PREVENTING JUSTICE?
A PRINCIPLED APPROACH TO THE COMMONWEALTH
CONTROL ORDER REGIME

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This article analyses the four principles of counter-terrorism preventive justice that United Kingdom academics Andrew Ashworth and Lucia Zedner recommended in their seminal 2014 book, Preventive Justice. It then applies the principles to the specific context of the Commonwealth’s counter-terrorism control order legislation to analyse how the principles would operate in practice. This article concludes that the principles are, on the whole, an effective and necessary means of limiting the powers of the state and correcting the imbalance between the competing interests of national security and human rights. However, amendments are needed to enhance the clarity of the principles and make them appropriate for an Australian context. The conclusion of this article recommends four reformulated principles that should be incorporated into the foundations of the Commonwealth control order regime by the legislature.

I  INTRODUCTION

The term ‘preventive justice’ encapsulates all situations where a state restricts or deprives an individual’s liberty in the absence of the commission of a criminal offence. This includes, for example, situations where a contagious individual is quarantined, where illegal immigrants are detained before deportation, and where individuals are placed under strict controls in an attempt to prevent the commission of terrorist activity.

Instances of preventive justice sit outside the criminal justice system. Accordingly, the individual whose liberty is being restricted or deprived lacks the protections that are afforded to other individuals who are charged with a

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1 Student at the University of Western Australia. This article is based on my thesis that was submitted in partial fulfilment of the requirements for the degree of Bachelor of Laws with Honours. Thank you to Dr Tamara Tulich for her generous supervision.

2 Andrew Ashworth and Lucia Zedner, Preventive Justice (Oxford University Press, 2014) 1-2, 5-7, 21.

3 Andrew Ashworth and Lucia Zedner, Preventive Justice (Oxford University Press, 2014) 2-4, 21.

criminal offence. Additionally, whilst states may have noble intentions in situations of preventive justice, the limits of their powers are haphazard and imprecise. This has enabled states to introduce liberty-restricting legislation with alarming breadth and unintended consequences.

In recognition of this, academics Andrew Ashworth and Lucia Zedner developed ‘principles of preventive justice’ that seek to restrain the powers of the United Kingdom (UK) executive in preventive justice contexts, and simultaneously champion citizens’ rights and liberties. Ashworth and Zedner also devised four principles tailored to instances of counter-terrorism preventive justice. It was intended that these principles would be incorporated into the foundations of all UK preventive justice legislation, thereby limiting the actions of the executive and providing the judiciary with an additional means of safeguarding liberty. Ashworth and Zedner’s principles, published in 2014, represent the first attempt of academics to devise principles for all preventive justice contexts, and represent remarkable progress in correcting the imbalance between state power and civil liberties. However, the principles have not been analysed or critiqued, and have not been applied to situations of preventive justice outside the UK. This article goes some way to fill that gap in the literature.

This article critiques Ashworth and Zedner’s four counter-terrorism principles and applies them to a specific instance of Australian preventive justice – namely, the Commonwealth control order (CO) regime. COs allow specified courts to restrict the movement and actions of individuals to protect

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6 Such protections include the right to a fair and timely trial in open court, the right to know the evidence and confront witnesses, the right to legal advice and aid, and confidentiality in communication with lawyers. It also means that facts must be proved on the balance of probabilities (a lower standard than the criminal standard of beyond reasonable doubt): Andrew Ashworth and Lucia Zedner, Preventive Justice (Oxford University Press, 2014) 189; Carol Steiker, 'The Limits of the Preventive State' (1998) 88 Journal of Criminal Law and Criminology 771, 777-778, 806. This is especially prevalent in the counter-terrorism space: see Ashworth and Zender at 172; Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, Assessing Damage, Urging Action (International Commission of Jurists, 2009) 1; Susan Donkin, Preventing Terrorism and Controlling Risk – A Comparative Analysis of Control Orders in the UK and Australia (Springer Briefs in Criminology, 2014) 60.


8 Andrew Ashworth and Lucia Zedner, Preventive Justice (Oxford University Press, 2014) 195.

9 Andrew Ashworth and Lucia Zedner, Preventive Justice (Oxford University Press, 2014) 266.
the public from a terrorist act, or to prevent the provision of support for or facilitation of a terrorist act or hostile activity.\textsuperscript{10} Controlees need not be charged, convicted or even suspected of committing a criminal offence.\textsuperscript{11} The process is not attenuated by the safeguards of the criminal law.\textsuperscript{12}

Part II of this article expands on the above introduction to preventive justice and COs. It also advances the discussion of the purpose and importance of Ashworth and Zedner’s counter-terrorism preventive justice principles. Parts III to VI analyse each of the principles recommended by Ashworth and Zedner. The first requires counter-terrorism measures to be necessary and proportionate to the value gained. The second provides that measures taken should be a last resort and the least restrictive that are consistent with the preventive justice purpose. The third principle requires sufficient substantiating evidence, an avoidance of fallible secret intelligence. The final principle concerns the right to a fair trial.

This article seeks to identify the strengths and weaknesses of Ashworth and Zedner’s principles as they are applied to an Australian context with the ultimate purpose of recommending four reformulated principles that should underpin the Commonwealth CO regime. The four principles that this article recommends are adapted to the Commonwealth legal system and minimise the ambiguities inherent in several of Ashworth and Zedner’s principles. The purpose of these reformulated principles is to prompt and guide the legislature to implement much-needed changes to the Commonwealth CO legislation.

II  PREVENTIVE JUSTICE AND THE COMMONWEALTH CONTROL ORDER REGIME

A  Preventive Justice

The first recorded use of the term ‘preventive justice’ dates back to 1769, when Sir William Blackstone used it to describe measures implemented by a state that

\[\text{\textsuperscript{10} Criminal Code Act 1995 (Cth) (Criminal Code) s 104.4(d).} \]
\[\text{\textsuperscript{11} Criminal Code Act s 104.4; Thomas v Mowbray (2007) 233 CLR 307, 432 [357] (Kirby J).} \]
are designed to prevent future offences.\textsuperscript{13} Many years later, Carol Steiker wrote that within the criminal justice system, states are prevented from restricting liberty except in clearly defined circumstances after due processes have been followed.\textsuperscript{14} In contrast, Steiker argued, it is unclear what constitutional and policy limits are placed on states when they restrain liberty for non-punitive, preventive purposes. \textsuperscript{15} Steiker questioned what limits should be placed on states in this context, but did not seek to define them.\textsuperscript{16} There have since been numerous contributions by academics towards defining the limits of the ‘preventive state’ envisaged by Steiker.\textsuperscript{17} The concept gained notable traction in the wake of the September 11 attacks in 2001, with scholars focusing particularly on prevention in anti-terrorism endeavours by states.\textsuperscript{18}


Andrew Ashworth and Lucia Zedner are at the forefront of this trend. Their 2014 text, *Preventive Justice*, is a valuable contribution to the literature on preventive justice, and is particularly useful for its practical suggestions for lawmaking. Ashworth and Zedner defined ‘preventive justice’ as encapsulating all situations where a state seeks to restrict or deprive an individual’s liberty for any coercive, preventive purpose – be it punitive or not. This definition of preventive justice (the definition which this article adopts) includes situations where a mentally ill individual is hospitalised and where a person is stopped and searched on the street for suspicious activity. Given these situations operate outside the well-established criminal law sphere, persons the subject of preventive justice lack the protections that would be afforded to them had they committed a criminal offence. These protections include the right to a fair and timely trial in open court, the right to know the evidence against them and confront witnesses, the right to legal advice and aid, and confidentiality in communication with their lawyers.

The primary objective of Ashworth and Zedner’s study was to develop principles and values to guide and limit the UK executive’s use of preventive


19 Andrew Ashworth is an Emeritus Professor at the University of Oxford Faculty of Law. He has obtained an LL.B. from the London School of Economics, a B.C.L from Oxford, and Ph.D from Manchester University. His research focuses primarily on sentencing, criminal law and criminal justice. In addition to numerous journal articles and book chapters, he has published 22 books since 2001. For a full list and biography, see University of Oxford Faculty of Law, Andrew Ashworth (2015) University of Oxford <http://www.law.ox.ac.uk/people/profile.php?who=ashwortha>. Lucia Zedner is a Professor of Criminal Justice, Law Fellow at Corpus Christi College, Oxford and a Member of the Centre for Criminology, University of Oxford. She has studied at the University of Oxford, and was a Prize Research Fellow at Nuffield College Oxford. She has been a lecturer at the London School of Economics and has served on the editorial boards of journals including the Criminal Law Review, Punishment and Society, International Journal of Criminal Law Education, Australian and New Zealand Journal of Criminology, and the Oxford Comparative Law Forum. For a full list and biography, see University of Oxford Faculty of Law, Lucia Zedner (2014) University of Oxford <http://www.law.ox.ac.uk/people/profile.php?who=zednerl>.


techniques that involve coercion. Principles specific to counter-terrorism were devised because ‘[c]ounterterrorism measures give rise to some of the most coercive instances of prevention and, as such, constitute some of the greatest justificatory challenges’. Four principles were recommended by Ashworth and Zedner to restrain the state’s powers in counter-terrorism preventive justice contexts:

(i) The necessity principle, that any restriction of, or deprivation of, liberty must be necessary for the prevention of terrorist activity, and should continue for no longer than is absolutely necessary for that purpose.

(ii) The principle of the least restrictive appropriate means, that any restrictions on liberty must be a last resort and the least intrusive that are consistent with the preventive purpose.

(iii) The principle of sufficient substantiating evidence, requiring a high standard of proof (beyond reasonable doubt) and avoiding the use of fallible secret intelligence.

(iv) The right to a fair trial, including the principles of openness, transparency, and accountability, in terms of the right to know upon what grounds the measure is needed, open access to evidence, rights of challenge and appeal, legal assistance to do so, and a presumption in favour of open hearings. Use of secret evidence in closed material proceedings and other limitations on disclosure should be permitted only where they constitute the least restrictive means to further a compelling government interest, and special advocates should be used only where the grounds of national security are overwhelming.

These principles provide a set of minimum protections afforded to individuals in the counter-terrorism space, and simultaneously act as restrictions on what states may do and when. These minimum protections can and should be used to guide the legislature to implement changes to counter-terrorism regimes that do not provide for these minimum protections.

The analysis, constructive critique and suggestions for reform of Ashworth and Zedner’s principles are important for a number of reasons. First, the principles are a means of ensuring that the Commonwealth executive respects

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24 Andrew Ashworth and Lucia Zedner, Preventive Justice (Oxford University Press, 2014) 1.
25 Andrew Ashworth and Lucia Zedner, Preventive Justice (Oxford University Press, 2014) 172.
26 Andrew Ashworth and Lucia Zedner, Preventive Justice (Oxford University Press, 2014) 195. At 195, the authors also suggest adhering to a principle of proper usage to prevent legal powers intended for one purpose being used for another, but this did not form part of their core recommendations.
27 Andrew Ashworth and Lucia Zedner, Preventive Justice (Oxford University Press, 2014) 24. In effect, the protections also act as restrictions on the state. A state cannot, for example, restrain or deprive an individual’s liberty until that individual has been afforded a fair trial.
liberty, even when it exercises its duty to protect the public. This is especially important given there is no Bill of Rights or Human Rights Act applicable at a Commonwealth level, and given established principles of human rights and liberty do not feature prominently in Australia’s anti-terrorism discourse. Secondly, COs are migrating to other fields of preventive justice beyond counter-terrorism. The Commonwealth executive’s powers need to be defined before this trend intensifies. Thirdly, the principles will provide a greater degree of guidance and predictability for policy-makers and individuals concerned about civil liberties. Finally, the critique is intended to enable a more productive analysis of what limits should be placed on states when competing interests are at play.

B The Commonwealth Control Order Regime

1 Brief History

The Commonwealth CO regime is one small but significant part of a comprehensive suite of counter-terrorism laws. The events of September 11 and Security Council Resolution 1373 created a powerful imperative for the Howard government to enhance national security. Despite facing similar or less material threats than its Allies, the Commonwealth responded by passing over 60 Acts through Parliament, surpassing the number of anti-terror laws in


31 Security Council Resolution 1373 condemned 9/11 and declared that all states shall take all necessary steps to prevent the commission and facilitation of terrorist acts: SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1373 (28 September 2001).

the UK, United States (US) and Canada. They were hurriedly introduced in Australia in 2005 by the Anti-Terrorism Act (No. 2) 2005 (Cth). Given only one month to pass through Parliament, the Senate Legal and Constitutional Legislation Committee fast-tracked its inquiry procedure. One consequence of the hastened process was a lack of considered debate on the extent to which it was appropriate to import COs from the UK.

In 2012, the UK repealed all CO legislation in response to a 2010 Counter-Terrorism and Security Powers Review and a finding by the Joint Committee on Human Rights that COs were out of all proportion to the supposed public benefit, and resulted in ‘unnecessary breaches of individuals’ rights to liberty and due process’. COs in the UK have been replaced with Terrorism Prevention and Investigation Measures (TPIMs). They appear to continue to impose significant restrictions upon individuals who have not been charged with a criminal offence. Meanwhile, the Australian government has

**Telecommunications Interception Legislation Amendment Act 2002 (Cth); Anti-Terrorism Act (No 2) 2005 (Cth).**


38 Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Order Legislation (HL Paper 64, HC 395, 2010); Andrew Ashworth and Lucia Zedner, Preventive Justice (Oxford University Press, 2014) 186.


fastidiously defended COs and broadened their reach.  

2 What is a CO?

COs are established under Division 104 of the Criminal Code. To obtain an interim CO, a senior member of the Australian Federal Police (AFP) must acquire the Commonwealth Attorney-General (AG)'s written consent to the order, and then apply to an issuing court for an order. This may be done ex parte.

To order an interim CO, the court must be satisfied on the balance of probabilities that making the order would substantially assist in preventing the commission, support or facilitation of a ‘terrorist act’ or a ‘hostile activity’ in a foreign country. Alternatively, the Court may be satisfied that the person has trained with a ‘listed terrorist organisation’ or has previously been convicted.


42 Criminal Code s 104.2. This requirement may be waived in urgent circumstances. In such cases, the senior member of the AFP may apply directly to the Court, but must obtain the AG’s consent within eight hours of the member making the request: Criminal Code ss 104.6(2), 104.10.

43 Criminal Code s 104.3. ‘Issuing court’ means the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia: Criminal Code s 100.1.


45 A ‘terrorist act’ is an action or a threat of action which (1) causes death, serious physical harm, or serious damage to property, endangers life, creates a serious risk to public health or safety, or seriously interferes with or disrupts certain vital systems; (2) is done with the intention of advancing a political, religious or ideological cause; and (3) is done with the intention of coercing a government or intimidating the public: Criminal Code s 100.1(1)-100.1(3). See also Thomas v Mowbray (2007) 233 CLR 307, 235 [8] (Gleeson CJ), 337-338 [44]-[45] (Gummow and Crennan JJ).

46 A person engages in a ‘hostile activity’ if they engage in conduct with the objective of overthrowing a government, intimidating the public, killing or injuring a head of state or person of public office, or unlawfully destroying or damaging government property. It is immaterial whether that objective is achieved: Criminal Code s 117.1(1).

47 Criminal Code s 104.4(c).

48 Under Criminal Code ss 102.1(1)-(2) the Governor-General may make a regulation declaring that a particular organisation is a terrorist organisation. Before doing so, the AG must be
of a terrorism-related offence in Australia or abroad.\textsuperscript{49} These criteria were significantly expanded in December 2014.\textsuperscript{50}

Additionally, the Court must be satisfied that each of the obligations, prohibitions and restrictions imposed by the CO are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act; or preventing support for or the facilitation of a terrorist act or hostile activity in a foreign country.\textsuperscript{51}

The terms of the CO may restrict the places the individual can visit, define the people with whom the individual can communicate, as well as prohibit the individual from using or accessing specified articles, substances and technology (including the internet). A CO may require an individual to wear a tracking device, allow him or herself to be photographed and allow impressions of his or her fingerprints to be taken. A CO may also require an individual to participate in counselling or education and report to specified persons at specified times and places.\textsuperscript{52} Restrictions may be tantamount to 24-hour house arrest.\textsuperscript{53}

Interim COs must be confirmed in court if the AFP wishes them to remain in force for any extended period of time.\textsuperscript{54} COs can technically last 12 months for adults, and 3 months for young people aged 16 to 18,\textsuperscript{55} but courts may satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or advocates the doing of a terrorist act.

\textsuperscript{49} Criminal Code s 104.4(c). Part 5.3 of the Criminal Code outlines all the terrorist-related offences in Australia. These offences include directing the activities of a terrorist organisation, recruiting or providing support for or financing a terrorist organisation, and being a member of or associating with a terrorist organisation.

\textsuperscript{50} Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth) Sch 1, ss 2(1), 73. For a summary of the other amendments that the Act made to existing statutes, see The Law Library of Congress, Treatment of Foreign Fighters in Selected Jurisdictions (December 2014) Library of Congress <http://www.loc.gov/law/help/foreign-fighters/treatment-of-foreign-fighters.pdf> at 8-10.

\textsuperscript{51} Criminal Code s 104.4(1)(d).

\textsuperscript{52} Criminal Code s 104.5(3).


\textsuperscript{54} No new criterion is to be applied by the court when confirming the order: Criminal Code, s 104.14(7). See also Thomas v Mowbray (2007) 233 CLR 307, [479], [480] (Hayne J). To confirm a CO, the court need only be satisfied that the interim CO was properly made. There is no requirement that the court take into account the parties’ submissions to determine whether or not the CO is still necessary: Andrew Lynch and George Williams, What Price Security? (University of New South Wales Press, 2006) 46. Section 104.4 thus supplies all the substantive content of power to be exercised at all stages during the life of the order: Thomas v Mowbray (2007) 233 CLR 307, 415 [309] (Kirby J).

\textsuperscript{55} Criminal Code ss 104.12, 104.12A, 104.14, 104.16(1); 104.28(2).
impose successive COs in relation to the same individual.\textsuperscript{56} COs may not currently be imposed on persons under the age of 16,\textsuperscript{57} although the Federal Government has indicated that it is considering lowering the age to 14.\textsuperscript{58} The penalty for contravening a CO is five years’ imprisonment.\textsuperscript{59}

In 2007 the High Court upheld the constitutional validity of COs in \textit{Thomas v Mowbray}.\textsuperscript{60} The majority held that Division 104 was supported by the defence power in s 51(vi) of the \textit{Commonwealth Constitution}, and that it did not confer non-judicial power on a federal court.\textsuperscript{61} The majority judgments sidestepped the moral and ethical concerns that many academics express in relation to COs.\textsuperscript{62} Only Kirby J in his dissent launched a scathing attack at the policy implications of COs.\textsuperscript{63} Therefore, although the constitutional validity of COs has been confirmed,\textsuperscript{64} the door has not closed on the argument that COs are morally unsound and require amendment.\textsuperscript{65}

\textsuperscript{56} \textit{Criminal Code} s 104.16(2).
\textsuperscript{57} \textit{Criminal Code} ss 104.12, 104.12A, 104.14, 104.16(1). COs imposed on 16- to 18-year-olds may only last three months: s 104.28(2). COs cannot be imposed on persons under the age of 16: s 104.28(1).
\textsuperscript{59} \textit{Criminal Code} s 104.27. Of the six COs that have been issued in Australia, only one controlee has been found to have breached a control: Louise Hall, ‘Terror suspect denied bail, will challenge control order ‘in first case of its kind’’ \textit{The Sydney Morning Herald} (online), 12 February 2015 <http://www.smh.com.au/nsw/terror-suspect-denied-bail-will-challenge-control-order-in-first-case-of-its-kind-20150211-13ckyf.html>.
\textsuperscript{62} Lisa Burton and George Williams, ‘What Future for Australia’s Control Order Regime?’ (2013) 24 \textit{Public Law Review} 182, 200. In particular, there was no analysis of whether Thomas was denied a fair hearing, despite many civilians and academics arguing that he was.
\textsuperscript{63} \textit{Thomas v Mowbray} (2007) 233 CLR 307, 432 [357]-[358] (Kirby J).
\textsuperscript{64} Notably, however, this was before the 2014 amendments. No court has determined whether these amendments have had a bearing on the validity (constitutional or otherwise) of the CO regime.
\textsuperscript{65} Some academics advocate that COs should be repealed entirely: Bret Walker SC, \textit{Declassified Annual Report: 20\textsuperscript{6} December 2012} (Commonwealth of Australia, 2013) 4; Lisa Burton and George Williams, ‘What Future for Australia’s Control Order Regime?’ (2013) 24 \textit{Public Law Review} 182, 206-207. This article will not engage in a discussion of whether COs should be repealed entirely. The executive has had numerous opportunities to repeal the legislation but has
The Use, Effectiveness and Migration of COs in Australia

Only six individuals have been the subject of COs in Australia. The COs issued in relation to Joseph ‘Jack’ Thomas and David Hicks have both received a significant amount of public and academic attention. In March 2015, the Federal Circuit Court issued a CO against Ahmad Nazimand, a 20-year-old arrested and released without charge following the September 2014 Sydney raids. Another CO was issued in respect of Harun Causevic in September 2015 for his involvement in the Anzac Day terror plot in Melbourne’s Shrine of Remembrance. The AFP did not have sufficient evidence to secure a criminal conviction but were able to use substantially similar evidence to obtain a CO. The final two COs were issued in December 2014 after the Sydney Siege. They are subject to non-publication orders and little information about these COs is not taken such initiative. Therefore, this article suggests that suggesting amendments to the regime is a pragmatic and realistic approach worth pursuing.


Despite the limited number of COs issued in Australia, Australian citizens should not be complacent about the CO legislation. The infrequency with which it is relied upon does not justify the state having the power to restrict individual liberty in a way that is antithetical to the administration of justice. Placing trust in the executive not to exercise powers it possesses is a poor safeguard of individual liberty.

Notably, there is no proven evidence that the COs issued in Australia have made Australia appreciably safer. In its review of CO legislation, the former Independent National Security Legislation Monitor concluded that the COs issued against Jack Thomas and David Hicks were not reasonably necessary for the protection of the public from a terrorist act and recommended COs be repealed entirely. Even in the event that COs are proven to be effective at preventing terrorism, Zedner and Lynch argue that there can be no justification for laws that seek to promote security by diminishing essential rights and liberties.

Despite a lack of evidence proving that COs are effective, there is recent evidence to suggest that COs are undergoing a process of ‘normalisation’ and migrating to other contexts. This is especially evident in the ‘War on Bikies’, which has seen Australian State governments adopting a rhetoric of ‘war’, urgency and necessity to pass bikie CO legislation.


This is particularly the case in South Australia, New South Wales and Queensland: Serious and Organised Crime (Control) Act 2008 (SA) ss 22(5), 22(1); Crimes (Criminal Organisations Control) Act 2012 (NSW) ss 26-27; Criminal Organisation Act 2009 (Qld); Rebecca Ananian-Welsh and George Williams, ‘The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia’ (2014) 38(2) Melbourne University Law Review 362, 375-378. Spurred on by the finding in Thomas v Mowbray that COs are constitutionally valid, this legislation can impose a wide range of potential restrictions on a person’s liberty including prohibitions from associating with particular classes of people, being in the vicinity of certain places, or carrying
more common, governments can refer to the existence of such laws in other jurisdictions as a justification for like laws.\textsuperscript{78} If the Commonwealth counter-terrorism CO legislation goes too far in restraining liberty (as this article argues), this migration is concerning. It is clear that the rarity of counter-terrorism COs cannot be said to dispel concerns about the CO regime. This compounds the need for restraining principles akin to those suggested by Ashworth and Zedner. The protections afforded to individuals need to be defined and protected before they are eroded in other contexts.

The remaining Parts of this article will analyse and critique the four counter-terrorism principles proposed by Ashworth and Zedner. This endeavor will culminate in the suggestion of four reformulated principles adapted to an Australian context.

### III The Necessity Principle

Ashworth and Zedner’s necessity principle has two limbs. First, ‘any restriction of, or deprivation of, liberty must be necessary for the prevention of terrorist activity’.\textsuperscript{79} Second, those restrictions ‘should continue for no longer than is absolutely necessary for that purpose’.\textsuperscript{80}

#### A ‘Necessary for the prevention of terrorist activity’

1 ‘Necessary’

Ashworth and Zedner’s necessity principle requires the means to be ‘necessary’ to achieve the ends. The reference to what is ‘necessary’ in this test is ambiguous, and Ashworth and Zedner do not define it. It is unclear whether the means must be ‘conclusively’ or ‘absolutely’ necessary to achieve the ends, or whether a lower standard such as ‘reasonably’ necessary will suffice. This article argues that the principle needs to be reformulated to clarify what level of ‘necessity’ suffices.

How, then, should Ashworth and Zedner’s principle be reformulated? Adding ‘absolutely’ as a qualifier to ‘necessary’ is inappropriate. This is because it is very rarely – if ever – possible to be satisfied that a CO is ‘absolutely objects of a certain kind: Serious and Organised Crime (Control) Act 2008 (SA) s 22(5). Breach of the bikie CO may result in criminal prosecution and imprisonment: Serious and Organised Crime (Control) Act 2008 (SA) s 22(5); Crimes (Criminal Organisations Control) Act 2012 (NSW) s 26.


\textsuperscript{79} Andrew Ashworth and Lucia Zedner, Preventive Justice (Oxford University Press, 2014) 195.

\textsuperscript{80} Andrew Ashworth and Lucia Zedner, Preventive Justice (Oxford University Press, 2014) 195.
necessary’ to prevent a future act from occurring. A lower standard is needed. It is submitted that ‘reasonably appropriate and adapted’ is a more appropriate test.

‘Reasonably appropriate and adapted’, first considered in 1819,⁸¹ is a species of the genus of proportionality tests.⁸² It has generated numerous (and occasionally conflicting) interpretations and definitions, but the High Court consolidated and clarified much of this confusion in Tajjour v New South Wales (Tajjour).⁸³ Tajjour drew on Lange v Australian Broadcasting Corporation,⁸⁴ Coleman v Power,⁸⁵ and Unions NSW v New South Wales (Unions)⁸⁶ to suggest that ‘reasonably appropriate and adapted’ has a number of limbs that must be satisfied.⁸⁷ First, ‘reasonably appropriate and adapted’ requires there to be a ‘rational connection’⁸⁸ between the means and a ‘legitimate end’.⁸⁹ There is a rational connection if the measures adopted by the impugned law are capable of advancing that law’s purpose.⁹⁰ This is a low threshold: the measures do not have to be the only means capable of realising the purpose, nor do they have to

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⁸¹ McCulloch v Maryland 17 US 316, 421 (1819) (Marshall CJ).
⁸⁴ (1997) 189 CLR 520.
⁸⁶ (2013) 252 CLR 530.
⁸⁸ Tajjour v New South Wales (2014) 88 ALJR 860, 883-884 [76]-[79], [81] (Hayne J), 888 [110] (Crennan, Kiefel and Bell JJ). This confirmed the majority’s judgment in Unions NSW v New South Wales (2013) 252 CLR 530, 557 [50], 560 [60] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). In some jurisdictions, this first stage of the proportionality analysis is referred to as one of ‘suitability’, and is a threshold question: Tajjour at 888 [110] (French CJ).
completely achieve the purpose.91

Secondly, ‘reasonably appropriate and adapted’ incorporates the test of what is ‘reasonably necessary’.92 ‘Reasonably necessary’ is a test of ‘less restrictive means’.93 A law will not be reasonably necessary where there are other available alternative measures which can realise the purpose of the limiting law to the same extent as the measures chosen by the legislature, whilst also imposing a lesser burden on the individual’s liberty.94 Thirdly, ‘reasonably appropriate and adapted’ requires the court to be satisfied that the burden is not ‘undue’95 (meaning, in short, ‘unjustified’).96

What is important from the above discussion is that the ‘reasonably appropriate and adapted’ test is capable of being defined and applied, and has been afforded significant judicial attention in Australia (albeit mainly in the context of the implied freedom of political communication). Incorporating ‘reasonably appropriate and adapted’ into the Commonwealth CO regime would make this authority relevant and bring COs in line with the proportionality debate as it continues to develop. Admittedly, the test is not perfect – there are countless nuances and variations of the proportionality enquiry – but it is submitted that ‘reasonably appropriate and adapted’ is a better alternative to ‘necessary’.

Finally, the reasonably appropriate and adapted test affords a margin of appreciation to the executive, but gives the judiciary ample scope to scrutinise any claim of the executive that a CO is reasonably appropriate and adapted to

92 Tajjour v New South Wales (2014) 88 ALJR 860, 888 [113] (Crennan, Kiefel and Bell JJ); Lange v Australian Broadcasting Corporation (1997) 189 CLR 520. Notably, in Thomas v Mowbray (2007) 233 CLR 307, Gleeson CJ interpreted ‘reasonably necessary’ as a separate but related term to ‘reasonably appropriate and adapted’ (at 325 [9], 333 [27]). At [27] he stated that ‘reasonably necessary and reasonably appropriate and adapted’ ‘cannot plausibly be suggested… as inherently too vague for use in judicial decision-making’. However, this pre-dated the High Court’s conflation of the two terms and it is suggested that ‘reasonably necessary’ is now properly understood as a subset of ‘reasonably appropriate and adapted’.
95 Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 575 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); Tajjour v New South Wales (2014) 88 ALJR 860, 889-891 [116], [127], [133] (Crennan, Kiefel and Bell JJ).
its legitimate end.\textsuperscript{97} Recent cases such as \textit{Tajjour} and \textit{Unions} highlight that the judiciary is still prepared to carefully scrutinise Parliament to ensure that it does not go further than necessary in burdening rights or freedoms. ‘Reasonably appropriate and adapted’ is included in the reformulated necessity principle that this article recommends.

2 ‘For the prevention of terrorist activity’

Despite the clear benefits of the necessity principle, it does not require the court to identify specific terrorist activity before issuing a CO, nor does it require the court to find that the CO will prevent the controlee from engaging in terrorist activity.\textsuperscript{98} This section addresses each issue in turn.

(a) \textit{For the prevention of (unidentifiable and remote?) terrorist activity}

Neither the necessity principle nor the Commonwealth’s CO legislation requires courts to identify specific terrorist activity that the CO would be likely to prevent. Therefore, courts can restrict liberty on some apprehension that the CO would generally prevent terrorist activity.

The consequences of this are evident in the case example of David Hicks. Federal Magistrate Donald held that the interim and confirmed COs applied for over Hicks were necessary to prevent general terrorist activity.\textsuperscript{99} There was no proof that Hicks – or any third party connected to Hicks – was planning, facilitating or about to commit any particular terrorist activity, and his Honour could not identify any specific terrorist activity that the CO was likely to prevent.\textsuperscript{100} Despite this, Hicks was placed under a CO that imposed on him, amongst other things, a strict curfew, onerous obligations to regularly report to police, and limitations in the technology he could use.\textsuperscript{101} The former Independent National Security Monitor has concluded that the chances of terrorist activity occurring were slim.\textsuperscript{102}

Requiring courts to draw a connection between COs and the prevention of specific, identifiable terrorist activity would prevent them from drawing weak


\textsuperscript{98} Andrew Ashworth and Lucia Zedner, \textit{Preventive Justice} (Oxford University Press, 2014) 195.

\textsuperscript{99} \textit{Jabbour v Hicks} [2007] FMCA 2139, [31]; \textit{Jabbour v Hicks} [2008] FMCA 2139, [33].

\textsuperscript{100} \textit{Jabbour v Hicks} [2007] FMCA 2139, [31]; \textit{Jabbour v Hicks} [2008] FMCA 2139, [33].

\textsuperscript{101} \textit{Jabbour v Hicks} [2008] FMCA 2139, [38]-[55]. For a full list of the controls, see Sch 1 of the judgment.

connections as in the case of Hicks, thereby limiting the situations in which an individual’s liberty can be restricted. It would prevent courts from being able to issue what are essentially indefinite COs for unspecified and undefined terrorist activity.

A fairly compelling counter-argument to this is that the impulsive, sporadic nature of terrorism means that courts could rarely be satisfied that COs would prevent specific activity, and this would threaten national security. However, CO proceedings are interlocutory civil matters. This means that the court need only be satisfied on the balance of probabilities that the CO is reasonably appropriate and adapted to prevent specific terrorist activity. It also means that hearsay evidence is permitted in CO proceedings. The Criminal Code also allows for urgent CO applications to be fast-tracked to the courts, so it is possible for the AFP to obtain COs for imminent terrorist attacks. Finally, subject to some qualifications, Part V recommends that intelligence be permitted in CO proceedings. These aspects of CO proceedings favour the AFP and mean that it should be capable of proving the threat posed by specific terrorist activity. The Commonwealth CO legislation would be improved if courts were required to identify specific terrorist activity that the CO would be likely to prevent.

(b) A harmless controlee?

The second major failing of the necessity principle is that it does not require courts to find that the controlee is engaging, or is about to engage in specific terrorist activity – either by committing the act or materially facilitating it. The requirement that the controlee pose a risk is also absent from the Commonwealth CO legislation. This paved the way for the court in Jabbour v Hicks to find that the threat to the public arose from the possibility of third parties seeking Hicks out for advice and support in relation to their own

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103 Criminal Code s 104.28A(1).
104 Criminal Code ss 104.4(1)(c)-(d), 104.14(4)(b), 104.14(6). This is a lower standard than the criminal standard of beyond reasonable doubt: Brown v The King (1913) 17 CLR 570, 584-585 (Barton A.C.J.), 595 (Issacs, Powers J); Briginshaw v Briginshaw (1938) 60 CLR 336, 344 (Latham CJ); Miller v Minister of Pensions [1947] 2 All ER 372, 374 (Denning J).
105 Criminal Code s 104.28A(1); Evidence Act 1995 (Cth) s 75.
106 Criminal Code ss 104.6-104.11.
107 The qualifications being that intelligence must pass the same admissibility tests as evidence, and that intelligence does not need to be disclosed to the individual who is the subject of the CO application if disclosure would prejudice national security.
108 Thomas v Mowbray (2007) 233 CLR 307, 432 [357] (Kirby J); Lisa Burton and George Williams, ‘What Future for Australia’s Control Order Regime?’ (2013) 24 Public Law Review 182, 197. It could be the case that the person subjected to the order is the actual or prospective perpetrator of a terrorist act, but that is not a prerequisite to the issuance of a CO.
terrorist activities. Federal Magistrate Donald stated that ‘[w]ithout these controls, Mr Hicks could be exploited or manipulated by terrorist groups. Due to his knowledge and skills, he is a potential resource for the planning or preparation of a terrorist act’. However, there was no evidence that third parties had actually sought Hicks out, or that Hicks had any intention of engaging in terrorist activity himself. In his Honour’s words, the CO was necessary to ‘protect the public and assist Mr Hicks to reintegrate into the community’.

Also concerning about *Jabbour v Hicks* is that the Court did not – and was not required to – assess the *present* threat posed by Hicks. The only evidence before Federal Magistrate Donald was evidence that Hicks had trained with listed terrorist organisations five years prior, and letters he had written two years prior expressing his desire to protect Islam. Federal Magistrate Donald recognised that the evidence was ‘somewhat aged’, and acknowledged Hicks’ contention that the views expressed in the letters were prior to his detention in Guantanamo Bay Prison and no longer reflected his current views. However, instead of requiring the AFP to provide evidence establishing that the views expressed were current, his Honour relied on the fact that Hicks had not provided evidence to the contrary to maintain that Hicks was still a threat. This was despite the fact that the AFP held the burden of proof, and Hicks was under no obligation to provide evidence to the court.

The disquieting consequence of this is that once a person has trained with a listed terrorist organisation, that person will forever satisfy s 104.4(1)(c) of the

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110 Federal Magistrate Donald also found that Hicks had the capacity to carry out terrorist activity himself: *Jabbour v Hicks* [2008] FMCA 2139, [33]. However, his Honour did not need to find this to impose the CO, for a finding that the CO was likely to prevent terrorist activity committed by third parties would have been sufficient: *Criminal Code* s 104.4(1)(c).

111 *Jabbour v Hicks* [2008] FMCA 2139, Sch 2 [3]-[5].

112 *Jabbour v Hicks* [2007] FMCA 2139, [26]. There was no evidence that Hicks had at any time made any threat towards Australia or the Australian community: Bret Walker SC, *Declassified Annual Report: 20th December 2012* (Commonwealth of Australia, 2013) 21-22.

113 *Jabbour v Hicks* [2008] FMCA 2139, Sch 2 [3]-[5].

114 *Jabbour v Hicks* [2007] FMCA 2139, [12]-[16], Sch 2 [1]-[2]; *Jabbour v Hicks* [2008] FMCA 2139, [14]. The organisations that Hicks trained with (Lashkar-e-Tayyiba and Al Qa’ida) were not listed terrorist organisations at the time that Hicks trained with them.

115 *Jabbour v Hicks* [2007] FMCA 2139, [27]-[28]; *Jabbour v Hicks* [2008] FMCA 2139, [28]-[30]. His Honour did not provide an explanation as to why the letters supported a finding that the CO was necessary to prevent terrorist activity: Bret Walker SC, *Declassified Annual Report: 20th December 2012* (Commonwealth of Australia, 2013) 22.

116 *Jabbour v Hicks* [2007] FMCA 2139, [30].

117 *Jabbour v Hicks* [2007] FMCA 2139, [30]; *Jabbour v Hicks* [2008] FMCA 2139, [32].

118 *Jabbour v Hicks* [2007] FMCA 2139, [30]; *Jabbour v Hicks* [2008] FMCA 2139, [32].

119 *Criminal Code* ss 104.3, 104.4, 104.14(1).
Courts are not required to investigate whether the skills learned from training are still current and whether the individual still poses a threat. At best, the Court recognised a weak connection between Hicks, the CO and the general possibility of terrorist activity occurring.

The liberal scope of COs in Australia represents one of the major ways in which Australia departed from the precedent of the now-repealed UK regime. Before its repeal, the UK regime required the Home Secretary to find that the individual posed a threat by reason of his connection to specific terrorist activity. Perhaps Ashworth and Zedner’s necessity principle fails to specify that this connection is necessary because the UK regime already incorporated it and it was assumed as a given part of any counter-terrorism regime.

There are powerful justifications as to why an individual should pose a direct threat before a CO can be issued over them. Most obviously, their liberty is at stake. Studies of the effects of COs issued in the UK have demonstrated that COs have a devastating impact on controlees, their families and communities, so much so that the Joint Committee on Human Rights deemed them ‘out of proportion to the supposed public benefit’. The Joint Committee came to this conclusion despite the fact that UK non-derogating COs could not deprive liberty – they could only restrict it. Australian COs,

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122 Specifically, the Home Secretary could issue a CO if they had ‘reasonable grounds for suspecting the individual is or had been involved in a terrorist related activity’ and that it was ‘necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity’: Prevention of Terrorism Act 2005 (UK) ss 1(3), 2(1).


125 Before the UK regime was repealed, non-derogating COs issued in the UK could not amount to a deprivation of liberty else the state would breach the European Convention on Human Rights: see Convention for the Protection of Human Rights and Fundamental Freedoms, open for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 5; Human
conversely, can deprive liberty. The harm that results from this deprivation can be minimised and contained if COs are only issued over individuals that pose a direct threat to public safety.

The ability of controlees to challenge COs is also far more limited than what was the case in the now-repealed UK regime. UK courts could declare executive acts made in breach of the European Convention on Human Rights ultra vires, and controlees could also seek redress in the European Court of Human Rights. At most, Australian controlees may seek to rely on the limited CO review provisions in the Criminal Code or seek judicial review, although Williams and Burton write that a CO’s incompatibility with common law rights is unlikely to constitute a reviewable error of law.

For these reasons, the circumstances in which a CO can be issued in Australia should be limited to cases where courts find a material connection between the controlee and specific terrorist activity such that the controlee presents a threat to public safety. The necessity principle will be amended to incorporate this requirement.


As discussed in Chapter One, the Commonwealth is expanding the scope of COs into fields other than counter-terrorism. Defining the state’s powers in this context can prevent this harm from spreading: see Rebecca Ananian-Welsh and George Williams, ‘The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia’ (2014) 38(2) Melbourne University Law Review 362.


B ‘Continue for no longer than is absolutely necessary for that purpose’

The second limb of the necessity principle requires a determination as to whether the length of the CO is proportionate to the value of preventing terrorist activity. This limb ensures courts are barred from imposing unjustifiable, indefinite COs. However, despite the obvious benefit of this limb of the necessity principle, there is a persuasive argument that it is unnecessary. The proportionality test contained in the first limb already requires the court to determine whether the restriction or deprivation of liberty is reasonably appropriate and adapted to a legitimate purpose. A CO that lasts longer than needed would surely fail this test. The only purpose that this limb of the necessity principle serves is to make it absolutely clear that the duration of the CO’s restrictions must be taken into account by the court in making its proportionality assessment. This is not a strong enough justification for its inclusion. There is also a danger that the legislature, if interpreting the principle, may read into the limbs a difference that is unintended. On balance, this limb of the necessity principle should not be included in the principle as it is reformulated for the Australian context.

C An Alternative Principle

Both limbs of the necessity principle have merit. The first limb, however, fails to specify the degree of necessity required to inform the nature of the proportionality test that the court must apply. Additionally, it does not require the court to find that the individual who is the subject of the CO application is likely to engage in specific terrorist activity. The second limb of the necessity principle is otiose, given it is already provided for in the first limb.

This article proposes a reformulated necessity principle. It is that any restriction or deprivation of liberty must be reasonably appropriate and adapted to preventing the individual from committing, or facilitating the commission of, a terrorist act.

The principle should be interpreted in accordance with its plain English meaning. However, for clarity, a definition of ‘facilitate’ can be drawn from other facilitative offences in the Criminal Code. An individual facilitates the commission of a terrorist act if he does an act connected with the preparation for, the engagement of a person in, or assistance in a terrorist act. The individual facilitating the act must either know of the connection, or be reckless as to the existence of the connection. It does not matter if the terrorist act does not eventually occur, or if the act is connected with more than one

133 Criminal Code ss 101.5(1)-(6).
134 See Criminal Code s 101.5 for the offence of collecting or making documents likely to facilitate terrorist acts.
135 See Criminal Code ss 101.5(1)(c), (2)(c).
terrorist act.\textsuperscript{136}

IV THE PRINCIPLE OF LEAST RESTRICTIVE APPROPRIATE MEANS

The second principle recommended by Ashworth and Zedner requires courts to find that the CO’s restrictions on liberty are ‘a last resort and the least intrusive that are consistent with the preventive purpose’\textsuperscript{137} (or whether other options such as criminal prosecution are more appropriate). The principle is not incorporated in Division 104 of the \textit{Criminal Code}.\textsuperscript{138}

In light of the reformulated necessity principle that this article proposes, this principle recommended by Ashworth and Zedner is unnecessary. That is, the principle of least restrictive appropriate means is already encapsulated in the ‘reasonably appropriate and adapted’ proportionality test of the reformulated necessity principle. As discussed above, ‘reasonably necessary’ is a subset of ‘reasonably appropriate and adapted’. The ‘necessity’ for the means employed by the legislative provision is made out where no alternative exists which would be less harmful to an individual’s liberty while equally advancing the legislative purpose.\textsuperscript{139} Implicit in this is the requirement that the means employed be a last resort and the least restrictive that is consistent with the preventive purpose.

The only situation in which the principle of least restrictive appropriate means would be needed is if the legislature does not adopt the necessity principle, but does want to incorporate the principle of least restrictive appropriate means into the Commonwealth CO regime. In that case, both limbs of the principle of least restrictive appropriate means would prove valuable in protecting individual liberty.\textsuperscript{140} Indeed, the Council of Australian Governments (COAG) Review Committee has already recommended that the \textit{Criminal Code} be amended to require judges to consider whether the CO is the least intrusive way of restricting liberty consistent with the preventive purpose.\textsuperscript{141}

However, the principle can be slightly rephrased to ensure that the duration of the order is considered by the judiciary before a CO is granted. This provides the clarity that the second limb of the necessity principle delivered.

\textsuperscript{136} \textit{Criminal Code} ss 101.5(3)(a), (c).
\textsuperscript{137} Andrew Ashworth and Lucia Zedner, \textit{Preventive Justice} (Oxford University Press, 2014) 195.
\textsuperscript{138} Courts are merely required to consider how the CO would impact on the person’s circumstances (including their financial and personal circumstances): \textit{Criminal Code} s 104.4(2). This requirement is in addition to the other requirements discussed above (for example, the requirement that the CO be necessary to protect the public from terrorist activity).
\textsuperscript{139} \textit{Tajjour v New South Wales} (2014) 88 ALJR 860, 888 [113] [Crennan, Kiefel and Bell JJ).
\textsuperscript{140} Andrew Ashworth and Lucia Zedner, \textit{Preventive Justice} (Oxford University Press, 2014) 258-259.
The principle that this article recommends, therefore, is that any restrictions on liberty must be a last resort. The type, nature and duration of those restrictions must also be the least intrusive that are consistent with the preventive purpose.

V  THE PRINCIPLE OF SUFFICIENT SUBSTANTIATING EVIDENCE

The third principle recommended by Ashworth and Zedner is ‘the principle of sufficient substantiating evidence, requiring a high standard of proof (beyond reasonable doubt) and avoiding the use of fallible secret intelligence’ (SSE principle).\(^{142}\) This Part addresses each element in turn.

A  ‘High standard of proof’

The ‘standard of proof’ refers to the quantum of proof necessary to establish facts that must be met by the party that bears the burden of proving particular facts in issue. Ashworth and Zedner’s SSE principle requires the standard of beyond reasonable doubt, which is a cornerstone of Australian criminal law.\(^{143}\)

1  Beyond reasonable doubt

Australian judges have stated that the composite phrase ‘beyond reasonable doubt’ is properly understood in accordance with its plain English meaning,\(^{144}\) and further attempts to define it are unhelpful.\(^{145}\) Chief Justice Latham of the High Court has said, however, that to meet the standard of proof the presumption of innocence must be ‘definitely displaced’ either by direct evidence of facts which constitute the offence charged, or by evidence from which one can draw an inference which satisfies the mind beyond reasonable doubt.\(^{146}\) Similar sentiments are echoed in the UK and in the US.\(^{147}\) These three

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\(^{142}\) Andrew Ashworth and Lucia Zedner, Preventive Justice (Oxford University Press, 2014) 195.

\(^{143}\) See Evidence Act 1995 (Cth) s 142. This provision is replicated in the Evidence Act 1995 (NSW); Evidence Act 2001 (Tas); Evidence Act 2004 (Norfolk Island); and Evidence Act 2010 (Vic).


\(^{145}\) Thomas v The Queen (1960) 102 CLR 584, 597 (Kitto J); Green v R (1971) 126 CLR 28, 30-34 (Barwick CJ, McTiernan and Owen JJ); Brown v The King (1913) 17 CLR 570, 584 (Barton A.C.J.); Keil v The Queen (1979) 53 ALJR 525. There is a demonstrated reluctance from judges to define, especially for the benefit of juries in criminal trials: Thomas v The Queen (1960) 102 CLR 584, 587 (McTiernan J), 597 (Kitto J); Dawson v R (1961) 106 CLR 1, 18 (Dixon CJ); Green v R (1971) 126 CLR 28; R v Chatzidimitiou (2000) 1 VR 493.

\(^{146}\) Briginshaw v Briginshaw (1938) 60 CLR 336, 344 (Latham CJ).

\(^{147}\) In the UK, Denning J described ‘beyond reasonable doubt’ as requiring a ‘high degree of probability’, but not such that ‘fanciful possibilities [can] deflect the course of justice’: Miller v Minister of Pensions [1947] 2 All ER 372, 373–4. At 373-374, Denning J explained the test as
jurisdictions demonstrate consensus that the standard is a high one, and requires almost complete certainty to satisfy. Courts have considerable experience applying the standard.

2 Australia’s current civil standard

The Commonwealth CO regime does not implement the first limb of Ashworth and Zedner’s SSE principle. Rather, the standard required for a court to issue a CO is the ‘balance of probabilities’. This is the ordinary standard of proof applicable in Australian and English civil litigation. The balance of probabilities standard requires a lesser degree of assurance than beyond reasonable doubt: the civil standard only requires the decision-maker to be at least 51 per cent satisfied of the alleged fact, occurrence or thing. The rationale for the standard of proof being higher in criminal trials is that more serious consequences result from mistaken conclusions.
Three enquiries

Three enquiries are necessary to determine whether the higher principle advocated for by Ashworth and Zedner should be adopted. The first is whether there is precedent for the criminal standard being applied in civil matters. The second enquiry is whether - in light of *Briginshaw v Briginshaw*\(^{153}\) (*Briginshaw*) - the balance of probabilities standard may require more of courts when issuing COs as opposed to ordinary civil trials. The third is whether the *Briginshaw* civil standard represents an adequate balance between national security concerns and individual liberty, such that the higher criminal standard is unnecessary. This section concludes that the *Briginshaw* civil standard does fashion an adequate balance between the two competing interests.

(a) *Precedent for applying the criminal standard in civil matters*

The SSE principle requires courts to apply a criminal standard in civil matters. Although unusual, there is precedent for this in Australia.\(^{154}\) In *Witham v Holloway*,\(^{155}\) the High Court held that in all instances of contempt – civil or criminal – the criminal standard (beyond reasonable doubt) should be applied.\(^{156}\) The court concluded that cases of civil contempt must realistically be seen as criminal in nature for the outcome is punishment.\(^{157}\) The same conclusion has been reached in other Australian,\(^{158}\) English\(^{159}\) and Canadian\(^{160}\)


\(^{153}\) 1938) 60 CLR 336.


\(^{155}\) 1995) 183 CLR 525.

\(^{156}\) *Witham v Holloway* (1995) 183 CLR 525, 534 (Brennan, Deane, Toohey and Gaudron JJ)


\(^{159}\) *Comet Producers UK Ltd v Hawkes Plastics Ltd* [1971] 2 QB 67; *Heatons Transport v Transport and General Workers’ Union* [1973] AC 15; *Dean v Dean* [1987] FCR (UK) 96; *Garvin v Dumas Publishing Ltd* [1989] Ch 335.

cases.

The adoption of the criminal standard in contempt cases is a specific anomaly of the law. Australian and UK courts have demonstrated a strong preference for adopting the balance of probabilities standard in other civil proceedings, even when there are allegations of crime.\(^{161}\) In any event, civil contempt can be distinguished from COs. Technically, a CO has no punitive purpose.\(^{162}\) Further, cases of contempt always require courts to assess whether the evidence is sufficient to prove the commission of a past act. COs are issued on the basis of a future threat.\(^{163}\) It is difficult to see how the standard of beyond reasonable doubt could ever be satisfied with respect to a future act.

(b) *Briginshaw: A variable civil standard?*

This enquiry analyses the extent to which the balance of probabilities is a standard which requires more of decision-makers in particular circumstances. In the leading case of *Briginshaw*,\(^{164}\) Dixon J held:

> reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal...\(^{165}\)


In England there are some cases supporting the application of the criminal standard. See *Thurtell v Beaumont* (1923) 1 Bing 339; *Chalmers v Shackell* (1834) 6 C & P 475; *Willnett v Harmer* (1839) 8 CB 695; *Eifie A Issaias v Marine Insurance CO Ltd* (1923) 15 LI L Rep 186 (CA); *New York v Heirs of Phillips* [1939] 3 All ER 952, 954. Other, more recent, English cases accord with the Australian position in suggesting that the civil standard applies, though the gravity of the issues must be borne in mind. See *Lek v Matthews* (1927) 29 Lloyd LR 141, 164; *Hornal v Neuberger Products Ltd* [1957] 1 QB 247; *Slattervy v Mance* [1962] 1 QB 676; *Re Dellow’s Will Trusts; Lloyds Bank Ltd v Institute of Cancer Research* [1964] 1 All ER 771; *Nischina Trading Co Ltd v Chiyoda Fire and Marine Insurance Co Ltd* [1969] 2 QB 449.


\(^{164}\) (1938) 60 CLR 336.

\(^{165}\) *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-362 (Dixon J).
Justice Dixon's judgment demonstrates decision-makers will require more compelling evidence to be satisfied on the balance of probabilities if the allegations or consequences are grave, or if the alleged occurrence is highly improbable.

Briginshaw was the first of a wave of cases that considered how the nature and consequences of the facts to be proved might alter what the balance of probabilities standard requires. In Rejfek v McElroy and Neat Holdings v Karajan Holdings the High Court reaffirmed that the strength of the evidence required for the civil standard to be satisfied may vary according to the gravity of the facts to be proved. The court also affirmed that the civil standard only ever requires 51 per cent certainty. The Briginshaw test is firmly entrenched in Australian jurisprudence and legislation.

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167 (1965) 112 CLR 517.


170 Rejfek v McElroy (1965) 112 CLR 517, 521–522 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ); Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449, 450–451 (Mason CJ, Brennan, Deane and Gaudron JJ). At 450, Mason CJ, Brennan, Deane and Gaudron JJ stated in Neat Holdings that the variation of the quality and quantity of evidence required to meet this 51 per cent reflects 'a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.'


(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

(a) the nature of the cause of action or defence; and
(b) the nature of the subject matter of the proceeding; and
(c) the gravity of the matters alleged.
standard also commands authority in the UK and Canada.

Despite the fact that it is the prevailing standard in Australian civil matters, the former Independent Security Monitor questions whether the Briginshaw interpretation of the civil standard has been applied in CO proceedings. The court did not apply it in the David Hicks matters. In Thomas v Mowbray, Gummow and Crennan JJ recognised that CO proceedings require an application of the principles in Briginshaw, but did not engage with the principles thereafter. It remains unclear whether courts are using Briginshaw principles in CO proceedings. For clarity, then, if this article recommends the Briginshaw interpretation of the civil standard, that will be made clear in the reformulated principle.

(c) Should Ashworth and Zedner’s criminal standard be adopted?

The third enquiry that naturally arises is this: should Ashworth and Zedner’s criminal standard be adopted, or is the Briginshaw civil standard preferable in CO proceedings?

A major benefit of the Briginshaw civil standard is that it requires compelling, quality evidence to be put before the court before a CO can be issued. The focus of the Briginshaw interpretation is on the strength of the evidence, not the quantity. Therefore, in contrast to a simple interpretation of the civil standard of proof, the Briginshaw interpretation increases the responsibility of the AFP to collect compelling evidence. Putting the onus on the AFP to produce only high-quality, persuasive proof that a CO is necessary is more useful and effective than what a simple interpretation of the civil standard of proof ordinarily requires.

As mentioned above, it is also questionable whether the high criminal standard could ever be satisfied in CO proceedings. First, COs are issued on the basis of a future threat.

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179 Thomas v Mowbray (2007) 233 CLR 307, 432 (Kirby J), 469 [476] (Hayne J). Specifically, the decision-maker must be satisfied that the CO is necessary to protect the public from a future threat.
reasonable doubt that such a threat will eventuate.\textsuperscript{180} Secondly, the criminal standard would be difficult to satisfy given terrorism commonly consists of covert and unexpected acts of extreme violence. It is appreciably difficult to collect a significant amount of evidence to establish the commission of such acts before they occur.

There is, however, scope for valid criticism to be made of the civil standard in CO proceedings. The former Independent Security Monitor and COAG Review Committee have asserted that the current civil standard has encouraged ‘forum shopping’ in that it has, in effect, given the AFP a second chance at restraining liberty.\textsuperscript{181} COs provide an alternative means of restricting an individual’s liberty where a prosecution fails but the authorities continue to believe that the acquitted defendant poses a threat to national security.\textsuperscript{182} As the Jack Thomas and Harun Causevic cases demonstrate, COs can be imposed on individuals using the same evidence that resulted in them being acquitted of terrorism offences.\textsuperscript{183} As a matter of principle, generally individuals acquitted of a criminal offence should not then be subjected to coercive measures based on the same evidence.\textsuperscript{184}

If the criminal standard is implemented, the undeniable reality is that COs would be more difficult to obtain, and fewer (if any) would be issued. Recognition of the national security mandate is critical here. The reality of CO legislation is that it was implemented to protect the public from an individual terrorist act, or that it would prevent the provision of support for or the facilitation of a terrorist act or hostile activity: Criminal Code s 104.4(d). Additionally, if the necessity principle is adopted, the decision-maker would need to be satisfied that the CO is reasonably necessary to prevent the individual from committing or materially facilitating the commission of a terrorist act.

\textsuperscript{180} It is important to distinguish criminal preparatory offences here. Whilst on first blush it seems that these offences attract the criminal standard for an act that has not yet occurred, what needs to be proven is the commission of preparatory acts, not that the future act would eventuate. The criminal standard is applied only to the acts that have already occurred.


\textsuperscript{184} Andrew Ashworth and Lucia Zedner, \textit{Preventive Justice} (Oxford University Press, 2014) 189.
when prosecution for a criminal offence is not possible.\textsuperscript{185} Implementing a criminal standard across all offence and CO provisions would digress from the rationale behind the implementation of COs and, therefore, arguably make COs worthless. The reality is that terrorism represents an unquestionable threat to the collective security of the public, and COs are one method used by the executive to protect citizens. Implementing the criminal standard to protect against forum shopping would come at the untenable expense of national security.

It is also necessary to address the possibility that Australia could introduce a third standard of proof for COs. The US has a third, intermediate standard of proof between the civil and criminal standards.\textsuperscript{186} It requires ‘clear, strong and cogent evidence’.\textsuperscript{187} There is also authority in New South Wales and Western Australia for a third standard of proof in the sex-offender context.\textsuperscript{188} It requires ‘a high degree of probability’ which is more than the ordinary civil standard of proof, but less than the criminal standard.\textsuperscript{189} However, outside this context, the High Court has rejected the notion of a third standard of proof in Australia.\textsuperscript{190} It invites confusion and its effectiveness is questionable given the varying scale of certainty that the Briginshaw civil standard requires.\textsuperscript{191}

(d) Conclusion

Implementing the higher criminal standard in the counter-terrorism preventive justice space would represent a very significant departure from the status quo. It would rarely – if ever – be possible to satisfy and may jeopardise national security. This article submits that the Briginshaw civil standard is adequate for CO proceedings. Courts are familiar with it, and recognise that it requires evidence of a higher quality to be put before the court where the allegations or consequences are serious, or there is an inherent unlikelihood of the alleged occurrence. The reformulated principle that this article suggests affirms the civil standard in CO proceedings, but requires courts to interpret this standard

\textsuperscript{185} Hon Philip Ruddock, ‘Law as a Preventative Weapon Against Terrorism’ in Andrew Lynch et al (eds), Law and Liberty in the War on Terror (The Federation Press, 2007) 3, 4.
\textsuperscript{187} J D Heydon, Cross on Evidence (LexisNexis, 2015) [9085].
\textsuperscript{188} Cornwall v Attorney-General (NSW) [2007] NSWCA 374, [21] (Mason P, Giles and Hodgson JJA); Director of Public Prosecutions (WA) v D [2010] WASC 49, [13] (Hasluck J); Crimes (Serious Sex Offenders) Act 2006 (NSW) ss 9(2), 17(2), 17(3); Dangerous Sexual Offenders Act 2006 (WA) s 7(2)(b).
\textsuperscript{189} Cornwall v Attorney-General (NSW) [2007] NSWCA 374, [21] (Mason P, Giles and Hodgson JJA).
\textsuperscript{190} Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449, 450 (Mason CJ, Brennan, Deane and Gaudron JJ); Murray v Murray (1960) 33 ALJR 521, 524 (Dixon J); Briginshaw v Briginshaw (1938) 60 CLR 336, 362-363 (Dixon J).
\textsuperscript{191} Briginshaw v Briginshaw (1938) 60 CLR 336, 362-363 (Dixon J).
Permitting the use of secret intelligence in the courtroom raises a host of issues and complex questions for determination. Such issues include the politicisation of the judiciary and the conflict between security, privacy, open justice and the right to a fair trial. A major benefit of Ashworth and Zedner’s principle is that it identifies these issues and asks these questions. However, the second limb of the SSE principle is packed with ambiguities: how does one ‘avoid the use’ of fallible secret intelligence? When is its use permissible? What makes intelligence fallible? What is the difference between intelligence and evidence? A reformulated principle is needed to answer these questions.

The following discussion outlines the benefits and risks of permitting intelligence in CO proceedings. It explains the current use of intelligence in Australia and concludes that intelligence should be permitted in the courtroom only if it meets the same admissibility criteria as evidence.¹⁹²

1 Defining intelligence and evidence

No definition of ‘intelligence’ commands universal acceptance.¹⁹³ Gill and Phythian define intelligence as ‘the mainly secret activities – targeting, collection, dissemination and action – intended to enhance security and/or maintain power relative to competitors by forewarning of threats and opportunities’.¹⁹⁴ Their definition incorporates a number of key points: intelligence involves the human interpretation of raw data;¹⁹⁵ it is security-


based and aims to provide advance warning; it can be covert and it should be secret.196 This article adopts this definition.

‘Evidence’, conversely, comprises all materials collected for the purpose of resolving disputes through the ascertainment of facts and the determination of legal responsibility through litigation.197 In a criminal context, evidence is collected after an alleged offence in order to assist in a trial.198 For evidence to be useful in any prosecution, it must be admissible and therefore legally obtained.

2 Should intelligence be permitted in the courtroom?

The ‘judicialisation of intelligence’ refers to the permitting of intelligence into the courtroom.199 It has been an increasing worldwide phenomenon in recent decades, despite an initial reluctance by judges to engage in intelligence analysis.200 The introduction of intelligence into the courtroom subjects intelligence to the rule of law, external verification and adversarial challenge in legal proceedings.201

(a) Benefits of the judicialisation of intelligence

The executive’s decisions about what measures should be taken to protect the

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public from a terrorist act are often based on intelligence.\textsuperscript{202} Indeed, it is ‘widely recognised that the gathering of intelligence is a ‘crucial’ strategy in dealing with terrorism’.\textsuperscript{203} If a CO is necessary to prevent a terrorist act, but the only proof of that takes the form of intelligence, there exists an almost undefeatable argument that this intelligence should be permitted in court.

Additionally, subjecting intelligence to the rule of law, third party analysis and adversarial challenge can expose errors, exaggerations and speculation in the analytical conclusions of intelligence agencies.\textsuperscript{204} A former CIA analyst has written that intelligence is invariably about ‘creating a mosaic’ of disparate raw data to discern a bigger picture,\textsuperscript{205} with gaps invariably filled by assumptions.\textsuperscript{206} There is no guarantee all erroneous intelligence would be vetted by the court,\textsuperscript{207} but enabling judges to critique the analysis of raw data would provide a valuable accountability check on the accuracy, fairness and precision of intelligence.\textsuperscript{208} The public respect of and trust placed in judges would also lend credibility to proceedings.\textsuperscript{209}

It is also arguable that permitting intelligence will increase the adjudicative fairness afforded to the controlee. Knowing the intelligence – or at least knowing that intelligence is being used to support the CO application – would likely give the controlee increased rights of challenge and appeal.\textsuperscript{210}

(b) \textit{Risks associated with the judicialisation of intelligence}

The first risk associated with permitting intelligence in the courtroom is that sensitive data must leave the controlled environment of the intelligence


\textsuperscript{206} This is particularly the case where an intelligence agency collects raw data from a foreign agency, and cannot determine the accuracy of that data or whether it has been shaped by confirmation bias: Kent Roach, ‘When Secret Intelligence Becomes Evidence’ (2009) 27 Supreme Court Law Review 147, 154-155.


agency. Notably, however, in Canada – where intelligence is permitted in court – evidence does not need to be disclosed to the court if that disclosure would prejudice national security. This minimises the risk of valuable secrets being leaked or accidentally disclosed.

Secondly, the interpretation of security risks, surveillance and insider information has the potential to move the judiciary into an executive space, blurring the separation of powers. However, Australian federal courts are protected from this via well-established principles derived from sections 71 and 72 of the Commonwealth Constitution, and set out in the Boilermakers’ decision. Federal courts will not exercise non-judicial power except in very limited circumstances. Additionally, a distinction can be made between a determination that there is an imminent terrorist threat (a question for the executive), and a determination as to whether the orders requested by the AFP are necessary and proportionate to that threat (a question for the judiciary). The latter does not involve politicisation of the judiciary.

Thirdly, evaluating intelligence requires a determination to be made about the weight to afford ‘diffuse, fragmentary and even conflicting pieces of intelligence’, which are determinations far removed from those ordinarily made

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214 Commonwealth Of Australia Constitution Act (Cth).
216 These circumstances include where non-judicial power is incidental or auxiliary to the exercise of Commonwealth judicial power, and where non-judicial powers are exercised under the persona designate doctrine: R v Kirby; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254; Grollo v Palmer (1995) 184 CLR 348.
217 A v Secretary of State for the Home Department [2005] 2 AC 68, 137 (Lord Hope of Craighead).
by courts.\footnote{Thomas v Mowbray (2007) 233 CLR 307, 477 [510] (Hayne J).} If the court has no criterion on which to assess the intelligence and no expert evidence to test it, it may be left with no practical choice but to accept the validity of the intelligence as proffered by the executive.\footnote{Thomas v Mowbray (2007) 233 CLR 307, 477-478 [511]-[512] (Hayne J). See also Ian Leigh, 'The accountability of security and intelligence agencies' in L Johnson, Handbook of Intelligence Studies (Oxford: Routledge, 2007) 67, 76.} This would damage the appearance of institutional impartiality and public confidence in the judiciary.\footnote{Thomas v Mowbray (2007) 233 CLR 307, 477-478 [511]-[512] (Hayne J).}

(c) Use of intelligence in Australia

appears that information pertaining to intelligence is permitted in court provided the prescribed procedures are followed. However, there has been no judicial determination of the matter.\(^228\)

In light of the fact that intelligence is permitted in prescribed proceedings, and in light of the increasing judicialisation of intelligence worldwide, it may be naïve and unrealistic to advocate for the prohibition of intelligence from the courtroom. The gates are already open. Additionally, and as described above, there are valid and persuasive reasons for permitting intelligence in court, which are only partially offset by the risks. Instead of banning intelligence to obviate the risks, protective limitations can be imposed on the intelligence that is permitted in court.

(d) **Suggested limitations on the reliance on intelligence in court**

The limitation Ashworth and Zedner suggest is that ‘fallible’ intelligence should not be used, but they do not define the ambiguous term.\(^229\) Walker posits a promising limitation worth exploring. It is that intelligence must meet the same admissibility tests as evidence for it to be permitted in the courtroom and relied upon by the decision-maker.\(^230\) Admissibility tests for evidence include relevance,\(^231\) opinion,\(^232\) and legality (especially regarding admissions and confessions).\(^233\) Applying this to Ashworth and Zedner’s principle to give it content, intelligence is ‘fallible’ and should not be used if fails the same admissibility tests applied to evidence in the proceedings.

This limitation forces the AFP to be discerning with the intelligence it puts before the court. It limits the risk of the court being misled by unreliable


\(^231\) Specifically, relevant material to the charge (criminal) or cause of action (civil) can be admitted: *Hollingham v Head* (1858) 140 E.R. 1135; *Smith v R* (2001) 206 CLR 650.

\(^232\) *Hollington v F Hewthorn and Co Ltd* [1943] 1 KB 587, 595 (Goddard LJ). There are exceptions to this rule, however. They include opinions of lay witnesses, where it would be impractical or impossible to require evidence to be given in a different way (*Sherrard v Jacob* [1965] NI 151; *R v Whitby* (1957) 74 WN(NSW) 441), and expert opinion evidence (*Transport Publishing Co Pty Ltd v Literature Board of Review* (1956) 99 CLR 111). See generally K Arenson and M Bagaric, *Rules of Evidence in Australia* (LexisNexis Butterworths, 2nd edn, 2007) Chapter 11.

\(^233\) If evidence is illegally or improperly obtained, this will prima facie not be admissible. See *Criminal Investigation Act 2006* (WA); *Nicholls and Coates v R* (2005) 219 CLR 196; *Wright v SOW* [2010] WASCA 199; *McDermott v R* (1948) 76 CLR 501, [511]-[512] (Dixon J); *R v Lee* (1950) 82 CLR 133.
intelligence, and forces the AFP and the Australian Security Intelligence Organisation to collect raw data legally. Implementing the rule against opinion evidence means only experts can draw analytical conclusions from the raw data, which again reduces the risk of speculative, biased or erroneous conclusions being drawn. Requiring intelligence to meet evidential admissibility tests gels nicely with the Briginshaw standard of proof discussed above: Briginshaw requires quality evidence to be put before the court, and the admissibility tests are important in distinguishing quality intelligence from questionable and misleading intelligence.

Generally hearsay evidence is inadmissible. 234 This is because hearsay can be inaccurate: it is not delivered on oath, the court cannot observe the demeanor or tone of the person making the statement or test the truthfulness of the statement in cross examination. 235 However, hearsay evidence is currently permitted in CO proceedings. 236 It is submitted that hearsay intelligence should also be permitted in CO proceedings so the rules governing evidence and intelligence are consistent: the rigidities of evidence should not stultify justice in urgent cases concerning national security. 237

Finally, it must be remembered that intelligence often concerns legitimate secrets. Alongside the limitation that intelligence must meet admissibility standards, intelligence should not need to be disclosed if the disclosure would prejudice national security. This goes some way to protect against accidental disclosure of government secrets. The consequences of this limitation for the rights of the controlee are discussed in the final principle.

(e) Conclusion

The judicialisation of intelligence is a controversial, under-developed and disparate area of law. The unsettled nature of this area means that we need a restrictive principle to define if and what intelligence may be relied upon by the state when it applies for a CO. If a CO is necessary to prevent a terrorist act, but the only proof of that takes the form of intelligence, that intelligence should be permitted in court provided it meets the same admissibility criteria for evidence. That intelligence does not need to be disclosed to the controlee or the public if disclosure would endanger national security.

234 Subramaniam v Public Prosecutor [1956] 1 WLR 965. Exceptions include statements of persons now deceased, statements in public documents, statements of contemporaneous physical condition and evidence given on a previous occasion. There is also some support for third party confessions forming an exception: see Button v R [2001] WASCA 7 (Malcolm CJ); Brown v WA [2011] WASCA 111 (Mazza J).
236 Criminal Code s 104.28A(1); Evidence Act 1995 (Cth) s 75.
C An Alternative Principle

The following reformulated principle is recommended:

The principle of sufficient substantiating evidence requires a court to find the case of a party proved if it is satisfied on the balance of probabilities. Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

(a) the nature of the cause of action or defence; and
(b) the nature of the subject matter of the proceeding; and
(c) the gravity of the matters alleged.

The court may rely on intelligence if that intelligence satisfies the same admissibility tests imposed on evidence in the same proceedings. Nothing in this principle requires intelligence to be disclosed to the public or to the individual who is the subject of the CO application if that disclosure would prejudice national security.

VI Right to a Fair Trial

Ashworth and Zedner’s final principle concerns the right to a fair trial.238 The principle requires openness, transparency and accountability, open access to evidence, rights of challenge and appeal, legal assistance and a presumption in favour of open hearings.239 A full discussion of all of these requirements is beyond the scope of this article. Rather, this article focuses on the subject’s right to know the case against them. This is one of the most important aspects of a fair trial.240 Only a limited discussion is necessary, given the matter has been covered extensively in the literature.241

Currently, when an Australian court issues an interim CO it must set out a summary of the grounds on which the CO is made, but that summary does not need to include any information likely to prejudice national security.242 When

238 Andrew Ashworth and Lucia Zedner, Preventive Justice (Oxford University Press, 2014) 195.
239 Andrew Ashworth and Lucia Zedner, Preventive Justice (Oxford University Press, 2014) 195.
240 Andrew Ashworth and Lucia Zedner, Preventive Justice (Oxford University Press, 2014) 181.
242 Criminal Code s 104.5(2A).
the AFP elects to confirm the CO, it does not need to disclose to the subject of the order any information which would prejudice national security, or put at risk ongoing operations of law enforcement agencies or intelligence agencies. Importantly, the CO regime does not oblige the AFP to notify the controlee that it wishes to rely on secret intelligence, and provides no opportunity for the controlee to challenge the case for non-disclosure; indeed, the controlee may never know the information exists. These provisions have serious repercussions on the controlee’s ability to understand and challenge the case that has been put against them, thus prejudicing their right to a fair trial.

In Secretary of State for the Home Department v AF (AF) the House of Lords considered whether three COs were issued in ways consistent with the right to a fair trial. The court ruled 9-0 that sufficient detail of the allegations had to be disclosed to the individuals to enable them to give effective instructions to the special advocates representing them. The only qualification on this was that it may be acceptable not to disclose the sources of the evidence to the controlee if it would negatively impact upon national security. Notwithstanding this, the Court still believed that the controlee would receive a fair trial. The judgment has been subsequently endorsed judicially. In 2013 the COAG Review Committee recommended the principles be incorporated into the Commonwealth CO regime. The Committee contended that the controlee must at least be given sufficient information about the allegations against him (the ‘gist’ of the case) so that he can give effective instructions to his counsel.

Incorporating the principles recommended in AF and by the COAG Review Committee would increase openness, transparency and accountability in CO proceedings. It would better protect the right to a fair trial and increase

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249 AN v SSHD [2010] EWCA Civ 869.
controlees’ ability to challenge and appeal decisions. This article recommends the following reformulated principle: the right to a fair trial. Without limiting the scope of this right, the individual who is the subject of the control order application must be given sufficient detail of the allegations against him or her to enable effective instructions to be given in relation to those allegations.

VII CONCLUSION

Security of Australian citizens is not only threatened by those who would do us harm: it is threatened also by the gradual erosion of fundamental rights and freedoms by legislators who purport to protect. Our security, therefore, depends on the scrutiny of our legislators to ensure that they act with restraint in matters concerning individual liberty.

By championing national security, the Commonwealth CO regime lays waste to basic presumptions of criminal procedure. The regime has sidestepped these traditional protections because COs represent a form of civil preventive justice, and in this space the powers of the state and protections afforded to individuals are haphazard and ill-defined.

Ashworth and Zedner’s principles of preventive justice are a valuable first step in defining the powers of the state and the rights it must respect. However, Ashworth and Zedner acknowledge that their principles merit further deliberation, debate, and a sensitive application to particular factual situations. This article has provided a valuable second step by critiquing Ashworth and Zedner’s four counter-terrorism principles and applying them to the Commonwealth CO legislation.

This article ultimately recommends four reformulated principles that are adapted to Australia and minimise ambiguities:

(i) The necessity principle: that any restriction or deprivation of liberty must be reasonably appropriate and adapted to preventing the individual from committing, or facilitating the commission of, a terrorist act.

(ii) The principle of the least restrictive appropriate means: that any restrictions on liberty must be a last resort. The type, nature and duration of those restrictions must also be the least intrusive that are

consistent with the preventive purpose.\footnote{This principle is not strictly necessary for it is already incorporated into the reasonably appropriate and adapted test in the necessity principle. It is recommended in the event that the legislature adopts the principle of the least restrictive principle but not the necessity principle.}

(iii) The principle of sufficient substantiating evidence: requires a court to find the case of a party proved if it is satisfied on the balance of probabilities. Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

a. the nature of the cause of action or defence; and  
b. the nature of the subject matter of the proceeding; and  
c. the gravity of the matters alleged.

The court may rely on intelligence if that intelligence satisfies the same admissibility tests imposed on evidence in the same proceedings. Nothing in this principle requires intelligence to be disclosed to the public or to the individual who is the subject of the CO application if that disclosure would prejudice national security.

(iv) The right to a fair trial: without limiting the scope of this right, the individual who is the subject of the control order application must be given sufficient detail of the allegations against him or her to enable effective instructions to be given in relation to those allegations.

These restraining principles have been developed as suggested foundations for the Commonwealth CO regime. This article recommends the legislature consider amending the CO legislation accordingly. This will correct the imbalance between national security and individual liberty, and define the limits of the preventive state.