

*David Thomae**

KEEPING THE PEACE OF THE REALM

BY SAMUEL WHITE

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Justice John Logan's foreword of Samuel White's book, *Keeping the Peace of the Realm*, is in his inimitable style when he declares '[t]he role of the military is to kill the Queen's enemies. The role of the police is to maintain the Queen's peace.'¹ Thus, Justice Logan eloquently frames an important debate on the role of the military and its legal authority to operate domestically in circumstances short of war.

White's treatise on this topic is timely. We are coming out of almost three years of a once in a century pandemic, where the jurisprudential tension in Australia's federated constitutional democracy has strained the social cohesion of our country.² The impacts of climate change on the scale of natural disasters affecting Australia have seen the Australian Defence Force ('ADF') being used to support state and territory governments at a level never seen or contemplated.³ During the 2019–20 bushfires, the Commonwealth Government used their powers under s 28 of the *Defence Act 1903* (Cth) ('*Defence Act*') to call out, for the first time in our history, 3,000 ADF

* AM, BA (UNSW), MBA (USQ), LLB (QUT), GDLP (ANU), MIR (UQ). Major General, Australian Army; Commander, 2nd Division and Commander, Joint Task Force 629 (charged with coordinating the Australian Defence Force response to domestic operations).

¹ Justice JA Logan, 'Foreword' in Samuel White, *Keeping the Peace of the Realm* (LexisNexis, 2021) v, v.

² See generally Scott Stephenson, 'The Relationship between Federalism and Rights during COVID-19' (2021) 32(3) *Public Law Review* 222.

³ See: Chris Barrie, 'Climate Change, Security and the Australian Defence Force' (2016) 67(2) *United Service* 13, 15–16; Zoe Lippis, 'The *Defence Act 1903* (Cth): A Guide for Responding to Australia's Large-Scale Domestic Emergencies' (2022) 45(2) *Melbourne University Law Review* 596, 599; Josh Butler and Daniel Hurst, "'Near Persistent" Natural Disasters Placing Intense Pressure on Australian Defence Force', *The Guardian* (online, 19 September 2022) <<https://www.theguardian.com/australia-news/2022/sep/19/near-persistent-natural-disasters-placing-intense-pressure-on-australian-defence-force>>.

reservists for the conduct of domestic operations.⁴ During the COVID-19 pandemic, the ADF was called upon to provide a myriad of domestic operations support tasks including assisting the state police for state and territory border controls, biosecurity control checkpoints, quarantine compliance management, contact tracing, and even supporting the aged care sector.⁵ These tasks are not usually contemplated or within the scope of ADF capabilities, but a disciplined and professional ADF pivoted and carried them out with great empathy and humility.

The use of the ADF to do more than supporting the response to natural disasters in a domestic setting is more controversial. Armed soldiers in the streets of Australian cities have not been part of the contemporary Australian experience and would likely prompt vigorous political and community debate on the suitability of the ADF for the task — where police agencies have primacy for maintaining law and order and keeping ‘the King’s Peace’.⁶ However, the geo-strategic circumstances of Australia have deteriorated to the extent that we find ourselves in a complex and potentially dangerous inflection point as serious as at any time since federation.⁷ The *2020 Defence Strategic Update*⁸ posited that the great power competition between the United States and China is challenging the stability of the post-World War II liberal rules-based order — where China’s determination to achieve greater influence in the Indo-Pacific has the potential to undermine the stability of the region.⁹ So called ‘grey-zone’ activities by nation-States challenge the orthodoxy of the distinction between ‘peace’ and ‘war’, blurring the lines to create legal and social challenges based on the premise that it is clear who a nation’s adversary is.¹⁰ The use of grey-zone methods such as non-attributable activities subverting democracy, actions across the cyber domain, economic pressure, and militarisation of infrastructure are examples of coercive statecraft below the threshold of military conflict.¹¹

Keeping the Peace of the Realm is a timely examination of the legal complexities in the use of the ADF domestically, in circumstances short of a declared war. Sam prompts a scholarly debate on the sources of power to use the military in a constitutional federal democracy, with the inherent tension contained in s 119 of the

⁴ Cf *Royal Commission into National Natural Disaster Arrangements* (Report, 28 October 2020) 189–90. See also Lippis (n 3) 603–4.

⁵ Linda Reynolds, ‘Expansion of ADF Support to COVID-19 Assist’ (Media Release, Department of Defence, 1 April 2020); Linda Reynolds, ‘Defence Provides Additional Assistance in Response to COVID-19’ (Media Release, Department of Defence, 23 March 2020). See also Lippis (n 3) 608.

⁶ TA Critchley, *A History of Police in England and Wales* (Constable, rev ed, 1978) 5. See also W Paul, ‘The King’s Peace’ (1927) 1(5) *Australian Law Journal* 131, 131–2.

⁷ See generally John Blaxland, ‘A Geostrategic SWOT Analysis for Australia’ (Discussion Paper No 49, Strategic & Defence Studies Centre, Australian National University, June 2019).

⁸ Department of Defence, *2020 Defence Strategic Update* (Report, 1 July 2020).

⁹ *Ibid* 11 [1.2]–[1.3], 14 [1.12].

¹⁰ *Ibid* 12 [1.5].

¹¹ *Ibid*.

Constitution, which provides for the Commonwealth to ‘protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence’.¹²

Chapter 1 frames the issues, emphasising the importance of pt IIIAAA of the *Defence Act* as the statutory power to use the ADF domestically and addressing the ambiguity surrounding the definition of ‘domestic violence’ — arising from the term’s use in both the *Constitution* and the *Defence Act*.¹³ Additionally, the ‘internal security prerogative’ is introduced as the focus of the book, to examine the use of the ADF beyond their requirements of responding to natural disasters and beneath the domestic violence threshold contained in the *Constitution*.¹⁴

Chapter 2 examines the Commonwealth executive power, derived primarily from s 61 of the *Constitution*. In doing so, White critically analyses the use of executive power for the purposes of using the military in domestic operations and describes the common law rights that act to limit a broad interpretation of the ‘breadth and depth’ of the application of s 61 including:¹⁵ (1) bodily integrity; (2) freedom from false imprisonment; and (3) protection of one’s property.¹⁶ In circumstances where common law rights could easily be infringed by the ADF when carrying out tasks for domestic operations, the statement made by Gibbs CJ is noteworthy: ‘It is fundamental to our legal system that the executive has no power to authorize a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer.’¹⁷ This offers a stark reminder to ADF members of the critical importance of understanding the legal authority behind their actions, particularly in domestic operations where the interplay between Commonwealth and state jurisdictions may create tension. The increasing technological capacity of the ADF in the electronic spectrum, space and intelligence, surveillance, and reconnaissance capabilities,¹⁸ requires careful consideration of the legal authorities regarding domestic operations.

This is followed by Chapter 3, which provides a discussion on other sources of power for the operation of the ADF domestically. The Crown’s prerogative powers of ‘command and control’,¹⁹ ‘war’²⁰ and ‘internal security’²¹ are succinctly described and countervailing views of their applicability and breadth are examined.

¹² See Samuel White, *Keeping the Peace of the Realm* (LexisNexis, 2021) 2–4 [1.4]–[1.7].

¹³ *Ibid* 2 [1.5].

¹⁴ *Ibid* 5 [1.13].

¹⁵ *Ibid* 13 [2.7].

¹⁶ *Ibid* 15–16 [2.13]. See generally at 13–16 [2.7]–[2.15].

¹⁷ *A v Hayden* (1984) 156 CLR 532, 540, quoted in *ibid* 15 [2.12].

¹⁸ See White (n 12) 15–16 [2.13]. See generally: 2020 *Defence Strategic Update* (n 8) 36 [3.9]–[3.12]; Department of Defence, *Shaping Defence Science and Technology in the Intelligence Domain 2016–2026* (Domain Strategy, September 2017).

¹⁹ See White (n 12) 37–8 [3.15]–[3.20].

²⁰ See *ibid* 34–6 [3.5]–[3.14].

²¹ See *ibid* 39–42 [3.21]–[3.33].

Chapter 4 brings the previous chapter's analysis of the Crown's prerogatives to Australia's federal constitutional construct, with a particular emphasis on a comparison to the definition of 'domestic violence' within the *United States Constitution*.²² To assist in determining whether the 'internal security prerogative has fallen into desuetude', White helpfully discusses historical examples of the use of prerogative powers to authorise the employment of the ADF.²³ This includes: the 1949 Coalminer's Strike;²⁴ suppression of secessionist movements in the Territory of New Guinea in 1970;²⁵ the call-out of the ADF at Bowral for the Commonwealth Heads of Government Meeting ('CHOGM') following the Hilton Bombing;²⁶ and both the 2002 CHOGM and 2003 visit to Australia by the United States President, where Royal Australian Air Force fighter jets were authorised to shoot down civilian aircraft, if they endangered these head of state visits.²⁷ White concludes that the Commonwealth has used the internal security prerogative historically to authorise the use of the ADF domestically.²⁸

Chapters 5 and 6 provide a detailed analysis of the internal security prerogative and the nationhood power, including whether they have been abridged by pt IIIAAA of the *Defence Act* and are no longer available to be exercised by the Commonwealth. White first concludes that the internal security prerogative has been abridged, but only in respect to the use of the ADF against domestic violence.²⁹ In terms of the nationhood power, White concludes that the abridgement does not affect the exercise of that power for a proper purpose.³⁰ These chapters are the crux of the issue examined by this book and provide a balanced analysis of the countervailing views of jurisprudence that have not yet been tested. When looked at in the context of Australia's geo-strategic environment, one is left with some doubt as to the legal clarity required for the ADF to be authorised to operate against grey-zone activities in a domestic setting.

Chapter 7 concludes by summarising the critical issue of where the Commonwealth's lawful authority to use the ADF domestically is derived from, highlighting the ambiguity that exists and discussing a potential roadmap to enact legislation to provide clarity. That clarity is needed in the current circumstances that Australia faces, and as the *2020 Defence Strategic Update* posits, the timeline for crisis and conflict can no longer be expected to be drawn out over a decade, bringing urgency

²² *United States Constitution* art IV § 4.

²³ White (n 12) 74 [4.63]–[4.64].

²⁴ See *ibid* 74–5 [4.65]–[4.67].

²⁵ See *ibid* 75–6 [4.68]–[4.71].

²⁶ See *ibid* 76–8 [4.72]–[4.77].

²⁷ See *ibid* 78 [4.78]–[4.79].

²⁸ *Ibid* 80 [4.85].

²⁹ *Ibid* 104 [5.79].

³⁰ *Ibid* 119–20 [6.50]–[6.51].

to the need for the Commonwealth to examine whether the current legal framework is fit for this purpose.³¹

Keeping the Peace of the Realm is essential reading for all involved in the integration and employment of the ADF on domestic operations in Australia. The increased use of the ADF for a broad spectrum of domestic operations and Australia's strategic circumstances provide an impetus for a better understanding of the constraints on the Commonwealth's legal authority to use the ADF domestically. The book is an excellent balance between the scholarly and the practical, and is readily accessible to laypersons who wish to understand the central issues of the book.

³¹ 2020 *Defence Strategic Update* (n 8) 14 [1.13].