

Chapter Thirteen

How Does it End? Reflections on Completed Prosecutions under Australia's Anti-Terrorism Legislation

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Introduction

Much has been written, both in this collection of essays and elsewhere, about the overbreadth of the terrorism offences contained in Part 5.3¹ of the *Criminal Code Act 1995* (Cth) ('Criminal Code').² Likewise, the unwieldy nature and conceptual complexity of the definition of 'terrorist act' upon which most of the terrorism offences depend has received significant criticism.³ Whilst academic commentary based on the text of both the offences and the definition has abounded, given the few actual prosecutions in this country,⁴ there has

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¹ Part 5.3 in its original form was inserted into the *Criminal Code Act 1995* (Cth) ('Criminal Code') as a result of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth). The Act came into force on 6 July 2002.

² For examples outside this collection see: M Gani and G Urbas, 'Alert or Alarmed? Recent Legislative Reforms Directed at Terrorist Organisations and Persons Supporting or Assisting Terrorist Acts' (2004) 8(1) *Newcastle Law Review* 23, 49-50; S Bronitt and B McSherry, *Principles of Criminal Law* (Sydney: Lawbook Co, 2nd ed, 2005) 894-6; B McSherry, 'Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws' (2004) 27(2) *University of New South Wales Law Journal* 354, 364-9; A Lynch and G Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (Sydney: UNSW Press, 2006) 14-28.

³ Such criticisms have come from a variety of sources and perspectives and have been made in respect of a range of aspects of the definition. For example, in its submission to the Sheller Committee (the Security Legislation Review Committee) in 2006, the Commonwealth Director of Public Prosecutions (DPP) argued for the definition to be simplified by removing some of its requirements in order to facilitate prosecutions: Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (December 2006) [5.12]. Other critics argue that the current definition incorporates inherently vague concepts: McSherry, above n 2, 362 — or is overbroad in some respect(s): see, eg, K Roach, 'A Comparison of Australian and Canadian Anti-Terrorism Laws' (2007) 30(1) *University of New South Wales Law Journal* 53, 56 in relation to 'serious damage to property'. The Sheller Committee itself found that inclusion of a 'threat of action' in the definition increased the 'complexity of the definition of "terrorist act"'. Sheller Committee, *Report of the Security Legislation Review Committee* (June 2006) [6.10] and recommended that this aspect of the definition be removed and become the basis for a separate offence: [6.14] and [6.15].

⁴ The completed prosecutions are the subject of this chapter. At the time of writing there are over 25 people who have been committed to stand trial on charges under Part 5.3 of the Criminal Code. They will be referred to in the context of the particular offences with which they have been charged.

necessarily been less scrutiny of how those offences have been dealt with in specific cases.

As at the beginning of 2008, there have been three prosecutions under Part 5.3 of the Criminal Code that have proceeded through to verdict and sentence: the prosecutions of Zak Mullah (aka Zeky Mullah), Jack Thomas and Faheem Lodhi. There are some clear differences between the cases — the most obvious being that Lodhi and Mullah were charged with 'terrorist act' offences, while Thomas' prosecution related to 'terrorist organisation' charges.⁵ Nevertheless, these three prosecutions have several things in common. Each of them involved (to a greater or lesser degree) the jury grappling with the complexities of the Criminal Code definition of 'terrorist act'⁶ in the course of its consideration of whether particular terrorist offences had been committed by the accused. Each of these three prosecutions also required the jury to consider that definition in the context of a 'simple' case, in the sense that the motivation for the terrorist act alleged by the prosecution coincided with the motivation of the accused.⁷ Accordingly, at least in the context of such 'simple' cases, the outcome of each prosecution sheds interesting light on both the theoretical scope and the practical function of that definition.

The central argument of this chapter can be summed up very briefly: the outcomes of these three cases suggest that whilst both the terrorism offences and the definition of 'terrorist act' are indeed broadly drafted, the intricacy of that definition may have had the perverse effect of confining the ambit of those offences that rely upon it. In short, the current definition of 'terrorist act' is so dense and multi-layered that offences that incorporate it will be difficult to prove except in the more obvious or blameworthy cases.⁸ Flowing from this first argument is a second one: that broadly drafted offences that do not incorporate the definition of 'terrorist act' are not similarly confined or constrained in their application. In this regard, 'terrorist organisation' offences where executive proscription is the method by which an organisation has been designated as 'terrorist', are particularly worrying in their breadth and scope. The same overbreadth may also apply to 'difficult' terrorist act cases, where the accused does not share the motivations of those involved in a terrorist act with which he or she is connected.

In drawing out the arguments set out in the previous paragraph, this chapter will be divided into two parts. Part I will briefly address the offences in Part

⁵ See the discussion below on the significance of this difference.

⁶ Contained in s 100.1 of the Criminal Code. See discussion below.

⁷ See below for discussion of the concept of 'simple' and 'difficult' cases in the context of motivation for the terrorist act alleged.

⁸ Note that the current definition of 'terrorist act' is highly problematic in a number of important ways, in particular, in how it deals with 'motive' (see discussion in McSherry, above n 2, 359-64). This aspect of the definition is beyond the scope of this chapter.

5.3 of the Criminal Code in order to provide the context for the discussion of the prosecutions of Mallah, Thomas and Lodhi. It will also explain the concept, as I use it in this chapter, of 'simple' as opposed to 'difficult' terrorist act cases. Part II will consider the details of the prosecutions as well as the implications of their outcomes.

I. Brief Overview of Part 5.3

The terrorism provisions in the Criminal Code prohibit a range of activities connected with 'terrorist acts'; 'terrorist organisations'; and 'financing terrorism'. Offences in each of these areas were first inserted into the Code in mid-2002,⁹ but a series of amending acts have both added new offence provisions¹⁰ and increased the scope of original and new offences.¹¹ The following section briefly summarises the anti-terrorism offences contained in Part 5.3 of the Criminal Code as well as analysing some of their important features.

A. Terrorist Act Offences

The original range of 'terrorist act' offences has not been extended by amending legislation. In relation to 'terrorist acts', ss 101.1 to 101.6 of the Criminal Code prohibit the following conduct:

- 101.1 Engaging in a terrorist act (penalty: life imprisonment).
- 101.2 Providing or receiving training connected with terrorist acts where the person either knows that the training is connected with preparation for, engagement in or assistance in a terrorist act (penalty: 25 years) or is reckless as to the existence of that connection (penalty: 15 years).
- 101.4 Possessing things connected with a terrorist act where the person knows of the connection (penalty: 15 years) or is reckless as to its existence (penalty: 10 years).
- 101.5 collecting or making a document where the document is connected with a terrorist act and the person knows of that connection (penalty: 15 years) or is reckless as to the existence of that connection (penalty: 10 years).¹² There is no offence if the collection or making of the document

⁹ For an analysis of the 'terrorist act' and 'terrorist organisation' offences as originally passed in 2002, see Gani and Urbas, above n 2.

¹⁰ See *Anti-terrorism Act (No 2) 2004* (Cth) which inserted a new offence relating to association with members of a terrorist organisation; *Anti-Terrorism Act (No 2) 2005* (Cth) which added the offence of financing a terrorist.

¹¹ See *Anti-terrorism Act 2004* (Cth) which amended terrorist organisation membership offences; and offences of providing training to or receiving training from a terrorist organisation; *Anti-Terrorism Act (No 1) 2005* (Cth) which provided that no specific terrorist act need be identified under the terrorist act offences (see discussion below); and *Anti-Terrorism Act (No 2) 2005* (Cth) which extended the grounds upon which a terrorist organisation could be proscribed to include those organisations that advocated the doing of a terrorist act.

¹² Belal Khazaal has been committed to stand trial in relation to a charge under this offence (making a document — a book — in connection with the engagement of a person in a terrorist act, knowing of that connection). He is also charged with inciting the commission by others of an offence of engaging

was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act.

- 101.6 doing any act in preparation for or planning a terrorist act (penalty: life imprisonment).¹³

There are several important aspects of these 'terrorist act' provisions relating to fault elements (or mental states), preventative function and jurisdiction that should be noted.

1. Fault Elements

Different penalties apply depending on whether the accused knows or is reckless as to whether their conduct is connected with terrorist acts. The Criminal Code defines each of these mental states — 'knowledge' and 'recklessness' (as well as the concept of 'intention' which is central to the definition of 'terrorist act') — in its Chapter 2.¹⁴

2. Preventative Function

(a) Original 'Terrorist Act' Offences

With the exception of s 101.1, under each of these provisions as they existed before the *Anti-Terrorism Act (No 1) 2005* (Cth) came into effect in November 2005 (see discussion below), an offence may be committed 'even if the terrorist act does not occur'.¹⁵ In addition, s 101.6 specifically prohibits acts done in preparation for or planning of terrorist acts. Accordingly, a significant function of the offences as they were originally conceptualised was prevention — to allow for the arrest and punishment of planners of terrorist acts well before those acts had occurred.¹⁶ In particular, s 101.6 sought to deal with potential terrorist activity at its very earliest stage (even before the inchoate forms of these offences — attempts, conspiracy and incitement — are considered).¹⁷ The original s

in a terrorist act, contrary to ss 11.4 and 101.1 of the Criminal Code. Pre-trial hearings began on 12 November 2007 and are listed to recommence in February 2008.

¹³ See n 17 below for details of current prosecutions under this offence.

¹⁴ Chapter 2 of the Criminal Code sets out General Principles of Criminal Responsibility and all federal offences must be interpreted by reference to those principles (see s 2.1 of the Criminal Code). For a discussion of interpretive issues relating to the Code, see M Gani, 'Codifying the Criminal Law: Issues of Interpretation' in S Bottomley and S Corcoran, *Interpreting Statutes* (Sydney: Federation Press, 2005) 197; I Leader-Elliott, 'Elements of Liability in the Commonwealth Criminal Code' (2002) 26 *Criminal Law Journal* 28.

¹⁵ See original ss 101.2(3), 101.4(3), 101.5(3) and 101.6(2).

¹⁶ The centrality of the preventative function of the legislation was emphasised by the Attorney-General's Department in its submission to the Senate Legal and Constitutional Legislation Committee in relation to the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth). See *Submission 383A*, 1-3.

¹⁷ Clearly, inchoate forms of these broadly drafted preparation offences extend liability to very preliminary conduct. On 25 February 2008, the trial of Mirsad Mulahalilovic, Abdul Rakib Hasan, Khaled Cheikho, Moustafa Cheikho, Mohamed Ali Elomar, Mazen Touma, Khaled Sharrouf, Omar Baladjam and Mohammad Omar Jamal commenced. The accused were arrested in November and December 2005 as part of Operation Pendennis in Sydney. They are charged with conspiring to do an act in

101.6 covered 'any act' (that is any conduct whatsoever) done in preparation for or planning of a terrorist act even if that terrorist act does not occur. It was with this last offence (s 101.6) that Zak Mullah was charged in December 2003 — the first terrorism charge laid in Australia under the new anti-terrorism legislation.

(b) 'Terrorist Act' Offences as a Result of the Anti-Terrorism Act (No 1) 2005 (Cth)

Whilst no new 'terrorist act' offences have been added to Part 5.3 by the numerous Anti-Terrorism Acts referred to above, it is arguable that the ambit of those offences has been enlarged as a consequence of amendments contained in the *Anti-Terrorism Act (No 1) 2005* (Cth). Those amendments spell out that liability for 'terrorist act' offences can be established even if the prosecution cannot identify any specific terrorist act with which the accused's behaviour is connected. Liability for prohibited conduct rests in the connection of that conduct with 'a' terrorist act even if 'the' particular terrorist act cannot be ascertained.¹⁸

It should be noted here that the amendments effected by *Anti-Terrorism Act (No 1) 2005* post-date the commencement (and, in the case of Mullah, the conclusion) of the three prosecutions that are the subject of this chapter. Whilst the amendments have retrospective effect as a result of s 106.3 of the Criminal Code,¹⁹ the NSW Court of Criminal Appeal held, in relation to Faheem Lodhi, that s 106.3 could not apply retrospectively where criminal prosecutions had already commenced.²⁰ It is interesting to observe that the full court of the NSW Court of Criminal Appeal suggests in the same judgment that the amendment itself may not have been necessary.²¹ That Court held that the original formulation (discussed above) already demonstrated that the Parliament intended it to apply to conduct connected to a non-specific terrorist act and, further, that

preparation for a terrorist act contrary to ss 11.5 and 101.6 of the Criminal Code. No time or place in relation to the act is specified.

¹⁸ The formula adopted by the legislation is to set out, in relation to each 'terrorist act' offence barring s 101.1, that an offence may be committed even if:

- (a) a terrorist act does not occur;
- (b) the prohibited activity or thing is not connected with a specific terrorist act; or
- (c) it is connected with more than one terrorist act.

See the discussion of both the circumstances and the significance of these amendments in A Lynch, 'Legislating with Urgency — the Enactment of the *Anti-Terrorism Act [No 1] 2005*' (2006) 30 *Melbourne University Law Review* 747.

¹⁹ Section 106.3 was inserted into the Criminal Code by Item 22 of Schedule 1 to the *Anti-Terrorism Act (No 2) 2005* (Cth) and was proclaimed on 15 February 2006.

²⁰ *Lodhi v The Queen* (2006) 199 FLR 303, [22]-[56]. The judgment was delivered by Spigelman CJ with McClellan CJ at CL and Sully J agreeing.

²¹ As Andrew Lynch has done in Lynch, above n 18, 765-7.

'the clear intention of Parliament [was] to create offences where an offender has not decided precisely what he or she intends to do'.²²

3. Jurisdiction

The most extreme form of extended jurisdiction under the Criminal Code (Category D jurisdiction) applies to each offence.²³ This is also the case for the terrorist organisation and financing terrorism offences discussed below.²⁴ Under Category D, an offence can be committed whether or not either the conduct constituting that offence or the effects of that conduct occurs in Australia.²⁵ So, at least technically, any person of any nationality, anywhere in the world, could be pursued under this legislation. Of course, such a prosecution is unlikely in any but the most extraordinary of cases.²⁶ What is noteworthy, in this context, is the attempt by the Commonwealth to assert universal jurisdiction over terrorism-related offences, which it clearly regards as an archetype of trans-national crime.²⁷

B. Definition of Terrorist Act

Given the discussion above, the definition of 'terrorist act' under s 100.1 of the legislation is crucial to understanding the operation of these offences. In summary, that section provides that a terrorist act is an action or threat of action done or made with two intentions present: the intention of advancing a political, religious or ideological cause; **and** the intention of coercing, or influencing by intimidation a government (including that of a foreign country) or intimidating the public or a section of the public.

²² *Lodhi v The Queen* (2006) 199 FLR 303, [66]. For the full discussion see [63]-[70] where Spigelman CJ broadly endorses the analysis of Whealy J at first instance in *R v Lodhi* (2005) 199 FLR 236, [43], [52]; *R v Lodhi* [2006] NSWSC 584 (Unreported, Whealy J, 14 February 2006) [65]-[69], [76].

²³ By virtue of ss 101.1(2), 101.2(4), 101.4(4), 101.5(4), 101.6(3) of the Criminal Code.

²⁴ See ss 102.9 and 103.3.

²⁵ Section 15.4 Extended geographical jurisdiction — category D

If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:

- (a) whether or not the conduct constituting the alleged offence occurs in Australia; and
- (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

Note: The expression *offence* is given an extended meaning by ss 11.2(1), 11.3, 11.6(1).

²⁶ See the discussion of extended geographical jurisdiction in Gani and Urbas, above n 2, 27-8; and in B McSherry, 'The Introduction of Terrorism-Related Offences in Australia: Comfort or Concern?' (2005) 12(2) *Psychiatry, Psychology and Law* 279, 282.

²⁷ Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth), 17: 'This jurisdiction is appropriate due to the transnational nature of terrorist activities, to ensure that a person cannot escape prosecution or punishment based on a jurisdictional loophole.'

Under s 100.1(2), to constitute a terrorist act, the action must also do one (or more)²⁸ of the following:

- a. cause serious physical harm to a person other than the offender
- b. cause serious damage to property
- c. cause death
- d. endanger another's life
- e. create a serious risk to the health or safety of the public
- f. seriously interfere with, disrupt or destroy an electronic system (including, but not limited to, an information system; a telecommunications system; a financial system; a system used for the delivery of essential government services; a system used for, or by, an essential public utility; or a system used for, or by, a transport system).

Under s 100.1(3), action that is advocacy, protest, dissent or industrial action falls outside the definition of terrorist act provided that it is not intended to bring about serious physical harm or death, or to endanger the life of a person, or to create a serious risk to the health or safety of the public or a section thereof.

Observations on the 'Terrorist Act' Definition and its Implications for 'Simple' and 'Difficult' Cases

The definition of 'terrorist act', as outlined above, demonstrates obvious complexities as well as a parliamentary intention to achieve an expansive scope.²⁹ The definition is undoubtedly drafted very broadly in a number of respects: it covers both an action and a threat of action; it encompasses an intention to coerce a government (including the government of another country), the public or a section of the public; it takes in actions that do cause and threats of action that would cause a wide variety of harm (and not just fatal harm) and potentially extends even to a mere threat of action that would, if carried out, seriously interfere with certain types of electronic systems. Nevertheless, despite this breadth of drafting, the prosecution has a high hurdle to clear in that it must show, beyond reasonable doubt, two levels of 'intention'³⁰ in relation to the terrorist act — that there was an intention to advance a political, religious or ideological cause by the action or threat of action and, further, that there was an intention to coerce or intimidate a government or to intimidate the public.

²⁸ Justice Whealy made this clear in *R v Lodhi* [2006] NSWSC 584 (Unreported, Whealy J, 14 February 2006) [98]. The NSW Court of Criminal Appeal agreed with Whealy J's analysis: *Lodhi v The Queen* (2006) 199 FLR 303, [74].

²⁹ Justice Whealy has remarked that 'it will be seen that the definition of "terrorist act" postulates an action or threat of action of the widest possible kind': *R v Lodhi* [2006] NSWSC 584 (Unreported, Whealy J, 14 February 2006) [75].

³⁰ Defined in s 5.2 of the Criminal Code. See discussion below in n 37.

It has now been made clear in the judgment of the New South Wales Court of Criminal Appeal in *Lodhi*³¹ that the intentions in relation to advancement and coercion attach to the terrorist act itself and not to the state of mind of the accused as he or she was engaging in the conduct that constitutes the offence. Accordingly, the Court explained, these intentions are physical elements that characterise the action or threat of action that constitutes the 'terrorist act'³² and are not fault elements applying to the accused themselves (although the accused may indeed hold such intentions).³³ This dimension adds a further degree of conceptual difficulty to the 'terrorist act' definition that must be understood and applied by a jury. It also, potentially, has the undesirable effect of lowering the prosecutorial hurdles posed by the dual inquiry into 'intention' in what I will call 'difficult' cases. By 'difficult' cases, I mean the prosecution of very peripheral or marginal players in terrorist acts (who *themselves* do not intend the advancement or coercion required by the definition but who are knowingly or recklessly connected with a plan where such motivations are clearly present in others).³⁴

As has already been noted, none of the three cases that are the subject of this chapter represents a 'difficult' case of the kind described above. In *Mallah* and *Lodhi*, the person argued to have held the intentions referred to in the terrorist act definition was the accused himself.³⁵ Indeed, the sentencing remarks in the case of *Mallah*³⁶ suggest that the prosecution addressed the issue of intention by reference to the state of mind of the accused as he engaged in the alleged terrorist act (that is by reference to what Mallah meant to do or accomplish³⁷ by his plan of action). In Thomas' case, the accused was argued to have shared

³¹ *Lodhi v The Queen* (2006) 199 FLR 303 (Spigelman CJ with McClellan CJ at CL and Sully J agreeing).

³² The Court suggests at [90] that the intentions identifying the character of a terrorist act are 'circumstances' within the meaning of s 4.1(1)(c) of the Criminal Code. The prosecution is not required to particularise the person who has the relevant 'intention' because that person may not be known.

³³ The Court quoted extensively at [80] and endorsed at [90] Whealy J's judgment of 14 February 2006 — *R v Lodhi* [2006] NSWSC 584 (Unreported, Whealy J, 14 February 2006) [83], [103].

³⁴ Such a difficult case is posed by Gani and Urbas, above n 2, where the hypothetical accused is a humanitarian aid worker tending to the physical injuries of Tamil Tigers.

³⁵ In relation to *Lodhi*'s case on this point, see *R v Lodhi* (2006) 199 FLR 354, [28]. The situation in Thomas' case is somewhat different. Thomas was charged with terrorist organisation offences in relation to Al Qa'ida (a proscribed organisation since 2002). However, as will be seen in the discussion below, the offence for which he was acquitted, s 102.7, incorporates the definition of 'terrorist act'. For *Mallah*, see below.

³⁶ *R v Mallah* [2005] NSWSC 317 (Unreported, Wood CJ at CL, 21 April 2005).

³⁷ See *R v Mallah* [2005] NSWSC 317 (Unreported, Wood CJ at CL, 21 April 2005) [22]. The definition of 'intention' in relation to conduct is contained in s 5.2(1) of the Criminal Code. A person intends conduct if he or she 'means to' engage in it. It appears from the sentencing remarks in this case that it was *Mallah*'s intention in relation to his conduct that was argued. However, as has already been noted, in the later case of *Lodhi* both Whealy J and the NSWCCA discussed the two references to intention in the terrorist act definition as circumstances identifying the character of the action or threat of action as terrorist. Under s 5.2(2), a 'person has intention with respect to a circumstance if he or she believes that it exists or will exist'. Arguably, then, conceptualising the intention requirements of the terrorist act definition as in respect of circumstance would make the prosecutor's task easier.

the philosophies and motivations of Al Qa'ida.³⁸ Accordingly, the prosecutions of Mallah, Thomas and Lodhi were 'simple' cases, in that, in each, the relevant terrorist act motivations were argued either to have been held solely by the accused or to have been shared by the accused with others.

The discussion of the case law that follows will focus particularly on the issue of whether the enquiry into intention in these 'simple' cases has tempered the effects of both overbroad offence provisions and an overexpansive definition of 'terrorist act'.

C. Terrorist Organisation Offences

The second category of offences set out in Part 5.3 of the Criminal Code is those involving 'terrorist organisations'. Unlike the 'terrorist act' offences discussed above, the original list of terrorist organisation offences enacted in 2002³⁹ has been augmented by a variety of subsequent Anti-Terrorism Acts.⁴⁰ Current offences relating to terrorist organisations are:

- 102.2 — intentionally directing the activities of a terrorist organisation, knowing that it is a terrorist organisation (penalty: 25 years) or being reckless as to whether it is such an organisation (penalty: 15 years);
- 102.3 — intentionally being a member of a terrorist organisation where the person knows the organisation is a terrorist organisation (penalty: 10 years).⁴¹ Under subsection 2, an accused may escape liability if he/she proves that he/she took all reasonable steps to cease to be a member of the organisation as soon as practicable after learning that this was a terrorist organisation.⁴²
- 102.4 — intentionally recruiting a person to join or participate in the activities of a terrorist organisation, knowing that it is a terrorist organisation

³⁸ In relation to the second of the two s 102.7 counts against him (discussed below), Thomas was alleged to be a 'sleeper' in Australia who could be activated by Al Qa'ida to undertake a terrorist act. See the discussion of such prosecution allegations by the Chief Magistrate attached as Appendix B to Teague J's decision in relation to bail: *DPP (Cth) v Thomas* [2005] VSC 85 (31 March 2005).

³⁹ For the original terrorist organisation offences, see Gani and Urbas, above n 2, 34-5.

⁴⁰ See above nn 10 and 11 for a brief description of these amending Acts.

⁴¹ Following police operations and arrests in November and December 2005 in Melbourne, the trial of 12 men for terrorist organisation offences began in the Supreme Court of Victoria on 13 February 2008. The charges mainly relate to the membership offence, but charges against some accused also include making funds available to a terrorist organisation (a s 102.6 offence). The accused are Abdul Nacer Benbrika (who is also charged with directing the activities of a terrorist organisation under s 102.2), Amer Haddara, Aimen Joud, Shane Kent, Abdullah Merhi, Ahmed Raad, Ezzit Raad, Fadal Sayadi, Hany Taha, Shoue Hammoud, Majed Raad and Bassam Raad. On 14 December 2007 Aruran Vinayagamoorthy, Sivrajah Yathavan and Arumugan Rajeevan were committed to stand trial for this offence and also for offences under s 102.6 in relation to their alleged membership and funding of the Liberation Tamil Tigers of Eelam (LTTE). Vinayagamoorthy and Yathavan are also charged under s 102.7 with providing support or resources to LTTE.

⁴² This offence was originally confined to membership of terrorist organisations that were listed under the Act. The amended provision was introduced by the *Anti-Terrorism Act 2004* (Cth), which came into effect on 1 July 2004.

(penalty: 25 years) or being reckless as to whether it is such an organisation (penalty: 15 years).⁴³

- 102.5 — intentionally providing training to or receiving training from a terrorist organisation being reckless as to whether it is a terrorist organisation (penalty: 25 years) or where the organisation is a proscribed terrorist organisation (penalty: 25 years).⁴⁴
- 102.6 — intentionally receiving funds from or making funds available to or collecting funds for a terrorist organisation (whether directly or indirectly), knowing the organisation is a terrorist organisation (penalty: 25 years) or being reckless as to whether it is such an organisation (penalty: 15 years). There is an exception for funds received solely for the purpose of providing legal representation for a person in proceedings related to terrorist offences or for assisting the organisation to comply with the law.
- 102.7 — intentionally providing to a terrorist organisation support or resources that would help the organisation engage (directly or indirectly) in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs), knowing that the organisation is a terrorist organisation (penalty: 25 years) or being reckless as to whether it is such an organisation (penalty: 15 years).⁴⁵
- 102.8 — intentionally associating,⁴⁶ on two or more occasions, with another person who is a member of a terrorist organisation or who promotes or directs the activities of such an organisation where that intentional association provides support to the terrorist organisation. To be guilty of this offence, the person would have to know both that the organisation involved was a terrorist organisation and that the person with whom they were associating was a member of, or a promoter or director of the activities of the organisation. Additionally, he or she would have to intend that the support provided by the association with that member assist the organisation to expand or to continue to exist. (Penalty: 3 years.) Exceptions apply to family members, providers of humanitarian aid, persons providing legal advice or

⁴³ Lodhi was originally charged with this offence on 22 April 2004. It was alleged that he attempted to recruit medical student Izhar ul-Haque to participate in Lashkar-e-Tayyiba (LeT) activities (relating to periods before that organisation was listed as a proscribed organisation). The charges in relation to this offence were later dropped.

⁴⁴ This offence is another that has been amended since its original enactment. See Gani and Urbas, above n 2, 35 for its original form. Amongst other changes, the new offence increases the penalty where an accused is reckless as to whether an organisation is terrorist from 15 to 25 years. The offence was amended by the *Anti-Terrorism Act 2004* (Cth) sch 1 para 20. Izhar ul-Haque was charged with receiving training from a terrorist organisation (LeT) under the original offence in April 2004. After some delay, due to a 2006 application to the High Court in relation to the constitutionality of the legislation, his trial began in the NSW Supreme Court in October 2007. On 12 November, the charge against ul-Haque was dropped, following a decision by Adams J that ruled certain records of interview inadmissible as evidence: *R v ul-Haque* [2007] NSWSC 1251 (Unreported, Adams J, 5 November 2007).

⁴⁵ Thomas was acquitted of two counts of this offence. See discussion below.

⁴⁶ Under s 102.1(1) associating means meeting or communicating with another person. This offence was inserted into the Criminal Code as a result of the *Anti-Terrorism Act (No 2) 2004* (Cth).

representation and to association which takes place in the course of practising a religion and in a place of religious worship.

1. Observations on s 102.8: a Workable Provision?

This last provision, associating with a terrorist organisation, has several features in common with the definition of 'terrorist act' that has been discussed above. Like that definition, s 102.8 is very broadly drafted (so much so that it needs explicitly to exempt family members from its scope). But, I would argue that because of its multiple layers and complexity, the offence is probably very narrow in its application. Like the definition of 'terrorist act', this provision casts its net widely in a number of respects: it covers any form of meeting or communication with a member of a terrorist organisation (including an informal member)⁴⁷ or simply a person who 'promotes'⁴⁸ the activities of a terrorist organisation on two or more occasions. Nevertheless, it requires multiple physical and fault elements to be in place (including the provision of support, knowledge that the organisation is a terrorist one and the intention to assist the organisation through the support provided by the association). In practical terms, the offence is likely to be difficult to prove beyond reasonable doubt to a jury except in the most blameworthy cases. In any event, in such egregious cases, the behaviour it seeks to sanction is clearly dealt with by other offences.

2. Implications of Broadly Drafted 'Terrorist Organisation' Offences

The implications of overbreadth in relation to terrorist organisation offences are even more troubling than those in relation to terrorist act offences in a number of respects. First, these are arguably serious 'status offences' whereby individuals are liable for lengthy jail sentences because of their status (for example, as 'members' of a terrorist organisation), type or associations rather than because of their actual conduct. The issues and problems associated with 'status offences' such as the terrorist organisation offences have been addressed by a number of authors since the introduction of Part 5.3⁴⁹ and I will not go into them further here. Second, given the serious consequences that may flow to an individual through association of various kinds with a 'terrorist organisation', the process by which an organisation is designated as 'terrorist' requires the closest scrutiny.

⁴⁷ Under s 102.1(1) a member of an organisation includes:

(a) a person who is an informal member of the organisation; and

(b) a person who has taken steps to become a member of the organisation; and

(c) in the case of an organisation that is a body corporate — a director or an officer of the body corporate.

⁴⁸ This term is not defined in the legislation and is likely to be interpreted by reference to its normal or dictionary meaning.

⁴⁹ See, eg, Gani and Urbas, above n 2, 33; Bronitt and McSherry, above n 2, 779; McSherry, above n 2, 364-6, McSherry, above n 26, 282-3.

Particularly problematic in this regard is the method by which the executive can proscribe an organisation as terrorist, under the current arrangements.⁵⁰

As will be seen below, the definition of 'terrorist act' plays an important part in the prosecution of 'terrorist organisation' offences, particularly in relation to their characterisation as such.

D. Definition of Terrorist Organisation

The definition of a terrorist organisation under s 102.1(1) of the Criminal Code is lengthy and complex — running to 18 subsections and nearly 800 words. The original 2002 definition was controversially amended in 2004⁵¹ to allow for executive proscription of organisations.

Under that first definition, there were two methods by which an organisation could be a 'terrorist organisation' for the purposes of prosecution of an individual under Part 5.3 of the Criminal Code. First, a jury could determine that an organisation was a terrorist one in the course of a prosecution by application of limb (a) of the definition: that is, by deciding that the organisation in question was one 'that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs)'. Second, under limb (b) an organisation could be listed under regulations (which itself could only occur if it had first been listed by the Security Council of the United Nations) so that the issue of whether an organisation with which an individual was allegedly associated was terrorist was settled before any prosecution of that individual. A further alternative that was used prior to the 2004 amendments (in order to circumvent the requirement for prior Security Council listing under limb (b)) was to pass legislation to list a specific organisation as terrorist. This legislative option was followed in order to list Hizballah, Hamas and Lashkar-e-Tayyiba.⁵²

Under the current mechanism, the original limb (a) remains in place, but, under limb (b), terrorist organisations can be specified in regulations by executive action independent of Security Council listing.⁵³ Under s 102.1(2), before the Governor-General can make such a regulation, the Minister (the Attorney-General) must be:

satisfied on reasonable grounds that the organisation:

⁵⁰ See Hogg's Chapter 14 in this volume.

⁵¹ This was as a result of the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth) which was enacted in March 2004. The political history of that Act, which allowed for executive proscription of terrorist organisations, and the way it eventually became law is discussed in both Gani and Urbas, above n 2, 48-9 and in M Gani, 'Upping the Ante in the "War on Terror"' in P Fawcner (ed), *A Fair Go in an Age of Terror* (Victoria: David Lovell Publishing, 2004) 97-8.

⁵² See the *Criminal Code Amendment (Hizballah) Act 2003* (Cth) and the *Criminal Code Amendment (Hamas And Lashkar-E-Tayyiba) Act 2003* (Cth).

⁵³ Limb (b) of the s 102.1(1) definition now reads: (b) an organisation that is specified by the regulations for the purposes of this paragraph (see sub-sections (2), (3) and (4)).

(a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or

(b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).⁵⁴

Section 102.1(2A) requires that the Leader of the Opposition be briefed (though no more) before an organisation is listed under this procedure. There is a de-listing mechanism contained in s 102.1(4) and reviews by the Parliamentary Joint Committee on the Australian Security Intelligence Organisation (ASIO), the Australian Secret Intelligence Service (ASIS) and the Defence Signals Directorate (DSD)⁵⁵ are provided for by s 102.1A.

Clearly then, the definition of 'terrorist act' is central to decision-making about whether an organisation is 'terrorist', whether that decision is made by a jury during a trial or by the Attorney-General outside of the context of a prosecution. Under limb (a) of the definition, a jury must decide, in the course of an individual's prosecution for a 'terrorist organisation' offence whether or not the organisation involved was directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (regardless of whether any terrorist act has actually occurred). Under limb (b) an organisation can only be listed as terrorist if the Attorney-General is satisfied (on reasonable grounds) that the organisation is so involved or that it advocates the doing of a terrorist act.

Again, limb (a) is very broadly drafted. Involvement by an organisation in a terrorist act need not be direct: engagement can be indirect and extends beyond planning and assisting to 'fostering'⁵⁶ a terrorist act even if it does not occur. Nevertheless, it is at least arguable that the same issues of complexity discussed above in relation to the 'terrorist act' definition, may, in practice, incline a jury towards caution in finding that an organisation is 'terrorist' under limb (a). This is especially so where a jury might wonder why a particular organisation has

⁵⁴ Under s 102.1(1A) the definition of advocates is as follows:

(1A) In this Division, an organisation *advocates* the doing of a terrorist act if:

(a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or

(b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or

(c) the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act.

⁵⁵ Now known as the Parliamentary Joint Committee on Intelligence and Security.

⁵⁶ 'Fostering' is another undefined term.

not already been listed by the Attorney-General under his broad proscription powers if it is, indeed, terrorist.⁵⁷

Those proscription powers are, undeniably, sweeping. Whilst the Minister must be satisfied of the relevant matters 'on reasonable grounds', the broad drafting of s 102.1(2)(a) and the inclusion of mere 'advocating' in paragraph (b) — which itself extends both to indirect urging and to direct praising of an act in circumstances where there is a *risk* that a person *might* be led to engage in a terrorist act⁵⁸ — make the Attorney-General's listing powers expansive.⁵⁹

Accordingly, regardless of any difference of approach or understanding that the Attorney-General on the one hand and a jury, on the other, might bring to the legal definition of 'terrorist act', that definition is unlikely to play the same kind of tempering role in the Minister's decision-making as it is in the context of a jury deliberating whether an organisation is terrorist under limb (a) of the s 102.1(1) definition. If the bar is set so low as to allow the Minister to proscribe an organisation on the basis that it praises an act in circumstances where there is a risk that such praise might have the effect of 'leading a person (regardless of his or her age or any mental impairment) ... to engage in a terrorist act',⁶⁰ then that bar barely constitutes a hurdle at all.

Again, there has been, and continues to be, significant academic and political criticism of the executive proscription method.⁶¹

⁵⁷ The Sheller Committee, above n 3, 11, recommends (at Recommendation 10) that limb (a) of the definition of terrorist organisation be removed if the process of proscription is reformed to meet the requirements of administrative law (see the discussion in n 59 below).

⁵⁸ The Sheller Committee, above n 3, 11 also recommended (at Recommendation 9) that paragraph (c) of s 102.1(1A) (the definition of 'advocates' set out above in n 54), be removed.

⁵⁹ The Sheller Committee did recommend a change to the proscription process either: 1. by retaining executive proscription but building into that process a notification method or, 2. by replacing the executive proscription process with a judicial one. In relation to 1. the Committee recommended the adoption of: 'a method for providing a person, or organisation affected, with notification, if it is practicable, that it is proposed to proscribe the organisation and with the right to be heard in opposition. An advisory committee, established by statute, should be appointed to advise the Attorney-General on the case that has been submitted for proscription of an organisation. The Committee would consist of people who are independent of the process, such as those with expertise or experience in security analysis, public affairs, public administration and legal practice. The role of the committee should be publicized, and it should be open to the committee to consult publicly and to receive submissions from members of the public.'

In relation to 2, the judicial proscription process recommended was one made 'on application by the Attorney-General to the Federal Court with media advertisement, service of the application on affected persons and a hearing in open court': Sheller Committee, above n 3, Recommendation 4, 9-10. However, the Parliamentary Joint Committee on Intelligence and Security explicitly stated that it did not look at proscription issues for its December 2006 Report because the Committee itself had general oversight of this matter under the legislation and would be enquiring into it in early 2007: Parliamentary Joint Committee on Intelligence and Security, above n 3, [1.7].

⁶⁰ See paragraph (c) of the s 102.1(1A) definition in n 54 above.

⁶¹ See, as just a few examples, the Gani and Urbas, above n 2, 48-9; Gani, above n 51, 97-8; J Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (Sydney: UNSW Press, 2004) 204-11; Commonwealth, *Parliamentary Debates*, House of Representatives, 3 June 2003, 15774 (Simon Crean, Leader of the Opposition); Sheller Committee, above n 3, Ch 9; and Hogg Chapter 14 in this volume.

E. Financing Terrorism Offences

There are two financing terrorism offences in Division 103 of Part 5.3 of the Criminal Code. Again, this is a Division that has been amended since 2002, particularly as a result of the *Anti-Terrorism Act (No 2) 2005* (Cth), which added the second offence below. The financing terrorism offences are:

- 103.1 — intentionally providing or collecting funds being reckless as to whether the funds will be used to facilitate or engage in a terrorist act (penalty: life imprisonment); and
- 103.2 — intentionally making available to or collecting funds for or on behalf of another person (whether directly or indirectly) being reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act (penalty: life imprisonment).

Once again, the definition of 'terrorist act', as understood and applied by a jury, plays a central part in these offences. As yet, there have been no prosecutions for financing terrorism under this legislation.

II. The Cases of Zak Mallah, Jack Thomas and Faheem Lodhi

As mentioned above, Mallah and Lodhi were charged with 'terrorist act' offences whilst Thomas was prosecuted under two 'terrorist organisation' provisions. In addition to the terrorism offences, Mallah and Thomas were each charged with another, non-terrorist offence: Mallah pleaded guilty to threatening to cause harm to a Commonwealth public official; and Thomas was found guilty of having in his possession a falsified Australian passport.

The coupling of terrorist charges with other lesser offences is a phenomenon that was warned against by early critics of the terrorist offences contained in Part 5.3 of the Criminal Code. It was argued that the existence of these broadly drafted terrorism offences would fulfil a symbolic as well as a somewhat insidious practical role: with a terrorism offence in their back pocket, prosecutors could secure pleas to lesser, more traditional criminal law offences.⁶² In the context of the central thesis of this chapter, it is at least arguable that the difficulties experienced by jury members in conceptualising the terrorist act definition and applying it to the offences that contain it, may also encourage them to convict on the more traditional 'fall-back' charge.

Each of the cases of Mallah, Thomas and Lodhi is analysed in turn.

⁶² See, eg, the submission by Justice John Dowd on the original Bill in 2002 on behalf of the International Commission of Jurists in the Report of the Senate Legal and Constitutional Legislation Committee, Parliament of the Commonwealth of Australia, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (2002)* 38.

A. Zak Mallah

The first prosecution under the 'terrorist act' offences was that of Zak Mallah who was arrested and charged in December 2003. The charges he eventually faced involved two counts under s 101.6 — doing an act in preparation for or planning a terrorist act (which carries a penalty of life imprisonment)⁶³ and threatening to cause harm to a Commonwealth public official under s 147.2 of the Criminal Code (which carries a penalty of two years' imprisonment).⁶⁴ He

⁶³ The provision as it read at the time that Mallah was charged (note the discussion of the subsequent changes to sub-s (2), above in the text at n 18) is as follows:

Section 101.6 Other acts done in preparation for, or planning, terrorist acts

(1) A person commits an offence if the person does any act in preparation for, or planning, a terrorist act.

Penalty: Imprisonment for life.

(2) A person commits an offence under subsection (1) even if the terrorist act does not occur.

(3) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against subsection (1).

⁶⁴ Section 147.2(2) Threatening to cause harm

(2) A person (the *first person*) is guilty of an offence if:

(a) the first person makes to another person (the *second person*) a threat to cause harm to the second person or to a third person; and

(b) the second person or the third person is a public official; and

(c) the first person:

(i) intends the second person to fear that the threat will be carried out; or

(ii) is reckless as to causing the second person to fear that the threat will be carried out; and

(d) the first person makes the threat because of:

(i) the official's status as a public official; or

(ii) any conduct engaged in by the official in the official's capacity as a public official; and

(e) the official is a Commonwealth public official; and

(f) if subparagraph (d)(i) applies—the status mentioned in that subparagraph was status as a Commonwealth public official; and

(g) if subparagraph (d)(ii) applies—the conduct mentioned in that subparagraph was engaged in by the official in the official's capacity as a Commonwealth public official.

Penalty: Imprisonment for 2 years

(2A) Absolute liability applies to the paragraphs (2)(e), (f) and (g) elements of the offence.

The charge as set out in the ruling of Wood CJ at CL (on pre-trial issues relating to the admissibility of evidence) in *R v Mallah* [2005] NSWSC 358 (Unreported, 11 February 2005) [1] was that the accused: 'Between about 28 November 2003 and 3 December 2003 at Sydney in the State of New South Wales:

(a) made to another person, namely, to undercover officer using an assumed name 'Greg' (the second person) a threat to cause serious harm to a third person, namely, he threatened to kill unidentified officers of the Department of Foreign Affairs and Trade or the Australian Security Intelligence Organisation; and

(b) the third person is a public official; and

(c) he was reckless as to causing the second person to fear that the threat will be carried out; and

(d) he made the threat because of the official's status as a public official; and

(e) the official is a Commonwealth public official.'

was acquitted on both counts of the terrorist act offence and pleaded guilty to the non-terrorism offence (see below). The terrorist act alleged in relation to both the s 101.6 counts (and also the threat alleged under s 147.2) was that Mallah threatened to kill officers of ASIO or the Department of Foreign Affairs and Trade (DFAT). The particular acts charged as the preparatory or planning acts for the purposes of s 101.6 were buying a rifle and selling a videotape, photographs and a three-page typed statement to an undercover police officer.

1. Facts of the Case

The facts of the case are relatively straightforward.⁶⁵ Mallah had been refused an Australian passport on the grounds that he was likely to engage in conduct that might prejudice the security of Australia or of a foreign country (he was interviewed by ASIO officers and during that interview he told those officers that he could not rule out joining a jihad). He was very upset as a result of his application being refused and began behaving erratically and appearing on television and radio making provocative statements. He purchased a rifle and ammunition and the police became aware of this. They executed a search warrant and:

The rifle and ammunition were found along with a number of documents, including a handwritten will, a printed document 'How can I prepare myself for Jihad', a handwritten letter which appears to have been a message to ASIO, and a typed manifesto setting out his grievances and identifying ASIO as his target, as well as a copy of a job application and supporting documents which he had sent to ASIO.⁶⁶

Mallah was arrested and charged with firearms offences for which he was fined. The trial attracted more media attention and he appeared on various television shows and was also interviewed by various newspapers (including *The Australian*). In the course of these numerous interviews he

showed, or sold, to the journalists copies of some of the documents which police had earlier seized, as well as some photographs of himself in dramatic poses, holding a knife, and wearing the kind of garb which, it seems, he considered appropriate for a would-be terrorist or suicide bomber. It is also evident that he made it known that he had made a videotape which, amongst other things, included recitations from the Koran, images of himself, and a recitation of what purportedly was to be his last message to the world.⁶⁷

As a result of this behaviour, New South Wales Counter-Terrorist Coordination Command undertook an undercover operation to see if Mallah was in fact

⁶⁵ The facts are set out in *R v Mallah* [2005] NSWSC 317 (Unreported, Wood CJ at CL, 21 April 2005) [3]-[27].

⁶⁶ *Ibid* [11].

⁶⁷ *Ibid* [14].

planning a terrorist related offence. An operative 'Greg' posed as a freelance journalist who wanted to write a story on Mallah. He made phone contact and met several times with Mallah over a period of days. They negotiated a price of \$3000 for the videotape and photos and other items that related to a seige he said he was planning of an ASIO or DFAT building during which he planned to take and kill hostages. It appears that Mallah also expected to be shot and killed by police during the seige.

At trial, Mallah pleaded guilty to the s 147.2 offence (which had been an offence under the Criminal Code since well before the enactment of the terrorism provisions).⁶⁸ The jury acquitted him of both counts of the s 101.6 offence. Mallah was sentenced to two years six months with release to be subject to entering a good behaviour bond with conditions attached.⁶⁹

2. Case Analysis

The jury's acquittal of Mallah in relation to the terrorism offences means, of course, that the prosecution did not prove beyond reasonable doubt all the elements of the offence in relation to either s 101.6 count. The defence had argued that there was no genuine plan for a terrorist act — Mallah was not in fact planning to kill ASIO or DFAT officers but was just talking nonsense and stringing 'Greg' along in order to make money and get some publicity. In relation to the intentions that must be shown for there to be a 'terrorist act', the issue was whether, if Mallah did have such a plan to kill government officers, he meant to advance a political, religious or ideological cause in pursuing it 'as distinct from some purely personal cause either to secure a passport, or to exact revenge on ASIO or DFAT for obstructing its issue, or to gain publicity for himself'.⁷⁰ Additionally, the defence argument was that, if there was a genuine plan to kill, Mallah did not mean by its implementation to coerce or influence by intimidation the government of the Commonwealth to alter its policies or to do something that it would not otherwise have done. Again, his motivation was merely to pursue a personal vendetta against ASIO and/or DFAT.

Effectively, in order to show the physical and fault elements of the offence,⁷¹ the prosecution needed to establish that Mallah meant to do an act as part of a genuine plan to commit a terrorist act. The jury did not accept this.

⁶⁸ The offence was inserted into the Criminal Code as a result of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth).

⁶⁹ *R v Mallah* [2005] NSWSC 317 (Unreported, Wood CJ at CL, 21 April 2005) [88]-[90]. Mallah was, in fact, released in October 2005 — his sentence effectively being increased by six weeks after he assaulted a prison officer in May 2005.

⁷⁰ *Ibid* [22].

⁷¹ The fault element of s 101.6, by virtue of the default fault element provision of the Criminal Code (s 5.6), is that the accused *intentionally* engaged in the prohibited conduct (here 'doing any act in preparation for or planning a terrorist act'). Under s 5.2(1) a person has intention with respect to conduct if he or she 'means to engage in that conduct'.

In response to Mallah's acquittal on the terrorism offence, the Attorney-General expressed disappointment and stated, through a spokeswoman, that he would see whether the verdict 'exposed any technical difficulties in the law'.⁷² The Anti-Terrorism Acts of 2005 (particularly Act No 1) contained measures that were designed to 'clarify' (effectively broaden the ambit of) the terrorism offences.⁷³ Crucially, though, there was no revisiting of the actual definition of 'terrorist act' contained in s 100.1 of the Criminal Code.

B. Jack Thomas

Jack Thomas was arrested in November 2004 and, like Mallah, was charged with both terrorism and non-terrorism related offences.⁷⁴ In the former category, he was charged under s 102.6(1)⁷⁵ of the Criminal Code with intentionally receiving funds from a terrorist organisation (Al Qa'ida — which has been a proscribed organisation since 2002) knowing it was a terrorist organisation. He was also charged under s 102.7(1)⁷⁶ of the Code with two counts of intentionally providing resources (himself) to a terrorist organisation that would help it engage in preparing or planning a terrorist act (count one in relation to preparing for a terrorist act overseas and count two in relation to preparing for such an act in Australia) knowing that the organisation to which he was providing resources was a terrorist organisation. In the category of non-terrorism-related offences,

⁷² Quoted in N Wallace and J Kerr, 'Not a Terrorist, Just an Angry Loner Starved of Attention', *Sydney Morning Herald* (Sydney), 7 April 2005, 1.

⁷³ Former Prime Minister of Australia, John Howard, Joint Press Conference with the then Attorney-General, Philip Ruddock, Parliament House, 8 September 2005.

⁷⁴ The charges and facts of the case are clearly set out in *DPP v Thomas* [2006] VSC 120 (Unreported, Cummins J, 31 March 2006) [1]-[5].

⁷⁵ That subsection reads:

Section 102.6 Getting funds to or from a terrorist organisation

(1) A person commits an offence if:

(a) the person intentionally receives funds from, or makes funds available to, an organisation (whether directly or indirectly); and

(b) the organisation is a terrorist organisation; and

(c) the person knows the organisation is a terrorist organisation.

Penalty: Imprisonment for 25 years.

⁷⁶ Section 102.7(1) provides:

(1) A person commits an offence if:

(a) the person intentionally provides to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of *terrorist organisation* in this Division; and

(b) the organisation is a terrorist organisation; and

(c) the person knows the organisation is a terrorist organisation.

Penalty: Imprisonment for 25 years.

Paragraph (a) of the definition of terrorist organisation provides:

Terrorist organisation means (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs).

Thomas was charged under s 9A(1)(e) of the *Passports Act 1938* (Cth) with possessing a falsified passport.

Thomas contested all charges but was ultimately found guilty of the receiving funds and the false passport offences. However, significantly from the point of view of the central thesis of this chapter, he was acquitted by the jury in relation to both counts of providing resources to a terrorist organisation. In March 2006, Thomas was sentenced to five years for receiving funds from Al Qa'ida and one year for the passport offence (sentences to be served concurrently). The non-parole period was set at two years.⁷⁷ Given that the maximum penalty for the s 102.6 offence is imprisonment for 25 years, the sentence was very much at the lower end of those available.

Thomas' case and its aftermath are extraordinary in a number of respects and his story continues to be played out both in the courts and in the public arena. In August 2006, the Supreme Court of Victoria Court of Appeal overturned Thomas' conviction on both the counts set out above on the basis that self-inculpatory statements made by Thomas in the course of interviews with Australian Federal Police (AFP) officers in Pakistan were not voluntarily made and, accordingly, should not have been admitted as evidence in his trial.⁷⁸ Nine days after Thomas' acquittal, he became the first Australian to be made subject to an interim control order,⁷⁹ that set significant limits on Thomas' movements, communications and other freedoms. Thomas has since unsuccessfully attempted to have the control order quashed on the grounds that Division 104 of the Criminal Code is wholly invalid under the *Australian Constitution*.⁸⁰ In addition, criminal proceedings are pending against Thomas in the Victorian Supreme Court. This is as a result of the Supreme Court of Victoria Court of Appeal ordering his retrial in December 2006.⁸¹ The basis for the Court's decision was that admissions by Thomas in a *Four Corners* program on ABC television and in *The Age* newspaper were both voluntarily made and capable of supporting a conviction and, further, that in the circumstances of the case, it would not be unjust to order a retrial.⁸²

1. Facts of the Case

Jack Thomas trained with Al Qa'ida at the Al Farooq training camp in Afghanistan for a period of three months from March to July 2001 (that is before the events of September 11 2001). After a period in Kabul, Thomas went to Pakistan and

⁷⁷ See the sentencing remarks of Cummins J in *DPP v Thomas* [2006] VSC 120 (Unreported, Cummins J, 31 March 2006) [18]-[21].

⁷⁸ *R v Thomas* (2006) 14 VR 475, [94] (Maxwell P, Buchanan and Vincent JJA).

⁷⁹ Under pt 5.3, div 104, sub-div B, s 104.4 of the Criminal Code.

⁸⁰ See the decision of the High Court in *Thomas v Mowbray* [2007] HCA 33 (2 August 2007).

⁸¹ The re-trial was listed to commence in February 2008.

⁸² *R v Thomas* (No 3) (2006) 14 VR 512.

stayed in Al Qa'ida safe houses until he received, from a senior Al Qa'ida operative (Khaled Bin Attash), funds of \$3500, an airline ticket to Australia and a passport that had been falsified (in order that his stay in Pakistan would appear to have been much shorter than it, in fact, was).

Shortly after this, Thomas was arrested by Pakistani authorities and remained in custody in Pakistan (during which he was interrogated by Pakistani and United States (US) operatives and subjected to threats and some physical violence by them)⁸³ until 6 June 2003 when he returned to Australia. Whilst in Pakistani custody, he was also interviewed by officers both of ASIO and the AFP. It was evidence that he gave during an interview with AFP officers in March 2003 that was the subject of the appeal described above.

2. Case Analysis

With respect to the two s 102.7 offences (of which the jury found Thomas not guilty) the prosecution had alleged that Thomas was trusted by Al Qa'ida operatives who saw him as being a believer in their cause. Further, it alleged that he took the money and plane ticket (as well as a phone number and email address through which he could communicate with the organisation when he got back to Australia) because he had agreed to operate as a sleeper cell for Al Qa'ida in Australia. Thomas had argued that he had never pledged allegiance to the organisation, had never offered himself as a resource and had only accepted the ticket and money in order to get home to his family.

Thomas' acquittal on these charges demonstrates that the jury was not convinced beyond a reasonable doubt that Thomas was providing resources (in this case his services as a 'sleeper cell' in Australia) to Al Qa'ida that would help that organisation engage in preparing a terrorist act in Australia or elsewhere.

Once again, it is arguable that the complexities of the definition of 'terrorist act' (which is incorporated into the s 102.7 offence) played a part in his acquittal. In particular, it is arguable that the breadth given to the offence by the tenuous nature of the connection required between the provision of support or resources to a terrorist organisation and the complex concept of a 'terrorist act' gave the jury pause. All that is required for an accused to be liable under this provision is that he or she intentionally⁸⁴ provide to a terrorist organisation support or resources that *would*⁸⁵ (not does) help it engage (*directly or indirectly*) in

⁸³ In his 'Reasons for Ruling Number 3', the trial judge, Cummins J detailed Thomas' description of treatment he had received in custody at the hands of Pakistani and two US operatives and generally accepted its accuracy at [41]. See *DPP v Thomas* [2006] VSC 243 (Unreported, Cummins J, 7 April 2006) [36]-[40].

⁸⁴ This requirement is part of the offence as a result of s 5.6 of the Criminal Code. See above n 71 for an explanation of this provision and a definition of intention.

⁸⁵ It is arguable that this constitutes a circumstance associated with conduct, which would, as a result of s 5.6, require the prosecution to prove that the accused was 'reckless' as to whether their provision

preparing, planning, assisting in or fostering the doing of a terrorist act⁸⁶ (*whether or not a terrorist act occurs*) in the knowledge that the organisation in question is a terrorist one. The doctor who patches up an injured Al Qa'ida operative, knowing who she is dealing with might be caught by this provision and subject to up to 25 years' imprisonment if successfully prosecuted.⁸⁷ Whilst Thomas' situation is clearly more blameworthy than that of any such hypothetical doctor, discomfort with the tenuousness of the link required by the offence, in conjunction with the difficulties of working with the terrorist act definition might incline the jury to require a great deal from the prosecution if it is to convict on this offence. This is especially so when it is returning guilty verdicts in relation to other offences.

C. Faheem Lodhi

At the time of writing, Faheem Lodhi is the only person who has been convicted of a 'terrorist act' offence under the Commonwealth Criminal Code.⁸⁸ Lodhi is currently serving a 20-year sentence (with a minimum non-parole period of 15 years)⁸⁹ in New South Wales as an AA classified inmate (a classification applying to inmates who represent a special risk to national security).⁹⁰ He was originally charged in April 2004 with a variety of 'terrorist act' offences with the prosecution eventually settling on the following:

of support or resources would help the organisation to engage in preparing a terrorist act. Recklessness with respect to circumstances is defined in s 5.4 of the Criminal Code as:

- (1) A person is reckless with respect to a circumstance if:
- (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

Alternatively, if this is characterised as part of the prohibited conduct, the default fault provision of intention might be argued to extend to whether the accused meant to provide support or resources of a kind that would help the terrorist organisation prepare for a terrorist act: see Gani and Urbas, above n 2, 43.

⁸⁶ As defined in s 100.1(2).

⁸⁷ See the hypothetical scenario referred to above in n 34.

⁸⁸ Lodhi's appeal against both his conviction and sentence was dismissed by the NSW Court of Criminal Appeal in December 2007: *Faheem Khalid Lodhi v R* [2007] NSWCCA 360 (Unreported, Spigelman CJ, Barr and Price JJ, 20 December 2007). Lodhi has filed an application for special leave to appeal to the High Court.

⁸⁹ Section 19AG of the *Crimes Act 1914* (Cth) (inserted into that Act as a result of Item 1B of Schedule 1 of the *Anti-Terrorism Act 2004* (Cth)) requires a judge sentencing for terrorism offences to set the single non-parole period at a percentage of at least three-quarters of the sentence. See the sentencing remarks of Whealy J in *R v Lodhi* (2006) 199 FLR 364, [105].

⁹⁰ See Regulation 22 of the *Crimes (Administration of Sentences) Regulation 2001* (NSW) under which AA classified inmates must 'at all times be confined in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment'. Justice Whealy discusses the conditions in which Lodhi had been and was likely to be held, including (effective) 'solitary confinement', in his sentencing remarks in *R v Lodhi* (2006) 199 FLR 364, [79]-[82].

- one count of s 101.4(1) — possessing a thing (in this case a document about how to make bombs) connected with a terrorist act, knowing of such a connection;⁹¹
- two counts of s 101.5(1) — collecting or making documents (collecting maps of the electricity supply system and making aerial photos of Australian Defence Force establishments) connected with terrorist acts, knowing of such a connection;⁹² and
- one count of s 101.6 — doing an act (seeking information about the availability of materials that could be used to make bombs) in preparation or planning a terrorist act.⁹³

Lodhi was found guilty of three of the four charges (he was acquitted by the jury of the second count under s 101.5, in relation to the aerial photos) and was sentenced to 20 years' imprisonment in relation to the most serious offence (s 101.6) and ten years' imprisonment for each of the other offences, with the sentences to be served concurrently.

The prosecution of Lodhi was a lengthy and complex affair raising questions relating to a range of issues, including the form of the indictments, the constitutional validity of the *National Security Information (Criminal & Civil Proceedings) Act 2004* (Cth), the taking of evidence in Pakistan and the retrospective application of s 106.3 of the Criminal Code.⁹⁴ As a result, there were multiple rulings by both the trial judge and the NSW Court of Criminal Appeal. The discussion in the first part of this chapter has already analysed some of these judgments, most importantly the significance of the rulings of both Whealy J and the three judges of the NSW Court of Criminal Appeal in relation to the definition of 'terrorist act'. Both Courts ruled that the 'intention' requirements in the definition of terrorist act (in relation to both advancing a

⁹¹ The relevant provision is: s 101.4 Possessing things connected with terrorist acts:

- (1) A person commits an offence if:
- (a) the person possesses a thing; and
 - (b) the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
 - (c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).

Penalty: Imprisonment for 15 years.

⁹² The relevant provision is: 101.5 Collecting or making documents likely to facilitate terrorist acts

- (1) A person commits an offence if:
- (a) the person collects or makes a document; and
 - (b) the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
 - (c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).

Penalty: Imprisonment for 15 years.

⁹³ See above n 63 in relation to Mallah for the full text of the offence.

⁹⁴ See the text at n 20 above in relation to this issue.

religious, political or ideological cause and coercing or intimidating a government) did not relate to the state of mind of the accused, but rather constituted circumstances attaching to the terrorist act itself. Accordingly, it was not necessary for the prosecution to show that the accused himself held such intentions.⁹⁵ Lodhi's situation was, however, a 'simple' case in this regard, as the discussion below highlights.

1. Facts of the Case

Lodhi worked at a firm of architects in Sydney.⁹⁶ He became involved with Willie Brigitte (a French citizen who had trained with Lashkar-e-Tayyiba⁹⁷ in Pakistan in 2001) when Brigitte came to Australia in May 2003. Lodhi claimed that he had been asked to look after Brigitte by a common acquaintance of the two men: Sajid Mir, whom Lodhi had met at a mosque in Pakistan in 2002 and 2003. The trial judge, Whealy J, found that this association was 'not an innocent one' and that the two men were meeting 'so that, in general terms, the prospect of terrorist actions in Australia could be explored'.⁹⁸ In October 2003, Brigitte was deported back to France after French authorities contacted Australian Intelligence agencies reporting that he had 'substantial links' to terrorism.⁹⁹ Shortly before Brigitte's detention and subsequent deportation, Lodhi obtained a desk map and a wall map of the Australian electricity supply system from Energy Supply giving a false name and contact details. On execution of a search warrant at the firm where Lodhi worked police found a 15-page document in Urdu in Lodhi's handwriting that was described by the prosecution as 'a terrorism manual for the manufacture of homemade poisons, explosives, detonators and incendiary devices'.¹⁰⁰ The document referred to a particular explosive device containing an explosive called urea nitrate. The day after Brigitte was detained, Lodhi sent a fax under the name and address of a fictitious company to a chemical firm and obtained, in response, a price list for various chemicals including urea and nitric acid (the components of urea nitrate).

2. Case Analysis

The trial judge's remarks, at sentencing, reveal several interesting points. First, the evidence against Lodhi demonstrated that his planning of a terrorist act was at a very early stage. As Whealy J states:

⁹⁵ See the text at nn 31-33 above.

⁹⁶ The facts of the case are set out in full by Whealy J in his sentencing remarks: *R v Lodhi* (2006) 199 FLR 364.

⁹⁷ Now a proscribed terrorist organisation under the Criminal Code.

⁹⁸ See the sentencing remarks of Whealy J in *R v Lodhi* (2006) 199 FLR 364, [10].

⁹⁹ Brigitte and Mir have since been convicted of terrorism related offences in France (Mir in absentia).

¹⁰⁰ *R v Lodhi* (2006) 199 FLR 364, [24].

I am perfectly satisfied that the proposal had not reached the stage where the identity of a bomber, the precise area to be bombed or the manner in which the bombing would take place, had been worked out.¹⁰¹

Nevertheless, the offences with which Lodhi was charged target precisely the type of preparatory behaviour undertaken at a very early stage in the planning of a terrorist act. The fault element of knowledge¹⁰² of a connection with a terrorist act (present in both s 101.4(1) and s 101.5(1)) does not require awareness at the time of the prohibited conduct of either a specific or a general terrorist act, nor of a specific target.¹⁰³ Second, Whealy J, emphasised that this was, in fact, what I term a 'simple' case in relation to the definition of 'terrorist act' in the sense that evidence was presented that Lodhi himself held the necessary intentions to advance a religious cause and to coerce the government. Whealy J describes the evidence going to prove such an intention as follows:

There was also found in his possession a significant amount of material which threw considerable light on his intentions in relation to these offences. The material included a CD-Rom which was described, throughout the trial, as the 'jihadi CD'. This was a virtual library containing exhortations to violent jihad, justifications for suicide bombings (called 'martyrdom' in the text of the material), and which extolled the virtues of those who had given their lives to the murder of innocent civilians and others in the name of extremist Islam. Much of the material exhorted the reader or listener to follow, or at least support violent jihad. In addition to this CD, there were two volumes of the *Lion of Allah*, other material and [a] Chechnyan videocassette glorifying those who had given their lives in the fight between Chechnya and Russia.¹⁰⁴

He further found that:

all this material makes it clear that the offender is a person who has, in recent years, been essentially informed by the concept of violent jihad and the glorification of Muslim heroes who have fought and died for jihad, either in a local or broader context. The material is eloquent as to the ideas and emotions that must have been foremost in the offender's mind throughout October 2003 and later, at least until the time of his arrest.¹⁰⁵

Such evidence together with evidence of Lodhi's association with Brigitte and Mir was clearly sufficient to convince the jury that Lodhi's conduct was undertaken with the intention to advance the cause of violent jihad and to coerce

¹⁰¹ Ibid [26].

¹⁰² Under s 5.3 of the Criminal Code a person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

¹⁰³ *R v Lodhi* [2006] NSWSC 584 (Unreported, Whealy J, 14 February 2006) [82]-[83].

¹⁰⁴ *R v Lodhi* (2006) 199 FLR 364, [18].

¹⁰⁵ Ibid [20].

the Australian government and/or intimidate the public.¹⁰⁶ If the complexity of the definition of 'terrorist act' serves as a break on convictions in relation to less blameworthy cases, as I argue, nevertheless in 'simple' cases, where evidence going to the state of mind of the accused is powerful, a jury will infer intention in relation to the 'terrorist act' definition even when the offence relates to very preparatory behaviour.

III. Conclusion

It is indisputable that the definition of 'terrorist act' in Part 5.3 of the Criminal Code plays a crucial role in the operation of anti-terrorism offences in Australia. Indeed, this fact was the subject of specific comment in the 2006 Review of Security and Counter Terrorism Legislation:

The Sheller Committee recognised that the definition of a 'terrorist act' is pivotal within this overall scheme. Any change to the definition will influence the scope of offences and powers afforded to the Commonwealth law enforcement and intelligence agencies.¹⁰⁷

The influence of the definition on the scope of these offences has been the subject of this chapter. My central argument has been that whilst the definition of 'terrorist act' in the Criminal Code is complex, unwieldy and apparently very expansive, it may, in what I have called 'simple' cases, have the somewhat perverse effect of confining the operation of broadly-drafted offences. The definition has not yet been tested by a 'difficult' case — although the judgment in *R v Lodhi* foreshadows that it may not play the same moderating role where a very peripheral player is linked to a clear case of terrorism.

By contrast, where prosecutions do not rely on a jury working with the 'terrorist act' definition, convictions will be easier to secure. In particular, this will be the case where the charges relate to terrorist organisation offences and the organisation has already been proscribed by the Attorney-General (as opposed to being found to be a terrorist organisation in the course of a trial). Accordingly, the least defensible form of terrorist offences (status offences in relation to executively proscribed organisations) may become the primary basis for prosecutions. This would be a worrying development. Reform of the proscription process,¹⁰⁸ is urgently required.

Re-working of the 'terrorist act' definition is a more delicate prospect. As has been demonstrated, any change to that definition would have widespread consequences for the operation of all the offences into which it is incorporated.

¹⁰⁶ See Whealy J's further remarks in *R v Lodhi* (2006) 199 FLR 364, [33].

¹⁰⁷ Parliamentary Joint Committee on Intelligence and Security, above n 3, [5.11].

¹⁰⁸ The Sheller Committee recommends a series of reforms of the proscription process to meet the requirements of administrative law in the *Report of the Security Legislation Review Committee*, above n 3, 9ff, ch 9.

Indeed, whilst its simplification is desirable, the preservation of its tempering effects must be ensured. What is even more important, however, is that the substantive offences relating to terrorist acts, including their capacity to encompass (and disproportionately punish) marginal players and inchoate or very preparatory conduct be re-visited.