) Viscount Radcliffe, in the minority, cited Field J in *United States v Pacific Railroad*:

> Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple or defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the State in such cases overrides all considerations of private loss – *Salus populi* is then, in truth, *suprema lex*.

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216 *Burmah Oil* [1965] AC 75, 141, 144, 148, 159–60, 162.

217 *Additional Protocol I*, art 52.

218 *Burmah Oil* [1965] AC 75, 99. In another case decided after 28 March 2016, the date which this book reflects the law up until, but before publication, *Rahmatullah (No 2) v Ministry of Defence* [2017] UKSC 1, (a separate aspect of the appeal from the *Serdar Mohammed* case, relating specifically to Act of State doctrine), Lady Hale, with whom the majority agreed, stated that ‘destruction, of property, for example in the course of battle, was indeed a government act.’ [36].


221 120 US 227 (1887).

222 *Burmah Oil* [1965] AC 75, 133.
Interestingly Viscount Radcliffe also helpfully refers to John Locke’s *True End of Civil Government*, specifically Chapter 14 ‘Of Prerogative’, and states:

‘The essence of a prerogative power, if one is to follow Locke’s thought, is … to act for the public good, where there is no law, or even to dispense with or override the law where the ultimate preservation of society is in question.’

Given this broad view of the war prerogative, it is perhaps not surprising then that Viscount Radcliffe was unwilling to see such destruction of private property as compensable. Compensation aside, the telling point from both the majority and minority is the very broad view given to the power to interfere with private property in the course of operations in war. Importantly the case also draws out that necessity becomes easier to argue the closer the action is to the face of the enemy. Although *Burmah Oil* does not refer to *Shaw Savill & Albion Co*, the majority’s emphasis on De Vattel’s distinction between acts done in battle and acts done preparatory to battle may be significant given the distinction in *Shaw Savill & Albion Co Ltd* between actual operations against the enemy and other operations. The general rule appears to be that the closer an action is to the face of the enemy, the more it is likely to be a lawful exercise of the war prerogative. It is consistent with the doctrine of combat immunity in *Shaw Savill & Albion Co Ltd* that destruction occurring outside of actual operations against the enemy should be compensable. It is more important however that prerogative power to destroy property where necessary is available, even if it is not in battle but rather to deny that property to the enemy. It is perhaps appropriate that there is a requirement to compensate for destruction outside of battle so that a military commander may be more careful in determining whether it is necessary to cause such destruction.

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224 *Burmah Oil* [1965] AC 75, 118.
226 [1965] AC 75.
227 (1940) 66 CLR 344.
228 See Renfree, above n 11, 463–5.
2 Acquisition

The 1920 House of Lords case of *De Keyser’s Royal Hotel* is significant in drawing a distinction between prerogative acts in the face of an emergency and those for which more time is available.\(^{229}\) In this case, the Royal Flying Corps requisitioned a hotel in London to be its administrative headquarters during the First World War.\(^{230}\) The proprietor of the hotel protested but relinquished possession to the Army.\(^{231}\) The question was whether the prerogative or the *Defence of the Realm Consolidation Act 1914* (UK) authorised the occupation of the hotel and whether compensation was payable.\(^{232}\) The Law Lords found for the proprietor of the hotel\(^{233}\) and entered into an interesting analysis of the relationship between prerogative and statute. Essentially, there was no dispute that the taking of the hotel was lawful, whether under prerogative or statute.\(^{234}\) Given that there was a statute in place which provided for compensation in such an event, however, it should be preferred to reliance upon the prerogative power alone.\(^{235}\) This is consistent with the argument of this book that statutory power should be preferred to prerogative power covering the same field, except in extraordinary situations of necessity. It was not clear, ultimately, as to whether compensation would have been payable had the taking been under the prerogative alone, hence the House of Lords had to reconsider this question in *Burmah Oil*\(^{236}\) as discussed above.\(^{237}\) Insofar as the war prerogative is concerned, Lord Sumner made the following observation:

Of course, with the progress of the art of war, the scope both of emergencies and of acts to be justified by emergency extends, and the prerogative adjusts itself to new discoveries, as was resolved in the *Saltpetre Case*; but there is a difference between things belonging to that category of urgency, in which the law arms Crown and subject alike with the right of intervening and sets public safety above private right, and things which, however important, cannot belong to that category, but, in fact, are simply committed to the general administration of the Crown.\(^{238}\)

\(^{229}\) [1920] AC 508.
\(^{230}\) Ibid 509.
\(^{231}\) Ibid 523.
\(^{232}\) Ibid 523.
\(^{233}\) Ibid 581.
\(^{234}\) Ibid 523.
\(^{235}\) Ibid 529.
\(^{236}\) [1965] AC 75.
\(^{237}\) *Tampa Case* (2001) 110 FCR 491 referred extensively to this discussion, as discussed in Chapter 1.
\(^{238}\) *De Keyser’s Royal Hotel* [1920] AC 508, 565.
This indicates that the necessity of responding with urgency to an emergency in war can authorise acts against property which would otherwise be unlawful. The courts will be careful to draw a distinction however between what is necessary and what is merely important. This is consistent with the reasoning of *Shaw Savill & Albion Co Ltd*, as both Starke J and Dixon J referred approvingly to *De Keyser’s Royal Hotel*.\(^{239}\)

Australia’s written *Constitution* creates a significant difference from the English perspective on this issue due to the existence of s 51 (xxxi), which provides:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws [emphasis added].\(^{240}\)

Compensation is not necessarily a direct concern of the ADF in combat operations. It would more likely be the Department of Defence that would address such questions. It is worth exploring the issue mainly as a limit on the power to acquire property. That is to say, that it must at least be an indirect operational concern of the ADF whether any acquisition of property should be on just terms.

In 1943 in *Johnston, Fear & Kingham & The Offset Printing Company Pty Ltd v Commonwealth*\(^{241}\) the Commonwealth had taken possession of an offset printing press under the *National Security (Supply of Goods) Regulations 1939–1942* (Cth). The owners argued that the acquisition was not on just terms in accordance with s 51 (xxxi).\(^{242}\) The case therefore essentially turned on the invalidity of Commonwealth legislation to acquire property on anything other than just terms. As to the acquisition of property under prerogative or executive power, Latham CJ made the following obiter dicta comment:

239 (1940) 66 CLR 344, 354, 363.
240 See Renfree, above n 11, 463–5, and the list of compulsory acquisition cases in connection with defence which he cites at n 85.
241 (1943) 67 CLR 314 (‘Johnston, Fear & Kingham’).
242 Ibid 315.
It may be that the prerogative of the Crown authorizes the seizure and use of property in the course of war-like operations without any compensation to the owner. The Commonwealth Constitution does not contain any such provision as that which is to be found in the fifth amendment of the American Constitution – ‘Nor shall private property be taken for public use without just compensation.’ This is an absolute prohibition of any taking of private property for public use without just compensation, whether or not a statute purports to authorize such a taking. The Commonwealth Constitution contains no such provision. The only reference to the subject is contained in a positive grant of legislative power. The limitation upon the legislative power of the Commonwealth Parliament does not necessarily involve any corresponding limitation with respect to the executive power of the Commonwealth.243

This comment is significant for a number of reasons. It is the first direct comment in the jurisprudence of the High Court upon the power of the Commonwealth to seize property in the course of warlike operations. It clearly indicates that prerogative power might authorise such action. The comment is also significant because it distinguishes between legislative authority to acquire property, which is subject to the just terms requirements of s 51 (xxxi), and executive authority to seize property in warlike operations, which may not be compensable at all (noting that this case preceded Burmah Oil);244 although the idea that the executive power might extend beyond limits of the Commonwealth’s legislative power would not appear to have survived Williams;245 as discussed in Chapter 1. The executive power cannot extend beyond the legislative power so any acquisition of property by prerogative power,246 outside of damage and destruction directly in battle, would be subject to the limitation upon the power of the Commonwealth Parliament to acquire property on anything other than just terms.247 It is not even open to make an exception on the grounds of necessity as compensation is essentially a post hoc consideration. It is difficult to contemplate a situation where it would be necessary not to afford just terms compensation for the acquisition

244 [1965] AC 75.
245 (2012) 248 CLR 156.
246 Chapter 1 nn 111–19.
247 Noting that just terms does not mean just compensation but rather what is fair, including what is in the interests ‘of the public or of the Commonwealth’, and not arbitrary, Grace Bros Pty Ltd v Commonwealth (1946) 72 CLR 269, 290–1. Keifel J cited this part of Dixon J’s judgment with approval in JT International SA v Ctb (2012) 86 ALJR 1297, 1368, which concerned legislation to enforce plain packaging of tobacco products, which the High Court decided was not an acquisition of property within the terms of s 51 (xxxi) of the Constitution.
of property. That said, damage, destruction or even temporary occupation of property in battle are arguably not subject to this limitation as they are justified by the necessity of combat and subject to the combat immunity doctrine in *Shaw Savill & Albion Co Ltd*.

Although Latham CJ did not mention *De Keyser’s Royal Hotel*, it is interesting to note how it informed other judgments in *Johnston, Fear & Kingham*. Starke J referred to it, among other cases, in stating that ‘Actual war operations and military necessity require further consideration, and so does the requisitioning of property for war purposes …’ Conversely, McTiernan J quoted Lord Atkinson’s statement in that case that ‘[n]either the public safety nor the defence of the realm requires that the Crown should be relieved of a legal liability to pay for the property it takes from one of its subjects’.

Less than a year later, the High Court gave its judgment in *Minister of State for the Army v Dalziel*. Mr Dalziel owned land in Sydney which the Minister took indefinite possession of under the *National Security (General) Regulations 1939–1943* (Cth). The Court found that the regulation in question did not provide for acquisition on just terms and was therefore invalid. Latham CJ dissented and drew on *De Keyser’s Royal Hotel* to make a distinction between temporary taking of possession—that is, requisition—of property due to the exigencies of war and permanent acquisition, which requires a transfer of title. The strength of the majority judgments in *Minister of State for the Army v Dalziel* that any deliberate

248 (1940) 66 CLR 344. This position might find some more recent support in the High Court case of *JT International SA v Cth* (2012) 86 ALJR 1297, where Hayne and Bell J at 1335, with whom the majority agreed, stated that where the Commonwealth acquires no interest of a proprietary nature, there can be no acquisition of property within the terms of s 51 (xxxi) of the Constitution. Arguably, destruction, damage and temporary occupation in battle also create no proprietary interest for the Commonwealth and so are not compensable on just terms. As stated above, the main question for this book is whether there is a power for the ADF to damage, destroy or acquire property. The question of whether such action subsequently requires the payment of compensation is of only indirect importance. To pursue the longstanding scholarly debate on acquisition on just terms would therefore place undue emphasis on a point which, although important in constitutional scholarship, is tangential to this book.

249 [1920] AC 508.

250 (1943) 67 CLR 314.

251 Ibid 325.

252 Ibid 329, quoting *De Keyser’s Royal Hotel* [1920] AC 352.

253 (1944) 68 CLR 261.

254 *National Security (General) Regulations 1939–1943* (Cth) reg 60H.


256 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 280–2.
acquisition of property by the Commonwealth under statute,\textsuperscript{257} whether temporary or permanent, must attract just terms compensation seems to have rendered the rest of Latham CJ's dissenting view on this point of no further value. The strengthening of his position from \textit{Johnston, Fear \& Kingham} on the prerogative power to acquire property,\textsuperscript{258} however, is significant given the reasoning in \textit{Burmah Oil} above.\textsuperscript{259} His Honour stated that 'Taking possession of land belonging to another person may be authorized by the royal prerogative or under a valid statute (or regulation)'\textsuperscript{260} None of the other justices addressed this point so that, although stated in dissent, it provides a useful indication that the prerogative does extend this far. Given \textit{Shaw Savill \& Albion Co Ltd},\textsuperscript{261} presumably this could only be temporarily in the course of actual operations against the enemy. An example would be the destruction of a wharf or airfield or the acquisition of a hotel to become a hospital where the threat from the enemy was sufficient to justify such action as necessary. However, the deliberate destruction of the hotel or a municipal water supply, for example, might not be justified as necessary. Neither would contribute directly to enemy war-fighting capacity nor would they likely be classified as military objectives in accordance with s 268.36 of the \textit{Criminal Code Act 1995}, discussed above, if they fell into enemy possession.

C Breach of Regulatory Requirements

The final area where the ADF may need to act contrary to statute in war relates to State and Territory regulatory requirements. It is likely that ADF operations in Australia during war would prima facie be subject to a range of regulatory requirements. As mentioned in Chapter 2, the \textit{Defence Act} provides as follows:

\textbf{123 Immunity from certain State and Territory laws}

(1) A member of the Defence Force is not bound by any law of a State or Territory:

(a) that would require the member to have permission (whether in the form of a licence or otherwise) to use or to have in his or her possession, or would require the member to register, a vehicle, vessel, animal, firearm or other thing belonging to the Commonwealth; or

\begin{thebibliography}{99}
\bibitem{257} Ibid.
\bibitem{258} (1943) 67 CLR 314.
\bibitem{259} [1965] AC 75.
\bibitem{260} \textit{Minister of State for the Army v Dalziel} (1944) 68 CLR 261, 270.
\bibitem{261} (1940) 66 CLR 344.
\end{thebibliography}
(b) that would require the member to have permission (whether in the form of a licence or otherwise) to do anything in the course of his or her duties as a member of the Defence Force.

This section would address many State and Territory regulatory requirements involving licences, registrations or permits but, arguably, would not extend to cover activities for which it might not be possible to obtain permission under State or Territory law because they would simply be prohibited.262 For example, ADF combat operations in or near Australia could be expected to result in a range of regulatory breaches of any number of laws relating, for example, to roads and traffic, the environment or building regulation. This could happen through the manoeuvring of tanks on roads, the construction of fortifications, aircraft noise over built-up areas, the transport of explosives or operations inconsistent with protection of terrestrial or marine nature reserves.

At this point it is worth returning to the application of State laws discussed in Chapter 2, as well as Commonwealth regulatory control, and putting the combat immunity doctrine in Shaw Savill & Albion Co Ltd263 together with the principles of legality and State regulation of Commonwealth executive power stated in the DHA Case.264 The DHA Case265 did not refer to Shaw Savill & Albion Co Ltd266 but it did address the principle of legality and the cases related to it. Brennan CJ, although in a single judgment, perhaps expressed the position of the majority most clearly:

But if the proscribed act is done or the proscribed omission is made by the servant or agent without statutory authority, there is no prerogative power in the Crown in right of the Commonwealth to dispense the servant or agent from liability under the State criminal law. In A v Hayden I sought to explain the relevant principle:

The incapacity of the executive government to dispense its servants from obedience to laws made by Parliament is the cornerstone of a parliamentary democracy … By the Bill of Rights the power to dispense from any statute was abolished. Whatever vestige of the dispensing power then remained, it is no more. The principle, as expressed in the Act of Settlement, is that all officers and ministers ought to serve the Crown according to the laws …

262 Eg Marine Pollution Act 1987 (NSW) s 8 ‘Prohibition of discharge of oil or oily mixtures into State waters’.
263 (1940) 66 CLR 344.
264 Re Residential Tenancies Tribunal of NSW v Henderson; Ex parte Defence Housing Authority (1997) 190 CLR 410 (‘DHA Case’).
265 Ibid.
266 (1940) 66 CLR 344.
It follows that, absent Commonwealth statutory authority, the Crown in right of the Commonwealth cannot authorise its servants or agents to perform their functions in contravention of the criminal laws of a State and cannot confer immunity upon them if, in performing those functions, they contravene those laws. For that reason, Pirrie v McFarlane was, in my respectful opinion, rightly decided.267

The joint judgment of Dawson, Toohey and Gaudron JJ stated this rule:

If in regulating activities engaged in by the Crown and its subjects alike a State statute extends as a matter of construction to the Crown in right of the Commonwealth, then that Crown is bound by the statute in the same way as the subject is bound, subject always to any inconsistency with a valid Commonwealth law.268

This is consistent with the reasoning in Shaw Savill & Albion Co Ltd269 that when the armed forces in war are not actually engaged with the enemy, noting that it is possible to engage the enemy from a distance, then those forces should obey laws of general application, including State and Territory laws. This is not to say that State laws could restrict the war prerogative of the Commonwealth, because the exercise of the war prerogative is not an activity in which the subject can engage ‘alike’ with the Commonwealth.270 As Dawson, Toohey and Gaudron JJ, in the majority, stated:

The States … do not have specific legislative powers which might be construed as authorising them to restrict or modify the executive capacities of the Commonwealth. No implication limiting an otherwise given power is needed; the character of the Commonwealth as a body politic, armed with executive capacities by the Constitution, by its very nature places those capacities outside the legislative power of … a State … [p]rerogative [is] part of the definition of Commonwealth executive power going, as it does, to the rights or privileges of the Crown in right of the Commonwealth.271

From this it is possible to argue that so central a prerogative as the war prerogative is a Commonwealth capacity for which it is beyond the power of the States to legislate. A broad rule would appear to be that the closer an

269 (1940) 66 CLR 344.
271 Ibid 440–1.
action is to engagement in actual operations against the enemy, the more likely it is to be lawful, even if prima facie contrary to laws of general application.

This is clearly far from being an easy rule to apply. As Dixon J noted in *Shaw Savill & Albion Co Ltd*, as quoted above, ‘It may not be easy under conditions of modern warfare to say in a given case upon which side of the line it falls’.272 The contrasting judgments in *Pirrie v McFarlane* illustrate this inherent tension in the relationship between the ADF, as a Commonwealth entity, and the States.273 Starke J said of members of the forces that ‘if he commits an offence against the ordinary criminal law, he can be tried and punished as if he were a civilian’.274 Then again, Isaacs J in dissent stated that ‘military commands, lawful by Commonwealth law, are not susceptible of denial or abridgment by State law’.275 That both statements appear equally applicable to the application of State law to ADF operations in war only serves to underscore the difficulty of discerning the lawfulness of any particular ADF action. Actions in combat against the enemy should be free of the application of State law. Actions closely related to combat against the enemy, such as manoeuvring forces and equipment or the construction of defences where it is to face an imminent threat from the enemy should also be free from the application of State law. State law could apply to other routine ADF activities within State jurisdiction however, which any citizen could undertake during wartime.

VI Conclusion

The war prerogative is a curious element of the executive power of the Commonwealth in that it is so well recognised in theory and practice, yet there is so little authority with which to give it substance. Much of this would appear to be due to the nonjusticiable character of most acts of war and the traditional deference of Parliament to the executive on the conduct of military operations. What case authority there is addresses the margins of when the war prerogative may or may not apply, and not so much what the war prerogative may or may not authorise. Fortunately,

272 (1940) 66 CLR 344, 362.
273 (1925) 36 CLR 170.
274 Ibid 228.
275 Ibid 205.
there is sufficient case authority arising from the Second World War in *Shaw Savill & Albion Co Ltd*\(^{276}\) and *Burmah Oil*\(^{277}\) to identify that the war prerogative will authorise combat operations against a possibly distant enemy using much of the technology of modern warfare, such as aircraft, submarines and long range ordnance. From this recognition in these cases it is possible to read the applicable statutes with a view to what they do not say about the war prerogative as much as for what they do say.

The High Court’s repeated affirmation of the principle of legality in relation to defence matters in *Shaw Savill & Albion Co Ltd*\(^{278}\) and the DHA Case\(^{279}\) (in addition to *A v Hayden*\(^{280}\) discussed in Chapter 1) means that it is not possible simply to understate the relevance of this legislation. With regard to legislation of general application, such as the criminal law of the Australian Capital Territory, which applies to ADF operations through the *Defence Force Discipline Act* and the *Crimes at Sea Act 2000*, statutory interpretation can, arguably, address the principle of legality. It seems very unlikely that the Parliament would have proscribed the deliberate causing of death, destruction and detention under the war prerogative without express words. To the contrary, even though not authorising such deliberate action, there are a number of provisions of the *Defence Force Discipline Act* which presume that such action lawfully occurs. This is also the case with the legislation which Parliament has explicitly applied to the conduct of warfare; that is, div 268 of the *Criminal Code Act* and the *Geneva Conventions Act*. It appears mostly to be drafted carefully to avoid proscribing the deliberate causing of death, destruction and detention permitted by the international law of armed conflict. Where an act is of questionable necessity, such as interning civilian enemy aliens in Australia, the prerogative may not be enough and statutory authority may be required.

*Shaw Savill & Albion Co Ltd,*\(^{281}\) and the United Kingdom Supreme Court decision in *Smith,*\(^{282}\) made clear that actions under the war prerogative will be protected only by the combat immunity doctrine when they involve actual operations against the enemy. Otherwise the armed forces

\(^{276}\) 1940) 66 CLR 344.
\(^{277}\) [1965] AC 75.
\(^{278}\) (1940) 66 CLR 344.
\(^{279}\) (1997) 190 CLR 410.
\(^{281}\) (1940) 66 CLR 344.
\(^{282}\) [2013] UKSC 41.
must comply with the general law as much as any other citizen must. It will not necessarily be clear as to which side of this distinction any particular ADF action in war will fall. The closer the action is to being actual operations against the enemy, the more likely it is to be justified as a necessary exercise of the war prerogative. The test of necessity in the case of war becomes, then, an assessment of whether an action was in the course of actual operations against the enemy. As Smith indicates,\textsuperscript{283} this is far from being an easy test to apply, which is consistent with the inherent uncertainty of the concept of \textit{Fortuna}. The principles of both legality and the supremacy of Parliament would, however, likely lead to the application of combat immunity being done conservatively.

\textsuperscript{283} Ibid.
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